Neutral Citation No. [2005] IEHC 82

THE HIGH COURT

Record No. 38 MCA 2003

IN THE MATTER OF AN APPLICATION PURSUANT TO THE PLANNING AND DEVELOPMENT ACT 2000 AND
AND IN THE MATTER OF AN APPLICATION THE REGULATIONS MADE THEREUNDER PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000
AND IN THE MATTER OF AN APPLICATION BY DUBLIN CITY COUNCIL
BETWEEN

DUBLIN CITY COUNCIL

APPLICANT

AND
LIFFEY BEAT LIMITED

RESPONDENT

JUDGMENT of Quirke J. delivered on the 10th day of March, 2005.

This is an application pursuant to s. 160 of the Planning and Development Act, 2000 (and the regulations made thereunder) for various reliefs including:

> (a) an order restraining the respondent from the unauthorised use, as a nightclub, of premises known as "Spirit". The premises are located at Middle Abbey Street and The Lotts in the City of Dublin.
> (b) an order requiring the respondent to comply with: (i) condition No. 4 of a planning permission which is contained in planning register reference number 2298/95, (ii) condition No. 4 of a planning permission which is contained in planning register reference number 0354/97 and, (iii) condition No. 2 of a permission which is contained in planning register reference number 0629/98.
> All of the permissions and conditions apply to the said premises known as "Spirit"
> (c) (i), an order requiring the respondent to cease the allegedly unauthorised use of the basement level of the premises known as "Spirit" as a bar and (ii), an order requiring that it be restored to the use permitted by the planning permissions as a museum and
> (d) orders requiring the respondent to ensure that any development of the premises is carried out in conformity with (i), conditions. 1 and 5 of the planning permission contained in planning register reference number 0354/97 and (ii), the entirety of the permissions granted and the conditions attached to the permissions.

FACTUAL BACKGROUND

1. The respondent is the owner of premises which are located at Middle Abbey Street, Dublin 1 and The Lotts, Dublin 1. The premises comprise a five storey over-basement building.
A leasehold interest in the property was acquired in 1996 by predecessors in title to the respondent which is the owner of the business name "Spirit". The building is substantial in size. From the date of its acquisition in 1995 it was the intention of its respective owners and occupiers to use the building on a commercial basis as a place of public entertainment.
2. By a planning permission bearing the planning register reference number 2298/95 the then owners of the premises were granted permission, (a), to demolish an existing structure at 57 Middle Abbey Street, Dublin 1, (b), to replace that structure with a new five storey over-basement building, (c), to alter a structure at numbers 44, 45, 46 and 47 The Lotts, Dublin 1, and (d), to change the use of the combined premises to accommodate a theatre, a place of public entertainment and ancillary accommodation.
3. Condition number 1 of planning permission register reference number 2298/95 (hereafter referred to as PP 2298/95) provided as follows:

> *"... the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application save as may be required by the conditions attached hereto .."*

Condition No. 4 of PP 2298/95 provided *inter alia* that:
"The use of the premises shall be confined to:

> *(1)(a) the ground floor being used as a public entertainment area (music) with emphasis on seated entertainment where food is served*
> *(b) no part of this permission entitles the use of any part of the premises as a nightclub or similar function type of premises other than those as stated in condition 4(a) and (b) unless prior planning permission has been obtained for this use from the Planning Authority or on Bord Pleanala on appeal.*

(c) the bar shall be used only as an ancillary use to the principal uses.

> *REASON: In the interest of proper planning and development of the area, to protect the amenity of adjoining residential development and to comply with the terms of this permission".*

4. On the 6th June, 1997, the then owners of the premises were granted permission to revise the approved plans. In the new permission bearing planning register number 0354/97 of 1997 (hereafter referred to as PP 0354/97) the owners were permitted a change of use.
The change was described under the heading *"Description"*. It provided as follows:
1. revisions to approved plan consisting of changes to elevations to The Lotts and Abbey Street, roof structures and lift shaft, together with revised mezzanine arrangement
2. changes of use from approved plans as follows
(a) "basement from store to museum,
(b) ground floor from music venue to museum, retail and restaurant
(c) second and third floors from office space to bar and music library".

Condition number 1 of PP 0354/97 provided *inter alia* that:

> *" .. the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application .."*

Condition no. 4 of PP 0354/97 provided as follows:

"The use of the premises shall be confined to

> *(a) the first floor being used a public entertainment area (music) with emphasis on seated entertainment where food is served*
> *(b) no part of this permission entitles the use of any part of the premises as a nightclub or similar function type premises other than those stated in condition 4(a) and (b) unless prior planning permission has been obtained for this use.*
> *(c) the bar shall be used only as an ancillary use to the principal uses.*
> *REASON: In the interest of proper planning and development of the area, to protect the amenity of adjoining and residential development and to comply with the plans of this permission)."*

5. On 25th June, 1998, the then owners of the premises were granted a further planning permission with the register reference number 0628/98 (hereafter referred to as PP 0628/98)

> Under the heading *"Description"* it provided as follows:
> *"Signage and modifications, consisting of changes to elevations to approved plans".*

Condition number 2 of PP 0628/98 provided as follows:

> *"The use of this premises shall be confined to*
> *(a) the ground floor being used as a public entertainment area (music) with emphasis on seated entertainment where food is served."*
> *(b) no part of this permission entitles the use of any part of the premises as a nightclub or similar function type basis other than the use as stated in condition 4 (a) unless prior planning permission has been obtained for this use from the Planning Authority or An Bord Pleanála on appeal).*
> *(c) The bar shall be used only as an ancillary use to the principal uses."*
> *REASON: "In the interest of proper planning and development of the area, to protect the amenity of adjoining residential development and to comply with the terms of this permission".*

6. Condition No. 4 of PP 0354/97 has been couched in terms virtually identical to the terms of condition No. 4 of PP 2298/95 with the important exception that the condition 4 of PP 0354/97 authorised the use of the first floor as " *a public entertainment area (music) with emphasis on seated entertainment where food is served"* whereas condition no. 4 of PP2298/95 authorised the use of the ground floor for that purpose.
Condition No. 2 of PP 0628/98 (which was the counterpart condition in respect of conditions 4 of the two earlier planning permissions) appeared to repeat the permission to use the ground floor as:

> "*a public entertainment (music) with emphasis on seated entertainment where food is served".*

7. With effect from 1996 the premises have been used as an "entertainment venue". It was initially known as "H.Q. Music Hall of Fame"
It's owners describe it as a *"multipurpose entertainment venue"*. It has been used for the promotion of a variety of musical and theatrical events. Between 1996 and 2003 more than 150 productions (principally concerts and performances by artists) were held within the premises. Many well known actors and entertainers were engaged for these performances. It has also been averred on behalf of the respondent and acknowledged on behalf of the applicant that the premises have, in the main, been maintained in an appropriate fashion since its opening. Some difficulties concerning noise have been addressed by the owners of the premises to the satisfaction of the applicant.
8. The premises enjoy the benefit of the following licences:

(a) A music and singing and public entertainment licence for public music and singing and other entertainment events including *"...pantomime exhibitions and trade shows, circuses, shows, religious festivals and gatherings, awards and presentation ceremonies, banquets, concerts, dramatic concerts, cinematographic exhibitions, recitals, performances, amusements, games, sports, funfairs, carnivals and public entertainment of the like kind."*
(b) A public dance licence.
(c) A theatre licence issued by the Revenue Commissioners pursuant to the provisions of s. 7 of the Excise Act 1835, and,
(d) A licence for the sale of intoxicating liquor issued by the Revenue Commissioners on the basis that the premises comprises a licensed place of public entertainment.

9. Mr. Denis Desmond, who has an interest in the respondent, in evidence, has averred that the term *"disc-jockey"* is now used to describe full time professional *"performance artists"* who are normally recognised members of the Musicians Union and generate music by utilising different types of technology. He averred that this is a skill and an art in itself and that *"disc-jockeys"* who have performed within the premises have been *"performance artists"* of that type.
10. Mr. Michael Colgan, who is the artistic director of the Gate Theatre in Dublin has averred *inter alia* that:

> *"the nature of the performances and productions staged in the premises are of genuine artistic and theatrical nature ... I have seen many shows throughout continental Europe which are not literally based but are in fact cabaret based such as those found particularly in Germany and France. These shows would, by and large use the same essential format as the theatrical productions that are staged in [the premises]."*

11. The applicant received a complaint which was dated the 22nd February, 2002, in relation to an alleged change of use of the respondent's premises from a "music venue" to a "nightclub".
Consequent upon this complaint, the applicant's planning enforcement officer Mr. Colm McKernan carried out an inspection of the premises where he found that major refurbishment works were being carried out.
Mr. McKernan informed the then occupant Mr. Wooton of the complaint and that the premises could only be used as prescribed by the relevant planning permissions.
A letter was sent by the applicant dated 28th March, which informed Mr. Wooten that the conversion of the premises to a nightclub was expressly prohibited.
However, further complaints were received by the applicant on or about 13th May, 2002, alleging use of the premises as *"a nightclub with dance music"*.
Between the 18th May, 2002, and 19th December, 2003, Mr. McKernan undertook a further eight separate inspections of the premises. Most of these inspections were undertaken after midnight.
During seven of the nine inspections undertaken the ground floor of the premises was not used for the service of food of any kind. On one occasion, (the 18th May, 2002) a small section of the ground floor was in use as a restaurant area and on another occasion (the 19th December, 2003) a table had been installed on the ground floor where refreshments comprising principally bread (baguettes and panninis) could be purchased.
During all nine inspections part of the ground floor was in use by patrons for dancing to music provided by disc-jockeys.
During all relevant inspections portions of the ground floor were used for the provision of alcohol. During most of the inspections part of the ground floor was used as a small cinema where patrons could watch different types of films.
None of the inspections disclosed the performance of any type of theatrical production or dance routine or other type of live entertainment on the ground floor.
The nine inspections conducted by the applicant disclosed that on all relevant occasions the first floor was used by a number of people dancing to music played by a disc-jockey.
During those inspections no food was served on any part of the first floor. On one occasion a large *"drop-down"* screen was in use for the purpose of viewing Grand Prix racing. On four occasions performers (principally dancers) were on stage.
On all relevant occasions patrons were dancing to music provided by disc-jockeys (usually from "*disc-jockey boxes"*).

THE LAW
Section 160 (1) of the Planning and Development Act 2000 (the Act of 2000) provides as follows:

> ***"****(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in order to ensure, as appropriate, the following:*

(a) that the unauthorised development is not carried out or continued;
(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;
(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject."

Section 2 of the Act of 2000 provides *inter alia* as follows:
"Unauthorised use" means, in relation to land, use commenced on or after 1st October 1964, being a use which is a material change in use of any structure or other land and being development other than –
(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act)……..
"Use" in relation to the land does not include the use of the land by the carrying out of any works thereon."

The onus of proving that a particular development is unauthorised rests upon the applicant for relief pursuant to the provisions of s. 160 of the Act of 2000.
That onus may be discharged *inter alia* by proof that the use of the land or premises concerned has materially changed from the use permitted by the planning permission and that the change of use is not lawful *per se* or has not been otherwise lawfully authorised.
Proof that the use complained of offends and is in breach of a condition of the planning permission is sufficient to prove unauthorised use for the purposes of s. 160.

The Basement.
I am satisfied on the evidence that the applicant has established on the balance of probabilities that at all times material to these proceedings the use by the respondent of the basement area of the premises has been *"unauthorised use"* within the meaning of the Act of 2000.
The use permitted by PP0354/97 (and drawing no. 9615/101) was *"…as a museum space with changing rooms…".*
It has been clearly established on the evidence that the basement area has not been bona fide used for that purpose at any material time since the grant of PP0354/97.
The purported use of the basement as a "*a museum of holistic healing"* in the manner averred to in evidence is inconsistent with any reasonable sensible pragmatic construction of what is understood to be a museum.
That fact has not been seriously disputed by Mr. Galligan S.C. on behalf of the respondent.
It follows that there has been on the part of the respondent, an unauthorised use of the basement area of these premises over a substantial period of time.

The remainder of the premises.
The second floor of the premises comprised a balcony or "viewing area" and a small bar which was intermittently open during inspections by the applicant.
The third and fourth floors were used primarily for staff and office accommodation during the material time. There were some inconsistencies in the uses of those three floors when contrasted with the uses permitted by the planning permissions but the applicant, quite properly, did not seek relief on the basis of isolated specific instances of inconsistency. It sought relief on the overall basis that at specific times the premises, as a whole, was used as a *"nightclub".*
Sub-paragraph (b) of condition no. 4 of PP2298/95, which is common to all three relevant planning permissions, is central to these proceeding.
It provides that:

"*No part of this permission entitles the use of any part of the premises as a nightclub or similar function type of premises other than those as stated in condition 4 (a) and (b) unless prior planning permission has been obtained for this use from the Planning Authority or on An Bórd Pleanála on appeal."*

It is contended by Mr. Holland S.C. on behalf of the applicant that the effect of that subparagraph is to make the three planning permissions expressly subject to the condition that no part of the premises may be used *"as a nightclub or a similar function type premises".*
Mr. Galligan S.C. on behalf of the respondent contends that this condition is qualified by the words which follow it. Those words are *"other than the use as stated in condition 4 (a) and (b)".*
The issue in this case concerns the proper construction of the condition.

THE USE AUTHORISED
The conditions which apply in respect of the relevant three planning permissions have been drafted so poorly that their construction, for practical purposes, has proved very difficult.
Accordingly, in order to seek to establish the meaning and intent of the conditions, it became necessary throughout these proceedings for the parties, and the court, to place some reliance upon the plans, particulars and specifications which were lodged with each of the planning applications.
This was warranted having regard to the provisions of the condition (no. 1 in each case) which required that:

"*the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application save as may be required by the conditions attached hereto…".*

After due consideration the court concluded and the parties agreed that the combined effect of the imposition of the conditions and of the lodgement of the plans and specifications is that the respondent has been permitted to use both the ground floor and the first floors as:

"*a public entertainment area (music) with emphasis on seated entertainment where food is served.*"

The assertion made on 18th May, 2002, by Ms. Byrne on behalf of the respondent that the premises had been "*used as a comedy club, almost every night from 7.30 pm to 11.00 pm on the first and second floors*" has not been disputed by the applicant. Evidence has also been adduced indicating that between 1996 and 2003 the premises were used for more than 150 concerts and performances by well known actors and entertainers.

Accordingly the evidence has established a significant use by the respondents of the premises as "*a public entertainment area (music) with emphasis on seated entertainment*".

Between 22nd February, 2002, and the 19th December, 2003, the applicant undertook nine separate inspections of the respondent's premises. The results of those inspections have been outlined earlier.

It has not been established on the evidence that food has been provided by or on behalf of the respondent in the manner contemplated by the relevant conditions. The applicant however does not bring these proceedings for the purpose of requiring the provision by the respondent of food throughout the performances which are staged within the premises. Similarly the relief sought has not been sought because the applicant is dissatisfied with the amount of fixed seating which has been provided by the respondent for its patrons. Most of the seating provided has been moveable seating and it has been moved and rearranged to accommodate different types of activity on the premises from time to time.

The respondent has made a number of changes to the internal layout of its premises and to the fixtures and fittings therein. However the applicant has not identified any alterations within the premises which could, of themselves, be deemed to comprise a material change of use of the premises and which would not be properly classified as either (a) an *"exempted development"* within the meaning of s. 4 of the Act or (b) the carrying out of *"works"* within the meaning ascribed to that term by the provisions of the Act.

The principal ground relied upon by the applicant in support of its application is its claim that the use by the respondent of the ground and first floors of the premises offends and has been in breach of the condition within the relevant permissions which requires that "*no part of this permission entitles the use of any part of the premises as a nightclub or similar function type of premises other than those as stated in condition 4 (a) and (b)".*

The applicant has authorised the use of the premises by the respondent as *"a public entertainment area (music)."* It has failed to define that term or to seek to explain what is meant by it.

Condition No. 4(1) (a) appears to qualify the use permitted by adding the words *"with emphasis on seated entertainment where food is served."* However the plans, particulars and specifications lodged with the applications have made express provision for areas on the ground and first floors where patrons may dance.

It is difficult therefore to avoid the conclusion that the planning permissions to use the two floors for public entertainment should be construed as including its use by way of music and dancing.

The applicant has at all material times known (or it ought to have known), that the premises enjoys *inter alia* the benefit of (1) a music, singing and public entertainment licence (which permits such activity until 4.00 am each day) and (2) a theatre licence (which permits the sale of alcohol on the premises at any time from 30 minutes prior to the commencement of a theatrical performance until 30 minutes after the conclusion of that performance).

No evidence has been adduced in these proceedings indicating that the applicant has ever had any objection to the grant of those licences.

It is of some significance that the use of the ground and first floors of the premises as a *"public entertainment area"* was not confined in any respect by time.

Accordingly the terms of sub-para. (1) (a) of the relevant conditions may, *prima facie*, be construed as authorising the use of the ground and first floors of the premises as a public entertainment area where music may be played and dancing may be permitted and alcohol may be served without any restriction as to time.

Sub-paragraph (b) of the relevant conditions purports to prohibit "*the use of any part of the premises as a nightclub or similar function type of premises"* but qualifies that restriction by the use of the words *"other than those as stated in condition 4 (a) and (b).*"

No attempt has been made by the applicant to define *"nightclub or similar function type of premises…".* The applicant has consistently refused to offer any assistance either to the respondent or to this court as to what was or is intended by the use of the word *"nightclub"* within the condition. It was invited to do so repeatedly by the respondent before these proceedings were commenced.

It was scarcely surprising therefore that it could offer little assistance to the court as to the appropriate construction of the immediately following words "*or similar function type of premises".*

The kernel of the applicant's case was summarised by Mr. McKernan when he averred that:-*"The problem exists when the live show ends and the nightclub use commences".*

The applicant, therefore, acknowledges that up to a particular time each evening the use of the premises by the respondent has been broadly in compliance with the use authorised by the applicant.

It is claimed that, on the evidence, the use of the premises has materially changed on particular evenings of particular weeks at particular times.

The applicant seeks from this court, an order requiring the respondent *"to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in order to ensure"* that the unauthorised use is not continued and that the *"development"* is carried out in conformity with the relevant permissions and with the conditions to which those permissions are subject.
Before making an order of the kind sought by the applicant this court must first be satisfied:

> (a) that there has been *"unauthorised use"* on the premises by the respondent within the meaning ascribed to that term by the Act of 2000,
> (b) that this *"unauthorised use"* by the respondent is likely to continue unless restrained, and,
> (c) that it is appropriate, in the circumstances, for this court to exercise its discretion to grant the relief which has been sought.

UNAUTHORISED USE

As I have already indicated, the respondent has been authorised by the three relevant planning permissions to use the ground and first floor of the premises as
*"a public entertainment area (music) with emphasis on seated entertainment where food is served" w*ithout any restriction in time. The use authorised by the permission has not been confined to any specific period or periods of time, or to any particular day or days or to any particular week or weeks, etc.
I am satisfied, on the evidence, that the use of the ground and first floors of the premises by the respondent has been used as a *"public entertainment area (music)"* at all material times since the grant of the relevant permission.
Whilst it is unclear what is intended by the words *"with emphasis on seated entertainment,"* the evidence has established that substantial seating accommodation has been provided for the patrons who frequent the premises and that *"entertainment"* has been provided on both floors by way of theatrical performances, cinema film productions and by dancers and other performers. Most of the theatrical performances have concluded before midnight.
On the evidence, food has very rarely been served to supplement the *"public entertainment"* in the manner required by the terms of sub-condition (1)(a) of the relevant conditions.
The applicant's claim for relief rests almost exclusively upon alleged breaches by the respondent of the restrictive sub-condition (1)(b) of the relevant conditions within the permissions. This provides that *"no part of this permission entitles the use of any part of the premises as a nightclub or a similar function type premises other than those stated in condition 4(a) and (b)".*
The applicant has, at all material times, been unwilling to define the word *"nightclub"* or to assist the court as to its definition. It requires the court to define the term *"nightclub"* and to decide what is meant by the condition and what precise restriction in the use of the premises the condition was intended to achieve.
In *Grianan an Aileach v. Donegal County Council* (Unreported, Supreme Court, 15th July, 2004) the Supreme Court considered a declaration made by the High Court (Kelly J.) that the plaintiffs were permitted to use a visitors' centre in Co. Donegal for particular types of activities but were not permitted to use it for *"the holding of weddings or use as a nightclub".*
The Supreme Court (Keane C.J.) held that the issue for consideration, namely whether the proposed uses were authorised by the planning permission, required the determination of whether what was being proposed would constitute a material change in the use of the premises. Since this required the determination of the question as to whether the proposed uses would constitute a *"development"* it was a question which the planning authority and An Bord Pleanála were empowered to determine pursuant to s. 5 of the 2000 Act.
The court was not entitled to determine that issue because if it did so *"there would be an overlapping and unworkable jurisdiction between the courts and the planning authority and An Bord Pleanála".* However, Keane C.J continued: at page 26 that:

> *"If the enforcement proceedings are brought in the High Court, that court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission…".*

Mr. Holland relies upon the latter finding in support of his contention that this court should determine, in the instant case, whether there has been a material change of use by the respondent of the premises which are the subject of these proceedings._
In these proceedings the applicant has not sought declaratory relief of the kind which was sought on behalf of the applicant in *Grianán An Aileach*. This court clearly has jurisdiction (pursuant to the provisions of s. 160 of the Act of 2000) to grant or refuse the relief sought. The exercise of that jurisdiction requires a determination as to whether there has, in this case, been a material change in the permitted use of the premises.
The applicant claims that there has been *"unauthorised use"* of the premises by the respondent which is likely to continue unless restrained. It is contended that it is appropriate in the circumstances for this court to exercise its discretion to grant the relief which has been sought.
In *Grianán an Aileach,* Keane C.J. pointed to the difficulties which can result where imprecise language is used in the grant

of planning permission.
He observed (at p. 28):

> *"In the present case, the trial judge, quite understandably, was concerned to resolve issues which had been brought before the High Court in a manner which was fair to both the planning authority and the public interest which it represents on the one hand and the legitimate interests of the plaintiffs on the other hand. This resulted, however, in the granting of a declaration in a form which had not been sought by either party and which clearly creates further difficulties. Can it be said that the prohibition on "weddings" (presumably intended to exclude the social function which normally takes place in a hotel or restaurant following the wedding itself) extends to other social functions and, if so, how are they to be defined? Does the prohibition on "non-cultural activities" extend to every form of pop or rock concert? What precisely is meant by "use as a nightclub?.*
> *Some responsibility may be attributed to the planning authority for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of planning tribunal."*

Although the instant proceedings comprise enforcement proceedings
within the jurisdiction of this court I am nonetheless satisfied that the fundamental principle identified by Keane C.J. in the foregoing passage applies with equal force to the facts of these proceedings. Matters involving planning policy lie within the remit and competence of the planning authorities and tribunals established by the legislature. It is not the function of the courts to seek to resolve questions involving planning policy by *"acting, in effect, as a form of planning tribunal"*.
In these proceedings the applicant has established on the evidence that, until midnight each day, the use of the premises has (save as to the service of food), at all material times been in accordance with the use authorised by the planning authority. It has adduced detailed evidence of nine inspections of the premises undertaken on behalf of the applicants between 18th May, 2002 and 19th December, 2003. Those inspections were undertaken close to or after midnight on each occasion. They disclosed (a) a primary or predominant use of the premises by patrons for dancing to music provided by disc-jockeys with (b) occasional performances by dancers and (c) the use of portion of the ground floor premises as a small cinema.
The applicant claims that this evidence discharges the onus which rests upon the applicant, of proving that the use of the premises has materially changed from the use permitted by the three planning permissions which apply to the premises. However, as I have indicated earlier, the terms of sub-paragraph (1) (a) of the relevant conditions may, *prima facie,* be construed as authorising the use of the ground and first floors of the premises as a public entertainment area where music may be played and dancing permitted and alcohol served without restriction as to time.
The applicant claims that the evidence has established on the balance of probabilities that the premises (or part of the premises) has been used *"as a nightclub or similar function type of premises other than those as stated in condition 4 (a) and (b)"* and that (a) this is an unauthorised use which (b) will continue unless restrained by order of the court.
In *Grianán An Aileach* Keane C.J. posed the question *"what precisely is meant by "use as a nightclub?"*. Mr Holland says that the question posed in that case was both rhetorical and *obiter*.
However, I cannot avoid asking the same question in these proceedings.
On greater complexity I cannot avoid addressing the question as to what precisely is meant by *"use of ...the premises as a nightclub or similar function type of premises other than those as stated in condition 4 (a) and (b)…"*.
The applicant claims that the respondent has, on nine occasions, been in breach of the restrictive sub-condition (1)(b) of the relevant conditions imposed by the planning permissions in respect of the premises. The applicant says that this comprises a material change of the permitted use of the premises (within the meaning of the Act of 2000).
Reliance has been placed by both parties upon the following *dicta* of the Supreme Court (McCarthy J.) in the case of *X.J.S. Investments Ltd. v. Dun Laoghaire Corporation* [1987] I.L.R.M. 659 (at p. 663):

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

Although these observations referred to the terms of a draft development plan, they apply with equal force to documents granting or refusing planning permission for the development of property. Such documents are of considerable importance, not just to persons having an interest in the property to be developed but also to the community as a whole since they affect the proper planning and development of the areas within the remit of particular planning authorities.
Accordingly there is a requirement that such documents should be couched in terms which are comprehensible and capable of construction *"in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents"*.
That requirement imposes an obligation upon planning authorities (and An Bord Pleanála) to take reasonable steps to ensure

that, insofar as is practicable the terms of documents granting or refusing planning permission will be comprehensible to members of the public.
Obviously some documents of a technical character must, of necessity, be couched in technical terms. However, where it is possible, reasonable care should be taken by planning authorities (and An Bord Pleanála) to make the terms and conditions which apply to planning permissions comprehensible to the parties who have an interest in the property to be developed and to the members of the public who have an interest in the proper planning and development of the area in which they reside.
It follows that there is a requirement (and a corresponding obligation upon planning authorities and An Bord Pleanála) to ensure that where the permitted use of property is restricted or confined by a condition or a number of conditions, then the terms of those conditions should be clearly comprehensible and capable of definition and explanation.
Where a restrictive condition is imposed confining the use of property in a particular manner then some care should be exercised by the party which is imposing the condition to clarify the nature and extent of the restriction imposed by the condition.
In particular where clarification is sought from the planning authority (or An Bord Pleanála) by a party having an interest in the property as to the nature and extent of the restriction imposed by a condition within a planning permission then reasonable steps should be taken by the planning authority (or the Board) to provide the clarification sought. The planning process is intended to be substantially consultative in nature (subject to the application of the principles of natural and constitutional justice).
In the instant case the respondent, on a number of occasions, sought clarification from the applicant as to what was intended by the words *"use of ...the premises as a nightclub or a similar function type premises other than those stated in condition 4 (a) and (b)"* within sub-condition (1) (b) of the relevant conditions. No clarification was provided.
On the evidence, the applicant has failed to discharge its obligations either (a) to make the terms of the relevant conditions reasonably comprehensible to interested persons (including members of the public) or (b) to provide clarification to the respondent as to the nature and extent of the restrictive sub-condition (1) (b) of the relevant conditions when that clarification was sought.
It has been contended on behalf of the applicant that the term *"use...as a nightclub"* can and will be understood within its ordinary meaning by members of the public without legal training and that the court should *"stand in the shoes"* of members of the public for that purpose.
I do not believe that this court can or should perform such an exercise.
It has been argued in these proceedings that activities which may currently identify the use of premises as a *"nightclub"* may differ from activities which would have identified the use of premises as a *"nightclub"* in former (not too distant) times. I accept that contention. Fashions and behavioural trends change (sometimes radically) with the passage of time.
No evidence was adduced during the course of these proceedings directed towards assisting the court in establishing what the applicant intended to achieve by imposing the restrictive conditions which it imposed. The court is accordingly invited to speculate upon what the applicant intended to achieve. It would be wholly inappropriate for the court to do so. It is decidedly not the function of the court to impose its view as to how the premises should be used. That is a planning matter which is within the remit of the applicant. It is the responsibility of the applicant to determine how the premises should be used. It is the responsibility of the applicant to do so clearly and coherently.
The applicant claims that it has discharged the onus of proving an unauthorised use of the premises by the respondent. It contends that this unauthorised use has been use "*as a nightclub or similar function type of premises other than those as stated in condition 4 (a) and (b)".*
I am not satisfied that the applicant has established on the evidence and on the balance of probabilities that there has been an unauthorised use of any part of the premises other than the basement. I say this because no evidence has been adduced which has enabled this court to decide what use "*as a nightclub or similar function type of premises other than as stated in condition 4(a) and (b)"* comprises.
In summary, I am satisfied on the evidence that the applicant has established on the balance of probabilities that at all times material to these proceedings the use by the respondent of the basement area of the premises has been *"unauthorised use"* within the meaning of the Act of 2000
I am not satisfied that "*unauthorised use"* of the remainder of the premises by the respondent within the meaning ascribed to that term by the s. 2 of the Act of 2000 has been proved in these proceedings.