

IRELAND / JUDGMENT

Kenny -v- TCD [2008]

IESC 18 (10 April 2008)

[2008] IESC 18

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[2008] IESC 18 [New search] [Help] Judgment Title: Kenny -v- TCD Neutral Citation: IESC [2008] 18 Supreme Court Record Number: 168/03 High Court Record Number : 2004 No. 1940p Date of Delivery: 10 April 2008 Court: Supreme Court Composition of Court: Fennelly J., Macken J., Peart J. Judgment by: Fennelly J. Status of Judgment: Approved Judgments by Result Concurring Fennelly J. Appeal allowed - set aside High Court Order Macken J., Peart J. THE SUPREME COURT [S. C. No: 168/03] Fennelly J. Macken J. Peart J. Between James Kenny Plaintiff/Respondent and The Provost, Fellows and Scholars of the University of Dublin, Trinity College Defendants/Appellants Judgment delivered the 10th day of April 2008 by Fennelly J.

1. This is an appeal by the above named defendants and appellants against the order of the High Court (Finnegan P) dated 2nd April 2003, refusing an application to dismiss the plaintiff's proceedings for failure to disclose a reasonable cause of action or, alternatively, under the inherent jurisdiction of the court. For ease of reference, I will refer to defendants and appellants as "Trinity" and the plaintiff and respondent as Mr Kenny.
2. The appeal forms part, though a central one, in a saga of litigation in which Mr Kenny, through a multiplicity of proceedings, contests the validity of a planning permission granted to Trinity in 1999 to redevelop Trinity Hall, the University's hall of residence in Dartry.
3. In the present action Mr Kenny seeks to overturn a High Court order (McKechnie J) refusing him leave to apply for judicial review of the principal planning decision. He pleads that McKechnie J was misled by fraud on the part of Trinity. It is necessary to trace the planning history and the earlier litigation insofar as it bears on this contention. Planning history

4. In April 1999, Trinity applied for planning permission for a development consisting of the construction of new student halls of residence at Trinity Hall. The project comprised approximately 25,000 square meters including three new student residences and ancillary facilities.
5. Mr Kenny and others, including the Dartry and District Preservation Association, opposed the development.
6. On 11th November 1999, Dublin Corporation (now Dublin City Council) made a decision to grant planning permission subject to 14 conditions. Mr Kenny and the Association appealed the decision to An Bórd Pleanála (“the Board”). The Board held an oral hearing between 24th and 26th May 2000 at which Mr Kenny was represented. On 4th August 2000 the Board made a decision to grant permission subject to 19 conditions.
7. On 3rd October 2000, Mr Kenny and the Association commenced an application for leave to apply for judicial review by way of certiorari of the Board’s decision dated 4th August 2000 (High Court reference number 2000 No. 532JR.) I will refer to those proceedings as the “first judicial review.”
8. Following a four-day hearing, and consideration of seven affidavits and many exhibits, McKechnie J, gave judgment on 15th December 2000, reported at [2001] 1 IR 565 , refusing leave to apply for judicial review. In the present proceedings, Mr Kenny seeks to have that decision set aside. He asks that the first judicial review be reheard. I will need to refer to the reasons of McKechnie J later.
9. On 2nd March 2001, McKechnie J made an order refusing the application of Mr Kenny for a certificate, pursuant to s. 82(3B)(b) of the Local Government (Planning and Development) Act, 1963 as amended by insertion by s. 19(3) of the Local Government (Planning and Development) Act, 1992, granting leave to appeal his decision to this Court. McKechnie J also awarded costs against Mr Kenny.
10. I mention one only of the other proceedings instituted by Mr Kenny, as it has an indirect relevance to the present proceedings. On 4th January 2002, Dublin City Council issued a Compliance Order to the Appellants bearing the reference P.0022 confirming satisfactory compliance by Trinity with certain conditions of the planning permission granted by the Board. Mr Kenny on 3rd July, 2002 was granted leave to apply for judicial review to quash that Compliance Order. Mr Kenny, in those proceedings, claims, inter alia , a declaration that the installation of the boilers and boiler rooms in the roof spaces and the omission of the plant rooms from the buildings as indicated on revised plans submitted to the planning authority on 7th October 1999 is an unlawful material alteration to the development permitted by the planning permission. By order of the High Court of 19th October 2004 (Murphy J) that application for judicial review was dismissed. Mr Kenny has appealed the decision of the High Court to this Court. The appeal is pending. The first judicial review

11. In order to understand the issues in the present proceedings, it is necessary to identify a core area of dispute concerning the planning application. It concerns the location of boilers throughout the development. The importance which Mr Kenny attaches to this issue was disclosed by a letter written, after the decision of McKechnie J, by his then solicitor on 1st March 2002: "It is clear from my client's instructions that your client misled the court with regard to its true intentions and plans for the location of boilers as of the dates on which the affidavits were filed and the case heard."
12. The essential facts are not in dispute.
13. Neither the original application nor any revision of drawings or plans during the planning process identified the location of boilers. A number of drawings, however, indicated the location of "plant rooms." In addition, the original Environment Impact Statement provided by Trinity and a revised version indicated that the development would be serviced by a centralised boiler plant.
14. The adequacy of the treatment of this issue by Trinity and by the Board in its decision was at the heart of the first judicial review. Mr Kenny complained that, although Trinity had indicated during the planning process that it sought to develop boiler house facilities, it had provided no plans or drawings to the Board. In his Statement to Ground the application for judicial review, Mr Kenny mentioned that Trinity had said that it might place the boiler house facility in basements under the buildings of the proposed development and that it might construct a central boiler house facility on the site of the proposed development. The Board, he claimed, should have required Trinity to supply sufficient information. Thus, it was claimed, the Board had insufficient information and could not lawfully exercise its jurisdiction to determine the planning application resulting in the Board's decision being invalid.
15. There were other grounds for the first judicial review, not now relevant. It is the boiler issue which connects the present proceedings with the first judicial review and it is only that issue, as addressed by McKechnie J, which now needs to be considered.
16. Mr Kenny's key complaint, as described by McKechnie J in his judgment was that there was insufficient information before the Board to enable it to exercise its jurisdiction. Mr Kenny quibbles with that statement only to the extent that he says that there was no information at all on the issue.
17. That was the basic submission relating to the boiler-house issue, made by Mr Kenny to McKechnie J in the first judicial review. He also pointed out that a centralised boiler system had been mentioned in the Environmental Impact Statement, whereas, at the oral hearing, a decentralised system had been mentioned as the preferred option. (see page 570 of the judgment). Furthermore, he pointed out that: "...during the oral hearing, an attempt was made by the applicant for planning permission, [Trinity], to have the boiler house facilities sited in the basement, which suggestion had not previously made or considered, much less evaluated or analysed."

18. McKechnie J acknowledged that “some confusion ha [d] arisen with regard to the boiler house facilities.” (page 577). He then observed: At the oral hearing two suggested modifications to this were advanced. Firstly, it was urged upon the Inspector that these facilities could properly be placed in the basement, this being the first time that such a location was mentioned with no real consideration having been given to the quantity of excavation involved or the effect on the tree roots or on the water table. Rightly so in my view,..... the Inspector emphatically ruled out any further debate on this possibility. The learned judge explained the second modification as follows: “In the Service Engineers Reports, originally given and as revised, plant rooms are listed for all three buildings. In the revised plans and in particular Drgs. 213A, 214 and 215, all dated September 1999, plant rooms are again shown, though it should be said that one could not readily identify all such rooms, without an explanation that the floor plan was but a typical or representative one.”
19. He noted: “At the oral hearing there was very considerable debate on this question. Every interested person made a contribution. Some such persons were for and some against the development including those witnesses specifically called on behalf of the Applicant.”
20. McKechnie J expressed his own concluded view on this issue in the following terms: “Notwithstanding this confusion and despite the entry in the EIS and the floating of the basement solution, what is abundantly clear however, is that at the Oral Hearing, as per the Design Architect a decentralised system was in fact being sought on behalf of the developer.”
21. The learned judge analysed the nature of the dispute. He found, (see page 578) that, at the oral hearing, everyone present knew of this proposal and indeed made comment on it. His final conclusion was that: “Examples of matters in dispute were, - the precise location of the plant rooms - (this being essential it was claimed to determine the emanating noise); the fact that one such room was shown next to a living area, whether the dimensions of such areas were sufficient, what should be the height of the flue, its location etc. Whilst I am satisfied that all of these matters were adequately dealt with at the oral hearing and that many are also suitable to be dealt with by agreement with the local authority, in addition could I say that I would set my face totally against such a microscopic examination by this Court of such matters of details.”
22. Mr Kenny is unhappy with the approach of the learned judge. He insists that there was no or insufficient detail of the boiler positions; he says that the matter could not simply be dealt with by agreement. At the hearing of the appeal, he argued that no planning permission had been granted for the installation of boilers and, at one point, that the effect of the judgment of McKechnie J was to grant such a permission. However, he did not dispute that, in the absence of a certificate giving him leave to appeal the decision of the High Court, he could not contest the correctness of the judgment of McKechnie J.

23. I should observe, at this point, that McKechnie J was expressly aware that Trinity had proposed the location of boilers in basements. The point was made in Mr Kenny's Statement to Ground Judicial Review. The learned judge noted the criticism of that proposal made at the oral hearing. He was not aware that, prior to the oral planning hearing, Trinity had applied for a fire safety certificate based on plans and drawings showing boiler houses in the basement of one building. The latter fact is the nub of Mr Kenny's fraud allegation. The present proceedings
24. Mr Kenny says that, following the decision of McKechnie J, and as a result of persistent research and use of the Freedom of Information Acts, he discovered that Trinity had applied on 19th May 2000 (i.e. prior to the oral planning hearing) to the Building Control Authority (in fact, Dublin County Council) for a fire safety certificate in relation to one of the three buildings. The application included a proposal to place boilers in a basement of that building. Mr Kenny thus issued the present proceedings in which he claims that the decision of McKechnie J was procured by fraud.
25. Mr Kenny issued a Plenary Summons on 7th November 2002 claiming the following: "1. An injunction restraining the Developer from completing the Development and in particular locating the boilers in the roof spaces of the development buildings.
2. An Order directing the rehearing of the Plaintiff's judicial review application and in particular the evidence in relating to the location of the said boilerhouses.
3. An Order setting aside the award of costs to the Developers in respect of the original application for judicial review.
4. Costs."
26. A statement of claim was delivered on 20th January 2003. In the events that have happened, it has now, if belatedly been amended and its original contents can be ignored. On any view, however, it was clear that the essential relief sought was that the judgment and order of McKechnie J be set aside that that the first judicial review be reheard.
27. On 7th March 2003, Trinity issued a notice of motion seeking:
 1. An Order pursuant to Order 19 rule 28 of the Rules of the Superior Courts striking out the above entitled proceedings as being frivolous, vexatious and as disclosing no reasonable cause of action.
 2. Further or in the alternative and without prejudice to the foregoing, an Order pursuant to the inherent jurisdiction of the Court striking out the within proceedings as an abuse of process and/or in excess of jurisdiction.
28. That motion was heard by Finnegan P. By his order dated 2nd April 2003, he refused the relief sought. He held that, if he were to take the Statement of Claim on its own, he would have struck it out. He thought that the statement of claim (in its then unamended form) failed to disclose a cause of action. He had regard, however, to matter contained on affidavit,

which “manage [d] to scramble across the threshold” and to the fact that Mr Kenny was not represented. The learned President did not specify the material which enabled Mr Kenny to cross “ the threshold. ” He fixed times for the delivery of pleadings. The order gave Mr Kenny leave to amend his statement of claim. Mr Kenny did not avail of that opportunity, though he has now belatedly applied for such leave.

29. Trinity appealed against the order of the learned President. This Court, by its order of 20th June 2003, allowed the appeal and ordered that Mr Kenny’s claim be struck out as disclosing no reasonable cause of action. By an order of 15th October 2007, this Court set aside its order of 20th June 2003, for reasons irrelevant to the present hearing, with the effect that the appeal of Trinity against the order of the learned President dated 2nd April 2003 was reinstated. This judgment follows upon the rehearing of this appeal.
30. By an order dated 1st February 2008, Clarke J granted liberty to Mr Kenny to amend his statement of claim in the terms of a draft he provided to the court. Trinity has agreed that, for the purposes of this appeal, its motion is based on the statement of claim as thus amended. It places no reliance on the terms of the original statement of claim or the delay of Mr Kenny in seeking its amendment.
31. Paragraph 3 of the amended statement of claim reads as follows: The Plaintiff claims that the Defendant through its servants and agents knowingly and for the purpose of inducing a judge of the High Court so to act, misled the Court during the hearing of a judicial review application entitled In the Matter of James Kenny Applicant, An Bord Pleanála (“the Board”)Respondent, Dartry and District Preservation Association and others, Notice Parties, said hearing being before Mr. Justice McKechnie in November 2000, in manner(s) following, all of which were capable of causing and/or caused Judge McKechnie to refuse the Applicant (the Plaintiff herein) leave, which he would not otherwise have refused;
 - (i) submitting to the Honourable Court certain architectural plans and drawings relating to a development proposed by Defendant at Trinity Hall, Dartry Road, Dublin 6 and purporting to show therein that boilers would be installed in certain rooms of buildings identified on the plans and drawings as “plant rooms” which submission was made to the Planning Section of the then Dublin Corporation and was false and not in compliance with the requirements of the directly effective EU Directive 97/11, or of EU Directive 85/337 (as amended by 97/11) which governed part of the planning process and under which the Defendant had a statutory duty to disclose detailed information and data on the environmental effects of the proposed development to the Board, also to interested members of the public, and to the Honourable Court, which information and data it failed to disclose. (ii) Concealing from the Honourable Court the material facts of an application which Defendant had previously made and was then pursuing for the location of some of the aforesaid boilers in the basement of one of the aforesaid buildings to another section of Dublin Corporation namely the Fire Prevention Section, while at the same time it was preparing a further application to locate additional boilers in another of the aforesaid buildings, which applications should have been disclosed to Judge McKechnie. (iii)

Intentionally inducing a judge of the High Court

- (a) to accept that on the basis of evidence which the Defendant knew to be untrue, the boilerhouses in question would be installed in what it described as randomly located plant rooms in two of the three buildings in the proposed development, the type and relevant locations of which were of central relevance to the body of information and detailed particulars which the Defendant was required to, but failed to, furnish to the planning authority with its revised planning application, which information should also have, but did not, correspond to the locations proposed in each of its fire safety certificate applications, and
 - (b) in so failing to comply with the statutory duty imposed on it, the Defendant also did not inform the Honourable Court, as it should have done, that it had omitted to identify any locations for boilerhouses in the Environmental Impact Statement which accompanied its revised planning application, other than by stating thereon that the development would be serviced by a centralised boiler which did not appear on any of its plans or drawings. (iv) Inducing a judge of the High Court.....to believe incorrectly that in the case of the third building in the development, a boilerhouse would be located in a small plant room on the ground floor of that building, which location was challenged in the affidavit evidence from Anthony Gallagher, architect, who averred that such location was much too small for its claimed purpose, which evidence the Defendant, contrary to the intention which it had stated to Judge McKechnie, did not place the boilerhouses in the location it had shown, but did so without seeking or obtaining the planning permission which it knew was required. Submissions on appeal
32. The essence of Mr Kenny's case is that the judgment and order of McKechnie J should be set aside and that the first judicial review should be reheard.
33. Trinity, in its appeal, relies, firstly, on the jurisdiction conferred on the Court by Order 19 rule 28 of the Rules of the Superior Courts, which provides: "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."
34. Secondly, Trinity invokes the inherent jurisdiction of the court.
35. In the exercise of the first jurisdiction, the Court is restricted to considering the pleadings: it asks whether a cause of action is disclosed. On the other hand, when exercising its inherent jurisdiction to dismiss a claim alleged to be frivolous or vexatious, the Court may consider affidavit evidence. This latter jurisdiction is to be used sparingly and with great caution. However, where the Court is satisfied that the Plaintiff's case must fail, the Court should exercise its power to strike out the Plaintiff's claim to avoid injustice to a Defendant. (see *Barry v. Buckley*, [1981] IR 306.)

36. In the absence of fraud, it would be vexatious and an abuse of the process of the Court to litigate any matter which was already concluded by a final and binding Order of the Court . Fraud is the only basis on which such an Order could be set aside. Counsel cited Tassan Din .v. Banco Ambrosiano S. P. A.,

[1991] 1 IR 569.

37. Trinity, in its written submissions, drew particular attention to the dictum of McCracken J in Fay v Tegral Pipes Ltd ,

[2005] 2 IR 261 , 266: “While the words ‘frivolous and vexatious’ are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed.”

38. Trinity maintains that a final judgment may be set aside on the ground of fraud only where: a) the judgment was obtained by fraud; b) the fraud alleged amounts to “conscious and deliberate dishonesty” (reference was made to The Amphilil Peerage Case , [1977] AC 547); c) as was stated by Barrington J in Waite .v. House of Spring Gardens Limited (High Court unreported 26th June 1985), “the proper method of impeaching a concluded Judgment on the ground of fraud was by action in which the particulars of the alleged fraud are exactly set out.” Reliance was also placed on the judgment of Murphy J in Tassan Din .v. Banco Ambrosiano S. P. A ., cited above, and on that of Denham J in Superwood Holdings Plc. v Sun Alliance and London Insurance Plc . [1995] 3 IR 303 with particular regard to the need to plead fraud with the necessary particularity.

39. Mr Kenny does not contest these propositions of law. He submitted, however, that the judgment of McKechnie J was not, for the purpose of those principles, a final judgment. Nothing was determined by McKechnie J except that Mr Kenny was refused leave to apply for judicial review. Mr Eamonn Galligan, Senior Counsel for Trinity responded by referring to s. 82(3B)(b) of the Local Government (Planning and Development) Act, 1963 as amended by insertion by s. 19(3) of the Local Government (Planning and Development) Act, 1992. That provision, which was in force at the time of the decision of McKechnie J, is that: “The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case save with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in

the public interest that an appeal should be taken to the Supreme Court.”

40. Mr Kenny also submitted that natural justice required that he be allowed to have a hearing of his complaint and that the judgment of McKechnie J had the effect of depriving him of that right.
41. Mr Galligan analysed the amended statement of claim by reference to the judgment of McKechnie J. He submitted that the learned judge had been concerned with the adequacy of the documentation which had been before the Board for the purposes of its decision, not with the intentions of Trinity. The fire safety certificate sought by Trinity from the Building Control Authority (in fact, the same body as the planning authority) cannot concern the Board at all. When one reads the judgment of McKechnie J, one sees that the fact that Trinity had applied for a fire safety certificate involving the placing of boilers in a basement, if he had been aware of it, could not have affected his judgment. The planning permission did not permit the construction of basements. Thus, Trinity could not, in any event, have proceeded with any such proposal without a further planning permission. The application for a fire safety certificate was immaterial to the matter before McKechnie J and would not have influenced his judgment.
42. Mr Kenny, in reply, examined the history of Trinity’s proposals in relation to the placement of boilers in detail. He recalled that, at the oral hearing, there was conflict on this issue which was never resolved. He argued that the planning permission gave no permission for boilers at all, but acknowledged that McKechnie J had decided otherwise. He described an intense debate before McKechnie J, in which large and detailed plans and drawings were presented to the judge. The Trinity proposal could not have been brought about. The engineer for the applicants generally had disputed the view of Trinity’s experts, maintaining that no flues or other technical details of boilers had been shown. According to Mr Kenny, the essential element of the fraud was to persuade McKechnie J that it was feasible to place boilers at “random locations” in plant rooms throughout the development, whereas Trinity had never had any intention of doing so. Their concealment of the application for a fire safety certificate was, in these circumstances, fraudulent.
43. Mr Kenny acknowledged that the boilers had not, in fact, been placed in any basements, that no planning permission had been obtained for the excavation of basements and that, at the time of the hearing before McKechnie J, the proposal for the insertion of boilers in roof-spaces (which is what has, in fact, happened) had not been formulated. Nonetheless, he maintains that the proposal for which Trinity argued before McKechnie J was never a genuine one and had come into existence only for that hearing and was never heard of again. The law

44. I am satisfied that the decision of McKechnie J was a final one for the purposes of the principles relating to the setting aside judgment. s. 82(3B)(b) of the Local Government (Planning and Development) Act, 1963, as inserted in 1992, expressly so provides. Such a decision is made after a hearing *inter partes*. The Oireachtas has designated the decision as final.
45. What then is the law regarding the setting aside of a final judgment? Mr Galligan cites three Irish cases, all High Court decisions: *Kelly v Ireland*
- [1986] I. L. R. M. 318, (O’Hanlon J); *Waite .v. House of Spring Gardens Limited*, cited above (Barrington J); *Tassan Din .v. Banco Ambrosiano S. P. A.* (Murphy J). In truth, only the last of these is directly in point. Murphy J there cited extensively from speeches of the House of Lords in the *Amphill Peerage Case*, also cited above.
46. It is necessary to draw a clear distinction between the power of an appeal court, such as this Court, to set aside a judgment of a court of first instance on the ground of discovery of new evidence and the jurisdiction to set aside on the ground of fraud. Murphy J examined this matter in *Tassan Din*. The plaintiff, in that case, argued “that the availability of new evidence which was not and could not have been available to one party at the hearing of the case was a ground for setting aside or rescinding a judgment otherwise than in pursuance of an appellate jurisdiction.” See page 578 of the report). It had been thought in former times in England that there could be a jurisdiction to set aside a judgment of a court of concurrent jurisdiction, based on the discovery of new material evidence. Such a possibility was contemplated in a decision in the House of Lords in 1894: *Boswell v Coaks*
- (1894) 6 R. 167. However, in more modern times, it was considered that the earlier decisions were explicable by the absence of a Court of Appeal: see *In re Barrells Enterprises and Others*
- [1973] 1 WLR 19. Murphy J concluded, at page 580, with a statement which undoubtedly correctly states the law: “It seems to me, therefore, that all that can be said is that at one time a court might have set aside a judgment of a court of co-ordinate jurisdiction not merely for the grounds of fraud but also on the basis of the discovery of new evidence. The law, as I understand it, in this country is that (in the absence of fraud) “new evidence” can be availed of as part of the appeal process or not at all. No authority has been opened to show that the decision of a final court of appeal can be challenged in subsequent proceedings on the basis of new evidence. In the very nature of a court of final appeal such an action would involve a contradiction in terms.”
47. This passage would dispose of any argument of Mr Kenny in reliance on the principles of natural justice that he should be entitled to have the judgment set aside on the ground of the discovery of new evidence. It is true that Mr Kenny did not enjoy an unfettered right of appeal. He required a certificate from the High Court, but that does not change the principle.

48. There is, however, a right to maintain an action to set aside a judgment, which has been obtained by fraud. Barrington J stated in *Waite v. House of Spring Gardens Limited*, cited above, that: "There is no doubt that an action may be brought to set aside a judgment obtained by fraud and that no leave is required of the Court prior to the institution of the proceedings." He cited the decision of the House of Lords in *Jonesco v Beard*
- [1930] 1 AC 298 for the proposition, pronounced by Lord Buckmaster, at page 300 of the report, that: "It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires."
49. The jurisdiction to set aside judgments on the ground of fraud must be seen against the background of the important principle of *res judicata* and of the public policy which discourages endless litigation expressed in the maxim: *interest rei publicae ut sit finis litum*. Keane J, as he then was, commented thus in *Dublin Corporation v Building & Allied Trade Union and others*
- [1996] 2 I. L. R. M. 547, at 556: "...it is important to bear in mind that the public interest referred to reflects, in part at least, the interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes."
50. From a reading of the authorities it appears necessary to consider three aspects of this important, though exceptional power: firstly, the quality or degree of fraud or dishonesty that must be alleged; secondly, the extent to which it must be shown that the alleged fraud affected the impugned judgment; thirdly, the particularity with which the fraud must be pleaded.
51. What degree of fraud or dishonesty must be alleged? Murphy J, in *Tassan Din*, cited two passages from the *Amphill Peerage Case*. That celebrated and unique case was concerned with an attempt to impugn a declaration of legitimacy affecting inheritance of a peerage. The law lords applied the principles relevant to all cases of attempts to set aside judgments. Lord Simon was of opinion that: "To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge of the subject. No doubt, suppression of the truth may sometimes amount to suggestion of the false: *The Alfred Nobel* [1918] P. 293. But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient."
52. To similar effect, Lord Wilberforce, at page 571: "What is fraud for this purpose? Learned counsel for John Russell without venturing upon a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments, and this case is surely a *fortiori* or at least analogous, it is clear that only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. Authorities as to

judgments make clear that anyone wishing to attack a judgment on grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it.”

53. It is worth also quoting the words of Lord Russell of Killowen, at page 598, if only for the purpose of eliminating any suspicion that the learned law lords were influenced by the very extraordinary nature of the proceeding, to set aside a declaration of legitimacy made many years before and to affect the status of a peer of the realm: “I consider that fraud in this context is the same as that which is required to be established in an action to set aside an ordinary judgment *inter partes* on the ground that it has been obtained by fraud: less than that will not suffice. In such an action particulars of that which is alleged to have been the fraudulent conduct must be given, and strong proof of the fraudulent conduct is required. This is not a mere matter of court practice: it is something which justice requires, having regard to the gravity of an accusation of dishonest dealing designed to pervert the course of justice and achieving that aim.”
54. I am satisfied that, in order to ground an action to set aside a judgment, the plaintiff must allege fraud in the true sense, that is deliberate and purposeful dishonesty, knowing and intentional deceit of the court. That approach is consistent with the statement of principle made by Keane J, in *Dublin Corporation v Building & Allied Trade Union and others*, with the interests of parties to litigation who have secured a final decision of a court and with the overriding public interest in finality of litigation.
55. In addition, the fraud alleged must be such as to affect the impugned decision in a fundamental way. It will not suffice to allege that the new situation revealed by the uncovering of the fraud might have affected the judgment. It will not be enough to show, for example, that a witness lied unless it is shown that the true version of his evidence would probably have affected the outcome. Mr Galligan, on behalf of Trinity, submitted that the court should adopt the test adopted by O’Hanlon J in *Kelly v Ireland*, cited above. The test would be whether new evidence “changes the whole aspect of the case.” That was, of course, a very different type of case. The plaintiff claimed damages for alleged assault by gardaí. He had been convicted in a criminal trial, where the court had rejected as untrue the allegations now made in a civil action. Thus, there was a question of issue estoppel. However, in the course of the proceedings, the plaintiff claimed in addition to have found new evidence which had not been before the criminal court. O’Hanlon J adopted the test I have mentioned, following a dictum of Goff LJ in *McIlkenny v Chief Constable of the West Midlands*
- [1980] QB 283. Would the alleged new evidence “change the whole aspect of the case? I believe that, in an action to set aside a judgment based on an allegation that the court was deliberately deceived into making the impugned decision no less stringent test should be required. There must be something fundamental, something that goes to the root of the case.

56. An additional point arises. In general, a court approaches an application to dismiss pursuant to Order 19, rule 28 on the basis of the pleadings. Do the pleadings, as they are read by the court, disclose a cause of action? Would the alleged facts, if true, confer a cause of action? That test clearly applies in a modified form to such an application when made in a case such as the present. Where the substance of the claim is the validity of a final decision of a court of competent jurisdiction, the court hearing an application to dismiss must be permitted to examine the impugned decision, including the reasoning of the judgment. It cannot be constrained by the version of that decision disclosed in the pleadings seeking to set it aside.
57. The third matter is the necessity for particularity in pleading. It is the unanimous view of the various judges cited in argument that the allegation of fraud said to have deceived the former court must be pleaded with particularity and exactness. I have cited the statement of Barrington J in *Waite v Lord Buckmaster* in *Jonesco v Beard*, Cited above, insisted that “the particulars of the fraud must be exactly given...” Similarly, according to Lord Wilberforce, “anyone wishing to attack a judgment on grounds of fraud must make his allegation with full particularity.....” In essence, the nature of the fraud, deceit or dishonesty must be clearly and unambiguously alleged. It is not enough to allege mere non-disclosure, unless the plaintiff can identify an obligation to disclose arising either under law or from the circumstances. Examination of the pleadings
58. The amended statement of claim undoubtedly alleges fraud consisting of intentional deceit of McKechnie J. The original version expressly ascribed this fraudulent behaviour to counsel. The amended version omits this and attributes it generally to Trinity without designating any alleged fraudulent actor. For present purposes, nonetheless, I consider that it contains allegations to a sufficient degree of fraud or dishonesty to satisfy the standard required by the cases cited.
59. I ask next whether the alleged fraud has been pleaded with sufficient particularity. The amended statement of claim specifies that Trinity persuaded McKechnie J that it intended to place boiler houses at various or “random” locations at various locations throughout the development and that it dishonestly persuaded the learned judge to that effect, having no genuine intention so to place the boilers. This amounts to saying that Trinity made statements to the learned judge which they knew to be false. On the other hand, several averments in the amended statement of claim relate to matters which were clearly before McKechnie J, for example the architectural plans and drawings mentioned in paragraph (i) and the Environmental Impact Statement mentioned at paragraph (iii)(b). In addition, Mr Kenny accepted at the hearing that the proposal to place boilerhouses in the roof space did not exist at the date of the hearing before McKechnie J and thus, could not have been fraudulently concealed from him. The key allegation is that, at the time of that hearing, Trinity had “previously made and was then pursuing” an application “for the location of some of the aforesaid boilers in the basement of one of the ...buildings...”

60. Thus, Mr Kenny has satisfied two of the three requirements which I have identified as essential components of an action to set aside a final judgment on the ground of fraud. It does not follow, of course, that the allegations are plausible or credible, merely that the allegations have been clearly made.
61. I must, in these circumstances, consider the remaining essential requirement, namely the degree to which the fraud affected the impugned judgment. For this purpose, as I have explained, the court should look at that judgment.
62. For the purpose of the present proceedings, the subject-matter is strictly limited to the issue of boiler houses. So far as that issue was concerned in the first judicial review, Mr Kenny alleged that no plans or drawings relative to a boiler house facility were submitted to the [Board] for its consideration . He variously described the information provided as “inadequate” and “insufficient” with the consequence that he claimed the deficiency “thereby vitiate [d] the decision...”
63. McKechnie J, therefore, accurately summarised Mr Kenny’s argument as being that there was “insufficient information before [the Board] which would have enabled it to exercise its jurisdiction...” Mr Kenny says there was no information, but that would also be insufficient.
64. Insofar as Mr Kenny had relied on the insufficiency of information as constituting a breach of the applicable regulations, McKechnie J (at page 577) said that Mr Kenny’s counsel had been unable to specify any breach. In fact, Mr Kenny’s point, as explained to this Court, is the more general one that the boiler houses being part of the development specific planning permission had to be obtained for them. I do not regard this point as significant.
65. McKechnie J took into account, in the course of his judgment, that two suggested modifications to the treatment of the boiler houses had been advanced at the oral hearing. In particular, he noted that the inspector, at the oral hearing, had emphatically ruled out the possibility of locating boilers in the basement. The crucial and decisive conclusion of McKechnie J was expressed in the following terms: “Examples of matters in dispute were, - the precise location of the plant rooms - (this being essential it was claimed to determine the emanating noise); the fact that one such room was shown next to a living area, whether the dimensions of such areas were sufficient, what should be the height of the flue, its location etc. Whilst I am satisfied that all of these matters were adequately dealt with at the oral hearing and that many are also suitable to be dealt with by agreement with the local authority, in addition could I say that I would set my face totally against such a microscopic examination by this Court of such matters of details.”
66. McKechnie J thus showed that he was fully conscious of the disputes regarding the location of boiler houses both at the oral hearing and at the hearing which took place before him in the High Court. Of particular relevance is the fact that he was fully aware that Trinity had proposed their placement in basements and that this had been ruled out. It is absolutely clear that McKechnie J did not consider this to be a matter which he had to resolve. Mr Kenny lays great emphasis on the dispute at the High Court hearing between the experts for

Trinity, on the one hand, and the applicants for judicial review, on the other. His fraud allegation relates centrally to this issue: that Trinity deceived the learned judge into believing that the boilers could be placed in the various “plant rooms.” But, significantly, the judge firmly ruled that he did not have to resolve this issue. He thought that it was a matter to be resolved within the planning process. Mr Kenny strongly disagrees with this view. But that is a disagreement which this Court cannot resolve on this appeal.

67. I am satisfied that it was completely irrelevant to the decision of McKechnie J that Trinity had applied, as they had, to the Building Control Authority for a fire safety certificate based on plans which showed, inter alia, boilerhouses being placed in a basement. The issue before McKechnie J was the validity of the decision of the Board to grant planning permission, which could not be affected to any degree by an application by Trinity, pursuant to another statutory scheme. Even if it must be accepted, for the purposes of the present application that the application for a fire safety certificate evinced an intention to place boilerhouses in basements, any such intention patently could not have been carried into effect without a further grant of planning permission. Crucially, its existence could not have affected the validity of the planning permission granted by the Board, which was the only matter before McKechnie J.
68. Accordingly, I have reached the conclusion that the amended statement of claim in the present action discloses no reasonable cause of action and that the action is frivolous and vexatious. Therefore, I would allow the appeal and make an order dismissing the action.
69. In the alternative to all of the foregoing, I reach the same conclusion, based on an appraisal of the facts and circumstances surrounding the grant of planning permission by An Bórd Pleanála, the hearing before McKechnie J and the judgment of the learned judge. That is that, under the inherent jurisdiction of the Court, this Court should dismiss the proceedings because they are certain to fail. The modern line of authority relating to the exercise of this jurisdiction commences with the judgment of Costello J in *Barry v Buckley*, cited above, and approved in later cases, where, at page 308, the learned judge explained it as follows: “But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see *Wylie's Judicature Acts* (1906) at pp. 34-37 and *The Supreme Court Practice* (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L. J. in *Goodson v. Grierson* 5 at p. 765. This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be

justified and is manifestly causing irrevocable damage to a defendant.”

70. It is undoubtedly the case, as has been repeated in several of the cases, that the jurisdiction must be exercised sparingly. Courts must exercise the drastic power to exclude a litigant from pursuing a claim only in very clear cases. It should be assumed that disputed issues of fact will be resolved in favour of the plaintiff. I have made the required assumptions in dealing with the matter under the rules of court.
71. However, as I have also pointed out, the essential facts and circumstances concerning the planning application and procedures leading to the decision of An Bórd Pleanála, are not in dispute. It is of particular importance to keep in mind the nature of the claim: Mr Kenny seeks, on the ground of fraud, to set aside a final judgment of the High Court (McKechnie J). He has had the opportunity of placing his challenge to the validity of the planning permission before the High Court. As already explained, I am quite satisfied that the facts allegedly concealed from the learned judge with fraudulent intent, would, if he had been aware of them, not have materially affected the decision. On that ground, the action is doomed to failure. On this ground also, I would allow the appeal and dismiss Mr Kenny’s action

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[1991] 1 IR 569, a, at 574, per Murphy, J BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S18.html>

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