Trinity College had informed Mr. Justice McKechnie at the hearing of the previous application for leave to bring judicial review in November, 2000 that the boiler installations would be located in various plant rooms throughout building 3. The compliance submission was the first indication of any intention to place before the planning authority proposal for boiler installations in the roof spaces. He again referred to the requirement for planning permission and the concession made by Ms. Boyle that no application for planning permission was made for boilers or flues to be installed anywhere in the three building development.

Mr. Kenny referred to the consultations alluded to by Ms. Boyle regarding centralised water storage facilities. This was not a term used in the planning application or appeal process. Mr. Kenny said that such centralisation, irrespective of its location, would require a grant of planning permission. Ms. Boyle's reference to the Dublin City Development Plan, 1999, he believed, served no purpose. That was a reference to general site development standards 14.1.2 at paragraph 4 which stated as follows:

> "Dublin Corporation is concerned for the proliferation of plant and tank rooms on top of the roofs of buildings in the city. For this reason, plant and tank rooms are being included in the calculation that the gross floor area of buildings. The Corporation considers that such facilities should be provided within the roof space of buildings unless the applicant can prove justification of the need, in exceptional circumstances, to locate plant and tank rooms outside the roof of buildings."

Mr. Kenny says that, as no application for planning permission was ever made in relation thereto, it would not have been possible for any such storage installations to have been the subject of a planning permission condition.

It was not possible for Mr. Kenny nor Mr. Gallagher to give full consideration to Ms. Boyle's assertion regarding to the concealment of plant rooms in the absence of any plans/drawings.

He further submitted that the reference to noise and air emissions being "greatly reduced" was meaningless as no data for boilers or flues was provided or contained in the environmental impact study.

11.4 The environmental impact of the proposed development was on the basis of the overall total of bed spaces which he said was not relevant to the re-ordering of room use from the original proposed uses which were approved by the Board. It did not follow, he submitted, that because the increased bed spaces were agreed by the Council that they are fully in accordance with the terms and conditions of the Board's planning permission. He believed that financial reasons were at least one of the considerations for the creation of these new bed spaces. Mr. Kenny noted that there were no exhibits available to show how an incorrect location could affect the number of bed spaces.

11.5 Mr. Kenny further submitted that it was clear from reading of the permission granted by the Board that condition 9 in relation to the trees was a stand alone condition and that Trinity College was not in any way entitled to speculate as to what the intention of the Council might or might not have been as Trinity College had no justifiable basis for claiming that the Council was entitled to interpret a condition imposed by the Board in such a way as would produce a result other than that dictated by its clear and express wording. Mr. McConville, on behalf of Trinity College and Mr. Murray on behalf of the Dartry District Preservation Association had made detailed submissions to the hearing by An Bord Pleanála who, in turn, laid down a clear and unambiguous condition.

11.6 Mr. Kenny in paragraphs 59 to 66 dealt with allegations of delay and in paragraphs 67 to 69 with the latter allegations of the disclosure of facts and cost order.

He repeated what he said in the first affidavit regarding his letters to the Chief Planning Officer and the Senior Planning Enforcement Officer within one week of the development commencing. The delay was attributable to the failure of the employees of the Council to adequately address or respond to his complaints. Prejudice results from Trinity College proceeding with an unauthorised development and the Council acting in excess of jurisdiction. Given the numerous representations made by him to the Council of which Trinity College was aware, any lapse of time prior to the institution of the proceedings could not be taken to indicate any acquiescence on his part in the unauthorised development.

11.7 In relation to the failure to disclose material facts he said that he was not allowed to enter the site and inspect the works in progress. He could only see the extent of the works from the upper floor of his house which were proceeding on foot of an *ultra vires* agreement and in breach of the planning permission.

The issue of costs was completely irrelevant to the issue raised in the subsequent proceedings.

12. Replying affidavit of Council

Patrick F.A. McDonnell, Chief Planning Officer of Dublin City Council, said that on 24th December, 2001 he advised the Assistant City Manager (Planning) that details submitted by the architects of the notice party were in compliance with certain planning conditions imposed in a grant of planning by An Bord Pleanála on 4th August, 2000, namely conditions numbered 2, 6 to 9, and 17. He said that several meetings and discussions had taken place with the notice party's architects and himself prior to the preparation of that report. He was satisfied that the proposal complied with the conditions.

The remainder of the affidavit deals in detail with the above mentioned conditions.

13. Mrs. Boyle's Supplemental Affidavit

Mrs. Boyle's supplemental affidavit of 25th November, 2002 referred, in particular, to the applicant's second affidavit and to Mr. Gallagher's affidavit.

She agreed that the role of the Board was to consider an application on first principles. She agreed that the Board's oral hearing had been comprehensive and detailed. However, there was no material in the inspector's summary of this hearing as to the origin of the wording of condition 2 and accordingly the Board may not have been aware of the consequence of a literal interpretation.

The Board was not in dereliction of its duty in indicating in its conditions that certain matters be agreed between the Council and the developer. Each and every aspect was not determined by the Board. This was not dereliction. In assessing various alternative proposals for the implementing of these matters the Council acted responsibly and properly executed its statutory function.

She referred to the lack of clarity and the requirement to agree.

She referred in further detail to the implementation of the conditions. Particular reference was made to the roof pitch where a minor change, sketched in the affidavit, did not affect the height.

The allegations of misleading Mr. Justice McKechnie regarding the location of boilers had not been referred to his court. The placing of equipment in plant rooms did not require planning permission. There is no associated impact on amenities. The architect's report with the April, 1999 submission indicated that plant rooms were to be provided in "ancillary top-storey areas such as plant rooms…" The Council deemed that, as no locations were in fact indicated to the Board as to where precisely the boilers were to be located and as the roof space plant areas were capable of accommodating such equipment, there was compliance with the conditions.

She disputed the allegation that material facts were withheld in previous proceedings or that the court was misled.

14. **Mr. Kenny's Third Affidavit**

Mr. Kenny in his affidavit sworn 9th December, 2002 said that Mr. McDonnell failed to exhibit the report prepared by him in respect of the compliance process. Mr. Kenny says that Mr. McDonnell had made a number of errors in his affidavit: that An Bord Pleanála did not seek any alteration to the design but simply imposed a condition requiring the first floor to be omitted; did not say that the height of the building was to be reduced in the interest of visual amenity but rather directed that the first floor be omitted in the interest of visual amenity which, he says, was not the same thing.

Mr. Kenny again referred to the omission of the first floor. He said that the Board sought the omission of that floor so that the building height would thereby be reduced. It was specific as to how the reduction in building height was to be achieved. When he agreed that there was no guidance given by the Board as to why, in particular, the first floor rather than any other floor was to be omitted, it did not relieve the respondent of the responsibility to ensure that the condition be complied with. He believed that the respondent had no right to seek to correct the Board's so-called "disruption" of the architect's design intentions which, he believed, had been done by the sweeping Article 35 request. He referred to the modification of the proposed scheme in the grant of planning permission.

Reference was also made by Mr. Kenny to the emphatic eaves detailing of the roof, to the roof space/boiler locations, to the bed spaces, trees and other miscellaneous matters.

15. <u>The Building Contractor - The second named notice party</u>

A statement of grounds of opposition was filed on 31st March, 2003 on behalf of Michael McNamara & Co., raising the absence of prompt application, acquiescence by the applicant and the applicant's failure to take any adequate or timely measures or remedies to protect his interest. The applicant was not entitled to the relief sought by reason of his failure to disclose material and relevant facts to the court.

The statement then detailed the second named notice party's opposition in relation to the conditions.

The statement of opposition was grounded in the affidavits of Mr. Tim Sheehan, Senior Quantity Surveyor of the second named notice party. Two affidavits – sworn 23rd April, 2003 and 5th September, 2003 - detailed the delay and the overall completion of the development. The development involved a workforce of 160 and a cost of €48.75 million of which sub-contract and third party suppliers amounting to €37.2 million. As of 23rd April, 2003 work on site had proceeded for 15 months and development was anticipated for a further 7 months. At the date of the latter affidavit works in the sum of almost €31.5 million (including V.A.T.) had been certified and additional purchase orders with suppliers and sub-contractors then amounted to in excess of €30 million.

16. <u>Related proceedings</u>

16.1 The applicant, in a separate set of proceedings had issued a plenary summons on 7th November, 2002 against Trinity College. The statement of claim sought certain reliefs including *inter alia*, an order directing the re-hearing of the previous judicial review leave application and an order setting aside the order for costs on the ground that the court was misled on that occasion. Trinity College, by a motion dated 7th March, 2003 sought to strike out the proceedings as, *inter alia*, disclosing no reasonable cause of action and an abuse of process. Proceedings were discontinued against Dublin City Council when this application was heard by Finnegan P. on 31st March, 2003, who in a reserved judgment, refused Trinity's application. On 20th June, 2003 the Supreme Court allowed the appeal and struck out the proceedings as showing no reasonable cause of action.

Moreover, on 17th July, 2002, the applicant commenced related proceedings under s. 160 of the Planning and Development Act, 2000.

16.2 Notwithstanding, on 3rd July, 2003 the applicant instituted further proceedings which, it was submitted, was substantially similar to the proceedings struck out by the Supreme Court with identical relief together with the relief seeking damages.

16.3 A motion by the respondent and notice parties to strike out proceedings by the applicant to set aside the judgment of McKechnie J. because of alleged fraud was heard on 25th March last. This court, having heard the submissions of the parties in relation to the affidavits filed, saw fit to strike out those proceedings and to proceed with the proceed with the present application.

17. <u>Further Developments</u>

Trinity College offered the organisers of the 2003 Special Olympic World Summer Games the use of the development subject to appropriate permission. Notice was given to the applicant, to the Dartry and District Preservation Association and to a neighbouring landowner, a notice party to the first judicial proceedings, informing each of them of the intention to apply for planning permission. A grant was made by the Council subject to 7 conditions. The applicant, *inter alia*, appealed that grant of planning permission to An Bord Pleanála. Trinity withdrew the offer to the Special Olympics. An Bord Pleanála decided to grant permission subject to 6 conditions on 4th June, 2003. Later that month the development was occupied on a non-profit basis by Special Olympics participants.

Building No. 2 was completed on 11th August, 2003, building No. 3 on 20th June, 2003 and applications had been received from students to commence occupation in October, 2003. As of 5th September, 2003, Building No. 1 had been completed and applications were received from students to commence occupation in January, 2004.

18. <u>Decision of the Court</u>

18.1 The applicant's opposition to this development has involved prolonged and overlapping plenary claims and judicial review applications. The judicial review applications in respect of the planning application for this major development had been appealed to An Bord Pleanála which was, in turn, the subject of an unsuccessful judicial review before Mr. Justice McKechnie.

The present application is in relation to a further stage, the procedure leading to the compliance order issued by Dublin County Council on 4th January, 2002.

18.2 There are two preliminary issues that emerge from the pleadings in the present judicial review application, that of appropriateness and of promptness.

The court has to consider the extent to which the matters complained of may have already been decided and, to the extent that it has not, whether the application has been made promptly.

If the application, in the circumstances, had been made promptly then the court should then proceed to deal with the substantive issue relating to the respective powers of Dublin City Council, as planning authority, and An Bord Pleanála in relation to compliance with the latter's conditions.

What underlies both of these issues is, of course, the scope of judicial review itself which is an examination of the procedures followed in relation to the planning process as distinct from an appeal of the decision of the planning authority.

18.3 The first issue relates to the appropriateness of these proceedings which seek, *inter alia*, an order quashing the compliance order of 4th July, 2002. Irrespective of the reasons for the delay, it is clear that the development was fully completed at the date of the hearing. The delegates from the Summer 2003 Special Olympic World Summer Games had been in occupation of building No. 3 (which had been reduced in height pursuant to condition 2) on a non-profit basis in June 2003 nine months before these proceedings commenced. The entire development was complete and students accepted for accommodation in October, 2003 (Buildings 3 and 2) and in January 2004 (Building 1) five and two months respectively before the matter came for hearing before this Court.

18.4 In such circumstances the order of *certiorari*, prayed for in the notice of motion of 18th July, 2002, to quash the decision that Trinity College was in compliance with planning conditions would appear to be inappropriate both in relation to timing and to the decision of the courts in the previous judicial review application which covered much of the same ground. Counsel for the applicant did not press the matter. It is clear that the granting of such order and, indeed, even the seeking of such order would require a finding of wrongdoing on a scale that has no application to the present facts. The court, accordingly, rejects the application for *certiorari* as being, in the circumstance, inappropriate.

18.5 The several declarations in paragraphs (b) to (f) relate to the powers and jurisdiction of the planning authority and the lawfulness of the compliance order.

The applicant seeks to quash the compliance order on the basis of a decision constituted an "unlawful material alteration to the development as permitted and conditioned by An Bord Pleanála".

The difference between complying with conditions and making alterations was not spelled out in the application. There was some submission as to the undesirability of “designing by conditions” but no clear submission as to the principles to be followed.

Moreover, the applicant had agreed in this third affidavit, that no guidance had been given by the Board as to why the first floor had to be omitted other than in the interests of visual amenity. It clearly left the matter to be agreed between Trinity College and the council.

The applicant also agreed that it was reasonable in some circumstances to resolve design problems such as the ends of the buildings along Dartry Road at what he expressively called “the bookends”. Meetings were held between the developer and the planning authority and options discussed. There was no request for further information. Notice of commencement was served immediately after the order of 4th January, 2002.

The applicant had already unsuccessfully applied for *certiorari* in respect of the Board’s grant. While he sought to impugn the compliance order the grounds for doing so are substantially those used in the unsuccessful application. He sought to distinguish the grounds by referring to the non-disclosure of information and the misleading of the court in the previous application before McKechnie J. It has been difficult to isolate the grounds relating to each evidential basis for such grounds from the grounds previously relied on. Neither the evidence on affidavit nor the oral evidence to the Court substantiates either non disclosure to the council or the Board nor misleading of the Court.

18.6 The second issue relates to the promptness of commencing the proceedings arising in those circumstances. In the case of delay such an application would require cogent argument justifying such delay. The applicant was previously involved in an unsuccessful application for leave to apply for judicial review of the decision of An Bord Pleanála to grant planning permission which was refused by McKechnie J. in *Kenny (No. 1) v. An Bord Pleanála* [2001] 1 I.R. 565. A subsequent application for leave to appeal the refusal of the High Court was refused in *Kenny (No. 2) v. An Bord Pleanála* [2001] 1 I.R. 704.

Moreover, on 17th July, 2002 the applicant commenced related proceedings under s. 160 of the Planning and Development Act, 2000, in which Trinity College were named as co-respondent. Trinity College had also been present joined as a party to the proceedings by order of the High Court dated 20th January, 2003. Having regard to the nature of the development, it seems to this court that there is a very high onus on the applicant to commence proceedings with every possible expedition. The applicant despite the correspondence entered into with the council had failed to do so.

The planning compliance submission and addendum of August and November, 2001, the subject of the planning officer's satisfaction on 24th December, 2001, was the subject of the order on 4th January, 2002. The *ex parte* application was made on 3rd July, 2002 just within the six months required for an order for *certiorari.*

Order 84, rule 21(1) provides that all applications for judicial review should be made promptly. In the circumstances of this case, given the previous litigation and the application for an order of *certiorari* was not made promptly. The applicant's submissions regarding the delay in dealing by Dublin City Council with his correspondence must be taken within the context of previous applications. It appears to me unreasonable that the applicant, by correspondence with the respondent, could have had any realistic expectation that the planning authority would deem its decision regarding compliance *ultra vires* and, accordingly, rescind it. It does seem to me that neither *Euro Container Shipping Plc. v. Minister for the Marine*, High Court, 11th

December, 1992 nor *McEnarry v. Flynn*, High Court, 6th May, 1998 are relevant. *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 also involved a first application, in that case by an individual relying on his public representatives, is relevant to the present application.

It does not seem to me that the letter of 14th January, 2002 to the Chief Planning Officer and Senior Planning Enforcement officer can, in the circumstances, substitute for a prompt application for judicial review given, at that stage, that the applicant was aware of the circumstances surrounding the decision and had previously made an application for judicial review of the decision of the Board.

The application was made nearly two years after the Board's decision to grant planning permission. The appeal to the Supreme Court had been refused in the previous judicial review application (*Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704).

Order 84, r. 21 requires an application to be made promptly and in any event within six months from the relevant decision. Finally, the judicial review proceedings were commenced by way of ex parte application on 3rd July, 2002 almost six months from the date of the Order. Mr. Kenny, in his affidavit grounding this application, stated that he was informed on 4th January, 2001 that a compliance letter had issued on 24th December, 2001.

The applicant had previously sought unsuccessfully to quash the grant of planning permission. In the present proceedings he seeks, as he is entitled to do, to enforce that grant in a strict manner by seeking to quash the compliance order not on the grounds of irrationality or unreasonableness but on the basis of the principle of *vires*. That should have been done promptly in the circumstances. As it was not, the applicant has not complied with the Rules of the Superior Courts.

18.7 There are, indeed, strong public policy grounds for requiring that the decisions of the nature of the impugned decision are commenced promptly having regard to the serious consequences for a developer and contractor who commences to carry out development on foot of such a decision (see the statements of Simon Brown L.J. in *R v. Exeter City Council, ex p. Gill Thomas & Co. Ltd.* [1991] 1 Q.B. 471 at 484 and Pill L.J. in *R v. Newbury District Council, ex p. Chieveley Parish Council* ((Times Law Report, 10th September, 1998 CA) [1998] E.W.C.A. Civ 1279 (23rd July, 1998) which adopted the *Exeter City Council* case).

Simon Brown L.J. distinguished between a mere procedure impropriety or failure by the planning authority to have regard to relevant considerations, on the one hand and the fundamental basis of *ultra vires*, as in the present case:

> "… this application was not made promptly; no justification has been advanced for the delay; and (the developers) have both suffered prejudice. Generally speaking, these considerations would of themselves have been sufficient to bar relief. Certainly I would have found this so if the central object of the challenge were merely to procure a re-determination of the decision; if, for instance, the complaints were of procedural impropriety or failing to have regard to relevant considerations. But in fact this challenge has been advanced upon the more fundamental basis that, in light of section 51, the authority for one reason or another was simply not empowered to grant this planning application however they had approached the matter. In these circumstances, had I been persuaded of the correctness of this contention, I might possibly have exercised my discretion in the

> applicants' favour. That said, however, I cannot sufficiently stress the crucial need in cases of this kind for applicants to proceed with the greatest possible urgency, giving moreover to those affected the earliest warning of an intention to proceed. In this connection it should be remembered that there is conspicuously absent from the legislation any right to appeal in fact or law from a planning authority's grant of planning permission. And even when a right of challenge *is* given - the right of statutory application under section 245 to challenge a ministerial decision - it must be exercised within six weeks. Only rarely is it appropriate to seek judicial review of a section 29 permission; rarer still will be the occasions when the court grants relief unless the applicant has proceeded with the greatest possible celerity. For reasons earlier given, this application fails and is dismissed."

It seems to me that the same reasoning applies to the promptness in challenging a compliance order as being *ultra vires* the Council.

18.8 Whatever prejudice the applicant might suffer, or might have suffered, at the time of the hearing of the application, is clearly disproportionate to the disruption to be suffered by each of the notice parties were the court to accede to the relief sought. It is clear, from the decision in *Dekra Éireann Teoranta v. Minister for Environment* [2003] 2 I.R. 270 (the Supreme Court) and *O'Connell v. Environmental Protection Agency* [2001] 4 I.L.R.M. 494 (Herbert J.) that delay is fatal in respect of challenges by way of judicial review to decisions to award public contracts which are not made at the earliest opportunity or in the case of the validity of a decision by the Environmental Protection Agency to grant or refuse a licence. The imposition of a non-expandable upper time limit within which an application for leave to apply for judicial review must be brought does not in any way suspend or lessen the requirement that every application for judicial review must be brought promptly within that stipulated period.

18.9 If I am wrong with regard to the issues of appropriateness and promptness I should consider the substance of the application. The applicant relies on *Wicklow Trust Ltd. v. Wicklow County Council*, (High Court, 5th February, 1998), reported in [1998] I.E.H.C. 19 wherein McGuinness J. stated that the question was whether the planning authority were correct rather than reasonable in their opinion. The same approach was adopted by Geoghegan J. in *Gregory v. Dun Laoghaire/Rathdown County Council*, (Unreported High Court, Geoghegan J., 16th July, 1996) and, by Murphy J. on appeal to the Supreme Court as follows:

> "It was argued on behalf of the Council that the interpretation of Condition 2 as requiring only internal changes was at least a reasonable construction of the condition and, even if erroneous, it was a construction which the Council was entitled to put on the condition in a proper and *bona fide* exercise of their functions. In my view this argument is unsustainable. The proper function of the Council was the implementation of the condition imposed by the Board. If they erred in that regard the error was as to the nature of their duties rather than the performance of it. The only power exercisable by the Council was to agree details in relation to the revised plan on the basis of the implementation of the condition imposed by the Board. Any

> agreement reached without that condition having been fulfilled was necessarily *ultra vires* the Council."

The applicant submitted that this approach was approved and adopted, in *O'Connor v. Dublin Corporation* (Unreported, High Court, O'Neill J., 3rd October, 2002) [2000] 179 JR). That case also involved compliance of conditions attached to the grant by An Bord Pleanála by agreement between the developer and the Council.

Under the heading "Correct approach to construction of the planning permission", O'Neill J. concluded, at p. 28 of the unreported judgment that following *Gregory v. Dun Laoghaire/Rathdown* the appropriate test to be applied is that the conclusion or decision of the (Council) must be looked at to see that it is correct in law and not unreasonable in the sense of the test laid down in *O'Keeffe v. An Bord Pleanála*.

O'Neill J. continued:

> "It necessarily follows from this, that what is required of this compliance procedure is no more than faithful implementation of a decision of An Bord Pleanála. The jurisdiction so invoked on the part of the respondents is a very limited one and of a ministerial nature. What they do have to do is to implement what has already been decided in essence. Thus, all that they must ascertain is the true or correct meaning of the conditions attached to the planning permission and to confine themselves and the notice party to such proposals as are in compliance with those conditions." (at p. 29)

Mr. Justice O'Neill described the exercise involved as:

> "This exercise is wholly and radically different to the jurisdiction exercised by a planning authority after the statutory planning

procedure has been gone through, in making its decision to grant or refuse an application for permission or approval. The latter exercise is clearly of a judicial nature and involves the local authority drawing on its resources of expertise in planning matters and having regard to the circumstances of each case and the relevant planning considerations making a decision which necessarily involves on its part an extensive discretion. When ultimately that process is finally exhausted by a decision of An Bord Pleanála if there is an appeal, it would be wholly contrary to principle and impractical if the questions which were involved in the application and in the appeal were to be reopened or to be revisited on a compliance application particularly in circumstances where the essential parties, i.e. in this case the applicant or otherwise, the public were excluded. *A fortiori*, new issues could not be opened at this stage of the process. Therefore in my view it necessarily and obviously follows that the respondent must be confined in this exercise solely to the ascertainment of the true and correct meaning of the conditions and, consequent on that, confirmed in their agreement to proposals which faithfully adhere to and implement those conditions." (pp. 29-30)

While there are similarities between *O'Connor* and the present case it seems to this Court that the discretion of the Council to achieve compliance with the conditions in this case was wider. This was, indeed, implicitly recognised by the applicant in relation to the reduction by one floor and to the treatment of "book ends". It was conceded that there were alternative ways in which the conditions could be complied with. In *O'Connor* the modification (*inter alia*) of the development to provide a reduced proportion of glazing to give greater visual interest did not allow any alternative.

18.10 It is necessary to consider the criteria laid down by Hamilton C.J. in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 which was relied on in *O'Connor*. In imposing a condition that a particular matter be left to be agreed between the developer and the planning authority An Bord Pleanála is entitled to have regard to a number of factors. These include the desirability of leaving to a developer which is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of that enterprise and also leaving technical matters or matters of detail to be agreed between the developer and the planning authority. The enforcement of such conditions, the monitoring, supervision and enforcement of such conditions are left to the planning authority.

In that case the contention that it was an unlawful delegation of the Board's power to have matters agreed between the applicant and the planning authority was rejected by the High Court (Keane J.) and, on appeal, by the Supreme Court. The Board is entitled to grant permission subject to conditions. This is not an abdication of the decision-making powers of the Board.

In imposing conditions the Board is obliged to set forth the purpose of such details, the overall objective to be achieved by the matters which have been left for such agreement and to state clearly the reasons therefor and to lay down criteria by which the developer and the planning authority can reach agreement (*Boland v. An Bord Pleanála* [1996] 3 I.R. 435 at 446-7).

In that case the conditions related to the appropriate contribution to be made by the developer. The principles established have, in my view, a wider application.

The conditions imposed by An Bord Pleanála clearly gave the reasons for the conditions as: the interest of visual (and residential) amenity, orderly development and to protect existing trees and within that parameter imposed conditions which could be achieved in alternative ways to be agreed with the Council.

18.11 While it could be argued that there was no criteria laid down by which the developer and the planning authority could reach agreement, the conditions imposed by An Bord Pleanála had already been the subject of previous unsuccessful judicial review. That decision can no longer be challenged nor, indeed, does the applicant seek to challenge them. An Bord Pleanála referred to the Council the task of seeking agreement in relation to compliance with those conditions and, as is clear from the evidence, the Council interacted in detail with the developer as was referred to in the affidavits of Mr. P. F. A. McDonald and Ms. George Boyle.

The question arises whether the planning authority exceeded what was delegated to it. The relevant conditions have already been referred to together with the reasons for such conditions. The development had to be carried out in accordance with the revised plans except as might otherwise be required in order to comply with the other conditions. Condition 8 required revised drawings to be submitted to and agreed in writing in a similar manner in the interest of orderly development. The reduction in height by the omission of the first floor, in the interest of visual amenity, was to be done by way of revised drawings incorporating the modification which was to be submitted to the planning authority for agreement prior to the commencement of development. Several solutions were proposed in relation to compliance. The Council expressed its satisfaction with the revised drawings eventually submitted. There was no requirement that full drawings be submitted.

In a similar manner condition 9 in relation to the trees to be retained, in order to protect the existing trees and in the interests of visible and residential amenity, were dealt with by An Bord Pleanála. While there would not appear to have been literal compliance (and it was submitted that such was not possible) both experts agreed there had been substantial compliance - at least a high degree of attention in monitoring for possible tree damage had taken place. On the evidence of the applicant's own expert the exclusion zone was generally well observed throughout the site. The court is of the opinion that literal compliance was neither possible nor required.

Agreement with the Council was formalised by way of the compliance order of 4th January, 2002, the subject of these judicial review proceedings.

18.12 Compliance submission and order is a practical procedure with the necessary formality to deal with the reference back to the planning authority in relation to the relevant conditions. Moreover, it is clear that the applicant was informed of the compliance order at the time it was made and, notwithstanding the correspondence referred to, did not initiate the present proceedings until the eve of the expiry of the six months time limit.

The faithful implementation of the decision of An Bord Pleanála in relation to its conditions depends in the first instance on the degree of specificity of those conditions. The more specific, the less discretion there is regarding their implementation. The more general they are the more scope there is between the planning authority and the developer. There is clear evidence that there are several ways whereby a general condition such as that relating to the western arm of building number 3 could be reduced in height in the interest of visual amenity by the omission of the first floor.

The requirement of having revised drawings of the proposed development with floor plans and elevations corresponding in detail submitted to and agreed by the planning authority in the interests of orderly development is practically complied with when the authority agrees in writing.

There is evidence that floor plans and elevations corresponding in detail were considered in the course of the extensive interaction between the planning authority and the developer that there were revised drawings, notwithstanding with some errors.

As is clear from *Boland* the Board is entitled to have regard to the desirability of leaving to a developer, who is hoping to engage in a complex enterprise, a certain limited degree of flexibility having regard to the nature of the enterprise. It seems to me that the balance between that flexibility and the conditions in relation to the stated reasons is a matter which, in this instance, has been left by An Bord Pleanála to the planning authority. To the extent that the enforcement of such conditions requires both monitoring and/or supervision, it is appropriate that this be dealt with by the planning authority. An Bord Pleanála has lawfully delegated the process of agreement with the developer to the planning authority.

In the circumstances it follows that agreement was reached within the scope of the conditions imposed, in conformity of what had been decided in essence by the Board.

It seems to me that the procedure by which submissions were made in relation to planning compliance were, in the circumstances, both appropriate and expedient.

While the compliance process does not involve the procedures pertinent to the planning process, including the right of any member of the public to object, the public is entitled to access to the agreed drawings on the planning file.

18.13 It needs to be emphasised that judicial review proceedings is not an appeal. Even if there had been any frailty in the manner in which that power had been exercised there are other discretionary factors which the court would have to take into account, such as the applicant's lack of promptness and the circumstances of work having been commenced for several months, and the appropriateness of the *certiorari* point and the full disclosure of all relevant facts.

In the circumstances, having regard to the procedural, substantive and discretionary grounds, the court refuses the relief claimed.

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Judgment

Title: Kenny -v- Trinity College & anor
Neutral Citation: [2011] IEHC 202
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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
nd	The High Court refuses a certificate to appeal the

2 March, 2001	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;

(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.
> >
> > 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.'
>
> 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..

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[2019] IEHC 825

THE HIGH COURT

2019/55/MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT AND IN THE MATTER OF AN APPLICATION

BETWEEN

RONALD KRIKKE
PIA UMANS
SEAN HARRIS
CATHERINE HARRIS
PATRICK KENNEALLY
CAROLINE KENNELLY
KENNETH GEARY

APPLICANTS

AND

BARRANAFADDOCK SUSTAINABILITY ELECTRICITY LIMITED

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 6 December 2019

INTRODUCTION

1. This matter comes before the High Court by way of an application pursuant to Section 160 of the Planning and Development Act 2000 (*"the PDA 2000"*). Section 160 is intended to provide a summary procedure whereby breaches of the planning legislation can be brought before the court expeditiously. The procedure is colloquially described as an application for a "planning injunction". The procedure is available to "any person", and benefits from special costs rules under Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

2. The principal legal issues which fall for determination in the present case all concern the interaction between the respective competences of local planning authorities, An Bord Pleanála and the courts. In particular, an issue arises as to the weight, if any, which must be given to a Section 5 declaration in subsequent enforcement proceedings. An issue also arises as to the legal status of a decision made by the local planning authority purporting to agree points of detail pursuant to a planning condition.

3. The facts of the case are straightforward. The respondent is the operator of a wind farm (hereinafter *"the Developer"*). The wind farm is located in the townland of Ballyduff, County Waterford. The relevant planning permission had authorised the erection of wind turbines of a particular scale and dimensions. In the event, wind turbines of a different scale and dimensions have been erected instead. The principal distinction between the "as permitted" and the "as built" turbines is that the rotor blade diameter has increased from 90 metres to 103 metres. This deviation is said, by the Developer, to have been compensated for by a reduction in hub height, which has the consequence that the overall tip height has remained at the permitted level of 125 metres.

4. An Bord Pleanála has since made a declaration pursuant to Section 5 of the PDA 2000 to the effect that the alterations to the turbines, including the length of the rotor blades, do not come within the scope of the planning permission. The Applicants contend that the Developer is precluded by the existence of this Section 5 declaration from reagitating before this court an argument that the "as built" turbines are authorised by the planning

permission. In response, the Developer seeks to rely on an earlier decision, namely the decision of the planning authority to "agree" points of details in respect of the wind turbines. This earlier decision was made pursuant to a condition of the planning permission which left over points of detail, including the design, height and colour of the turbines, for agreement with the planning authority. It is said that neither the Applicants nor this court is entitled to look behind this decision in circumstances where same has not been challenged in judicial review proceedings.

5. The Developer has advanced a number of other arguments for saying that there has been no "unauthorised development", and contends, in the alternative, that relief should be refused as a matter of discretion.

6. The Developer, whilst maintaining the formal position that the change in turbine type is authorised by the planning permission, has, nevertheless, made two attempts to obtain development consent retrospectively in respect of the "as built" turbines. First, the Developer made an application for leave to apply for "substitute consent" under Part XA of the PDA 2000. The application for leave was refused by An Bord Pleanála by decision dated 13 August 2019. This decision is now the subject of judicial review proceedings before the High Court. These judicial review proceedings have been taken by all of the Applicants herein. The parties informed the court last week (28 November 2019) that the judicial review proceedings are not being opposed by An Bord Pleanála, but that there is likely to be a dispute as to whether the matter should be remitted to the Board. This matter is listed for hearing in the Commercial List this morning (6 December 2019).

7. Secondly, the Developer had made an application for retention planning permission to the local planning authority pursuant to Section 34(12) of the PDA 2000. This application had been submitted to Waterford City and County Council on 4 October 2019. This application has since been withdrawn in early November 2019.

STRUCTURE OF THIS JUDGMENT

8. This judgment is structured as follows. The factual background to the dispute will be set out in more detail under the next heading below. This chronology will include more recent events, such as the decision on the part of An Bord Pleanála to refuse leave to apply for substitute consent.

9. The legal issues will then be addressed in the following sequence. First, the legal status of the Section 5 declaration will be considered. This will be the lengthiest part of the judgment. This is because there is a significant body of case law in relation to Section 5, and it is necessary to examine same in some detail. Secondly, the court will consider de novo the question of whether the change in turbine type represents unauthorised development. This exercise is carried out on a *de bene esse* basis. Thirdly, the legal status of the planning authority's purported agreement to the compliance submission will be considered. Fourthly, the factors which are relevant to the exercise of the court's discretion will be addressed. Finally, the principal conclusions of the court will be summarised at the end of this judgment.

FACTUAL BACKGROUND

THE PLANNING PERMISSIONS

10. An Bord Pleanála granted planning permission on 22 November 2005 for the development of a wind farm. (Reg. Ref. 04/1559) ("*the 2005 planning permission*"). The planning application had initially sought permission for the erection of twelve wind turbines. It seems, however, that revised plans and particulars were subsequently submitted, and one of the proposed turbines was omitted and the scale and dimensions of three of the turbines were reduced.

11. The development is of a type which is subject to the requirements of the Environmental Impact Assessment Directive (2011/92/EU) ("*the EIA Directive*"). This is because the proposed development exceeded the threshold for a mandatory environmental impact assessment ("*EIA*") under Schedule 5 of the Planning and Development Regulations 2001. As such, the planning application had to be accompanied by an environmental impact statement ("*EIS*"), and An Bord Pleanála was required to carry out an EIA as part of its decision-making.

12. The planning permission, as granted by An Bord Pleanála, allowed for the erection of eleven wind turbines and other associated development. More specifically, the planning permission authorised the erection of eight wind turbines with a hub height of 80 metres and a blade length of 40 metres (equivalent to a rotor diameter of 80 metres), and a further three wind turbines with a hub height of 60 metres and a blade length of 40 metres (equivalent to a rotor diameter of 80 metres). The two sets of wind turbines would have had an overall tip height of 120 metres and 100 metres, respectively.

13. The following two conditions of the 2005 planning permission are relevant to the issues which arise in these proceedings.

> 1. The development shall be carried out in accordance with the plans and particulars lodged with the application, as amended by the revised information received by the planning authority on the 3rd day of February, 2005, the 22nd day of February, 2005 and the 27th day of May, 2005, except as may otherwise be required in order to comply with the following conditions. For the avoidance of doubt, this permission relates only to 11 number turbines only with the layout of the turbines as that received on 27th day of May, 2005.
>
> Reason: In the interest of clarity.
>
> 3. Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction. In default of agreement, the matter shall be referred to An Bord Pleanála for determination.
>
> Reason: In the interest of visual amenity.

14. The first condition had the legal effect of confining the permitted development to that as set out in the revised information received by the planning authority, i.e. the scale and dimensions of three of the turbines had been reduced. The third condition has since been replicated in a subsequent decision of the planning authority (2011) which authorised certain modifications in respect of the proposed development.

15. The next event of relevance is that the "appropriate period" of the 2005 planning permission, i.e. the time period within which development works could be lawfully carried out, had been extended on 29 November 2010 for a further period of five years. (22 November 2015). But for this extension, the planning permission would have withered in 2010.

16. The Developer subsequently submitted an application in 2011 for permission for a "modification" to the permitted wind farm development. The hub height of the three smaller turbines was to be increased to 80 metres; and the blade length of all eleven turbines was to be increased to 45 metres (equivalent to a rotor diameter of 90 metres). All eleven turbines would, therefore, have an overall tip height of 125 metres.

17. The application had been made, at first instance, to the local planning authority, Waterford County Council. (Reg. Ref. PD 11/400). The planning authority made a decision on 23 November 2011 to grant planning permission *("the 2011 planning permission")*.

18. Condition No. 1 of the 2011 planning permission provides as follows.

> "1. The proposed development shall be carried out in accordance with plans and particulars lodged with the Planning Authority on 30 September 2011 save where amended by the conditions herein.
>
> Reason: to clarify the scope of the permission in the interests of development control."

19. As explained under the next heading below, Condition No. 3 of the 2011 planning permission required points of detail to be agreed subsequently with the planning authority.

20. It does not appear from the face of the planning authority's decision of 23 November 2011 that an EIA had been carried out by the planning authority.

21. For the sake of completeness, it should be noted that a *further* application for planning permission was made in 2013. This related to what has been described as "Phase 2" of the wind farm. The decision of the planning authority at first instance was to grant planning permission for an extension to the permitted wind farm, comprising three (additional) turbines with a tip height of up to 130.5 metres and associated access tracks and site works. An environmental impact statement ("*EIS*") had been submitted with this application. Thereafter, there was an attempt made by third parties to appeal the

planning authority's decision to An Bord Pleanála. The appeal was, however, dismissed as invalid.

22. Condition No. 7 of the 2013 planning permission stipulates that the maximum blade tip height of the (three) proposed wind turbines shall be 130.5 metres. No complaint is made in these proceedings in respect of this second phase of the wind farm.

23. The wind farm, as constructed, consists of twelve turbines. Nine of these turbines have been constructed pursuant to the earlier planning permissions. (Two permitted turbines have been omitted). The balance of three turbines has been constructed pursuant to the 2013 planning permission. These Section 160 proceedings are concerned only with the first nine turbines.

COMPLIANCE SUBMISSION: 13 DECEMBER 2013

24. Condition No. 3 of the 2011 planning permission provides as follows.

> "3. Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction.
>
> Reason: In the interest of visual amenity."

25. Given the importance which they have since assumed as an issue in these proceedings, it is necessary to set out in some detail the events in relation to the compliance submission made pursuant to this condition.

26. The consultants acting on behalf of the Developer, Fehily Timoney & Company, made a compliance submission to Waterford County Counsel under cover of letter dated 6 November 2013. This compliance submission sought the agreement of the planning authority in relation to points of detail under a number of the conditions of the 2011 planning permission. Relevantly, the compliance submission addressed Condition No. 3 of the planning permission as follows.

> "4.1. Condition Wording
>
> *Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction.*
>
> Reason: In the interest of visual amenity.
>
> 4.2. Developers Compliance Proposal
>
> The preferred model being considered for installation at Barranafaddock Wind Farm is the GE 2.x Series wind turbine.

Design

Technical details of the selected turbine model are included in Appendix B of this report. The document summarizes the technical description and specification of the GE 2.x Series wind turbines and includes a number of available turbine variants. The 2.x Series are three-bladed, upwind, horizontal-axis wind turbines with the turbine rotor and nacelle mounted on the top of a tubular tower.

Height

The preferred turbine is installed on a tapered tubular tower of hub height 73.5m with a maximum tip height of 125m. Schematic details of the GE turbine arrangement proposed are included in Appendix B.

Colour

The wind turbines will be finished in a light grey colour.

At this stage the developer requests that the Planning Authority confirm that the proposed turbine is considered appropriate.

The turbines will be geared to ensure that the blades rotate in the same direction."

27. As appears from the foregoing, the compliance submission does not expressly state that the planning authority's agreement was being sought in respect of an increase in rotor diameter from 90 metres to 103 metres.

28. The above text from the compliance submission does, of course, refer to Appendix B. One of the documents included in Appendix B is a drawing labelled "LE13-731-04-0 10 (Rev. A)". This drawing had been submitted in A3 format. This drawing shows a schematic of a wind turbine, and indicates, albeit in very small font, that the rotor diameter is 103 metres.

29. The compliance submission also included a document prepared by GE Energy entitled "Technical Documentation Wind Turbine Generator Systems 2.x Series". Page 14 of this latter document sets out, in tabular form, Technical Data for the 2.x Series. The rotor diameter for the various models of the turbines is indicated as ranging between 100 metres and 103 metres.

30. The response of Waterford County Council to the compliance submission was to issue a letter to the Developer, care of Fehily Timoney & Co., on 13 December 2013 ("*the decision-letter*"). The decision-letter is less than three pages in length. In effect, the decision-letter merely lists off various conditions of the 2011 planning permission, with a brief observation below each.

31. Insofar as Condition No. 3 is concerned, the decision-letter states as follows.

"Condition 3

Noted and agreed."

32. There is no analysis in the decision-letter of the compliance submission. Nor is there any express acknowledgement that the planning authority were agreeing to an increase in rotor diameter from 90 metres to 103 metres.

SECTION 5 REFERENCE

33. Waterford City and County Council made a reference to An Bord Pleanála pursuant to the provisions of Section 5 of the PDA 2000 on 24 May 2018. (Ref. ABP-301738-18).

34. The question referred was as follows.

> "Whether the deviation from the permitted blade length of 45 metres (90 metres in diameter) to the constructed blade length of 51.5 metres (103 metres in diameter) in relation to permission granted under planning register reference number PD 11/400 for modifications to a windfarm at Barranafaddock Wind Farm, County Waterford is or is not development or is or is not exempted development?"

35. The Developer made a detailed submission on the Section 5 reference through its consultants, Fehily Timoney & Company, on 29 June 2018. It is apparent from this submission that the Developer was fully aware that an earlier Section 5 Declaration issued by An Bord Pleanála in respect of the Kilvinane Wind Farm was potentially relevant. The Developer also sought to rely on the planning authority's decision-letter of 13 December 2013.

36. The submission on behalf of the Developer summarised its conclusions as follows.

> "7.0 Conclusion
>
> In summary, the deviation of the rotor diameter from 90m to 103m can be considered immaterial in planning terms because:
>
> 1. The nature and scale of the windfarm development is such that the increase in rotor diameter is not a material alteration.
> 2. There has been no alteration to the turbine locations and the increase in rotor diameter of 14% is significantly less than the 40% alteration which was found to be material in *Bailey v. Kilvinane*.
> 3. On the basis of the comparative environmental analysis, it can be concluded that there are no significant changes to the environmental impacts arising from the change in rotor diameter.
> 4. Waterford County Council, in approving the detailed design of the turbines in 2013, did not consider the increase in rotor diameter to be material in planning terms."

37. The reference above to a "comparative environmental analysis" is to a separate document which had been included as part of the submission to An Bord Pleanála. This is a detailed six-page analysis which compares the environmental impact of the "as permitted" and "as built" wind turbines. The comparative environmental analysis concludes by stating that "there are no significant changes relating to the environmental impacts, based on the

methodologies employed in the September 2011 Environmental Report submitted as a part of the planning application for the permitted development".

38. As is standard practice, An Bord Pleanála assigned an inspector to prepare a report and recommendation in relation to the Section 5 reference.

39. It is evident from the inspector's report that the Developer had made a similar jurisdictional objection to that which it seeks to agitate in these proceedings. More specifically, as appears from the following passage at page 5 of the inspector's report, the Developer had sought to rely on the decision-letter of 13 December 2013 as authorising the alterations in the scale and dimensions of the wind turbines.

> "The owner / occupier has submitted a response to the PA referral request which provides for a summary of the planning history associated with the wind farm development. The submission also note that Waterford City & County Council issued a compliance response in December, 2013 indicating that the turbine erected on the site was noted and agreed. The response questions the appropriateness of the Section 5 Referral with regard to the particular question raised by WCCC in the context of the planning compliance agreed. It is further considered that the statement under the heading 'Reason for Referral' may give the incorrect impression that WCCC was not aware of the change in blade length before 2016. [...]"

40. This summary in the inspector's report reflects the points made, in particular, at §5.2.1 of Fehily Timoney & Company's submission.

41. The inspector indicated (at pages 10 and 11 of her report) that she would have "no objections in principle" to the alterations given that the overall tip height of the wind turbines continued to comply with the specific condition of the planning permission. (It will be recalled that the increase in the length of the rotor blades had been off-set by a reduction in the hub height). The inspector went on to say, however, that An Bord Pleanála itself had adopted a different approach in relation to the Kilvinane Wind Farm. As discussed presently, the Kilvinane Wind Farm is the subject of a judgment of the Court of Appeal. An order had been made under Section 160 restraining the operation of a wind farm, the turbines of which did not comply with the scale and dimensions permitted.

42. The approach which An Bord Pleanála had taken in relation to the Kilvinane Wind Farm had been summarised as follows in the inspector's report.

> "The Board will note a similar Section 5 request in relation to the Kilvinane Wind Farm, PL88.RL2891 refers, whereby the developer of that windfarm received confirmation from the PA that a number of changes made, including a reduction in turbine hub heights, increased rotor blade lengths, reduction in the number of turbines installed and a change of location of turbines within 20m of the permitted locations, were not material and complied with the permission granted. The Board, following a Section 5 request from a third party, concluded that –

(a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,

(b) the relocation of and alterations to turbines, including the modification to the overall height of the turbines and the length of the rotor arms/blades do not come within the scope of the permission granted,

(c) there is no provision for exemption for the said relocation and alterations to turbines provided for in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and

(d) therefore, the construction of the wind turbines as currently erected on site including alterations and modifications to the turbines height and rotor arms/blades is development and is not exempted development."

43. The inspector's own conclusion was then set out as follows.

"8.9. Is or is not exempted development

While I would have no objections in principle to the alterations to the blade length as constructed, given that the hub heights have been reduced and the overall tip height has complied with the specific condition of planning permission, in light of the determination in relation to PL88.RL2891, a precedent might be considered as having been set. In this regard, I refer to the Boards consideration of the physical alterations to turbines - in particular the alterations to blade length and the overall height of the turbines - did not come within the scope of the relevant planning permission, it is possible to conclude in this case that the reduction in the hub height and the increased length of the rotor length, notwithstanding the fact that the permitted tip height of 125m has been maintained, do not come within the scope of the planning permission granted. In addition, the Board will note that there is no provision for exemption for the alterations to turbines provided for in either Section 4 of the Planning & Development Act 2000, as amended or Article 6 of the Planning & Development Regulations, 2001, as amended. As such, the development is not exempted development."

44. An Bord Pleanála ultimately accepted the inspector's recommendation. The Board made a declaration on 4 December 2018.

45. The operative part of the Board Order reads as follows.

"AND WHEREAS An Bord Pleanála has concluded that -

(a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,

(b) the alterations to turbines, including the length of the rotor arms/blades, do not come within the scope of the permission granted,

(c) there is no provision for exemption for the said alterations to turbines in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and

(d) therefore, the construction of the wind turbines as currently erected on site including the alterations to the rotor arms/blades is development and is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the deviation from the permitted blade length of 45 metres (90 metres in diameter) to the constructed blade length of 51.5 metres (103 metres in diameter) in relation to permission granted under planning register reference number PD11/400 for modifications to a windfarm at Barranafaddock Wind Farm, County Waterford is development and is not exempted development."

46. The Developer took no steps to challenge the validity of An Bord Pleanála's determination by way of judicial review proceedings.

ENFORCEMENT NOTICE

47. Following on from An Bord Pleanála's declaration, the planning authority issued a warning letter dated 20 December 2018. An enforcement notice was subsequently issued in respect of the wind farm development. This enforcement notice is dated 22 March 2019. The Developer then instituted judicial review proceedings in May 2019 seeking to challenge the validity of the enforcement notice. It seems that the operation of the enforcement notice has been stayed pending the outcome of these judicial review proceedings.

APPLICATIONS FOR RETROSPECTIVE DEVELOPMENT CONSENT

48. The Developer maintains the position that the change in the scale and dimensions of the wind turbines is authorised by the 2011 planning permission. Without prejudice to this position, the Developer had submitted an application to An Bord Pleanála for leave to apply for substitute consent on 29 January 2019.

49. It may be of assistance to the reader to pause briefly here, and to explain the concept of "substitute consent". The planning legislation had to be amended following a judgment of the Court of Justice of the European Union ("*CJEU*"), Case C-215/06, *Commission v. Ireland*, which had held that the blanket provision made for retention planning permission under the pre-2010 version of the PDA 2000 was inconsistent with the EIA Directive. The option of making an application for retention planning permission is no longer available in respect of an EIA development project which has been carried out in breach of either the requirement for a screening determination or for a full EIA.

50. The planning status of such an EIA development project may only be regularised by an application for substitute consent under Part XA of the PDA 2000. There is no automatic right to apply for substitute consent. Rather, a developer will, generally, be required to apply first for leave to make the application. Such an application for leave is made to An

Bord Pleanála. (There are special rules in relation to quarrying activity, but these are not relevant to this case).

51. On the facts of the present case, the Developer had made a leave-application to An Bord Pleanála on 29 January 2019, that is, shortly after An Bord Pleanála had issued its Section 5 declaration. An Bord Pleanála subsequently made a decision refusing leave to apply on 13 August 2019. The approach adopted by An Bord Pleanála appears to have been that it was not necessary to obtain substitute consent. The validity of An Bord Pleanála's decision has been challenged in two separate sets of judicial review proceedings which have been entered into the Commercial List of the High Court. The first of these proceedings has been taken by the Applicants herein; the second by Mr Peter Sweetman.

52. The parties informed me last week (28 November 2019) that An Bord Pleanála does not intend to oppose those judicial review proceedings. The Board is conceding the judicial review proceedings on the very narrow ground that the Board's records of the decision-making process are inadequate. The Board has been careful to note in correspondence that its approach does not involve any concession by the Board of any of the additional grounds of judicial review relied upon by the Applicants.

53. The parties to the judicial review proceedings are in disagreement as to the precise basis on which the Board's decision is to be set aside, and, as to whether the application for leave to apply for substitute consent should be remitted to An Bord Pleanála for reconsideration. These matters are to be the subject of a separate hearing before the Commercial List of the High Court this morning.

54. The Developer had also made an application for retention planning permission to Waterford City and County Council. That application had been made on 4 October 2019, but has now been withdrawn.

55. I will return to consider the relevance of these applications, towards the end of this judgment, when I come to address the factors informing the exercise of the court's discretion in Section 160 proceedings.

SUPPLEMENTARY LEGAL SUBMISSIONS

56. By order dated 28 November 2019, the parties were given liberty to file supplemental written legal submissions addressing the implications for the within proceedings, if any, of the very recent judgment of the CJEU in Case-261/18, *Commission v. Ireland (Derrybrien)* and *Mone v. An Bord Pleanála* [2010] IEHC 395. The submissions were received by the court on 5 December 2019.

DETAILED DISCUSSION OF LEGAL ISSUES

STATUS OF SECTION 5 DECLARATION

57. The first legal issue to be addressed in this judgment is whether the finding by An Bord Pleanála, i.e. that the increase in the length of the rotor blades does not come within the scope of the planning permission granted, is binding on the parties. Put otherwise, does the Section 5 declaration give rise to a form of issue estoppel which precludes the Developer from reagitating, before this court, the argument which it had lost before An

Bord Pleanála to the effect that the deviations are within the scope of the planning permission.

58. Leading counsel for the Applicants, Mr John Rogers, SC, submits that the Section 5 reference is binding. Counsel cites, in particular, the judgment in *Cleary Compost and Shredding Ltd v. An Bord Pleanála (No. 1)* [2017] IEHC 458, [104] to [118]. That judgment, in turn, relies on the Court of Appeal judgment in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541.

59. In the Applicants' written legal submissions, it is stated that An Bord Pleanála has concluded that the alteration was not only "development", but also that it was not an "exempted development", and that it was carried out in breach of a permission and the conditions thereof. It is further submitted that the Board's finding "removed any room for argument" on the part of the Developer with regard to the status of the development.

60. Leading counsel on behalf of the Developer, Mr Declan McGrath, SC, has sought to argue that An Bord Pleanála does not have jurisdiction under Section 5 of the PDA 2000 to make a finding that "unauthorised development" has been carried out. It is further submitted that for the Board to have found that the "as constructed" wind turbines had not been carried out in accordance with the planning permission would, by necessary implication, involve an (impermissible) finding that the Developer had carried out "unauthorised development". Counsel cites, in particular, *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210; *Heatons Ltd. v. Offaly County Council* [2013] IEHC 261; and *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189; [2017] 2 I.L.R.M. 297. It is sought to distinguish the judgment in Killross Properties on two bases: (i) the Section 5 declaration in that case was to the effect that the development was not "exempted development" which is a finding within the Section 5 jurisdiction; and (ii) it was the applicant, not the respondent, who was held to be bound by the Section 5 declaration. It is submitted that a *respondent*, faced with proceedings which place reliance on a public law measure, may be justified in challenging the validity of the measure concerned even though that party might be, strictly speaking, out of time in maintaining a *direct challenge* to the relevant measure (*Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, [49]).

61. It is further submitted that the court should lean against an interpretation of the Section 5 declaration which would involve attributing to the Board a finding that the development was in breach of planning permission. (Such a finding would, on the Developer's argument, be *ultra vires*). The court should instead interpret the Section 5 declaration as saying no more than that the erection of wind turbines constitutes "development" and is not "exempted development".

62. The Developer submits that the operative part of the Section 5 declaration is confined to the very last paragraph thereof, i.e. the paragraph commencing with the words "NOW THEREFORE An Bord Pleanála ...". (The Board's declaration has been set out in full at paragraph 45 above). This narrow interpretation of the declaration would, it is submitted, "square the circle" by rendering the Board's declaration in a manner which holds it *intra*

vires. The decision would otherwise be unlawful and invalid. This is because, on the Developer's argument, An Bord Pleanála had no jurisdiction to decide what falls within or outwith a planning permission.

ANALYSIS OF THE ARGUMENTS ON SECTION 5

63. It is proposed to structure this discussion as follows. First, the interaction between a Section 5 declaration and enforcement proceedings will be considered. Secondly, the Developer's argument that the Section 5 reference procedure does not properly apply to the interpretation of a planning permission will then be addressed.

(1). Section 5 declaration and enforcement proceedings

64. The planning legislation has, from the very outset, put in place a procedure whereby the question of whether a particular act constituted "development" or "exempted development" could be determined. This initially took the form of a reference to An Bord Pleanála, with an appeal thereafter to the High Court. This was provided for under Section 5 of the Local Government (Planning & Development) Act 1963.

65. Since the enactment of the PDA 2000, the reference is now normally made in the first instance to the local planning authority, with a right of review thereafter to An Bord Pleanála, and a right of judicial review to the High Court. The planning authority can itself make a reference directly to An Bord Pleanála, and this is what occurred on the facts of the present case.

66. The Section 5 procedure is unusual in that it confers a jurisdiction upon a public authority to determine issues which, in many instances, will necessitate an adjudication on questions of law. The constitutional validity of conferring such a jurisdiction upon An Bord Pleanála under the Local Government (Planning & Development) Act 1963 had been upheld by the High Court (Kenny J.) in *Central Dublin Development Association v. Attorney General* (1969) 109 I.L.T.R. 69.

67. The more modern case law is characterised by an enthusiasm for the revised form of procedure now provided for under Section 5 of the PDA 2000. As elaborated upon below, the case law over the last fifteen years or so has confirmed (i) that Section 5 of the PDA 2000 has largely ousted the High Court's jurisdiction to grant declaratory relief in respect of planning matters; (ii) that an unchallenged declaration may be relied upon in enforcement proceedings; and (iii) that An Bord Pleanála is an expert decision-maker, whose decisions attract curial deference.

68. This modern case law commences with the judgment of the Supreme Court in *Grianán an Aileach Interpretative Centre Ltd. v Donegal County Council* [2004] IESC 41; [2004] 2 I.R. 625 ("*Grianán an Aileach*"). The judgment addresses the question of whether the court's inherent jurisdiction to grant declarations as to the planning status of lands is consistent with the Section 5 procedure. The Supreme Court considered that the continued existence on the part of the High Court of a general jurisdiction to adjudicate upon the proper construction of a planning permission would create a danger of

"overlapping and unworkable jurisdictions". The making of a declaration by the High Court might have the result that neither An Bord Pleanála nor the local planning authority would thereafter be in a position whereby it could exercise its statutory jurisdiction under Section 5 without finding itself in conflict with the earlier determination by the High Court.

69. The solution adopted by the Supreme Court to this conundrum was, in effect, to find that the existence of the Section 5 reference procedure ousted the High Court's jurisdiction to grant (freestanding) declarations in respect of planning matters.

70. The judgment recognises, of course, that the High Court continues to have original jurisdiction to determine planning issues when adjudicating upon enforcement proceedings under Section 160 of the PDA 2000. The Supreme Court held that if enforcement proceedings are brought in the High Court, then that court may "undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission".

71. At a later point in the judgment, Keane C.J. stated as follows at paragraph [36].

> "Some responsibility may be attributed to the defendant for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that court might find itself having to determine whether particular operations constituted a 'development' which required permission and the same issue could arise in other circumstances, e.g., where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. But in every such case, however it came before the court, the court would resolve the issue by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting a permission. That is difficult to reconcile with the law as stated thus by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 [...]".

72. This aspect of the judgment is entirely consistent with the approach adopted in *Cork Corporation v. O'Connell* [1982] I.L.R.M. 505. There, the Supreme Court held that the existence of a pending reference under the precursor of what is now Section 5 of the PDA 2000, i.e. Section 5 of the Local Government (Planning & Development) Act 1963, did not oust the High Court's jurisdiction to entertain enforcement proceedings.

73. The judgment in *Grianán an Aileach* left open the separate question as to what should happen where An Bord Pleanála had already issued a Section 5 declaration in advance of the hearing of enforcement proceedings. This question has since been addressed in a

series of High Court judgments. There is now a consistent line of case law which indicates that a Section 5 declaration, which has not been challenged in judicial review proceedings, is binding and conclusive in enforcement proceedings involving the same parties as to the reference. In particular, a declaration to the effect that an act is "development" or is "exempted development" cannot normally be revisited in subsequent enforcement proceedings between the same parties or their privies. See *Wicklow County Council v. O'Reilly* [2015] IEHC 667 (waste recovery business not exempted development); and *McCoy v. Shillelagh Quarries* Ltd [2015] IEHC 838 (quarrying activity had intensified to such an extent as to amount to a material change of use).

74. There is an exception to this approach where it would be unfair to treat a party as bound by a Section 5 declaration. In *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397, the High Court (Hogan J.) declined to treat a respondent to enforcement proceedings as bound by a Section 5 reference which had been made without a proper statement of reasons. The High Court held that it would be "quite unfair" to shut out a respondent from arguing that a structure was "exempted development" on the basis of a Section 5 declaration which, on its face, plainly failed to meet the requirements of administrative fairness specified in *Mallak v. Minister for Justice and Equality* [2012] IESC 59; [2012] 3 I.R. 297, notwithstanding that the determination had never been challenged at the relevant time by way of judicial review.

75. The correctness of this line of case law has since been upheld by the Court of Appeal in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541, *("Killross Properties")*. On the facts, An Bord Pleanála had issued a series of Section 5 declarations to the effect that works, consisting of the erection of a temporary electricity transmission line by a statutory undertaker, were "exempted development". Killross Properties Ltd., who had made the Section 5 references, had sought to challenge An Bord Pleanála's declarations in judicial review proceedings, but those proceedings were dismissed by the High Court (Hedigan J.) in August 2014 . Notwithstanding this procedural history, Killross Properties Ltd. then pursued an application under Section 160 of the PDA 2000.

76. The Court of Appeal, per Hogan J., held that the High Court was not entitled to "go behind" the Section 5 declarations.

> "[...] the High Court cannot go behind an otherwise valid s. 5 determination to the effect that the development in question represent exempted development in the course of a s.160 application. The effect of such a determination is that planning permission is not required, so that by definition the development cannot be unauthorised. It follows that the High Court cannot grant the relief claimed in the s. 160 proceedings.

77. The rationale for this approach is explained as follows, at paragraphs [29] to [31] of the Court of Appeal's judgment.

> "First, it can be said that as the planning authorities (or, An Bord Pleanála, as the case may be) determined that the works in question represent exempted development, it necessarily follows that no planning permission is required. The logical corollary of this conclusion is that the development in question cannot by definition be "unauthorised" within the meaning of s. 160 if no planning permission is required so that consequently any such s. 160 application is bound to fail.
>
> Second, it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the court to revisit the merits of the issue which had already been determined in the course of the s. 5 determination. This is further reinforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.
>
> Third (and related to it the second argument), it could be said that the s. 160 proceedings represent an attempt indirectly to challenge the validity of the s. 5 determinations otherwise than by means of the judicial review requirement specified by s. 50 of the 2000 Act."

78. The practical effect of these various judgments is that the existence of an (unchallenged) Section 5 declaration gives rise to a form of issue estoppel whereby the parties are bound by the declaration. In circumstances where the Section 5 declaration is to the effect that a particular act constitutes "development", then the moving party in an application for injunctive relief under Section 160 of the PDA 2000 can rely upon that declaration in support of their application. This is subject to an exception where it would be unfair. (*Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397).

79. The current legal position is, therefore, that enormous significance now attaches to a Section 5 declaration. The existence of an (unchallenged) declaration will, in certain circumstances, be dispositive of many of the issues which arise in enforcement proceedings. The precise implications of all of this have not yet been fully teased out. In particular, questions remain as to whether, for example, An Bord Pleanála would be precluded from entertaining a reference by virtue of the existence of an earlier un-appealed declaration made by a local planning authority pursuant to a separate reference. Questions also remain as to whether a Section 5 declaration constitutes a "development consent" for the purpose of the EIA Directive.

80. The Developer in the present case seeks to argue that a distinction should be drawn between (i) a finding that a particular act is "development" or "exempted development", and (ii) a finding that it is "unauthorised development". It is contended that An Bord Pleanála does not have jurisdiction to make a finding of the latter type. Much reliance is placed in this regard on the following passage from the judgment of the High Court (Finlay Geoghegan J.) in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210 ("*Roadstone Provinces*").

> "[An Bord Pleanála] has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not 'unauthorised development'. It may only determine what is or is not 'development'. Hence, a planning authority, such as the notice party, cannot refer a question under s.5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not 'unauthorised development' will most likely be determined by the courts where a dispute arises on an application under s. 160 of the Act."

81. It should be noted, however, that this statement was made in the context of a pre-1964 quarry, and appears to have been informed, in part at least, by the highly technical definition of "unauthorised development". To elaborate: the planning legislation does not apply retrospectively to "development" which had commenced prior to the coming into force and effect of the Local Government (Planning & Development) Act 1963 on 1 October 1964. Such pre-1964 development is not, however, treated as "exempted development", but rather enjoys a *sui generis* status. This is achieved by confining the definitions of "unauthorised works" and "unauthorised use" to development which commenced on or after 1 October 1964. The Supreme Court in *Waterford County Council v. John A. Wood Ltd*. [1999] 1 I.R. 556 has since formulated a test which defines the extent of quarrying activity which can be carried out and completed in reliance on the commencement of works prior to 1 October 1964.

82. Returning to the facts of *Roadstone Provinces*, it appears that the point being made in the passage cited above is that An Bord Pleanála does not have jurisdiction to determine whether a particular development constitutes the lawful continuation of pre-1964 development. Put shortly, An Bord Pleanála does not have jurisdiction to apply the legal test in *John A. Wood Ltd.* This is apparent from the very next passage of the judgment in *Roadstone Provinces,* at paragraph [22].

> "The reason for which I have drawn attention to the fact that the respondent was considering whether or not there was or is a development by reason of a material change in the use of the applicant's lands, as distinct from the carrying out of any works, is because of the reliance placed by both parties, for different purposes, on the decision of the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556. That is a decision on a case stated from the High Court (determining an appeal from the Circuit Court) on proceedings under s. 27 of the Local Government (Planning and Development) Act, seeking an order restraining the respondent therein from carrying on quarrying operations on certain lands. Section 27 of the Act of 1976 is similar to s. 160 of the Act of 2000. The question put by the High Court to the Supreme Court in the case stated was whether the quarrying operations being carried out by the respondent 'is development requiring planning permission?'. The resolution of that question depended upon whether or not the quarrying operations then carried on were or were not 'development commenced before the appointed day' and therefore were or were not excluded from a requirement to apply for planning permission under s. 24 (1) of the Act of

1963. That issue was resolved by the Supreme Court by considering whether or not the works then being carried out by the respondent at its quarrying operations were works which commenced prior to the appointed day. *The Supreme Court did this by considering what might have been reasonably contemplated or anticipated as the continuation of works commenced before the appointed day. In the context of the definitions in the Act of 2000, it was a determination as to whether the works were or were not 'unauthorised works'. That is not a question which the respondent has jurisdiction to determination on the instant reference under s.5 (4) of the Act of 2000.** The Supreme Court, in *Waterford County Council v. John A. Wood Ltd.*, was not considering whether or not there had been a material change in use of the lands. On the facts, the only objection appears to have been based upon the carrying out of works without planning permission."

*Emphasis (italics) added.

83. It would appear, therefore, that the judgment in *Roadstone Provinces,* strictly speaking, had been concerned with the narrow question of pre-1964 user, and does not necessarily articulate a more general proposition as to the limitations of the Section 5 jurisdiction. Certainly, this seems to have been the interpretation of the judgment taken by the High Court (Baker J.) in *Cleary Compost and Shredding Ltd v. An Bord Pleanála (No. 1)* [2017] IEHC 458. Having cited the passage from Roadstone Provinces set out at paragraph 80 above, Baker J. stated as follows.

> "This *dicta* of Finlay Geoghegan J. is regularly quoted as authority for the proposition that the jurisdiction under s. 5(4) of the Act is one which is confined to determining whether works or use is development.
>
> Finlay Geoghegan J. was considering the import of a s. 5 declaration where what was challenged was the decision of the respondent that the expansion southward of a quarry was development and not exempted development. The decision was quashed by certiorari as there was pre-1964 use and no determination had been made whether there was an identified factual difference between that use and current use. The judgment does not go so far as to say that the consequence of a s. 5 declaration can never be understood to mean that a development is not one authorised by planning permission. The judgment of Finlay Geoghegan J. is authority for the proposition that development which does not have the benefit of a planning permission is not always in legal terms a development which is 'unauthorised', and the jurisdictional limit of s. 5 is to determine whether there is development, after which there arises the second question whether permission is required or exists.
>
> [...]
>
> A development is not unauthorised merely on account of the fact that an activity or works are found to be development. The development may, as in the case of a quarry, the context in which *Roadstone Provinces Limited v. An Bord Pleanála* was

> decided, be exempt from the requirement to obtain planning permission if it is a continuation of pre-1964 user. In such cases the development is not unauthorised although it is development. A development may also be found to have occurred but to be exempt.
>
> However, it must be the case that, absent an argument that there is relevant pre-1964 use, if works or activity are declared in the s. 5 process to amount to development and if a determination is made that it is not exempt, then the inevitable conclusion is that the development does not have the benefit of planning permission, is not authorised in planning terms, and is 'unauthorised'."

84. The judgment in *Cleary Compost* goes on to make the separate point at paragraph [90] that an earlier Section 5 declaration will not preclude a subsequent declaration to different effect being made if there has been a *change in circumstances* between the dates of the two declarations.

85. The nature of the Section 5 jurisdiction has also been considered by the Court of Appeal in *Killross Properties*. The Court of Appeal put the matter as follows (in a passage subsequently cited with approval in *Cleary Compost*).

> "Yet if An Bord Pleanála (or, as the case may be, a planning authority) rules that a particular development is not exempted development, the logical corollary of that decision is that planning permission is required. In practice, there is often only a very slender line between ruling that a development is not exempted development since this will generally – perhaps, even, invariably – imply that the development is unauthorised on the one hand and a finding that a particular development is unauthorised on the other. Conversely, where (as here) An Bord Pleanála (or the planning authority) rules that the development is exempt, this necessarily implies that the development is lawful from a planning perspective since, by definition, it has been determined that no planning permission is required."

86. In two recent judgments, the Supreme Court has expressed some caution as to the reliance on Section 5 declarations in criminal proceedings and enforcement proceedings, respectively. Both judgments were delivered in May 2017. The first in time is the judgment in *Cronin (Readymix Ltd.) v. An Bord Pleanála* [2017] IESC 36; [2017] 2 I.R. 658. In addressing the question of whether the planning legislation falls to be interpreted as penal legislation, the Supreme Court, per O'Malley J., stated as follows at paragraph [43] of the judgment.

> "It follows that the primary role in determining whether a development is exempted or not is given to (depending on the circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for judicial review. However, it plainly does not, and could not, result in a determination of guilt or innocence of a criminal offence. There was no suggestion to the contrary at any stage of these proceedings. In my view, therefore, it is entirely inappropriate to read the provisions of s.4 as if they related

to 'the imposition of a penal or other sanction'. What they are concerned with is the exemption of categories of development from the general requirement to obtain permission."

87. The second judgment is that in *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189; [2017] 2 I.L.R.M. 297. McKechnie J., delivering the judgment of the court, reserved his position in relation to the status of a Section 5 declaration in the context of enforcement proceedings. See paragraphs [55] and [56] of the reported judgment as follows.

> "By engaging the enforcement mechanism of, say, s. 160, there is no question of the Council making any planning determination that the structure is unauthorised: even that power is not conferred on either a planning authority or An Bord Pleanála by s. 5 of the 2000 Act (*Roadstone Provinces Limited v. An Bord Pleanála* [2008] IEHC 210, (Unreported, High Court, Finlay Geoghegan J., 4 July 2008)), nor is the situation in any way analogous to that arising in *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625. Likewise, it seems to bear no real relationship to the other cases quoted, including *Heatons Limited v. Offaly County Council* [2013] IEHC 261, (Unreported, High Court, Hogan J., 4 June 2013) and *State (Fitzgerald) v. An Bord Pleanála* [1985] I.L.R.M. 117.
>
> A further word about s. 5 of the 2000 Act: the power given to both planning bodies under that section relates to what is a 'development' or what is an 'exempted development'. Even though a decision on either issue may have significant consequential effect, it is not an end in itself. Without more, and simply on that basis, a s. 160 order could not be made: one must go further and establish the "unauthorised" nature of the underlying development. Thankfully, the difficult question of the courts' review power where a declaration one way or the other has been made on a s. 5 reference does not arise on this appeal (see the judgment of the Court of Appeal (per Hogan J.) in *Bailey v. Kilvinane Wind Farm Ltd.* [2016] IECA 92, (Unreported, Court of Appeal, 16 March 2016), which judgment is under appeal to this court)."

88. It should be noted that the appeal in *Bailey v. Kilvinane Wind Farm Ltd.* (referenced in the above passage from *Meath County Council v. Murray*) subsequently became moot in circumstances where the developer in that case obtained a grant of substitute consent. The Supreme Court did not, therefore, have to rule on this issue in the context of that appeal.

(2). Section 5 jurisdiction to interpret planning permission

89. The case law confirms that An Bord Pleanála does have jurisdiction to interpret a planning permission in the context of a Section 5 reference. The question first arose for consideration in *Palmerlane Ltd. v. An Bord Pleanála* [1999] 2 I.L.R.M. 514. This was a case decided under the *previous* version of the planning legislation. The equivalent

provision to what is now Section 5 of the PDA 2000 was to be found in the coincidentally numbered Section 5 of the Local Government (Planning & Development) Act 1963.

90. The judgment in *Palmerlane Ltd*. arose out of a dispute as to whether the use of a convenience store for the sale of hot food for consumption off the premises represented "development". The operator of the convenience store had sought to refer the matter to An Bord Pleanála. An Bord Pleanála had refused to entertain the reference, stating that it did not have power to decide whether or not a particular development had been carried out in accordance with a particular permission. An Bord Pleanála considered that as the sale of hot food had been part of the user of the premises from the outset, there simply was no change in use, the materiality of which it could assess. The board's decision to decline jurisdiction was then challenged in judicial review proceedings. Having noted that An Bord Pleanála would have been prepared to entertain the reference had the use for the sale of hot food been introduced subsequent to the opening of the store, the High Court (McGuinness J.) took the pragmatic view that the board's jurisdiction should not turn on such nice distinctions.

> "The decision of An Bord Pleanála in the instant case also, in my view, creates the somewhat anomalous and unreasonable situation that if the Applicant were to select another of its 'Spar' shops, where the position was that the premises had been in use as a retail shop under an earlier planning permission and the company had subsequently embarked on the limited sale of hot food for consumption off the premises, the Applicant could presumably successfully have sought a determination of a reference pursuant to Section 5 of the 1963 Act. I appreciate that each determination under Section 5 deals only with the particular case on its own facts. However, in a situation where a very large number of convenience stores operate in the same way as the shop in question in the instant case, it seems to me to be in accordance with reason and common sense that questions such as this should be determined on a consistent basis by those with expertise in the planning area, namely An Bord Pleanála."

91. This pragmatic approach on the part of the High Court was elevated to a more general statement of principle by the judgment of the Supreme Court in *Grianán an Aileach*. As discussed under the previous heading above, the central issue in the appeal had been whether the High Court continued to enjoy a parallel jurisdiction to grant declarations as to the interpretation of planning permissions notwithstanding the existence of Section 5 of the PDA 2000. In the course of its adjudication on the central issue, the Supreme Court had cause to consider the nature and extent of the Section 5 jurisdiction. The Supreme Court, per Keane C.J., concluded that a question as to whether proposed uses constitute "development" which is not authorised by planning permission is one which may be determined under Section 5 of the PDA 2000.

> "In the present case, the issue that has arisen between the plaintiff and the defendant is as to whether the proposed uses are authorised by the planning permission. I am satisfied, however, that, although the issue has arisen in that

> particular form, it necessarily requires the tribunal which determines it to come to a conclusion as to whether what is being proposed would constitute a material change in the use of the premises. If it would not, then the question as to whether the particular uses were authorised by the permission simply would not arise. In the present case, the defendant at all times has been contending, in effect, that the proposed uses would constitute a material change in use which is not authorised by the present planning permission. Equally, for its part, the plaintiff has been contending that the uses are authorised by the existing planning permission but has not contended that, if that were not the case, it would in any event be entitled to carry them out as not constituting a material change of use. It would seem to follow that the question as to whether planning permission is required in this case necessarily involves the determination of the question as to whether the proposed uses would constitute a 'development', i.e. a question which the planning authority and An Bord Pleanála are empowered to determine under s. 5 of the Act of 2000."

92. Keane C.J. at a later point in his judgment stated as follows (at pages 636/37 of the reported judgment).

> "The reasoning adopted in both *McMahon v. Dublin Corporation* and *Palmerlane v. An Bord Pleanála* which, I am satisfied, is correct in law would indicate that, in such circumstances, a question as to whether the proposed uses constitute a 'development' which is not authorised by the planning permission is one which may be determined under the Act of 2000 either by the planning authority or An Bord Pleanála. In the present case the question is as to whether the various proposed uses, which the defendant contends, would involve the regular use of the premises for events associated with a concert/entertainment venue rather than a visitors' centre, are in a planning context materially different uses from use as a visitors' centre and the uses indicated on the lodged plan, in which case they would not be authorised by the planning permission."

93. There is no principled distinction between (i) a finding that a particular act of development is or is not "exempted development", and (ii) a finding that a particular act of development does not come within the scope of a planning permission. In each instance, An Bord Pleanála is required to assess the difference between two forms of "development", and to reach a determination as to whether the difference between the two is material or immaterial. In the case of the user of lands, the exercise is to determine whether there has been a material change of use. In the case of permitted works under a planning permission, the exercise is to determine whether the difference is an immaterial deviation.

94. An Bord Pleanála is the expert body entrusted under the planning legislation with this task. For the court to carry out the same exercise subsequently gives rise to the very mischief which the judgment in Grianán an Aileach is intended to avoid.

SUMMARY OF LEGAL PRINCIPLES RE: SECTION 5

95. The current state of the case law can be summarised as follows.

(i). The fact that both the High Court and An Bord Pleanála have jurisdiction, in certain circumstances, to determine whether a particular act is "development" or "exempted development" presents a potential risk of overlapping and unworkable jurisdictions.

(ii). In order to reduce this risk, the Supreme Court has held that the High Court's inherent jurisdiction to make declarations as to the planning status of lands is ousted. More specifically, the High Court's jurisdiction to adjudicate upon the proper construction of a planning permission is largely confined to enforcement proceedings. (It might also arise in the context of contractual or conveyancing disputes). The Supreme Court has not yet had to address the specific question of whether the High Court, in hearing enforcement proceedings, is bound by an earlier (unchallenged) Section 5 declaration.

(iii). The Court of Appeal has held that an (unchallenged) Section 5 declaration to the effect that certain works are "exempted development" is binding on the parties in subsequent enforcement proceedings. The Court of Appeal has not yet had to address the question of the legal status of a Section 5 declaration to the effect that certain works are <u>not</u> "exempted development" or to the effect that certain works do not come within the scope of an existing planning permission. Put otherwise, the Court of Appeal has not yet ruled on whether a declaration which is adverse to a *respondent* is binding.

(iv). The High Court, in at least three judgments, has held that Section 5 declarations to the effect that planning permission is required for certain acts are, in principle, binding on the parties in enforcement proceedings.

(v). Certain judgments have expressed reservations as to the jurisdiction of An Bord Pleanála to make declarations to the effect that a particular act is "unauthorised development".

(vi). The principal ground for finding that a Section 5 declaration is binding is in order to reduce the risk of overlapping and unworkable jurisdictions. This would appear to involve a form of issue estoppel. A secondary ground for the finding is that it might offend against Section 50 of the PDA 2000 to allow a party to make a collateral challenge to a Section 5 declaration in the context of subsequent enforcement proceedings.

(vii). The Section 5 jurisdiction extends to questions of interpretation of planning permission.

(viii). Whereas a Section 5 declaration may be dispositive of many of the issues in enforcement proceedings, there remain a number of matters which fall outwith the Section 5 jurisdiction. In particular, An Bord Pleanála has no function in determining whether the development being enforced against has the benefit of the "seven-year rule", i.e. whether the proceedings are statute barred by reference to the seven-year limitation period provided for under Part VIII of the PDA 2000. It also follows by analogy with the judgment in *Cleary Compost* that an earlier Section 5 declaration will not be binding if there has been a change in *circumstances* in the interim.

FINDINGS OF THE COURT ON SECTION 5 REFERENCE

96. The current state of the authorities, therefore, appears to be that, at the very least, a Section 5 declaration must be given significant weight in subsequent enforcement proceedings. The principal rationale underlying this case law is the desirability of avoiding overlapping and inconsistent decision-making.

97. Applying these principles to the facts of the present case, I have concluded that the Section 5 declaration precludes the Developer from reagitating the argument that the "as built" wind turbines are authorised by the 2011 planning permission. The Developer had a full opportunity of making its case in this regard to An Bord Pleanála. In particular, the Developer had made submissions before the Board to the effect, first, that the decision-letter of 13 December 2013 authorised the change in scale and dimensions; and, secondly, that the circumstances were distinguishable from those of the Kilvinane Wind Farm. Those submissions were, ultimately, rejected by An Bord Pleanála.

98. To allow the Developer to rerun the same arguments before this court would give rise to precisely the type of overlapping and unworkable jurisdictions which the judgments discussed above are intended to avoid. Were this court to embark upon a *de novo* consideration of these matters, and to come to a *contrary* conclusion to that of An Bord Pleanála, this would bring about the very mischief which the case law is intended to avoid.

99. Of course, different considerations would apply where a party had not been afforded fair procedures before An Bord Pleanála or where the declaration is bad on its face, e.g. the decision is not fully reasoned. See, for example, *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397 (discussed at paragraph 74 above). A Section 5 declaration would not be binding in such circumstances. No such contingencies arise, however, on the facts of the present case.

100. In reaching this conclusion as to the status of the Section 5 declaration, I have given careful consideration to the legal submissions—both written and oral—advanced on behalf of the Developer. It will be recalled that one of the arguments advanced is to the effect that the court should apply a "double construction" rule to the Section 5 declaration, i.e. if the declaration is open to two constructions, then it should be interpreted in the manner which holds it *intra vires*. More specifically, it had been argued that the declaration should be interpreted as confined to a finding that the erection of the wind turbines is "development" and not "exempted development". (See paragraph 62 above).

101. With respect, the narrow interpretation which the court is invited to give to the Section 5 declaration is entirely artificial. It would require the court to disregard large portions of the text of the declaration, and also to disregard the underlying inspector's report. Such

an artificial approach would be contrary to the well-established principles governing the interpretation of planning decisions. (See *In re XJS Investments Ltd.* [1986] IR 750). The rationale for a decision of An Bord Pleanála is to be found by reading the Board's decision in conjunction with the underlying inspector's report (save in cases where the Board had disagreed with the inspector's recommendation). See *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

102. On the facts of the present case, it is obvious the Board followed its inspector's recommendation, and had adopted the same approach as it had in respect of the Kilvinane Wind Farm. This entailed making an express finding, at sub-paragraph (b) of the Section 5 declaration, to the effect that the alterations to the turbines, including the length of the rotor arms/blades, do not come within the scope of the planning permission granted. Put otherwise, An Bord Pleanála expressly addressed the interpretation of the planning permission and resolved this issue against the Developer.

103. Notwithstanding the fact that the Developer did not seek to challenge An Bord Pleanála's declaration at the time, the Developer now maintains the position in these enforcement proceedings that the Section 5 jurisdiction does not allow An Bord Pleanála (i) to determine whether particular works come within the scope of a planning permission, nor (ii) to make a finding of "unauthorised development". This position is untenable. As discussed in detail under the previous headings, the case law establishes that the Section 5 jurisdiction is not as narrow as the Developer contends.

104. Similarly, the attempt on the part of the Developer to distinguish the facts of the present case from those of *Killross Properties* is not well-founded. Whereas it is correct to say that *Killross Properties* was concerned with a declaration to the effect that certain works were "exempted development", and that this declaration was, therefore, adverse to the case which the applicant, as opposed to the respondent, was making in those proceedings, these points of distinction do not affect the underlying rationale. The underlying rationale of the judgment is to avoid unworkable and overlapping jurisdictions. This mischief arises equally in the case of a Section 5 declaration which is adverse to a respondent as in the case of a declaration which is adverse to the applicant. In each instance, An Bord Pleanála will have made findings on issues which are relevant to the subsequent enforcement proceedings. For the court hearing the enforcement proceedings to embark on a *de novo* consideration of these issues would involve the court re-opening the very issues which had been determined by An Bord Pleanála. This would be contrary to the general principle stated in *Grianán an Aileach* to the effect that the Oireachtas may confer on statutory bodies, expressly or by implication, an exclusive jurisdiction to determine specific issues. Section 5 of the PDA 2000 has conferred just such a jurisdiction on An Bord Pleanála.

105. It might, perhaps, be said that the legal status now attaching to a Section 5 declaration is more significant than a literal interpretation of the section might at first suggest. The case law from the last fifteen years is, however, clear. Section 5 has been given a purposive interpretation, which is intended to reflect the fact that An Bord Pleanála has

been entrusted with specific competences under the PDA 2000. More generally, this interpretation is also consistent with the principle of finality in litigation and that parties are estopped from re-agitating issues which have been decided against them. This is subject to the exceptions discussed under the next paragraph.

106. The High Court will retain original jurisdiction to determine planning issues in enforcement proceedings where there is no Section 5 determination in existence. It will also have jurisdiction where, as in *Wicklow County Council v. Fortune (No. 3),* the Section 5 declaration is bad on its face or had been reached in breach of fair procedures. The High Court will also retain original jurisdiction where an issue arising in enforcement proceedings has not been specifically addressed by An Bord Pleanála or where there has been a change in circumstances in the interim. None of these contingencies arise on the facts of the present case. The precise same issues which the Developer seeks to agitate in this court had been raised before An Bord Pleanála and were determined against the Developer. If the Developer had wished to challenge that determination, then the remedy was to make an application for judicial review. The Developer did not do so.

107. Accordingly, I am satisfied that the Section 5 declaration made by An Bord Pleanála in this case should be treated as binding on the Developer, and as conclusive of the question of whether or not the "as built" wind turbines come within the scope of the 2011 planning permission. The declaration is not, of course, determinative of the outcome of the enforcement proceedings. The Applicants would still have to prove to the satisfaction of the court that works had been carried out by the Developer, and that proceedings were instituted within the relevant seven-year limitation period. It remains open to the Developer to resist the proceedings on the basis of the court's discretion.

DE NOVO ASSESSMENT

108. For the reasons set out under the previous heading, I have found that the Section 5 declaration is binding on the Developer. The Developer cannot, therefore, seek to defend the enforcement proceedings before this court on the basis of an argument that the "as built" turbines come within the scope of the planning permission.

109. Lest I be incorrect in this finding, however, I propose to address the question of compliance with the planning permission *de novo*. Put otherwise, I propose to embark upon my own assessment of whether the "as built" turbines come within the scope of the planning permission. This exercise is being carried out *de bene esse*, and without prejudice to my finding as to the binding effect of the Section 5 declaration. The exercise is only being undertaken on account of the urgency of the proceedings. There is a risk that if this judgment were to be decided on the narrow basis that the Section 5 determination is binding, then this might result in unnecessary delay in the event of an appeal. More specifically, if the finding on the narrow issue were to be overturned on appeal, and this court had not addressed separately the question of compliance with the planning permission, then it would become necessary to remit the matter to the High Court for rehearing (with all the attendant delay and cost). It seems preferable that this judgment should, insofar as reasonably practicable, address all issues and contingencies.

110. The Developer's argument can be summarised as follows. A planning permission provides for some flexibility, and "immaterial deviations" from the permitted development are implicitly authorised by the permission. The court should, therefore, engage in the process of examining whether the environmental impact of the deviations between the "as permitted" and "as built" wind turbines are material. The Developer has filed detailed affidavit evidence which, it is said, indicates that there is no material difference between the two.

111. The court is, in effect, being invited to engage in a form of screening exercise analogous to that required under the EIA Directive. With respect, this is not what the planning legislation requires. The term "works" is broadly defined under the PDA 2000, and, in contrast to the term "use", is not subject to a "materiality" test.

> ""works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure."

112. The legal consequence of this is that even very minor "works" are, in principle, subject to a requirement to obtain planning permission. The broad definition of development "works" is counterbalanced by the putting in place of legislative measures which exempt prescribed classes of development from the requirement to obtain planning permission. Some of these exemptions are provided for under Section 4(1) of the PDA 2000, but most are to be found in Regulations made by the Minister for Housing, Planning and Local Government (*"the Minister"*) pursuant to Section 4(2) of the PDA 2000. This section reads as follows.

> "(2)(a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—
>
> (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or
>
> (ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described)."

113. The position under the planning legislation is, therefore, that planning permission is required for even minor development "works", the definition of which includes relevantly an "extension", *unless* the works fall within a class of "exempted development".

114. The decision as to whether to exempt particular classes of development "works" from the requirement to obtain planning permission resides principally with the Minister. As appears from Section 4(2), the Minister is required to consider whether or not the carrying out of such development would "offend against principles of proper planning and sustainable development".

115. The courts do not have an equivalent jurisdiction to waive the requirement to obtain planning permission for minor development "works". The only role which a court has in assessing the materiality of development "works" is where a developer seeks to argue that a departure from the terms of a planning permission represents an "immaterial deviation". The principles governing this assessment have been set out, with characteristic clarity, by Fennelly J. in *Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College* [2009] IESC 19 ("Kenny") at paragraphs [18] to [20] of the judgment as follows.

> "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.
>
> However, planning laws are not intended to make life impossible for developers, for those executing works such as architects, engineers or contractors or for the planning authorities in supervising them. Nor are they there to encourage fine-tooth combing or nit-picking scrutiny of the works. I will mention later one or two examples of this type of exercise in the present case. The exchange of affidavits amounts to some 300 pages.
>
> While the planning authority or An Bórd Pleanála on appeal grants the permission, it is a common feature of permissions, especially for large developments, that additional detail is necessary in order to carry the development into effect and such detail, often in the form of further plans, drawings, specifications or other explanations, will require approval by the planning authority prior to commencement of the development. There is an obvious practical necessity for a procedure whereby matters of detail can be agreed between the planning authority and the developer. This ensures supervision but allows a degree of flexibility within the scope of the permitted development."

116. The planning permission in *Kenny* had included a number of conditions, of the type flagged in the last paragraph above, i.e. conditions which left over points of detail to be

agreed between the developer and the planning authority. The planning authority had relied on the conditions to authorise certain departures from the strict terms of the planning permission. As discussed under the next heading below, the Developer in the present case seeks to rely on the existence of such a condition in the 2011 planning permission as authorising the increase in rotor diameter.

117. Staying for the moment with immaterial deviations, the case law indicates that the flexibility allowed under a planning permission is very limited. Thus, for example, the High Court in *Cork County Council v. Cliftonhall Ltd.* [2001] IEHC 85 held, *with some reluctance*, that an exceedance of the ridge height of one block of apartments of between 0.5 metres and 1.3 metres was immaterial in the context of an overall residential development of six blocks. The court calculated that the deviation between the "as permitted" and "as built" height was in the order of some 7 per cent.

118. In *O'Connell v. Dungarvan Energy Ltd.*, unreported, High Court, Finnegan J., 27 February 2000, it was held that the relevant planning permission implicitly authorised the erection of a steel structure *to replace* an existing structure. Crucially, the replacement structure was of the same dimensions as the existing structure, and would, in any event, have been "exempted development".

> "It was therefore necessary, if the development should proceed, that a stronger steel structure capable of supporting the cladding be provided. This replacement steel structure as to its external dimensions will correspond both as to height and floor area with that which is being demolished. The external appearance of the building will be in accordance with the planning permission condition 3 thereof. In these circumstances the course of conduct which the Respondent has undertaken is in direct consequence of the imposition of the said condition 8 in the Integrated Pollution Control Licence. It is therefore within the category of unforeseen variations mentioned by Denning M R and as such authorised by the planning permission. It is also immaterial having regard to what I have said as to its floor area, height and the fact that its external appearance will be determined in accordance with condition 3 of the planning permission and so unaffected by the variation. In short the variation in the development is within the terms of the planning permission. It is also exempted development pursuant to the Local Government (Planning and Development) Regulations 1995 Article 9 A as inserted by the Local Government (Planning and Development) Regulations 1995."

119. The judgment most directly on point is that of the Court of Appeal in *Bailey v. Kilvinane Wind Farm* [2016] IECA 92. The Court of Appeal held at paragraph [87] that an increase in rotor diameter of 23 metres was a material deviation.

> "The same reasoning also applies in the context of the diameter size of the turbines. As constructed the two turbines, T3 and T4, each have a rotor diameter of 90m, which is 23m. larger than that sanctioned by the 2002 planning permission, thus very significantly extending the sweep of the rotor circumference. The sweep of the rotor diameters thus rises from 57п (57 x3.1416 = 179m.) to 90п

> (57 x 3.1416 = 283m.). It is impossible to say that such a large and appreciable increase in the diameter size of the rotors beyond that sanctioned by the planning permission is not material. The potential impact in terms of sightlines (and other visual impacts), noise, shadow flicker and the overall footprint of these larger turbines on third parties is simply too great."

120. The increase in rotor diameter in the present case is 13 metres. I am satisfied, for reasons similar to those set out in the judgment in *Kilvinane Wind Farm* that this is a material deviation.

121. The materiality of the deviation has to be assessed by reference to the description of the permitted development as per the grant of planning permission. The description expressly refers to a rotor diameter of 90 metres. Indeed, the precise purpose of the application had been to allow for an increase of 10 metres from that permitted under the 2005 planning permission.

122. There is a further reason that the Developer cannot rely on the concept of "immaterial deviations". The case law indicates that the rationale for allowing some flexibility in planning permissions is to address unexpected contingencies during the course of the carrying out of the development. On the facts of the present case, the decision to change turbine types was a deliberate decision made in advance of the carrying out of the works. This was not an unexpected event such as might benefit from the concept of "immaterial deviations". The materials put before the Board in the context of the Section 5 reference indicate that this decision was informed by considerations other than visual amenity.

> "The reason for this selection is to facilitate the use of the best available technology at the wind farm, ensuring that the wind farm can harness the local wind capacity to its full potential, thus ensuring that the viability of the development is not compromised."

123. The court is not tasked nor properly qualified to determine whether or not planning permission should be granted. For this reason, the arguments made by the Developer which touch upon the merits of the proposed development, and invite the court to engage in a detailed "compare and contrast" exercise as between the environmental impacts of the "as permitted" and "as built" turbines is inappropriate. This is not the function of the court. It is no answer to a complaint that a person has carried out development without the requisite planning permission to say that it is highly likely that had a planning application been made same would be granted. A developer cannot short-circuit the process in this way. This is especially so in the context of an EIA development project such as that in issue in the present proceedings.

124. The correct legal analysis is that the court is merely deciding whether or not the Developer is required to make a planning application. The court is not making any adjudication as to whether planning permission will be granted, or whether the planning application is subject to environmental impact assessment for the purposes of the EIA Directive. These are all matters for the expert decision-makers who have been entrusted

with these functions under the planning legislation. The case law is all in one direction, and it is to the effect that matters of planning judgment are best left to the local planning authorities and An Bord Pleanála.

COMPLIANCE SUBMISSION

125. The Developer contends that the change in wind turbine type has been authorised by dint of the planning authority having "agreed" to the compliance submission by its letter dated 13 December 2013. In circumstances where no application for judicial review has been made seeking to question the validity of this decision-letter, it is said to be immune from challenge. The decision-letter is said to be binding on the court and cannot be impugned in these enforcement proceedings. Counsel relies in this regard on Section 50 of the PDA 2000, and the judgment of the Supreme Court in *Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College* [2009] IESC 19.

126. I have concluded that the decision-letter of 13 December 2013 cannot be relied upon as authorising the alterations to the rotor diameter of the wind turbines for the following two reasons.

127. First, as a matter of interpretation, the decision-letter cannot be read as "agreeing" to an increase in rotor diameter in circumstances where the Developer did not expressly request agreement to this increase. Planning documents are to be interpreted in their ordinary meaning as they would be understood by members of the public, without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning. (See *In re XJS Investments Ltd.* [1986] IR 750).

128. The decision-letter is headed up as follows.

> "Re: PD 11/400 – permission for a modification to the permitted Barranafaddock Wind Farm (Planning Ref. 04/1559 & An Bord Pleanála reference number PL 24.213290 in the townlands of [...] Co. Waterford. The modifications include a proposed increase in turbine hub height (to 80m) of three of the permitted 11 turbines, and an increase in rotor diameter of all turbines to 90m (from 80m) and the micro-siting of ten of the permitted turbines. As a result of this modification there will also be associated minor revisions to the supporting civil infrastructure design including the provision of a borrow pit and the modification and relocation of the permitted substation."

129. As appears, the description of the development expressly refers to a rotor diameter of 90 metres. A person reading the decision-letter would naturally assume that this is all that is permitted. There is no other reference to rotor diameter in the decision-letter, and there is literally nothing which indicates that an *increase* in rotor diameter to 103 metres has been agreed to.

130. It is no answer to this to suggest that the heading of the decision-letter might have been intended merely to reflect the description of the permitted development as per the 2011

planning permission. There is nothing in the decision-letter which indicates that the heading is intended to refer to anything other than the form of development as agreed by the planning authority. Moreover, the very fact that the planning permission only permits a rotor diameter of 90 metres emphasises that the planning authority could not use the occasion of agreeing points of detail to rewrite the planning permission. See *Treacy v. An Bord Pleanála* [2010] IEHC 13, [78]. The High Court (MacMenamin J.) emphasised that Section 34(5) of the PDA 2000 cannot be read in such a manner as to allow a matter of detail turn the framework or substance of the grant of planning permission on its head. Any matter of detail must perforce fall within the four walls of the parent grant of permission. It cannot denature it.

131. Returning to the facts of the present case, the planning authority would not have had jurisdiction under Condition No. 3 of the planning permission to authorise an increase in the rotor diameter beyond the 90 metres prescribed under the planning permission. This is especially so in circumstances where the condition singles out "height" as the only aspect of the scale or dimensions of the wind turbines which might be subject to agreement. Even then, the planning authority would only have had jurisdiction to agree a height equal to or less than the maximum height of 125 metres permitted under the 2011 planning permission. The reason stated for the imposition of the condition was "in the interests of visual amenity", and it thus allowed for the possibility of a reduction in the permitted height.

132. The hypothetical intelligent person reading the decision-letter must be taken as being aware of the content of the compliance submission of 6 November 2013, and as having read the decision-letter in conjunction with same. As appears from the extract from the compliance submission set out at paragraph 26 above, the Developer did not expressly seek the agreement of the planning authority to an increase in rotor diameter.

133. It is not enough, as has been contended for by counsel on behalf of the Developer, that the proposed alteration is capable of being deduced by either (i) carrying out the mathematical exercise of subtracting the figure stated for the hub height from that stated for the maximum tip height of the turbines, and then multiplying the resulting figure by two, or (ii) by a careful examination of the fine print of the A3 Schematic GE Turbine which had been included in Appendix B of the compliance submission.

134. Had the Developer wished to obtain the planning authority's agreement to an increase in rotor diameter, then this should have been stated in express terms in the body of the compliance submission. Neither a planning authority nor a member of the public should be expected to wade through extensive documentation in order to attempt to ascertain what precisely it is that a developer is seeking agreement to. Public participation lies at the heart of the planning process. This is especially so in the context of development, such as the present case, which consists of a project subject to the public participation requirements of the EIA directive.

135. The second reason for saying that the decision-letter cannot be relied upon as authorising the increase in rotor diameter is, perhaps, more fundamental. It is a requirement of the

EIA Directive that any "change" or "extension" of projects already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, must itself be subject to assessment. It is necessary, therefore, that a form of screening exercise be carried out before a decision to authorise a change or extension can lawfully be made.

136. On the Developer's case, the decision-letter is said to have authorised a change to a permitted EIA development project. This involved an increase in the rotor diameter from 90 metres to 103 metres. (It will also be recalled that the original 2005 planning permission had only allowed for a rotor diameter of 80 metres). This "change" or "extension" should have been screened in order to determine whether it is likely to have adverse effects. There is simply no evidence that Waterford County Council carried out such an exercise prior to the issuance of the decision-letter. Rather, the decision-letter baldly states: "Condition 3 Noted and agreed". Such an unreasoned decision cannot have had the legal effect of authorising the change contended for.

137. In this regard, a loose analogy can be drawn with the facts of *Bailey v Kilvinane Windfarm Ltd.* [2016] IECA 92. The developer in that case had sought to rely on written representations made by an official of the local planning authority to the effect that an extension of the blade length of proposed wind turbines were acceptable to the planning authority. (In contrast to the present case, the written representations had not been made pursuant to Section 34(5) of the PDA 2000).

138. The Court of Appeal considered that it was not reasonable for the developer in that case to have relied upon these written representations. Whereas this finding was informed, in part, by the fact that the written representations were informal, the court also attached some weight to the fact that no assessment of the impact of the changes had been carried out by either the developer or the planning authority. See paragraphs [100] and [101] of the judgment.

> "It is inherent in the doctrine of good faith as a general principle of law that any party seeking to avail of that principle should show appropriate regard for the rights of third parties who might reasonably be affected by their actions. There is nothing at all to suggest that either the developer or, for that matter, the Council official in question gave any consideration to this issue. In such circumstances no sensible developer could reasonably suppose that a planning authority could informally sanction such deviations from location and rotor diameter without a formal assessment of the potential planning and environmental impact of these changes and especially their potential effects on third parties.
>
> It is obvious that any thing other than trifling changes in terms of the location of the turbines and the size of the diameter of the rotor blades could have major implications for local residents in terms of visual impact, sight lines, noise and shadow flicker. Viewed objectively, therefore, one could not say that any conclusion that the development had been constructed in accordance with the terms of the planning permission or that these admitted deviations were not

material was one which, adopting the language of O'Sullivan J. in *Altara Developments*, a developer could reasonably hold. This was especially so when no consideration whatever was given to the rights of the neighbours who lived in the immediate vicinity of the wind farm as to the potential effects of these changes."

139. Counsel on behalf of the Developer has argued that, in circumstances where it was not challenged at the time, the decision-letter of 13 December 2013 is immune from judicial review. It is said, therefore, that it does not matter whether the decision-letter is lawful or not, it cannot be questioned in these enforcement proceedings.

140. With respect, this argument overstates the effect of Section 50 of the PDA 2000. Reliance on that section is not available in circumstances where a decision is bad on its face and/or exhibits an error of law. See, for example, *Mone v. An Bord Pleanála* [2010] IEHC 395, [83] and [84].

> "It would seem to me that as a matter of common sense, where a grant as in this case has been issued without the relevant statutory basis, it can have no force. The fact that the erroneous grant was not challenged could in no way confer it with retroactive validity; such is wholly outside of the legislative scheme which entirely governs this area of law. The 1998 grant was therefore wholly illusory; it was a grant in name only, having no possible basis in either law or fact. No future actions could change this. The council had no power or jurisdiction to make the grant. It must therefore follow that any subsequent decision which places reliance upon this must be similarly flawed, being based on no legitimate legal or factual basis. The Board's decision that the development was based on a valid planning permission, as well as being erroneous, was a decision it had no power to make; it was not possible as a matter of law for the Board to retroactively confer validity on the 1998 grant.
>
> The argument of the Board by reference to s.50 of the Act of 2000 is misconceived. That section (subject to the court's power to extend time, which here is not relevant) is a time limit restriction operating not as a matter of defence but of jurisdiction. It regulates the challenge to a decision, nothing more. It leaves unaltered the legal status of the decision. It has no influence on the lawfulness or effect of the decision. It gives it no badge of either approval or disapproval. It prevents challenge. Notwithstanding these views the practical effect of this section is that in almost all cases once the time period has expired, no further consideration will be required or needed. But exceptionally, as here, where a subsequent decision depends on conferring the status of legality on a legal nullity, that decision will not be allowed to stand."

141. A similar approach had been taken by the High Court, in the specific context of a Section 5 declaration, in *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397. Hogan J. declined to rely on a Section 5 determination issued by a planning authority in circumstances where the court considered that the reasons given for the determination were "not altogether satisfactory". This was so notwithstanding that the actual validity of

the Section 5 determination had not been under challenge in the proceedings. (The proceedings in *Fortune (No. 3)* were enforcement proceedings under Section 160 of the PDA 2000).

142. The argument for saying that the court is entitled to disregard a planning decision which is bad on its face is even stronger in the context of EIA projects. The very recent judgment of the CJEU in Case C-261/18, *Commission v. Ireland (Derrybrien)* has emphasised that a Member State cannot deem a development project, which has been carried out in breach of the requirements of the EIA Directives, to be authorised simply because the domestic time-limits for legal challenges to the relevant development consent have expired.

> "80 Similarly, Directive 85/337 precludes projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, from being purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment (judgment of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, paragraph 43).
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> [...]
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> 94 In any event, Ireland simply states that, after the expiry of the period of 2 months, or 8 weeks set by the PDAA, respectively, the consents at issue could no longer be the subject of a direct application to a court and cannot be called in question by the national authorities.
>
> 95 By its argument, Ireland fails to have regard, however, to the case-law of the Court referred to in paragraph 80 above, according to which projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, cannot be purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment.
>
> 96 It must further be noted that while it is not precluded that an assessment carried out after the plant concerned has been constructed and has entered into operation, in order to remedy the failure to carry out an environmental impact assessment of that plant before the consents were granted, may result in those consents being withdrawn or amended, this is without prejudice to any right of an economic operator, which has acted in accordance with a Member State's legislation that has proven contrary to EU law, to bring against that State, pursuant to national rules, a claim for compensation for the damage sustained as a result of the State's actions or omissions."

143. Mr McGrath, SC, on behalf of the Developer, submitted that the within proceedings did not give rise to any issue of EU law. The facts of the present case were said to be entirely distinguishable from those of *McCoy v. Shillelagh Quarries Ltd.* The original version of the

proposed development had been subject to EIA by An Bord Pleanála at the time of the grant of the first planning permission in 2005. The Applicants did not seek to challenge the 2011 planning permission, and would be precluded from doing so now by virtue of the expiration of the eight-week statutory time-limit. It is said that there is no evidence before the court that there had been any failure to comply with the EIA Directive at the time of the grant of this planning permission.

144. Counsel made a cogent argument to the effect that the EIA Directive allowed for the possibility of points of detail being agreed subsequent to the grant of development consent, and submitted that the change in turbine type had been lawfully authorised by the decision-letter of 13 December 2013 issued in response to the compliance submission. This decision-letter had never been challenged by the Applicants, and, therefore, neither they nor the court could go behind same. On this analysis, there simply was no breach of EU law.

145. This argument was made with conviction, and merits careful consideration. Having reflected on same for a number of weeks now, and having regard to the supplemental written legal submissions filed on 5 December 2019, I have come to the conclusion that the legal position is more nuanced. The argument advanced on behalf of the Developer has, at its core, the proposition that the domestic law time-limits on judicial review proceedings constrain the court's jurisdiction in enforcement proceedings. The logic of the argument is that even if a court considered that development consent had been granted in breach of the EIA Directive, the court would be powerless to restrain the continuation of a development project. This would be so irrespective of how egregious the breach is or how obviously defective the decision relied upon is. This argument cannot be reconciled with the requirements of the EIA Directive and the manner in which domestic time-limits have been treated of in the case law of the CJEU.

146. Member States are obliged under Article 10A thereof to provide effective, proportionate and dissuasive penalties for breaches of the EIA Directive. It would be inconsistent with this obligation were an obviously deficient decision to be allowed block effective enforcement against an EIA project which had been carried out in breach of the EIA Directive. On the facts of the present case, as found by this court, the Developer carried out development without the requisite planning permission. The 2011 planning permission did not authorise the erection of wind turbines of the scale and dimensions actually put up. The subsequent decision relied upon to authorise this, i.e. the decision-letter of 13 December 2013, could not have had this purported legal effect for the reasons outlined at paragraphs 135 *et seq.* above. This courts obligation to give effect to the EIA Directive cannot be negated by the decision-letter of 13 December 2013.

DISCRETIONARY FACTORS

147. The Developer submits in the alternative—without prejudice to its principal argument that there has been no "unauthorised development"—that the circumstances of the case are such that relief should be refused as a matter of discretion. Counsel emphasises that the court enjoys a broad discretion under Section 160 of the PDA 2000. The judgments of the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R.

189; [2017] 2 I.L.R.M. 297 ("*Murray*") and *An Taisce v. McTigue Quarries Ltd.* [2018] IESC 54; [2019] 1 I.L.R.M. 118 ("*McTigue Quarries*") are cited in this regard.

148. Counsel then identifies a number of factors which, it is said, indicate that the court's discretion should be exercised against the grant of relief. First, any departure from the terms of the 2011 planning permission is not material and does not give rise to any additional impacts on the environment when compared with the "as permitted" turbines. Secondly, the developer has acted in good faith at all times and, in particular, sought and obtained the agreement of Waterford County Council to the change in turbine type. Thirdly, the Developer had made an application for leave to apply for "substitute consent" under Part XA of the PDA 2000 as early as January 2019. An Bord Pleanála made a decision in August 2019 to the effect that substitute consent was not necessary. (The Board's decision is the subject of judicial review proceedings, and the parties informed this court that An Bord Pleanála has indicated an intention to consent to an order of *certiorari* on certain, limited grounds). Fourthly, it is said that there has been delay on the part of the Applicants: the wind farm has been operational since 2015, but the within proceedings were not instituted until February 2019. Finally, it is said that there is a public interest in the continued operation of the wind farm as a source of renewable energy.

149. Counsel submits that the court's discretion is unaffected by any considerations of EU law. In particular, it is said that the Applicants have failed to demonstrate that there has been any *breach* of the EIA Directive.

150. It is submitted that it does not necessarily follow from the judgment in C-261/18, *Commission v. Ireland (Derrybrien)* that it is necessary for a development to cease operations while an application for retrospective development consent is undertaken. Any question in relation to the suspension or revocation of a consent can be addressed as part of the substitute consent process. It is said that the grant of relief under Section 160 of the PDA 2000 would be disproportionate. See §7 of the supplemental written legal submissions of 5 December 2019, as follows.

> "In the circumstances of this case, it is submitted that the grant of relief under section 160 of the 2000 act would be disproportionate and is not required on foot of the duty of sincere co-operation. The grant of relief in this case is not necessary to achieve the objectives of the Treaty in relation to the assessment of environmental impacts and, indeed, would go beyond what is necessary. What is necessary to achieve the objectives of the Treaty is, at a maximum, the assessment of the use of the particular turbine in accordance with the requirements of the EIA Directive. That can be achieved through an application for Substitute Consent and there is no requirement for the wind farm deceased operation for that to be achieved."

151. The conduct of the Developer in the present case in seeking to regularise the planning status of the wind turbines is said to stand in "stark contrast" to that of the operator of the Derrybrien Wind Farm. See §10 of the supplemental written legal submissions.

FINDINGS OF THE COURT ON DISCRETION

152. For ease of exposition, it is proposed to address the various discretionary factors by reference to the broad categories of considerations identified by the Supreme Court in *Murray and McTigue Quarries.*

The nature of the breach: ranging from minor, technical and inconsequential up to material, significant and gross

153. The breach in this case is material. An increase in rotor diameter of 13 metres cannot be characterised as minor or technical. This breach also has to be seen in the context of a development project which is subject to the EIA Directive. The discretion of the court to "forgive" a breach of this type is more limited.

Conduct of Developer

154. The conduct of a developer and, in particular, its attitude to planning control, are relevant considerations. It is important to recall, however, that the judgment in *Murray* states that the fact that a developer had been acting in good faith, whilst important, will not necessarily excuse him from an order. This point has been reiterated in *McTigue Quarries.*

155. The judgment in *Murray* indicates that the reason for an infringement of planning control may range from genuine mistake, through to indifference and up to culpable disregard. The conduct of the Developer in the present case lies towards the former end of the scale. The evidence before the court establishes that the Developer had been acting in good faith. In particular, the Developer had engaged proactively with the planning authority. See, for example, the records of meetings between the Developer's consultants and the planning authority. The mistaken attempt to rely on Condition 3 as the basis for changing the turbine type is indicative of a mistake rather than any culpable disregard. Nevertheless, ignorance of the law cannot be an excuse for non-compliance with a planning permission. It was not reasonable for the Developer to rely on Condition No. 3 as a vehicle through which to introduce significant changes to the wind turbines. Moreover, it is of little credit to the Developer that the terms of the compliance submission did not make it expressly clear that what was being sought was the agreement of the planning authority to a change in rotor blade diameter.

The attitude of the planning authority

156. Following upon the issuing of An Bord Pleanála's Section 5 declaration, the planning authority served an enforcement notice on the Developer. (The enforcement notice is now the subject of separate judicial review proceedings). The fact that the local planning authority has been moved to take enforcement action is a factor which points in favour of granting relief.

The public interest in upholding the integrity of the planning and development system

157. The fact that this development is subject to the EIA Directive is a relevant consideration under this category. Article 10A of the EIA Directive (as most recently amended by Directive 2014/52/EU) provides as follows.

> "Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive."

158. Weight must be given to this the exercise of the court's discretion. One of the requirements of the EIA Directive is that any "change" or "extension" to a previously permitted project which is likely to have a significant adverse effect must be subject to (further) environmental impact assessment. It is necessary, therefore, to carry out a form of screening exercise to determine whether a change or extension is likely to have a significant adverse effect. Whereas it may well be the position that the outcome of a screening exercise in relation to the change in the scale and dimensions of the turbines would be that no EIA is required, this does not obviate the legal requirement to carry out such a screening exercise. (See Case C-215/06, *Commission v. Ireland* to the effect that the failure to carry out a screening exercise represents a breach of the EIA Directive).

159. The High Court (Baker J.) held in *McCoy v. Shillelagh Quarries Ltd.* [2015] IEHC 838, [84] and [85]. that the exercise of the court's discretion should be informed by reference to EU environmental law.

> "I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.
>
> Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some of only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish and when Irish law arises as a result of the obligations of Ireland and Community law."

160. Counsel for the Developer in the present case points out—entirely correctly—that the breach of EU law at issue in *Shillelagh Quarries Ltd*. was very serious and had continued for many years, and that an application for substitute consent had been refused. Whereas the breach in the present case is of a much lesser order, the EU law dimension is nevertheless a factor to which some weight must be given.

Public interest in general

161. The Developer relies in this regard on the fact that the development is of a type which provides renewable energy and that this is in the public interest. As against this, it has to

be said that the overall impact of an order restraining the operation of this individual development project would be minimal in the national context.

Conclusion

162. As appears from the foregoing discussion, there are a number of discretionary factors which are in favour of the Developer. These have to be weighed against the factors which point towards the grant of relief. The principal of these is that the development project is of a type subject to the EIA Directive. The EIA Directive obliges a Member State to provide effective, proportionate and dissuasive penalties for breaches of national legislation. The importance of ensuring compliance with the EIA Directive has very recently been emphasised by the judgment of the CJEU in Case C-261/18, *Commission v. Ireland (Derrybrien)*.

163. I have concluded that the court's discretion should be exercised as follows. The Developer should be afforded an opportunity to regularise the planning status of the wind turbines. It would be inappropriate, therefore, to make an order requiring the immediate removal of the wind turbines. Rather, the Developer is to be afforded a further reasonable period of time within which to seek, if possible, to regularise the planning status of the lands.

164. (The precise mechanism by which this might be achieved is itself the subject of separate judicial review proceedings. More specifically, there is a dispute as to whether the application for leave to apply for substitute consent should be remitted to An Bord Pleanála. This dispute is listed for hearing before the Commercial List of the High Court this morning (6 December 2019).)

165. It would not, however, be appropriate to allow the operation of the wind turbines to continue uninterrupted pending the outcome of an application for leave to apply for substitute consent. This is similar to the approach which had been adopted by the Court of Appeal in *Bailey v. Kilvinane Wind Farm*. There has been a breach of EU law, and this court is obliged to ensure that there is an effective and dissuasive remedy for same.

166. Counsel for the Developer has made a submission to the effect that—in circumstances where An Bord Pleanála has an express statutory power to direct the cessation of development pending the determination of an application for substitute consent—the court should, in effect, leave it to An Bord Pleanála to decide whether any interim measures are required. This submission is correct insofar as it goes. It is, however, clear from the wording of the relevant provision, namely Section 177J of the PDA 2000, that the Board's jurisdiction to issue a direction only arises subsequent to a decision to grant leave to apply for substitute consent. It seems that only the court has jurisdiction to make an order requiring the cessation of operations pending the making of a decision to grant leave to apply for substitute consent. I propose, therefore, to make an order restraining the operation of the wind turbines *pro tem*. The Developer has liberty to apply, on seven days' notice to the Applicants, to have this order vacated in the event

that An Bord Pleanála makes a decision to grant leave to apply for substitute consent. I will hear both parties at that stage.

167. In the event that substitute consent is granted, I would propose to vacate the order entirely. Again, however, I will hear the parties before making any order to this effect.

CONCLUSIONS AND FORM OF ORDER

168. The Section 5 declaration precludes the Developer from reagitating the argument that the "as built" wind turbines are authorised by the 2011 planning permission. The Developer had a full opportunity of making its case in this regard to An Bord Pleanála. In particular, the Developer had made submissions before the Board to the effect, first, that the decision-letter of 13 December 2013 authorised the change in scale and dimensions of the wind turbines; and, secondly, that the circumstances of the case were distinguishable from those of the Kilvinane Wind Farm. Those submissions were, ultimately, rejected by An Bord Pleanála.

169. In circumstances where the Developer did not challenge the Section 5 declaration, the Developer is estopped from seeking to reopen the Board's findings in these proceedings.

170. The 2011 planning permission did not authorise the erection of wind turbines of the scale and dimensions actually put up. In circumstances where the wind farm is subject to the requirements of the EIA Directive, the proposed increase in rotor diameter constituted a "change" or "extension" of a permitted development, and could only have been lawfully authorised by way of the making of an application for planning permission.

171. The Developer is not entitled to rely on the alleged agreement of the planning authority to the compliance submission as providing authorisation for the "change" or "extension". On its correct interpretation, the decision-letter of 13 December 2013 does not have this effect. Moreover, the planning authority would not, in any event, have had jurisdiction to approve the "change" or "extension" pursuant to Section 34(5) of the PDA 2000.

172. The Developer should be afforded an opportunity to regularise the planning status of the wind turbines. It would be inappropriate, therefore, to make an order requiring the immediate removal of the wind turbines. Rather, the Developer is to be afforded a further reasonable period of time within which to seek, if possible, to regularise the planning status of the lands.

173. There will be an order made pursuant to Section 160 of the PDA 2000 restraining the operation of the wind turbines *pro tem*. The Developer has liberty to apply, on seven days' notice to the Applicants, to have this order vacated in the event that An Bord Pleanála makes a decision to grant leave to apply for substitute consent.

DUBLIN CITY COUNCIL
PLANNING APPLICATION FORM

DUBLIN CITY COUNCIL. - The Provost, Fellows and Scholars of the University of Dublin, Trinity College, Dublin 2, intend to apply for Permission for Retention of Development carried out at New Student Halls of Residence, Trinity Hall, Dartry, Dublin 6, and Associated Grounds, Wayleaves, Servicing, Support and Ancillary Facilities; in the curtilage of Purser House, Greenane and the original Trinity Hall Building, which are Protected Structures. The Development consists of a single storey, detached 7.2m x 4.5m (32.4sq.m.) 3m high MV Substation/Switchroom in accordance with ESB Specification 13320 Rev. 5 February 2000 "General Specification for MV Substation and Metering Switchroom Buildings", located to the north of the site. The Substation is accessed via existing vehicular entrances at Dartry road and Palmerstown Park. The planning application may be inspected or purchased between the hours of 9.00a.m.-4.30p.m. at the offices of Dublin City Council Planning department, block 4, Ground floor, Civic Offices, wood quay, dublin 8. A submission or observation in relation to the application may be made in writing to Dublin City Council on payment of a fee of €20.00 within the period of five weeks beginning on the date of receipt by the authority of the application.

For Office use only: I.T – 15/10/04
S.N – 15/10/04.

...y: [signature]

History Files

5170/04, Receipt No. 04793

1101/99 CP

0577/03 CP

Amount € 350

...AD INSTRUCTIONS BEFORE COMPLETING FORM
...LL QUESTIONS MUST BE ANSWERED

PLANNING
27 OCT 2004
REGISTRY
DEPARTMENT

Permission	☐
Retention Permission	☒
Outline Permission	☐
Permission on foot of outline permission	☐

Place X in appropriate box.

5170/04 27.OCT.2004
DUBLIN CITY COUNCIL

Where permission on foot of outline permission is being applied for, quote outline permission Plan No. ....n/a.....

- *Previous planning permission reference no. 1101/99*
- *Previous An Bord Pleanála permission reference no. PL5.29S. 117164*

2. Postal address of site or building: (If none, give description sufficient to identify):

Pick up underline

- *New Student Halls of Residence, Trinity Hall, Dartry, Dublin 6, and Associated Grounds, Wayleaves, Servicing, Support and Ancillary Facilities; in the Curtilage of Purser House, Greenane and the Original Trinity Hall Building, which are Protected Structures.*

3. Name of applicant (principal, not agent):

- *The Provost, Fellows and Scholars of the University of Dublin, Trinity College*

Address:

- *Director of Buildings Office, West Chapel, Trinity College, Dublin 2*

E-mail address (if applicable) ____________ n/a ______________

Please note that a c/o address is not acceptable.

4. Where the applicant is a company registered under the Companies Acts 1963–1999, please state the following:

Registered address of Company ____________ n/a ____________

Registered Number of Company ____________ n/a ____________

Names of Company Directors ____________ n/a ____________

5. Name and address of person or firm responsible for preparation of drawings:

Name: *Ms. George Boyle, B.Arch., MRIAI, RIBA, ARIAM, Associate Director*

Address *Murray O'Laoire Architects, 17 Fumbally Court, Fumbally Lane, Dublin 8*

Telephone: *453 7300* Fax: *453 4062*

E-mail Address: : *george.boyle@murrayolaoire.com*

6. Name and address to which notifications should be sent: *as above*

Telephone : *as above* Fax : *as above*

7. Brief description of nature and extent of proposed development, including reference to number and height of buildings, protected structures, etc. where appropriate:

(This should correspond with the wording of the newspaper and site notice.)

The Development consists of retention of a single storey, detached 7.2m x 4.5m (32.4sq.m.) 3m high MV Substation/Switchroom in accordance with ESB Specification 13320 Rev. 5 February 2000 "General Specification for MV Substation and Metering Switchroom Buildings", located to the north of the site. The substation is accessed via existing vehicular entrances at Dartry Road and Palmerston Park. The planning application may be inspected or purchased between the hours of 9:00 a.m. – 4:30 p.m. at the offices of Dublin City Council Planning Department, Block 4, Ground Floor, Civic Offices, Wood Quay, Dublin 8. A submission or observation in relation to the application may be made in writing to Dublin City Council on payment of a fee of €20.00 within the period of five weeks beginning on the date of receipt by the authority of the application

8. In the case of buildings to be retained* on site, please state:-

Address Red= subject of this application	Floor	Present use(s) (or use(s) when last used – date when last use ceased should be indicated)	Area of each use (m^2)	Proposed use(s)	Area of each use (m^2)
[illegible]	7 Floors	Student Residences	7150	Student Residences	7150
Building 1	G.F	Ancillary Facilities	1200	Ancillary Facilities	1200
Building 2	6 Floors	Student Residences	8200	Student Residences	8200
Building 3	5 Floors	Student Residences	9250	Student Residences	9250
Cunningham	3 Floors	Student Residences	1800	Student Residences	1800
Trinity Hall	3 Floors	Administration	1065	Administration	1065
Purser House	3 Floors	Administration	615	Administration	615
Sports Hall	2 Floors	Recreation	750	Recreation	750
ESB Substation	1 floor	Electrical Services	32.4	Electrical Services	32.4

(* NB In the above context "buildings to be retained on site" are deemed to mean existing structures as distinct from structures to be the subject of an application for retention)

9. (a). Does the proposal involve demolition, partial demolition or change of use of any habitable house* or part thereof.

No

(b). Does the proposal involve the demolition of a building which forms part of a terrace of buildings or which abuts on another building in separate ownership:

No

(c). In the case of a habitable house* please state if occupied and give details of occupancy.

N/a

* A "habitable house" is a building or part of a building which

(a) is used as a dwelling or

(b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling, or

(c) was provided for use as a dwelling but has not been occupied

10. Does the development involve a **PROTECTED STRUCTURE** or a proposed **PROTECTED STRUCTURE** ?

Yes X No ☐ *Place X in appropriate box.*

(If yes, the newspaper and site notice must indicate this fact). √

- ***Development is in curtilage of Purser House, Greenane and the Original Trinity Hall Building, which are Protected Structures.***

11. (a) Area of site .... approx. 34,250 .... m²

(b) Total floor area* of proposed development (i.e. new & retained) approx. 30,100 m²

(c) Floor area* of buildings proposed to be retained within site 30,060 m²

(d) Floor area* of new buildings proposed within development 32.4 m²

(e) Floor area* of buildings to be demolished n/a m²

* Gross floor area i.e. the total floor space on each floor measured from the inside of the external walls.

(* NB in the above context, "buildings to be retained within site" are deemed to mean existing structures, as distinct from structures to be the subject of an application for retention)

12. Fee Payable: ____ (€10.80 x 32.4) = €350.00 ____ Basis of calculation:

- *Class 4 of Schedule 9: Section 2 (Column : fee for retention permission) of Planning & Development Regulations 2001 (provision of buildings other than buildings coming within class 1, 2 or 3): €240 for each building, or €10.80 for each square metre of gross floor space to be provided, whichever is the greater.*

If exemption from payment of fees is being claimed, evidence to prove eligibility or exemption in accordance with Article 157 of the Planning & Development Regulations 2001 must be submitted.

- ____________ n/a ______

Classes of fees set out in Explanatory Leaflet

5170 44 27 OCT
DUBLIN CITY COUNCIL
Planning Dept.

13. (a). State applicants legal interest or estate in site (i.e. freehold, leasehold, etc.):

____________ freehold ____________

(b). Date such interest acquired: ________ 1896 ________

(c). If applicant is not the owner, state name and address of owner and include documentary evidence of consent of the owner to make the application.

____________ n/a ____________

14. List of documents enclosed with application:

- *Cover Letter to Planning Officer x 1*
- *Accompanying Letter to Planning Enforcement Section x 6*
- *Copies of Public Notices: Newspaper Notice x 1, Signed Site Notice x 1*
- *€350.00 fee (by cheque)*

- *Part V is not applicable as site does not involve housing*
- *6 copies Architects' drawings: see schedule attached to Architects' Report*
- *6 copies Architects' report including Appendices with previous grant permission*
- *6 copies ESB Specification 13320 Rev. 5 of February 2000 "General Specification for MV Substation and Metering Switchroom Buildings".*

15. Is this site within a zone of archaeological interest?

Yes [X] No [ ] *Place X in appropriate box.*

- *Site is in vicinity of estimated location of Rathmines Castle (Old) which estimated location is not on the subject site*

16. Date of erection of site notice(s): 15.10.04

17. Is an Environmental Impact Statement, in accordance with Part 10 of the Planning and Development Regulations 2001, required?

Yes [ ] No [X] *Place X in appropriate box.*

If yes, the newspaper notice and site notice must indicate this fact.

18. Does the development comprise, or is it for the purpose of an activity in relation to which an integrated **Pollution Control Licence or a Waste Licence** is required?

Yes [ ] No [X] *Place X in appropriate box.*

If yes, the newspaper notice and site notice must indicate this fact..

19. Does the European Communities (Control of Major Hazards involving Dangerous Substances) Regulations 2000 apply to the proposed development?

Yes [ ] No [X] *Place X in appropriate box.*

20. Do any statutory notices apply to the site/building at present? (e.g. Enforcement. Dangerous Buildings, Derelict Sites, Building Control, Fire Safety etc.)

Yes [X] No [ ] *Place X in appropriate box.*

If yes, please give details

- *Development is subject to Warning Letter issued under Section 152 of Planning & Development Act 2000. Copy attached at Appendix D of Architects' Report.*

21. (a). In the case of residential developments please provide breakdown of residential mix:-

Number of	Studio	1 Bed	2 Bed	3 Bed	4 Bed	4+ Bed	Total
Houses	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Apartments	n/a	n/a	n/a	n/a	n/a	n/a	n/a

(b). In all types of development please state:

Proposed plot ratio ------.88 ---- Proposed site coverage --------21%------

- *note figures apply to entire site including all new and existing structures*

22. Details of Compliance with the requirements of Part V of the Planning & Development Act 2000 (Social & Affordable Housing)

Is the proposal exempt from the requirements of Part V
Yes X No ☐

If the answer is **YES**, then all applications containing new residential units must be accompanied by either a **Certificate of Exemption** under Section 97, or by details of when the application for exemption was made but has not yet issued, or by such details that show the proposal is otherwise exempt under Section 96 (14) of the above Act.
If the answer is **NO**, please attach particulars of agreement on provision of Social / Affordable Housing, in compliance with Section 96 of the Act.

Retention Application is not for permission for the development of houses or for a mixture of developments including a part that relates to the development of houses and is therefore exempt from the requirements of Part V under Section 96 (14) (a) of the planning and development Act 2000; ~~Structure to be Retained~~ does not contain residential units

27 OCT 04

23. Has a Pre-Planning Consultation, in accordance with Section 247 of the Planning & Development Act 2000 taken place

Yes X No ☐ *Place X in appropriate box.*

If yes, please state date of meeting *Tuesday 5th October 04; by telephone only*

- *Telephone Consultations: Una Bagnall, South-East Area Planning Officer; Vincent Healy, Registry Officer; Rory O'Byrne, Acting Planning Enforcement Manager*

24. Is the site of the proposal subject to a current appeal to an Bord Pleanála in respect of a similar development

Yes ☐ No ☒ Place X in appropriate box.

If yes, please give details
_______________n/a_______________

I, the undersigned, hereby declare, all the foregoing particulars to be true and I hereby certify that all the accompanying drawings are fully in compliance with the Planning and Development Regulations 2000

Signature of applicant .... **Date:** 25.10.04
(or his/her agent)

Applicants' Architect,
George Boyle, B.Arch., MRIAI, RIBA, ARIAM,
Associate Director for Murray Ó'Laoire Architects

It should be understood that:

(a) **the granting of planning permission does not relieve the developer of the responsibility of complying with any requirements under other codes of legislation affecting the proposal, and**

(b) **a person shall not be entitled solely by reason of a planning permission to carry out any development**

Dublin City Council
Comhairle Cathrach Bhaile Átha Cliath

Planning Department
Civic Offices, Wood Quay, Dublin 8

An Roinn Pleanála
Oifig[redacted] Cathrach, An Ché Adhmaid, Baile Átha Cliath 8

T. 01 222 0400 E. planning@dublincity.ie www.dublincity.ie

PLANNING APPLICATION FORM – Part 1

For Office use only 27/10/04 26/5/05		Plan No: 4811/07	
Checked by: DS	History Files		Date Received
Receipt No. 44556	5170/04	1101/99	PLANNING 15 AUG 2007 REGISTRY DEPARTMENT
Amount € 320.00	1623/03	0577/03	

PLEASE READ INSTRUCTIONS BEFORE COMPLETING FORM - ALL QUESTIONS MUST BE ANSWERED

1. Type of application:

Permission [X] **AND** Retention Permission [X]

Outline Permission [N/A]

Permission on foot of Outline Permission [N/A]

Place X in appropriate box.

Where permission on foot of outline permission is being applied for, quote outline permission Plan No. [N/A]

PLANNING HISTORY ***(included for convenience of planning authority)***

'99 Previous planning permission ref. no. **1101/99**
Previous An Bord Pleanala permission ref. no. PL. 295.117164
'03 Previous planning permission ref. no. **0577/03**
Previous An Bord Pleanala permission ref. no. PL. 295.202689
'04 Previous planning permission ref. no. **5170/04**
Previous An Bord Pleanala permission ref. no. PL 295. 210538

4811/07 15 AUG 2007 DUBLIN CITY COUNCIL Application Rec'd

2. Postal address of site or building: (if none, give description sufficient to identify):

Student Halls of Residence, Trinity Hall, Dartry, Dublin 6 and associated grounds, wayleaves, servicing, support and ancillary facilities in the curtilage of Purser House, Greenane and the original Trinity Hall building, which are 3 Protected Structures. The site is bounded by Dartry Road, Palmerston Park, Temple Square and Temple Road.

3. Name of applicant (principal not agent):

The Board of the University of Dublin Trinity College Dublin 2

4. Where the applicant is a company registered under the Companies Acts 1963–1999, please state the following:

Registered address of Company: **N/A Not a registered company, but a registered charity**

Registered Number of Company: **N/A Registered company: Registered Charity number CHY 11**

Names of Company Directors: **The Provost, Fellows and Scholars of the Holy and Undivided Trinity of Queen Elizabeth near Dublin**

S.N. 15/8
I.T. 2/8

DUBLIN CITY COUNCIL
PROTECTED STRUCTURES
The Board of the University of Dublin, Trinity College, Dublin 2 intend to apply for retention permission for development and for permission for development at Student Halls of Residence, Trinity Hall, Dartry, Dublin 6, and associated grounds, wayleaves, servicing, support and ancillary facilities, in the curtilage of Purser House, Greenane and the original Trinity Hall building, which are 3 Protected Structures. The site is bounded by Dartry Road, Palmerston Park, Temple Square and Temple Road. The application for retention permission consists of the retention of free-standing, external steel cabinet enclosing G250 Meter Skid apparatus installed by An Bord Gais' contractors to supply and meter gas to the residences in accordance with An Bord Gais specifications and procedures. The cabinet is approximately 830mm x 1610mm x 2850mm high and sits behind the rendered perimeter wall to the northeast of the site, where it is accessed by existing entrances at Dartry Road. The application for permission relates to a timber enclosure around a [illegible] cabinet installed to protect the gas installation. The timber enclosure is approximately 1250mm x 2000mm x 2900mm high. The planning application may be inspected or purchased at a fee not exceeding the reasonable cost of making a copy, at the offices of Dublin City Council during its public opening hours and a submission or observation in relation to the application may be made to the authority in writing on payment of the prescribed fee within the period of 5 weeks beginning on the date of receipt by the authority of the application.

[illegible] NO
1811/07
DATE REC'D
15 AUG 2007
DUBLIN CITY COUNCIL
[illegible] Planning Dept Application Rec'd

5. Name of person or firm responsible for preparation of drawings:

George Boyle, B.Arch., MRIAI, RIBA, ARIAM, Associate Director for Murray Ó'Laoire Architects
17 Fumbally Court, Fumbally Lane, Dublin 8

6. Brief description of nature and extent of proposed development, including reference to number and height of buildings, protected structures, etc. where appropriate.
(This should correspond with the wording of the newspaper and site notice.)

The application for retention permission consists of the retention of free-standing, external steel cabinet enclosing G250 Meter Skid apparatus installed by An Bord Gais' Contractors to supply and meter gas to the residences in accordance with An Bord Gais specifications and procedures. The cabinet is approximately 830mm x 1610mm x 2850mm high and sits behind the rendered perimeter wall to the northeast of the site, where it is accessed by existing entrances at Dartry Road. The application for permission will consist of a timber enclosure around a pressed metal cabinet installed to protect the gas installation. The timber enclosure is approximately 1250mm x 2000mm x 2900mm high.

7. (a). State applicant's legal interest or estate in site (i.e. freehold, leasehold, etc.): *Freehold, acquired 1896*

(b). If applicant is not the owner, state name and address of owner and include documentary evidence of consent of the owner to make the application.

Applicant is the owner

8. In the case of CURRENT buildings to be retained* on site**, please state:

Address (Purple = existing, Orange = subject of this application)	Floor	Present use(s) or previous use where retention permission is sought (or use(s) when last used – date when last use ceased should be indicated)	Area of each use (m^2)	Proposed use(s) or use(s) it is proposed to retain	Area of each use (m^2)
Building 1	7	Student residences	~7,150	Student residences	~7,150
Building 1	GF	Ancillary facilities	~1,200	Ancillary Facilities	~1,200
Building 2	6	Student residences	~8,200	Student residences	~8,200
Building 3	5	Student residences	~9,250	Student residences	~9,250
Cunningham	3	Student residences	~1,800	Student residences	~1,800
Trinity Hall	3	Administration	~1,065	Administration	~1,065
Purser House	3	Administration	~615	Administration	~615
Sports Hall	2	Recreation and amenity	~750	Recreation & amenity	~750
Substation	1	Electrical Services for ESB	32.4	Electrical Services	32.4
Gas enclosure	1	Apparatus enclosure for An Bord Gais G250 Meter Skid	~2.5	Apparatus enclosure for An Bord Gais G250 Meter Skid	~2.5

* NB in the above context, "buildings to be retained on site" are deemed to mean *existing structures*, as distinct from structures to be the subject of an application for retention which are highlighted in orange

** NB Greenane House, North Gate Lodge and the Botanical Gardens Structures are not within subject site

9.	(i) Does the proposal involve demolition, partial demolition or change of use of any habitable house* or part thereof?	*No*
	(ii) Does the proposal involve the demolition of a building which forms part of a terrace of buildings or which abuts onto another building in separate ownership?	*No*

(iii) In the case of a habitable house* please state if occupied and give details of occupancy:

N/A

*A **"habitable house"** is a building or part of a building which

(a) is used as a dwelling *or*
(b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling, *or*
(c) was provided for use as a dwelling but has not been occupied

10. In all types of development, please state:

(a) Total site area	*~34,250* m^2
(b) Floor area* of buildings proposed to be retained within site	*~30,065* m^2
(c) Floor area* of new buildings proposed within development	*~2.5* m^2
(d) Total floor area* of proposed development (i.e. new and retained)	*~30,070* m^2
(e) Floor area* of buildings to be demolished	*N/A* m^2
(f) Total *Non-Residential* floor area*	*~2.5* m^2

*** NB figure rounded up for convenience** (to item (d))

*** NB in the above context, "buildings to be retained on site" are deemed to mean *existing structures*, as distinct from structures to be the subject of an application for retention**

(g) Proposed plot ratio	*0.88*	(h) Proposed site coverage	*Not > 21%*

NB figures apply to entire site including all new and existing structures

11. If the proposal involves the provision of Child Care/Crêche facilities please state:

No. child care spaces	*N/A*	Total floor area*	*N/A* m^2

3 0 2 5 7

12. In the case of residential developments please provide:

(a) A breakdown of residential mix:

Number of	Studio/ Live Work	Granny Flat	1 Bed	2 Bed	3 Bed	4 Bed	4+ Bed	Total
Houses	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*
Apartments	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*

(b) Total net floor area** *N/A* (c) Total gross floor area* *N/A*

*** No new residential units**

** Gross floor area i.e. the total floor space on each floor measured from the inside of the external walls.*

***Gross floor area minus common circulation areas*

13. Fee Payable €240 + €80 **€ 320**

Basis of calculation:

Retention Permission Application:
Class 13 of Planning Application Fees set by Department of Environment, Heritage & Local Government: "Development not coming within any of the above classes"

Permission Application:
Class 13 of Planning Application Fees set by Department of Environment, Heritage & Local Government: "Development not coming within any of the above classes"

Class No.	Calculation	Amount
Class 13	*1.33 sqm (0.000133ha) @ €30 per 0.1ha OR €240 minimum (retention charge) => minimum charge applies = €240*	*€ 240*
Class 13	*2.5sqm - 1.33 sqm = 1.77 (0.000177ha) @ €80, or €10 per 0.1ha, whichever is the greater => maximum charge applies = €80*	*€ 80*

If exemption from payment of fees is being claimed, evidence to prove eligibility or exemption in accordance with Article 157 of the Planning & Development Regulations 2001 must be submitted.

Classes of fees are set out in Explanatory Notes

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14. Approved newspaper in which notice was published: *IRISH TIMES*

Date of publication: *02.08.07*

Date of erection of site notice(s): *15.08.07*

15. (i)Does the development involve a **PROTECTED STRUCTURE (and/or its curtilage)** or a **proposed PROTECTED STRUCTURE (and/or its curtilage)?**

Yes [X] No [ ] *Place X in appropriate box*

(If **yes**, the newspaper and site notice must indicate this fact). ***yes***

(ii) Does the proposed development consist of work to the exterior of a structure that is located in an Architectural Conservation Area (A.C.A.)?

Yes [ ] No [X] *Place X in appropriate box*

16. (a) Are you aware of any valid planning applications previously made in respect of this land/structure

Yes [X] **No** [ ] *Place X in appropriate box*

If **yes** please state planning reference number(s) and date(s) of receipt of the planning application(s) (if known)

Reference Number(s).	Date(s)
1101/99	***Notification of Decision to Grant permission 11.11.99*** ***An Bord Pleanala Appeal Grant Date 04.08.00*** ***Written Compliance order 02.01.02***
0577/03	***Notification of Decision to Grant permission 03.04.03*** ***An Bord Pleanala Appeal Grant Date 04.06.03***
5170/04	***Notification of Decision to Grant permission 16.12.04*** ***An Bord Pleanala Appeal Grant Date 26.05.05***

If a valid planning application has been made in respect of this land or structure in the six months prior to the submission of this application, then the site notice must be on a yellow background in accordance with Article 19(4) of the Planning and Development Regulations 2001 as amended.

N/A

(b) Is the site of the proposal subject to a current appeal to an Bord Pleanála in respect of a similar development?

Yes [ ] **No** [X] *Place X in appropriate box*

If **yes**, please state An Bord Pleanala Reference No.: ***N/A***

17. Is this site within a zone of archaeological interest?

Yes [ ] No [X] *Place X in appropriate box*

SITE OF ARCHAEOLOGICAL INTEREST IN VICINITY OF SITE OF SUBJECT APPLICATION, AND WITHIN LANDS IN OWNERSHIP OF APPLICANT, AS INDICATED ON SITE PLANS SEE ATTACHED

18. Is an **Environmental Impact Statement**, in accordance with Part 10 of the Planning and Development Regulations 2001, required?

Yes [ ] No [X] *Place X in appropriate box*

(If **yes**, the newspaper and site notice must indicate this fact).

19. Do the **Major Accident Regulations** apply to the proposed development?

Yes [ ] No [X] *Place X in appropriate box*

20. Does the development comprise, or is it for the purpose of an activity in relation to which a **Waste Licence** is required?

Yes [ ] No [ ] *Place X in appropriate box*

(If **yes**, the newspaper and site notice must indicate this fact).

21. Do any **statutory notices** apply to the site/building at present? (e.g. Fire Safety, Enforcement, Dangerous Buildings, Derelict Sites, Building Control, etc.)

Yes [X] No [ ] *Place X in appropriate box*

If **yes**, please give details:

ENFORCEMENT WARNING LETTER WITH RESPECT TO DEVELOPMENT ISSUED

22. Has a Pre-Planning Consultation in accordance with **Section 247 of the Planning and Development Act 2000** taken place in respect of this application?

Yes [ ] No [X] *Place X in appropriate box*

*** pre-planning telephone conversation with Alison Scott, Acting Senior Planning Officer for South City Team and South East Area, 14th August 2007**

If **yes**, please state date of meeting: ***N/A***

NOTE: You should only tick the 'Yes' box if a formal meeting has taken place with an Area Planning Officer

23. Is it intended that any part of the proposed development will be taken in charge by Dublin City Council?

Yes [ ] No [X] *Place X in appropriate box*

If the answer is **yes**, please attach site plan clearly showing area(s) intended for taking in charge.

24. Details of Compliance with the requirements of **Part V of the Planning and Development Act 2000 (Social & Affordable Housing)**, as amended:

Is the proposal exempt from the requirements of Part V?

Yes [X] No [ ] *Place X in appropriate box*

If the answer is **yes**, then all applications containing new residential units must be accompanied by either a **Certificate of Exemption** under Section 97, or by details of when the application for exemption was made but has not yet issued, or by such details that show the proposed development is otherwise exempt under Section 96 (14) of the above Act.

No residential units proposed in application

If the answer is no, please attach particulars of agreement or proposal to comply with the provisions of Section 96 of the Act (as amended).

N/A

I, the undersigned, hereby declare, that to the best of my knowledge and belief, the information given in this form is correct and accurate and fully compliant with Planning and Development Act 2000 as amended and the Regulations made thereunder.

Signature of applicant (or his/her agent) [signature] **Date** *15.08.07*

PLANNING APPLICATION FORM – Part 2

4811/07
15/8

CONTACT DETAILS

25. Address of applicant (principal not agent):
The Board of the University of Dublin, Trinity College
Paul Mangan, Director of Buildings,
West Chapel, Trinity College, Dublin 2
Please note that a c/o address is not acceptable

26. Address of person or firm responsible for preparation of drawings:
George Boyle,
Murray Ó'Laoire Architects,
17, Fumbally Court, Fumbally Lane,
Dublin 8

27. Name and address to which notifications should be sent:
George Boyle,
Murray Ó'Laoire Architects,
17, Fumbally Court,
Fumbally Lane,
Dublin 8

IMPORTANT: Part 2 of the application form must always be submitted on a completely separate page as this information will not form part of the public file.

COADY ARCHITECTS

Schedule of Accommodation

Project: **Student Halls of Residence, Trinity College, Dartry**
Job ref: **2354**
Date: **17/08/2017**
Revision -

		Brief Requirement			
Building	Room Name	Bedspace	Bedrooms	Apaments	Total Area (m2)
1	Single Bedrooms	158	158		
	Single Disabled Bedrooms	9	9		
	Twin Bedrooms	96	48		
	Staff apartment (Single Bedroom with adjoining Kitchen)	5	5		
	Subtotal:	**268**	**220**	**53**	**7020**
2	Single Bedrooms	220	220		
	Single Disabled Bedrooms	14	14		
	Twin Bedrooms	84	42		
	Staff apartment (Single Bedroom with adjoining Kitchen)	6	6		
	Subtotal:	**324**	**282**	**62**	**8174.2**
3	Single Bedrooms	253	253		
	Single Disabled Bedrooms	18	18		
	Twin Disabled Bedrooms	2	1		
	Twin Bedrooms	68	34		
	Staff apartment (Single Bedroom with adjoining Kitchen)	4	4		
	Subtotal:	**345**	**310**	**63**	**9217.4**
	TOTAL	**937**	**812**	**178**	**24412**

Judgment Title: Kenny -v- Dublin City Council

Neutral Citation: [2009] IESC 19

Supreme Court Record Number: 06/05

High Court Record Number: 2002 383 JR

Date of Delivery: 05/03/2009

Court: Supreme Court

Composition of Court: Fennelly J., Macken J. Peart J

Judgment by: Fennelly J.

Status of Judgment: Approved

Link to Memo on Judgment: Link

THE SUPREME COURT

Appeal No. 006/2005
(Record No. 383 JR/2002)

Fennelly J.
Macken J.
Peart J.

JUDICIAL REVIEW

Between:

JAMES KENNY

Applicant

And

DUBLIN CITY COUNCIL

Respondent

And

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

Notice Party

And by order of the Court made on 20th January 2003

MICHAEL McNAMARA & COMPANY

Notice Party

JUDGMENT of Mr. Justice Fennelly delivered the 5th day of March, 2009.

1. By a decision of 4th January 2000 the respondent (Dublin City Council, hereinafter "the Council"), certified compliance by the notice party (hereinafter "Trinity") with the terms of planning permission for the building of Trinity Hall.

This is an appeal against a High Court decision (Murphy J) refusing to quash that decision at the instance of the appellant (hereinafter "Mr **Kenny**").
2. This is not the first and may not be the last case in which Mr **Kenny** contests the building by Trinity of its new Trinity Hall buildings. My judgment of 10th April 2008 in ***Kenny*** *v The Provost, Fellows and Scholars of the University of Dublin, Trinity College* [2008] 2 I.R. 40, mentioned the *"saga of litigation in which Mr* ***Kenny****, through a multiplicity of proceedings, contests the validity of a planning permission granted to Trinity in 1999 to redevelop Trinity Hall, the University's hall of residence in Dartry."*

Planning history

3. On 12th April 1999, Trinity applied for planning permission for a development consisting of the construction of new student halls of residence at Trinity Hall.
4. The development was large and complex. It covers an area of approximately 25,000 square metres and comprises, *inter alia,* three new student-residence buildings ranging in height from three to seven storeys to accommodate 832 bedrooms arranged in 180 apartments, a 400 seater dining facility, a launderette, a students' shop, the refurbishment of Trinity Hall, a listed building, the removal of a gate lodge, a new atrium between Trinity Hall and the sports hall and further and other associated buildings, works and facilities.

5. One of the buildings is opposite Mr **Kenny**'s residence. He and the Dartry and District Preservation Association, of which he is a member, opposed the development. In the course of the planning process the Council made a request to Trinity to submit revised plans under Article 35 of the Local Government (Planning and Development) Regulations, 1994. Trinity complied on 7th October 1999.

6. On 11th November 1999, the Council (under its former description, Dublin Corporation) made a decision to grant planning permission subject to 14 conditions.

7. Mr **Kenny** and the Association appealed the decision to An Bórd Pleanála ("the Board"). Mr **Kenny** was represented at the oral hearing. On 4th August 2000 the Board made a decision to grant planning permission subject to 19 conditions.

8. The planning conditions relevant to the present appeal are:

> <u>Condition 1</u>
>
> "The proposed development shall be carried out in accordance with the revised plans submitted to the planning authority and received on the 7th day of October, 1999, in response to a request for revised plans under Article 35 of the Local Government (Planning and Development) Regulations, 1994, except as may otherwise be required in order to comply with the following conditions.
>
> Reason: In the interests of clarity."
>
> <u>Condition 2</u>

> "The western arm of Building Number 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 Number 3 shall be submitted to the planning authority for agreement prior to the commencement of development.
>
> Reason: In the interest of visual amenity."
> <u>Condition 8</u>
>
> "Revised drawings of the proposed development, with floor plans and elevations corresponding in detail, shall be submitted to and agreed in writing by the planning authority prior to the commencement of development.
>
> Reason: In the interest of orderly development."
> <u>Condition 9</u>
>
> "Existing trees shall be retained and areas shown as open space on the lodged plans shall be planted and landscaped in accordance with the plans submitted to the planning authority. The open areas shall be available for use by the students on completion of the proposed residential units. All landscaping works shall be carried out within 12 months of the completion of the buildings in the proposed development. <u>Services and utilities shall not be laid within 10 metres of the bole of any of the trees to be retained.</u> Prior to the commencement of the development the developer shall submit details and agree with the planning authority measures necessary to protect the trees to be retained. All trees to be retained shall be protected during the development by a timber post and rail fence which shall enclose the crown spread of the trees.
>
> Reason: To protect the existing trees and in the interest of visual and residential amenity."

[emphasis added]

9. Mr **Kenny** has contested the validity of the planning permission. Those judicial review proceedings ended with the decision of this Court on 10th April 2008, mentioned above. Certain conditions of the planning permission required Trinity to submit certain matters to the Council for agreement. The present proceedings concern compliance with conditions of the permission.

10. In August 2001, Trinity's architects, Murray O'Laoire, made a planning-compliance submission of some seventy pages to the Council. An addendum of some twenty five pages was submitted in November 2001.

11. By report dated 24th December 2001, Patrick McDonnell, Dublin City Council Planning Office, reported that the details submitted by the developer were satisfactory and complied with the requirements of of the relevant conditions.

12. The Council, by a decision of 4th January 2002, determined that the compliance submissions were satisfactory and in compliance with the relevant conditions of the planning permission. That is the decision which Mr **Kenny** challenges in the present appeal. I will call it the Council decision

Judicial Review

13. On 4th July 2002, Mr **Kenny** obtained leave ("the leave order") from the High Court (O'Caoimh J) to apply for judicial review of the Council decision. Mr **Kenny** claims that the Council permitted major changes to the permitted development. The decision was, therefore, made without or in excess of jurisdiction and *ultra vires.* I will examine these features of the Council decision in greater detail. The judicial review concerns essentially four aspects of the Council decision, namely:

1. The Council permitted compliance with Condition No. 2 by the omission of a floor other than the first floor of the western arm of Building No 3 as was required by that condition;
2. The Council approved the installation of boilers and boiler rooms in the roof spaces of buildings nos 2 and 3, which was not allowed by the permission and so as to alter the roof design and profile and to depart from revised plans submitted in October 1999;
3. The Council permitted an increase in the number of bed spaces permitted in building no. 3;
4. The Council permitted the laying of services and utilities within ten metres of the bole of trees and the erection of timber post-and-rail fences which fail to enclose the crown spread of trees which were to be retained.

14. Murphy J, by his judgment of 8th September 2004, refused the application for judicial review. The learned judge based his decision primarily on Mr **Kenny**'s delay in seeking judicial review together with the prejudice suffered by Trinity. The college openly carried out the development during the period of delay. Secondly, and alternatively, the learned judge concluded that, in any event, the agreement of the Council was reached within the scope of the conditions imposed in the planning permission.

15. Mr **Kenny**, in his notice of appeal, challenges the decision of the High Court both in respect of the finding of delay and the determination that the Council had, in its decision of 4th January 2002, acted within jurisdiction and *intra vires* the planning permission granted by An Bórd Pleanála.

16. The contested planning issues involve the interpretation of the planning permission and the limits to the discretion which may be exercised by the planning authority in approving compliance with conditions.

Legal principles

17. To begin with, some simple matters of common sense need to be mentioned concerning planning permissions. I make these preliminary remarks, because Mr

Kenny asks the Court to examine, at least in certain respects, the fine details of the development.

18. 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.

19. However, planning laws are not intended to make life impossible for developers, for those executing works such as architects, engineers or contractors or for the planning authorities in supervising them. Nor are they there to encourage fine-tooth combing or nit-picking scrutiny of the works. I will mention later one or two examples of this type of exercise in the present case. The exchange of affidavits amounts to some 300 pages.

20. While the planning authority or An Bórd Pleanála on appeal grants the permission, it is a common feature of permissions, especially for large developments, that additional detail is necessary in order to carry the development into effect and such detail, often in the form of further plans, drawings, specifications or other explanations, will require approval by the planning authority prior to commencement of the development. There is an obvious practical necessity for a procedure whereby matters of detail can be agreed between the planning authority and the developer. This ensures supervision but allows a degree of flexibility within the scope of the permitted development.

21. The distinction between the statutory and quasi-judicial function to grant permission and the ministerial function to approve details is clear as a matter of principle. It may be a difficult line to draw in practice.

22. It is obvious that neither the planning authority nor An Bórd Pleanála can determine each and every aspect of a development. The Board, in particular, determines the fundamental issues. Conditions frequently impose modifications on the developer and provide that the details be worked out in agreement with the planning authority.

23. In some cases, the planning authority may consider the detail provided in the application to be insufficient. In other cases, the planning authority or An Bórd Pleanála may decide to grant permission for a development provided changes are made. In such cases, the authority granting the permission will not draft the plans for the altered development. It will require the developer to do so. The practice of requiring plans, drawings or other details to be approved by the planning authority is both reasonable and practical. This division of function was approved by the Supreme Court in *Boland v An Bórd Pleanála* [1996] 3 I.R. 435, a case where an objector sought *certiorari* of the planning permission on the ground that the conditions involved an improper abdication of the functions of the planning authority. The scope of this faculty and its limits are described in the judgment of

Hamilton C.J., who referred, *inter alia,* to *"the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience..."*

24. There may also be questions of interpretation. The planning permission is a formal and public document. The applicant, the planning authority and the public have participated in a formal statutory procedure, leading to its grant. The permission enures to the benefit of the land on which the permitted development is to be carried out.

25. Consequently, the planning permission is to be interpreted according to objective criteria. The subjective beliefs either of the applicant or the planning authority are not relevant or admissible as aids to interpretation. (see *Readymix (Eire) v Dublin County Council,* Supreme Court, unreported 30th June 1974). The matter is well expressed in the following passage from Simons on *Planning and Development Law* (2nd Ed., 2007, paragraphs 5.06-5.07):

> *"A planning permission is a public document; it is not personal to the applicant, but rather enures for the benefit of the land. It follows as a consequence that a planning permission is to be interpreted objectively, and not in light of subjective considerations peculiar to the applicant or those responsible for the grant of planning permission. A planning permission is to be given its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."*

26. It follows from the principle of objective interpretation that the correct interpretation is a matter of law and can ultimately be decided only by the court. In *Gregory v Dun Laoghaire Rathdown County Council* (Supreme Court, unreported 28th July 1977), to which I will refer shortly in more detail, the respondent planning authority had submitted that the interpretation it had placed on a planning condition, even if erroneous, was reasonable. Murphy J, speaking for the majority of this court described that argument as *"unsustainable."* He explained:

> *"The proper function of the Council was the implementation of the condition imposed by the Board. If they erred in that regard the error was as to the nature of their duties rather than the performance thereof. The only power exercisable by the Council was to agree details in relation to the revision of plans on the basis of the implementation of the condition imposed by the Board. Any agreement reached without that condition having been fulfilled was necessarily* ultra vires *the Council."*

27. However, an objective interpretation will not provide the complete answer in every case. It is not a synonym of literal interpretation. All parties to the present appeal accepted the following statement of McCarthy J in *Re XJS Investments Ltd v Dun Laoghaire Corporation*, [1986] IR 750 at 756:

> *"Certain principles may be stated in relation to the true construction of planning documents:*

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.
(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning..."

28. A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even than the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context.
29. On this point, the case of *Gregory v Dun Laoghaire Rathdown County Council* is also helpful.

30. The interpretation of the condition in that case undoubtedly presented a difficulty. An application was made for retention of what was called a garage/loft. Permission was granted. An Bórd Pleanála, on appeal, imposed a condition as follows:

> "The proposed loft shall be omitted. The proposed garage shall be of a single storey construction. Revised details shall be agreed with the planning authority……"

31. The reason given was: "in the interest of residential amenity."
32. The planning authority agreed revised details, purportedly in compliance with the condition: the loft was to be omitted but the approved change led to no alteration in the height of the garage. The compliance order was challenged. Geoghegan J, upheld by the Supreme Court, considered that the agreement was not in compliance with the condition. He believed that the height of the structure, though not specified, was the main concern.

33. The Council argued, in defence of its decision, that the condition had been complied with: the loft was omitted; the garage was single storey. That was a literal approach. The Council argued that if the Board had intended that the height was to be reduced, *"it would have expressly so provided."* It had not done so. This Court, on appeal, relied heavily on the reason for the complaint which had been made by the objector, which had led to the imposition of condition. His only concern was with the height of the structure. He was not in any way concerned with the internal layout. Murphy J said:

> *"By imposing the condition in question they clearly required the reduction of the height of the structure by the removal of the loft area as shown on the plans before them and the second storey which constituted that loft. The omission or deletion of the loft was the means by which the reduction in height of the structure was to be achieved."*

34. Thus, the principle of objective interpretation excludes purely subjective considerations, such as the understanding of the developer or the planning authority, but it does not provide a result where a provision is unclear, ambiguous or contradictory.

35. The principle does not resolve the problem which, as I explain later, arises in respect of Condition No. 2, namely that the condition is, itself, contradictory or, at least, ambiguous. The *Gregory* case shows that the court does not confine itself to a purely literal interpretation of a condition. It will seek to ascertain its true meaning from its context in the planning process.

36. I turn then to a consideration of the four individual complaints made by Mr **Kenny**.

Removal of first floor

37. Condition No. 2 required that building No. 3 on the Dartry Road elevation be "reduced in height by the omission of the first floor…" The reason for the condition was the *"interest of visual amenity."*

38. It is common case that Trinity omitted a floor other than the first. The condition was interpreted by the Council as requiring that the overall height of the building be reduced by one floor.

39. The Council accepted that the option selected for compliance with Condition No. 2 "as illustrated in the compliance documents [was] an appropriate reflection of the intention of the Condition while maintaining the spirit of the proposal."

40. Mr **Kenny**, in his grounding affidavit, says that the "first floor was selected by the Board for omission because it protruded from the façade of the building and increased its domineering effect." It is worth noting, however, that Mr **Kenny**, in a memorandum of 22nd January 2002, addressed to the Assistant City Manager, stated: "the intention is clearly stated – to reduce the overall height by one storey."

41. Mr Declan McGrath, barrister at law, on behalf of Mr **Kenny**, submitted that it was not permissible, under the guise of a compliance order, to approve design changes. He distinguished the power of the court to decline to make an order pursuant to section 160 of the Planning and Development Act, 2000 where there have been immaterial departures from the terms of the planning permission. Condition No. 2 is, he says, clear on its face and very specific. The fact that no reason was given for the choice of the first floor for omission is immaterial and that the Council fundamentally misunderstood their role in dealing with compliance.

42. Trinity contends that the strictly literal interpretation of Condition No. 2 proposed by Mr **Kenny** would render the condition meaningless. The first floor and the two floors immediately above have identical layouts. On the other hand, externally the first floor steps out over a foot past the rest of the façade. This was a design feature intended to avoid flat façade monotony and is common to Buildings 1, 2 and 3. It is also intended to reflect the historical buildings on site. The Dartry Road elevation is described in all submitted documents as a "composite elevation." Design coherence and consistency was a requirement of the Council. Removal of the first floor would adversely affect consistency of the design. A complete redesign might be required.

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.

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.

45. It is of interest to contrast Mr **Kenny**' objection to the removal of the first (rather than another) floor of building no.3, with his acceptance of the modification, also through the compliance process, of the condition in relation to what became known as the "bookends" issue. The north wing of the west elevation of building Number 3 remained at five storeys, though the remaining western arm was reduced by one storey to comply with Condition 2, and although this was not in keeping with a literal reading of condition 2. Otherwise the visual amenity of the structure would have been adversely affected with the two bookends of the building being at different heights. Mr **Kenny** explained that he did not object to this departure from a literal reading of Condition No. 2 as follows:

> " Most people who are acquainted with compliance procedures appreciate that a planning authority in seeking to give effect to a Bord Pleanala planning permission condition, may be presented with a problem of design detail which arises from the condition, which is not material and which needs to be resolved with the Appellant. The above "bookend" case is an example of an issue which emerges from a Bord Pleanala condition producing a design problem. Residents could not reasonably object to the manner in which this design difficulty is resolved because it has to be resolved in good

> architectural design terms. Either both "bookends" are to be allowed to remain at their original height or only one is"

46. I cite this passage, not to turn Mr **Kenny**'s own words against him or to treat them as an admission, but rather because it consititutes an excellent explanation of the scope for resolution of a design difficulty.

47. Regrettably, it represents a rare example of balance and commonsense. I will give but one example of the type of trivial detail into which Mr **Kenny** would have the Court enter. 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.

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.

49. 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**.

<u>Boilers and boiler rooms in the roof spaces</u>

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.

51. Trinity states, however, that the architects' report submitted with the application in April 1999 had stated that "ancillary top-storey areas such as plant rooms, water stores and lift over-runs are designed to be discrete [sic, should be 'discreet'] and invisible from any point on the ground." Moreover, details of floor calculations were given in the October 1999 data. Thus it was clear that a number of plant rooms were to be located in the roof space, though originally intended for water storage, booster pumps and lift machinery. Thus the original submission of 1999 referred to plant to be located in roof-space plantrooms.

52. 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.

53. The circumstances as they progressed were described as follows in the compliance submission:

> *"Further to the leave application hearing, the progression of the project demonstrated that the plant areas in the roof space would be adequate to house boiler rooms and water storage facilities and that support plant rooms would not be required and the few locations indicated previously on the plans. These scattered supplementary plant rooms are therefore removed from the plans.*
>
> *As supplementary information to the Compliance documents, the submission includes for plant room layouts showing the under-roof areas at the upper floors. These areas will be as outlined in the planning report extract above: i.e. discrete* [sic] *and not visible from the ground. These plans were not included in the original October 1999 documents. Although it is not regular practice to include roofspace plans, their omission caused considerable confusion and their inclusion was considered appropriate in the interests of clarity*
>
> ***Solution/Response****:*
> *Plant is adequately housed therefore at the over-staircore areas under the roof an specifically on the courtyard side of the buildings in order to ensure that their volumes will not be apparent from street level. The plant areas are clad in zinc to match the roof finish and in no case break the ridge line of the roof."*

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.

55. 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.

56. 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.

57. Moreover, this very issue was the subject of a ruling by McKechnie J in the different legal context of Mr **Kenny**'s application for judicial review of the planning permission (***Kenny*** *v An Bórd Pleanála* [2001] 1 I.R. 565.) The learned judge expressed himself at some length on the topic. He recalled the planning process and the fact that the isssue of location of boilers had been discussed at the oral hearing. The following is a brief extract:

> *"Whilst I am satisfied that all of these matters were adequately dealt with at the oral hearing and that many are also suitable to be dealt with by agreement with the local authority, in addition could I say that I would set my face totally against such a microscopic examination by this court of such matters of details."*

58. That reasoning is at least equally applicable to the present appeal concerning judicial review of the compliance order. I treated the issue of the location of boilers at some length in my judgment in ***Kenny*** *v The Provost, Fellows and Scholars of the University of Dublin, Trinity College,* cited above in the somewhat different context of Mr **Kenny**'s claim that Trinity had fraudulently concealed their intentions regarding the issue from McKechnie J. I cited the same passage from the judgment of McKechnie J.
59. In my view, the complaint is without substance or merit.

<u>Permitting an increase in the number of bed spaces</u>

60. Mr **Kenny**'s complaint is that the number of bed spaces in building no.2 was increased from 308 to 324. In the affidavit he swore to ground his application for judicial review, Mr **Kenny** said:

> "The decision to relocate all plant to the roof spaces is linked to another significant departure from the 1999 plans, an increase in the bed spaces in building no. 2. This increase is addressed in the addendum to the Compliance Submission where it is argued by the architects that, although the 1999 plans indicated that building no. 2 would contain 300 bed spaces, this was a miscalculation and that the building would actually have contained 308 bed spaces. However, even if the architects are correct in that regard and I do not accept that the revised calculation is correct, the Compliance Submission indicated that building no. 2 would contain a revised total of 324 bed spaces. In relation to the increase of 16 bed spaces, it was explained that 6 arose from correctional actions to rectify design discrepancies and 10 from assigning an extra bedspace to an oversized room to achieve a desired bedroom mix."

61. The complaint does not relate to any aspect of the design or construction of the buildings or of building no. 2 in particular, but to the internal allocation of the use of space. Mr **Kenny** says that it constitutes a breach of Condition No. 1. On closer analysis, the following emerges.

62. According to both the public notice for the October 1999 proposal and the application then made, the development would incorporate:

> "3 no student buildings to contain 832 no bedrooms arranged in 180 no apartments over 3 to 7 storeys."

63. The scheme project total in all public notices refers to the overall total for the combined development and not to individual totals for individual buildings. The decision of An Bórd Pleanála to grant permission also refers only to the total number of bedrooms.

64. An appendix to the architects' original submission showed building 2 with a total of 300 bed spaces in 60 apartments. The compliance documents of August 2001 changed this to 324 bed spaces in 62 apartments. The removal of one floor from building 3 resulted in a reduction from 377 to 346 in that building. As explained in the preceding section, there were changes in the disposition of plant and boilers. This resulted in space becoming available for use as bedrooms. There were some alterations of internal layout.

65. There was no increase in the total number of bed spaces in the development.

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.

Laying of services and utilities within ten metres of the bole of trees

67. Condition No. 9 is quoted above. It is directed to the preservation of trees on the development site. Mr **Kenny** made two complaints in his application for leave, namely:

1. that Trinity had not complied with the requirement that services and utilities were not to be laid within 10 metres of the bole of any of the trees to be retained;
2. that Trinity had not observed the requirement that all trees being retained were to be protected during the development by a timber post and rail fence which shall enclose the crown spread of the trees.

68. 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.

69. The planning application involved "the retention of existing trees and the western arboretum and site perimeter and is accompanied by a comprehensive management plan for the treatment of existing and proposed trees."

70. The real focus is on the first requirement. Mr **Kenny** complains that Trinity persuaded the Council to permit non-observance of the condition in the case of some trees. Trinity made submissions to the Council along the lines that it was:

> *"neither useful, realistic nor practical in the interests of the development or of the trees on the site. A number of trees on the site will necessarily require more than the stipulated 10m tree protection zones. Others will never attain such a requirement throughout their lifespan..."*

71. It went on to suggest:

> *"Having examined this condition as potentially overly onerous in some cases under its current wording a professional and respected arborist was commissioned to assess each individual tree that the development appears to place in jeopardy and to advise on the potential impacts of the development and how best to adequately protect these specimens."*

72. It is clear that strict and literal compliance with the condition presented problems. It is equally clear that Trinity, with the agreement of the Council, has breached the condition to some extent.

73. The Council points out, however, that:

- some of the buildings, whose construction is permitted by the planning permission, are closer than 10 metres to the bole of a tree;
- there were some pre-existing services and utilities within 10 metres of the bole of a tree.

74. Trinity retained the services of a highly qualified arborist, Mr Joseph McConville, who has sworn a number of affidavits dealing with Mr **Kenny**'s complaints in great detail. The evidence shows that the 10-metre condition has been breached to a lesser or greater degree in the case of 16 out of 275 trees on the site. In many cases, the distance is still 7 or 8 metres, though in the case of two trees the distance will be 5 metres. Mr McConville has gone to great pains to demonstrate the extent of care taken to protect all trees, including those which will be within the 10-metre zone. The Council agreed the adjustment on that basis.

75. Mr McConville explains, for example, that services were laid as close as possible to buildings and that it would have been impossible to provide services without encroaching on the 10-metre distance.

76. It is clear, therefore, that, in a literal sense, there has been non-compliance with part of Condition No. 9, though to a very minor extent.

77. Mr **Kenny**, in written submissions, acknowledges the alternative means of tree protection proposed by Trinity, but insists that alleged difficulties in complying with the condition do not justify a departure from the clear and unambiguous terms of the condition and that, consequently, the Council acted *ultra vires* in approving the plans.

78. What is involved here is 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.

79. 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 approval of this aspect of the submissions forms a very small part of the entirety of the Council's decision. To accede to Mr **Kenny**'s application would require the Court to quash the decision in its entirety. It has not been suggested that this aspect of the decision is severable. Certiorari is a discretionary remedy. In my opinion, the Court should not grant an order of certiorari in respect of the entire decision based on such an inconsequential discrepancy. Furthermore, 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.

In addition, I will consider the issue of delay. The learned trial judge held that Mr **Kenny**'s application for judicial review failed, in any event, by reason of his own lack of promptness in applying to the Court.

Delay

80. Order 84, rule 21(1) of the Rules of the Superior Courts requires that all applications for judicial review "be made promptly" and in any event within three months from the date when the grounds for the application first arose, or six months when the relief sought is *certiorari*. The Court has power to extend the time where it considers there is "good reason" for doing so.
81. The decision of the Council was made on 4th January 2002. The application for leave to apply for judicial review was made on 3th July 2002. The leave order was made on 4th July. The application was thus, to the extent of one day, made within the permitted period of six months. Mr **Kenny**'s application can be rejected on delay grounds only if he failed to apply promptly. I addressed the issue of the need to move promptly in two cases, which have been cited to the Court in argument.

82. In *Dekra Éireann Teoranta v Minister for the Environment and Local Government* [2003] 2 IR 270 at page 302 I dealt with an application in the special context of judicial review of public-procurement decisions, where Order 84A, rule 4 of the Rules applies. That rule substitutes the expression "at the earliest opportunity" for the term "promptly," which applies in the present case. I said:

> *"The nature and extent of the burden to show "good reason" calls for some further remarks. The time to be explained by the applicant may commence to run within the period. This flows from the need to move at "the earliest opportunity". Nonetheless, a claim cannot normally be defeated for delay if it is commenced within the relevant period. There would need to be some special factor such as prejudice to third parties (The State (Cussen) v Brennan [1981] IR 181). Thus, different levels of importance may be attached to time falling within and without the*

period. The fact of delay within the period may affect the approach of the court to time falling without. The court must always have regard to the circumstances of the particular case and to the fact that the power to extend the time is there in the interest of permitting the courts to do justice between the parties."

83. In my judgment in *O'Brien v Moriarty* [2005] 2 ILRM 321 at 335, while observing on the somewhat stricter approach to compliance with time limits adopted by the courts in recent years, I said:

"Nonetheless, matters have not reached the stage where an application within time can be defeated in the absence of some special factor."

84. I then proceeded as follows:

"The prejudice to a third party, in the case of State (Cussen) v Brennan was singular. The prosecutor, by his delay, had allowed the successful candidate for the post he had applied for to act on foot of his appointment by, for example, giving notice of termination of his existing employment and instructing solicitors in the purchase of a new house. That case remains, nonetheless, a solitary example. I remain of the view I expressed in the Dekra case, namely that an applicant for leave to apply for judicial review will not normally be defeated for failure to move "promptly" where the application is made within the permitted time. The burden would be on the respondent to establish the contrary."

85. It is necessary, therefore, to consider whether Mr **Kenny**'s application should, as was held by the learned trial judge, be defeated on the ground of his lack of promptness in making his application.

86. As always, context is everything, but, in the context of a large development such as that on which Trinity was embarking the failure to apply until the eleventh hour, the second last day of the six-month period, cannot fail to attract attention.

87. There was already a significant history to this planning dispute. Mr **Kenny** had opposed the application throughout the planning process with determination and tenacity. He applied for judicial review of the decision of An Bórd Pleanála dated 4th August 2000. In order to do so, he had had to comply with the strict time limit laid down by section 82 (3A) of the Local Government (Planning and Development) Act 1963 as amended as amended by insertion by s. 19(3) of the Local Government (Planning and Development) Act, 1992. He had suffered the rejection of that application by McKechnie J in the High Court on 15th December 2000.

88. He concerned himself intensively, not to say obsessively, with the minutiae of the development. He made phone calls to and visited the planning offices of the Council. On one of his visits in September 2001, he learned of the first compliance submission made by Murray O'Laoire. He was so concerned about it that he wrote to the Council on October and November 2001.

89. There is a great deal of material in the affidavits and the exhibits which shows how active and aware Mr **Kenny** was as to what was happening on site. Of course, he lives immediately opposite.

90. From Mr **Kenny**'s grounding affidavit, it is clear that, on 4th January 2002, he was "concerned as to the increased activity on the site;" he observed that "work commenced in or about 7th January 2002."

91. On 10th January 2002 he said:

> "I obtained a copy of the compliance letter. I was shocked that the [Council] would issue a compliance letter on the basis of the revised plans and details submitted by the developer's architects which clearly, in my view did not comply with the conditions of the permission."

93. On 14th January, he wrote to the Senior Planning Enforcement Officer "drawing attention to the non-compliance with those conditions." He said: "If the development work currently being undertaken is not halted pending the outcome of the judicial review leave application, the financial consequences may be very serious for those who continue with such work." He sent a covering letter of the same date to the architects for Trinity enclosing copies of his letters to the Council. That appears to be the only form of contact he ever made with Trinity. His affidavit proceeds, most materially, on the delay issue:

> "In my letter of 14th January 2002.................I expressed my view forcefully that conditions 2, 8 and 9 of the permission had not been complied with and signalled my intention to apply for judicial review of the decision of the Council."

94. This correspondence demonstrates that Mr **Kenny** was fully aware that the Council, by its decision of 4th January 2002 had approved the compliance submissions provided by Trinity, that the terms of the decision were inconsistent with his own views of the proper interpretation of the planning permission and that Trinity was proceeding with the development.

95. He made no attempt to contact Trinity or their architects, other than by copying the latter with his letter of 14th January. He threatened judicial review, but did not follow through with his threat. Thereafter, he bombarded the Council with letters and phone calls. On 22nd January 2002, he sent a 24-page memorandum to Mr S. Carey, the Assistant Manager-Planning and Development. He received no comfort that the Council would accept his submissions. The Council stood over its decision.

96. Mr **Kenny**'s excuse is that, having applied unsuccessfully for judicial review, he was "extremely reluctant to bring another application." He sought instead to exhaust every avenue to avoid having to do so. At the same time, he thought the Council had not treated his complaints and enquiries seriously.

97. In the result, according to the architect for Trinity, by 4th July 2002, building no. 2 was 15% structurally complete and building no. 3 was 55% structurally complete. More particularly, the first floor of the western arm of building no. 3, which was the subject of Condition No. 2 was 100% structurally complete.

98. This is a particularly clear case of failure to apply promptly for judicial review. Knowing that the developer was acting contrary to his own views of the interpretation of the planning conditions, he allowed the matter to proceed. In full knowledge that "the financial consequences [might] be very serious…," he threatened judicial review but failed to follow through. He allowed matters to proceed to such a stage that they were irreversible. He has offered no plausible excuse other than his own reluctance to commence a fresh proceeding.

99. My primary view is that, apart from some doubt regarding the distance between a very small number of trees, and the bole of the nearest tree, Mr **Kenny** has failed to show any respect in which the Council's decision is not within the scope of the authority given to it by An Bórd Pleanála. The application is, therefore, without merit. In the unlikely event that the extent of non-compliance with Condition No. 9 could be considered of such significance as to justify quashing the decision, the application would fail on the ground of delay.

100. I would, for these reasons, dismiss the appeal and affirm the order of the High Court.