Neutral Citation Number: [2011] IEHC 202

THE HIGH COURT

2002 72 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000 AND IN THE MATTER OF AN APPLICATION BY JAMES KENNY

BETWEEN

JAMES KENNY

APPLICANT

AND

THE PROVOST, FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN,

TRINITY COLLEGE

AND

MICHAEL McNAMARA & COMPANY

RESPONDENTS

Judgment of Mr. Justice Feeney delivered on the 15th day of April, 2011.

1. The first named respondent (T.C.D.) has by notice of motion dated 6th November, 2009 sought an order pursuant to the inherent jurisdiction of the Court dismissing and/or striking out the proceedings as being moot, *res judicata* and/or bound to fail following the determination of the Supreme Court of proceedings titled *James Kenny v. Dublin City Council*, Respondent, and the Provost, Fellows and Scholars of the University of Dublin, Trinity College, Notice Party, bearing Record No. 2002/383 J.R. and/or as being frivolous and vexatious and an abuse of process. The proceedings before the Court were commenced by James Kenny on the 17th July, 2002 wherein relief is sought pursuant to s. 160 of the Planning and Development Act, 2000 (herein after referred to as the Act). Section 160 of the Act provides for injunctions in respect of unauthorised development. Under that section an application can be made to Court for orders in respect of unauthorised development. Section 160(1) of the Act provides that an application may be made by a planning authority or any other person whether or not the person has an interest in the land. Mr. Kenny has sought to invoke the provisions of that section in respect of a development carried out by T.C.D. at Trinity Hall, Dartry Road, Rathmines. Proceedings under s. 160 are commenced by way of originating notice of motion and the procedure is a summary procedure. The scheme provided for under s. 160 makes no provision for the exchange of pleadings between the parties and the formal pleading is the originating notice of motion. Section 160 is a successor of s. 27 of the Local Government (Planning and Development) Act 1976. The nature and extent of s. 27 applications was considered by the Supreme Court in *Mahon v. Butler* [1997] 3 I.R. 369 and the Supreme Court in its judgment identified that the remedy under s. 27 (the precursor of s. 160) was a statutory injunction which was distinct from the general equitable jurisdiction of the High Court and that in making an order under that section, the Court could not exceed the jurisdiction conferred by that section. The Court identified the summary nature of the procedure and indicated that the procedure was not appropriate where the issues involved complex facts and law where judicial review proceedings were more appropriate. Denham J. in her judgment (at p 380) identified among the factors which would carry weight in the exercising of the Court's discretion in considering a s. 27 application that one of the matters was

> "… the complexity of the facts and law involved in that litigation which mirrors the issues on the existing or any proposed s. 27 application".

In this case as in other s. 160 applications there has been no formal exchange of pleadings but the nature of the case made by the applicant and the first named respondent's reply thereto are disclosed in the affidavits which have been filed.

1.2 The background giving rise to these proceedings stems from a development that T.C.D. carried out at Trinity Hall, Dartry Road, Rathmines and from the planning permission obtained from An Bord Pleanála on 4th August, 2000 for that development. Conditions contained within that planning permission required that certain matters be agreed between the first named respondent (T.C.D.) and Dublin City Council prior to the commencement of the development. Mr. Kenny sought leave to judicially review the grant of planning permission and leave was refused by order of the High Court made on 15th December, 2000. The conditions attached to the planning permission which Mr. Kenny sought to have judicially reviewed provided that a number of items were to be agreed between Dublin City Council and T.C.D.. This resulted in T.C.D. making a compliance submission to Dublin City Council in August 2001 together with a further addendum thereto which was submitted on behalf of T.C.D. in October 2001. Dublin City Council issued a compliance order on 4th January, 2002. In July 2002 Mr. Kenny instituted two further Court proceedings. On the 3rd July, 2002 Mr. Kenny applied for judicial review in respect of the compliance order and on 17th July, 2002 these proceedings, that is the s. 160 proceedings under the Act, were instituted. Mr. Kenny obtained leave to seek judicial review of the compliance order on 3rd July, 2002. After these proceedings were instituted on 17th July, 2002 due to the fact that those proceedings and the 3rd July, 2002 proceedings both related to the compliance order of 4th January, 2002 they were listed together. This resulted in both proceedings coming on for hearing in March of 2004. In recognition of the fact that the outcome of the judicial review proceedings would have repercussions on the proceedings commenced under s. 160, the judicial review proceedings were dealt with first in the High Court hearing in March of 2004. Following the hearing, judgment was reserved. On the 19th of October, 2004, the High Court gave judgment refusing Mr. Kenny's application for judicial review of the compliance order. That order was appealed by notice of appeal dated 5th January, 2005 and the appeal was heard by the Supreme Court in October 2008 and the judgment of the Court was delivered by the Supreme Court on 5th March, 2009 resulting in an order dismissing the appeal and affirming the order of the High Court. Central to T.C.D.'s claim in this application is that the issues the subject matter of these proceedings have been determined as a result of the judgment of the Supreme Court delivered on 5th March, 2009. These proceedings have been brought by way of originating notice of motion and by summary procedure where there has been no formal exchange of pleadings and where the nature of the claim and the response thereto are to be identified from the affidavits which have been filed by the parties.

1.3 Mr. Kenny has been involved over a number of years in various legal proceedings which have sought to have declared invalid the decision of An Bord Pleanála granting planning permission to T.C.D. for the development of student residences at Trinity Hall. That development has now long since been completed. As indicated above, Mr. Kenny applied for leave for judicial review of the decision of An Bord Pleanála and on 15th December, 2000 he was refused leave to judicially review the grant of permission. An application was made for a certificate to appeal the High Court's decision and that application was refused.

2. The judgment of the High Court in the judicial review proceedings on 19th October, 2004 was appealed to the Supreme Court. Thereafter Mr. Kenny sought various reliefs in relation to discovery within the s. 160 proceedings and orders were made. On 3rd April, 2007 T.C.D. brought an application to stay the s. 160 proceedings pending the determination of the appeal in the judicial review proceedings which was pending before the Supreme Court. On 10th May, 2007 Mr. Kenny sought leave to deliver further affidavits within the s. 160 proceedings and/or to amend the s. 160 proceedings. Those two motions came before the High Court on a number of occasions and on 22nd October, 2007 the motions came on for hearing and were adjourned pending a decision from the Supreme Court in the appeal in the judicial review proceedings. As set out above on 5th March, 2009 the Supreme Court dismissed Mr. Kenny's appeal in the judicial review proceedings. As a result of the judgment and order of the Supreme Court the compliance order issued by Dublin City Council on 4th January, 2002 stands confirmed and the application to quash that decision has been rejected. This Court therefore must proceed on the basis that the compliance order of 4th January, 2002 is a full and effective order.

2.1 It is the judgment of the Supreme Court in the judicial review proceedings which is at the heart of the application made by T.C.D.. T.C.D. seeks pursuant to the inherent jurisdiction of the Court to have these proceedings struck out as moot, *res judicata* and/or bound to fail following the decision of the Supreme Court. T.C.D. also bases its application on a claim that the proceedings are frivolous, vexatious and/or an abuse of process.

2.2 Mr. Kenny's application for relief under s. 160 of the Act was grounded on an affidavit sworn by him on the 17th July, 2002. Between that date and 5th September, 2003 a number of affidavits were sworn by various deponents on behalf of Mr. Kenny, and on behalf of T.C.D. A consideration of those affidavits and the affidavit sworn by Mr. Kenny verifying the statement of grounds in the judicial review proceedings identifies that the issues of complaint raised by Mr. Kenny in those proceedings and the judicial review proceedings overlap to the extent that they are almost identical and indistinguishable. It was in recognition of such overlap that the s. 160 proceedings were adjourned by the High Court on 22nd October, 2007 pending the completion of the Supreme Court appeal in the judicial review proceedings. When the matter was adjourned by the High Court Mr. Kenny had sought leave to deliver further affidavits within the s. 160 proceedings and/or to amend his notice of motion therein. When this matter came back for hearing before the High Court in July of 2009, which was subsequent to the Supreme Court judgment in the judicial review proceedings, in an attempt to clarify the full extent and nature of outstanding matters, if any, in respect of which Mr. Kenny continued to make complaint in the s. 160 proceedings, the Court directed Mr. Kenny to identify the issues which he alleged remained in dispute. Mr Kenny failed to identify the matters he claimed to remain in issue and on 6th October, 2009 Mr. Kenny informed the Court that it was his contention that all matters identified by him in the various affidavits within the s. 160 proceedings remained in dispute. Mr. Kenny duly swore an affidavit on 2nd December, 2009 wherein he expressly disputed that any of the matters the subject matter of a s. 160 application had been substantially determined by the Supreme Court judgment. He further contended that the scope of the Court's supervisory jurisdiction in judicial review being limited that any judgment in the judicial review proceedings could not be extended into these proceedings as the judicial review proceedings were, broadly speaking, restricted to reviewing the procedural legality and validity of an administrative body's decision or action. Mr. Kenny went on, at para. 12 of his affidavit of 2nd December, 2009, to aver that there was only a partial overlap between the matters in issue in the judicial review proceedings and the s. 160 proceedings. Mr. Kenny went on to aver that the most relevant and accurate assessment method as to what was or was not decided by the Supreme Court was for him to specify those issues which are particular to the s. 160 proceedings. Mr. Kenny then swore further affidavits wherein he sought to identify the matters which he claimed remained in dispute, notwithstanding the Supreme Court judgment. He did so in affidavits sworn by him on 26th February, 2010 and on 10th May, 2010. In considering the application brought by the first named respondent the Court will have regard to those affidavits and to the matters identified by Mr. Kenny and claimed by him to remain in contention notwithstanding the judgment of the Supreme Court of 5th March, 2009. One of the matters identified by Mr. Kenny in his affidavits was an allegation of fraud. In High Court proceedings, Record No. 2008/1319P, Mr. Kenny brought an action against T.C.D. The issue of those proceedings required an application to be made to Court, as by a previous order of 30th March, 2006, Mr. Justice Clarke had made a so called "Isaac Wunder" order. That order restrained Mr. Kenny from issuing: "any further proceedings against the second named defendant (T.C.D.) herein without the prior leave of this Honourable Court save in respect of making an application for leave to seek judicial review seeking to challenge on new grounds the grant of the planning permission". As a result of the "Isaac Wunder" order of 30th March, 2006, Mr. Justice Clarke considered an application by Mr. Kenny in January 2009 seeking an order permitting him to seek relief against T.C.D. By order of 28th January, 2009 the High Court refused Mr. Kenny permission to bring the proceedings contemplated against T.C.D. as set out in the documents which were before the Court. In considering this application this Court has regard not only to the judgment of the Supreme Court of 5th March, 2009 but also to the "Isaac Wunder" order of 30th March, 2006 and the judgment of the Court of that date and the order of Mr. Justice Clarke of the 28th January, 2009 refusing permission to Mr. Kenny to commence further proceedings against T.C.D. Mr. Kenny has identified as one of the remaining complaints a claim in relation to the *vires* of the compliance submission. It follows that this Court in considering this application and the issue of abuse of process must consider whether or not the matters which Mr. Kenny seeks to raise in relation to the *vires* of the compliance submission are matters which were or ought to have been litigated within the judicial review proceedings. The Court will return to this matter later in the judgment.

3. The following timeline identifies certain facts and dates relating to the issues in these proceedings and sets out the chronology of the s. 160 proceedings.

4th August, 2000	Permission granted by An Bord Pleanála for the building of Trinity Hall.
15th December, 2000	High Court refuses Mr. Kenny leave to seek judicial review in respect of the grant of permission
2nd March, 2001	The High Court refuses a certificate to appeal the refusal of leave to apply for judicial review.
August 2001	Compliance submission made by T.C.D. to Dublin City Council.
October 2001	Addendum to the compliance submission submitted by T.C.D. to Dublin City Council.
4th January, 2002	Certified compliance issued by Dublin City Council.

3rd July, 2002	Mr. Kenny applies and obtains leave to seek judicial review in respect of the compliance order.
17th July, 2002	Section 160 proceedings are instituted by Mr. Kenny.
July 2002 – January 2003	Affidavits in support of the s. 160 application sworn and filed by Mr. Kenny and Anthony Gallagher.
June 2003	Building No. 3 completed at Trinity Hall.
July 2003	Building No. 2 completed at Trinity Hall.
January 2004	Building No. 1 completed at Trinity Hall.
24th March, 2004	Judicial review proceedings and s. 160 proceedings listed for hearing in the High Court.
19th October, 2004	Judgment delivered by the High Court in the judicial review proceedings.
5th January, 2005	Mr. Kenny appeals the decision of the High Court in respect of the judicial review proceedings to the Supreme Court.
18th March, 2005	Mr. Kenny seeks discovery in the s. 160 proceedings.
18th April, 2005	Affidavit of discovery in the s. 160 proceedings filed by T.C.D.
1st December, 2005	Mr. Kenny issues motion seeking an order for further and better discovery in the s. 160 proceeding.
2nd February, 2006	T.C.D. applies to adjourn the s. 160 proceedings pending the determination of the appeal to the Supreme Court in the judicial review proceedings.
30th March, 2006	T.C.D. seeks and obtains an "Isaac Wunder" order against Mr. Kenny. The application being made in High Court proceedings, Record No. 2005/3320P in which Mr. Kenny was the plaintiff and T.C.D. was the defendant.
19th October, 2006	High Court makes an order for further and better discovery in the s. 160 proceedings.
3rd April, 2007	T.C.D. brings an application seeking a stay in the s. 160 proceedings pending the determination by the Supreme Court of the appeal in the judicial review proceedings.
9th May, 2007	Mr. Kenny seeks leave to have further affidavits which were sworn by himself and Anthony Gallagher admitted in the s. 160 proceedings and/or to amend the s. 160 proceedings.
10th May, 2007	Notice of motion issued by Mr. Kenny seeking leave to deliver further affidavits in the s. 160 proceedings and/or to amend the s. 160 proceedings.
22nd October, 2007	The applications for a stay in respect of the s. 160 proceedings and Mr. Kenny's application to deliver further affidavits and/or to amend the s. 160 proceedings adjourned by the High Court pending the conclusion of the judicial review appeal in the Supreme Court.
October 2008	The Supreme Court hears the appeal in the judicial review proceedings.
5th March, 2009	The Supreme Court dismisses Mr. Kenny's appeal in the judicial review proceedings.
6th November, 2009	T.C.D. issues a motion seeking to dismiss Mr. Kenny's s. 160 proceedings pursuant to the inherent jurisdiction of the Court.
23rd July, 2010	The High Court makes an order refusing Mr. Kenny leave to commence proceedings against An Bord Pleanála seeking injunctive relief restraining An Bord Pleanála from enforcing an order for costs recovered by that body against Mr. Kenny in the judicial review proceedings

4. T.C.D. as applicant in this motion seeks relief on a number of different or alternative grounds. T.C.D. seeks to invoke the Court's inherent jurisdiction to dismiss proceedings. A litigant has a right of access to the courts which is guaranteed by the Constitution and that right has been interpreted as including the right to litigate claims which are justiciable and the right to initiate litigation. Those rights, however, are not unfettered rights as it is necessary for the court to balance the constitutional rights of plaintiffs to commence and prosecute claims with the interests of defendants who should not be compelled to defend proceedings that are vexatious or bound to fail. In considering applications to strike out proceedings, the Court has regard not only to the provisions of Order 19, rule 28 but also to the inherent jurisdiction which the Court possesses to uphold the integrity of the judicial system by preventing abuse of process. In considering the matter as to whether proceedings are frivolous, the Court addresses the issue as to

whether or not the prosecution of such proceedings would constitute a waste of Court time and also whether such a claim has a rational basis. When considering the issue as to whether or not proceedings are vexatious, the Court must address whether or not the proceedings are without foundation and cannot possibly succeed and also whether such proceedings have an ulterior or improper purpose. If the Court is satisfied that the proceedings as pleaded disclose no reasonable cause of action or is satisfied, on the uncontested facts, that the claim is bound to fail then, such proceedings should be struck out.

5. The jurisdiction of striking out proceedings pursuant to Order 19, rule 28 or pursuant to the Court's inherent jurisdiction is a power which must be exercised sparingly and only when the Court is satisfied that there is a clear case to justify the exercise of such discretion (see *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425). As stated by Denham J. in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2004] 1 I.R. 506 (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, as emphasised by Denham J. in her judgment such jurisdiction should be exercised "if a court is convinced that a claim will fail" (p. 509).

6. In considering the jurisdiction invoked in this case, and the pleadings and uncontested facts, the Court must address the following matters:

> (a) whether there is no reasonable cause of action;
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> (b) whether the case made by the applicant is frivolous or vexatious and that such claim is without foundation and cannot possibly succeed;
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> (c) whether the claim made by the applicant has as its purpose some ulterior or improper purpose;
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> (d) whether the proceedings being pursued by the applicant are an abuse of process in that the applicant is seeking a relief from the Court relying on material evidence that was considered and determined at a previous court hearing or alternatively where such evidence was deliberately omitted from an earlier application for similar relief which was declined by the Court. In considering this matter the Court must address whether or not the party seeking the relief has established that the process of the Court is being abused by the applicant in making repeated attempts to re-open litigation or in pursuing litigation in an oppressive manner.

7. The principles to apply in applications to strike out proceedings were identified in the judgment of Costello J. in *Barry v. Buckley* [1981] I.R. 306 (at p. 308) in the following terms:

> "The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* at p. 765."

The courts have consistently emphasised that the jurisdiction must be used sparingly and only in clear cases. The legal principles to be applied and the decided cases were reviewed by the Supreme Court in *Supermacs Ireland Ltd. v. Katesan (Naas) Ltd.* [2000] 4 I.R. 273 and Geoghegan J. identified the legal principles in his judgment (at p. 283/284):

> "A large number of cases, starting with *Barry v. Buckley* [1981] I.R. 306, were presented to the court in a book of cases but they were not really opened to any extent. However I think it important to refer briefly to the latest of those cases *Jodifern Ltd v. Fitzgerald* [2000] 3 I.R. 321 and in particular to the judgment of Barron J. In his judgment Barron J. says the following at p. 332:-
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> > 'Every case depends upon its own facts. For this reason, the nature of the evidence which should be considered upon the hearing of an application to strike out a claim is not really capable of definition. One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. Again, while documentary evidence may well be sufficient for a defendant's purpose, it may well not be if the proper construction of the documentary evidence is disputed. If the plaintiff's claim is based upon allegations of fact which will have to be established at an oral hearing, it is hard to see how such a claim can be treated as being an abuse of the process of the court. It can only be contested by oral evidence to show that the facts cannot possibly be true. This however would involve trial of that particular factual issue.
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> > Where the plaintiff's claim is based upon a document as in the present case then clearly the document should be before the court upon an application of this nature. If that document clearly does not establish the case being made by the plaintiff then a defendant may well succeed. On the other hand, if it does, it is hard to see how a defendant can dispute this *prima facie* construction of the document without calling evidence and having a trial of that question.'
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> Although the issue in that case seems to have been abuse of the process of the court the same principles would equally apply to an issue as to whether or not there was or was not a reasonable cause of action."

That case is also authority for the proposition that even though the power to strike out a claim must be exercised sparingly and only in clear cases, that where there is no evidence to support a claim the Court should not shrink from exercising the power.

8. The rationale behind the jurisdiction to strike out proceedings was identified in the judgment of McCracken J. in the Supreme Court in *Fay v. Tegral Pipes Ltd*. [2005] 2 I.R. 261 where he stated (at p. 266):

> "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."

Access to the courts is for the resolution of genuine disputes between parties. When an application is made to stay or strike out proceedings preventing an abuse of process, the Court must look to see whether or not there are matters of genuine dispute for resolution and must ensure that the Court process is not used as a forum for lost causes and that the plaintiff is not litigating matters of personal concern that on the facts of the case have no basis for a complaint in law. In considering the jurisdiction to strike out proceedings, one of the matters to consider is whether or not a plaintiff is attempting to re-open litigation or seeking to have the Court re-consider matters already determined by the Court and thereby pursue litigation in an oppressive manner.

9. Part of the consideration includes the Court addressing the issue as to whether a litigant is seeking to make the same contention in legal proceedings which might have been, but was not, brought forward in previous litigation. In *Carroll v. Ryan* [2003] 1 I.R. 309, the Supreme Court considered an application made by the defendant to have part of the first plaintiff's claim struck out as an abuse of process. The Supreme Court upheld the High Court's decision striking out part of the first named plaintiff's claim and in dealing with the issue as to the law to apply to such applications Hardiman J. held as follows (at p. 317):

> "There is a well established rule of law whereby a litigant may not make the same contention, in legal proceedings, which might have been but was not brought forward in previous litigation. This rule is often traced to the judgment of Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 100. The learned Vice-Chancellor spoke as follows at pp. 114 and 115:-
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> > '… I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.'"

Hardiman J. went on to consider (at p. 318) other authorities and referred with approval to the judgment of Brooke L.J. in *Woodhouse v. Consigna* [2002] 1 WLR. 2558 where he referred to this public interest at p. 2575:

> "But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in *Henderson v. Henderson* (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits where one would do …"

Hardiman J. went on in his judgement (at p. 318):

> "This seems quite consistent with his seems quite consistent with what Lord Bingham said in *Johnson v. Gore Wood & Co*. [2002] 2 A.C. 1, at p. 31 when he urged that the court should arrive at:-
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> > '… a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.'"

10. Applying the principles identified and approved by Hardiman J. to this application, this Court has to make a broad merits-based judgment, which takes account of public and private interests involved and also takes account of all the undisputed facts of the case for the purpose, as stated by Lord Bingham, of focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it an issue which could have been raised before. The Court must also consider whether matters have already been considered and decided by a Court. The Supreme Court both in Carroll v. Ryan and in the later case of *Bula Ltd. (In Receivership) v. Crowley* [2009] IESC 35, have identified and applied as part of the law the principle that litigants are entitled to be protected from successive applications where claimants seek in essence to re-litigate or to raise matters at a later stage which could have raised in earlier proceedings. Therefore, in looking at the facts in this case, this Court must consider not just has the Supreme Court judgment dealt with the claims made by Mr. Kenny but also whether or not the applicant is attempting to raise issues which should have been raised in earlier proceedings. The authorities clearly establish that a defendant/respondent should not be oppressed by successive suits where one would do and that in the absence of special circumstances, the parties should bring their whole case before the Court in a single set of proceedings. In applying the principle in *Henderson v. Henderson*, the Court must be careful to ensure that it is not applied in a manner which fails to recognise an applicant's rights including the right of access to the courts. It is only in circumstances where the applicant's conduct could be identified as an abuse of the process of Court that an order should be made striking out the plaintiff's claim. The facts of this case establish that the s. 160 proceedings were brought before the Court together with the judicial review proceedings and that, at that stage the judicial review proceedings were directed to be dealt with first, so that the decision made in that case would be available to determine what, if any, matters remained to be decided in the s. 160 proceedings. Those circumstances are such that the Court must give careful consideration of the Supreme Court judgment in the judicial review proceedings to ascertain what are matters or causes which have been dealt with and what claims cannot now succeed.

11. Within the s. 160 proceedings, Mr. Kenny claims that T.C.D. is in breach of its permission. As a planning permission is a public document and is not personal to the parties to litigation and inures for the benefit of the land, it follows that when a court comes to interpret a planning permission it must do so objectively and as part of that process a planning permission must be given its ordinary meaning as would be understood by members of the public. In s. 160 applications the onus of proof rests with the applicant and it is for Mr. Kenny to identify the facts upon which he relies which supports his allegation of breach of planning permission by T.C.D.. At this stage, those facts do not have to be proved but they must be more than mere assertions.

12. In interpreting planning permissions the courts must adopt an objective interpretation and the planning permission is to be given its ordinary meaning. In carrying out that task the Court is assisted by the approach to this matter as identified in the judgment of

Fennelly J. in *Kenny v. Dublin City Council* (Unreported, Supreme Court, 5th March, 2009) (at para. 18) where Fennelly J. set down what he identified as "some simple matters of common sense … concerning planning permissions".

> "There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within plans, drawings, specifications and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect in exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of a permission, there are enforcement procedures."

That statement recognises the fact that in considering the wording of a planning permission and an application under s. 160 the Court must have regard to the fact that immaterial departures do not constitute a breach of planning permission. This matter is further dealt with in paragraph 17 of this judgment.

13. This Court will later analyse the various contentions raised by Mr. Kenny within the s. 160 proceedings both in the original grounding affidavits and in the later affidavits. Mr. Kenny has identified various issues which he claims remain between the parties. In some instances those matters were set forth in the grounding affidavit but in other cases Mr. Kenny seeks to expand the grounds relied upon and does so on the basis that he did not progress such matters because he had made a complaint to the Ombudsman. Mr. Kenny acknowledges in his replying affidavit sworn on 10th May, 2010 that Building 1 was not included in the judicial review proceedings which were only concerned with Building 3 as a unit and with one aspect of Building 2, namely, the increase in its bed space numbers. Mr. Kenny proffers as an explanation the reason for Building 1 not being included in the judicial review proceedings the fact that Building 1 was then the subject of a complaint by him to the Ombudsman against the Council's failure to issue a warning to Trinity in respect of an unauthorised/unlawful development of Building 1. Mr. Kenny avers that due to the Ombudsman's ongoing investigation in relation to his complaint concerning Building 1, his allegations in relation to that building were not included in his judicial review proceedings and that therefore never formed any part of his complaints which he made to the High Court or the Supreme Court. The explanation given by Mr. Kenny in relation to the failure to include Building 1 within the judicial review proceedings application is not soundly based. It is clear that notwithstanding the complaint which Mr. Kenny made to the Ombudsman that he instituted proceedings in respect of identified matters. It is also clear that Mr. Kenny raised with the Ombudsman matters which were in issue within the Court proceedings including a claim relating to the lack of appropriate planning permission for the location of the boilers and the roof of Building 3 which were alleged to have been built other than in accordance with planning permission. He also raised the issue of the erection of boilers and flues without planning permission. Mr. Kenny did not refrain from instituting proceedings in relation to those matters. There therefore does not appear to be any rational connection between the fact that Mr. Kenny was making a complaint to the Ombudsman and his willingness to include matters within judicial review proceedings. The Court therefore cannot accept as a reason for the absence of such complaints or the delay in making such complaints the fact that there was a complaint made to the Ombudsman. The fact of a complaint being made to the Ombudsman cannot and, in a number of instances, did not act as a restraint on Mr. Kenny. The Court does not accept Mr. Kenny's purported explanation for failing to include Building 1 within the judicial review proceedings. The Court will return to this matter later in the judgment.

14. Mr. Kenny was granted the opportunity to put down on affidavit all matters which he claimed remained to be determined, in the s. 160 proceedings, in the light of the Supreme Court judgment. In an affidavit sworn by Mr. Kenny on 26th February, 2010, Mr. Kenny averred that the scope of the s. 160 proceedings was only partly affected by the findings of the Supreme Court and its judgment. Mr. Kenny contended that a number of matters remained undecided both as contended for in his original affidavit sworn in support of his original application in the s. 160 application and in relation to further and additional matters identified by him in subsequent affidavits.

15. The first matter raised related to condition No. 1 in the planning permission and Mr. Kenny averred that T.C.D. were mistaken in their claim that this matter had been comprehensively dealt with by the Supreme Court judgment when that judgment had dealt with the location of boilers, the relocation of boilers and the consequent changes to the roof pitch and profile and also with the increase in bed spaces in Building No. 2 of the development. Consideration of the averments made by Mr. Kenny in support of his complaints relating to condition No. 1 identify that he takes issue with the location of the boilers in the completed buildings and the relocation of boiler rooms and the consequent "changes to the roof pitch and profile" together with a further complaint relating to the increase in the number of bed spaces within Building No. 2. The Supreme Court, in the judgment of Mr. Justice Fennelly, dealt, in a separate section with the issue of boilers and boiler rooms in roof spaces in paragraphs 50 to 59 of the judgment. That section of the judgment commenced by identifying what was described as the essence of Mr. Kenny's complaint and it was identified in the following terms (at paragraph 50):

> "The essence of this complaint is that boiler facilities and other plant have been placed in the roof spaces of buildings 2 and 3 and that Mr Kenny maintains that the 1999 plans did not provide for any use to be made of these spaces."

The judgment continued at paragraph 52 where it was stated:

> "The 1999 plans did not indicate the location of the boiler rooms. The location, as distinct from the existence, of the boiler installations was not addressed in the 1999 plans. The October 1999 Plans did not indicate boiler room locations. However, the submission stated that the original planning application was being retained unless inconsistent with the revised submission. Therefore, the roof space plant rooms were retained by the October 1999 submission. It was a central contention in Mr Kenny's challenge to the validity of the planning permission that there was no planning permission for boiler rooms."

It is clear from the judgment of the Supreme Court that Mr. Kenny maintained as a central contention in that case that there was no valid planning permission for the boiler rooms which had been placed in the roof spaces of Buildings No. 2 and 3. Having considered the evidence, the Supreme Court held, at paragraph 54:

> "Trinity submits that that the installation of the boilers is in compliance with the permission. Following the oral hearing, it was intended that a boiler would be located in each house of each building. In addition, it was determined to use boilers of a more domestic scale which were free-standing and not affixed to the buildings. As roof space had become available, (because, *inter alia* of the adoption of lifts without machine-rooms) it was determined to locate boilers at that level. This had no impact on the roof pitch and profile. Owing to design innovations, the boilers are now located in plant rooms at roof space level. Planning permission was granted for the said plant rooms. Accordingly, the fact that a different element of plant, namely, free standing domestic type boilers are located therein, cannot affect the validity of the permission."

The Supreme Court continued at paragraph 55 of the judgment and stated:

> "In my view Mr. Kenny's complaint is without merit. It was explicitly envisaged in the original planning application that a

> number of plant rooms would be located in the roofspace. The installation of the boiler equipment in the plant room in the roof space does not require planning permission. The notion of 'plant' is wide enough to include boilers, such as the decentralised and relatively small boilers which have been installed. The location of the boilers has no impact on the roof pitch or profile."

The Supreme Court went on to hold that the matter of the precise location of the boilers within the development is an eminently suitable matter for agreement pursuant to the procedure envisaged by condition No. 8. The finding was in relation to the location of boilers within the development and was not referable to just one building. Mr. Kenny contends that the decision of the Supreme Court does not conclusively deal with the location of the boilers and the relocation of boiler rooms and the consequent changes to the roof pitch and profile. Mr. Kenny contends that the Supreme Court did not give any consideration to or make any finding in respect of any building or design feature of the development, except for Building No. 3. It is clear from the judgment of the Supreme Court that the Court had identified as the essence of Mr. Kenny's complaint that the boiler facilities and other plants had been placed in the roof spaces of Buildings No. 2 and 3 and it is also clear that in considering these matters the Supreme Court addressed the issue as to the impact that the placing of the boiler rooms had on the roof pitch and profile. The Supreme Court concluded that the placing of plant rooms in the roof spaces of Buildings No. 2 and 3 did not affect the validity of the permission. It is not now open to Mr. Kenny to re-litigate this matter and that is in effect what he seeks to do so. Mr. Kenny seeks to contend that condition No. 1 of the Board's planning permission was breached so that the entire development became and remains unlawful. To succeed in that claim, Mr. Kenny has to disregard the consideration and determination by the Supreme Court at the hearing before that Court that it was a central contention of Mr. Kenny's challenge to the validity of the planning permission that there was no planning permission for the boiler rooms. He also must disregard the determination by the Supreme Court that Mr. Kenny's contention was incorrect and that planning permission had been granted for the said plant rooms and that the placing of boiler rooms in those plant rooms was permissible and within the planning permission.

In his submissions to this Court Mr. Kenny contended that to the extent that the Supreme Court made a finding that "the location of the boilers had no impact on the roof pitch and profile," that this may not be the case, as the Supreme Court's finding did not establish that there was any causal link between the installation of the boilers and the roof spaces and the alteration of the roof pitch or profile and that the Supreme Court did not address the issue of whether the alteration of roof pitch/profile had been granted planning permission. The Supreme Court expressly held, at paragraph 54, that the locating of the boiler rooms in the roof spaces of Buildings No. 2 and 3 had no impact on the roof pitch and profile. The Supreme Court expressly held that the placing of the boilers in the roof spaces cannot affect the validity of the permission. It follows that it is not open to Mr. Kenny to re-litigate matters already determined by the Supreme Court judgment. Mr. Kenny's complaint that the boiler facilities and other plant have been placed in the roof spaces of Buildings No. 2 and 3 with the consequent changes to the roof pitch and profile are matters which have already been considered and dealt with in the Supreme Court judgment wherein it has been determined that such matters do not affect the validity of the permission.

The Supreme Court also addressed and considered Mr. Kenny's complaint in relation to the increase in bed spaces in Building No. 2. It was dealt with in a separate section under the heading "Permitting an increase in the number of bed spaces" and in paragraphs 60 to 66 of the judgment. Having identified the nature of Mr. Kenny's complaint concerning the increase in the number of bed spaces in Building No. 2, the Supreme Court concluded (at para. 66):

> "Condition No. 8, in the interest of orderly development, required the submission of revised drawings of the proposed development, with floor plans and elevations corresponding in detail, all to be agreed by the Council prior to the commencement of development. It is perfectly obvious to me that these minor adjustments to the number and location of bed spaces are matters of detail and are most appropriate to agreement in accordance with that procedure. They followed on from other natural, normal and reasonable alterations in the plans. Mr Kenny has not identified anything in the nature of a planning consideration, any departure from the overall development objective or, in short, anything worthy of serious consideration under this head of complaint. This complaint is also without merit."

It is clear that the Supreme Court addressed Mr. Kenny's complaint in relation to the increase in the number of bed spaces in Building No. 2 and concluded that Mr. Kenny had not identified anything in the nature of planning considerations worthy of serious consideration in relation to his complaint and that that complaint was without merit. This Court is satisfied that it is not now open to Mr. Kenny to contend, within these proceedings, that there has been a breach of planning permission arising from the increase in bed spaces in Building No. 2. That matter has been identified as being a matter of detail and not relating to anything "in the nature of a planning consideration" and is a complaint which the Supreme Court has identified as being without merit. Whilst it is clearly the case that the judicial review proceedings and the s. 160 proceedings are different in their nature and in their effect, it is also the case that where the Supreme Court has considered an identical complaint to the complaint now sought to be pursued by Mr. Kenny and has made findings that such findings result in a situation being created where it would be both frivolous and vexatious to allow such matters to be re-ventilated within the s. 160 application. To permit that to happen would be for the same complaint to be re-litigated and that would amount to an abuse of process.

16. A further matter in respect of which Mr. Kenny contends that there has been an unauthorised development relates to his complaint of a breach of condition No. 2 of the permission. That condition related to the western arm of Building No. 3. Condition No. 2 stated:

> "The western arm of building No. 3, that is on the full Dartry Road elevation, shall be reduced in height by the omission of the first floor. Revised drawings incorporating this modification to building 3 shall be submitted to the planning authority for agreement prior to the commencement of the development."

The reason identified for that condition was stated to be in the interests of visual amenity. Mr. Kenny's contention in relation to the removal of the first floor of Building No. 3 was dealt with in the case heard and determined by the Supreme Court. The Supreme Court dealt with this matter under the heading "Removal of First Floor" and in paragraphs 37 to 49 of its judgment. The Supreme Court judgment identified the fact that Trinity had contended at the hearing before the Supreme Court that a strictly literal interpretation of condition No. 2 would render the condition meaningless and the Supreme Court held (at para. 43):

> "Condition No. 2 presents a problem of interpretation. It is clear from the terms of the condition itself that the purpose of the removal of the first floor was the reduction of the height of the building. The reference to the interests of 'visual amenity' can only be read in that light. There is nothing either in the planning history or in the terms of the planning permission to indicate that An Bórd Pleanála wished to alter the façade of the building. The Inspector's report did not recommend the removal of any floor. The evidence produced suggests that the profile of the façade was a consistent and desirable element of the design throughout the planning process. The planning permission makes no mention of protrusion or 'domineering effect' suggested by Mr Kenny as the reason for the condition."

The judgment went on to hold (at para. 44):

> "This means that there was a contradiction or ambiguity at the heart of the condition. Condition No. 1 required the development to be carried out in accordance with the plans submitted except as may otherwise be required in order to comply with the following conditions. Compliance with Mr Kenny's proposed literal interpretation of Condition No. 2 would lead to inconsistency with Condition No. 1 by altering the façade. I do not agree with the submission made on behalf of Mr Kenny that it is plain and unambiguous. I am satisfied that the true objective of Condition No. 2 was the reduction in the height of the building. This objective has been achieved. There is no evidence that An Bórd Pleanála chose the elimination of the first, rather than any other floor in order to secure the desired reduction in height or that it wished to alter the composite elevation in any way. I am satisfied that the Council acted within the scope of its powers by approving the compliance plans submitted by Trinity in August and November 2001."

Mr. Kenny in his submission to this Court questions the Supreme Court's non-literal interpretation and also the factual basis of the Supreme Court's finding particularly in relation to the fact that a reduction in the height of the building had been achieved. However, what is clear from the judgment of the Supreme Court and, in particular, paragraph 44 is that the Supreme Court has determined that the Council acted within the scope of its powers by approving the compliance plans submitted by Trinity in August and November 2001. At paragraph 47 of the judgement the Supreme Court dealt with a matter which it identified as the type of trivial detail into which Mr. Kenny would have the Court enter in the following terms, namely:

> "As part of his complaint regarding Condition No. 2, he says that the changes made to the roof details related to an increase in the pitch of the roof with 'the effect that the height of the building has not been reduced by one storey as required.' Trinity has replied to this in some detail. It says that the pitch of each roof is as indicated in the October 1999 section drawings. There was an error in the elevational drawings. An addendum to the compliance submission corrected the error. It also explains a minor change in roof pitch because a 'steeper roof-pitch in set back areas ensures that eaves and ridge heights are consistent across building elevations.' The change prevents an unsightly flat fascia at the Dartry Road elevation. It does not affect the height of the building."

Mr. Justice Fennelly went on in the judgment of the Supreme Court to hold (at para. 48):

> "I do not believe that the judicial review procedure is intended to lead the courts into such intricate matters of design detail or scrutiny of the planning and development process."

Mr. Kenny contends that the Supreme Court judgment did not address the issue of whether the alteration of roof pitch/profile had been granted planning permission and that therefore this matter remains properly for consideration within these proceedings. The Supreme Court (at para. 49) of its judgment dealt with the assertion by Mr. Kenny that the problem in relation to the alteration of roof pitch and profile could only be dealt with by means of a new planning application, which was based upon the contention that the existing planning did not permit of such alteration, in the following terms:

> "Mr Kenny submits that the problem encountered by Trinity in complying with the literal interpretation of the condition could be solved only by means of a new planning application. Such an approach is extreme. It is unrealistic and pointless. There has been no suggestion that it was ever the intention to change the profile of the building, which was the only thing that would have been achieved by the order sought by Mr Kenny."

This Court is satisfied, that in the light of the determinations and findings within the Supreme Court judgment, that to allow and permit Mr. Kenny to pursue his complaint in relation to condition No. 2 would be to allow and permit him to pursue a non-realistic and pointless matter. The complaint sought to be pursued by Mr. Kenny in relation to this matter is one which in essence has already been considered by the Supreme Court. To re-ventilate the same matter is an attempt by Mr. Kenny to misuse or abuse the process of court by seeking to raise matters which have already been determined by the Court. To permit Mr. Kenny to seek judicial review in respect of a matter which is unrealistic and pointless would be to permit an abuse of the process of the Court. It would involve the Court in considering a claim which can confer no benefit on Mr. Kenny.

17. A further matter raised by Mr. Kenny in the s. 160 proceedings relates to an alleged breach of condition No. 9 of the permission. That condition dealt with trees and provided that services and utilities should not be laid within ten metres of the bole of any of the trees which were to be retained. The Supreme Court dealt with Mr. Kenny's complaints concerning trees in a section of its judgment entitled "Laying of services and utilities within ten metres of the bole of trees". Paragraphs 67 to 79 inclusive sets out the judgment of the Supreme Court in relation to the issue of trees and that section commences with the Court identifying that Mr. Kenny had made complaints in relation to the issue of services being laid within ten metres of the bole of a tree and also that Trinity had not observed the requirement that all trees being retained were to be protected during the development in a specified manner. In his submissions to this Court Mr. Kenny makes the point that the Supreme Court's finding only dealt with the issue of the laying of services and utilities within ten metres of the bole of trees and did not address his complaint that all trees that were being retained were to be protected during the development. Consideration of the Supreme Court judgment identifies that that is not the case in that the Supreme Court addressed the second of Mr. Kenny's two complaints, in relation to the protection of trees during the development in the following terms (at para. 68 of the judgment):

> "Mr. Kenny does not specify, in his grounding affidavit, how he alleges that the second of these requirements was breached. It now seems irrelevant. The development has long since been completed."

Mr. Kenny avers that Trinity did not enclose certain trees on the boundary of Building No. 3 during the development. The position which exists is that the development works are now complete and the manner in which the trees were protected or not protected during the development work is of no relevance as the development has long since been completed. Mr. Kenny avers that several trees at the perimeter have since been removed because of their deteriorated condition and seeks to link such removal to "the possible non-protection of those trees". Mr. Kenny recognises that no causal link can be established and since the development has been completed, any complaint relating to the protection of trees during the development is of no relevance and cannot be the basis for maintaining a claim at this point in time that there has been a breach of s. 160 of the Planning and Development Act 2000. To allow a claim of that nature where the development has been completed and where no causal link can be identified between the alleged breach of protection during development and any subsequent events would be an abuse of process and would involve the Court in a pointless consideration and would be a waste of Court time.

At paragraph 72 of the judgment of the Supreme Court it was held that it was clear that strict and literal compliance with the condition concerning the laying of service and utilities within ten metres of the bole of trees had presented problems and it was clear that Trinity had breached that condition to some extent. However, at paragraph 78 of its judgement the Supreme Court held that

what was involved in such a breach was:

> "…a case of non-compliance with the literal terms of a condition, though to a minor if not trifling degree. The problem goes back to the terms of the permission itself. It is a mistake to take it out of context. This was a very large and complex development. Literal compliance with the 10-metre part of Condition No. 9 was not feasible if the development was to be carried out as approved."

The Supreme Court went on (at para. 79 of its judgment) to state:

> "Mr Kenny has been able to demonstrate a very minor, not to say trivial, discrepancy between the compliance submissions of Trinity in respect of the 10-metre condition and the terms of Condition No. 9 as strictly and literally interpreted."

The Supreme Court held that as *certiorari* was a discretionary remedy, the Court should not grant an order of *certiorari* in respect of the entire decision based upon such an inconsequential discrepancy. The Supreme Court held (at paragraph 79):

> "… Mr. Kenny retains the alternative of pursuing his application pursuant to section 160 of the Planning and Development Act 2000. I express no view whatever on the merits of that application."

This Court is satisfied that the only area where Mr. Kenny has identified a factual matter within the s. 160 proceedings, absent amendment, which has not been already considered and in effect determined by the Supreme Court relates to this minor or trifling breach. The breach identified is so inconsequential that this Court is satisfied that to allow and permit that matter, as the sole remaining issue, where Mr. Kenny or the public could gain no practical benefit, to proceed to a full hearing would in all the circumstances be an abuse of process and would subject the defendant to further unnecessary and expensive litigation. As this Court is satisfied that this is the only area in respect of which Mr. Kenny has identified, within his unamended proceedings, a factual basis in support of his s. 160 application, and where such matter has been identified in the judgment of the Supreme Court as being of a trivial nature and given that the development has been completed and that neither Mr. Kenny or the public can gain any benefit that to permit the s. 160 application to proceed in respect of such a trivial or minor breach, in isolation, would amount to an abuse of process. In the unreported judgement of the High Court of Finnegan J. delivered on 6th April, 2001 in *Cork County Council v. Cliftonhall Ltd.* it was recognised that the type or nature of the breach of a planning permission may be relevant to the question as to whether there has, in fact, been any unauthorised development at all, in that planning permissions are to be interpreted flexibly so as to allow for a tolerance in respect of what has been described as "immaterial deviations".

Finnegan J. had earlier that year, in the case of *O'Connell v. Dungarvan Energy Ltd*. [2001] WJSC-HC5119 (Unreported judgment of 27th February, 2001), also considered the issue of a trivial or technical breach of planning permission in s. 27 enforcement proceedings. In his judgment, Finnegan J. quoted with approval the statement of Lord Denning in *Lever (Finance) Ltd. v. Westminster Corporation* [1973] All E.R. 496 (at p. 500):

> "In my opinion a planning permission covers work which is specified in the detailed plans and any immaterial variation therein. I do not use the words *'de minimis'* because that would be misleading. It is obvious that, as the developer proceeds with the work there will necessarily be variations from time to time. Things may arise which were not foreseen. It should not be necessary for developers to go back to the planning authority for every immaterial variation. The permission covers any variation which is not material."

This Court accepts that statement as a correct statement of the law and it is one which Mr. Kenny totally fails to grasp where he continues to pursue immaterial, minor and trifling variations on the basis that T.C.D., as developer, was required to seek planning permission for such variation. That is not the case as the permission covers any variation which is not material.

This Court is satisfied that the non-compliance by T.C.D. with the literal terms relating to tree protection was so inconsequential that it must properly be identified as an immaterial variation. On the basis that this Court accepts as factually correct that there was non-compliance with condition No. 9 the facts identified demonstrate that such non-compliance was so minor that it could not be described as a material deviation and cannot be the sole basis relied on in a s. 160 application.

18. In the period from July 2002 to January 2003 Mr. Kenny and Anthony Gallagher swore a number of affidavits in support of the s. 160 application. Mr. Kenny has now sworn a number of additional affidavits setting out what he alleges to be further and additional breaches over and above those disclosed in the original affidavits. In relation to these additional matters T.C.D. raises a fundamental objection to the effect that the matters in respect of which Mr. Kenny now seeks to complain and upon which he seeks to rely in support of a s. 160 application are matters which he knew or ought to have known at the time that he swore his affidavits in support of the s. 160 application in the period up to July 2003. T.C.D. claim that to allow and permit additional matters which were known in 2003, to be ventilated at this stage is an abuse of process in that it permits Mr. Kenny to "drip feed litigation" and that Mr. Kenny has excessively delayed in making these claims. This Court is satisfied that those contentions are well based and taking account of the public and private interests involved and the manner in which Mr. Kenny has litigated his complaints against T.C.D. that it is an abuse of the process of the Court to allow and permit such complaints to be litigated at this stage or to permit the s. 160 proceedings to be amended. Nor has Mr. Kenny identified in any way how the public would benefit from the litigation of the matters he now seeks to litigate. The s. 160 proceedings were before the Court and were listed for hearing in March of 2004 and all and any matters relevant to those s. 160 proceedings which were known to Mr. Kenny should have been ventilated and identified prior to that date. Taking account of all the facts identified in the affidavits before this Court, this Court is satisfied that in all the circumstances Mr. Kenny is misusing and abusing the process of court by seeking to raise before it issues which could have been identified at the time when Mr. Kenny and Anthony Gallagher swore affidavits in support of the s. 160 application in the period from July 2002 to January 2003. That was prior to the completion of any of the three buildings at Trinity Hall. The delayed and drip feed nature of Mr. Kenny's complaints is evident from the fact that he now seeks to make complaints in relation to building No. 1 within the s. 160 proceedings. There is no reference to building No. 1 in these proceedings, absent an amendment. Mr. Kenny seeks to explain the absence of any reference to building No. 1 within the proceedings and to explain why he did not progress litigation in relation to that matter on the basis that he had made a complaint to the Ombudsman and that only when his final report was completed in 2005 did Mr. Kenny view himself as being free to progress litigation in relation to certain matters. Mr. Kenny contends that the Rules of the Superior Courts do not preclude the submission of breaches by Trinity of the Board's planning permission. He claims the breaches he seeks to raise reflect the Ombudsman's finding that the building works on which Trinity was engaged in building the building No. 1 were of such character that the Council, on receipt of a complaint from the applicant, should have issued a warning letter to Trinity. This Court is satisfied that the proceedings herein do not refer to building No. 1 and that to permit and allow the proceedings to be amended at this point in time to extend to that building should not be permitted. The matters in respect of which Mr. Kenny seeks to complain concerning building No. 1 are matters which he knew prior to the institution of these proceedings and would have been known to him at the time he brought his judicial review proceedings. He chose not to include such complaints in the s. 160 proceedings and in effect has delayed

for a number of years in seeking to raise those matters within the s. 160 proceedings. Both proceedings, that is these proceedings in relation to s. 160 of the Act and the judicial review proceedings, were commenced and prosecuted by Mr. Kenny following a detailed and extensive examination and consideration of the compliance submissions. The matters in respect of which Mr. Kenny now seeks to take issue concerning building No. 1 are all matters which were manifest from the compliance submissions which were submitted during 2001. This Court is satisfied that the proceedings before the Court do not encompass building No. 1 and that any complaint concerning that building could only arise in circumstances where the Court was prepared to amend the pleadings to include the status of the building works at building No. 1. In the light of the fact that this Court is satisfied that the matters in respect of which Mr. Kenny seeks to complain were known to him at the time that he commenced these proceedings and swore affidavits in support of his application and were not included it follows that there is no proper basis for amending the pleadings in the manner sought by Mr. Kenny. Nor has Mr. Kenny provided any credible explanation for the delay in raising these matters.

19. Mr. Kenny contends in the affidavits on which he now seeks to rely that there was non-compliance by T.C.D. in that there is an extra floor over the western façade of building No. 4. This complaint was identified by Mr. Kenny in his affidavit sworn on 26th February, 2010. In the replying affidavit thereto sworn by Mr. Merriman on 15th March, 2010 it was identified that the extra floor is in fact a plant room and not an extra floor. The presence and location of that plant room was apparent from the compliance submissions which were complete by October of 2001 and the attempt by Mr. Kenny to raise the issue of the presence of the plant room as a so called extra floor in building No. 4 is in fact an attempt to challenge the compliance orders and is therefore not a matter for consideration in the s. 160 application but rather in an application for judicial review. Mr. Kenny has already litigated in relation to the compliance notice in relation to other matters and no issue was raised therein in relation to the matter in respect of which Mr. Kenny now seeks to complain.

20. In the additional affidavits sworn by Mr. Kenny and in particular in his affidavit of 26th February, 2010, he raises a number of matters which were not previously identified in these proceedings. Those matters include complaints concerning the installation of boilers and boiler flues, the alleged deficiencies in the Environmental Impact Statement ("EIS") submitted by T.C.D. to An Bord Pleanála, which it is alleged results in T.C.D. being in breach of environmental directives, the alleged use of Trinity Hall during certain summers, the alleged increase in roof pitch of building No. 2 and an alleged increase in height of building No. 2, the alleged unauthorised location of an ESB sub-station and allegations of fraud as set out in various paragraphs including paragraphs 28, 37 and 38 of the affidavit of Mr. Kenny sworn on 10th May, 2010.

In his affidavit sworn on 26th February, 2010 Mr. Kenny takes issue in relation to the installation of boiler flues in building No. 1. The Court has already dealt with the issue concerning the fact that building No. 1 is not referred to in the original affidavits grounding Mr. Kenny's s. 160 proceedings. In any event, even if Mr. Kenny's complaints in relation to the installation of boiler flues in building No. 1 were properly within these proceedings, and this Court is satisfied that they are not and further that the proceedings should not be amended to permit of such a complaint, the factual position is that the installation of the boiler flues in building No. 1 was covered by the compliance submission and was expressly identified in the addendum to the compliance submissions of November 2001. It is also the case that the Supreme Court in its judgment concluded that the location of boilers had no impact on either the roof pitch or profile and it is also the case that the judgment of the Supreme Court was made on the basis that as regards the installation of the boilers there was a valid compliance order made on foot of the compliance submission. The manner in which the Supreme Court dealt with the plant rooms, in paragraph 55 of its judgment, is predicated upon a number of matters including that the installation of the boiler equipment in the plant room in the roof space did not require planning permission. It is also the case that Mr. Kenny has raised the issue of the boilers and the location of the boilers in other proceedings and to allow and permit a re-litigation of the issue of the presence and location of the boilers in such circumstances and to permit an amendment to allow such litigation would be an abuse of process.

21. A further matter in respect of which Mr. Kenny makes complaint relates to alleged deficiencies in the EIS submitted on behalf of T.C.D.. This complaint relates to the placing of boiler installations in the roof space of buildings No. 1 and No. 2 and it is claimed by Mr. Kenny that the same was unauthorised and amounted to a breach of EU law. In his affidavit sworn on 26th February, 2010, Mr. Kenny avers that due to the lack of sufficient information within the EIS that the placing of boiler installations in the roof space of building No. 1 and No. 2 was a breach of EU environmental law. This claim represents a further attempt to challenge the adequacy of the EIS and Mr. Kenny has done that on a number of previous occasions both within the leave application in the judicial review proceedings and in the proceedings which Mr. Justice Clarke heard ([2008] No. 1319P) which were held (at paragraph 6.2) of the unreported judgment delivered by Mr. Justice Clarke on 28th January, 2009 as being "fundamentally misconceived" and in respect of which Mr. Justice Clarke refused permission to bring such proceedings. This claim did not form part of the claim initially brought within these proceedings and as with the other matters in respect of which Mr. Kenny would require to seek an amendment to allow and permit such matters to be raised within these proceedings, this Court is satisfied that such amendment should not be permitted and that in all the circumstances given the history of this matter and the previous litigation and determinations made by the courts in relation to this matter that it would amount to an abuse of process to permit of such amendment. The nature and extent of the abuse is demonstrated by the fact that within the leave proceedings it was, held by McKechnie J. in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565 (at p. 577, para. 15):

> "During the course of this hearing it was suggested, that in relation to the boiler house facilities there was a breach of the Local Government (Planning and Development) Regulations, 1994, and/or a breach of Council Directive 85/337/EEC and/or the domestic provisions incorporating this Directive into Irish law. On being invited to identity precisely what regulations or articles or sections were breached and how, it was not possible for counsel on behalf of the applicant to so indicate. Accordingly, this submission cannot constitute a substantial ground for the purposes of this application."

In the leave proceedings no deficiency was identified, on behalf of Mr. Kenny notwithstanding a general allegation of deficiency, and to allow and permit the proceedings herein to be amended to include such a claim at this point in time would create an injustice and be an abuse of process. It is also the case that in arriving at his decision to refuse permission to bring proceedings Mr. Justice Clarke dealt with the nature and extent of the decision of the European Court of Justice in *Commission v. Ireland* Case C – 215/06 and held, notwithstanding Mr. Kenny's reliance on that decision, Mr. Kenny did not have a stateable case and his case was fundamentally misconceived.

22. In paragraph 12 of Mr. Kenny's affidavit sworn on 26th February, 2010, Mr. Kenny takes issue in relation to the unauthorised use by T.C.D. of building No. 3 in permitting that building to be used during the summer months of certain years by foreign children who were taught in a room within building No. 1 contrary to the planning permission. Such use was not permissible and it would appear that there was a breach of the planning permission in certain years by T.C.D.. However, it is also clear from the undisputed evidence available to this Court and acknowledged by Mr. Kenny in his affidavit that there was no unauthorised use after the summer of 2007 and that he did not observe any unauthorised use during the summers of 2008 or 2009. T.C.D. acknowledges in paragraph 13 of the affidavit of Tom Merriman sworn on 15th March, 2010, in response to this complaint, that bedrooms were converted to teaching rooms in certain summers but that such use had been discontinued since the summer of 2008 and is not an ongoing use. In those

circumstances there is, on the undisputed facts available to this Court, no continuing unauthorised use and this Court is therefore satisfied that it would be both inappropriate and oppressive to permit Mr. Kenny an amendment to litigate this issue, as the unauthorised use in respect of which complaint is made is not continuing and there is no unauthorised use occurring.

23. Two further matters in respect of which Mr. Kenny seeks to make complaint relate to the alleged change in roof pitch and the increase in height of building No. 2. Both these matters have been considered and addressed within the Supreme Court judgment and in effect Mr. Kenny is seeking to disregard the consequences and effect of that judgment and to challenge the compliance order. This Court is satisfied that these matters of complaint are not within the s. 160 proceedings as brought by Mr. Kenny and further it would not be appropriate or just to permit an amendment to allow such matters to be ventilated within the s. 160 proceedings.

24. At paragraph 25 of Mr. Kenny's affidavit sworn on 26th February, 2010 he raised other matters in respect of which he made complaint which were identified as "other unauthorised development". The first of those matters concerned an ESB sub-station. In paragraph 26 of his affidavit Mr. Kenny avers that as a result of complaints made to the Council, notwithstanding that it had purported to consent to this unauthorised development during the compliance procedure for building No. 3, the Council was obliged to issue a warning letter to T.C.D.. Mr. Kenny further avers that T.C.D. then applied for planning permission to retain its unauthorised development and that permission was granted. Given the uncontested fact that the ESB sub-station is now covered by a valid grant of planning permission any issue in relation to the sub-station is not an appropriate matter for an application under s. 160 as such development is not an unauthorised development.

25. In a number of paragraphs contained within Mr. Kenny's sworn affidavit of 10th May, 2010 allegations of "fraud" are made against T.C.D.. Mr. Kenny claims that T.C.D. fraudulently caused the Council to accept its compliance proposals and that such proposals were submitted in circumstances where T.C.D. knew or ought to have known that such proposals would deceive the public including Mr. Kenny. This claim is yet a further instance of Mr. Kenny's attempt to disregard the effect and consequences of the Supreme Court judgment. The issue of fraud was raised in the Supreme Court hearing and what Mr. Kenny claims, in an attempt to avoid the consequence and effect of the Supreme Court judgment, is that the Supreme Court were informed of a particular fraud allegation alleged against Trinity but that the issue raised was held not to relate to the subject matter of the proceedings before the Court. An attempt at this late stage for Mr. Kenny to introduce a complaint in relation to fraud, in his affidavit of 10th May, 2010, is in effect an attempt to expand the proceedings beyond previous allegations and to disregard the consequence and effect of earlier court decisions.

In proceedings (2005/3320P) in which Mr. Kenny was applicant and T.C.D. the first named respondent, Mr. Kenny made claims against T.C.D. The nature of case Mr. Kenny sought to make was identified in the unreported judgment of Mr. Justice Clarke of the 30th March, 2006, where he held (at p. 4):

> "The central contention upon which these new proceedings are based is an allegation made by Mr. Kenny that four photomontages that were submitted with the original Environmental Impact Statement to the board as part of the original planning process were, as he described it, manipulated and, it is contended, that a fraud was perpetrated on the Court, and that in substance, the judgment and order of McKechnie J was secured by fraud."

Those proceedings had been brought by Mr. Kenny in relation to the planning permission obtained by T.C.D. for Trinity Hall. T.C.D. applied to Court to have the proceedings struck out as being frivolous and vexatious and bound to fail and reserved its application for an "Isaac Wunder" order. Having reviewed the authorities, Clarke J. held that an order should be made as sought and he also granted an "Isaac Wunder" order subject to Mr. Kenny being entitled to seek, on notice to the various defendants or notice parties, leave to seek judicial review on new grounds. Clarke J. had also identified that in relation to raising new grounds, Mr. Kenny faced "an uphill struggle" to persuade the Court to extend time given the time limits and the delay.

Mr. Kenny has engaged in a multiplicity of proceedings against T.C.D. and to allow and permit the complaint of fraud as now made to be litigated within these s. 160 proceedings would be, given the history of the litigation (including the proceedings 2005/3320P0, delay, and all the circumstances, to permit an abuse of process to occur. In so far as Mr. Kenny claims that any Court judgment was as a result of fraud, it would be necessary for such matter to be raised with those proceedings and not in this s. 160 application.

26. In the light of the determinations hereinbefore set out this Court is satisfied that Mr. Kenny's claims within these proceedings should be struck out pursuant to the inherent jurisdiction of the Court in that such claims as Mr. Kenny now seeks to pursue are in some instances bound to fail as a result of earlier final Court decisions and in other instances are bound to fail on the undisputed facts before the Court and in the one instance in relation to the issue of trees is of such a minor matter that such issue cannot be permitted to proceed as a sole issue and is not a matter which could amount to a breach of permission. Further, insofar as Mr. Kenny seeks to expand the s. 160 proceedings by amending his proceedings to include additional claims, this Court is satisfied that on the facts and given the circumstances in which Mr. Kenny seeks such amendments and the delay in applying for amendments that to allow and permit such amendments would be an abuse of process and would amount to a clear attempt by Mr. Kenny to bring forward claims within the amended proceedings which were not brought forward or litigated in previous litigation. In refusing to amend the s. 160 application, the Court is also satisfied that Mr. Kenny has delayed in making such application and has provided no credible explanation for such delay. Further, this Court is satisfied that on the undisputed facts before the Court that to allow and permit Mr. Kenny to litigate matters which have already been determined would be to subject T.C.D. to expensive, protracted and unnecessary proceedings and for T.C.D. to be placed in a position of having to defend claims which cannot succeed. The Court will therefore make an order in the terms of paragraph 1 of the notice of motion of 6th November, 2009 striking out Mr. Kenny's proceedings against T.C.D..