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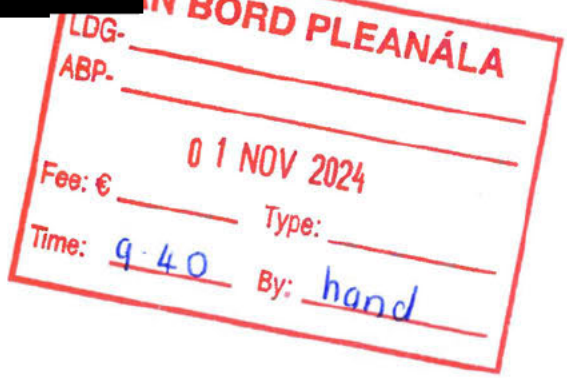

An Bord Pleanála
Marlborough Street,
Dublin 1

31st October 2024

JN: 7318 Pods

Re: Four Pods at Shanks Mare, Collegelands Summerhill Co Meath
Collegelands Forge Limited
Section 5 Submission – Four Pods.
Section 5 Ref No RA/S52466.
ABP-321043-24

Dear Sir,

Following your letter of 15th October 2024 I am instructed by Collegelands Forge Limited, Teach Cille, Hanleys Road, Kilmore, Kilcock, Co Kildare to make this submission following decision of Meath County to submit the Section 5 application for adjudication by An Bord Pleanala.

A notification was served on the Planning Authority in relation to the part of the development granted planning permission under RA191557, under the Planning and Development Act 2000, as amended, amendment of Part 1 of Schedule 2 to Planning and Development Regulations 2001, the Planning and Development (Exempted Development) (No. 4) Regulations 2022 (S.I. 605/2022) as amended by the Planning and Development (Exempted Development) (No. 4) Regulations 2023 (S.I. 376/2023), with particular reference to the requirement set out in Article 2 Class 20F Column 2 item 5 of 376/2023 to inform the local authority of the location where the change of use is taking place prior to the commencement of development.

The part of the development granted planning permission under RA191557 is currently in use providing accommodation to persons to whom temporary protection applies in accordance with Article 2 of Council Implementing Decision (EU) 2022/382 of 4 March 2022.

Since the commencement of the provision of temporary accommodation my client has been subjected to continuous complaints to the Planning Authority by anonymous third parties.

I am of the opinion that the necessity for this section 5 appeal stems from one such complaint.

The Planning Authority in a previous Section 5 application refused to accept the subject development constituted exempted development.

I draw your attention to the Judgement of Humphreys J. in the case of Dromaprop Limited v Leitrim County Council. I attach the full Judgement at **V,** and quote from it below.

"145. Matters not pleaded but loosely touched on during the hearing include (paraphrasing somewhat) :

(i) that the refusal was not the honest application of technical judgement under the building control code but was the result of a wider decision within the council to block the project for policy reasons ***or to pander to local agitation,*** *or more generally that the refusal was motivated by an improper motive or was not bona fide - that issue might have required cross-examination or discovery or both;*

(ii) in particular that the council was motivated by improper political considerations relating to local hostility to the provision of housing to persons seeking international protection - while the written submissions touched on the alleged " political pressure", this would have needed to be more fully pleaded and evidenced ;

(iii) that the decision was ad hoc and an improper departure from the council's treatment of other similar developments contrary to the right to consistent decision-making as an element of the right to fair procedures - the references to common practice were not phrased as a legal ground of challenge;

(iv) that the refusal was improperly discriminatory as between Dromaprop and other applicants in a similar situation carrying out developments, but ones that are not the subject of local opposition - there is a passing reference in sub-ground 6 to "common practice" but it is not phrased as an equality or non-discrimination challenge

(v) there is also no pleaded case about lack of reasons, save to the extent that irrationality inherently involves a lack of a valid reason; ..."

I draw your attention further to the Planning and Development Act 2000, as amended, Section 4 (1) (h) which defines exempted development as *"development consisting of the carrying out of works for the maintenance,* ***improvement or other alteration*** *of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;"*

Further I draw your attention to the Planning and Development Regulations 2001 as amended, Article 6 (1) Subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Nothing in Article 9 is relevant in the current situation, as demonstrated below.

The overall current development satisfies the criteria set out above.

The current authorised use of the four pods is as holiday homes within the hotel complex. They are not used for the provision of accommodation to persons to whom temporary protection applies in accordance with Article 2 of Council Implementing Decision (EU) 2022/382 of 4 March 2022.

The four pods are shown in drawing No 19-131-104PD on foot of which planning permission was granted comprised an entrance directly into a kitchen/living/dining room, a shower room and two double bedrooms, accessed through the open plan living area.

ALTERATIONS TO PLANNING APPROVED DRAWING:

The builder to suit his convenience made a minor alteration to the approved drawing.

I draw your attention to the Planning and Development Act 2000, as amended, with particular reference to Section 4 (1) (h), which states *"4.—(1) The following shall be exempted developments for the purposes of this Act— (h) development consisting of the carrying out of works for the maintenance,* ***improvement or other alteration*** *of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;*

I draw your attention to the fact that the four pods are located to the rear of the main building within the curtilage of the site and are not visible from the public road or any area to which the uninvited public have access and the alterations do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

The substitution of the concrete blockwork column was a practical solution because the proposed steel columns required a separate trade which was not readily available, due to the current labour shortage.

This deviation from the detail shown on the drawing on foot of which planning permission was granted was an immaterial alteration, had no consequential impact on the proper planning and development of the area as expressed in the final grant of planning permission and the Meath County Development Plan current at the time when planning permission was granted.

Had planning permission been sought in the first instance for the concrete block column in each pod it would have been granted.

Conclusion:

The erection of the four pods constituted development as defined by the Planning and Development Act 2000, as amended, Section 3 (1) (a).

While Planning and Development Act S.32,as amended is relevant to the subject property I draw your attention to the Supreme Court Order cited below.

The immaterial, inconsequential and trivial deviation from the four pods drawing submitted to Meat County Council on foot of which planning permission register reference No 22629 (Copy attached **I**) was granted, by which a bedroom window in each inner bedroom was altered to facilitate safe escape in case of a fire , which would comply with a fire officers reasonable condition or conditions satisfies Supreme Court Order Appeal Record No 006/2005 High Court Record No 383 JR/2002 (Copy attached **III**) (Paragraphs 17-19) which upheld the High Court Order and acknowledged that in practical terms there may be modest variation between the plans submitted and the structures constructed as occurred in the case of the log cabin side bedroom windows

I now comment on the Planning and Development Regulations 2001, as amended, Article 9 (1) (a):

(i) The alterations to the windows does not contravene a condition attached to a permission as set out in High Court Order Record No 2002 383 JR of Murphy J. (4th January 2000) in Kenny v. Dublin City Council and Provost, Fellows & Scholars of the University ofDublin, Trinity College and Anor, and more particularly the Supreme Court Order SC Record No 06/05 Neutral Citation [2009] IESC 19 SC Appeal No 006/2005, Order dated 5th March 2009. (CASE WEBLOCATION (https://www.bailii.org/ie/cases/IESC/2009/S19.html)(Copy attached) (Paragraphs 17-19), being deviations which are necessary for fire certification compliance and in planning terms are immaterial, inconsequential and trivial.

(ii) Not relevant.

(iii) Not relevant, the log cabin is a substantial distance from the public road and is not visible from the public road.

(iv) Not relevant, the works on the windows are located at the side of the building.

(v) Not relevant.

(vi) There is no landscape or view impacted by the log cabin windows.

(vii) Not relevant.

(vii a-c) Not relevant.

(viii) Thefour pods are authorised structures under planning register reference No 22629.

(ix) Not relevant

(x) Not relevant.

(xi) Not relevant.

(xii) Not relevant.

The immaterial, inconsequential and trivial alterations of the front and side windows of the planning permitted four pods at the above-mentioned property by the omission of a steel column at the intersection of the front and side windows and the substitution of a concrete column have no impact on any element of Article 9, and as a result are deemed to satisfy Section 4 (1) (h) of the Planning and Development Act2000, as amended and Article 6 (1) and conform to the judgement criteria of High Court Order of Murphy J. (4th January 2000) in Kenny v. Dublin City Council and Provost, Fellows& Scholars of the University of Dublin, Trinity College and Anor, and more particularly the Supreme Court Order Record

dated 5th March 2009 (Copy attached **III**) (Paragraphs 17-19), as being works of an inconsequential nature.

SUMMARY:

For the foregoing reasons I ask An Bord Pleanála to conclude the alterations of the front and side windows of the planning permitted four pods at the above-mentioned property by the omission of a steel column at the intersection of the front and side windows and the substitution of a concrete column from those illustrated on drawing No 19-131-104PD and Photo **IV** are an immaterial or inconsequential reasonable variation from the planning permitted development and/or constitute exempted development as set out above.

I ask An Bord Pleanála to conclude the immaterial variation does not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures falls within the scope of exempted development as set out above.

Yours faithfully

William Doran

I attach appendices

I Meath Co Co Planning permission grant 22.629
III Supreme Court Decision Kenny v Dublin City Council
IV Photo of corner of POD
V Drumprop Limited v Leitrim Co Co

Comhairle Chontae na Mí
Roinn Pleanáil,
Teach Buvinda, Bóthar Átha Cliath,
An Uaimh, Contae na Mí, C15 Y291
Fón: 046 – 9097500/Fax: 046 – 9097001
R-phost: planning@meathcoco.ie
Web: www.meath.ie

Meath County Council
Planning Department
Buvinda House, Dublin Road,
Navan, Co. Meath, C15 Y291
Tel: 046 – 9097500/Fax: 046 – 9097001
E-mail: planning@meathcoco.ie
Web: www.meath.ie

Planning & Development Act 2000 – 2022
NOTIFICATION OF FINAL GRANT

TO: Collegelands Forge Limited
c/o McKenna + Associates
High Street,
Trim,
Co. Meath.

Planning Register Number:	22/629
Application Receipt Date:	16/05/2022
Further Information Received Date:	05/09/2022

In pursuance of the powers conferred upon them by the above-mentioned Act, Meath County Council has by Order dated 05/10/2022 GRANTED PERMISSION to the above named for the development of land in accordance with the documents submitted namely:- the development consists of the erection of four 51.5 sqm. detached pods, each of which would be 3 metres tall and which would provide two bedrooms and a combined kitchen/ dining area, as well as bathroom accommodation, along with the use of these four structures for tourist accommodation purposes;
The retention of an existing 54 sqm. timber log cabin which already occupies the site (whose removal is required under condition no. 4 of permission reg. RA/191557) and the use of this two-bedroom plus living area building for short-term residential occupation. The proposal also includes the decommissioning of a septic tank (which was permitted under reg. RA191557), the provision of a new soakaway, the installation of a mechanical aeration sewage treatment system and the construction of a 300 sqm. soil polishing filter, the closure of an existing entrance and upgrade works to an existing access which serves the adjacent Shanks Mare development and its use in connection with this proposal, a new turning circle for fire services and an extra parking area accommodating 11 new bays, which are in addition to the 21 spaces on the subject land. The application includes all site works, such as the removal of an existing stone wall, the raising of the land at Gate 1 by 300mm, the creation of a gravel surface, the provision of a wheelie-bin store and the removal of a gas tank. This development will be held in common ownership with the Shanks Mare development and will not be sold or leased separately. Included in this are all associated site works and services. Significant further information/revised plans submitted on this application at Shanks Mare Public House, Collegeland and Arodstown, Summerhill, Co. Meath, **subject to the 7 conditions set out in the Schedule attached.**

On behalf of Meath County Council.

DATE: **17/11/2022**

NOTE: (Outline Permission Applications Only)
OUTLINE PERMISSION is subject to the subsequent Application for Permission consequent on the grant of Outline Permission of the Planning Authority. Outline Permission is for 3 Years only. Until such has been obtained to detailed plans of the development proposed, the development is NOT AUTHORISED.

NOTE:

The permission herein granted shall, on the expiration of 5 years (unless otherwise conditioned / Outline Permission) beginning on the date of the granting of permission, cease to have effect as regards: -

(1) In case the development to which the permission relates is not commenced during the period, the entire development and

(2) In case such development is so commenced, so much thereof as is not completed within that period.

*Personal Data/ Information – If you have submitted personal data relating to your application, this will be destroyed within 1 month of this Notification. If you wish to collect your Personal Data / Information please arrange to collect within 1 week of the date of this Notification. Photographic ID (Passport / Driving Licence) will be required and the Planning Authority ...

Schedule of Conditions:

1. The development shall be retained, constructed and completed in accordance with the plans and particulars lodged with the Planning Authority on the '16/05/22', and further information received on '05/09/22' and '12/09/22' except where conditions hereunder specify otherwise. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

   Reason: In the interests of the proper planning and development of the area.

2. The 5 tourism related units shall remain as one entity with the adjoining permitted tourism development permitted under pl. ref: RA191557 and shall not be sold or otherwise transferred / leased separately. Each tourism unit shall be used for short stay holiday accommodation only (maximum of 1 month) and shall not be used as a permanent place of residence.

   Reason: In the interest of proper planning and sustainable development.

3. (a) The applicant/developer shall provide and maintain sightlines of 90 meters to both sides of the proposed entrance to the nearside road edge from a setback of 3metres the envelope of visibility shall encompass the area between a driver eye height in the range of 1.05 metres to 2.00 metres, and an object height in the range of 0.6 metres to 2.00 metres, in accordance with T.I.I Document DN-GEO-03060. The entire nearside edge of the road shall be visible over the entire sightline.
   No development work shall commence on site until the visibility splays have been provided.

   (b) The applicant/developer shall remove the entire roadside boundary hedge contained within the blue line and red line Boundaries (as shown on drawing no 19-131-103PD) to the north of the proposed entrance and set it back at least 3 metres from the existing road edge. A grass verge, at least 3 metres in width, shall be provided between the edge of the road and the new site boundary. This work shall be completed prior to any other work commencing on site.

   (c) The applicant/developer shall remove the entire roadside boundary fence contained within the blue line and red line boundaries (as shown on drawing no 19-131-103PD) to the south of the proposed entrance and set it back at least 3 metres from the existing road edge. A grass verge, at least 3 metres in width, shall be provided between the edge of the road and the new site boundary. This work shall be completed prior to any other work commencing on site.

   Reason: In the interests of traffic safety

4. (a) The new roadside boundary shall be designed as a Forgiving Roadside and shall comply with TII standard DN-GEO-03036.

(b) The applicant/developer shall provide and maintain forward visibility stopping sightlines of 90 meters approaching the entrance, in compliance with TII Standards.

(c) The developer/applicant shall close up the existing agricultural entrance located within the proposed entrance

(d) The proposed entrance shall comply with the following. I. The entrance layout shall be in compliance with the Meath Rural Design Guide.

- The face of the entrance piers shall be at least 3 meters from the edge of the road.
- The entrance gate shall be recessed at least 12 meters from the edge of the road to allow a vehicle to pull in fully off the road prior to opening the gate.
- The entrance driveway should be no more than +/- 2.5% for the first 5 meters.

The area within the visibility splay shall be cleared to provide a level surface no higher than 250mm above the level of the adjoining carriageway and shall be retained and kept clear thereafter.

(e) The applicant shall provide carparking spaces as shown on the site layout plan submitted drawing no 19-131-103PD

The applicant shall provide a minimum of 2No. of accessible car parking spaces as shown on the Site Layout Plan Submitted drawing no 19-131-103PD. All accessible parking spaces shall comply with Part M of the Building Regulations.

All carparking spaces shall be properly constructed on a durable permanent surface and laid out to the satisfaction of Meath County Council. All road marking shall be installed in accordance with the Traffic Signs Manual.

(f) The applicant shall provide all necessary ducting to facilitate the installation of future Electric Vehicle charging points, at a rate of 20% of total number of carparking spaces.

(g) The applicant shall provide 1 private secure bicycle parking space per bed space and 1 additional parking space per unit as per Table 11.4 of the Meath County Development Plan 2021-2027

Cycle parking facilities shall be conveniently located, secure, easy to use, adequately lit and well sign posted. All long-term (more than three hours) cycle racks shall be protected from the weather.

(h) Road drainage across the entrance to the site and along the adjacent public road shall not be impeded and/or be interrupted in any way.

In this regard, the applicant shall be requested to install a 300mm (minimum size) diameter twin wall corrugated uPVC pipe or similarly approved drainage pipe across the full width of the proposed entrance.

The pipe must be drained to an existing roadside gully/field drain, if present. In the event of a drain not being present, the applicant must drain the pipe to a soakaway located within the site boundaries.

Road gullies must be installed at the entrance to the proposed development and at appropriate locations along the length of the site. The road gullies shall be connected to the 300mm pipe by means of a 150mm diameter twin wall corrugated uPVC pipe or similarly approved drainage pipe. All the road gullies must be lockable and be approved to the current IS EN standards for use on a public road.

All drainage work shall comply with Section 3.1 of the Guidelines for Road Drainage 2nd Edition March 2022.

Reason: In the interests of traffic safety

5. The existing septic tank and percolation area shall be de-commissioned and permanently removed off site following installation of the new wastewater treatment system and percolation area and the area shall be chemically sterilised.

Reason: In the interest of proper planning and sustainable development.

6. (a) The onsite DWWTS proposed shall be constructed in accordance with the recommendations provided in Sections 4, 5 and 6 of the Site Characterisation Form submitted with the application, and contained in the Environmental Protection Agency Code of Practice for Domestic Wastewater Treatment Systems (2021). Certification from an appropriately trained and qualified person, as well as the manufacturer or supplier in the case of secondary packaged wastewater treatment system, that the complete DWWTS has been satisfactorily installed and commissioned to accord with the provisions of the EPA Code of Practice, Domestic Waste Water Treatment Systems (Population Equivalent $\leq$ 10), 2021 and the Site Characterisation Form submitted on '16/05/22', shall be submitted to the Planning Authority prior to occupation of the

house. The certification shall include an as constructed cross-sectional drawing through the installed DWWTS, including any associated infiltration/treatment area.

b) The installation and maintenance of this DWWTS shall be such as to not give rise to any polluting matter entering any waters, tidal waters or any part of any river, stream, lake, canal, reservoir, aquifer, pond, watercourse or other inland waters, whether natural or artificial, or any contiguous to those mentioned which for the time being is dry. In this, all minimum separation distances to receptors, as outlined in Table 6.2 of the EPA Code of Practice (2021) must be adhered to.

c) The applicant shall provide and arrange for the continuous and indefinite maintenance of the entire DWWTS installed, which shall be maintained in accordance with the manufacturer's instructions and in line with Table 12.1 of the EPA Code of Practice (2021).

Reason: In the interests of public health and to provide for the protection of the environment.

7. The site and building works required to implement the development shall only be carried out between the hours of 8.00am to 6.00pm Monday to Friday and 8.00am to 2.00pm on Saturdays. No activity on site Sundays and Bank Holidays. In exceptional circumstances hours of operation may be extended for a specified period of time subject to written agreement from the Planning Authority.

Reason: To safeguard the amenities of adjoining residential occupiers.

Advice Note:

(i) It should be clearly understood that a grant of permission does not relieve the applicant/developer of the responsibility of complying with any requirements under other statutory codes affecting the development.

(ii) This permission does not confer title. It is the responsibility of the applicant/developer to ensure that they control all the lands necessary to carry out the proposed development.

(iii) This permission does not alter or extinguish or otherwise affect any existing or valid right of way crossing, impinging or otherwise pertaining to these lands.

(iv) The applicant/developer is responsible for the full cost of repair in respect of any damage caused to any adjoining public roadway arising from the construction work and should make good any such damage forthwith to the satisfaction of Meath County Council.

(v) During construction the applicant should provide adequate off carriageway parking facilities for all traffic associated with the proposed development, including delivery and service vehicles/trucks. There shall be no parking along the public road.

(vi) No muck, dirt, debris or other material should be deposited on the public road or verge by machinery or vehicles travelling to or from the site during the construction phase. The applicant should arrange for vehicles leaving the site to be kept clean.

(vii) All waste generated during construction, including surplus excavation material to be taken off-site, shall be only recovered or disposed of at an authorised site which has a current Waste Licence or Waste Permit in accordance with the Waste Management Acts, 1996 to 2008. This shall not apply to the reuse of excavated uncontaminated soil and other naturally occurring material within the applicant's site boundary.

(viii) Where the applicant/developer proposes to connect to a public water/wastewater network operated by Irish Water, the applicant must sign a connection agreement with Irish Water prior to the commencement of the development and adhere to the standards and conditions set out in that agreement.

Note 1: In the interest of Public Health and Environmental Sustainability, Irish Water Infrastructure capacity requirements and proposed connections to the Water and Waste Water Infrastructure will be subject to the constraints of the Irish Water Capital Investment Programme.

Note 2: All works to comply with current Irish Water Code of Practice for Water and for Waste Water.

(ix) Planning Compliance must be submitted (hard copies not required) in the following format:

a. **House Extensions and Single Residential Units (urban and rural)**
Forward by e mail to planningcompliance@meathcoco.ie and shall include a cover letter outlining relevant compliance issues together with appropriate drawings in PDF format.

b. **All Other Planning Compliance**
Forward to Planning Compliance, Planning Department, Buvinda House, Dublin Road, Navan, C15 Y291 and shall include a cover letter outlining relevant compliance issues together with a CD that includes all relevant maps and drawings in PDF format (high resolution).

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Judgment Title: Kenny -v- Dublin City Council

Neutral Citation: [2009] IESC 19

Supreme Court Record Number: 06/05

High Court Record Number: 2002 383 JR

Date of Delivery: 05 March 2009

Court: Supreme Court

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

Judgment by: Fennelly J.

Status of Judgment: Approved

Judgments by
Result
Concurring
Fennelly J.
Appeal dismissed - affirm High Court Order
Macken J. Peart J.

Outcome: Dismiss

THE SUPREME COURT

Appeal No. 006/2005
(Record No. 383 JR/2002)
Fennelly J.
Macken J.
Peart J.
JUDICIAL REVIEW
Between:
JAMES KENNY
Applicant
And

DUBLIN CITY COUNCIL
Respondent
And
THE PROVOST FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN,
TRINITY COLLEGE
Notice Party

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

MICHAEL McNAMARA & COMPANY
Notice Party

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

1. By a decision of 4th January 2000 the respondent (Dublin City Council, hereinafter "the Council"), certified compliance by the notice party (hereinafter "Trinity") with the terms of planning permission for the building of Trinity Hall. This is an appeal against a High Court decision (Murphy J) refusing to quash that decision at the instance of the appellant (hereinafter "Mr Kenny").
2. This is not the first and may not be the last case in which Mr Kenny contests the building by Trinity of its new Trinity Hall buildings. My judgment of 10th April 2008 in Kenny v The Provost, Fellows and Scholars of the University of Dublin, Trinity College [2008] 2 IR 40, mentioned the "saga of litigation in which Mr Kenny, through a multiplicity of proceedings, contests the validity of a planning permission granted to Trinity in 1999 to redevelop Trinity Hall, the University's hall of residence in Dartry."

Planning history

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

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

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

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

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

Condition 1

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

Condition 2

"The western arm of Building Number 3, that is on the full Dartry Road elevation, shall be reduced in height by the omission of the first floor. Revised drawings incorporating this modification to Building Number 3 shall be submitted to the planning authority for agreement prior to the commencement of development.

Reason: In the interest of visual amenity."

Condition 8

"Revised drawings of the proposed development, with floor plans and elevations corresponding in detail, shall be submitted to and agreed in writing by the planning authority prior to the commencement of development.

Reason: In the interest of orderly development."

Condition 9

"Existing trees shall be retained and areas shown as open space on the lodged plans shall be planted and landscaped in accordance with the plans submitted to the planning authority. The open areas shall be available for use by the students on completion of the proposed residential units. All landscaping works shall be carried out within 12 months of the completion of the buildings in the proposed development. Services and utilities shall not be laid within 10 metres of the bole of any of the trees to be retained. Prior to the commencement of the development the developer shall submit details and agree with the planning authority measures necessary to protect the trees to be retained. All trees to be retained shall be protected during the development by a timber post and rail fence which shall enclose the crown spread of the trees.

Reason: To protect the existing trees and in the interest of visual and residential amenity."

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

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

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

12. The Council, by a decision of 4th January 2002, determined that the compliance submissions were satisfactory and in compliance with the relevant conditions of the

planning permission. That is the decision which Mr Kenny challenges in the present appeal. I will call it the Council decision

Judicial Review

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

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

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

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

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

Legal principles

17. To begin with, some simple matters of common sense need to be mentioned concerning planning permissions. I make these preliminary remarks, because Mr Kenny asks the Court to examine, at least in certain respects, the fine details of the development.

18. There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within

plans, drawings, specifications and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect in exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of a permission, there are enforcement procedures.

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

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

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

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

23. In some cases, the planning authority may consider the detail provided in the application to be insufficient. In other cases, the planning authority or An Bórd Pleanála may decide to grant permission for a development provided changes are made. In such cases, the authority granting the permission will not draft the plans for the altered development. It will require the developer to do so. The practice of requiring plans, drawings or other details to be approved by the planning authority is both reasonable and practical. This division of function was approved by the Supreme Court in Boland v An Bórd Pleanála [1996] 3 I.R. 435, a case where an objector sought certiorari of the planning permission on the ground that the conditions involved an improper abdication of the functions of the planning authority. The scope of this faculty and its limits are described in the judgment of Hamilton C.J., who referred, inter alia, to "the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience…"

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

25. Consequently, the planning permission is to be interpreted according to objective criteria. The subjective beliefs either of the applicant or the planning authority are not relevant or admissible as aids to interpretation. (see Readymix (Eire) v Dublin County Council, Supreme Court, unreported 30th June 1974). The matter is well expressed in the following passage from Simons on Planning and Development Law (2nd Ed., 2007, paragraphs 5.06-5.07):
"A planning permission is a public document; it is not personal to the applicant, but rather enures for the benefit of the land. It follows as a consequence that a planning permission is to be interpreted objectively, and not in light of subjective considerations peculiar to the applicant or those responsible for the grant of planning permission.
A planning permission is to be given its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."

26. It follows from the principle of objective interpretation that the correct interpretation is a matter of law and can ultimately be decided only by the court. In Gregory v Dun Laoghaire Rathdown County Council (Supreme Court, unreported 28th July 1977), to which I will refer shortly in more detail, the respondent planning authority had submitted that the interpretation it had placed on a planning condition, even if erroneous, was reasonable. Murphy J, speaking for the majority of this court described that argument as "unsustainable." He explained:
"The proper function of the Council was the implementation of the condition imposed by the Board. If they erred in that regard the error was as to the nature of their duties rather than the performance thereof. The only power exercisable by the Council was to agree details in relation to the revision of plans on the basis of the implementation of the condition imposed by the Board. Any agreement reached without that condition having been fulfilled was necessarily ultra vires the Council."

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

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning..."

28. A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even than the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context.

29. On this point, the case of Gregory v Dun Laoghaire Rathdown County Council is also helpful.

30. The interpretation of the condition in that case undoubtedly presented a difficulty. An application was made for retention of what was called a garage/loft. Permission was granted. An Bórd Pleanála, on appeal, imposed a condition as follows:
"The proposed loft shall be omitted. The proposed garage shall be of a single storey construction. Revised details shall be agreed with the planning authority....."

31. The reason given was: "in the interest of residential amenity."

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

33. The Council argued, in defence of its decision, that the condition had been complied with: the loft was omitted; the garage was single storey. That was a literal approach. The Council argued that if the Board had intended that the height was to be reduced, "it would have expressly so provided." It had not done so. This Court, on appeal, relied heavily on the reason for the complaint which had been made by the objector, which had led to the imposition of condition. His only concern was with the height of the structure. He was not in any way concerned with the internal layout. Murphy J said:
"By imposing the condition in question they clearly required the reduction of the height of the structure by the removal of the loft area as shown on the plans before them and the second storey which constituted that loft. The omission or deletion of the loft was the means by which the reduction in height of the structure was to be achieved."

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

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

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

Removal of first floor

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

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

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

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

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

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

43. Condition No. 2 presents a problem of interpretation. It is clear from the terms of the condition itself that the purpose of the removal of the first floor was the reduction of the height of the building. The reference to the interests of "visual amenity" can only be read in that light. There is nothing either in the planning history or in the terms of the planning permission to indicate that An Bórd Pleanála wished to alter the façade of the building. The Inspector's report did not recommend the removal of any floor. The evidence produced suggests that the profile of the façade was a consistent and desirable element of the design throughout the planning process. The planning permission makes no mention of protrusion or "domineering effect" suggested by Mr Kenny as the reason for the condition.

44. This means that there was a contradiction or ambiguity at the heart of the condition. Condition No. 1 required the development to be carried out in accordance with the plans submitted except as may otherwise be required in order to comply with the following conditions. Compliance with Mr Kenny's proposed literal interpretation of Condition No. 2 would lead to inconsistency with Condition No. 1 by altering the façade. I do not agree with the submission made on behalf of Mr Kenny that it is plain and unambiguous. I am satisfied that the true objective of Condition No. 2 was the reduction in the height of the building. This objective has been achieved. There is no evidence that An Bórd Pleanála chose the elimination of the first, rather than any other floor in order to secure the desired reduction in height or that it wished to alter the composite elevation in any way. I am

satisfied that the Council acted within the scope of its powers by approving the compliance plans submitted by Trinity in August and November 2001.

45. It is of interest to contrast Mr Kenny' objection to the removal of the first (rather than another) floor of building no.3, with his acceptance of the modification, also through the compliance process, of the condition in relation to what became known as the "bookends" issue. The north wing of the west elevation of building Number 3 remained at five storeys, though the remaining western arm was reduced by one storey to comply with Condition 2, and although this was not in keeping with a literal reading of condition 2. Otherwise the visual amenity of the structure would have been adversely affected with the two bookends of the building being at different heights. Mr Kenny explained that he did not object to this departure from a literal reading of Condition No. 2 as follows:
" Most people who are acquainted with compliance procedures appreciate that a planning authority in seeking to give effect to a Bord Pleanala planning permission condition, may be presented with a problem of design detail which arises from the condition, which is not material and which needs to be resolved with the Appellant. The above "bookend" case is an example of an issue which emerges from a Bord Pleanala condition producing a design problem. Residents could not reasonably object to the manner in which this design difficulty is resolved because it has to be resolved in good architectural design terms. Either both "bookends" are to be allowed to remain at their original height or only one is"

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

47. Regrettably, it represents a rare example of balance and commonsense. I will give but one example of the type of trivial detail into which Mr Kenny would have the Court enter. As part of his complaint regarding Condition No. 2, he says that the changes made to the roof details related to an increase in the pitch of the roof with "the effect that the height of the building has not been reduced by one storey as required." Trinity has replied to this in some detail. It says that the pitch of each roof is as indicated in the October 1999 section drawings. There was an error in the elevational drawings. An addendum to the compliance submission corrected the error. It also explains a minor change in roof pitch because a "steeper roof-pitch in set back areas ensures that eaves and ridge heights are consistent across building elevations." The change prevents an unsightly flat fascia at the Dartry Road elevation. It does not affect the height of the building.

48. I do not believe that the judicial review procedure is intended to lead the courts into such intricate matters of design detail or scrutiny of the planning and development process.

49. Mr Kenny submits that the problem encountered by Trinity in complying with the literal interpretation of the condition could be solved only by means of a new planning application. Such an approach is extreme. It is unrealistic and pointless. There has been no suggestion that it was ever the intention to change the profile of the building, which was the only thing that would have been achieved by the order sought by Mr Kenny.

Boilers and boiler rooms in the roof spaces

50. The essence of this complaint is that boiler facilities and other plant have been placed in the roof spaces of buildings 2 and 3 and that Mr Kenny maintains that the 1999 plans did not provide for any use to be made of these spaces.

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

52. The 1999 plans did not indicate the location of the boiler rooms. The location, as distinct from the existence, of the boiler installations was not addressed in the 1999 plans. The October 1999 Plans did not indicate boiler room locations. However, the submission stated that the original planning application was being retained unless inconsistent with the revised submission. Therefore, the roof space plant rooms were retained by the October 1999 submission. It was a central contention in Mr Kenny's challenge to the validity of the planning permission that there was no planning permission for boiler rooms.

53. The circumstances as they progressed were described as follows in the compliance submission:
"Further to the leave application hearing, the progression of the project demonstrated that the plant areas in the roof space would be adequate to house boiler rooms and water storage facilities and that support plant rooms would not be required and the few locations indicated previously on the plans. These scattered supplementary plant rooms are therefore removed from the plans.

As supplementary information to the Compliance documents, the submission includes for plant room layouts showing the under-roof areas at the upper floors. These areas will be as outlined in the planning report extract above: i.e. discrete [sic] and not visible from the ground. These plans were not included in the original October 1999 documents. Although it is not regular practice to include roofspace plans, their omission caused considerable confusion and their inclusion was considered appropriate in the interests of clarity

Solution/Response:
Plant is adequately housed therefore at the over-staircore areas under the roof an specifically on the courtyard side of the buildings in order to ensure that their volumes will not be apparent from street level. The plant areas are clad in zinc to match the roof finish and in no case break the ridge line of the roof."

54. Trinity submits that that the installation of the boilers is in compliance with the permission. Following the oral hearing, it was intended that a boiler would be located in each house of each building. In addition, it was determined to use boilers of a more domestic scale which were free-standing and not affixed to the buildings. As roof space had become available, (because, inter alia of the adoption of lifts without machine-rooms) it was determined to locate boilers at that level. This had no impact on the roof pitch and profile. Owing to design innovations, the boilers are now located in plant rooms at roof space level. Planning permission was granted for the said plant rooms. Accordingly, the

fact that a different element of plant, namely, free standing domestic type boilers are located therein, cannot affect the validity of the permission.

55. In my view Mr Kenny's complaint is without merit. It was explicitly envisaged in the original planning application that a number of plant rooms would be located in the roofspace. The installation of the boiler equipment in the plant room in the roof space does not require planning permission. The notion of "plant" is wide enough to include boilers, such as the decentralised and relatively small boilers which have been installed. The location of the boilers has no impact on the roof pitch or profile.

56. The matter of the precise location of the boilers within the development is an eminently suitable matter for agreement pursuant to the procedure envisaged by Condition No. 8.

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

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

58. That reasoning is at least equally applicable to the present appeal concerning judicial review of the compliance order. I treated the issue of the location of boilers at some length in my judgment in Kenny v The Provost, Fellows and Scholars of the University of Dublin, Trinity College, cited above in the somewhat different context of Mr Kenny's claim that Trinity had fraudulently concealed their intentions regarding the issue from McKechnie J. I cited the same passage from the judgment of McKechnie J.

59. In my view, the complaint is without substance or merit.

Permitting an increase in the number of bed spaces

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

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

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

62. According to both the public notice for the October 1999 proposal and the application then made, the development would incorporate:
"3 no student buildings to contain 832 no bedrooms arranged in 180 no apartments over 3 to 7 storeys."

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

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

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

66. Condition No. 8, in the interest of orderly development, required the submission of revised drawings of the proposed development, with floor plans and elevations corresponding in detail, all to be agreed by the Council prior to the commencement of development. It is perfectly obvious to me that these minor adjustments to the number and location of bed spaces are matters of detail and are most appropriate to agreement in accordance with that procedure. They followed on from other natural, normal and reasonable alterations in the plans. Mr Kenny has not identified anything in the nature of a planning consideration, any departure from the overall development objective or, in short, anything worthy of serious consideration under this head of complaint. This complaint is also without merit.

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

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

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

68. Mr. Kenny does not specify, in his grounding affidavit, how he alleges that the second of these requirements was breached. It now seems irrelevant. The development has long since been completed.

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

70. The real focus is on the first requirement. Mr Kenny complains that Trinity persuaded the Council to permit non-observance of the condition in the case of some trees. Trinity made submissions to the Council along the lines that it was:
"neither useful, realistic nor practical in the interests of the development or of the trees on the site. A number of trees on the site will necessarily require more than the stipulated 10m tree protection zones. Others will never attain such a requirement throughout their lifespan…"

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

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

73. The Council points out, however, that:

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

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

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

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

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

78. What is involved here is a case of non-compliance with the literal terms of a condition, though to a minor if not trifling degree. The problem goes back to the terms of the permission itself. It is a mistake to take it out of context. This was a very large and complex development. Literal compliance with the 10-metre part of Condition No. 9 was not feasible if the development was to be carried out as approved.

79. Mr Kenny has been able to demonstrate a very minor, not to say trivial, discrepancy between the compliance submissions of Trinity in respect of the 10-metre condition and the terms of Condition No. 9 as strictly and literally interpreted. The approval of this aspect of the submissions forms a very small part of the entirety of the Council's decision. To accede to Mr Kenny's application would require the Court to quash the decision in its entirety. It has not been suggested that this aspect of the decision is severable. Certiorari is a discretionary remedy. In my opinion, the Court should not grant an order of certiorari in respect of the entire decision based on such an inconsequential discrepancy. Furthermore, Mr Kenny retains the alternative of pursuing his application pursuant to section 160 of the Planning and Development Act, 2000. I express no view whatever on the merits of that application.

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

Delay

80. Order 84, rule 21(1) of the Rules of the Superior Courts requires that all applications for judicial review "be made promptly" and in any event within three months from the date when the grounds for the application first arose, or six months when the relief sought is certiorari. The Court has power to extend the time where it considers there is "good reason" for doing so.

81. The decision of the Council was made on 4th January 2002. The application for leave to apply for judicial review was made on 3th July 2002. The leave order was made on 4th July. The application was thus, to the extent of one day, made within the permitted period of six months. Mr Kenny's application can be rejected on delay grounds only if he failed to apply promptly. I addressed the issue of the need to move promptly in two cases, which have been cited to the Court in argument.

82. In Dekra Éireann Teoranta v Minister for the Environment and Local Government [2003] 2 IR 270 at page 302 I dealt with an application in the special context of judicial review of public-procurement decisions, where Order 84A, rule 4 of the Rules applies. That rule substitutes the expression "at the earliest opportunity" for the term "promptly," which applies in the present case. I said:
"The nature and extent of the burden to show "good reason" calls for some further remarks. The time to be explained by the applicant may commence to run within the period. This flows from the need to move at "the earliest opportunity". Nonetheless, a claim cannot normally be defeated for delay if it is commenced within the relevant period. There would need to be some special factor such as prejudice to third parties (The State (Cussen) v Brennan [1981] IR 181). Thus, different levels of importance may be attached to time falling within and without the period. The fact of delay within the period may affect the approach of the court to time falling without. The court must always have regard

to the circumstances of the particular case and to the fact that the power to extend the time is there in the interest of permitting the courts to do justice between the parties."

83. In my judgment in O'Brien v Moriarty [2005] 2 ILRM 321 at 335, while observing on the somewhat stricter approach to compliance with time limits adopted by the courts in recent years, I said:
"Nonetheless, matters have not reached the stage where an application within time can be defeated in the absence of some special factor."

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

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

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

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

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

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

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

91. On 10th January 2002 he said:
"I obtained a copy of the compliance letter. I was shocked that the [Council] would issue a compliance letter on the basis of the revised plans and details submitted by the developer's architects which clearly, in my view did not comply with the conditions of the permission."

93. On 14th January, he wrote to the Senior Planning Enforcement Officer "drawing attention to the non-compliance with those conditions." He said: "If the development work currently being undertaken is not halted pending the outcome of the judicial review leave application, the financial consequences may be very serious for those who continue with such work." He sent a covering letter of the same date to the architects for Trinity enclosing copies of his letters to the Council. That appears to be the only form of contact he ever made with Trinity. His affidavit proceeds, most materially, on the delay issue: "In my letter of 14th January 2002.....I expressed my view forcefully that conditions 2, 8 and 9 of the permission had not been complied with and signalled my intention to apply for judicial review of the decision of the Council."

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

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

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

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

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

99. My primary view is that, apart from some doubt regarding the distance between a very small number of trees, and the bole of the nearest tree, Mr Kenny has failed to show any

respect in which the Council's decision is not within the scope of the authority given to it by An Bórd Pleanála. The application is, therefore, without merit. In the unlikely event that the extent of non-compliance with Condition No. 9 could be considered of such significance as to justify quashing the decision, the application would fail on the ground of delay.

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

IV

App IV Corner of Pod showing concrete pier rather than steel post. Between windows.

[2024] IEHC 234

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000047]

BETWEEN

DROMAPROP LIMITED

APPLICANT

AND
LEITRIM COUNTY COUNCIL

RESPONDENT

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

1. The applicant carried out works on the Abbey Manor Hotel, Dromahair, Co. Leitrim for the purpose of converting it to use as accommodation for international protection applicants and displaced persons. Building regulations permit completion to be certified on a partial, area-by-area basis. The applicant submitted a completion certificate in that regard covering the above-ground floors. The two basement floors were to be closed off and not used pending development. Regulations provide that a council has 21 days to invalidate the certificate, request further information, or register it. The council engaged in unremarkable co-operative correspondence with Dromaprop and made a limited request for technical information. Following receipt of that, the council abruptly turned around, outside the statutory period for a rejection, and purportedly invalidated the certificate on a sweeping, objection-in-principle basis grounded on a new concept of lack of "collaborative compliance" arising from the uncertified parts of the development in an unspecified way, identified only by reference to 16 chapter headings of regulations running to hundreds of pages. The basic issue in the present case is whether such an opaque, out-of-time, generalised rejection, inconsistent with the failure to object in principle when the certificate was submitted, irreconcilable with the limited nature of the further information sought, and hostile to the concept of partial certification that is expressly recognised as legitimate in regulations, is lawful.

Facts

2. Catherine Dunne B.L. sets out the background to statutory control of building standards in her article "Building Regulations, Control Compliance and Judicial Review" in the current *Bar Review*, April 2024, vol. 29 no. 2 p. 68 (notes omitted):

> "Historically, building control and fire safety legislation has tended to follow as a response to building disasters and failures. The Great Fire of London, which occurred in 1666, began in a bakery on Pudding Lane and raged for four days, ultimately leading to the introduction of building regulation in the UK with the Rebuilding Acts in 1667. Before the Great Fire, London was comprised of a mass of timber-framed buildings and thereafter, the city's buildings were rebuilt on their original plots using brick and stone. In 1981, the tragic fire in the Stardust nightclub in Artane, Co. Dublin, led to the introduction of the Fire Services Act, which was followed by the Building Control Act 1990. The design and construction of buildings is now regulated under the Building Control Acts 1990 to 2014, which provide for the making of Building Regulations and Building Control Regulations. BC(A)R was introduced in 2014 to amend the pre-existing legislation in response to mistakes made in developments constructed during the Celtic Tiger period, including ... Priory Hall and Longboat Quay. Set out in 12 parts (classified as Parts A to M), BC(A)R represented one of the most significant changes to the Building Control Code since the 1990 Act, by strengthening the existing provisions in relation to notifications, compliance and registration of buildings."

3. The Abbey Manor hotel in Dromahair dates from 1860. The National Inventory of Architectural Heritage affords it a regional rating and records the following:

> "Detached seven-bay two-storey double-pile hotel, built c.1860, with projecting entrance bay with pyramidal roof and gabled dormer lights. Pitched slate roof, currently being rebuilt. Rendered chimneystacks. Ransom coursed limestone with red brick dressings and rendered walls to side and rear and with cut stone relieving arches to ground floor windows. Timber casement windows with stone sills and brick surrounds. Upper windows have gables with carved bargeboards. Replacement glazed timber door with brick surround and fanlight. Carved stone head over doorway at south end of façade.
>
> Appraisal
>
> This hotel is a prominent structure in the town of Dromahair. Its ornate design incorporates details such as the [pyramidal] roof to the entrance bay, gables and the use of contrasting limestone and brick dressings. It is an architecturally pleasing structure, which makes a positive contribution to the built heritage of the area."

4. Dromaprop is the owner of the Abbey Manor Hotel. Part of the premises is included on the Record of Protected Structures in the Leitrim County Development Plan 2023-2029.

5. The council is the building control authority for the County of Leitrim.

6. Planning permission was granted to Dromaprop on 12th January 2023 under planning register ref. No. P22/138 to retain and complete renovations and alterations to the property including the original Protected Structure. The grant of permission was subject to 14 conditions.

7. No commencement notice was served, contrary to the building regulations.

8. On 9th August 2023, Dromaprop served a 7 day notice under art. 20A of the Building Control Regulations. This is not limited to any particular phase of development – that part is left blank. The 7 day notice was issued after works commenced, contrary to the regulations.

9. At some point during the course of 2023, Dromaprop made the decision to convert the premises to use as temporary accommodation for persons seeking international protection.

10. Dromaprop liaised with the council throughout these works in respect of its statutory and regulatory obligations in respect of the property. On 11th October, 2023, Mr Nathan Gregg, building control officer with the council, attended at the property and discussed the phased completion and certification with Dromaprop's architects.

11. Dromaprop applied for a fire safety certificate and submitted a Fire Safety Report dated October 2023. Section 1.1 of that document says that "The works relevant to this application include all areas of the building".

12. On 16th October 2023, the council through the medium of Mr Gregg himself issued a fire safety certificate for "renovations works to existing hotel at Abbey Manor Hotel, Main street, Dromahair, Co Leitrim." This document, of note in the light of the *volte face* adopted by the council later, reads as follows (note omitted):

> "Leitrim County Council hereby certify that the works or building to which the application relates, will, if constructed in accordance with the plans, calculations, specifications and particulars submitted, comply with the requirements of Part B of the Second Schedule to the Building Regulations, 1997 to 2022. In considering the application, no assessment has been made as to whether the works or building will comply with other requirements of the Second Schedule to the Building Regulations, 1997 to 20022. This fire safety certificate is granted with no conditions."

13. On 25th October 2023, Dromaprop pre-applied for the certification of the phased completion of the development. The description of the works included in this notification expressly noted the partial certification as follows: "Phased Completion of renovation works to the Ground Floor, First Floor and Second Floor of the Abbey Manor Hotel, Dromahair Co. Leitrim."

14. On 7th November 2023, the Department of Children, Equality, Disability, Integration and Youth wrote to the council outlining the intended use of the property for people displaced persons and persons seeking international protection.

15. Dromaprop issued the Certificate of Compliance upon completion at issue in these proceedings on 13th November 2023.

16. This is a detailed document, and makes clear that it does not cover the entire property. It includes a plan DRG No. C101 R1.0-CCC GF FF SF, which is headed "Hatched Area Not covered under this Completion Certificate" that covers the Lower Basement Plan and Upper Basement Plan.

17. Mr Nigel Coleman, one of Dromaprop's architects, sent an email to Mr Gregg on the same date:

> "Hi Nathan,
> I have submitted the pre-notification CCC for the Abbey Manor Hotel in Dromahair. Submission No. 8499865. The commencement date was set as 16th November.
> The [Disability Access Certificate] Decision (Sub no. 4009571) was due on the 9th but has been extended to the 23rd of November.
> Can we extend the CCC date for 2 weeks or will we submit a new CCC?"

18. Mr Gregg replied 20 minutes later. His reply, set out below:

> "Thanks Nigel, noted. Perhaps the easiest way is for me to request Further Information. That will keep the CCC 'live' without the need to submit a new one along with the associated documents.
> I would have looked for the FDAS, EL, Mech and Elec installation and commissioning certs anyway and this will also facilitate sufficient time for the DAC to be granted."

19. Mr Gregg duly forwarded a request for revised information regarding the CCC to Dromaprop's architect on 13th November 2023. This reads as follows:

> "BCMS <[address]@nbco.gov.ie> Leitrim County Council Áras an Chontae Carrick on Shannon Leitrim
> Mr Declan Hallinan, Director Mr Declan Hallinan Mr Michael Conmy
> Date
> Re: Abbey Manor Hotel Submission No: 2053000
> 13 November 2023 at 14:59

Commenced Works: Renovation Works to the Abbey Manor Hotel, Dromahair, Co. Leitrim
Completed Works: Phased Completion of renovation works to the ground floor, first floor and second floor of the Abbey Manor Hotel, Dromahair, Co. Leitrim.
(This certificate does NOT include the upper and lower basement levels).
Address: Main Street Dromahair Leitrim F91 AT22
Dear Sir/Madam,
Leitrim County Council, as the Building Control Authority, hereby notifies you, in accordance with Article 20F(5), that the Certificate of Compliance on Completion submission, as referenced above, requires Revised Information or additional documentation, as listed. The Revised Information must be returned to the Building Control Authority on or before the 27/11/2023 12:00am. Please upload installation and commissioning certification for the fire detection and alarm system, emergency lighting system, mechanical and electrical installations as appropriate.
Yours Sincerely,
Building Control Section Leitrim County Council
BREXIT NOTE : The departure of the United Kingdom from the European Union presents major challenges for the Construction Industry in Ireland. From the end of the transition period, end users such as builders, certifiers, designers and specifiers will expect to be assured by economic operators, that the construction products they source and use are compliant with EU marketing rules. Please see the DPLGH produced Construction Industry Preparing for the end of the Brexit Transition Period Frequently Asked Questions which contains a series of frequently asked questions aimed at explaining the impacts of the end of the transition period on the supply and use of construction products in the Irish construction sector."

20. On or about 14th of November, the council received a detailed enquiry from a local resident, Ms Fiona McPadden, including a query of whether the layout of the rooms in the property was compliant with the planning permission which was sought and granted.

21. The council granted Dromaprop a Disability Access Certificate for the property on 23rd November 2023.

22. Mr Gregg emailed Bury Architects on the 23rd November 2023, and indicated that prior to considering the CCC it was necessary to compile "robust" documentation.

23. Dromaprop's architect continued to liaise with Mr Gregg. On 1st December 2023, Mr Gregg wrote to Mr Coleman in the following terms:

"Hi Nigel,
The CCC is at the Revised Information status which means that no clock is ticking effectively from my perspective. Please ensure that all documents are uploaded prior to submitting again.
Also, as I am sure you are aware, there has been a great deal of political interest in this submission, it is imperative that the documentation is as thorough as possible. Thank you for the link to the OneDrive files, I will review as soon as possible."

24. Mr Gregg sent a further email on 19th December 2023 to Dromaprop's architect and engineer. He noted that the revised information sought on 13th November was outstanding and reminded Dromaprop that the CCC was not yet valid.

25. On the same date, Dromaprop's architect uploaded all of the outstanding requested revised information. This information included the Fire Detection and Alarm Systems Final Certificate and Emergency Lighting Fighting Certificate. These certificates applied to the entire property, including the two basement floors then under construction. This represented the totality of the required CCC documentation in respect of the first phase of the construction works at the property.

26. Dromaprop also uploaded revised CCC drawings on the same date which included not only the entirety of the Ground, First and Second Floors, but also the completed Basement Kitchen and Laundry. This revised CCC still did not include certain elements of the works to the remaining areas of the lower basement floor still under construction.

27. On 20th December 2023, Dromaprop's architect wrote referring to the fact that "there is a lot of political interest at this property and also pressure to house refugees at this time." He sought a decision before Christmas in order to "move the refugees into the hotel and not have them waiting in temporary accommodation until the new year".

28. The next communication received by Dromaprop was the decision from the council's Building Control Section on 9th January 2024 to mark the CCC, submitted on 13th November 2023, and revised on 19th December, 2023, as invalid, in the following terms:

"Leitrim County Council, as the Building Control Authority hereby notify you in accordance with Article 20F(6) of the Building Control Regulations 1997 to 2015 that the Certificate of Compliance on Completion in relation to the above, submitted on 2023-12-19, does not

conform to the provisions of Article 20F (3) and (4), and has been marked as Invalid, for the following reasons:

The Phased Completion of the Building cannot be considered acceptable where upper levels or floors depend upon the collaborative compliance of floors below them that are not included in the Certificate of Compliance on Completion. The requirements of the Second Schedule to the Building Regulations in respect of: A1 Loading A3 Disproportionate Collapse B1 Means of Escape B2 Internal Fire Spread (Linings) B3 Internal Fire Spread (Structure) B4 External Fire Spread B5 Access and Facilities for the Fire Service D1 Materials and Workmanship F1 Means of Ventilation Part H Drainage and Waste Disposal Part J Heat Producing Appliances L1 - L4 Conservation of Fuel and Energy Part M Access and Use refer in terms of elements or systems dependent or partly dependent on a whole building completion."

29. This communication was followed by an email from Mr Gregg to Mr Conmy reiterating that the phased nature of the CCC which caused it to be marked invalid. Mr Gregg then went on to warn Dromaprop not to seek to occupy the property on pain of enforcement action and prosecution.

30. Mr Conmy responded by way of letter dated 10th January 2024 outlining the illogicality of the council's decision, and pointing out that it was contrary to ordinary practice to reject a CCC simply on the basis that it related only to a completed phase of a project and not the property as a whole.

31. That letter in effect satisfies the need for a demand as a usual prerequisite to an order of *mandamus*, but in any event the submission of the certificate itself inherently constitute a request for registration.

32. Dromaprop informed the court on 16th April 2024 that the basement works were in any event completed recently and would be certified in the coming days. To an extent this raises a fairly significant spectre of mootness over the proceedings if the property can now be certified as a whole, in which context "collaborative compliance" does not arise, but I don't need to deal with that because it hasn't arisen as of just yet.

Procedural history

33. Dromaprop issued the proceedings on 12th January 2024 grounded on its Statement of Grounds and two affidavits sworn by Mr Declan Hallinan, Director of Dromaprop, and Mr Michael Conmy, architect, respectively.

34. Dromaprop was granted leave to apply for judicial review by Hyland J. in the Judicial Review List on 12th February 2024, on which date, with the consent of both parties, the matter was transferred into the Planning & Environment List to travel with the related proceedings H.JR.2024.66.

35. The council filed a Statement of Opposition and Replying Affidavit of Mr Gregg on 25th March 2024.

36. Dromaprop filed a further affidavit from Mr Conmy on 26th March 2024 in response to the council's affidavit.

37. The council filed a further replying affidavit from Mr Gregg on the 11th April 2024 (having provided Dromaprop with an unsworn version previously).

38. Dromaprop delivered its legal submissions on 8th April 2024. The council delivered its replying submissions on 14th April 2024.

39. The matter was listed for hearing on Tuesday 16th April 2024, and was heard on that date and on 17th April 2024, when judgment was reserved.

Relief sought

40. The reliefs sought in the statement of grounds are as follows:

"1. An Order of certiorari, by way of judicial review, to remove for the purpose of its being quashed the decision of Leitrim County Council dated 9th January 2024 to declare the Applicant's Certificate of Compliance on Completion bearing Submission Number 2053000 invalid for the purposes of Article 20F(6) of the Building Control Regulations 1997 to 2023;

2. Such declaration(s) of the legal rights and/or legal position of the Applicant and persons similarly situated and/or of the legal duties and/or legal position of the Respondent as this Honourable Court considers appropriate;

3. An Order directing the Respondent to enter the Certificate of Compliance on Completion on the Register under Part IV of the Building Control Regulations 1997, as amended;

4. If necessary, an order for the discovery of documentation which is or has been in the power, possession or procurement of other parties hereto and which is relevant to any issue in these proceedings;

5. Further and/or other Orders or relief;

6. Liberty to apply;

7. Liberty to file further affidavits; and

8. The costs of these proceedings."

41. As regards the free-floating wording of relief 3, Dromaprop indicated an intention to apply to amend that to add the words "of mandamus" after the word "Order". Liberty to file an amended statement of grounds was granted, and the council did not particularly object to that on the basis that, as directed, the existing statement of opposition would be taken as including any defences that could be made to the claim for *mandamus* including the alleged lack of a letter of demand (although as noted above, I do not regard that defence as well founded given that it is inherent in the submission of the certificate that there is a request that it be validated and registered, which was reinforced by the subsequent letter of 10th January 2024).

Grounds of challenge

42. The core grounds of challenge are as follows:

"1. The decision of Leitrim County Council dated 9th January 2024 to declare the Applicant's Certificate of Compliance on Completion bearing Submission Number 2053000 invalid ('the decision') for the purposes of Article 20F(6) of the Building Control Regulations 1997 to 2023 ('the Regulations'), in respect of the Abbey Manor Hotel, Dromahair, Co. Leitrim ('the property') is invalid such that it is unlawful, ultra vires, void and of no legal effect, where it was made otherwise than in accordance with Article 20F(3) and (4) of the Regulations, and/or is contrary to Article 20F(9) of the Regulations.

2. The decision is invalid in circumstances where it is vitiated by error of law, and/or made upon error of fact, such that the decision is unlawful, void and of no legal effect.

3. The decision is invalid due to its unreasonableness and/or irrationality.

4. The decision is invalid such that it is unlawful, ultra vires, void and of no legal effect, where it was made outside of the time limit of 7 days as prescribed by Article 20(6)(ii) of the Regulations."

Submissions of the parties

43. The statement of case helpfully summarises some of the parties' submissions as follows:

"Applicant's position

35. The Applicant seeks an order of certiorari quashing the decision to invalidate the CCC on the basis that was made contrary to the provisions of the Building Regulations which specifically allow for the phased certification of development, was based upon a fundamental error of law, was based upon a fundamental error of fact, and was irrational.

36. Article 20F of the Regulations provides as follows:

'20F.(1) Subject to paragraph(2), a Certificate of Compliance on Completion shall be submitted to a building control authority and relevant particulars thereof shall be included on the register maintained under Part IV before works or a building to which Part II or Part IIIA applies may be opened, occupied or used. ..

(9) A Certificate of Compliance on Completion may refer to works, buildings, including areas within a building, or developments, including phases thereof, and relevant details shall be clearly identified on the Certificate of Compliance on Completion itself and, subject to validation in line with the requirements at paragraphs (3) and (4), on the register.' (Emphasis added)

37. The rejection by the Respondent of the Applicant's CCC as invalid on the sole basis that it relates only to the first phase of construction works, and does not include the whole building completion, is contrary to the provisions of Article 20F(9) set out above, which expressly provides that a CCC 'may refer to works, buildings, including areas within a building, or developments, including phases thereof,'.

38. The Decision was framed, and Mr Gregg's affidavits have confirmed, on the basis that it was impossible to assess the completed phase of the development because of the supposed need to assess the 'collaborative compliance' of the then ongoing changes to the layout of the Lower Basement Floor. This constitutes a fundamental error of fact where the subject matter of the CCC was capable of being qualitatively assessed on foot of each of the Building Control compliance headings identified by Mr Gregg in the Decision without any need to assess the 'collaborative compliance' of the changes to the basement layout. The factual basis of the Applicant's submission in this regard is set out in the Second Affidavit of Michael Conmy.

39. The phased completion and certification of works in large construction projects such as hotels and multi-unit developments is the usual and prudent way in which such projects are completed and certified.

40. The rejection by the Respondent of the Applicant's CCC, which relates to the vast majority of the property, excluding only portions of the two basement floors that are not proposed to be used or occupied until completed and separately certified, is not only contrary to law, but also is also contrary to industry best practice and further contrary even to basic logic. The Applicant submits that it is therefore void by reason of irrationality.

41. The Applicant also contends that the invalidation of the compliance certification w a contemporaneous with the escalation of concerns on planning matters, and contemporaneous with correspondence with the International Protection Accommodation Service, a unit of the Department of Children, Equality, Disability, Integration and Youth, and all of that points to a concerted attempt on the part of the authority to use whatever procedural means were available, including the unexpected invalidation of the compliance certification, to prevent the Applicant from putting the hotel premises into use.

Respondent's Position

42. The proceedings concern judicial review of the Building Control Authority's decision (which function is performed in the public interest) whether to validate a certificate relating to compliance with Building Regulations - which is highly technical and fact specific determination and so appropriately subject to a highly deferential standard of review. The context also includes the failure of the Applicant to comply with the Building Control in commencing development.

43. The Applicant's contention, at §39 above, in totally inappropriate and without substance – the claim that the Council was seeking 'to use whatever procedural means were available, including the unexpected invalidation of the compliance certification, to prevent the Applicant from putting the hotel premises into use', in entirely rejected and same does not correspond with any ground of challenge in the within judicial review proceedings. To include such contentions and incorrect allegations in the Statement of Case is totally inappropriate.

44. The Applicant's case is advanced on a misunderstanding of the Council's Decision and the reason provided – based on this misunderstanding the Applicant alleges that the Council invalidated the CCC 'because it related to a phase of the development, rather than the entirety of the development' (Submissions at §27) – on this flawed basis it is asserted that the Council acted contrary to Art.20F(9) of the Building Control Regulations. The foregoing demonstrates the incorrect interpretation adopted by the Applicant upon which it has advanced its narrow pleaded case.

45. The Council, upon receipt of the CCC and the further information sought, assessed same in terms of compliance with the Second Schedule of the Building Regulations, in the exercise of evaluative judgment, pursuant to Art.20F of the Building Control Regulations. Contrary to the Applicant's interpretation of the Council's Decision, on any objective reading of same, it is clear that the Council invalidated the CCC in light of the dependency / partial dependency between the levels of the building as a whole, including the parts in the CCC and those not, and by express reference to various aspects of the Second Schedule of the Building Regulations – in accordance with Art.20F(3) and Art.20F(4) of the Building Control Regulations. The Applicant's misunderstanding of the Council's reasoning is evident from the fact that neither it, in the Statement of Grounds, nor Mr Conmy (the Applicant's Architect), in his first Affidavit, allege any error or flaw against the Council's Decision by reference to any aspect(s) of the Second Schedule of the Building Regulations referred to in the Council's reason for refusal and the works carried out/the subject matter of the CCC. There is no pleaded case advanced in this regard – and insofar as the Applicant attempt to do so in the Second Affidavit of Mr Conmy, this is not permissible.

46. The Applicant, in an attempt to advance arguments of irrationality: (i) adopts and relies on the incorrect standard of review; and (ii) fails to understand that the Council's assessment and evaluation of the materials does not equate to a 'material error of fact'. In substance, the Applicant's grounds comprise submissions as to the merits and, in the within proceedings, the Applicant, in essence seeks to impermissibly substitute its evaluation of the works for that of the Council – which it is not open to it to do.

47. The Council's decision was lawful, rational and in accordance with the statutory scheme provided for by Art.20F of the Building Control Regulations."

The law

44. A feature of the current building control regime is an element of self-certification by professions on behalf of those responsible for the development, subject to regulatory oversight.

45. The building control code of practice provides:

"1.5 Regulatory Oversight

Oversight is central to the revised arrangements for the control of building activity that will operate from 1 March 2014. Building Control Regulations require the private sector to play an active part in achieving compliance and providing better buildings. A key aim of the Code is for regulatory oversight to ensure a culture of compliance with Building Regulations using a risk based approach to target those who are non- compliant.

Building Owners, Designers and Builders are responsible for the notices, certificates, plans and documentation that are to be lodged with building control authorities. Regulatory

oversight is necessary in order to ensure that any failure of regulation among the agencies involved – be they Building Owners, Designers, Builders and/or Building Control Authorities is detected and remedied in an effective and timely manner.

A key element in detection is the system of risk analysis, whereby the online Building Control Management System, having regard to the notices and documents lodged at commencement, will inform the Building Control Authority's decisions to deploy available resources towards the inspection and investigation of those construction projects where the risk of failure is highest. This will help Building Control Authorities to escalate findings of non-compliance and, where necessary, effectively use their powers of inspection, enforcement and prosecution in the event of serious breaches of Building Regulations. The aim is that the powers of enforcement and prosecution will become a more credible threat to those who are non-compliant.

2. Definitions

The definitions set out below are for the purpose of explaining terms used in this Code of Practice. They are not, and should not be construed as being, legal definitions or interpretations of similar terms which may be used in the Act of 1990 or any regulations made thereunder."

46. In the already-mentioned article, Catherine Dunne BL helpfully sets out the background:

"The primary legal responsibility for compliance with the requirements of the Building Regulations rests at all times with the owner of the building or works, and with any Builder or designer engaged by the owner. It must be noted that contractual obligations are separate and distinct from the statutory obligations under BC(A)R. All new buildings, and existing buildings that undergo an extension, a material alteration or a material change of use must be designed and constructed in accordance with BC(A)R. BC(A)R requires the submission to the BCA, via the online Building Control Management System (BCMS), of statutory notices of commencement and completion, accompanied by certification of design and construction, lodgement of compliance documentation, proposed inspection regimes and evidence of inspections during the construction phase, and validation and registration of certificates. Roles are assigned to various parties by BC(A)R, including Owners, Designers, Builders, Assigned Certifiers and Ancillary Certifiers."

47. Ms Dunne goes on:

"It is important to note that where a Certificate of Compliance on Completion or a Commencement Notice is submitted to a BCA, s.6(4) of the 1990 Act clearly asserts that the BCA is not under any duty to ensure that the relevant works or building complies with the Building Regulations, is free from defect or that the Certificate of Compliance is true and accurate. BCAs have the power under s.11(3) of the Building Control Acts 1990-2014 to request information, examine and scrutinise proposals, carry out inspections, issue enforcement notices and, where necessary, prosecute owners and/or Builders who fail to comply with statutory requirements. Currently, it appears that Building Control has a 'hands-off' role in the application of BC(A)R; it simply considers the documentation submitted to the BCMS for the purposes of certification, which is largely similar to the previous 'tick the box' exercise engaged in during the pre-BC(A)R era. Designers and Builders can sign off on their own buildings, a practice that would not be deemed permissible in many other jurisdictions."

48. A consolidated version of the Building Control Regulations 1997 is set out at https://revisedacts.lawreform.ie/eli/1997/act/496/front/revised/en/html. (Maybe this is as good a time as any to mention that the Law Reform Commission has significantly improved its presentation of revised legislation since I drew attention to some issues in that regard in *Stapleton v. An Bord Pleanála & Ors (No. 4)* [2023] IEHC 344, [2023] 6 JIC 2306.)

49. The commencement of works is meant to be preceded by a commencement notice under art. 8:

"8. A person who intends to carry out any works, or to make a material change of use as regards a building to which this Part applies, shall give, to the building control authority in whose functional area the works or building are, is or will be situated, notice in writing of such intention (in these Regulations referred to as a 'commencement notice') not less than fourteen days and not more than twenty-eight days before the commencement of the works or the making of the material change of use."

50. Article 11 provides for the application of Part III (fire safety certificates) to certain types of works including hotels:

"Application of Part III.

11. (1) Subject to sub-article (2) and articles 3 and 6, this Part applies to—

(a) works in connection with the design and construction of a new building,

(b) works in connection with the material alteration of—

(i) a day centre,
(ii) a building containing a flat,
(iii) a hotel, hostel or guest building, or
(iv) an institutional building, or
(v) a place of assembly, or
(vi) a shopping centre,

but excluding works to such buildings, consisting solely of minor works,

(c) works in connection with the material alteration of a shop, office or industrial building where—

(i) additional floor area is being provided within the existing building, or

(ii) the building is being subdivided into a number of units for separate occupancy,

(d) works in connection with the extension of a building by more than 25 square metres,

(e) a building as regards which a material change of use takes place,

to which the requirements of Part B of the Second Schedule to the Building Regulations apply.

(2) For the purposes of this Part, the following buildings are exempted—

(a) a single storey building which—

(i) is used exclusively for the storage of materials or products, for the accommodation of plant or machinery or in connection with the housing, care or management of livestock,

(ii) is used solely for the purpose of agriculture, and

(iii) is a building in which the only persons habitually employed are engaged solely in the care, supervision, regulation, maintenance, storage or removal of the materials, products, plant, machinery or livestock in the building,

and which is either attached to another such building or detached from any other building,

(b) a building used as a dwelling other then [*sic*] a flat,

(c) a single storey building used as a domestic garage,

(d) a single storey building (other than one described in (c)) ancillary to a dwelling (such as a summer house, poultry-house, aviary, conservatory, coal shed, garden tool shed or bicycle shed) which is used exclusively for recreational or storage purposes or the keeping of plants, birds or animal for domestic purpose's and is not used for the purposes of any trade or business or for human habitation,

or to works in connection with such a building provided that, after the works are carried out, the building is or continues to be a building referred to in paragraphs (a) to (d).

(3) This Part shall not apply in relation to works carried out in compliance with a notice served under Section 20 of the Fire Services Act 1981 (No. 30 of 1981)."

51. I should note that the typographical error in sub-para. (2)(b) ("then" instead of "than") is not just a feature of the consolidated version - it also appears in the original: https://www.irishstatutebook.ie/eli/1997/si/496/made/en/print#article 1.

52. Article 20A provides for a 7-day notice:

"20A (1) (a) A 7 day notice shall be submitted to a building control authority in respect of:

(i) all works or buildings to which Part III applies, pursuant to Article 11(1) of these Regulations, and

(ii) where it is proposed to commence work before grant of the relevant fire safety certificate."

53. Article 20F of the 1997 regulations provides:

"20F (1) Subject to paragraph (2) , a Certificate of Compliance on Completion shall be submitted to a building control authority and relevant particulars thereof shall be included on the register maintained under Part IV before works or a building to which Part II or Part IIIA applies may be opened, occupied or used.

(2) Subject to paragraph (10) , the requirement for a Certificate of Compliance on Completion shall apply to the following works and buildings —

(a) the design and construction of a new dwelling,

(b) an extension to a dwelling involving a total floor area greater than 40 square metres,

(c) works to which Part III applies.

(3) A Certificate of Compliance on Completion shall be —

(a) in the form specified for that purpose in the Sixth Schedule , and

(b) accompanied by such plans, calculations, specifications and particulars as are necessary to outline how the works or building as completed —

(i) differs from the plans, calculations, specifications and particulars submitted for the purposes of Article 9(1)(b)(i) or Article 20A(2)(a)(ii) as appropriate (to be listed and included at the Annex to the Certificate of Compliance on Completion), and

(ii) complies with the requirements of the Second Schedule to the Building Regulations, and

(c) accompanied by the Inspection Plan as implemented by the Assigned Certifier in accordance with the Code of Practice referred to under Article 20G(1) or a suitable equivalent.

(4) On receipt of a Certificate of Compliance on Completion, a building control authority shall —

(a) record the date of receipt of the Certificate, and

(b) consider within 21 days of the date of its receipt whether the Certificate of Compliance on Completion is valid having regard to —

(i) the requirements of paragraph (3) above, and

(ii) the building control authority' s own satisfaction that all enforcement notices, information requests and statutory processes, including any applications for certificates under Part III, Part IIIA or Part IIIB , relevant to the building concerned have been satisfactorily concluded.

(5) Where the building control authority considers that a Certificate of Compliance on Completion may not be valid having regard to paragraphs (3) and (4) , the building control authority may within 21 days of receipt of the certificate, write to the person who submitted the certificate and

(i) inform them, giving reasons, that the certificate does not comply with paragraphs (3) and (4) and cannot be accepted by the authority, or

(ii) require the person submitting the certificate to submit such revised certificate or such additional documentation as may be deemed necessary by the building control authority to accompany the certificate for the purposes of paragraphs (3) and (4).

(6)(i) Where the building control authority considers the Certificate of Compliance on Completion to be valid having regard to paragraphs (3) and (4), the building control authority shall, no later than 21 days of receipt of said certificate, enter particulars relating to the relevant certificate on the register maintained under Part IV and shall notify the person who submitted the certificate that particulars have been included on the register.

(ii) Notwithstanding paragraph (6)(i), where a revised certificate or additional documentation has been required in accordance with paragraph (5)(ii) , the building control authority, on full receipt of such revised certificate or additional documentation as appropriate, may avail of a further period of 7 days within which to consider the validity of the certificate. On or before the expiry of said 7 day period the building control authority, if it considers that no further action is warranted pursuant to paragraph (5), shall enter the relevant particulars on the register and notify the person who submitted the certificate as appropriate.

(7) A building control authority serving a notice in accordance with paragraph (5)(i) shall return to the person giving the certificate, the certificate and any documentation that accompanied the certificate.

(8) Where the plans, calculations, specifications and particulars comprehended under paragraph (3)(b) and the Inspection Plan comprehended under paragraph (3)(c) have been submitted to a building control authority on a date falling not more than 5 weeks and not less than 3 weeks prior to a nominated date on which a valid Certificate of Compliance on Completion is intended to be entered on the register, the building control authority shall at that point begin to consider the validity of a prospective Certificate of Compliance on Completion in accordance with paragraphs (3) and (4) so that the authority is in a position to include the details of the relevant Certificate of Compliance on Completion on the register on the nominated date provided that a valid Certificate of Compliance on Completion is received by the building control authority on a date not later than the date preceding the nominated date.

(9) A Certificate of Compliance on Completion may refer to works, buildings, including areas within a building, or developments, including phases thereof, and relevant details shall be clearly identified on the Certificate of Compliance on Completion itself and, subject to validation in line with the requirements at paragraphs (3) and (4) , on the register.

(10) Notwithstanding the provisions of subparagraphs (2)(a) and (2)(b) , where a valid Declaration of Intention to Opt Out of Statutory Certification has been included on the public register in respect of a new single dwelling, on a single unit development, or an extension to a dwelling, then the provisions of Article 20F shall not apply."

54. The council argued that the statutory provision for partial certification could apply to phases but could not apply to areas of the hotel in the manner adopted. That argument is incorrect because it can't be reconciled with the legislative provision - "A Certificate of Compliance on Completion may refer to works, buildings, including areas within a building, or developments, including phases thereof ...". A given floor or floors constitute "areas within a building". The council's submission is perhaps best viewed as just a reformulation of their more basic defence which is that the particular partial certification wasn't permissible due to "collaborative compliance". Disposing of that argument doesn't require any elaborate or creative re-writing of the term "areas" in the regulations, nor does such re-writing make the argument less infirm than it otherwise would be. But we will come to all that in due course.

55. Regulation 20G provides for the issue of a statutory code of practice:

"Code of Practice for Inspecting and Certifying Buildings and Works

20G (1) The Minister may from time to time publish a document with the title of the Code of Practice for Inspecting and Certifying Buildings and Works for the purposes of providing guidance with respect to inspecting and certifying a building or works for compliance with the requirements of the Second Schedule to the Building Regulations.

(2) Where a building or works to which these Regulations apply is inspected and certified in accordance with the guidance contained in the Code of Practice for Inspecting and Certifying Buildings and Works this shall, prima facie, indicate compliance with the relevant requirements of these Regulations.

(3) The provisions of any guidance contained in the Code of Practice for Inspecting and Certifying Buildings and Works concerning the use of a particular inspection framework or approach shall not be construed as prohibiting the use of other suitable frameworks or approaches."

56. The relevant code of practice was issued by the Minster in September 2016. The code provides as follows:

"3.6.4 Completion stage

The role of the Building Control Authority at completion stage is to validate the submission of the Certificate of Compliance on Completion and, where appropriate to include details of same in the statutory Register. The validation process will include checking that the certificate was properly completed and signed by the appropriate persons. The authority will check that there are no unresolved matters in relation to requests under Section 11 of the Act or Enforcement Notices or conditions attached to Fire Safety Certificates, Disability Access Certificates, etc. It is not appropriate for the Building Control Authority to commence a technical assessment at this stage. Documents accompanying the certificate of compliance on completion should be retained on the Building Control Management System by the Building Control Authority.

4. Certification

4.1 Certificates Required

As set out in the Building Control Regulations, certificates are required for certain buildings and works. The following four certificates are required to be submitted:

(a) the Design Certificate signed by the Design Certifier at the commencement stage;

(b) the form of Undertaking signed by the Assigned Certifier at the commencement stage;

(c) the form of Undertaking signed by the Builder at the commencement stage; and

(d) the Certificate of Compliance on Completion signed by the Builder and by the Assigned Certifier at completion stage.

4.2 Who can sign as the Design Certifier and/or as the Assigned Certifier

4.2.1 Assigned Certifier and Design Certifier

The following may be appointed and sign as the Assigned Certifier, provided they are competent in relation to the particular works involved:

(a) Architects that are on the register maintained by the RIAI under Part 3 of the Building Control Act 2007; or

(b) Building Surveyors that are on the register maintained by the SCSI under Part 5 of the Building Control Act 2007; or

(c) Chartered Engineers on the register maintained by Engineers Ireland under section 7 of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969. Similarly, the Design Certifier must be one of the above registered professionals and must be competent to carry out their design and to co-ordinate the design activities of others for the works concerned.

4.2.2 Ancillary Certifiers

Apart from the Assigned Certifier and Design Certifier there is likely to be a range of certifiers on most projects, including certifiers appointed by the Building Owner, by his design team and/or by the Builder. Ancillary certifiers may include:"

57. The type of certificate in question here, the certificate of compliance on completion, is addressed in para. 4.6 of the guidelines:

"4.6 Certificate of Compliance on Completion

The Assigned Certifier and the Builder sign the Certificate of Compliance on Completion, supported by Ancillary Certificates from other members of the design team and by certificates from specialist sub-contractors. The Assigned Certifier lodges the following on the Building Control Management System with the Building Control Authority:

(a) the Certificate of Compliance on Completion, supported by a schedule of Ancillary Certificates from other members of the design and construction team; and

(b) such plans, calculation, specifications and particulars as are deemed necessary by the Assigned Certifier to show how the building as completed achieves compliance with the Building Regulations and, indicating clearly, wherever applicable, how these documents differ from any documents submitted to accompany the Commencement Notice or submitted at a later date."

58. Of particular relevance to the present situation is the following:

"8. Completion Stage

8.1 Submission at completion

At completion stage, the Assigned Certifier is required to submit the following to the Building Control Authority:

(a) a Certificate of Compliance on Completion signed by the Builder (at Part A) and by the Assigned Certifier (at Part B);

(b) plans, calculations, specifications and particulars, showing how the completed building has achieved compliance with the Building Regulations must be lodged on the Building Control Management System when the Certificate of Compliance on Completion is submitted or at an earlier date. Where design documents have changed or supersede design documents previously lodged with the Building Control Authority with the Commencement Notice or at a later date, any such difference should be clearly identified;

(c) the Inspection Plan as implemented by the Assigned Certifier in accordance with this Code of Practice.

NB: The Certificate of Compliance on Completion must be validated and registered by the Building Control Authority before the building it relates to may be opened, used or occupied. If rejected by Building Control Authority within 21 days, the certificate is not valid.

8.2 Validation and Registration of Certificate

Where a Certificate of Compliance on Completion is received by a Building Control Authority, the Authority should validate the certificate and place it on the register where it is in order to do so within 21 days. The validation process will include checking that the certificate was properly completed and signed by the appropriate persons i.e. the Assigned Certifier and the Builder. The authority will check that there are no unresolved matters in relation to requests for information, enforcement notices or conditions attaching to Fire Safety Certificates, Disability Access Certificates, etc. It is not appropriate for the Building Control Authority to commence a technical assessment at this stage.

On receiving the certificate and accompanying documents, the Building Control Authority will:

(a) record the date of receipt of the certificate (this should be done online);

(b) within the next 21 days consider whether the certificate is valid and:

1) if valid, include details of the certificate on the statutory register,

2) if the certificate is regarded as not being valid, the Building Control Authority will reject the certificate and notify, giving reasons, the Assigned Certifier that the certificate cannot be accepted or require the Assigned Certifier to submit such revised certificate or additional documentation as may be deemed necessary by the authority for the purposes of validation.

(c) where the Building Control Authority does not validate or reject a certificate or seek a revised certificate or additional documentation within the 21 day period, the certificate will be placed on the Register automatically. A development, where the Certificate of Compliance on Completion has been registered will be deemed to comply with the certification procedures of the Building Control Regulations 1997 to 2015 if it has not been rejected by the Building Control Authority within the statutory 21 day period;

(d) if the Building Control Authority requires a revised Certificate or further documentation to be lodged, and such revised certificate or documentation is submitted, the Building Control Authority may, within 7 days of the date of the

submission, seek additional clarification in relation to the revised certificate. When additional clarification is not sought by the Building Control Authority within this seven day period, the Building Control Authority will include details of the Certificate of Compliance on Completion on the statutory Register.

8.3 Nominated Date for Registration of Certificate

(a) Between 3 and 5 weeks prior to a nominated completion date for the building, the Assigned Certifier may submit the required documentation demonstrating compliance and the Inspection Plan to the Building Control Authority and ask the Authority to proceed to consider the validity of the prospective Certificate of Compliance on Completion with a view to facilitating the inclusion of the details of the Certificate of Compliance on Completion on the statutory register on the nominated date.

(b) The Building Control Authority at that point arranges to undertake its validation checks and satisfy itself that there are no unresolved matters in relation to requests under Section 11 of the Act or enforcement notices or conditions attached to Fire Safety Certificates, Disability Access Certificates, etc.

(c) The Building Control Authority will also check the names of the Assigned Certifier and Builder as provided. Where the authority is not satisfied that matters are in order it will notify the Assigned Certifier that a Certificate of Compliance on Completion cannot be accepted and give reasons why.

(d) Where the Building Control Authority is satisfied that all requirements in relation to the submission of documentation have been met and where a valid Certificate of Compliance on Completion (that is consistent with the project described in the relevant Commencement Notice and the documentation submitted 3 to 5 weeks earlier and signed by appropriate persons notified as having been assigned to act as Builder and Assigned Certifier) is presented no later than one working day prior to the nominated date, the Certificate of Compliance on Completion will be included on the statutory register on the nominated date.

8.4 Phased Completion

For buildings that are completed for occupation on a phased basis for example houses or apartment blocks, it is appropriate that Certificates of Compliance on Completion for each phase may be submitted separately. In this regard, it should be noted that a Certificate of Compliance on Completion may refer to works, buildings, including areas within a building, or developments, including phases thereof. In such circumstances, one or more certificate of compliance on completion may be referenced to a single Commencement Notice. All Builders and Assigned Certifiers signing Certificates of Compliance on Completion should clearly identify the precise building units or works to which it relates. Where it is in order to do so, the Building Control Authority should accept the certificate for the particular phase and place it on the register."

The issues

59. The essential issues arising are as follows (subject to pleading objections that, as will be seen, I don't need to resolve):

(i) once the 7 day period from the furnishing of the revised certificate expired without action from the council, was the council obliged (and does it therefore remain obliged) to register the certificate forthwith?

(ii) assuming for the sake of argument that the council was entitled to reject the validity of the certificate on the basis of a lack of collaborative compliance, was the rejection unlawful when the council had previously requested only limited further information at a point in time when the alleged lack of collaborative compliance was equally present?

(iii) assuming for the sake of argument that the council was entitled to take into account collaborative compliance by reference to uncompleted parts of the development, did it fail to do so lawfully here on the facts by reference to the terms of the decision actually made?

(iv) is a council lawfully entitled to reject a certificate on the basis of a lack of merits as to the asserted compliance with the building code, as opposed to merely on the basis that necessary self-certification documents and similar documents have not been provided? and

(v) is a council lawfully entitled to reject the certificate on the basis of the council's detailed opinion of a lack of compliance that is due to dependency on other parts or phases of the development that are not the subject of the certificate or a previous certificate?

Issue 1 - The obligation to validate the certificate within 7 days

60. The council's main defence to the argument that they failed to act within the statutory 7 day period is that if they request further information during the initial 21 day period, they can just pocket the balance of the 21 day period and add it to the (indeterminate) time during which an applicant will be considering the request for further information, which may be over 21 days, but also add that period to the 7 day period following receipt of the further information. Thus the council's position is not just that it can "transfer" the period until after the additional information but can also "suspend" that period such that it does not run during any period when an applicant is considering the request for further information.

61. None of this has any basis whatsoever in the legislation. No other comparable statutory time limits work on the basis that such an unwritten procedure can be implied. Indeed allowing such a massive *unwritten* extension inherently undermines the time limits that *are* written in the legislation. The regulations clearly specify the 21 and 7 day periods running from dates of submission of identified documents.

62. Firstly we have sub-para. (6)(i). If the papers are in order, the council "shall, no later than 21 days of receipt of said certificate, enter particulars relating to the relevant certificate on the register maintained under Part IV and shall notify the person who submitted the certificate that particulars have been included on the register". Under sub-para. (6)(ii), if further information is requested the council "may avail of a further period of 7 days within which to consider the validity of the certificate", again dating from the receipt of the revised information. The word "may" means that the council doesn't need to avail of the period and may simply register the certificate on receipt. However if it wishes to avail of the period, what applies is the requirement that "On or before the expiry of said 7 day period the building control authority, if it considers that no further action is warranted pursuant to paragraph (5) , shall enter the relevant particulars on the register and notify the person who submitted the certificate as appropriate". The words "on or before the expiry of said 7 day period" would be redundant unless they imported an obligation to decide whether any further action was warranted within that period. Sure, if the council decided on further action, they could proceed on foot of sub-para. (5) and need not register. But the clear and necessary implication is that if the council does not so decide within the specified time limit then the requirement to register the certificate has effect on the expiry of the 7 day period from receipt of the revised information. So if the period passes without any action by the council then any discretionary consideration becomes a mandatory obligation. A council's refusal to register is thus not only amenable to an order of *certiorari* but also to an order of *mandamus* to validate and register.

63. The council argued that the time limit was directory rather than mandatory having regard to the need for protection of health and safety. While superficially plausible, like so much of the council's submission (characteristic of the excellent legal efforts made on the council's behalf), that is unfounded for several reasons. Firstly the overall scheme of the regulations is dependent on there being action within specific time lines that are dependent on other time lines. Creatively interpreting that as merely directory would undermine the extent to which the interlocking parts hang together, and would be a failure to carry out the judicial mission statement to uphold the Constitution and the laws. Secondly, there are no massively adverse health and safety implications caused by the council registering the certificate. The council can still proceed by way of an enforcement notice or court application if it subsequently forms the view that there is a breach of building regulations. Thirdly, the policy background for the time limits is as set out in the code of practice: "It is not appropriate for the Building Control Authority to commence a technical assessment at this stage". Such an approach reinforces the concept that the council is required to act within the statutory time limits. It wouldn't make sense for the process to be intended to be normally one of formal checking of the documentation, but also give the council endless time by holding the limits to be merely directory. The council here disregarded the guidance by engaging in technical assessment. Assuming for the sake of argument that that was lawful at the level of principle, such an exercise should have been carried out within the statutory timelines.

64. On that basis I would uphold core ground 4 and sub-ground 14:

> "4. The decision is invalid such that it is unlawful, ultra vires, void and of no legal effect, where it was made outside of the time limit of 7 days as prescribed by Article 20(6)(ii) of the Regulations.
>
> ...
>
> 14. In circumstances where Article 20F(6)(ii) appears to be basis on which the impugned decision was made (although this is not specified), the decision is unlawful and ultra vires in circumstances where it was made outside of the time limit prescribed. Accordingly, where the CCC was not deemed invalid, for lawful reasons, within the relevant time period, the self certified compliance has not been invalidated and accordingly the Applicant is entitled to have the CCC entered onto the Register for the purposes of Part IV of the Regulations, Article 21."

Issue 2 – the failure to raise collaborative compliance on original receipt of the certificate

65. The intention of the regulations is that the council should address any issues with a certificate in accordance with fairly strict time lines. The council has 21 days from receipt of the certificate to decide on validity. It has the option to request further information during the 21 day period, in which case it has 7 days from the provision of the information. However the request for information is not intended to be a stalling tactic. The intention to engage promptly with the certificate would be defeated if a council could "store up" objections to be launched at a later date.

66. If the council had a genuine, lawful and valid concern about collaborative compliance when the certificate was received, it could have (and a reasonable council would have) raised that with an applicant *at that time*. What it would not have done (and what the council did do) was to send the applicant on a pointless wild-goose-chase of putting in further material when there was a pre-existing overall objection in principle.

67. Dromaprop hasn't pleaded that the council acted *mala fide*, so we don't need to discuss that at this stage. But it has pleaded that the council acted irrationally, unreasonably and unlawfully. That pleaded complaint has been made out. The approach of seeking very specific further information does not sit rationally with the council harbouring a fundamental objection. Rather a rational and lawful decision-making process must mean that if the council seeks specified further information, the council was not postulating an objection in principle that could not be affected by such further information but rather had concerns which were limited to matters that could logically be affected by receipt of the documentation sought. A rational council acting lawfully would be confined on receipt of the additional material to issues that arose from that material.

68. This isn't a case like *Greaney v. Dublin Corporation* [1994] 3 I.R. 384, [1994] 3 JIC 0701 (Morris J.) where the complaint was rejection without prior notice. The lack of prior notice of the objection in itself isn't what makes the decision unreasonable. It is the failure to raise the objection at the point in time when the material giving rise to the objection was actually submitted. Instead the council "sent the fool further" by seeking further information, and then turned round and effectively said that the new information was irrelevant or at least not decisive, because of an overall objection arising from 16 chapters in the building regulations which were allegedly contravened by the adoption in principle of partial certification in this context.

69. So the issue isn't akin to that in *N.P.B.K. (D.R.C.) v. The International Protection Appeals Tribunal* [2020] IEHC 450, [2020] 9 JIC 2505 where the unfounded complaint was *inter alia* that the decision-maker hadn't signalled to the applicant in advance the nature of its evaluative judgment. That isn't the complaint here.

70. For the foregoing reasons I would uphold sub-ground 7:

> "7. The Respondent had not raised any concerns or queries regarding the fact that the CCC as originally submitted on 13th November 2023 referred only to the Ground, First and Second Floors of the property in any of the extensive correspondence exchanged after that date. Nor were any such concerns raised by the Respondent's officers who carried out inspections at the property after 13th November 2023. Accordingly, the application was first treated as valid for the purposes of Article 20F(3) and (4), before supplemental documentation was submitted (by upload to the Building Control Management System ('BMCS')) on 19 December 2023. The first time at which the phased nature of the CCC was raised as an alleged ground of invalidity was in the decision of 9th January 2024."

Issue 3 – the validity of the actual reason offered

71. Let's recall the actual reason given. On 9th January 2024 the Building Control Section of the council wrote to Dromaprop:

> "The Phased Completion of the Building cannot be considered acceptable where upper levels or floors depend upon the collaborative compliance of floors below them that are not included in the Certificate of Compliance on Completion. The requirements of the Second Schedule to the Building Regulations in respect of: A1 Loading A3 Disproportionate Collapse B1 Means of Escape B2 Internal Fire Spread (Linings) B3 Internal Fire Spread (Structure) B4 External Fire Spread B5 Access and Facilities for the Fire Service D1 Materials and Workmanship F1 Means of Ventilation Part H Drainage and Waste Disposal Part J Heat Producing Appliances L1 - L4 Conservation of Fuel and Energy Part M Access and Use refer in terms of elements or systems dependent or partly dependent on a whole building completion."

72. Dromaprop was fairly unsparing in submissions about this:

> "34. The Applicant submits that the Respondent, in invalidating a Certificate of Compliance on Completion because it related only to a phase of a development acted not only contrary to law, and in material error of fact, but contrary to ordinary logic and well-established industry norms. The decision was so baseless as to be irrational, and one which no sane decision maker could essay.
>
> ...
>
> 45. The Applicant submits that the circumstances of these proceedings fall squarely within the limited category of decisions which can be legitimately impugned on the basis of

irrationality. The list of Building Control headings which the Respondent asserted depended upon the 'collaborative compliance' of the lower basement can only be reasonably described as irrational. For example, how does the compliance of a car park with the Building Control requirements for fire tender access depend upon works to a basement floor? How does the compliance of ventilation *via* open windows on a first floor depend upon works to a basement floor? How is the adequacy of the materials used in a hotel lobby dependent on works to a lower basement floor? These assertions are, by definition, irrational. In point of fact, there was precisely nothing in the submitted CCC that depended in any way on the collaborative compliance of the works to the basement. The affidavit evidence from both parties bears this out. It is clear both from the face of the Decision and the paucity of the matters set out therein, that the CCC was invalidated because it related to a phase of the development only.

46. It is further submitted that this occurred in circumstances where the Respondent was under considerable political pressure locally. The Decision was unexpected and it out of the norm in such circumstances. The Decision was not only legally flawed but based on factual error, unsupported by any material, and unsupported by any logic or reasons. There was simply no relevant material before the Respondent that would have allowed a reasonable building control authority to invalidate the submitted CCC.

...

49. The Respondent's twin decisions to invalidate the CCC and to follow that by seeking relief under s.160 of the Planning and Development Act 2000 in the related proceedings had the substantive effect of preventing the Applicant from putting the property at the disposal of the Minister for Integration for the temporary accommodation of persons seeking international protection."

73. There are a couple of striking things about the council's missive. Firstly, it represents a startling handbrake turn in the relatively co-operative correspondence as between the parties. A switch is thrown behind the curtain, and what had been a fairly low-key, technical, collaborative discussion in first-name terms suddenly becomes an unheralded jolt of officious rejection.

74. The Irish writer Elizabeth Bowen contributed a deliciously tart turn of phrase to our culture when she described Aldous Huxley as "the stupid person's idea of the clever person" (reportedly in "Mr Huxley's Essays" (Review of *The Olive Tree and Other Essays* by Aldous Huxley), *The Spectator*, 11th December, 1936, p. 24, although that citation does not currently appear in the online archive). The council and its officials aren't stupid of course. But they may not be fully informed about forensic psychology. One is reminded of Bowen here because the kitchen-sink nature of the rejection – relying on 16 chapters running to hundreds of pages – is something approximating to an uninformed person's idea of a clever decision. It's almost as if the council thought the more headings and generalities they crammed in to the rejection, the more impregnable it would look to a court - as if every additional chapter referred to was another sandbag against challenge.

75. Mr Gregg has attempted in an *ex post facto* manner to set out arguments on affidavit as to how the certificate could be inadequate. But that is unimpressive on the facts here, for multiple reasons. Firstly, the actual decision is so general that it more than smacks of hostility to partial certification altogether. The concession that partial certification is fine and dandy in general, just not for this particular accommodation for protection seekers, only came later. Secondly insofar as the objection is now meant to be not to partial certification in general but only to partial certification here, that objection is a day late and has strong elements of a re-writing of the original. And thirdly the new version of events is also a dollar short in that its vagueness does not stand up under the detailed forensic onslaught unleashed by Dromaprop on affidavit. We will look at that more closely later.

76. Starting with the first point, the decision says that *inter alia* that "The requirements of the Second Schedule to the Building Regulations in respect of: [16 different chapters in a document of about 550 pages] refer in terms of elements or systems dependent or partly dependent on a whole building completion." That is phrased as a bald generalisation, not a careful, detailed, granular attempt to apply a general principle to the facts of the particular case. If that is a valid rationale then there could never be a partial certification.

77. Mr Gregg's attempt to explain the decision at the time (as opposed to later on with the leisure of thought, consultation and potential advice) doesn't help his position at all. He stated:

> "I have considered the certifications, as built drawings and declarations in respect of the CCC for the Abbey Manor Hotel in some detail. No matter how I look at it I cannot see how this can be considered a Valid CCC when taking the Upper Floors in isolation from the rest of the Building. This means, unfortunately, I have no alternative but to record it as Invalid on the BCMS which I have now done."

78. That is phrased as an objection in principle to the partial certification. Again there is nothing specific articulated about the particular building that makes partial certification, permitted generally by the regulations, impossible here. The council are now adopting a position along the lines of "oh

no, we never objected to partial certification in principle, it's a long lists of points specific to this building that are the problem here". The value of such after-thought is frequently low and is so here.

79. If I am wrong that the general hostility to partial certification articulated at the time makes the decision invalid, and if the meaning of the decision is to be read as conveying only that while none of these chapters are an obstacle to partial certification in general, there is something about this particular development that makes partial certification invalid, the problem with that is that the council didn't say at the time (or in any persuasive way since – but we will come to that shortly) what exactly it was that is special to this development that creates that situation.

80. There isn't anything about this particular development that is pointed to in the decision that separates it from the general principle of the legitimacy of partial certification. It would be inappropriate to allow the council to supplement that now, as the danger of after-the-event reconfiguration of reasons is far too great in a heated context such as this one.

81. If I am both wrong that the decision is invalid on its own terms, and wrong in saying that the council can't reconfigure the decision through subsequent evidence, then the council faces the final problem that Mr Gregg's evidence while lengthy is in critical respects entirely vague and general when compared to the granular evidence of Mr Conmy. Cross-examination might have been helpful to enable me to really get to the bottom of what went on here. But while a conflict on affidavit of averments of equal evidential weight that is not addressed by cross-examination is normally resolved against the party carrying the burden of proof (*RAS Medical Ltd v. the Royal College of Surgeons* [2019] IESC 4, [2019] 1 I.R. 63, [2019] 2 I.L.R.M. 273, [2019] 2 JIC 0501 (Clarke C.J.) and similar caselaw), that isn't to be applied simplistically without regard to the nature and content of the alleged conflict. It doesn't mean that the court can't evaluate the detail and granularity of what is averred to and the overall circumstances.

82. As noted in *Doorly v. Corrigan & Anor* [2022] IECA 6, [2022] 1 JIC 2104, while conflict between equally inherently credible averments, with no cross-examination, is normally resolved against the party carrying the onus of proof, a court is not always obliged to regard all averments as being equally credible, or to disregard internal or evident problems with them (see by analogy the manner in which the Supreme Court considered it was entitled to prefer an *affidavit* over even *oral evidence* in *Koulibaly v. Minister for Justice, Equality and Law Reform* [2004] IESC 50, [2004] 7 JIC 2906 (Unreported, Supreme Court, Denham J. (Geoghegan and McCracken JJ, concurring), 29th July, 2004)). Among the matters to which regard might be had would be included the failure to explain patently relevant questions that are clearly within that party's responsibility.

83. Here, Mr Gregg just doesn't properly or at all deal with the points made by Mr Conmy. This can be seen more clearly when we go through the various issues on which there is an alleged conflict of evidence. In fact what has happened is that Mr Gregg has failed to properly address and contest specific points put in evidence by Dromaprop, so the lack of cross-examination means that all such specific points must be resolved in favour of Dromaprop. Sure, Mr Gregg does include generalities denying everything and asserting his inability to assess compliance due to the limited certificate, but where the actual specifics are not addressed, such formulaic evidence falls massively flat and doesn't constitute a proper joinder of issue, in a situation such as we have here.

84. Let's take the issues heading-by-heading.

A1 loading

85. Mr Gregg averred:

> "(a) As referred to in the Council's invalidation reason – 'A1 Loading' provides, at §A1(1), that a 'building shall be so designed and constructed, with due regard to the theory and practice of structural engineering, so as to ensure that the combined actions that are liable to act on it are sustained and transmitted to the ground – (a) safely, and (b) without causing such deflection or deformation of any part of the building, or such movement of the ground, as will impair the stability of any part of another building.'
>
> The submitted CCC provides that it relates to the following building or works: 'Phased Completion of renovation works to the ground floor, first floor and second floor of the Abbey Manor Hotel, Dromahair, Co. Leitrim. (This certificate does NOT include the upper and lower basements levels).'
>
> The Lower and Upper Basement floors are not included in the CCC – as such, the Council could not consider or review any works to Loadbearing Walls or Elements on these floors. Given that the requirement is to 'ensure that the combined actions that are liable to act on it are sustained and transmitted to the ground' and that the Lower and Upper Basement Floors are located vertically below parts of the Ground and First Floors and the loads or combined actions cannot be transmitted to the ground except via the Lower and Upper Basement structural elements, it is clear that the requirement of Part A of the Second Schedule to the Building Regulations – A1 Loading – have not been met by the adoption of a Phased Completion."

86. Mr Conmy replied:

"In respect of the specific averments made by Mr Gregg, I make the following responses. In respect of the averments at para.21(a), as averred to above, no structural works were carried out to the lower and upper basement floors whatsoever. The super-structure in this part of the hotel is constructed of reinforced concrete and structural steel. It is of standard construction and in perfectly sound condition. It has stood for over two decades, since 2002, without any quibbles or concerns from the Respondent. No additional loadings were placed by the relevant works on the floors or walls of the basement and the original live loading allowance of 4.5Kn/m2 still applied, such allowance being set out at C4 for loading details in BS6399-1-1996 as referred to in Part A 1991 Technical Guidance Documents. This part of the building was constructed pursuant to the Building Control Regulations as they applied in 2002 and accepted by the Respondent as compliant with Part A and structurally sound. In this regard I beg to refer to the Certificate of Compliance prepared by Frank Cooney, Architect issued 26 January 2004 upon which pinned together and marked '2MC1' I have signed my name prior to the swearing hereof. Precisely nothing in the works carried out by the Applicant could even conceivably have affected the compliance and structural soundness of the lower basement floors, or the completed portions of the works which formed the subject matter of the CCC submitted by the Applicant."

87. Mr Gregg then replied:

"Mr Conmy presents the position that some, but not all, of the reasons of the Building Control Authority for invalidating the CCC must be incorrect as works are complete and in compliance with the Building Regulations insofar as they have been observed by the Assigned Certifier or Ancillary Certifiers – this is not accepted and misunderstands the reason for invalidation. He also asserts (inter alia, §10) that 'there was nothing to prevent the Respondent certifying this phase of the development...'. Firstly, it is not the role of the Council, Building Control Authority, to 'certify' phases of, or completions of works or developments. The definition of the Assigned Certifier, per the Code of Practice for Inspecting and Certifying Buildings and Works is 'Assigned Certifier means the competent, registered professional person assigned by the Building Owner to inspect and certify works in accordance with the Building Control Regulations.' Furthermore, and more fundamentally noting the nature of the averments made by Mr Conmy, the exclusion of the basement parts of the very items referred to by Mr Conmy (inter alia, §10) - "'the entire building, including the basement floors, is fitted with fire alarms and emergency lighting. All elements of structure are provided with 60-minute fire protection' - from the CCC, even though they are relevant to the project, is the issue at hand.

I do not agree that any completed works have no relationship or dependency on the ongoing works in the basement. The Council was of the opinion having regard to the nature of the Hotel, that there was dependency and collaborative compliance between the floors included in the CCC (ground-second floor) and those not included (upper and lower basement) and the CCC did not comply with the specified requirements of the Second Schedule of the Building Regulations – as detailed in the Councils invalidation decision and the Statement of Opposition. The Council formed the view that considering the specific type of building at issue and the requirements of the Second Schedule of the Building Regulations, and as the completed works to which the CCC related were dependent or partly dependent on the whole of the building being completed, the CCC was invalidated – the various averments made by Mr Conmy in his Replying Affidavit does not alter this fact and his contentions to the contrary are not accepted.

Furthermore, the statement by Mr Conmy that 'no structural works were carried out to the lower or upper basement floors whatsoever' seems to be contradicted by the Section Drawing (Proposed Section A-A, B-B, C-C & D-D) which highlights works to walls and floors at those levels. I beg to refer to a true copy of the said Section Drawing, which I have marked with the letters and number 'NG 1', prior to swearing my name hereto."

88. What can one say about this alleged "conflict" on evidence, other than perhaps that the two deponents are speaking a different language.

89. Mr Conmy's language is that of a person immersed in the actual development and able to relate abstract issues to the reality of facts in the field.

90. Mr Gregg on the other hand revels in desk-bound, abstract, official language, most of which could apply to almost any development. There is limited, carefully drafted, and, one suspects, probably very heavily lawyered, engagement with the actual situation on the ground. On the logic of his position, since walls form part of the structure, and walls go all the way down, then there could never be a valid partial certification of any building on a floor-by-floor basis. That is utterly inconsistent with the express statutory provision and intention for partial certification, and blows a huge hole in the regulations. If the legislative intention was that there could not be floor-by-floor

certification, that is such a massive issue that there is no way it could have been left out of a statutory provision authorising partial certification.

91. Mr Gregg's complaint that "The Lower and Upper Basement floors are not included in the CCC – as such, the Council could not consider or review any works to Loadbearing Walls or Elements on these floors" is, with respect, unfounded. Translated, it means – this is partial certification therefore our hands are tied, we just can't consider or assess the situation. But the council's hands aren't tied. Such a conclusion would require the council to ask itself whether the partial certificate meant that it had a complete lack of knowledge about everything outside the certified area. The answer is obviously no, for a host of reasons that are too tedious to recite.

92. A council can't simply write "here be dragons" on any uncharted part of the map, and assert the worst even if in reality there isn't any basis to suggest a breach of regulations. Mr Conmy expressly says "Precisely nothing in the works carried out by the Applicant could even conceivably have affected the compliance and structural soundness of the lower basement floors, or the completed portions of the works which formed the subject matter of the CCC submitted by the Applicant". Mr Gregg doesn't dispute that – he just alleges that there were some works to the walls and floors at basement levels. Even assuming that he is correct, so what. A council can't lawfully reject a certificate on such an abstract basis. There must be some reason to believe that the building regulations are not being complied with. Mr Conmy says there is no such basis under this heading. Mr Gregg has nothing in reply, other than to flee to the comforting oasis of generalities: "The Council was of the opinion having regard to the nature of the Hotel, that there was dependency and collaborative compliance between the floors included in the CCC (ground-second floor) and those not included...". And indeed it was. In the absence of any other factual material, bland generality might be enough. But it isn't enough when it is forensically taken apart and demolished brick by brick, as Mr Conmy has done here. There has been no meaningful reply, and frequently no reply at all, to the detail of this demolition. Against such a background, the uncontested points of factual detail must be resolved in favour of Dromaprop.

A3 structure

93. Mr Gregg averred:

"(b) As referred to in the Council's invalidation reason, A3(1) provides that a 'building shall be designed and constructed, with due regard to the theory and practice of structural engineering, so as to ensure that in the event of an accident the structure will not be damaged to an extent disproportionate to the cause of the damage' with A3(2) stating that for 'the purposes of sub-paragraph, (1), where a building is rendered structurally discontinuous by a vertical joint, the building on each side of the joint may be treated as a separate building whether or not such joint passes through the substructure'.

- Given that the development has been designated as being within Consequence Class 2b buildings (Upper Risk Group), additional measures are required to provide effective horizontal ties for framed and load-bearing wall construction, together with effective vertical ties in all supporting columns and walls.
- The Lower and Upper Basement floors are not included in the CCC, so the Council could not consider or review the works in the context of its robustness or ability to withstand damage to the structure to an extent disproportionate to the cause of damage. Given that the Ground and First Floors are located vertically above the Lower and Upper Basement Floors, it is clear that the requirement of Part A of the Second Schedule to the Building Regulations, A3 Disproportionate Collapse, has not been met by the adoption of a Phased Completion."

94. Mr Conmy replied:

"In relation to the averments at para.21(b), there was no engineering or design requirement to provide additional effective horizontal or vertical ties in the premises. The structure is tied with hollow core floors horizontally and the elements of structure are vertically tied with columns and beams. This was capable of being ascertained and the works to the basement could have had no conceivable bearing on this. There was no requirement to assess the building for disproportionate collapse because no works were carried out that in any way affected, or could have affected, the structural integrity which was already certified under the Building Control Regulations."

95. There was no specific reply to this by Mr Gregg.

96. We have the same basic dynamic – an assertion that the council "could not consider or review" matters because of the submission of a partial certificate under legislation that allows partial certificates, Mr Conmy then replies in detail specifying that "there was no engineering or design requirement" to do more than was done and that "this was capable of being ascertained and the works to the basement could have had no conceivable bearing on this", and then the lack of an effective reply.

97. The notion that the council can't review or assess something merely because it falls into the uncertified area is, I'm afraid, unsustainable. If they really want to insist on going the route of a technical examination, which the code of practice says they should not do at this stage, and assuming that doing so lawful, and also bearing in mind that there is no plea that subjecting this applicant to technical examination is discriminatory and an abuse where that is not the normal practice, then the council would at least have to ascertain what is ascertainable rather than refuse merely on the basis of the partial certification – which, let's remind ourselves, is what all the essentially repetitious material in the council's affidavit comes down to: "the requirement of Part A of the Second Schedule to the Building Regulations, A3 Disproportionate Collapse, has not been met by the adoption of a Phased Completion."

98. And finally in any event, this objection if valid can apply to any multi-storey building that is partially certified on a floor-by-floor basis. That would defeat the legislative intention to allow partial certification. The council seems to think that using wording referring to "the nature of the hotel" or the higher risk status of that type of accommodation (presumably because of the larger number of residents) somehow boxes off this development for special treatment allowing business as usual for other projects. Sadly, that doesn't follow. The fact that this is a hotel (I am not sure what the phrase "the nature of" the hotel means, if it means anything – certainly no special *nature* of *this* hotel has been identified that puts it into some *sui generis* category) may be a reinforcing argument in the council's mind for saying that they don't know what is happening with structural soundness on uncertified floors, but logically it can't be decisive. The principle they assert is that to validate a certificate for any floor you have to have confidence in the soundness of all floors, which can't be assessed except by a certificate. That logically applies to a two-story domestic dwelling or any multi-story development, precluding floor-by-floor partial certification and defeating the statutory purpose and wording.

B1 fire escape

99. Mr Gregg averred:

"(c) As referred to in the Council's invalidation reason, B1 provides that a 'building shall be so designed and constructed that there are adequate means of escape in case of fire from the building to a place of safety outside the building, capable of being safely and effectively used.'

- As part of the submitted CCC, supporting drawings included 'Elevations as constructed', dwg No. C105, dated 9th October 2023, by Bury Architects; and 'Site Layout Plan – Services', dwg No. omitted, dated 9th October 2023, by Bury Architects.
- Significant elevation areas are hatched out on the 'Elevations as constructed' drawing along 'Side Elevation (N-W) and the hatching is described as meaning 'Hatched Area Not covered under this Completion Certificate'.
- Section 1.4.7 of Technical Guidance Document B, 2006 & reprinted 2020, Final Exits, states: 'Final exits should be sited to ensure the rapid dispersal of persons from the vicinity of the building so that they are no longer in danger from fire and smoke. Direct access to a street, passageway, walkway or open space should be available. The route clear of the building should be well defined, and suitably guarded if necessary, in situations where the exit discharges other than to an open street or open space at street level. Final exits also need to be apparent to persons who may need to use them. This is particularly important where the exit opens off a stairway that continues down, or up, beyond the level of the final exit. Final exits also need to be sited so that they are clear of any risk from fire or smoke in a basement, or from openings to transformer chambers, boiler rooms and similar risks.'
- Given that the west Stairwell discharges to an external escape route that travels along the line of the 'Side Elevation (N-W)' and that the external wall and openings at Upper Basement Floor level are excluded from the CCC, it is clear that the requirements of Part B of the Second Schedule to the Building Regulation, B1 Means of Escape, has not been met by the adoption of a Phased Completion."

100. Mr Conmy replied:

"In relation to the averment at para.21(c) I say that the means of escape are adequate to comply with the phased evacuation of the building. Signage, emergency lighting and a fire alarm are fitted in all areas. The final exits are all clearly visible. The western stairwell shaft provides an escape through the basement levels, and this was included in the CCC submitted. There was nothing to prevent the Respondent assessing the compliance of the premises in this regard. Further, in any event, I repeat the earlier averments that it is not intended for the basement floors of the premises to be brought into immediate use."

101. There was no specific reply to this by Mr Gregg.

102. So where does this point stand? Again the critical dynamic is reliance on the generalised objection to the partial nature of the certification: "Given that ... the external wall and openings at Upper Basement Floor level are excluded from the CCC, it is clear that the requirements of Part B of

the Second Schedule to the Building Regulation, B1 Means of Escape, has not been met by the adoption of a Phased Completion" (the mantra "it is clear that ..." giving the game away here and throughout). Then the detailed reply – provision has been made for escape routes in the certified area. There is also provision for escape through the uncertified area, but that is not going to be brought into use for present purposes so doesn't matter. Confronted with this utter demolition of their position the council comes back swinging with ... nothing. Other than generalities and assertions of the type we have seen already. The lack of cross-examination to challenge the granular detail offered by Dromaprop seals the council's fate.

103. And again – the objection about egress on uncertified floors could be generalised to any multi-story building that is partially certified. If this is a valid objection then the statutory intention to allow partial certification is readily defeated.

B3 internal fire spread

104. Mr Gregg averred:

"(d) As referred to in the Council's invalidation reason, B3 Internal Fire Spread (Structure) provides, at §B3(1), that a 'building shall be so designed and constructed that, in the event of fire, its stability will be maintained for a reasonable period.'

- Section 3.1.2 of Technical Guidance Document B, 2006 & reprinted 2020, states: 'Structural frames, beams, columns, loadbearing walls (internal and external), floor structures and gallery structures, should have at least the fire resistance given in Appendix A, Table A1.'
- Further, Section 3.1.3 of Technical Guidance Document B, 2006 & reprinted 2020, states: 'The measures set out in Appendix A include provision to ensure that where one element of structure supports or gives stability to another element of structure, the supporting element has no less fire resistance than the other element.'
- Given that a fire could occur in any part of a building, regardless of whether it is occupied or not, and considering that the Lower and Upper Basement Floors are excluded from the CCC and that the structural stability of the Ground, First and Second Floors depends upon the inherent fire resistance of load bearing elements at Lower and Upper Basement Floors, it is clear that the requirements of Part B of the Second Schedule to the Building Regulation, B3 Internal Fire Spread (structure), has not been met by the adoption of a Phased Completion."

105. Mr Conmy replied:

"In respect of the averment at para.21(d), I say that the entire building, including the basement floors, is fitted with fire alarms and emergency lighting. All elements of structure are provided with 60-minute fire protection. The occupants of the premises and staff are provided with safe access and egress to and from the entire premises. All relevant details of firestopping and passive fire safety measures were included in the handover CCC submission. The compliance of the upper floors in this regard is not in any way dependent on the works to the basement – there was nothing to prevent the Respondent certifying this phase of the development in line with the common, ordinary application of the provisions of the Building Regulations.

In any event, details of the works to the basement were in fact submitted to the Respondent with the CCC submission. On 19 December 2023 my office uploaded all of the outstanding requested revised CCC information. This information included the Fire Detection and Alarm Systems Final Certificate and Emergency Lighting Certificate applying to the entire property, including the two basement floors. These details confirmed that the basement had been subject to precisely the same level of fire stopping, passive fire safety measures, and fitted with the same alarms and emergency lighting, as the rest of the premises."

106. There was no specific reply to this by Mr Gregg.

107. Again the previous points apply. The council's stock-in-trade is generality. When confronted with specifics they lapse into silence leaving Dromaprop's specific averments uncontroverted. The ground of objection, if valid, would apply to any multi-storey building, contrary to the express statutory system of partial certification, and would render floor-by-floor certification inherently unlawful.

B3 fire spread in concealed spaces

108. Mr Gregg averred:

"(e) As referred to in the Council's invalidation reason, B3(3) provides that a 'building shall be so designed and constructed that the unseen spread of fire and smoke within concealed spaces in its structure or fabric is inhibited where necessary.'

- Section 3.4.1 of Technical Guidance Document B, 2006 & reprinted 2020, states: 'If an element that is intended to provide fire resistance (i.e. it has requirements for fire resistance in terms of integrity and insulation) is to be effective, then every joint, or imperfection of fit, or opening to allow services to pass through the element, should be

adequately protected by sealing or fire-stopping so that the fire resistance of the element is not impaired.'

- The compliance report for the Fire Safety Certificate, submitted by MFA Consulting Engineers on 4th October 2023, details the proposed floor construction as 'reinforced concrete/timber' with Load Bearing Capacity in minutes of fire resistance of 60 mins. The method of exposure taken from Table A1 of Appendix A of Technical Guidance Document B is 'from the underside' and relates to 'any other floor including compartment floors'.
- Where any fire protection measures have been employed to meet the requirement of fire resistance of the Ground Floor, they have not been included in the CCC in respect of the fire resistance from the underside and of any openings in the floor construction as regards to the Upper Basement Floor level. Therefore, the Council does not know if those works are complete and in compliance with the requirement of Part B of the Second Schedule to the Building Regulations, B3 Internal Fire Spread (structure), as a result of the adoption of a Phased Completion."

109. Mr Conmy replied:

"In response to para.21(e) I say that the horizontal separation in the premises is achieved using hollowcore concrete slabs with a fire resistance of 120 minutes. The timber joist floor has a fire resistance in excess of 60 minutes. The fire protection measures, and the materials used are detailed in the phased submission. There was nothing to prevent the Respondent from verifying all of the above at the time of the CCC submission. The invalidation of the CCC on the alleged grounds that this and the other details referred to herein could not be verified was unreasonable, irrational and one which no reasonable building control authority would make."

110. There was no specific reply to this by Mr Gregg.

111. The same points apply as previously – the factual averment that Dromaprop's complete answer to the problem was available and verifiable by the council is uncontroverted. The council did not seek cross-examination and can't question that now. No reasonable council would have acted in such a manner by essentially feigning ignorance on matters that must be found as a fact to have been available to and verifiable by it.

B5 access

112. Mr Gregg averred:

"(f) As referred to in the Council's invalidation reason, B5 Access and Facilities for the Fire Service provides that a 'building shall be so designed and constructed that there is adequate provision for access for fire appliances and for such other facilities as may be reasonably required to assist the fire service in the protection of life and property.'

- The drawing submitted in support of the proposed Fire Safety Certificate – named 'Site Layout Plan', Drawing No. 0069-MFA-XX-ZZ-DR-C-200-01 Rev P.02, dated 5th September 2023 – and the Compliance Report produced by MFA Consulting Engineers, details the provision of hydrants, vehicle access of High Reach appliance to at least 50% of the perimeter, and the design of access routes and hard-standings.
- The drawing submitted with the CCC – named 'Site Layout Plan – Services', by Bury Architects – conflicts with the provision detailed in the Fire Safety Certificate in terms of access to the rear of the premises not being included. This excludes fire service vehicle access to all areas other than the front elevation from the Main Street. Additionally, it excludes access to the proposed Fire Hydrant located in the rear parking area. Furthermore, it is not known if the required vehicle turning facilities and minimum carrying capacity has been provided for fire brigade vehicles.
- Given that the rear external areas are excluded from the CCC, the Council does not know if those works are complete and in compliance with the requirement of Part B of the Second Schedule to the Building Regulations, B5 Access and Facilities for the Fire Service, as a result of the adoption of a Phased Completion."

113. Mr Conmy replied:

"The averment at para.21(f) is at odds with the notion that the CCC was invalid because ongoing basement works prevented a detailed assessment of the compliance of the premises with the Building Control Regulations. This self-evident fact is illustrated by the detailed assessment carried out by Mr Gregg in this sub-paragraph. In response to the assessment, he makes therein, I say the following. Access to the premises is available at all times for a fire tender to get to the rear car park. The turning circle is adequate and the load bearing capacity of the ground is adequate. This car park was installed when the premises was constructed, and it has remained the same since. Mr Gregg undermines the Respondent's defence by contending that he could not have assessed these facts due to limited basement works which did not affect these matters, and which could not affect these matters."

114. There was no specific reply to this by Mr Gregg.

115. The same points apply – the central conceit from the council is that since areas are "excluded from the CCC" then "the Council does not know" the position in these areas. It's a sort of mantra that is given a veneer of technical merit by being repeated under heading after heading. But the two basic points that we must keep in mind are firstly that partial certification is expressly allowed by the legislation, and secondly that merely because an area is uncertified doesn't mean that it follows that "the council does not know" anything about it. Why not walk around the back and have a look? Or have regard to maps, photos or other available material, since the car park has been there for a very long time. Or just ask the applicant, if it's that much of a concern. Or comply with the code of practice and avoid getting into a technical examination. Don't feign ignorance when there are ready sources of information available.

116. The assertion that the limited completion certificate "conflicts with" the fire safety certificate is misconceived. The completion certificate does not "conflict with" the fire safety certificate. Rather it avails of a statutory facility to certify in stages. If partial certification impermissibly "conflicts with" a full overview of the entire development in the context of a fire safety certificate, then virtually any partial certification would be illegal. But the regulations permit it.

D1 workmanship

117. Mr Gregg averred:

> "(g) As referred to in the Council's invalidation reason, D1 Materials and Workmanship provides that 'all works to which these Regulations apply shall be carried out with proper materials and in a workmanlike manner'. D3 provides definitions to same, including that 'proper materials' means materials which are fit for the use for which they are intended and for the conditions in which they are to be used, including materials which:
> ' (a) bear a CE Marking in accordance with the provisions of the Construction Products Regulation;
> (b) comply with an appropriate harmonised standard or European Technical Assessment in accordance with the provisions of the Construction Products Regulation; or
> (c) comply with an appropriate Irish Standard or Irish Agrément Certificate or with an alternative national technical specification of any State...'
> - Section 0.1 of Technical Guidance Document D, 2013, states: 'Materials include products, components, fittings, items of equipment and backfilling for excavations, Materials should be:- (a) of a suitable nature and quality in relation to the purposes and conditions of their use, and (b) adequately mixed or prepared, and (c) applied, used or fixed so as to perform adequately the functions for which they are intended.'
> - The exclusion of the Upper and Lower Basement Floors means that it is not possible to determine if the works are in fact complete and/or certify same in terms of the use of 'proper materials' and the workmanlike manner of the works.
> - Given that the Upper and Lower Basement Floors link directly to the remainder of the building by being positioned vertically below completed floors – via circulation routes, corridors and doorways, via service risers/shafts, via openings in floors for pipes, ducts, conduits or cables, via ventilation ductwork and any other similar means – it is clear that the requirement of Part D of the Second Schedule to the Building Regulations, D1 Materials and Workmanship, is not being complied with as a result of the adoption of a Phased Completion."

118. Mr Conmy replied:

> "In response to para.21(g) I say that the CCC submission documentation included details of all the materials used in the premises, including in the basement. Certification of workmanship was also included. All fire stopping to duct work, cables and conducts were properly carried out. The materials used in the basement were included in these certificates. Nothing prevented the Respondent from certifying the materials used on the upper floors pending the completion of the basement works, particularly where Article 20F of the Building Control Regulations specifically provides for this."

119. There was no specific reply to this by Mr Gregg.

120. And no wonder. There is no reply – one can't question the workmanship of the completed floors by reference to uncompleted floors. Yes the uncompleted floors link to the rest of the building, but that has nothing to do with whether proper materials and workmanship have been used in the certified parts. Any part of a building can be said to "link directly to" other parts. If linking to other parts is a basis for saying that "it is not possible to determine" the adequacy of partial certification, then partial certification is dead in the water not just for this development but for all developments. But it is expressly provided for in the statute. And again we have the cry that the council finds it impossible to determine things, but Dromaprop has averred that the relevant information was ascertainable, in this case from information submitted. That detail is factually uncontested.

F1 ventilation

121. Mr Gregg averred:

"(h) As referred to in the Council's invalidation reason, F1 Means of Ventilation provides: 'Adequate and effective means of ventilation shall be provided for people in buildings. This shall be achieved by:
(a) Limiting the moisture content of the air within the building so that it does not contribute to condensation and mould growth, and
(b) Limiting the concentration of harmful pollutants in the air within the building'
- Section 1.3 and Table 4 of Technical Guidance Document F, 2019, details the requirements of the design, installation and commissioning of any mechanical or natural ventilation systems.
- Section 1.3.1.17 of Technical Guidance Document F, 2019, states: 'Ventilation and air-conditioning systems should be commissioned and tested at completion so that the systems and their controls are left in the intended working order and can operate effectively and efficiently'. A way of demonstrating compliance would be to commission and test in accordance with the CIBSE Commissioning Code A:1996 (2006) in order to verify that the systems perform in accordance with the specification.
- Given that the Upper and Lower Basement Floors are excluded from the CCC, and the verification of the ventilation system on the Upper and Lower Ground Floors is therefore excluded as well, it is clear that the requirement of Part F of the Second Schedule to the Building Regulations has not been met as a result of the adoption of a Phased Completion."

122. Mr Conmy replied:
"In response to the averments at para.21(h) I say that ventilation throughout the premises (including in the basement) is provided via openable windows that have been in place since the hotel was constructed. Mechanical ventilation is fitted in the toilet area and in 3 no. ground floor bedrooms. There is no requirement to ventilate the basement bathrooms until such time as it is intended that they be brought into use. All of the foregoing information is provided in the CCC. No air conditioning is required or fitted in the building. This was also apparent from the CCC. Passive vents are fitted in the bedrooms. Nothing in the basement affected, or could conceivably affect, the compliance of the upper floors in respect of ventilation with the Building Control Regulations. In its efforts to seek to justify the unjustifiable rejection of the CCC because it applied to the completed phases of the development only, the Respondent has amply demonstrated in Mr Gregg's affidavit that in fact the CCC was eminently capable of being qualitatively assessed at the time it was submitted and should not have been invalidated.
Furthermore, contrary to Mr Gregg's averment, there is no requirement to specifically certify compliance with the CIBSE Commissioning Code A: 1996 (2006) because the work carried out at the premises is in accordance with Part F of the Building Regulations."

123. Mr Gregg further replied:
"Insofar as Mr Conmy (§16) seems to imply that I have stated it is a mandatory requirement to comply with CIBSE Commissioning Code. For clarity, I didn't say he is required to comply with that code. The TGD offers this as a possible to approach to demonstrating compliance. I quoted directly from the TGD, stating 'A way of demonstrating compliance would be to commission and test in accordance with...'."

124. As can be noted that is a very limited reply indeed. A virtually irrelevant footnote is quibbled with, but the critical granular evidence is uncontested. The lack of cross-examination is fatal to the council. Mere generality that has been forensically deconstructed and demolished has no weight in such a context. More specifically, there is no reply to the evidence that "Nothing in the basement affected, or could conceivably affect, the compliance of the upper floors in respect of ventilation with the Building Control Regulations". And again we have the problem for the council that the logic of this objection rules out any approach of partial certification – an approach which the statutory scheme permits.

H1 drainage systems

125. Mr Gregg averred:
"(i) As referred to in the Council's invalidation reason, H1 Drainage Systems provides:
'(1) A building shall be provided with such a drainage system as may be necessary for the hygienic and adequate disposal of foul wastewater from the building.
(2) A building shall be provided with such a drainage system as may be necessary for the adequate disposal of surface water from the building.
- Section 1.1.2 of Technical Guidance Document H, 2010 reprinted edition 2016, states: 'A foul wastewater drainage system should:
(a) Convey the flow of foul wastewater to a foul wastewater outfall, (a foul or combined sewer or a wastewater treatment system);
(b) Minimise the risk of blockage or leakage;

(c) Prevent foul air from the drainage system from entering the building under working conditions;
(d) Be ventilated to prevent the build up of gases;
(e) Be accessible for clearing blockages;
(f) Be adequately protected from accidental damage from sources such as traffic, ground settlement and free roots.'

- The bedroom layout, living accommodation and occupant capacity changes from the existing design and, as a result of the 'renovations', necessitate a review of the requirements of Part H of the Building Regulations. Given that the Upper and Lower Basement Floors have been excluded from the CCC and that elements of any wastewater drainage system must pass through and be sited within service shafts or risers located in the Upper and Lower Basement Floors, it is clear that the system cannot meet the requirements of Part H of the Second Schedule to the Building Regulations as a result of the adoption of a Phased Completion"

126. Mr Conmy replied:
"In respect of the averments at para.21(i), I say that the drainage system at the premises is fully operable, capable of being assessed, and was not dependent on the basement works. It is accepted that some trivial and technical alterations were made to layouts to facilitate the relocation of some plumbing, however, this did not necessitate the relaying of the drainage system.
The omission of the restaurant and the night club from the basement floors reduced the hydraulic load in the premises from 0.373l/m to 0.230l/m. As the premises was not extended and no extra demand was required, Part H of the Building Control Regulations was complied with."

127. There was no specific reply to this by Mr Gregg.

128. The same points apply to this heading as to previous ones. The critical point is the absence of any contest on the detailed facts.

J heat producing appliances

129. Mr Gregg averred:
"(j) As referred to in the Council's invalidation reason, J Heat Producing Appliances provides:
'J1 Air Supply – A heat producing appliance shall be so installed that there is an adequate supply of air to it for combustion, to prevent overheating and for the efficient working of any flue pipe or chimney serving the appliance
J2(a) Discharge of products of combustion – A heat producing appliance shall have adequate provision for the discharge of the products of combustion to the outside air
...
J3 Protection of building - A heat producing appliance and any flue pipe shall be so designed and installed, and any fireplace and any chimney shall be so designed and constructed, as to reduce to a reasonable level the risk of the building catching fire in consequence of its use.
...
J5 Fuel Storage System – protection against spread of fire to the system – A fixed fuel storage system, which serves a heat producing appliance, and any associated pipework carrying fuel to that appliance, shall be so located as to reduce to a reasonable level the risk of fuel ignition due to fire spreading from the building being served or an adjacent building or premises.
J6 Liquid fuel storage system – A fixed liquid fuel storage tank, which serves a heat producing appliance, and the pipes connecting it to that appliance shall be so located, constructed and protected as to reduce to a reasonable level the risk of the fuel escaping and causing pollution'

- The design, installation and commissioning of mechanical services and their associated ducting, air supply, flue or exhaust system and fuel storage should meet the requirements of Technical Guidance Document J.
- The drawing submitted in support of the CCC – named 'Lower and Upper Basement Plans', Dwg No. C101, dated 9th October 2023, produced by Bury Architects – details a large Plant Room located at the Lower Basement Floor.
- Given that this Plant Room contains mechanical services for use throughout the hotel and that same is located within the area on the drawing that is excluded from the CCC, it is clear that the requirements of Part J of the Second Schedule to the Building Regulations have not been met by the adoption of a Phased Completion."

130. Mr Conmy replied

"In respect of the averments at para.21(j) the Plant room is operational and is an integral part of the hotel. The gas installation is Certified by an RGI registered Plumber and the Certification for same was attached to the CCC submission. All fire stopping is complete around the services and the flues are correctly installed. The installation was previously Certified by the Designers of the hotel. The gas tank is installed in accordance with the RGI Regulations. Emergency works had to be carried out to stop water ingress into the fabric of the Protected Structure. Works included the reinstatement of the natural slate roof and the replacement of smashed windows and doors etc. In tandem with this work the property was surveyed in details and a formal Fire Safety Certificate was prepared and lodged under the 7-day format. Once validated, the Commencement Notice was served."

131. Mr Gregg further replied:

"In respect of §19, Mr Conmy refers to installations which were previously certified. Whilst an Ancillary Cert was uploaded with the CCC that relates to 'Plumbing and Heating works', there is no detail of what works were carried out in relation to the Plant Room.

In addition, the Code of Practice for Inspecting and Certifying Buildings and Works emphasises the significant impact of building failures and the potential cost to the public purse where this occurs (paragraph 12 Insurance). Whilst the requirement for professional indemnity insurance and latent defects insurance is not directly a matter for Building Control Authorities it highlights the importance of maintaining a clear line of oversight and ensuring that the building, as completed, achieves compliance with the Building Regulations and is so certified as such. As attested to by Mr Conmy, works to the Fire Detection and Alarm Systems and Emergency Lighting apply to the entire property and indeed that fire stopping and passive fire safety measures also have been installed at basement levels similar to upper floors. There can be no assumption that a fire will not occur simply because an area is unoccupied or unused, and in that event, if a failure were to occur there can be no comfort or confidence in the outcome, as these systems or areas are not included in the CCC and are not effectively certified by the Assigned Certifier as being complete."

132. Again we have the basic problem of the council's logic. The council says in effect that fire in uncertified Area A could spread to certified Area B and so the certificate for Area B can't be accepted without certification of the fire systems in Area A. That is all fine and dandy in the abstract, but such a logic applies to any part of any building. On that logic no individual area in a building could be partially certified because a fire in some other area could spread. The council's logic nullifies the statutory provision for certification on an area-by-area basis.

L1 conservation of energy

133. Mr Gregg averred:

"(k) As referred to in the Council's invalidation reason, L1 Conservation of Fuel and Energy provides:

'A building shall be so designed and constructed so as to ensure that the energy performance of the building is such as to limit the amount of energy required for the operation of the building and the amount of Carbon Dioxide (CO2) emissions associated with this energy use insofar as is reasonably practicable.

L4 For existing buildings other than dwellings, the requirements of L1 shall be met by:-

(a) Limiting the heat loss and, where appropriate, availing of heat gains through the fabric of the building

(b) Providing energy efficient space heating and cooling systems, heating and cooling equipment, water heating systems, and ventilation systems, with effective controls

(c) Ensuring that the building is appropriately designed to limit need for cooling and, where air-conditioning or mechanical ventilation is installed, that installed systems are energy efficient, appropriately sized and adequately controlled

(d) Limiting heat loss from pipes, ducts and vessels used for the transport or storage of heated water or air

(e) Limiting heat gains by chilled water and refrigerant vessels and by pipes and ducts that serve air conditioning systems

...

(h) when a building undergoes major renovation, the minimum energy performance requirement of the building or the renovated part thereof is upgraded in order to meet the cost optimal level of energy performance insofar as this is technically, functionally and economically possible'

- The European Union (Energy Performance of Buildings) Regulations 2021 (S.I. No. 393 of 2021), insofar as it relates to works relating to existing buildings other than dwellings, provides as follows:

'Regulation 5

...

(e) A building which has more than 10 car parking spaces, that is subject to subparagraph (g), undergoing major renovation, shall have installed at least one recharging point and ducting infrastructure (consisting of conduits for electrical cables) for at least one in every 5 car parking spaces to enable the subsequent installation of recharging points for electrical vehicles.

...

(g) The requirements of subparagraph (e) shall apply to a building undergoing major renovation where: (ii) in a case where the car park is physically adjacent to the building, the renovations concerned include the car park or the electrical infrastructure of the car park.'

- Section 2.4.1 of Technical Guidance Document L, 2022, states: 'The requirements of Part L apply to the completed building. Reasonable measures should be taken during construction and appropriate checks and assessments carried out prior to completion to ensure that compliance with Part L is achieved.'
- Table 10 of Technical Guidance Document L, 2022, provides acceptable levels of thermal insulation (measured in average area-weighted U-value) for each of the plane elements of the building for material alterations for each fabric element type.
- Diagram 2 of Technical Guidance Document L, 2022, provides acceptable lintel, jamb and cill [sic] designs to avoid excessive heat losses and local condensation problems and too [sic] limit local thermal bridging.
- Section 2.1.4.2 of Technical Guidance Document L, 2022, details practical measures to limit the infiltration of cold outside air by reducing unintentional air paths.
- Given that the provision of energy conservation measures are considered across a range of interrelated elements, that areas within the building structure such as internal corridors and doors are considered within the insulated fabric and are therefore not required to be insulated, and that the external walls, external doors and windows at the Lower and Upper Basement Floor levels have been excluded from CCC, it appears that a path of heat loss across plane elements is not included as completed. It is clear that the requirements of Part L of the Second Schedule to the Building Regulations have not been met as a result of the adoption of a Phased Completion.
- Additionally, given that the exterior parking areas shown on the drawing submitted in support of the CCC – named 'Site Layout Plan – Services', dwg No. omitted, dated 9th October 2023, by Bury Architects – are excluded from the CCC, if a major renovation has occurred, the requirements to comply with The European Union (Energy Performance of Buildings) Regulations 2021 (S.I. No. 393 of 2021) have not been met as a result of the adoption of a Phased Completion."

134. Mr Conmy replied:

"In respect of Mr Gregg's averments at para.21(k), I say that the premises has been designed in accordance with Part L of the Building Regulations in so far as is required at this time. There was no engineering need to replace the windows and doors and appropriate fabric upgrades were carried out. Extensive details relating to these matters are contained in the CCC submission,

With regard to the European Union, Emergency Performance of Building Regulations 2021, (S.I. 393/2021), these were followed where applicable as was confirmed in the CCC submission. A car charger will be installed in the car park in the future. Section 0.6.1 of Technical Guidance Documents L 2017 specifies that Part L does not apply to works to an existing Protected Structure including extensions. This information was provided as part of the CCC.

The car park was constructed in or around 2003 is available for use by construction traffic and fire tenders etc., As the attenuation system was not installed, no details of same were submitted with the CCC.

More generally, I repeat my evidence that the certification of hotel developments in the manner in which my office sought to certify this development is perfectly ordinary. As previously averred, building control authorities have accepted identically phased certifications, including, for example, works carried out at the Celbridge House Hotel and Leixlip House Hotel. The Respondent was in error in marking the CCC at issue in these proceedings as invalid simply because it relates only to a phase of the works, and not the hotel in its entirety. There is no reasonable or rational engineering or technical reason that would have prevented the Respondent from carrying out a qualitative assessment of the CCC submitted, as Mr Gregg has demonstrated through the qualitative assessment he has carried out in para.21 of his affidavit. I am also advised and believe there was and remains no legal impediment."

135. There was no specific reply to this by Mr Gregg.

136. Again similar points apply as before. The council's generic rejection dissolves on contact with detailed factual engagement, to which there is no response. Again the logic of the council's position impermissibly undermines the express statutory provision for partial certification.

Conclusion on issue 3

137. So I would uphold Dromaprop's pleas under this heading on a number of grounds. Firstly I would uphold core grounds 1, 2 and 3 in the particular factual context here:

> "1. The decision of Leitrim County Council dated 9th January 2024 to declare the Applicant's Certificate of Compliance on Completion bearing Submission Number 2053000 invalid ('the decision') for the purposes of Article 20F(6) of the Building Control Regulations 1997 to 2023 ('the Regulations'), in respect of the Abbey Manor Hotel, Dromahair, Co. Leitrim ('the property') is invalid such that it is unlawful, ultra vires, void and of no legal effect, where it was made otherwise than in accordance with Article 20F(3) and (4) of the Regulations, and/or is contrary to Article 20F(9) of the Regulations.
>
> 2. The decision is invalid in circumstances where it is vitiated by error of law, and/or made upon error of fact, such that the decision is unlawful, void and of no legal effect.
>
> 3. The decision is invalid due to its unreasonableness and/or irrationality."

138. Also sub-ground 5 and 6:

> "5. The rejection by the Respondent of the Applicant's CCC as invalid on the sole basis that it relates only to the first phase of construction works, and does not include the whole building completion, is contrary to the provisions of Article 20F(9) set out above, which expressly provides that a CCC 'may refer to works, buildings, including areas within a building, or developments, including phases thereof,'.
>
> 6. It is a common practice for valid CCCs to be issued by developers and accepted by building control authorities, as envisaged by Article 20F(9), when those CCCs apply only to a phase of a particular construction project. The rejection by the Respondent of the CCC at issue in these proceedings because it related only to the Ground, First, and Second Floors of the property, together with the Basement Kitchen and Laundry, rather than the entirety of the building, constitutes an error of law, and/or a mixed error of fact and law, such that the decision is unlawful, void and of no legal effect."

139. The decision by the council at the time is phrased at least in part on a basis that is inconsistent with the clear statutory permission for partial certification. That precludes raising objections to such certification that are so general or are logically susceptible to generalisation such as to undermine that statutory policy and intention.

140. The decision is also factually unsustainable given the actual physical layout of the property and the fact that matters such as fire escape from the floors to be occupied does not depend on access through the basement. I would therefore uphold sub-grounds 8, 9, 10 and 11:

> "8. As set out in the letter dated 10th January 2024 from the Applicant's architect, Mr Conmy, to the Respondent's decision maker, Mr Gregg (in reply to the communication of the decision on 9 January 2024 by Mr Gregg) the Applicant 'followed the route of a 'phased' handover of the building because at this stage the ground floor and the first floor are complete' and '[T]he Management of the Hotel have confirmed that they can run it and provide a full suite of services without having access to the two levels of basements'.
>
> 9. In the first instance, it is not proposed that the Applicant will use the basement floors of the property at all until such time as the construction works are completed and a valid CCC is issued in respect of those floors. It was explained to the Respondent in December during physical joint inspections, that access to the basement floors *via* lift and stairs will be securely sealed off so that residents and staff will not be able to access them.
>
> 10. As the incomplete works are limited to the basement, the emergency exits from the property are unaffected by those works in circumstances where none of the emergency access routes go through either basement floor. Again it was explained to the Respondent's inspecting officer in December, the property's L1 fire alarm and emergency lighting will be fully commissioned and operable on all floors of the property.
>
> 11. It was further explained that the ongoing works in the basement will not cause any issues in respect of the operation of the property from the Ground Floor up, as proposed, as builders and contractors will not have access to any areas of the property aside from the basement floors where works are ongoing. The Respondent's decision is therefore based upon a material error of fact, namely that it was not possible to assess the compliance of the Ground, First and Second Floor, and the Basement Kitchen and Laundry of the property until such time as the balance of the construction works in the remained of the two basement floors were completed. In such circumstances, the decision comprises an error of fact and/or an error of law, such that the decision is unlawful, void and of no legal effect."

141. As Dromaprop submits, if the decision is to be viewed as fact-specific, the fact that the respondent deemed it impossible to assess the compliance of the completed upper floors pending

the completion of the changes to the basement layout constitutes a material error of fact which goes to the validity of the decision.

142. I would also uphold sub-grounds 12 and 13 having regard to the departure of the actual decision-making process from what would be a logical, reasonable and rational approach (which for good measure is reflected in the normal and usual practice of building control decision-making):

> "12. As set out at para.6 herein, the phased completion and certification of works in large construction projects such as hotels and multi-unit developments is a common practice which reflects the usual way in which such projects are completed and certified.
>
> 13. The rejection by the Respondent of Dromaprop's CCC, which relates to the vast majority of the property, excluding only portions of the two basement floors that are not proposed to be used or occupied until completed and separately certified, is not only contrary to law, but also is also contrary to industry best practice and is furthermore contrary illogical, and is so unreasonable and irrational such as to render it ultra vires, invalid and of no legal effect."

Mandatory or declaratory relief

143. It can be assumed that the council will comply with the judgment and its underlying rationale. Seeing as I am finding that they are and remain obliged to register to certificate forthwith, I am assuming that they will do so without any form of relief directing them in that regard. I would propose to adjourn the matter for a brief period in that regard. In the absence of such compliance, more imperative reliefs can be considered. Since the consideration of further material was meant to be completed in 7 days, which has expired, the registration should now follow in a period much shorter than that, and presumably the council won't need a delay of more than about a day for this mere technicality to be satisfied which I suspect may not involve a whole lot more than pressing a few buttons to update the database. But in deference to the assumption I make in favour of the council that they will not need to be directed what to do, and therefore presuming that the council won't displace that assumption by failing to do the necessary, I won't make any mandatory orders at this time.

Issues that are not being decided

144. It's also probably worth clarifying what is not being decided. That falls into two categories, items that are definitely not pleaded and items where the pleading was disputed.

145. Matters not pleaded but loosely touched on during the hearing include (paraphrasing somewhat):

(i) that the refusal was not the honest application of technical judgement under the building control code but was the result of a wider decision within the council to block the project for policy reasons or to pander to local agitation, or more generally that the refusal was motivated by an improper motive or was not *bona fide* - that issue might have required cross-examination or discovery or both;

(ii) in particular that the council was motivated by improper political considerations relating to local hostility to the provision of housing to persons seeking international protection - while the written submissions touched on the alleged "political pressure", this would have needed to be more fully pleaded and evidenced;

(iii) that the decision was *ad hoc* and an improper departure from the council's treatment of other similar developments contrary to the right to consistent decision-making as an element of the right to fair procedures – the references to common practice were not phrased as a legal ground of challenge;

(iv) that the refusal was improperly discriminatory as between Dromaprop and other applicants in a similar situation carrying out developments, but ones that are not the subject of local opposition - there is a passing reference in sub-ground 6 to "common practice" but it is not phrased as an equality or non-discrimination challenge;

(v) there is also no pleaded case about lack of reasons, save to the extent that irrationality inherently involves a lack of a valid reason; and

(vi) there is no fair procedures or legitimate expectation argument pleaded regarding lack of advance notice of what the issues were.

146. As well as those issues, it is not necessary to decide the following more high-level arguments (whether they are pleaded or not, which I don't need to decide either):

(i) is a council in principle entitled to reject a certificate on the basis of a lack of merits as to the asserted compliance with the building code, as opposed to merely on the basis that necessary self-certification documents and similar documents have not been provided; and

(ii) is a council in principle entitled to reject the certificate on the basis of the council's detailed opinion of a lack of compliance that is due to dependency on other parts or

phases of the development that are not the subject of the certificate or a previous certificate?

147. Just to be as clear as I can be about it, I am assuming for the sake of argument that the council is entitled in principle to refuse to validate a certificate for a particular area on the basis of a particular issue arising from the relationship with an uncertified area. Even on that assumption, the council's decision here is not valid, because among other things, the logic of the refusal does not relate to particular features here that don't arise in developments in general, but rather significantly undermines the express statutory procedure for partial certification. But the assumption as to whether even such an exercise is permissible is only an assumption and may not be correct – however I don't need to decide that overarching issue of principle for present purposes.

Summary

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

(i) A council must validate and register a completion certificate within the statutory timeline of 21 days unless within that period it either decides that the certificate is invalid or seeks specified further information. If it does seek such information within the initial 21 days it must validate the certificate within 7 days of receipt of that information or reject it within the same period of 7 days, such rejection being on the basis of issues to which the further information is relevant. That applies regardless of when, within the original 21 day period, the information was sought. Failure to reject the certificate or make a request within the relevant period gives rise to an obligation to validate and register the certificate, but that does not affect a council's subsequent enforcement powers under ss. 8 and 12 in the event of it forming the view that there is a breach of building regulations.

(ii) A council's concerns must be articulated within the relevant period. Thus where a council requests further information, any ultimate rejection of the certificate must be based on matters dependent on the further information. Any fundamental objection in principle to the certificate must be addressed within the 21 day period and not stored up for later use after further information (not being of a nature that could remove the fundamental objection) is provided. A reasonable council acting rationally would not request further information that is not capable of resolving any fundamental objection.

(iii) The regulations evidence a clear statutory intention to permit partial certification of buildings or projects. Any issue raised by a council about compliance by reference to interaction with an uncertified part of a development (assuming such to be permissible in principle) must not be such as to undermine the basic principle of permissibility of partial certification, so must identify something specific about the particular development that creates a breach of the building regulations. Any such objection cannot be made on the basis of a point that is capable of generalisation so as to significantly cut back on partial certification generally. On the facts the generic reasons offered were irrational and erroneous in fact and law and in particular were of such general application in wording and/or logic as to be inconsistent with the express statutory procedure for partial certification. Furthermore, anything subsequently and purportedly identified as problematic about the relationship between the certified areas and the uncertified areas was either reasonably ascertainable by the council at the time (and so the claim of lack of knowledge was erroneous), or was logically susceptible to generalisation so as to undermine the whole statutory procedure for area-by-area certification, or was flawed under both such headings.

(iv) In consequence of the foregoing I would uphold (in the sense indicated in the judgment) core grounds 1 to 4 inclusive and sub-grounds 5 to 14 inclusive, individually and collectively.

(v) The other pleaded issues don't need to be decided.

149. Finally, as regards the context in which all this occurs, it's stating the obvious to say that court can only adjudicate on disputes with a legal dimension - it can't resolve wider community disagreements. But that said, perhaps it isn't too late for interested parties to avail of the tried and trusted methods of more intensive dialogue and of learning from how similar exercises have been handled positively elsewhere. The council and others in leadership positions can potentially play a constructive role in that regard, if they are willing to turn their attention to so doing.

Order

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

(i) there be an order of *certiorari* by way of judicial review, removing for the purpose of being quashed the decision of Leitrim County Council dated 9th January 2024 to declare the applicant's Certificate of Compliance on Completion bearing submission

Number 2053000 invalid for the purposes of article 20F(6) of the Building Control Regulations 1997;

(ii) the matter be listed at a time to be fixed in order to consider whether it is necessary to grant any other reliefs; and

(iii) the question of costs be adjourned for mention to that date.