THE SUPREME COURT

[Supreme Court Appeal No: 2011/297]

MacMenamin J.

O'Malley J.

Baker J.

BETWEEN:

JAMES KENNY

APPELLANT

- AND -

PROVOST FELLOWS & SCHOLARS OF THE UNIVERSITY OF DUBLIN TRINITY COLLEGE

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 14th day of August 2020.

Introduction

1. This appeal relates to the development by Trinity College Dublin of Trinity Hall, a complex providing accommodation for students in the Dublin suburb of Dartry. It is a large development of some 25,000m^2, with apartments provided over three to seven floors in three new buildings (referred to as Buildings 1, 2 and 3) in the grounds of the existing listed building. The appellant has been engaged in litigation about the development, with this respondent and with other parties, for over 20 years.

2. The appeal is against the decision of the High Court (Feeney J.) to strike out the appellant's application for an order under s.160 of the Planning and Development Act 2000. As explained in the judgment of Feeney J., he considered that the issues raised by the appellant had either been definitively decided in the course of related proceedings, or should have been raised earlier, or were insignificant, to the point that continuation of the litigation amounted to an abuse of process (see [2011] IEHC 202).

3. There have already been a great many written judgments in the course of the appellant's pursuit of litigation about the Trinity Hall development. I do not propose to summarise them all here, or to provide a full history of all of that litigation, but it is necessary to examine in detail some of steps taken and judgments delivered for the purpose of analysing certain of the arguments made in this appeal. For the avoidance of doubt, I stress that I am not attempting to provide a full account, but am selecting here only such details as I consider relevant for the purposes of this judgment.

Section 160 of the Planning and Development Act 2000

4. To put what follows in context, it is necessary to bear in mind that the application is one for relief under s.160 of the Act, as amended. The section applies where an "unauthorised" development has been, is being or is likely to be carried out or continued. In such circumstances a planning authority or any other person may apply to the High Court or to the Circuit Court, depending upon market value, and the court may make any order it considers necessary to ensure, as appropriate, that the unauthorised development is not carried out or continued, or that the land is restored to its previous condition, or that the development is carried out in conformity with the permission pertaining to that development. An application for an order under the section is made by way of motion and there is no provision for formal pleadings in the absence of a direction, where considered necessary, by the court.

5. The making of an order is a matter within the discretion of the court. In *Meath County Council v. Murray* [2018] 1 I.R. 189 and *An Taisce v. McTigue Quarries* [2018] IESC 54 this Court identified the following factors as matters to be taken into account :–

    a. the nature of the breach, which may range from minor, technical and inconsequential up to material, significant and gross;

b. the conduct of the developer, its attitude to planning control and its engagement or lack thereof with the process;

c. the reason for the infringement, which may range from general mistake, through to indifference, and up to culpable disregard;

d. the attitude of the planning authority – this is a factor which may be important although not necessarily decisive;

e. the public interest in upholding the integrity of the planning and development system;

f. the public interest in relation to, for example, employment for those other than the transgressor, or the importance of the structure or activity in question (such as infrastructural facilities or services);

g. The conduct and, if appropriate, the personal circumstances of the applicant;

h. The issue of delay on the part of the applicant, even if the application is made within the statutory period, and of acquiescence;

i. The personal circumstances of the respondent; and

j. The consequences of any such order, including the hardship and financial impact on the respondent and third parties.

Background

6. Planning permission for the development was granted, subject to a number of conditions, by Dublin Corporation (now Dublin City Council, and referred to hereafter as "the Council") in November 1999. Trinity had originally sought permission for ten buildings, but the basis for the permission ultimately granted was the revised plans, for three buildings, submitted by Trinity in October 1999. The appellant, along with some other local residents, objected to the proposal and appealed to An Bord Pleanála. On the 4th August 2000 the Board also decided to grant permission, subject to 19 conditions.

7. It may be noted at this point that the conditions included, at No. 1, a standard stipulation that the development was to be carried out in accordance with the revised plans submitted in October 1999 save where otherwise required by the other conditions. This condition was imposed in the interest of clarity. Condition No. 8 required the submission by the developer of revised drawings, with floor plans and elevations corresponding in detail, to be agreed by the planning authority prior to the

commencement of the development in the interest of orderly development. Condition No. 2 was the only one that referred specifically to any of the new buildings. It required the omission of the first floor of the western arm of Building No. 3, in the interest of visual amenity.

8. It is of some tangential relevance that one of the conditions imposed by the Council would have required a design alteration to the profiles of the buildings, to provide for "stronger roof profiles with pitched surfaces". The Board disagreed with that proposal, and no redesign in this regard was necessitated by its permission.

9. The appellant then sought leave to apply for judicial review of the Board's decision to grant permission. Leave was refused, after a full *inter partes* hearing, in a judgment delivered on the 15th December 2000 by McKechnie J. (see *Kenny v. An Bord Pleanála (No.1)* [2001] 1 I.R. 565) on the basis that the arguments raised did not meet the necessary threshold of "substantial grounds" under s.82(3)(a) of the Local Government (Planning and Development) Act 1963. McKechnie J. later refused leave to appeal against his decision.

10. The appellant subsequently expended a great deal of fruitless effort, over many years, in attempting to have this judgment, and various related and mounting costs orders, set aside on grounds ranging from allegations of fraud to claims that permission for the development was given in breach of EU law. These efforts led in 2006 to the making (by Clarke J.) of an Isaac Wunder order against the appellant, precluding him from bringing any further proceedings against Trinity or the Board without the leave of the court. However, that order obviously did not affect proceedings and appeals that were already in being.

11. In the meantime, in 2001, Trinity had made a compliance submission to Dublin City Council in relation to the conditions attached to the permission. The Council issued a compliance order on the 4th January 2002, confirming that Trinity had complied with the terms of the permission. On the 3rd July 2002 the appellant was granted leave to seek judicial review in respect of this decision ("the compliance judicial review"). Later that month, on the 17th July 2002, he issued the instant proceedings seeking orders under s.160 of the Act ("the s.160 application").

12. It is also relevant to note that in November 2002 the appellant issued a plenary summons claiming *inter alia* an injunction restraining Trinity from completing the development and, in particular, from locating the boilers in the roof spaces of the buildings, and an order directing the rehearing of the original judicial review. An application by Trinity to have these proceedings as being frivolous, vexatious and an abuse of process, or as being bound to fail, was unsuccessful in the High Court. However, Trinity's appeal to this Court was allowed in April 2008 and those proceedings were dismissed (see [2008] IESC 18).

13. The compliance judicial review and the s.160 application were eventually listed for hearing on the same day in March 2004. However, a decision was made in the High Court to deal with them separately and the judicial review was heard first. The claims therein were dismissed by Murphy J. on the 19th October 2004. The appellant appealed against that decision. In March 2009 this Court dismissed the appeal (see [2009] IESC 19).

14. Thereafter, in reliance on that judgment, Trinity issued a motion to dismiss the s.160 application pursuant to the inherent jurisdiction of the court on the basis that it was moot, *res judicata*, bound to fail and/or frivolous and vexatious and an abuse of process. That application was acceded to by Feeney J. on the 15th April 2011 (see [2011] IEHC 202). It is against that decision that this appeal is taken.

15. Before considering the issues in this appeal it will be necessary to determine with some precision what has been decided in the litigation to date. In the summaries that follow, I have for the most part omitted reference to the arguments made by the respondents and notice parties since the issue before this Court largely relates to the case made in earlier proceedings by this appellant. Further, I do not propose to consider in any detail the various judgments dealing with the allegations of fraud for this purpose, as they have undoubtedly been determined to the point of finality.

The judgment in the first judicial review

16. Two matters of relevance need to be noted about the judgment in these proceedings. The first is that the appellant had challenged, *inter alia*, the breadth of Condition No. 8 (which required the submission of revised plans with floor plans and elevations), arguing that it permitted development at large and was therefore *ultra vires*. That

argument was rejected. McKechnie J. held that the condition was intended to deal with discrepancies and ambiguities in the plans that had been noted by the inspector in the oral hearing, and did not in any significant way modify Condition No. 1.

17. The second relevant feature of the judgment is that it is clear that the issue of the boiler facilities was raised and thoroughly argued. It appears that, in brief, the appellant's complaint was that Trinity had provided no plans or drawings to the Board in respect of boilers, but at different stages had variously indicated that it might place them in basements under the buildings or might construct a central boiler facility on the site. The appellant contended that the Board had not been provided with sufficient information for the lawful exercise of its jurisdiction.

18. McKechnie J. accepted that there had been some confusion on this issue, but found that it was abundantly clear that, in fact, a decentralised system was being sought and all parties had made observations on this aspect. The dispute in the oral hearing before the inspector had concerned matters such as the precise location of the plant rooms, whether they were of sufficient size and what the height of the flues should be. McKechnie J. was satisfied that all of these matters had been adequately dealt with at the oral hearing, where the inspector had ruled out the possibility of placing the boilers in the basements. (The planning permission did not permit the construction of basements.) The trial judge considered that such issues were suitable to be dealt with by way of agreement with the local authority. He was also satisfied that the original plans submitted to the Council showed plant rooms in the buildings. In any event, he stated firmly that he considered it to be inappropriate for the court to become involved in such microscopic examination of matters of detail.

19. In plenary proceedings issued against Trinity in November 2002, the appellant (unrepresented in those proceedings) sought to have this judgment set aside on the grounds that McKechnie J. had been misled by the evidence adduced by Trinity as to the location of boilers in plant rooms. He also sought an injunction restraining the developer from completing the development and in particular from locating the boilers in the roof spaces of the buildings. In the statement of claim (as amended in February 2008) it was pleaded that Trinity had persuaded McKechnie J. that it intended to place boiler houses at various locations around the development, while not

in fact intending so to do. It had also concealed the fact that it had informed the Fire Prevention Section of the Council that boilers would be located in the basement of one of the buildings. It was also pleaded that no plans or drawings relative to boilers had been submitted to the Board for its consideration, and that the lack of information as to environmental impact, required by EU law, vitiated the Board's decision.

20. The High Court rejected an application by Trinity to have these proceeding struck out. In allowing Trinity's appeal, this Court confirmed that, having regard to the terms of the statute, the judgment of McKechnie J. was "final" for the purposes of the principle that a final judgment can only be set aside upon proof of fraud. It was accepted that the appellant had alleged a sufficient degree of fraud or dishonesty for this purpose. However, the Court rejected the contention of the appellant that there had been fraud on the part of Trinity (see [2008] IESC 18). It was noted that the adequacy of the treatment of the boiler issue had been at the heart of the first judicial review. McKechnie J. had made it clear that he was conscious of the dispute, and that he did not consider it to be a matter to be resolved by the court but as something to be decided within the planning process. In the circumstances, it was clear that the fire safety certificate application would not have materially affected his judgment, and the appellant's proceedings were therefore bound to fail.

21. The judgment refers to the fact McKechnie J. expressly recorded that an argument had been raised as to compliance with EU law, but that counsel had been unable to specify any breach thereof.

22. I will record here that during the period of time that this matter was before the courts, the appellant issued two other sets of plenary proceedings seeking to set aside the judgment of McKechnie J., again on grounds of fraud. One was struck out in March 2004, by Murphy J. The third was based on allegation that a photomontage submitted to the planning authorities was fraudulently misleading. It was struck out by Clarke J ([2006] IEHC 131), who also made an order prohibiting the appellant from issuing any further proceedings against Trinity or the Board without the leave of the court.

The Compliance Judicial Review

23. The compliance decision, issued by the Council on the 4th January 2002, stated that the details submitted by Trinity's architects were satisfactory and complied with the

requirements of Conditions Nos. 2, 6, 7, 8, 9 and 17 of the permission (these being the matters which were required by the Board to be the subject of proposals to be agreed by the Council).

24. In his challenge to this order, the appellant (who was supported by affidavits sworn by a Mr. Anthony Gallagher, a locally-resident architect who was one of the founder members of the association of residents opposed to the development) claimed that it was made in excess of jurisdiction and was *ultra vires* as permitting major changes to the development. In particular, it was pleaded in the statement of grounds that the Council had acted in excess of jurisdiction in finding that Conditions 2,6,7,8,9 and 17 of the Board's permission had been complied with. The claim was dismissed in the High Court, by Murphy J., and the appeal against that decision was dismissed by this Court on the 5th March 2009, with judgment being delivered by Fennelly J. ([2009] IESC 19).

25. The statement of grounds referred to the fact that a number of the conditions imposed by the Board had necessitated the submission of various details and drawings to the Council. Condition 2, the omission of the first floor of Building No. 3, required revised drawings incorporating this modification. Condition No. 8 required revised drawings of the development, with floor plans and elevations corresponding in detail. Condition No. 9, the protection of trees during the development, required the submission of detailed measures. In addition, Condition No. 1 directed that the development be carried out in accordance with the October 1999 revised plans, except where otherwise required.

26. The statement of grounds then went on to claim declaratory reliefs in relation to four specific elements of the proposals made by Trinity, all of which were said to amount to unlawful material alterations to the permission. The first of the specified complaints was that the Council had permitted compliance with Condition No. 2 by the omission of a floor other than the first floor of Building No. 3. The second was that it had 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, so as to alter the roof design and profile and to depart from the October 1999 plans. The third was that it permitted an increase in the number of bed spaces in Building No. 3. The fourth was

that it had permitted the laying of services and utilities within ten metres of the bole of trees, and the erection of fences that did not protect the crown spread of the trees.

27. The appellant's grounding affidavit exhibited the compliance submission, dated August 2001, along with an addendum thereto dated November 2001, and the compliance decision, all of which he said that he had obtained by mid-January 2002.

The judgment

28. Before dealing with the specific issues raised by the appellant, Fennelly J. found it necessary, in the context of a case where the Court was being asked to examine the "fine details" of the development, to refer to "some simple matters of common sense".

> *"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 works…*
>
> *20. While the planning authority or An Bord 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."*

29. Fennelly J. noted that where it was decided to grant permission provided changes were made to the proposal, the authority granting the permission did not itself draft the plans for the altered development. The developer would be required to do so, and the practice of requiring drawings, plans and other details to be agreed with the planning authority was both reasonable and practical.

The omission of a floor

30. It was certainly the case that the Council had permitted compliance with Condition No. 2 by the omission of a floor from Building No. 3 other than the first floor. In so doing, it had accepted that the removal of that floor would affect the consistency of the design, and had taken the view that the alteration was an appropriate reflection of the Board's intention while maintaining the spirit of the proposal. The appellant contended that this was not permissible, and further complained that changes had been made to the roof details and the pitch of the roof, with the result that the building had not been reduced by one storey, or about 3m, as required but was only 2.5m lower. In his final affidavit for the purpose of the compliance judicial review, the appellant argued that the pitched roofs now being put in place reflected the original wishes of the Council, and not the decision of the Board.

31. Trinity denied that the altered roof pitch affected the height, and argued that the pitch of the roof was as had been indicated in the October 1999 section drawings. There had been an error in the elevational drawings which had been corrected in the addendum to the compliance submission. This also explained a minor change in roof pitch, because a steeper roof-pitch in set-back areas was necessary to ensure that eaves and ridge heights were consistent across the building elevations.

32. The Court found that the condition was ambiguous, but that the evidence indicated that its true objective was the reduction in the height of the building, which had been achieved. Fennelly J. accepted that this prevented an unsightly flat fascia and that it did not affect the height of the building. He regarded the complaint that the roof pitch had been altered, with the effect that the building had not been reduced in height by one storey, as a "trivial detail". The Court accepted that the pitch was as indicated in the October 1999 plans and addendum, and that a minor change had been necessitated in set-back areas. It did not affect the height of the building.

33. It is, I think, important to mention two other observations of Fennelly J. when dealing with this issue. The first was that he did not believe that the judicial review process was intended to lead the courts into "such intricate matters of design detail or scrutiny of the planning and development process". The second was that the appellant's argument that the problem could only be solved by a fresh application for permission, based as it was on a literal reading of the conditions, was "unrealistic and pointless". The only thing that would be achieved by the order sought by the appellant would have been a change in the profile of the building.

Boilers and boiler rooms in the roof spaces

34. The Council had approved the installation of boilers and boiler rooms in the roof spaces of Buildings Nos. 2 and 3. The appellant maintained that the October 1999 plans did not provide for any use to be made of these spaces and expressed concern about the potential visual impact, consequent changes to the roof pitch and profile and noise and air pollution. He claimed that it departed from the revised plans submitted in October 1999.

35. Trinity relied upon the fact that plans submitted in April 1999 had referred to ancillary top-storey areas such as plant rooms, which were designed to be discreet and invisible from any point on the ground. The floor calculations submitted with the October 1999 plans made it clear that plant rooms would be located in the roof space. It was noted that it was not usual practice to include roof space plans, but their earlier omission had caused confusion in the judicial review proceedings and they were now included in the interests of clarity. The accompanying submission also stated that the original planning application was being retained unless inconsistent with the revised submission (i.e. the October 1999 plans).

36. Fennelly J. found the appellant's complaint on this aspect to be without merit. He accepted that the October 1999 plans did not address the location of the boilers. However, the original plans submitted to the Council had envisaged that plant rooms would be located in the roof space, and features of those plans were carried over in the October 1999 plans unless inconsistent with them. They were specifically addressed in the compliance submission. The installation of the boilers in the roof-space did not require planning permission, since the notion of "plant" was wide

enough to include boilers of the sort installed. Contrary to the appellant's contentions, the location of the boilers had had no impact on the roof pitch or profile. The matter of their precise location was an eminently suitable matter for agreement with the planning authority, pursuant to condition No. 8.

37. The judgment refers to the fact that the issue had been the subject of a ruling by McKechnie J. in the first judicial review, and his comment about the undesirability of such microscopic examination being undertaken by the courts was seen as equally applicable to the judicial review of the compliance order.

Increase in the number of bed spaces

38. The complaint here was that the number of bed spaces in Building No. 2 had increased. This had not involved any change in the design or construction of the building, but resulted from an alteration in the internal allocation of the use of space. However, there was no increase in the total number of bed spaces across the development.

39. Fennelly J. referred in this context to Condition No. 8, noting that it was imposed in the interest of orderly development to require the submission of revised drawings of the development, for agreement by the Council. He found that minor adjustments to the number and location of bed spaces, which followed from other "natural, normal and reasonable" alterations were matters of detail and were "most appropriate" to be dealt with in the compliance procedure. The appellant had 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 heading.

The laying of services and utilities

40. Condition No. 9 of the permission granted by the Board stipulated that existing trees were to be retained, and that services and utilities were not to be laid within ten metres of the bole of any such tree. The developer was to submit details and agree the measures necessary to protect the trees. All trees to be retained were to be fenced in a manner that protected their crown spread during the development.

41. The appellant complained that the Council had permitted the laying of services and utilities within ten metres of the bole of trees and that the erection of timber post-and-rail fences during the development failed to protect the crown spread.

42. Fennelly J. observed that it was accepted that the condition had been breached in respect of some of the trees. However, on the evidence the extent of the non-compliance with the literal terms of Condition No. 9 was very minor. The Court would not grant *certiorari* of the entire decision based on such an inconsequential discrepancy. Fennelly J. remarked that the possibility remained that this issue could be pursued in the s.160 application, although he expressed no view on the merits of that course.

Delay

43. As well as holding that the complaints of the appellant did not justify the quashing of the compliance decision, Fennelly J. considered that the application for judicial review should fail on grounds of delay. The compliance order had been issued on the 4th January 2002, but the appellant had not moved his application until the second-last day of the then-applicable six-month time limit in respect of applications for *certiorari*. The appellant had said that he had been reluctant to initiate fresh proceedings after losing the first judicial review, and that he had instead tried to get the Council and local elected representatives to take action.

44. In discussing this aspect, Fennelly J. noted that by January 2002 there was already a significant history to the dispute, with the application for leave in respect of the grant of permission by the Board having been determined in December 2000. He described the appellant as having concerned himself "intensively, not to say obsessively" with the development. In his grounding affidavit he had averred that he had noticed increased activity on the site from the 4th January 2002 and that work had commenced on the 7th January 2002. He had obtained a copy of the letter with the compliance decision on the 10th January 2002 and had written to the Senior Planning Enforcement Officer about it almost immediately. He was therefore aware that the Council had approved the compliance submissions, that the terms of its decision were inconsistent with his own interpretation of the planning permission and that Trinity was proceeding with the development. The evidence was that by the 4th July 2002

Building No. 2 was 15% structurally complete. Building No. 3 was 55% structurally complete, and the first floor of its western arm was 100% structurally complete.

45. Fennelly J. observed that in the context of a large development such as this, waiting until the second-last day of the six months "could not fail to attract attention". In the circumstances, the Court considered that this was a particularly clear case of failure to act promptly. The applicant had allowed matters to proceed to such a stage that they were irreversible, and had offered no plausible excuse other than his own reluctance to commence a fresh proceeding.

46. In his concluding remarks, Fennelly J. stated that his primary view was that, apart from some doubt regarding a very small number of trees, the appellant had failed to show that there was any respect in which the Council's decision was not within the scope of the authority given to it by the Board.

47. I have noted above that the appellant was supported in the compliance judicial review by Mr. Gallagher, who swore three affidavits in the matter between October 2002 and the end of January 2003. Certain aspects of his evidence in those proceedings are relevant to the issues now before the Court.

48. In his first affidavit, in October 2002, Mr. Gallagher referred *inter alia* to the averment made on behalf of Trinity that the alteration to the roof pitch of Building No. 3 did not affect the height. Mr. Gallagher stated that he could not comment on this in the absence of drawings, and "reserved" his position on the point. In a later affidavit he complained again that the exhibits to an affidavit sworn by Trinity's architect did not include the correct elevation drawings, without which the height and bulk of the buildings could not be appreciated. Trinity's architect had made the point that roof ridge heights were not given in the drawings. In her view it sufficed if the building was described in parapet heights, since those were the physical boundaries of the buildings that would be perceived by the public. Mr. Gallagher disagreed with that approach. He also asserted, without giving any detail, that the height of Building No. 2 (which was not complete at that stage) was being increased beyond its permitted height.

The s.160 Application

The Notice of Motion and Grounding Affidavit

49. As already noted, these proceedings were initiated on the 17th July 2002, shortly after the commencement of the compliance judicial review. The notice of motion claimed some 15 orders pursuant to the section. There is a degree of repetition in the reliefs sought but most of them are aimed at restraining further development at the site other than in accordance with the planning permission granted by the Board, with particular reference to Condition No. 1 (the general condition requiring Trinity to carry out the proposed development in accordance with the revised plans submitted to the Council in October 1999, except where otherwise required by the remaining conditions), Condition No. 2 (the removal of a storey from the western arm of Building No. 3) and Condition No.9 (the retention and protection of the trees).

50. Paragraphs 10, 11 and 12 of the notice seek orders prohibiting i) the installation of boilers or boiler rooms in the roof spaces of Buildings 2 and 3, ii) an increase in bed spaces in Building No. 2 and iii) the laying of services and utilities within ten metres of the boles of trees, or the erection of post and rail fences that did not enclose the crown spread of the trees, without a further grant of permission in each respect.

51. Paragraph 13 seeks an order that the lands be restored to their condition prior to the commencement of the unauthorised development. Paragraph 14 seeks the removal of any services or utilities laid within 10 metres of the bole of trees, and paragraph 15 seeks the reinstatement or restoration of any trees, that existed on the lands as of the date of the grant of permission but had not been retained.

52. The first affidavit sworn by the appellant, on the 17th July 2002, made the claim that Trinity had carried out or intended to carry out the development otherwise than in accordance with Conditions Nos. 1, 2 and 9 of the permission. He referred to the compliance order, and described it as merely evidencing the opinion of the Council, without being an impediment to a finding by the court that the permission was not in fact complied with. He also referred to the fact that he had obtained leave to seek judicial review in relation to it.

53. The precise allegations made in the application related to Conditions Nos. 1, 2 and 9. The claim made in respect of Condition No. 1 was that it was clear from the compliance submission that Trinity had carried out, was carrying out or intended to carry out the development otherwise than in accordance with the revised October 1999 plans. The first specific claim related to the location of the boiler installation and relocation of plant rooms. Here, the appellant referred to the disputes about the boilers during the oral hearing and in the first judicial review. The October 1999 plans had not indicated their location and therefore did not authorise their placement in the roof spaces of any of the buildings. The proposal made in the compliance submission in this regard constituted a material variation and was, therefore, unauthorised development. The appellant stated that he was particularly concerned about the visual impact of the relocated installations, the consequent changes to the roof pitch and profile and the potential for noise and air pollution.

54. The next issue was the increase in bed spaces in Building No. 2, from 308 to 324. The appellant characterised this change as intensification of use with considerable implications for noise levels in the vicinity, and therefore as a material variation and a breach of Condition No. 1. It could not be covered by Condition No. 8 (the requirement to submit revised drawings with floor plans and elevations corresponding in detail) and the Council was not empowered to approve it.

55. The appellant then alleged that Condition No. 2 had not been complied with, in that the compliance submission provided for the omission of a floor other than the first floor. Further, the pitch of the roof had been changed with the result that the reduction in height of one storey had not been achieved.

56. In relation to Condition No. 9, the appellant cited the view expressed by the development architects in the compliance submission that the requirement was "neither useful, realistic nor practical" in that some trees would require greater protection and others would not require 10 metres. It proposed to retain an arborist to assess each individual tree. The appellant argued that it was not permissible to derogate from the condition as imposed. He also averred that services and utilities were being laid within the 10-metre zones and that the trees were not being protected with fencing of the kind stipulated.

57. It may be noted here that the affidavit describes frequent attendance by the appellant at the public office of the Council for the purpose of inspecting the file on the development. He was aware of the submissions made by the architects and, having seen the compliance decision on the 10th January 2002, engaged in correspondence with the Chief Planning Officer, the Planning Enforcement section and the City Manager in an effort to have enforcement action taken by the planning authority in respect of what he believed to be the unauthorised development.

58. The following year saw a prolonged sequence of affidavits from both sides. It is neither necessary or helpful to summarise them all here, particularly where they deal with the issues specified in the grounding affidavit or with extraneous issues no longer of any relevance, but certain matters need to be highlighted.

59. Affidavits sworn on behalf of the respondent in 2002 complained of the appellant's delay in initiating the s.160 application, in similar terms to the case made by the respondent in the compliance judicial review. In addition to responding to the specific issues raised in the notice of motion and the appellant's affidavit, it was averred that works had been proceeding at a very accelerated pace, in part to counteract earlier delays caused by *inter alia* the appellant's earlier unsuccessful judicial review. Information as to the stage various parts of the development had reached was, in affidavit sworn in September 2002, provided in similar terms to the evidence considered by Fennelly J. in the judgment referred to above. The appellant was accused of withholding material information from the court, in failing to explain the extent of the work already done, and complained of the irreparable harm that would be done if the court were to intervene. It is relevant to note here that Building No. 1 seems to have been the last of the three buildings to be commenced. As of the 10th July 2002 it was, according to the respondent, "approximately 2% complete".

60. In response, the appellant denied any delay on his part and challenged the suggestion that any damage to Trinity could be attributable to him, rather than to its proceeding with unauthorised development. Further, he averred that he had not been allowed to enter the site and all that he knew about the progress and extent of the works was what was apparent from looking over the top of the hoarding surrounding it. It

appears that he could see Building No. 3 from his house, but had no view of the development works on Buildings Nos. 1 and 2.

61. The affidavits sworn by the appellant in 2002 and 2003 concentrated largely on the same issues as the grounding affidavit. The boilers, the removal of a floor from Building No. 3, the bed spaces, the roof pitch and the trees were the subject of intense dispute.

62. Mr. Gallagher swore a number of affidavits in support of the appellant. Apart from taking issue with Trinity's interpretation of the conditions attached to the permission, and its view of the respective roles of the Board and the Council, Mr. Gallagher's attention was, at least initially, focussed on the same matters as the appellant's.

63. However, it may be noted that in November 2002 Mr. Gallagher averred that he had compared a drawing of Building No. 3, as submitted in the compliance process, with the equivalent drawing from the plans seen by the Board. He said that his "recollection" was that there was a difference in roof pitch that added 0.5m to the height, so that the removal of a storey would not result in a full 3m reduction. However, as subsequently developed, his main point was that he considered that the development as built reflected the Council's original condition requiring a pitched roof with parapet walls, which had not been endorsed by the Board.

64. The respondent's architect took the same position on this as in the compliance judicial review – that the overall height of a building is determined by the height at eaves level rather than at the peak of the roof. Again, Mr. Gallagher stated that he reserved his position on this until he had sight of the relevant drawings.

Discovery

65. After the dismissal of the compliance judicial review by the High Court in September 2004, and while that matter was under appeal, the appellant sought discovery in the s.160 application. In an affidavit sworn for this purpose, he stated that, while the proceedings had overlapped to some extent, he believed that it was evident that the s.160 application concerned issues not covered by the judicial review. In particular, he referred to his contention that the respondent was not complying with Condition No. 1. He averred that the development had been fully, or at least, practically completed

and was currently occupied by students. He therefore wanted to see the "as built" drawings in order to compare them with the drawings submitted in October 1999. The application was successful, and he obtained an order to this effect on the 18th April 2005.

66. An affidavit of discovery was then filed in June 2005 on behalf of the respondent, in which it was averred that the only "as built" drawings in existence related to Buildings Nos. 2 and 3. These drawings had been commissioned in 2003 for, it was said, the sole purpose of the compliance judicial review. Privilege was claimed for them on that basis.

67. Disputes about discovery appear to have continued for quite some time. In an application for further and better discovery, drawings were sought relating to changes to the roof pitch and profile of each of the three buildings and consequent increases in height. This was objected to by Trinity on the basis that there was no reference to this issue in the notice of motion, and no mention of Building No. 1 at all. Further, it was asserted that the issues in the s.160 application had effectively been dealt with in the compliance judicial review. While that decision was under appeal, the appeal had not been progressed.

68. In response, the appellant expressed the view that, under the terms of the permission granted by the Board, the Council was restricted to giving its agreement to Building No. 3. It could not have authorised the "substantial alterations" to Nos. 1 and 2, and the High Court had not ruled that it could. He averred that it was clear that the respondent had engaged in further unauthorised development after the s.160 application had been instituted, and that the full extent of its breach of planning permission could not have been demonstrated at the time it was instituted. He believed that the Court had discretion to grant relief in respect of breaches that came to light in the course of the proceedings.

69. It appears that Dunne J. was not, at that stage, prepared to accept that the s.160 application was moot, and a further discovery order was made on the 19th October 2006. However, she was concerned about the respondent's evidence that it had approximately 6,500 drawings prepared in connection with the development (although not "as built" drawings) that might be captured by the order. She directed that before

the order was perfected the appellant should write to the respondent setting out what documents were required, and anticipated that they should number no more than 50 or 60. She considered that Building No. 1 was not relevant, in that it was not covered by her earlier discovery order.

70. Correspondence about the discovery issue appears to have continued as late as December 2007. The parties did not succeed in agreeing the basis for discovery, and this lack of agreement may have been the reason why the order of Dunne J. was never perfected. In any event, it appears that the respondent never did lodge an appeal against the order. However, it is relevant to note that in the course of the correspondence, the appellant's solicitor wrote to Trinity's solicitor on the 20th October 2006 setting out what he saw as the issues between the parties. These were:-

    - The location of the boiler installations "generally", and specifically the location of flues on the roofs and the relocation of boilers to the roof spaces of Buildings nos. 2 and 3;
    - Changes to the pitch and profile of the roofs of Buildings Nos. 2 and 3;
    - The relocation of plant rooms in Buildings Nos. 2 and 3;
    - The increase of bed spaces in Building No. 2, and;
    - The omission of the first floor of the western arm of Building No. 3.

71. In response, Trinity's solicitor took issue with the use of the word "generally", and referred to Dunne J.'s statement that Building No. 1 was not involved in the proceedings. The appellant's solicitor accepted this, in a letter dated the 25th April 2007.

The application to stay and application to file further affidavits

72. On the 3rd April 2007 the respondent issued a motion seeking to stay the s.160 proceedings pending the determination of the Supreme Court appeal in the compliance judicial review. In the affidavit grounding the application it was again asserted that the matters, the subject of the proceedings, had been determined in the compliance judicial review, that there were "no or very limited outstanding issues" and that the s.160 application was essentially moot. However, it was accepted that this

was a matter for legal submission. It was stated that the discovery order made by Dunne J. would be appealed when perfected.

73. On the 10th May 2007 the appellant issued a motion seeking liberty to file and deliver two affidavits, one sworn by himself and the other by Mr. Gallagher. The purpose was to put before the court evidence showing, in the view of the deponents, breaches of the planning permission that come to their attention since the appellant's last affidavit was sworn in late 2003.

74. The two motions were listed for hearing together in October 2007. However, they were not determined at that point, with Feeney J. deciding to adjourn them both pending the decision of the Supreme Court in the compliance judicial review.

75. It is necessary for the purposes of this appeal to refer to the affidavit of Mr. Gallagher sought to be filed by the appellant. This was sworn on the 9th May 2007. I note that in paragraph 2 of the affidavit Mr. Gallagher averred to the fact that he was familiar "with all of the Trinity Hall plans and drawings" from his participation in the Board's oral hearing, and from submitting affidavit evidence in respect of those plans and drawings for Buildings Nos. 1, 2 and 3 in the original judicial review.

76. He averred that in late 2003 (approximately four years earlier) he and the appellant had noticed that Building No. 1, which at that stage was nearing completion, appeared to be higher and to have a different profile to that shown on the plans approved by the Board. He therefore started work on a comparison between those plans and the plans submitted for the compliance process. For this purpose, he engaged members of the staff of a firm of architectural draughtsmen, ASL, to compare the two sets of plans. This work was, it appears, carried out in early 2004.

77. Mr. Gallagher took the view that, as the Board had imposed an express condition requiring the alteration of Building No. 3, the compliance plan should have shown only that modification. However, he believed that the developer's architect had taken advantage of Condition No. 8 to make further significant alterations. The first was that boilers were shown to be installed in roof spaces of all three buildings. Secondly, there were "numerous and substantial discrepancies" involving the height, length and roof spaces of each building and the footprint of Building No. 1.

78. Further, there had been a "major redesign" of the façade of Building No. 2, involving windows and parapets; there were "large-scale" alterations to the facades of Building No. 1, there were unauthorised structures on the roofs of each building and that the occupancy of Building No. 3 had been increased by virtue of what amounted to a redesign of the fourth floor.

79. In the case of Building No. 1 (the tallest building in the development), Mr. Gallagher said that it was not possible to make a close comparison because neither the Board-approved plans nor the compliance plans included north or south elevations. This, according to Mr. Gallagher, cast considerable doubt over both the Board's approval and the role of the planning authority. Examination of the east and west elevations showed that the building had an entirely different roof profile in the compliance submission, so that roofs that had been shown earlier as flat or gently sloping were steeply pitched and had unauthorised structures. The east elevation showed that ridge heights had increased by between 0.7m and 2.3m. The west elevation showed increases in ridge height of between 0.65m and 2m. The roof had been altered from a double pitch to a single pitch. The number of windows had increased.

80. This is not a complete list of the matters itemised in the report, but represents what might be seen as the more striking of the features complained of. A similar exercise in respect of the other two building produced similar results.

81. Trinity's response to the motion to introduce this evidence into the s.160 application was that the appellant was in effect making a new s.160 application within the existing one, by raising entirely new matters that were outside the scope of the original proceedings. No specific unauthorised development had previously been alleged in the proceedings in respect of Building No. 1. It was contended that the appellant was trying to raise the new issues in order to evade the consequences of the Isaac Wunder order, and also that he was mounting a collateral attack on the compliance order. It was also averred that Buildings Nos. 2 and 3 had been completed in, respectively, July and June 2003. Building No.1 was completed in January 2004. It appeared that the appellant had been in possession of the information now sought to be put before the court since that time. There had therefore been inordinate and inexcusable delay.

82. It is relevant to note one specific factual matter averred to on behalf of Trinity. It appears that Mr. Gallagher had sworn an affidavit in very similar terms in March 2004, and that counsel for the appellant had sought to file it in the High Court during the hearing of the compliance judicial review proceedings. Objection was taken, whereupon counsel had said that if it was not to be addressed in the judicial review, an application would be made to file it in the s.160 proceedings. However, that had not been done.

The application to dismiss

83. On the 7th December 2009 Trinity issued a motion seeking an order, pursuant to the inherent jurisdiction of the High Court, dismissing the s.160 application as being moot, *res judicata*, and/or bound to fail in the light of the judgment of this Court. The principal argument made was that the matters the subject of the proceedings had already been determined in the compliance judicial review.

84. In a replying affidavit the appellant (now representing himself) made the case that the order in the compliance judicial review appeal could not have disposed of the issues in the s.160 application. He had been advised by counsel at the outset that the issues could not, for procedural reasons, be contained within a single set of proceedings. Although there was an overlap, the judicial review was limited to the procedural legality and validity of the decision of the Council to issue the compliance certificate. That certificate had dealt with conditions Nos. 2, 6, 8, 9 and 17 of the permission granted by the Board. The issues before the Supreme Court had been mainly concerned with the compliance certificate and with Building No. 3. By contrast, the central issue in the s.160 application was whether there had been compliance with Condition No.1, and that condition could not be circumvented by the decision of the Council to issue the compliance decision.

85. The application under s.160 had been initiated because the appellant had believed, in 2002, that Trinity was constructing the buildings other than in accordance with the permission. He claimed that each of the three buildings had been built other than in accordance with the revised plans submitted in October 1999. It was accordingly necessary to carry out a detailed comparison between what was permitted and what

had been built. While that had been held to be inappropriate in judicial review proceedings, it was an appropriate matter for s.160 proceedings.

86. In this context, the appellant no longer accepted (as his solicitor previously had, on his behalf) that the proceedings did not encompass Building No. 1. He argued that the s.160 application extended to "any development" carried out other than in accordance with Condition No. 1.

87. The appellant contended that Condition No. 8 (requiring the submission of revised drawings for agreement by the Council) had been necessitated by the existence of certain discrepancies between the original plans and the October 1999 plans, as noted by the Board's inspector after the oral hearing. However, since no building redesign had been required by the Board in respect of Buildings Nos. 1 and 2, the respondent was obliged to build them in accordance with the October 1999 revised plans. It would not have been open to the Council to permit it to do otherwise. European Union law in relation to the principles of development consent had the effect that breaches of Condition No.1 could not be excused by the decision to certify compliance.

88. It was alleged that (leaving aside any reference to Building No. 3) certain breaches of Condition No. 1 resulted from breaches of European environmental law, detailed as follows:-

    (i) Boilers had been installed in Buildings Nos. 1 and 2 without planning permission. They were not shown on the October 1999 plans, and therefore breached Condition No. 1. The environmental impact statement submitted by Trinity had not included the requisite data on boiler pollutant emissions, and the Board could not, therefore, have granted permission for them.

    (ii) Pollutant emission flues had been installed in these two buildings without planning permission.

    (iii) Trinity had not submitted a survey on wild flora and fauna with its EIS, as required by EU law.

(iv) The EIS included computer-generated images that had been fraudulently interfered with by Trinity, giving a false view of what the development would look like.

89. In relation to Building No. 3, the appellant stated that he accepted that the Supreme Court's ruling was final in respect of the matters decided therein. However, he maintained that the Court had based its judgment on domestic law only and had not applied European Union law. He had made a complaint to the Commission in that regard.

90. Apart from the EU law considerations, the appellant complained that the roof profiles, and pitch angles, the building of additional, unauthorised floors, the installation of boilers in the roof spaces and the installation of boiler flues in Buildings Nos. 1 and 2 did not comply with the permission.

91. The motion to strike out the proceedings came on for hearing in January 2010. As already noted, by this time the appellant was representing himself. After having heard counsel for Trinity, Feeney J. attempted to get clarity from the appellant as to his position. Ultimately, he directed him to specify on affidavit his complaints about non-compliance with the permission, having regard to the fact that he could not re-litigate matters determined by the Supreme Court, and to give the dates upon which he had become aware, or apprehended, that there was non-compliance. It was pointed out to him that the court had a discretion under s.160, and that it was necessary that he should consider whether he could get any benefit from proceeding.

92. The appellant accordingly submitted an affidavit, sworn on the 26th February 2010, in which he made a number of claims in respect of the development which may be summarised as follows.

93. The issues identified in respect of Building No. 1 were:-

(i) An additional unauthorised floor had been built over most of the western façade and appeared to accommodate boiler installations.

(ii) Boilers and boiler flues had been installed in breach of EU law requirements about the data required in the EIS.

(iii) Class-rooms and lecture halls, which were not shown on the plans approved by the Board, had been constructed on a number of floors. These had been utilised for the unauthorised holding of classes for foreign schoolchildren during the university summer vacations, and the bedrooms had been used as accommodation for the children. This was a clear breach of the permission.

(iv) The EIS contained computer-generated images of the buildings in their completed state, which had been "fraudulently" interfered with by Trinity, so as to make Building No. 1 appear not to be visible from the entrance gate.

(v) It was evident, from a comparison of the Board-approved plans and the compliance proposal, that the footprint of the building had been materially altered on the east side and that there had been changes of use of ground floor space.

94. In relation to Building No. 2, it was claimed that so far as this building was concerned, the Supreme Court judgment dealt only with the bed spaces. The Court had made no findings in respect of its overall redesign or in respect of the additional floor that had been constructed.

95. The appellant stated that he had sought, in the compliance judicial review, to bring to the attention of the High Court a reduced-scale copy of the plan for this building included in the compliance proposal. This had been objected to by Trinity, with the result that only the Building No. 3 plans and drawings were admitted and considered. The plan should therefore be admitted in the s.160 proceedings.

96. The specific claims made in respect of Building No. 2 related to the following:

(i) An unauthorised additional floor, used to accommodate boiler installations.

(ii) The installation of boilers and boiler flues, located in the roof space, that had not been the subject of proper consideration in the EIS.

97. As far as Building No. 3 was concerned, the appellant asserted that the compliance judgment did not consider the question whether the building actually constructed was lawful, other than in respect of the removal of a floor. His remaining complaints were that:

    (i) The overall height of this building should have been reduced by approximately 3.5m. However, the redesign agreed by the Council resulted instead in an increase of approximately 1m – it was, therefore, some 4.5m higher than that permitted by the Board.

    (ii) The roof profile was entirely changed from an almost flat roof to one with a pitch of 26º.

    (iii) An unauthorised mezzanine floor appeared to have been added.

98. In addition, the appellant claimed that the Supreme Court had not fully considered the requirements of Condition 9 of the Board's permission, and that there had been a breach of the obligation to protect the crown spread of the trees in question by appropriate post and rail fencing. He attributed the deterioration and subsequent removal of a number of trees to this failure.

99. Insofar as any delay was admitted by the appellant, he attributed it to the fact that he had spent a considerable amount of time corresponding with the Council and with the Ombudsman, without obtaining satisfaction.

100. In a subsequent affidavit, sworn in May 2010, the appellant denied that he was guilty of delay. He stated that when Building No. 2 was externally complete, in late 2003, he and Mr. Gallagher had suspected that it varied from the Board-approved plans. ASL had accordingly carried out the comparison exercise, and it had been provided to Trinity on the 6th February 2004.

101. In relation to Building No. 1, the appellant said that the reason for not including it in the compliance judicial review was that he had made a complaint to the Ombudsman about it, and such a complaint could not be considered if it was the subject of litigation.

102. The final paragraph of this affidavit alleges that Trinity fraudulently caused the Council to accept that its compliance proposals complied with EU law.

103. I think it necessary to comment here on one matter that is not dealt with in the affidavits. It appears from the transcript that in the course of the hearing Feeney J. pressed the appellant to clarify what remedy he was seeking. The appellant acknowledged that the buildings would not be removed. What he wanted was that they should be "reinstated" to comply with the terms of the permission.

The judgment of Feeney J.

104. Before considering the substantive issues before him Feeney J. referred to the jurisprudence on the power of the court to strike out proceedings and the related principle dealt with in the *Henderson v. Henderson* line of authority. The authorities and principles are not in any way disputed by the parties in this appeal and it is unnecessary to set them out here.

105. In the light of the jurisprudence, Feeney J. approached the matter on the basis identified in *A.A. v. The Medical Council* ([2002] IESC 70) – that he had to make a broad merits-based judgment, taking into account the public and private interests involved and also taking into account all of the undisputed facts in the case. It was necessary to focus attention on two questions – whether, in all of the circumstances, the appellant was abusing the process of the court by seeking to raise before it an issue which could have been raised before, and whether certain matters had already been considered and determined by a court.

106. The appellant had accepted that Building No. 1 had not been dealt with in the compliance judicial review, and gave as his explanation the fact that he had been engaged in correspondence with the Ombudsman on a complaint that the Council had failed to warn Trinity about that building. Feeney J. did not consider this explanation to be soundly based, in that the complaint to the Ombudsman raised other matters that had indeed been included in the judicial review.

107. Feeney J. commenced his analysis of the appellant's case by examining the original grounding affidavits first. The appellant maintained that the Supreme Court had not dealt conclusively with the location of the boilers. This proposition was rejected, on

the basis that the judgment of Fennelly J. made it clear that the location of the boilers was a central part of the appellant's case, and found that that there was planning permission for the plant rooms and that it was permissible to place boilers in them. In those circumstances it was not open to the appellant to re-litigate this issue.

108. It was also submitted by the appellant that the Supreme Court had not dealt with the changes to the roof pitch and profile, in that it did not find that such changes were consequent to the placing of the boilers in the roof spaces and did not address the question whether they required planning permission. On this aspect, Feeney J. noted the express finding that locating the boilers in the roof spaces had no impact on the roof pitch and profile.

109. Similarly, the trial judge found that the complaint about the increase in bed spaces in Building No. 2 could not be further litigated, given the ruling of the Supreme Court that such minor adjustments were, in accordance with Condition No. 8, matters of detail to be agreed with the Council. The appellant could not be permitted to litigate an identical complaint on the issue in the s.160 application.

110. The appellant was continuing to argue that Condition No. 2 (the removal of a floor from Building No. 3) had been breached. Apart from questioning the interpretation of that condition as ruled upon by the Supreme Court, he submitted that, because of the change in roof pitch, the Court had not been correct in finding that a reduction in height had been achieved and had not determined whether the change required planning permission. Feeney J. pointed out that the Court had accepted that the pitch was as shown in the compliance submissions, and had expressly stated that matters such as a minor change in roof pitch were not appropriate subjects for scrutiny in the judicial review process. He was satisfied that it would be pointless to allow the appellant to pursue this further.

111. In relation to Condition No. 9 (protection of trees), the appellant contended that the Supreme Court had addressed only the question of the 10-metre distance and had not determined the issue about the proper protection of the trees by fencing during construction. Feeney J. pointed out that the Supreme Court had found that the appellant had not specified what his complaint was in this regard, and had observed that it now seemed irrelevant given that the construction had long since been

completed. Feeney J. agreed, and observed that no causal link had been shown between the alleged breach of the condition and any subsequent deterioration of any of the trees.

112. The 10-metre requirement had been found by the Supreme Court to have been breached to a minor, if not trifling degree, in circumstances where literal compliance would not have been feasible, and had found that it would not be sufficient to ground an order of *certiorari*. Feeney J. considered that this was the only factual matter asserted by the appellant that had not been finally determined, but that the breach was so inconsequential that no practical benefit could be gained by permitting the s.160 application to proceed to full hearing.

113. The judgment then moved to consideration of the later affidavits filed by the appellant. Trinity maintained its objection to these, arguing that they related to matters which the appellant knew or ought to have known when swearing affidavits prior to July 2003, that there had been excessive delay and that the appellant was "drip-feeding litigation". Feeney J. agreed, holding that having regard to the public and private interests involved, and the manner in which the appellant had litigated his complaints against Trinity, that it would be an abuse of the court's process to permit an amendment. The appellant had not shown that there would be any benefit to the public from the litigation. He considered that all the matters relevant to the s.160 application should have been identified prior to the hearing date that had been set in March 2004, and that the matters now complained of could have been identified in the period July 2002 to July 2003, prior to the completion of any of the buildings.

114. Feeney J. considered that the "delayed and drip feed" nature of the litigation was evident from the fact that the appellant now sought to make complaints about Building No. 1. He did not accept the contention advanced by the appellant to the effect that he could not have included this building in the case because he was making a complaint to the Ombudsman at the time. In paragraph 18 of the judgment he said:-

> *"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."

115. Notwithstanding those observations, the judgment goes on to consider in some detail the issues raised in the affidavits sworn by the appellant in February and May 2010.

116. It was claimed that an extra floor had been constructed over the western façade of Building No. 1. A replying affidavit identified this as a plant room, and not an extra floor. Feeney J. found that the presence and location of the plant room was apparent from the compliance submissions, and that to raise it as an issue now was in fact an attempt to challenge the compliance order.

117. The appellant had raised some new arguments in respect of the boiler flues installed in Building No. 1. Again, Feeney J. found that this was covered by the compliance submission, and was therefore the subject of what had been held by the Supreme Court to be a valid compliance order.

118. The challenges to the adequacy of the EIS had already been held (by Clarke J., in refusing leave, in January 2009, to issue proceedings aimed at setting aside the judgment of McKechnie J.) to be "fundamentally misconceived". To permit an amendment of the pleadings on this issue would be to permit an abuse of process. Feeney J. referred here to the judgment of McKechnie J. (at p. 577 of the report) stating that counsel for the appellant had suggested that the boiler facilities involved a breach of inter alia Council Directive 85/337/EEC. However, counsel had not been able to indicate what provision had been breached. Subsequently, Clarke J. had, in the course of refusing leave in January 2009, examined the detail of the decision of the European Court of Justice in *Commission v. Ireland (Case C- 215/06)* [2008] E.C.R. I – 04911, and had held that the appellant did not have a stateable case in that regard.

119. The appellant complained that there had been unauthorised use of Building No. 3 for the purpose of accommodating and teaching foreign schoolchildren during the summer months. It was clear that there had indeed been a breach of this nature in some years. However, the appellant acknowledged that this had ceased after the summer of 2007. There was no continuing unauthorised use and it would therefore be inappropriate and oppressive to permit it to be litigated.

120. The next issue was the alleged change in roof pitch and the increase in height of Building No.1. Feeney J. found that these were considered and addressed in the Supreme Court judgment, and that the appellant was seeking to disregard the consequences of that judgment and to challenge the compliance order.

121. The appellant complained that an ESB sub-station had been constructed without authorisation. This was correct – a warning letter had been issued and Trinity had subsequently obtained retention permission. It was therefore not an appropriate matter for a s.160 application.

122. The appellant also attempted to introduce allegations of fraud into the proceedings, relating to the images submitted with the EIS. Feeney J. found this to be another example of disregarding the Supreme Court order and seeking to challenge the compliance order. Given the history of the litigation, it would be an abuse of process to permit this to be raised again.

123. The judgment concludes with the following:-

> *"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 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."*

Submissions in this Appeal

124. The appellant is now legally represented, and it is proper to acknowledge that his lawyers have been of significant assistance to the Court. They have succeeded in putting order upon the somewhat chaotic state of the appellant's outstanding appeals before the Court, and have weeded out many that were redundant or hopeless. In this, the last of the appeals in so far as substantive planning issues are concerned, they have argued his case in a manner that was both succinct and effective.

125. Counsel submits that there are significant factual disputes between the parties and that in those circumstances the jurisdiction to strike out cannot be deployed. The disputes are said to arise primarily, but not exclusively, in respect of Building No. 1. It is contended that the trial judge erred in excluding this building from consideration, in circumstances where, it is said, it was always part of the case. It is submitted that the early affidavits filed in the s.160 application expressly refer to the roof pitch of all three of the buildings, and that, similarly, later affidavits raised issues that were common to the three buildings.

126. It is pointed out that the compliance process is not open to public participation, and counsel submits that the time-scale of the construction work was such that the appellant only became aware of construction details of after the proceedings had been initiated. It would be unfair if the Court were to find that he should have engaged an architect to examine the compliance documentation. The ASL report is relied upon as illustrating substantial changes between the plans which received permission and those submitted in the compliance process.

127. In this context, counsel suggests that there is, in relation to Buildings Nos. 1 and 2, a substantial legal issue as to whether the trial judge was correct to assume that anything built in accordance with the compliance decision must, in the light of the failed judicial review proceedings, be treated as authorised. The argument is that if it can be demonstrated that the Council agreed to something under Condition No. 8 that in fact went further than a matter of mere detail, and if it can be shown that there was a good reason for not raising it in the judicial review, then in principle it can be challenged in the s.160 application. It is submitted that the judgment of this Court covers only the points that were raised, and does not have the effect that the compliance decision became immune from challenge thereafter, such that all development covered by it must be deemed to be authorised.

128. In making this argument, counsel relies upon the reasoning of Simons J. in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2019] IEHC 825.

129. The argument that there are disputes of fact is made mainly by reference to the ASL drawings. It is submitted that Feeney J. erred in excluding these from his consideration, along with the affidavits sworn after March 2004, and that there would

have been no prejudice to Trinity in admitting them. The elevations are said to show that Building No.1, in particular, is significantly taller than as shown in the October 1999 plans. Building No. 1 is the tallest of the three buildings, and the report shows differences in ridge height as referred to above (in paragraph 79). Counsel says that this point is to do only with height, and is not the same as the issue decided in the compliance judicial review concerning the roof pitch. Fennelly J. did not suggest that placing the boilers in the roof space entitled Trinity to raise the roof height. The argument is that, in the context of an application to strike out, the cumulative effect of the differences in roof height is such that it could not be said that the appellant was bound to fail in making the case that there were material and significant variations between the permission and the building, that could not have been authorised by Condition 8, and that would have required an environmental impact assessment.

130. The reasons for not seeking to include this issue in the compliance judicial review were the efforts being made at the relevant time to obtain satisfaction from the Ombudsman and the Council's enforcement officials. Further, it is said that he did not at the time have access to the relevant information about Building No.1, and only became aware of the issues about it shortly before the High Court compliance judicial review hearing.

131. Counsel has assisted the Court by specifying the matters which, it is now accepted, cannot be litigated further. These are:-

- the number and allocation of bed spaces in Building No. 2;
- the omission of a floor from Building No. 3;
- the protection of the trees;
- the location of the boilers in the roof spaces of Buildings Nos. 2 and 3, and the roof pitch of those buildings within the permitted envelope; and
- any issue about the roof pitch of Building No. 1, which, applying the concept of the "permitted envelope", must also be seen as *res judicata*.

132. In summary, the matters said not to have been determined by the judgment in the compliance judicial review are:-

- The question whether any unauthorised changes were made to Building No. 1, including construction outside of the permitted envelope. These include unauthorised works involving the erection of pitched roofs with parapet walls; the increase of the footprint; the redesign of the building; alterations to the façade; the height of the building; and an extra floor over the western elevation;
- The redesign of Building No. 2, apart from the bed space issue;
- The redesign of the façade of Building No. 2;
- The addition of a floor to Building No. 2;
- Unauthorised structures on the roof of Building No. 3;
- The addition of an extra floor to Building No. 3;
- Any breaches of Condition 1 in respect of Buildings 2 and 3, other than the relocation of boilers within the permitted envelope of the building;
- The redesign of the roof of Building No. 1; and
- Any other breach of Condition No. 1 in respect of Building No. 1.

133. However, counsel has made it clear in the course of the hearing that, without conceding any of these issues, the essence of the appellant's case, based on the ASL drawings, is that the buildings have been constructed outside their permitted envelope.

Discussion

134. The appeal is against a finding that the appellant's case was bound to fail in the circumstances described at length above. The parties are, of course, agreed on the principles applicable to such rulings and in particular, on the principle that the jurisdiction is one that should be utilised sparingly.

135. As I said above, the appellant's case in this appeal has been presented very effectively. However, I have come to the conclusion that the appeal must fail.

136. I accept that as a matter of principle it was appropriate for the appellant to commence with separate proceedings and that he and his advisers correctly distinguished the principles behind the different functions served by judicial review and the s.160 procedure. In this case, the judicial review was, in principle, concerned with the compliance decision, while the s.160 application was, in principle, concerned with what was being constructed by the developer.

137. However, in this particular case it is clear from the pleadings and grounding affidavits that the issues raised in the two cases were in fact entirely merged. The compliance judicial review was not concerned with issues of form or procedure, but with the Council's *vires* in the light of the permission granted by the Board. The s.160 application did not involve any assertion that the development did not have permission, or that it was carried on in breach of any matter covered by the compliance decision. It is clear from the summary of the grounding affidavit (paragraphs 52 to 56 above) that the claim that the development was unauthorised was based on the assumption that it would be carried out in accordance with the compliance submission, and everything else in the case flowed from that.

138. The case made across both sets of proceedings can be summarised as adding up to an assertion by the appellant that a) what was being built was unauthorised because it was not in accordance with the permission granted by the Board, and b) insofar as it was authorised by the compliance decision then that decision must be *ultra vires* the terms of the Board's decision. Furthermore, it is obvious that identical specific claims were made in respect of the development by way of particularising the claims made in each set of proceedings.

139. For the appellant to succeed in the s.160 application, in those circumstances, he would also have to successfully impugn the compliance decision. Feeney J. expressed a view that this litigation would have run more efficiently if the two matters had been kept together, and he may well have been right. It seems to me that there can be little doubt but that if they had been heard together, they would have led to the same outcomes. However, Murphy J. was entitled to take the course of separating them and it appears that neither party disagreed with his view that this was appropriate. That course having been adopted, it was inevitable that the outcome of the judicial review would significantly affect the scope of the s.160 application. If the proceedings were to be dealt with sequentially, then, no matter in which order they were taken, it was never going to be open to the appellant to reargue any issues that were finally disposed of in whichever decision came first.

140. The compliance judicial review was dismissed in the High Court and, on appeal, in this Court. There is now an issue to be determined as to the effect of that judgment on

the viability of the s.160 application. The appellant asserts an entitlement to proceed, except in respect of the limited range of matters he concedes to be *res judicata*, on the basis that the s.160 application is sufficiently broadly drafted to include Building No.1; that he has specific complaints about that building and about the rest of the development that are not covered by the previous judgment of this Court; that the trial judge should have admitted his evidence in relation to those complaints; and that the judgment in the compliance judicial review does not establish the validity of the compliance decision for all purposes. He makes the point that he does not have to show that he would succeed on any of the issues he wishes to litigate – simply that he is not bound to fail.

141. Again, however, it is necessary to stress that the appellant does not claim that there has been development that was not within the contemplation of the Council when it made the compliance decision. All of the arguments he now wishes to pursue are based on the differences claimed to exist between that decision and the Board's permission. For example, what might appear to be counsel's strongest point – the variation permitted by the Council in the heights of the buildings and in particular the ridge height of Building No. 1 – is based on the ASL comparison between the plans approved by the Board and the plans submitted to the Council in the compliance process. There is no claim that the building has not been constructed in accordance with the compliance decision.

142. The situation, therefore, is that for understandable procedural reasons the appellant initiated two sets of proceedings that made the same specific complaints about the development but that sought different remedies against different respondents. Then, after one case had been dismissed in this Court, he attempted to raise, in the other case, different complaints about the development that had not previously been particularised in either. As a matter of fact, each of those complaints entails a challenge to the compliance decision. In principle, I can see little difference between what is proposed here and a straightforward case where a litigant, having lost a judicial review challenge to a decision on one argument, takes a second judicial review against the decision-maker on a different argument.

143. Looking at the case as pleaded in the light of the judgment in the compliance judicial review, it is clear that each of the matters specifically raised in the s.160 notice of motion and grounding affidavit is dealt with in that judgment. In part, as a result, the appellant's position now depends upon the analysis of his notice of motion as covering Building No. 1, and upon the submission that he could not fairly have been expected to have applied to file the 2007 affidavits any earlier than he did.

144. It is certainly the case that the development as a whole is referred to in the original notice of motion in these proceedings. I also have some sympathy with the point made that this building was the last to be commenced, and could envisage that in an appropriate case the s.160 process (which, after all, is designed to deal with situations where a development *has been, or is being,* or *is going to be*, carried out) would be sufficiently adaptable to enable further evidence to be admitted, and further arguments to be raised, prior to the substantive hearing. At the time when the proceedings were instituted, no plea could have been made that Building No. 1 was *being* constructed in an unauthorised way, since work on it had barely begun. If, hypothetically, it had become apparent that unlawful construction was being carried out over the succeeding months, that could have grounded an application to amend the proceedings by particularising any relevant matter.

145. However, that was not the way that the proceedings developed, and the appellant is forced to fall back upon the general plea in relation to Condition No. 1 as covering the issues now sought to be raised in respect of Building No.1. There are, however, two major difficulties in this regard. Firstly, it is entirely inconsistent with the express position taken by his legal representatives during the discovery dispute, and also with his own averments that he did not include Building No.1 in the litigation because he was pursuing a complaint to the Ombudsman. I do not see that it is now open to him to claim that it was included all along.

146. Secondly, in my view, a s.160 application cannot be regarded as properly mounted if all that is pleaded is a generic claim that there has been a breach of the standard condition that the development be carried out in accordance with the plans. That condition, in essence, merely confirms the general rule that a development must be carried out in accordance with the permission given. An allegation that the condition

has been breached will always require some degree of particularisation. It was particularised in this case in the reliefs sought in the notice of motion and in the grounding affidavit. The particular complaints made in that affidavit are the same as the particulars in the compliance judicial review, and, as in the compliance judicial review, they are based on the compliance submissions made on behalf of the developer and approved by the Council.

147. It also has to be repeated here that the motion for leave to file further affidavits in 2007 was an attempt to introduce, not evidence of construction work that could not have been known about earlier, but of a comparison between the Board-approved plans and the compliance submission plans. The information upon which this comparison was based was available to the appellant, on his own account, from the 10th January 2002, and has nothing to do with any allegation of unanticipated development. It formed the basis for his proceedings in both the judicial review and in this s.160 application.

148. In those circumstances there is, in my view, nothing unfair in finding that his current analysis of this information should have been introduced into the proceedings before the anticipated hearing date in March 2004. As a matter of fact, he did indeed have the benefit of an architect's advices, as well as legal advice, from a very early stage. Mr. Gallagher had been involved in the objection to the development from the start, and had also been involved in the first judicial review. However, the report on the alleged discrepancies between the plans approved by the Board and the compliance plan approved by the Council was not put together until some two years after the information pertaining to the latter was obtained.

149. It appears from the transcript of the hearing before Feeney J. that the appellant told him that counsel in the compliance judicial review had attempted to introduce "some drawings" in the High Court, but that Murphy J. had refused to accept them. Assuming that this related to the ASL report, it seems from the affidavits filed by Trinity that the decision of Murphy J. on this aspect was accepted by the appellant at the time, with the indication being given that the material would be the subject of an application in the s.160 proceedings. There is no indication that the decision to exclude the evidence was part of the appeal argued on the appellant's behalf before

this Court in the compliance judicial review proceedings. If it had been, it is highly likely that it would have failed in any event given the findings of the Court in relation to delay in the case.

150. Nor, in the event, did counsel apply to have the evidence adduced in the s.160 application. It was not until 2007 that the appellant, who was then without legal representation, attempted to introduce it on foot of a motion brought several years after the report came into existence.

151. However, quite apart from the issue of delay, it seems to me that the reality in relation to the issue is that this proposed evidence, and the argument as to material and impermissible variation made in reliance upon it, went to the validity of the compliance decision rather than to any claim that development had taken place that was not covered by that decision.

152. To repeat – each of the particulars originally pleaded in the s.160 application was also pleaded in the compliance judicial review. Each of those particulars has clearly been dealt with in the decision of this Court in the compliance judicial review, and what the appellant is now attempting to do involves, in effect, injecting a broad range of new particulars into the only remaining plea in the s.160 application – the plea that Condition No. 1 has been breached. In turn, each of those newly-particularised complaints involves an attack on the compliance decision. The question is whether that is permissible. The issue at the heart of this appeal, therefore, is whether this appellant has any entitlement to raise issues that turn on the validity of the compliance decision.

153. As noted above, the appellant relies in this context upon the reasoning of the High Court in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2019] IEHC 825. That decision is under appeal, and judgment is pending in the Court of Appeal. However, I do not believe that the outcome in *Krikke* could assist the appellant here in any material respect.

154. In *Krikke*, the developer had obtained a favourable compliance decision that was not challenged by any party. However, the planning authority later decided to refer a question to An Bord Pleanála under s.5 of the Planning and Development Act 2000,

as to whether a particular alteration constituted development and, if so, whether it was exempt development. The Board determined that it was development, and was not exempt. In turn, no party challenged that determination. Subsequently, objectors to the development brought an application under s.160, and in the course of those proceedings the developer challenged the *vires* of the s.5 declaration. The case, therefore, raised issues as to the legal effect of both an unchallenged compliance decision and an unchallenged s.5 declaration in subsequent litigation.

155. Simons J. considered that, on the facts of the case, the developer's compliance submission had been insufficiently clear in relation to the particular alteration in question and that the decision should not be seen as intentionally approving it. He also expressed the view that the planning authority would have acted *ultra vires* if it had intended to give approval without giving reasons.

156. In the instant case, however, the Court is not concerned with the status of an unchallenged decision. The validity of the compliance decision was indeed challenged, and it was challenged by this appellant on particular grounds. He failed in that challenge, and the question of the validity of the decision was determined against him. In my view he cannot now seek to achieve the same outcome by arguing in separate proceedings, where the Council is not a party, that, notwithstanding the decision of this Court, the compliance decision was *ultra vires* on grounds other than those previously raised by him.

157. This case does not come within the strict confines of the principles of *res judicata* or issue estoppel, given that the parties are not identical. However, it is in my view a clear example of abuse of process. The appellant is attempting to re-litigate an issue that has been determined against him, by way of a collateral attack. In concrete terms, if the compliance decision was lawful, then it was lawful for Trinity to construct the buildings in accordance with that decision. To argue that the construction is unlawful, where that argument is based entirely on the plans approved by the compliance decision, is in reality an attack on that decision.

158. In discussing the topic of collateral attack in *Sweetman v. An Bord Pleanála* [2018] IESC 1, Clarke C.J. said:

"[38] The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally-mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.

[39] The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like."

159. The instant case does not, as *Sweetman* did, involve two separate administrative decisions. Rather, the appellant seeks, having failed in his challenge to the decision-maker, to attack the beneficiary of the decision for acting in accordance with it. However, the position of a party who has the benefit of a decision that has in fact survived a challenge brought at the correct time must, I think, be all the stronger. As McKechnie J. observed in *An Taisce v. An Bord Pleanála* [2020] IESC 39, the concept of collateral attack has its roots in the effective administration of justice, in litigation fairness and in legal certainty. The overall aim is to protect the integrity of the legal norm.

160. As noted above, the primary view taken by this Court in the compliance judicial review was that (apart from the issues in respect of the trees, now abandoned) the appellant had failed to show any respect in which the Council's decision was not within the scope of the authority given to it by the Board. The case now made by the appellant cannot be seen as anything other than an attempt to re-open the issue as to whether the compliance decision came within the scope of that authority, based on new arguments that were available to him from the start but not previously pursued.

161. It the circumstances it would be entirely contrary to the principle of finality of litigation, and to what was described in *McCauley v. McDermott* [1997] I.L.R.M. 486

as the general interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions, to permit this litigation to proceed further. I consider that Feeney J. was correct in finding that to do so would be to permit an abuse of process, and I would therefore dismiss the appeal.

162. As this judgment is being delivered electronically, I would request the parties to file written submissions, not exceeding 500 words, in relation to costs. Such submissions should be filed within two weeks of today's date.