

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY LEISURE ARCADES LIMITED  
FOR JUDICIAL REVIEW

Leisure Arcades Limited's Application [2015] NICA 36

AND IN THE MATTER OF A DECISION MADE BY THE ENVIRONMENTAL  
SERVICES (LICENSING) COMMITTEE OF DERRY CITY COUNCIL ON  
23 JANUARY 2014

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

**COGHLIN LJ (delivering the judgment of the court)**

[1] This is an appeal by Leisure Arcades Limited ("the appellant") from a judgment of Gillen LJ, delivered on 10 October 2014, in the course of which he dismissed the appellant's application for judicial review of a decision by Derry City Council ("the respondent") to make a grant of a provisional amusement permit in respect of premises at 38 William Street, Derry. The permit had been granted to Fortuna Enterprises Limited ("the notice party") at a meeting of the respondent on 23 January 2014. On 6 June 2014 Treacy J had dismissed an objection that the application was out of time and granted leave to apply for judicial review. For the purposes of the appeal the appellant was represented by Mr McMillen QC and Mr Henry while Mr Donald Sayers appeared on behalf of the respondent and Mr Liam McCollum QC and Mr Paul Foster represented the notice party. The court is grateful to all counsel for their carefully prepared and attractively delivered, written and oral submissions.

**Background facts**

[2] For some 12 years the appellant limited liability company, which is owned by members of the McHugh family, has operated an amusement arcade at 15 William Street, Derry. The appellant's primary objection to the granting of the amusement permit to the notice party is grounded upon the assertion that such a grant would have a directly adverse impact upon the appellant's business. Mr Patrick McHugh

took responsibility for the original organisation and presentation of the appellant's objection.

[3] For the purpose of processing applications for amusement permits pursuant to the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 ("the 1985 Order") the respondent delegated its responsibility to its Environmental Services (Licensing) Committee ("the Committee").

[4] The notice party applied for planning permission in respect of a portion of the premises at 38 William Street, Derry on 15 June 2011 and planning permission was granted subject to the usual conditions. The plan annexed to the application restricted the proposed amusement premises to an area of the ground floor of the premises comprising some 56.65 square metres. The ground floor of the premises is to be shared by a café fronting on to William Street occupying 65.66 square metres. Access to the café by the public is by way of a door entered from William Street and the only access to the gaming area, containing 12 gaming machines, is through a door at the rear of the café premises. The appellant's existing amusement arcade is to be found a short distance away at 15 William Street where some 60 gaming machines are located. The notice party's application for a permit was advertised, as required, in local newspapers on 10 and 12 July 2013. The published notices simply referred to "premises situate at 38 William Street, Derry".

[5] A number of objections to the granting of the permit were received by the respondent including the location being opposite a Chapel of Rest, that there were already three premises providing gaming machines in the immediate vicinity of William Street, that an additional amusement/gaming arcade would be incompatible with the existing economic and social fabric of the area, that the presence of an additional arcade would encourage groups of people to congregate outside the premises and that the mix of café/arcade premises raised concerns about the potential encouragement for young people and children to become involved in gambling. The appellant's written objection was lodged by its solicitors on 6 August 2013 asserting, inter alia, that the premises were not suitable and that, in all the circumstances, it was undesirable that gaming machines should be used for providing amusement on the premises at the location in question.

[6] On 15 January 2014 the respondent's licensing officer, Shaun Austin, wrote to the appellant's solicitor stating that the permit application would be considered at a special Committee meeting on 23 January 2014 and that the appellant's objection would be brought to the Committee's attention. The letter confirmed that Mr McHugh would be invited to attend the meeting and might be heard by the Committee at its discretion. That letter was received by the appellant's solicitor on Friday 17 January 2014 and Mr McHugh was notified of its receipt and contents by e-mail. It appears that, on receipt of the notification, the appellant's solicitors telephoned Mr Austin on 17 January protesting that the notification was only some 6 days prior to the proposed hearing. The solicitors indicated that they had never received such insufficient notice despite having regularly represented clients in this

type of hearing. There also appears to have been some discussion about the decision to convene the hearing having been made at the beginning of January although there was some disagreement about the precise date. The solicitors confirmed that they were committed to another hearing which they had been unable to rearrange as a consequence of the short notice and that, therefore, they would be unable to appear on behalf of Mr McHugh before the Committee. In such circumstances, the solicitors requested a short deferral of the meeting to enable their client's valid objection to be fully aired. Mr Austin replied by e-mail on 22 January confirming that the correspondence would be brought to the Committee's attention and that it would be for the Committee to decide whether deferral was warranted. In a subsequent e-mail Mr Austin again confirmed that the decision whether to adjourn was a matter for the Committee and not for him and that it was considered that Mr McHugh had been given adequate notice of the meeting.

[7] As a consequence of the exchange referred to at paragraph [6] hereof the solicitors sent an e-mail to Mr McHugh at 12.43 on 23 January 2014 notifying him that the Committee would not be asked to consider the request for an adjournment until the meeting convened at 2.00pm on the following day and suggesting that, in the circumstances, he should proceed along the following path:

- "1. At the outset confirm that you still wish your request for an adjournment to be considered as you wish to have legal representation at the Hearing.
2. They may well bring to your attention the fact that you are not entitled as of right to make representation at the meeting either yourself or by someone on your behalf. But you should point out that natural justice demands that an objector is entitled to give full air to that objection and should not be fettered by the body considering the application.
3. If they decide to proceed regardless you should indicate that you will remain at the Hearing under protest to protect your position as an objector and without prejudice to any legal remedies which may become available to you arising from an unreasonable decision to refuse an adjournment. You should at this stage point out it is not accepted on any level that you received a reasonable period of notice of this hearing given that the decision to convene a meeting was made in early January yet was not notified to you until the arrival of a letter dated 15 January with your solicitors on 17 January.

4. Even though you will remain at the meeting under protest you should however feel free to develop your objection and raise all arguments against the application which you feel may assist you and also weigh in with the other eight objectors. At this point we don't know obviously which of the objectors will attend, if any, but hopefully some at least will turn up to pursue this matter."

[8] Patrick McHugh attended the meeting on 23 January 2014. Mr McHugh believed that Mr Austin was going to raise the issue of adjournment at the beginning of the Committee meeting. He did not do so and, since the course of the meeting appeared to him to be following a structure, Mr McHugh considered that it would be 'discourteous' to interrupt. It appears that the Council's senior solicitor spoke to Mr McHugh who informed him of his wish to request an adjournment in order to allow the attendance of his solicitor. That was reported to Mr Sean Carr the Chair of the Committee who asked the senior solicitor to address the Committee on that point when the other objectors had finished their representations. The various objectors were then invited to make their representations to the Committee. At the conclusions of those representations the senior solicitor advised the meeting that Mr McHugh had asked for the meeting to be adjourned. The senior solicitor explained to the Committee that it was a matter for the exercise of their discretion. It seems that a discussion then took place in the course of which members of the Committee expressed 'some concern about establishing a precedent for the timing of Council meetings being determined by the diaries of solicitors'. The senior solicitor advised the Committee that since the other objectors had attended and made their representations it would only be Mr McHugh and his legal representative who would attend the adjourned meeting and, therefore, other members of the public would not be inconvenienced. Ultimately, the Committee decided not to accede to the application to adjourn. The senior solicitor explained to Mr McHugh that the Committee had refused the application to adjourn and asked him if he wished to make any representations upon his own behalf. It appears that Mr McHugh indicated that he did not, as he believed that any points that he wished to make had been already addressed by the other objectors.

[9] In his affidavit evidence before the learned trial judge Mr McHugh complained that, if he had been provided adequate time, he would have liked to do the following:

- "(a) Obtain the documentation supporting the application to scrutinise the contents for accuracy etc.
- (b) I would have liked to see the City Council's policy documentation detailing the strategy for the development of the City centre.

- (c) I would have liked to have explored the reasons for Fortuna being refused the same application for a permit previously.
- (d) I would have liked time to engage an expert to look at the relevant issues.
- (e) A lawyer was clearly necessary to represent the interests of the company and they would have needed time to obtain the relevant material and prepare themselves.
- (f) If permissible I would have liked to have explained to the councillors the difficulties with opening a second premises on the same street."

[10] For the purpose of the hearing before Gillen J the appellant instructed alternative solicitors. On 25 September 2014 the original solicitors wrote a letter to the appellant's current solicitors providing certain information. They stated that Mr McHugh had presented as pessimistic regarding the prospects of a successful objection and that they had expressly discussed the option of instructing another firm, advising Mr McHugh that he might consider the services of a local solicitor with knowledge of licensing matters. The letter asserted that Mr McHugh declined to adopt such a course but indicated that he would attend the meeting along with numerous other unrepresented objectors. As noted above, the original solicitors set out in an e-mail steps that they advised Mr McHugh to take to protect his position.

### **The statutory framework**

[11] The following are the relevant provisions of the 1985 Order (as amended):

#### **"Grant of amusement permits**

111(1) An application for the grant of an amusement permit shall be made by the person who is, or by any person who proposes to be, the occupier of the premises for which the amusement permit is sought to the district council in which those premises are situate ....

(3) A district council shall refuse an application for the grant of an amusement permit unless it is satisfied

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(e) that, where the application is for the grant of an amusement permit for the purposes of Article 108(1)(ca), the premises for which the permit is sought are premises used wholly or mainly for the provision of amusements by means of gaming machines.

**Grant of amusement permit conditional on alterations being made in premises**

112(1) A district council which grants an amusement permit in respect of premises used wholly or mainly for the provision of amusements may grant the amusement permit subject to the condition that, within a period fixed by the council the holder of the amusement permit –

(a) shall make such alterations in the premises as the council may specify, being alterations which the council thinks necessary to ensure that the lay-out, character or condition (including the provision in the premises of adequate sanitary appliances and things used in connection with such appliances) of the premises is suitable for use as premises in which amusements by way of gaming machines are provided; ....

**Provisional grant of amusement permits**

113.–(1) Where premises used wholly or mainly for the provision of amusements are about to be constructed, altered or extended or are in the course of construction, alteration or extension, an application may be made by the person who proposes to be the occupier of the premises to the district council for the district in which the premises are or are to be situated for the provisional grant of an amusement permit for those premises.

(2) For the purposes of the provisional grant of an amusement permit Article 111 shall have effect as if –

(a) any reference to the grant of an amusement permit were a reference to the provisional grant of such a permit ...”

[12] Relevant provisions of the Amusement Permit (Prescribed Places) Regulations (Northern Ireland) 1986 (“the 1986 Regulations”) are as follows:

*“Prescribed premises*

2. The premises in which gaming by means of a gaming machine in accordance with the conditions of Article 108 of the Betting, Gaming, Lottery and Amusements (Northern Ireland) Order 1985 is authorised by an amusement permit shall be -

- (a) Premises used wholly or mainly for the provisions of amusements by means of gaming machines; or
- (b) Premises used wholly or mainly for the purposes of a pleasure fair consisting wholly or mainly of amusements.”

[13] Relevant provisions of the Amusement Permit (Additional Grounds for Refusal) Regulations (Northern Ireland) 1993 (“the 1993 Regulations”) are as follows:

**“Failure to comply with procedure**

2. Where a district council is not satisfied that the applicant for the grant of an amusement permit has complied with the procedures set out in the schedule, it shall refuse to grant that permit.

**Representations from third parties**

3. A district council may refuse to grant an amusement permit after hearing any representations in relation to the application for the grant of that permit which may be made by any person to the Council not later than 28 days after the date of that application.

**Schedule**

**Application**

Application for the Grant of an Amusement Permit

1 - An applicant for the grant of an amusement permit shall-

- (a) not later than 7 days after the date of the application, give public notice of the application by publishing an advertisement in such newspapers circulating in the district of the district council as that council may require;
- (b) supply a copy of the advertisement to the district council.

2. Every notice published under paragraph 1 shall state-

- (a) that application has been made for the grant of an amusement permit;
- (b) the name and address of the district council to which the application has been made;
- (c) the date on which the application was made;
- (d) the name and address of the applicant;
- (e) the address of the premises or proposed premises for which the amusement permit is sought;
- (f) that representations in relation to the application may be made to the district council mentioned in sub-paragraph (b) in accordance with regulation 3."

[14] The court notes that the respondent's website indicates that:

" Where representations have been lodged as a result of the public notice placed in two local newspapers both the applicant and the person or persons making the representations will be given the opportunity to appear before the Council."

The respondent's Standing Orders require that councillors are to be given three days notice of a meeting. However, no similar notice is provided in respect of objectors.

### **The grounds of appeal**

[15] The grounds of appeal advanced on behalf of the appellant may be summarised as follows:



- (i) That the refusal of the application on behalf of the appellant to adjourn the Committee meeting was procedurally so unfair as to be unlawful. The learned trial judge erred in finding that the Committee had taken into account or attached sufficient weight to the significance of the decision for the appellant, the complexities of law in this area, the requirement for expert evidence, the lack of activity for six months since the application was advertised, the inability of the appellant to secure the relevant documentation relating to the application and the very limited notice provided of the special meeting of the Committee. While there was no specific statutory obligation on the Committee to hear orally from objectors, other than PSNI, their own policy and Standing Orders confirmed that objectors would be given an opportunity to be heard. In order to be fair, such an opportunity required the provision of adequate notice and the practice in Belfast was to afford objectors 28 days notice.
  
- (ii) The provisions of the 1985 Order specified that the premises for which an amusement permit is sought must be used *wholly or mainly for the provision of amusements by means of gambling machines* (our emphasis). In this case the permit ultimately issued described the premises in question as “38 William Street, Derry”. However, the only portion of the 3 storey building located at that address to be used wholly or mainly for the provision of amusements by means of gaming machines was an area occupying less than 50% of the ground floor. The description of the extent of the premises to be used for gaming machines contained in the permit was therefore invalid.

## **Discussion**

### **The refusal to adjourn**

[16] Notice of the application for the amusement permit was advertised in local newspapers in accordance with Regulation 2 and the Schedule of 1993 Regulations in July 2013 and a written notice setting out the appellant’s objections was served upon the Council by his solicitors on 6 August 2013. There was no statutory obligation upon the respondent to hear oral representations on behalf of the objectors but the Council’s website and Standing Orders confirmed that such a procedure would be available. The extent of notice of the meeting and the circumstances in which such oral objections would be heard was a matter for the exercise of the Committee’s discretion. In this case despite the inability of his solicitor to attend upon his behalf as a consequence of the relatively short notice of the meeting, it is clear that the appellant had the benefit of detailed discussions with his solicitors regarding the issue of alternative representation, for example, by another local solicitor with knowledge of licensing matters. It would appear that the appellant declined to adopt such a course and indicated to his then solicitors that he would attend the meeting along with other unrepresented objectors. Upon learning

that he had chosen to adopt such a course of action the solicitors provided the appellant with an e-mail setting out steps that he should take to protect his position. The solicitors then acting for the appellant, after checking with him, furnished details of premises that the appellant submitted represented adequate facilities within the vicinity by e-mail. The appellant did attend the hearing in person and, having listened to the objections articulated by a number of other individuals he indicated that he had nothing to add. We have considered the specific matters raised by the appellant in his affidavit and set out at paragraph [9] above. At the hearing before this court no evidence of any previous application by the notice party was forthcoming. No issue was identified that might have required elucidation by an expert. The presence of other relevant premises in the vicinity had been recorded in writing by the appellant's previous solicitors and, as the appellant appears to have conceded at the time, had been highlighted by the other objectors. No criticism was made of the documentation supporting the application before this court.

[17] In the course of his carefully considered judgment Gillen LJ noted, as a general proposition, that the decision whether to adjourn a meeting convened by a Council is a matter for the exercise of that Council's discretion. The judicial review jurisdiction of the High Court is supervisory and the court will not intervene simply because it thinks that it would have reached a different decision. The court must be satisfied that the Council, in the exercise of its discretion, was wrong in principle or, that it resulted from a significant self-misdirection (R v Panel on Takeovers [1989] 1 All ER 509 at 526G). Ultimately, it seems to us that the practical question to be asked is whether the refusal to adjourn deprived the appellant of a fair and reasonable opportunity to present his case. In this case it was accepted by Mr McMillen that the appellant had formally objected to Fortuna being granted planning permission and that, therefore, he and his solicitors would have been aware of the extent of that planning permission within the relevant premises. Written objections were formally lodged by his solicitors in August 2013 and the appellant had an opportunity to consult in detail with his solicitors prior to the meeting. During the course of the meeting a number of objections were advanced to which, when asked, the appellant declared that he had nothing to add. The presence of the appellant's solicitor at the meeting would not have had any impact upon the form of the decision, which was expressed in the meeting as "...Application for the Provisional Grant of Amusement Permit for 38 William Street Derry BT48 6ET *as outlined within the above report* (our emphasis) was granted." The defect articulated as ground (ii) of the appeal would not have become apparent until the permit had actually been drafted. In the circumstances of this particular case we are not persuaded that the conclusion of Gillen LJ upon this aspect of the case can be criticised and, accordingly, we reject this ground of appeal. We would simply emphasise the importance of affording objectors a fair hearing. The reference to "solicitors' diaries" does not do that individual committee member any credit. The advent of reconstructed local authorities should present an opportunity for those bodies to discuss and rationalise the amount of notice to be afforded in this type of case.

## The decision of the Committee

[18] We have given careful consideration to the report submitted to the Committee by the Licensing Officer dealing with the provisional grant of an amusement permit in respect of the premises at 38 William Street, Derry. The report referred to the history of the application and the relevance of the 1994 Regulations. It also dealt with the character of the applicant, the proximity of other premises and the planning permission. When dealing with the type of premises the report recorded the need to ensure that the relevant premises were to be used wholly or mainly for the provision of amusement by means of gaming machines and went on to contain the following information:

“However, the plans of the premises show the proposed amusement premises, containing 12 No. gaming machines on the ground floor which is shared with a café fronting on to William Street. The Planning Permission for the proposed development of the premises restricts the gaming area to 56.65 square metres while the proposed café would occupy 65.66 square metres. The plans of the premises are attached at Appendix D1 and Appendix D2 and a copy of the Planning Permission is attached at Appendix E.”

The minutes of the special meeting of the Committee recorded, at paragraph 3.1.3 that the Committee had received that information. At paragraph 3.1.5 it was recorded that the Planning Permission that had been granted restricted the size of the proposed gaming area. The Committee was also made aware of the relevance of the 1985 Order to the application and the report confirmed that there was no police objection to the application.

[19] The minutes also recorded the presence and identity of a number of objectors together with the nature of their objections. The decision reached by the Committee was that the provisional permit should be granted.

[20] In R v Secretary of State Ex Parte Anderson (unreported [14 October 1988] NIQB) MacDermott LJ considered an application for an amusement permit in respect of the front of premises known as the Centre Spot Club Limited at 1A Lelia Street, Belfast. For a number of years a snooker club had existed at that location and the proposal was to develop an amusement arcade at the front of the premises containing gaming machines and in respect of which a permit was required by the 1985 Order. In that case the objector submitted that the term “premises” as used within the meaning of the 1985 Order referred to premises which were “in substance separate premises from those around him”. MacDermott LJ, having acknowledged the argument, went on to say:

“But I can find nothing in the legislation relating to the grant of Amusement Permits which requires consideration to be given to the question of whether or not the amusement premises are ‘part of’ or ‘separate’ from other premises. This is significant because ‘separateness’ is a concept with which this order remains familiar – for instance Article 12(4)(b) repeats the obligation to refuse a bookmaking licence where premises form part of licence premises within the meaning of the Licensing Act (Northern Ireland) 1971. As I read the 1985 Order a Council has jurisdiction to issue an amusement permit if the applicant shows that the proposed premises are used wholly or mainly for the provision of amusement by means of gaming machines. The Order has defined premises in an extremely wide fashion and it would be quite wrong to seek to control the granting of such permits by any judicial definition. This is especially so when the means of control is to be found in Article 112(1) of the Order.”

[21] In our view it is clear from a consideration of the report by the licensing officer and the minutes of the respondent Council that the Councillors concerned, when arriving at their decision, were properly informed and clearly satisfied that the area to which the application related was that portion of the ground floor outlined in the drawings annexed to the planning permission. The permit, dated 23 January 2014, that was granted by the Council refers to 38 William Street, Derry as “premises to be used wholly or mainly for the provision of amusement by means of gaming machines.” As the learned trial judge observed the address of the entire premises may have been inserted with a view to complying with Article 114 of the 1985 Order. However, we do not accept that the format of the permit as drafted raises any doubt as to the legal validity of the decision actually reached by the Council.

[22] Accordingly, we propose to dismiss the appeal and remit the matter to the Committee for the purpose of giving consideration to redrafting the permit in accordance with the requirements of the 1985 Order and the views expressed in this judgment.

