[2024] IEHC 233

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.MCA.2024.0000066]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND IN THE MATTER OF A NOTICE OF MOTION FOR RELIEF UNDER SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

LEITRIM COUNTY COUNCIL

APPLICANT

AND

DROMAPROP LTD

RESPONDENT

JUDGMENT of Humphreys J. delivered on Monday the 29th day of April 2024

1. To give effect to national policy regarding the need for additional residential provision for international protection seekers and displaced persons, regulations provide that conversion of hotels and similar residential institutions to accommodate such persons is exempted development, as long as the conversion does not breach a condition of planning permission. Is that qualification to be read as so wide that it includes not only conditions regarding specific features of the permission that apply to some instances of exempted developments of the type in question and not others, but extends to general conditions that would be *inherently* contravened by all instances of the very change of use which the exemption permits, thereby hollowing out that exemption? That is the primary question in this fairly technical challenge by a council to works aimed at enabling the accommodation of protection seekers in a hotel premises.

Facts

2. Dromaprop is the owner of the Abbey Manor Hotel, Dromahair, Co. Leitrim, the older part of which is a protected structure. The hotel was established in 1860 but closed in the crash period in 2009, and fell into some disrepair. On 4th July 2023 the current owners applied for permission for works which would enable the hotel to operate to serve the commercial tourist trade.

3. The application documentation detailed:

> "it is intended to use same as a 'suite hotel' to 'provide sleeping accommodation to the passing tourist trade with minimal food services'. It further outlined that 'no foods will be prepared on site…[t]here is no kitchen….'."

4. It also outlined that the plan is to provide "Room Only accommodation without any meals or drinks, essentially a Hotel without the Food and Beverage facilities…"

5. It also detailed that the:

> "'planned target guest would be short term guests working and visiting locally… The targeted guest will be September to May Corporate guests working locally midweek and leisure and corporate guests at the weekend… There is a captive audience of business / corporate guests acquiring budget friendly accommodation within a short drive to Sligo town…'. It was further noted that during 'summer months we would provide budget friendly [accommodation] to domestic and international visitors from a tourism perspective…'."

6. The council prepared a first planner's report dated 6th September 2022 and sought further information from Dromaprop on the same date. Following the submission of the further information, the council's second planner's report was prepared, dated 2nd December 2022.

7. The council granted planning permission Reg. Ref. No. P22/138 on 12th January 2023 for development comprising*, inter alia* the retention and completion of alterations to the existing Abbey Hotel. This included, at Schedule 1, the main reasons and considerations for the grant and, at Schedule 2, a list of 14 conditions.

8. Following the commencement of works pursuant to the permission, Dromaprop indicated that it proposed to change the use of the premises to provide temporary accommodation to persons seeking international protection or displaced persons.

9. In order to give effect to the proposed change in use Dromaprop has carried out certain works to the interior of the premises at variance from the permission.

10. The Department of Children, Equality, Disability, Integration and Youth issued a briefing note on 7th December 2023 stating that the property had capacity for 155 persons with 124 beds for families, and that a 12 month contract had been offered to the owner.

11. The proposed change of use has yet to commence and the premises are not occupied at time of writing.

Procedural history

12. The council commenced the proceedings in the Planning and Environment Division of the High Court by way of Notice of Motion, dated 1st February 2024 grounded on the affidavit of Bernard Greene, Senior Planner. The Notice of Motion was made returnable for 12th February 2024.

13. Dromaprop filed two replying affidavits from Declan Hallinan, Director of Dromaprop, filed on 14th February 2024 and Kevin Hughes, Planning Consultant for Dromaprop, filed on 21st February 2024.

14. The council filed a further affidavit in reply from Pio Byrnes, Acting Senior Planner, on 6th March 2024.

15. Dromaprop filed a further replying affidavit from Kevin Hughes, Planning Consultant, on 20th March 2024.

16. The council delivered its legal submissions on the 24th March 2024. Dromaprop delivered its legal submissions on the 8th April 2024.

17. Following case management in the Planning & Environment List the matter was listed for hearing with related proceedings, with the latter beginning first on 16th April 2024.

18. The present action was heard on 17th, 22nd and 23rd April 2024, when judgment was reserved.

Relief sought

19. The reliefs sought in the council's notice of motion are as follows:

> "1. An Order pursuant to Section 160(1)(a) of the Planning and Development Act 2000, as amended, restraining the Respondent, its respective servants, agents, licensees or any person acting in connection with it or on its instruction, from carrying out unauthorised development at The Abbey Manor Hotel, Dromahair, Co. Leitrim, specifically the change in use from commercial tourist accommodation, as permitted by Planning Permission Reg. Ref. No. P22/138, to temporary use to accommodate displaced persons and/or persons seeking international protection and all associated works including to the layout of the premises relating to and/or to facilitate such a change in use.
>
> 2. An Order pursuant to Section 160(1)(c) of the Planning and Development Act 2000, as amended, requiring the Respondent, its respective servants, agents, licensees or any person acting in connection with it or on its instruction, to carry out development at The Abbey Manor Hotel, Dromahair, Co. Leitrim, in conformity with Planning Permission Reg. Ref. No. P22/138 – and, insofar as this has not been done to date, an Order pursuant to s.160(2) requiring the Respondent to carry out remedial/restoration/alteration works so as to ensure the development complies with Planning Permission Reg. Ref. No. P22/138.
>
> 3. Interim and/or interlocutory relief pursuant to Section 160(3)(a) of the Planning and Development Act 2000 (as amended), as may be necessary.
>
> 4. Such further or other order as this Honourable Court shall deem fit.
>
> 5. The costs of these proceedings."

Legislation under which relief is sought

20. Section 160 of the 2000 Act provides:

> "160.—(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 the 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—
>
> (i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject, or
>
> (ii) in the case of a certificate issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban Renewal Act 1986, the planning scheme made under those Acts to which the certificate relates and any conditions to which the certificate is subject.
>
> (2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.
>
> (3) (a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.

(b) Subject to section 161, the order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.
(4) (a) Rules of court may provide for an order under this section to be made against a person whose identity is unknown.
(b) Any relevant rules of Court made in respect of section 27 (inserted by section 19 of the Act of 1992) of the Act of 1976 shall apply to this section and shall be construed to that effect.
(5) (a) An application under this section to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the land which is the subject of the application is situated.
(b) The Circuit Court shall have jurisdiction to hear and determine an application under this section where the market value of the land which is the subject of the application does not exceed €3,000,000.
(c) The Circuit Court may, for the purposes of paragraph (b), in relation to land that has not been given a market value or is the subject with other land of a market value, determine that its market value would exceed, or would not exceed, €3,000,000.
(d) Where the market value of any land which is the subject of an application under this section exceeds €3,000,000, the Circuit Court shall, if an application is made to it in that behalf by any person having an interest in the proceedings, transfer the proceedings to the High Court, but any order made or act done in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court by order.
(e) In this subsection 'market value' means, in relation to land, the price that would have been obtained in respect of the unencumbranced fee simple were the land to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land.
(5A) (a) An application under this section to the Circuit Court shall, in respect of development situated wholly or partly in the nearshore area of a coastal planning authority, be made to the judge of the Circuit Court for the circuit in which the functional area (other than the nearshore area) of that coastal planning authority is situated.
(b) The Circuit Court shall have jurisdiction to hear and determine an application under this section in relation to a development referred to in paragraph (a) where the aggregate amount of the levy or levies payable under Chapter 7 of Part 4 of the Maritime Area Planning Act 2021 in respect of the maritime area consent granted to the person who carried out the development does not exceed €500,000.
(5B) (a) An application under this section, in respect of development situated wholly or partly in the nearshore area of a coastal planning authority, shall be made to the High Court if that development was carried out by or on behalf of a person who at the time of the carrying out of the development was not the holder of a maritime area consent granted for the occupation of a maritime site for the purposes of the proposed development.
(b) An application under this section, in respect of development situated wholly in the outer maritime area, shall be made to the High Court.
(6) (a) An application to the High Court or Circuit Court for an order under this section shall not be made—
(i) in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development,
(ii) in respect of a development for which permission has been granted under Part III or section 293, after the expiration of a period of 7 years beginning on the expiration, as respects the permission authorising the development, of the appropriate period (within the meaning of section 40) or, as the case may be, of the appropriate period as extended under section 42, or
(iii) in respect of a development in respect of which a certificate has been issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban Renewal Act 1986, after the expiration of a period of 7 years beginning on the date the certificate ceases to have effect in accordance with Part 4 of the Dublin Docklands Development Authority (Dissolution) Act 2015.
(aa) Notwithstanding paragraph (a) an application to the High Court or Circuit Court for an order under this section may be made at any time in respect of unauthorised quarry development or unauthorised peat extraction development in the following circumstances:

(i) where no permission for the development has been granted under Part III and the development commenced not more than 7 years prior to the date on which this paragraph comes into operation;
(ii) where permission for the development has been granted under Part III and, as respects the permission—
(I) the appropriate period (within the meaning of section 40), or
(II) the appropriate period as extended under section 42 or 42A,
expired not more than 7 years prior to the date on which this paragraph comes into operation.
(ab) Notwithstanding paragraph (a) or (aa), an application to the High Court or Circuit Court may be made at any time for an order under this section to cease unauthorised quarry development or unauthorised peat extraction development.
(b) Notwithstanding paragraph (a), an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of the land.
(7) Where an order has been sought under this section, any other enforcement action under this Part may be commenced or continued."

Issue 1 – the hotel use issue (and consequent applicability in principle of Classes 14(d) and 20F)

21. The basic issue under this heading is whether, as of the date of commencement of the works by which the property was to converted to use as accommodation for protection seekers, it had an existing use as a hotel, or whether that use had been abandoned or extinguished. If it had an existing use, then the property stood to benefit in principle from the possibility of an exemption regarding conversion, subject to the issue of breach of conditions to which we will turn later.

22. A category of exempted development is provided under Class 14(h) inserted by article 4 of S.I. No. 582/2015 Planning and Development (Amendment) (No. 4) Regulations 2015 which allows for change of use:

"(h) from use as a hotel, motel, hostel, guesthouse, holiday accommodation, convent, monastery, Defence Forces barracks or other premises or residential institution providing overnight accommodation, or part thereof, or from the change of use specified in paragraph (i) of the said premises or institution, or part thereof, to use as accommodation for protected persons,"

23. A further relevant exemption is class 20F, inserted by the Planning and Development (Exempted Development) (No. 4) Regulations 2023, S.I. No. 376 of 2023, dated 19th July 2023. Those regulations provide as follows:

"S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023
Notice of the making of this Statutory Instrument was published in
'Iris Oifigiúil' of 21st July, 2023.
WHEREAS I, DARRAGH O'BRIEN, Minister for Housing, Local Government and Heritage, am of the opinion that development to which the following regulations apply would not offend against principles of proper planning and sustainable development by reason of the nature and limited effect of development belonging to that class on its surroundings;
AND WHEREAS a draft of the following regulations has been laid before each House of the Oireachtas and a resolution approving that draft has been passed by each such House;
NOW I, DARRAGH O'BRIEN, Minister for Housing, Local Government and Heritage, in exercise of the powers conferred on me by sections 4 (2) and 262 of the Planning and Development Act 2000 (No. 30 of 2000) (as adapted by the Housing, Planning and Local Government (Alteration of Name of Department and Title of Minister) Order 2020 (S.I. No. 408 of 2020)), hereby make the following regulations:
Citation and construction
1. (1) These Regulations may be cited as the Planning and Development (Exempted Development) (No. 4) Regulations 2023.
(2) These Regulations shall be included in the collective citation Planning and Development Regulations 2001 to 2023.
Amendment of Part 1 of Schedule 2 to Planning and Development Regulations 2001
2. Part 1 of Schedule 2 to the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) (as amended by Regulation 2 of the Planning and Development (Exempted Development) (No. 4) Regulations 2022 (S.I. No. 605 of 2022)) is amended by the substitution for the matter set out at CLASS 20F the following:
'CLASS 20F
Temporary use by or on behalf of the Minister for Children, Equality, Disability, Integration and Youth to accommodate or support displaced persons or persons seeking international

protection of any structure or part of a structure used as a school, college, university, training centre, social centre, community centre, non-residential club, art gallery, museum, library, reading room, sports club or stadium, gymnasium, hotel, convention centre, conference centre, shop, office, Defence Forces barracks, light industrial building, airport operational building, wholesale warehouse or repository, local authority administrative office, play centre, medical and other health and social care accommodation, event and exhibition space or any structure or part of structure normally used for public worship or religious instruction.

1. The temporary use shall only be for the purposes of accommodating displaced persons or for the purposes of accommodating persons seeking international protection.

2. Subject to paragraph 4 of this class, the use for the purposes of accommodating displaced persons shall be discontinued when the temporary protection introduced by the Council Implementing Decision (EU) 2022/382 of 4 March 20221 comes to an end in accordance with Article 6 of the Council Directive 2001/55/EC of 20 July 20012 .

3. The use for the purposes of accommodating persons seeking international protection shall be discontinued not later than 31 December 2028.

4. Where the obligation to provide temporary protection is discontinued in accordance with paragraph 2 of this class, on a date that is earlier than 31 December 2028, the temporary use of any structure which has been used for the accommodation of displaced persons shall continue for the purposes of accommodating persons seeking international protection in accordance with paragraph 3 of this class.

5. The relevant local authority must be notified of locations where change of use is taking place prior the commencement of development.

6. 'displaced persons', for the purpose of this class, means persons to whom temporary protection applies in accordance with Article 2 of Council Implementing Decision (EU) 2022/382 of 4 March 2022.

7. 'international protection', for the purpose of this class, has the meaning given to it in section 2 (1) of the International Protection Act 2015 (No. 66 of 2015).

8. 'temporary protection', for the purpose of this class, has the meaning given to it in Article 2 of Council Directive 2001/55/EC of 20 July 2001.'"

24. Class 14(h) applies to "protected persons" which are what might be deemed 'ordinary' asylum seekers and applicants for subsidiary protection applying under the International Protection Act 2015. Class 20F applies both to those seeking protection under the 2015 Act, and to "displaced persons" which is a limited category created by Article 2 of E.U. Directive 2022/382.

25. Dromaprop argues, as recorded in the statement of case:

"The proposed development, being the change in use of the Premises from a hotel to temporary accommodation for persons applying for international protection is a species of exempted development pursuant to Art.6 and Class 14 and Class 20F of the Second Schedule of the 2001 Regulations

...

The established use of the Premises was not abandoned in 2009 when the hotel closed during the Great Recession due to economic difficulties as there was no intention on the part of the then owners to permanently cease the use of the Premises in line with the established use. The established use was merely suspended, albeit for a time. The premises was not put to any other use in the intervening period. The Respondent neither applied for nor received any permission to commence a new use of the Premises, and the Permission granted in January 2023 does not refer to any such new use, either in the text of the grant of permission, nor in the Conditions to which it is subject."

26. The council's position is that the use as a hotel has been abandoned or extinguished. As recorded in the statement of case:

"In addition to the foregoing, insofar as the Respondent asserts that the Permission did not specify a use and that the 'established use' – a hotel use – continues. This is not accepted – the Permission clearly regulates and permits a specific form of tourism accommodation use which is different in planning terms to the previous use. Notwithstanding the foregoing, it is apparent from the evidence before the Court that any previous use/established use was abandoned in 2009, from which point the Premises remained in a derelict/ruinous condition for over a decade (as indicated on the Respondent's own planning application documentation). Both the length of time of non-use and the condition of the property indicates abandonment.

Furthermore, even if it was not abandoned, the act of applying for and commencing a permission, which concerns a specific type of short term tourist use, extinguished any previous general hotel use."

27. First of all it can be noted that there is no rigid definition of a "hotel". The *Concise Oxford Dictionary,* in the definitive 6th ed., 1976, defines the term in the first instance as "House for accommodation of travellers etc." (p. 521). It's accommodation, not anything else, that defines a hotel, and many travellers can testify that the boundary line between a guest-house for example and a hotel can be one of context or even public relations rather than fixed definition. Certainly a kitchen is not indispensable. Many hotels don't have kitchens.

28. The planners when analysing the original permission don't seem to have disputed the hotel use. That was only dreamed up belatedly. That gives an artificial flavour to the objection now made.

29. The council claims in submissions that the "use" as a hotel was abandoned when the hotel closed in the context of the crash in 2009. That cannot be accepted. Non-user can't be equated with an abandonment. Even the risk of neglect and damage to the building doesn't amount to a permanent abandonment of the potential use of the structure or any replacement structure on the site.

30. Shuttering a property doesn't preclude refurbishing or rebuilding it at a later stage. Even allowing a property to fall into disrepair doesn't in itself and in the absence of an intent to abandon its use for legal purposes extinguish the use for planning purposes. Certainly it does not establish a new use. The old use remains until something unequivocal happens by way of definitive abandonment in the legal sense of the use, surpassing mere neglect and non-operation.

31. As Dromaprop submits, the council has adduced no evidence of any intention on the part of the owners of the premises to ever abandon its use as a hotel during the years in which it was closed. *Wicklow County Council v. Jessup & Smith* [2011] IEHC 81, [2011] 3 JIC 0802 (Edwards J.) is an instructive case, but one that oddly gets only a half-sentence mention in passing in the council's submissions with no quotation or explanation, despite being by some years the most recent case from this jurisdiction mentioned under this heading (paras. 72-78), in the context of a submission that combs the archives across multiple jurisdictions for authorities up to 54 years in antiquity. In *Jessup*, a house that began to fall into disrepair from 1949 on was held not to have been abandoned as of 2007. Similar to here, the council relied unsuccessfully on planning application documents that referred to the house as in a state of abandon. The fact that the property was a house was a factor but the lapse of time there was far more extreme than here. Edwards J. was clear that the onus of proving abandonment lies on the applicant for s. 160 relief.

32. Of course there are cases that can be cherry-picked or mined for examples of abandonment, or for general statements about that, and the council makes a fair effort in that regard in its submissions. But it would be tedious to go through those one by one, as many cases turn on their own facts. The basic point is that as Edwards J. held in Jessup, the onus of proof of abandonment is on the party so claiming, and that hasn't been discharged here. Lots of properties closed in the crash, as they did in the Covid emergency. That isn't in itself abandonment. Closure through such *force majeure* is very distinct from a definitive legal decision to renounce a use permanently. There's no evidence of an intention to abandon. There is certainly no evidence of any other use being adopted or undertaken. All the council has is inference from disrepair and the like, but given that abandonment is a definitive legal act with huge consequences in planning terms, it cannot automatically be inferred merely from non-user or disrepair.

33. As regards the argument that any hotel use was abandoned or extinguished by the application for, or grant of, the 2023 permission for "commercial tourist accommodation", that isn't a new use. It is merely a particular form of hotel use. Some hotels cater for special categories of the market – some major on family services, others are exclusively for the child-free for example. A hotel providing temporary accommodation for commercial tourists, not involving meals, is still a hotel. The concept of "use" is not so delicate as to crumble with any mild change of tack or emphasis. I reject as without basis in logic, merit or legal policy the council's submission that "the act of applying for and commencing a permission, which concerns a specific types of short term tourist use, extinguished any previous general hotel use" (para. 73 of submissions). Microscopic fragility of shades of emphasis would create incredible uncertainty and inflexibility. Such bombastic arguments are best deflated by being taken to their absurd end points. If a barrister with a general practice decides to specialise within that, does that "extinguish" her "general" practice and involve the commencement of a wholly "new" practice? No it doesn't. It is an evolutionary process. Everything evolves. So to do uses of properties. Nothing stays still, and every business has to cater for a changing market. A given use is an envelope, not a strait-jacket. The prior use and the commercial tourism use are all well within the concept of the hotel envelope. Even the use to accommodate protection seekers and displaced persons might have been situated within the outer contours of the concept of a hotel. After all, some people live in hotels on an ongoing basis. Leo Szilard at the Strand Palace, Coco Chanel at the Ritz Paris, the Major in Fawlty Towers. But in any event the exemption doesn't apply only to "general hotel use", whatever that means – it's certainly not a term of art. Rather it applies to "hotel" use *simpliciter*.

34. In that regard, the continued use as a hotel is evidenced by the application for planning permission which retains that basic concept with a focus on a particular category of the market.

35. So the planning permission doesn't create a new use here. Even if it did (say because the old use had counterfactually been abandoned), the "new" use is still for a hotel. Any argument based on an extinguishment of an old use by reason of a permission for an inconsistent new use based on *Petticoat Lane Rentals Ltd v Secretary of State for the Environment* [1971] 1 W.L.R 1112, [1971] 2 All E.R. 793, doesn't arise on the facts because the new use isn't inconsistent (still less is it a "radical" change of use - see *Donegal County Council v. P. Bonar Plant Hire Ltd* [2020] IEHC 349, [2020] 7 JIC 1602 (Barr J.)). Even the council in submissions referred to the new use as "a species of hotel". But the ministerial exemption applies to the whole genus, not merely to any one species.

36. Having regard to the foregoing, the class 20F and 14(h) exemption is available to Dromaprop, subject to the art. 9 issue below.

Issue 2 – condition 1 insofar as relates to the new use

37. Article 9 of the Planning and Development Regulations 2001 provides *inter alia* that:

> "(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—
> (a) if the carrying out of such development would—
> (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,"

38. Condition 1 provides:

> "The development shall be executed and completed in its entirety in accordance with plans, particulars, details and specifications lodged as part of this application on the 14/07/2022 and as revised by the submissions of the 21/10/2020 & 09/11/2022 and save as is hereinunder otherwise required.
> Reason: To ensure satisfactory completion of development and in the interests of the proper planning and development of the area."

39. Assuming for the sake of argument that the council is totally correct that condition 1 relates the permission directly back to the type of development envisaged by the permission, namely a suite hotel focused on commercial tourist accommodation, that doesn't get the council very far. They think it is game, set and match because "condition" means any condition whatever. But not every condition can have been intended to be covered by such a reference in a context such as this.

40. Dealing first with condition 1 insofar as it requires the development to be carried out in accordance with the plans and particulars submitted, Woulfe J. in *Diamrem Limited v. Cliffs of Moher Visitors' Centre* [2021] IECA 291, [2021] 11 JIC 0501 dealt with a similar issue of interpretation in a different statutory context.

41. At para. 68 he noted that the application in that case for s. 160 relief was out of time by reference to the works aspect of the permission, and at para. 69 he identified that the applicant sought to counter that by relying on the ongoing enforceability of any condition "concerning the ongoing use of the land". The question then was what sort of conditions fell within that:

> "72. The applicant sought to argue on appeal that condition 1 was also a condition 'concerning the ongoing use of the land', although it appears that such argument was not made in the High Court. Condition 1 requires that the development should be carried out in accordance with the plans and particulars lodged with the application, except as may be otherwise required in order to comply with the conditions set out thereafter. The applicant submitted that as the plans and particulars indicated the temporary nature of the car park, the condition, therefore, was a condition 'concerning the ongoing use of the land'.
> 73. In one very broad sense, condition 1 might be thought to be such a condition, insofar as it could be seen as indirectly requiring the temporary car parking area to be used as such only during the period of construction, but not thereafter. However, I do not think that it was the intention of the Oireachtas to capture the standard type of condition which condition 1 represents within the ambit of the term 'condition … concerning the ongoing use of the Land' under s. 160(6)(b) of the 2000 Act, as such a construction of that provision would deprive s. 160(6)(a) of much force and effect. In my opinion, the respondents are correct in their submission that such a condition must relate to the day-to-day terms upon which the ongoing use of the land is to be permitted, such as conditions regarding hours of operation, noise levels, and so forth. Condition 1 is not that type of condition, and is, therefore, not a condition 'concerning the ongoing use of the land'."

42. So not all conditions are automatically encompassed in a general statutory reference to conditions. A similar logic applies here by analogy. The sort of conditions that are envisaged as being covered by art. 9(1)(a) are those that are particular to the development concerned, not those that are inherently involved in a permitted change of use. For example, if regulations provide that use can lawfully be changed from A to B, any existing relevant permissions will almost by definition

include conditions that involve use A. Such conditions are therefore again almost by definition contravened by a change from use A. If that sort of inherent reflection of the *status quo ante* is the type of condition that prevents an exemption having effect, then the whole concept of exemption is utterly hollowed out. There is no good reason to read the statute in that way so as to defeat itself or at least substantially defeat one of its purposes which is to allow categories of exempted development to be availed of.

43. Conditions that inherently are contravened by the permitted exempted change of use do not operate to exclude that change. Only conditions that are more specific in some way, and that apply to some but not all instances of developments that might wish to avail of the exempted change of use provided for in regulations.

44. Of course, exemptions are construed strictly: *Dillon v. Irish Cement Limited* (Supreme Court, Finlay C.J., 26th November 1986), 2004 WJSC-SC 2866, [1986] 11 JIC 2602, *Cronin (Readymix) Ltd v. An Bord Pleanála* [2017] IESC 36, [2017] 2 I.R. 658, [2017] 5 JIC 3002 (O'Malley J.), *Corajio Unlimited Co. v. An Bord Pleanála* [2023] IEHC 373, [2023] 6 JIC 2902 (Phelan J.). But not so strictly as to cease to have any substantial effect. An exemption that could be defeated by a condition inherently reflecting the *status quo* before availing of the exemption would have little meaning.

45. The fact that the onus of proof in relation to most (albeit not all) matters relevant to an exemption is in general on the respondent to a s. 160 application (*Doorly v. Corrigan* [2022] IECA 6, [2022] 1 JIC 2104 (para. 121), *South Dublin County Council v. Fallowvale Ltd* [2005] IEHC 408, [2005] 4 JIC 2803 (McKechnie J.)) doesn't solve the council's problem here.

46. Condition 1 (carrying out the development in accordance with the plans and particulars submitted) is not the sort of condition that prevents the application of an exemption, for the purposes of art. 9 of the 2001 regulations.

47. We will come back later to the question of condition 1 insofar as it relates to construction of the project in its entirety in accordance with the permission.

Issue 3 – condition 1 as it relates to correct and entire implementation of the permission

48. Condition 1 also requires that the development be completed in its entirety in accordance with the permission. That is all well and good and reflects the general legal obligation: *Horne v. Freeney* (Unreported, High Court, Murphy J., 7th July 1982), 1982 WJSC-HC 2157, [1982] 7 JIC 0702, *Dwyer Nolan Developments Ltd v Dublin County Council* [1986] I.R. 130, 1987 WJSC-HC 540, [1986] 4 JIC 2101 (Carroll J.). But does that mean that no exemption can be availed of for the change of use?

49. The answer to that is that art. 9 does not de-exempt a change of use merely because a breach of condition has occurred. It de-exempts the use if "the carrying out of such development would … contravene a condition". There must be a causative relationship between the carrying out of the proposed development (which means specifically the change of use) and the contravention. Even leaving aside altogether the point that the two basement floors are not going to be used for what is currently proposed, what caused the contravention is a lack of works completing the development in accordance with the requirement to complete the development in its entirety (and indeed to a lesser extent the carrying out of works inconsistent with the permission). Any given new use of the development such as it is does not cause such a contravention.

50. On this view, the "development [that contravene[s the] condition" to which art. 9(1)(a)(i) refers means, as the lead-in says, the "[d]evelopment to which article 6 relates [i.e., the proposed] exempted development". So it's not the already-carried-out non-conforming works that are encompassed by the word "development" in sub-para. (i). It is the proposed new development consisting only of the change of use. *That* change doesn't itself contravene the condition about completion of the works as a whole. The condition had already been contravened by the extent and nature of the works, not the new use.

51. In *Corajio Unlimited Company Ltd & Anor. v. An Bord Pleanála* [2023] IEHC 373, [2023] 6 JIC 2902, Phelan J. said:

> "74. While I am satisfied that the exemption provided for under Class 14(a) could only ever have been intended to apply where the original use was authorised, Article 9(1)(a)(i) of the 2001 Regulations puts the matter beyond doubt. It provides that development to which Article 6 relates shall not be exempted development for the purposes of the 2000 Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act. In view of the accepted breach of condition 1 of the applicable planning permission and the definition of 'unauthorised use' provided in s. 2 of the 2000 Act, use as a car sales room was never authorised. While the permission was granted for a premises to be used as a car sales room, all use of the premises, including use as a car sales room, is inconsistent with the use specified in the permission because the permission required a particular structure, and that structure was not provided. It must follow that a change in use which is similarly in breach

of condition because the premises has not been constructed in accordance with the condition and remains non-compliant with planning permission, is not exempt."

52. She referred to the definition of "unauthorised use" in s. 2 of the 2000 Act:

> "'unauthorised use' means, in relation to land, use commenced on or after 1 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), or
>
> (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G, 37N or 293 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject"

53. So her view was that an exempted change of use cannot be availed of in the context of a use dependent by a permission which envisaged a particular building, but where the building actually erected was non-conforming.

54. The problem with the council's reliance on that is that it doesn't apply here. The critical sentence in para. 74 is "use as a car sales room was never authorised". In *Corajio*, the use was dependent on there being a permission. Whereas here, the use as a hotel began in 1860. It was not dependent on a permission, and it did not become an unauthorised use due to any non-conformity with the permission – indeed that couldn't have happened given the definition of "unauthorised use" as applying to uses since 1964. The established, pre-63 hotel use here isn't "unlawful activity" (para. 72) in the same sense as the car showroom use in *Corajio* that depended on there being implementation of a permission in order to get off the ground.

55. There are other distinctions. In *Corajio*, the actual footprint of the development did not conform with the permission, and so there were areas of land that never could have had a conforming prior use. Clearly the deviations from the permission there were massively more significant than here, where we are just talking about internal layout, not the whole shape and footprint of the structure. The *Corajio* approach, even though it doesn't apply on these facts, is not without its complexities if it is to be construed as an absolute principle. Are we saying that any deviation beyond the trivial in a permission for a huge campus complex say, means that the complex or any part of it can never avail of an exemption, since the permission must be executed as a whole? Presumably we can leave that to another case.

Issue 4 – condition 5

56. Condition 5 states:

> "The 22 no. bedroom suites units shall be used for short-term letting only. No unit in the development shall be used for long term accommodation without a separate grant of planning permission, notwithstanding that any such use might be considered exempted development but for the provisions of this condition."

57. The council contends that the use of the premises as accommodation for displaced persons or those seeking international protection contravenes Condition 5 attached to permission P22/138. As recorded in the statement of case:

> "In this regard, Art.9(1)(a)(i) of the 2001 Regulations provides that development to which Article 6 relates (including Class 14 and Class 20F) shall not be exempted development if such development would contravene a Condition attached to a permission or be inconsistent with any use specified in a permission. The proposed change in use, and the works undertaken to give effect to same, is contrary to the Permission/Conditions attached to same. In particular, the Council considers that the proposed change in use is inconsistent with the particulars and plans specified by Condition 1 and the short-term letting of the hotel as envisaged by Condition 5 and Condition 1."

58. The problem with that argument is that it assumes that art. 9(a)(i) refers to any condition whatever. That isn't the case and indeed if conditions were drafted widely enough, that could defeat the purpose of any given exemption. It would also allow any given local authority to nullify the effect of any exemption, or indeed all exemptions if its drafting was clever enough, and the council certainly can't be faulted here on that metric. But we can go one better. What about a condition that "no additional works may be carried out or new uses availed of that would, but for this condition, be exempted development"? If the council's logic here is correct I don't see why something that general couldn't fly as well, thereby nullifying the whole national statutory framework on exempted development.

59. On its correct meaning, the reference to contravention of a condition (and in particular in the context of an exemption arising from doing something specifically allowed by an exemption, such as a change of use specifically allowed) does not include reference to a condition whose only relevance is merely that non-compliance is inherent in the very action being permitted.

60. Hence where the exemption applies in terms of a change of use from A to B, a condition which requires or arises from use A doesn't prevent the change being exempted. Where, however, in a particular situation, the change of use requires some more specific step C particular to the development and going beyond what is generically inherent in the change of use (say, for example, the opening of a particular road to the public that is conditioned to be for private use only), a contrary condition would prevent the exemption from having effect.

61. The conclusion under this heading is that condition 5 (the use being as specified in the application, and not such as to benefit from exemptions) is not the sort of condition that prevents the application of an exemption, for the purposes of art. 9 of the 2001 regulations.

62. If I am wrong about this, the rider that the use can't be long-term without a planning permission hasn't been shown to preclude the use here. The stay of any given protection seeker is only going to be short-term – once her protection application is decided then she will move on to the next stage of the process, which may or may not involve continued residential provision by the State. Certainly the council haven't shown that the protection seekers being accommodated here will transgress the limits of the short-term. The time limited nature of the exemption doesn't assist the council either. The departmental briefing note also states that only a 12 month contract has been offered to the provider. That doesn't sound very long-term.

63. The council misreads the briefing note insofar as concerns the statement that "it is not possible to say with certainty what the length of stay" will be. The council says "[t]he above therefore envisages a stay of indefinite duration". But the stay is not wholly indefinite. You might as well say that a lease of 6 months with power to give notice during the term is also indefinite because it might not last the full 6 months. Here, the exemption expires in 2028 and the contract with the provider expires after 12 months. Neither of those terms are indefinite.

64. The fact that "short term letting" is artificially defined for the purposes of s. 3A of the 2000 Act in terms of a fortnight doesn't advance things much further. As s. 3A expressly provides, the definition is only "[i]n this section". It is for the purpose of s. 3A and that alone. It does not reflect the general meaning of the term "short-term letting", even for the planning context. The council here submitted that it was "indicative", but that's an overstatement. Words can be defined to mean anything. There are many contexts where "short term" includes a period of years.

Issue 5 – internal works and art. 9(1)(a)(viii) - exclusion of the exemption

65. An exemption does not apply by virtue of art. 9(1)(a)(viii) of the 2001 regulations if it involves works that:

> "(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,"

66. Contrary to the council's submission under this heading, this provision has no relevance to an exempted change of use. It only applies to the availability of an exemption for works. *Corajio Unlimited Company Ltd & Anor. v. An Bord Pleanála* [2023] IEHC 373, [2023] 6 JIC 2902 (Phelan J.) didn't decide to the contrary and anyway the statutory language couldn't be clearer. It only applies to a development that involves "extension, alteration, repair or renewal". Those are works. Again, the council confuses the different "developments" involved here, albeit that labouring under such confusion was pretty much an essential precondition to their having found themselves in a position where they have taken the matter this far. The "development" that can't be exempt under sub-para. (viii) is a development consisting of further works to an unauthorised structure or a structure used for an unauthorised use. But insofar as the council are trying to restrain the proposed accommodation use, that is a separate "development", a change of use, to which sub-para. (viii) has simply no application.

Modularisation of remaining issues

67. The complaints made by the council fall into two categories – those the upholding of which would prevent the proposed use and those that don't. I have rejected the former. So the new use can go ahead. The choice as to the remaining issues is either:

(i) to decide now on any issues relating to the internal works that are said to be not in accordance with the permission and to deal in detail with all of the potential legal issues arising from that including:
   (a). materiality;
   (b). discretion; and
   (c). the form of any hypothetical order, bearing in mind that the worst case scenario for Dromaprop under this heading is an order for remedial works and not for a cessation of the proposed use, or

(ii) alternatively to modularise such issues to allow the opportunity for further submissions and indeed further reflection.

68. So to take stock at this point, the proposed use of the property is not unlawful and that can proceed without any further issues under the heading of planning. That doesn't mean that the internal works are all lawful or that retention permission would not be required by the letter of the

law. But a pause in proceedings in the context of modularisation does have certain benefits, albeit recognising that the council was unconvinced of those. Perhaps I can explain further.

69. First of all, the development consisting of the non-conforming works and the development consisting of the new use are separate developments legally. The legality of the latter is not dependent on the legality of the former. I am rejecting the council's argument to the contrary. So no possible outcome of Module II can affect the rejection of the claim that the change of use is unlawful. The best case scenario from the council's point of view would be an order to remediate the building to the letter of the planning permission, but not an order to cease housing protection seekers. What the former remediation order would actually achieve for the environment or anything else is another matter but we don't need to consider that further now.

70. Let's turn now to the advantages of modularisation for the court, the council, the respondent and indeed the State.

71. As regards the court, modularisation allows me to keep options open to the maximum extent which ensures both that the most appropriate order (which may include the option of no further order) can be made at the end of the day, and also to ensure that complex points are not decided unnecessarily.

72. As regards the council, it isn't seriously disadvantaged at the level of the merits because the issues any adjourned to Module II will remain live. A pause allows the council to decide whether to press any remaining concerns to the nth degree. The council can take comfort that not only have any local feelings been ventilated (if that's relevant, which the council seems to say it isn't) but the Majesty of the Law has been vindicated in the sense that no unlawful act by Dromaprop has been excused in any way. Rather the zone of any potential unlawfulness has been narrowed. It lies outside the proposed new use, which is lawful. Insofar as concerns matters that don't preclude the new use, those can be adjourned for the time being but that case has not been rejected. It is really up to the council to decide whether to declare victory in the sense of having achieved detailed scrutiny of the planning situation here, and indeed of having avoided any situation whereby breaches are whitewashed, as they might see it, under the heading of discretion, or alternatively to press remorselessly on with the proceedings to the bitter end. Given the quite reduced scope of possible non-compliance, one could not in principle rule out that there could be potential for Dromaprop to continue to advance in Module II their implicit complaint that they are being singled out for more intense scrutiny, and if so why. Whether that should be pursued further at all, and if so whether through discovery and cross-examination, is entirely a matter for the parties in the first instance. But maybe the whole matter is not yet beyond some form of agreed formula even at this stage.

73. A modest pause also allows Dromaprop to avail of any mechanisms that could alleviate any concerns of the council or for that matter of the court. Normally retention applications are irrelevant – to take them into account would be a lawbreaker's charter and would severely undermine planning enforcement. However this is not a normal situation. The present matter is not a case where a developer gratuitously reconfigured the interior of a development and then claimed that compliance would be performative because internal works were exempt. Most properties that could benefit from the change of use permitted by the regulations could do so in a relatively unproblematic way for that reason. This was a development where *the law changed during the course of the development itself*. Had the change come marginally later, after completion in accordance with the permission, and had Dromaprop decided to avail of the new exemption, the required fit-out works could be exempt (I don't need to decide at this stage, or possibly at all, the argument that only limited works are exempt under s. 4(1)(h) of the 2000 Act: *Cronin (Readymix) Ltd v. An Bord Pleanála* [2017] IESC 36, [2017] 2 I.R. 658, [2017] 5 JIC 3002 (O'Malley J.) *Morgan v. Slaneygio Limited* [2017] IEHC 284, [2017] 5 JIC 0405 (Baker J.)). So this isn't a case of cocking a snook at the statutory scheme in the sort of way that would if generalised give rise to significant potential evasion of the terms of permissions (as in *O'Connor v. Dublin Corporation* [2000] IEHC 68, [2000] 10 JIC 0301). It is a special situation where the integrity of the legal process is much less threatened by deviations than it normally would, given that there was a relevant change in the legal framework during the process itself. The proceedings most certainly can't be withdrawn, dismissed or stayed merely by reason of an intention to seek retention permission (see s. 162(3) of the 2000 Act), but they can be adjourned to a second module, at which stage one could if necessary give appropriate consideration to progress in relation to the regularisation process on the very specific facts here.

74. All that said, Dromaprop's view that deviations are very minor is disputed. The council has produced a useful comparison document dated 22nd April 2024, which shows some differences of internal layout on all five floors. While an attempted summary of the evidence rather than itself evidential, the apparent changes are possibly more than the merely trivial. The council suggests that Dromaprop could apply for a permission regarding the works at all levels and also the change of use. I conclude that no permission for the change of use is required. From its opposite perspective, Dromaprop says it intends to apply for retention only in relation to the basement. But that leaves the apparent non-compliance in other floors unaddressed. So perhaps an application for

permission for all of the non-conforming works at all levels is worth consideration. But I will leave that to the parties in the first instance.

75. The council had submitted as follows:

> "The Council's Affidavits set out the nature and extent of the changes to the Premises as a result of the works, noting that same are material and represent a significant departure from the Permission. Moreover, the said Affidavits outline how different planning considerations would have arisen if a planning application had been lodged for the proposed change in use – to accommodate international protection applicants – including, for example, the appropriateness of the location. Consideration would have been given to assessing how the proposed use aligns with the fact that the development site forms part of the commercial core of Dromahair village and applicable policies/objectives in the Development Plan relevant to same. In addition, residents of a facility for accommodating international protection applicants would require significant social and community facilities to be provided in the general vicinity, compared to tourists or people visiting the area for a short period of time – such as education, childcare, healthcare and public transport. The provision of private open space is also an amenity which would fall to be considered for such a facility when comparing the proposed and permitted uses. It is thus evident that material planning considerations arise in respect of the works undertaken to the premises for the purposes of seeking to implement the proposed change in use and same cannot be considered minor."

76. For the avoidance of doubt, insofar as the council says that an application for works for a proposed change of use could have essentially been robustly interrogated for multiple reasons, that has been overtaken by the finding that the proposed use is lawful. Any interrogation of a retention permission that takes place now would take place in the context of that finding and so on the basis that the use is a given.

77. A pause in proceedings also gives the Department a chance to review the wording of the Exempted Development No. 4 regulations. It can be noted that the ministerial regulations are somewhat narrowly drawn. A change of use to accommodate displaced persons is provided for but not works that are properly necessary and incidental to that. A quick glance at the (somewhat unstructured – no disrespect intended, because multiple issues were being debated at the same time) Dáil committee debate on the draft regulation (regarding legislative history see *Heneghan v. Minister for Housing, Planning & Local Government & ors* [2023] IESC 7, [2023] 2 I.L.R.M. 1) suggests some acknowledgment that fit-out of premises would take place on foot of the change of use, but it wasn't immediately obvious that there was also acknowledgement that the regulations didn't expressly assist that. The temptation to take *Heneghan* as a green light go through the debate line by line and set out various possible misunderstandings is easily resisted, but one can still legitimately make the general point that it is up to the Department in the first instance to consider whether or not there is a case to propose that limited works (such as internal deviations from permissions already granted but not implemented) which serve urgently needed exempted changes of use should themselves be expressly recognised as exempted.

78. New government policy as of March 2024 to provide State accommodation to avoid taking the sole hotels in towns out of service doesn't particularly affect the situation. The new policy is one to be rolled out over time up to 2028 and doesn't remove the need for accommodation right now.

Costs

79. As the matter is not being finalised I would also propose to adjourn the question of costs for the time being.

Summary

80. In outline summary, without taking from the more specific terms of this judgment:

(i) the previous use as a hotel had not been abandoned in planning terms prior to the planning application; if contrary to that it had been abandoned, it was replaced by an equivalent hotel use on grant of the permission;

(ii) the previous hotel use was not extinguished by the planning application. If contrary to the foregoing it was so extinguished, it was replaced by an equivalent hotel use;

(iii) thus the exemptions in class 14(h) and 20F were available on the basis of an existing hotel use subject to the council's arguments under art. 9 of the 2001 regulations;

(iv) article 9(1)(a)(i) of the 2001 regulations does not apply to conditions that would be inherently contravened by any type of development that is envisaged by a given exemption;

(v) thus the type of condition embodied in condition 1, namely construction and use in accordance with particulars submitted, is not the type of condition envisaged by art. 9 of the 2001 regulations as being such as to exclude the exemption;

(vi) insofar as condition 1 requires construction of the development in its entirety and in accordance with the permission, the lawfulness of the prior use as a hotel is not dependent on the permission and is not rendered unauthorised by any deviation

from the permission; thus the change of use does not itself occasion any breach of, and is not otherwise precluded by, that condition;

(vii) the type of condition embodied in condition 5, namely use for short-term commercial tourism, is not the type of condition that prevents the application of the exemption for protection seekers, because contravention of that is inherently involved in the change of use;

(viii) thus art. 9 does not remove an exemption related to a change in use from accommodation of one type of person to accommodation of another type of person merely because of the existence of conditions that limit the type or duration of accommodation or type of persons accommodated that may be facilitated in the premises;

(ix) the exemptions being availed of for change of use are not disapplied under s. 9(1)(a)(viii) because that provision only applies to an exemption for works;

(x) having regard to the foregoing, the proposed change of use is exempted development and can proceed, and the proceedings are dismissed insofar as they seek to restrain the proposed use; and

(xi) the questions of unauthorised departures from the planning permission that do not affect the lawfulness of the new use including questions of materiality and discretion of the court under s. 160, to the extent that it arises, are adjourned to a proposed Module II.

Order

81. For the foregoing reasons, it is ordered that:

(i) the proceedings be dismissed insofar as they seek to restrain or otherwise affect the proposed use of the property for the purposes set out in the exemptions at classes 14(h) and/or 20F of the Planning and Development Regulations 2001;

(ii) the proceedings be adjourned to a Module II insofar as they seek relief in respect of any non-compliance with the existing planning permission that does not affect the lawfulness of putting in place that proposed use of the property; and

(iii) the question of costs be adjourned pending Module II.