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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MISBEHAVIN' LIMITED FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY IAN BROWN FOR JUDICIAL REVIEW

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WEATHERUP J

The applications

[1] These two applications concern the decisions of District Councils on the licensing of sex establishments under Article 4 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985. The first application concerns a decision of Belfast City Council dated 13 March 2003 to refuse a licence for premises at Gresham Street, Belfast. The second application concerns a decision of North Down Borough Council dated 9 April 2003 to refuse a licence for premises at Bingham Mall, Bangor. Mr Larkin QC and Mr Reed appeared for the first applicant, Mr M Lavery QC and Mr M Lavery appeared for the second applicant and Mr O'Hara QC and Mr Scoffield appeared for both respondents.

The Local Government (Miscellaneous Provisions) Act (NI) 1985

[2] Schedule 2 of the 1985 Order provides for the licensing of sex establishments. By paragraph 2 "sex establishment" means a sex cinema or a sex shop.

Paragraph 4 provides a definition of "sex shop" and it applies to the premises proposed to be licensed by the applicants.

Paragraph 6 imposes a requirement for licences for sex establishments in any district in which the schedule is in force and that

applies to the districts of Belfast City Council and North Down Borough Council.

Paragraph 8 provides that the Council may grant a licence for a sex establishment on such terms and conditions and subject to such restrictions as may be specified.

Paragraph 10 provides for applications for licences and includes in particular the following sub paragraphs –

> (15) Any person wishing to make any representation in relation to an application for the grant, renewal or transfer of a licence under this Schedule shall give notice to the council, stating in general terms the nature of the representation not later than 28 days after the date of the application.
>
> (16) Where the council receives notice of any representation under subparagraph (15), the council shall, before considering the application, give notice of the general terms of the representation to the applicant.
>
> (17) The council shall not without the consent of the person making the representation reveal his name or address to the applicant.
>
> (18) In considering any application for the grant, renewal or transfer of a licence the council shall have regard to any observations submitted to it by the appropriate sub-divisional commander and to any representation of which notice has been sent to it under sub-paragraph (15).
>
> (19) The council shall give an opportunity of appearing before and of being heard by the council-
>
> (a) before refusing to grant a licence, to the applicant;
>
> (b) before refusing to renew a licence, to the holder; and
>
> (c) before refusing to transfer a licence, to the holder and the person to whom he desires that it shall be transferred.
>
> (20) Where the council refuses to grant, renew or transfer a licence, it shall, if required to do so by the applicant or holder of the licence, give him a statement in writing of the reasons for its decision within 7 days of his requiring it to do so.

Paragraph 12 provides for the refusal of licences as follows –

(1) Subject to paragraph 26, the council shall refuse an application for the grant, renewal or transfer of a licence under this Schedule where the applicant is-

(a) a person under the age of 18; or

(b) a person who is for the time being disqualified under paragraph 17(3); or

(c) a person, other than a body corporate, who is not resident in the United Kingdom or was not so resident throughout the period of six months immediately preceding the date when the application was made; or

(d) a body corporate which is not incorporated in the United Kingdom; or

(e) a person who has, within a period of 12 months immediately preceding the date when the application was made, been refused the grant or renewal of a licence for the premises, vehicle, vessel or stall in respect of which the application is made, unless the refusal has been reversed on appeal.

(2) Subject to paragraph 26, the council may refuse-

(a) an application for the grant or renewal of a licence on one or more of the grounds specified in sub-paragraph (3);

(b) an application for the transfer of a licence on either or both of the grounds specified in heads (a) and (b) of that sub-paragraph.

(3) The grounds mentioned in sub-paragraph (2) are-

(a) that the applicant is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reason;

(b) that if the licence were to be granted, renewed or transferred the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant, renewal or transfer of such a licence if he made the application himself;

(c) that the number of sex establishments in the relevant locality at the time the

application is made is equal to or exceeds the number which the council considers it appropriate for that locality;

(d) that the grant or renewal of the licence would be inappropriate, having regard-

(i) to the character of the relevant locality; or

(ii) to the use to which any premises in the vicinity are put; or

(iii) to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.

(4) Nil may be an appropriate number for the purposes of sub-paragraph (3)(c).

(5) In this paragraph "the relevant locality" means-

(a) in relation to premises, the locality where they are situated; and

(b) in relation to a vehicle, vessel or stall, any locality where it is desired to use it as a sex establishment.

The application to Belfast City Council

[3] The first applicant applied to Belfast City Council for a licence on 13 May 2002. By letters dated 5 September 2002 and 22 October 2002 notice was given to the first applicant on behalf of the Council of objections that had been received in respect of a number of applications for licences and the grounds for objection were set out in general. In addition, the first applicant received copies of minutes of meetings of Belfast City Council of 1989 and 1997 where, in respect of previous applications for licences for premises in Gresham Street, Belfast, it had been resolved on behalf of the Council that licences be refused and that the Council had determined that the appropriate number of sex establishments in the relevant locality should be nil. The first applicant was invited to consider arguments to be presented at a hearing before the Health and Environmental Services Committee of the Council on 18 November 2002 as to why the previous decisions of the Council should be changed. Accordingly, prior to the meeting of the Committee on 18 November 2002 the first applicant had received from the Council, notice of the grounds of objections to the applications that had been received and notice of the previous decisions of the Council that the appropriate number of sex establishments in the relevant locality should be nil.

[4] At the Committee hearing on 18 November 2002, two particular matters were of concern to the first applicant. In the first place it was apparent that certain documents had not been disclosed to the first applicant and secondly that the Committee was hearing objectors in person and the first applicant was not being made aware of their identity and the full extent of their objections in relation to the first applicant. The Committee hearing was rearranged for 2 December 2002. In the meantime, the applicant received further documents. A report of Kenneth Crothers dated 15 November 2002 advised on the retail character of the area and the future development proposals affecting the area. A report from the Health and Environmental Services Department Building Control Service outlined the nature of objections that had been received to the application. The report defined the relevant locality as a 600m radius from a centre point in Gresham Street, referred to the character of the relevant locality, previous decisions affecting the area, the applicant's proposals, the current policy of the Council and set out the recommendation/decision required by Committee members.

[5] The Committee meeting that took place on 11 December 2002 heard representations on behalf of the first applicant. The Committee then met on 20 January 2003 to decide on its recommendation in relation to applications received and the decision was communicated to the first applicant by letter dated 23 January 2003. The Committee had agreed to recommend that the Council in its capacity as licensing authority refuse the application. The first applicant was informed that proposed grounds for refusal were that the appropriate number of sex establishments in the locality should be nil and in any event that the applicant was not suitable.

[6] The application came before the Council on 3 February 2003. At the Council meeting it became apparent that there had been before the Committee, when it had considered the application, a number of documents that had not been furnished to the applicant or the Council. The matter was referred back to the Committee. The Committee met on 10 February 2003. The minutes of the Committee meeting record the procedural purpose of this reference back to the Committee. The Director of Health and Environmental Services informed the Committee that the full reports of the special meetings of the Committee of 18 November and 2 and 11 December had not been included with the minutes of the Committee meeting of 20 January 2003 which had been presented to the Council meeting of 3 February 2003. The letter to the first applicant of 23 January 2003 setting out the Committee recommendation had not included the reports of the earlier meetings of the Committee. This record seems to recognise a dual omission, namely the absence of the minutes being furnished to the first applicant as well as the absence of the minutes being forwarded to the Council. It might have been expected that the purpose of the reference back to the Committee was not only to allow the

Committee to correct that omission in relation to the papers submitted to the Council but also to correct the omission in the papers furnished to the first applicant so as to allow the first applicant to consider the missing papers and make representations to the Committee before the Committee made its recommendation to the Council. In the event the Committee on 10 February 2003 decided to affirm its recommendation to the Council of 23 February 2003 and to furnish all papers to the Council for its next meeting on 3 March 2003 and also to furnish all papers to the applicant prior to the Council meeting of 3 March 2003.

[7] Prior to the Council meeting of 3 March 2003 there was furnished to the first applicant by letter dated 25 February 2003 the affirmation of the Committee's earlier recommendation to the Council, the minutes of the earlier meetings of the Committee, reports of the Committee meetings of December 2002 and the report of the Head of Building Control. The applicant appeared before the Council meeting of 3 March 2003. The Council accepted the recommendation of the Committee and by letter dated 13 March 2003 informed the applicant of its decision to ratify the decision of the Committee. The grounds stated in the Committee letter of 23 January 2003 and repeated in the Council letter of 13 March 2003 were –

> "In coming to that conclusion, the Committee considered the character of the relevant locality, including the type of retail premises located therein, the proximity of public buildings such as the Belfast Public Library, the presence of a number of shops which would be of particular attraction to families and children and the proximity of a number of places of worship, and determined that the appropriate number of sex establishments for that locality be nil.
>
> The Committee was mindful that the Council might, if it so desired, decide that the appropriate number of sex establishments in the locality be other than nil, and accordingly, agreed to consider the merits of your application. The Committee has recommended that the Council refuse your application on the grounds that you have been operating a sex shop without a licence and in breach of the relevant legislation and that Mr P McCaffrey, a person convicted of relevant offences, appears to have an interest in the business

> to be carried on under the licence and, in addition, the company's formation appears to have been for the purpose of making the application other than in the name of a convicted person".

[8] Accordingly the basis of the Council's decision was that the appropriate number of sex establishments in the relevant locality should be nil so that the licence should be refused under paragraph 12(3)(c). Further the Council decided that in any event on the merits of the application that the licence should be refused on the ground that the applicant was unsuitable for the reasons given.

The application to North Down Borough Council

[9] The second applicant applied to North Down Borough Council on 18 December 2002 for a licence for premises at Bingham Mall, Bangor. On 28 March 2003 the Council furnished to the applicant notice of objections to the application together with a schedule that provided a breakdown of the reasons for objection from different groups, namely local residents, businesses and churches, those outside the borough, petitions and anonymous objectors. A meeting of the Council was held on 7 April 2003 at which the applicant and objectors made separate representations to the Council. The Council Officer's report and the Council's Planning Consultant's report were before the meeting. The Council resolved to adopt the relevant locality proposed by the Council's Planning Consultant and then resolved to reject the application. The reason is stated in the Council's letter to the second applicant of 9 April 2003 as follows –

> "I would advise you that the Council refused your application on the grounds that it resolved that the appropriate number of sex establishments in this locality is nil. The Council is also of the view that having regard to the character of the relevant locality and the use to which premises in the vicinity are put, that it would be inappropriate to grant a licence to these premises".

[10] Again the basis of the Council's decision was that the appropriate number of sex establishments in the relevant locality should be nil so a licence was refused under paragraph 12(3)(c). Further the Council decided that in any event the licence should be refused on the ground that a licence would be inappropriate under paragraph 12(3)(d).

The applicants' grounds

[11] The first applicant's grounds are –

(1) The decision of the Council to refuse the applicant a licence was in breach of natural justice and fairness in that:

(a) the applicant was provided with inadequate disclosure to enable him to meet the case against him;

(b) an oral hearing was not provided to the applicant at the Committee stage;

(c) the applicant had no opportunity to challenge the submissions against him.

(2) The Council's decision was illegal in that:

(a) it included consideration of 70 letters of objection all but one of which were outside the statutory time limit;

(b) oral representations were heard from groups who had not objected to the application and in relation to whom the applicant was not given notice in general terms as required by statute;

(c) it turned upon a decision that the appropriate number of sex establishments in the relevant locality was nil which was in breach of the European Convention on Human Rights in that -

(i) it was based on an assessment of relevant locality turning on factors that apply to all areas in Belfast and in effect amounts to a decision to refuse licences in the whole Council area;

(ii) Article 10 of the Convention protects freedom of expression. In Autronic -v- Switzerland the European Court of Human Rights held that licensing conditions applied to a commercial distributor of images could amount to interference with freedom of expression. The applicant argues that the denial of a licence in his case amounts to such interference;

(iii) in the United Kingdom the European Court of Human Rights recognised that there were competing interests to be balanced in consideration of freedom of expression and that a key principle in such considerations was proportionality. The applicant argues that the Council's decision is disproportionate given that the Council was in power to apply conditions to the grant of a licence such as could have met the Council's concerns but declined to do so; and

(iv) it was a breach of the applicant's rights under Article 1 of the first protocol of the Convention.

[12] The second applicant's grounds are –

(1) The objections were largely based on moral or religious beliefs and in considering these the Council had no regard to -

(a) the rights of persons to respect for private and family life and home and correspondence in contravention of Article 8 of the ECHR;

(b) the rights of persons to freedom of thought, conscience and religion in contravention of Article 9 of the ECHR;

(c) the rights of persons to freedom of expression in contravention of Article 10 of the ECHR.

(2) In reaching this decision the Council were in breach of the applicant's rights under Article 1 of the first protocol of the ECHR.

Procedural fairness before Belfast City Council

[13] The first applicant's challenge on the ground of procedural fairness concerned inadequate disclosure, absence of an oral hearing, and lack of opportunity to challenge the representations made against the applicant [grounds 1(a), (b) and (c)].
Representations were made by the first applicant to the Committee on 11 December 2002. By that stage the first applicant had certain reports that had not been made available prior at the first meeting on 18 November 2002. When the Committee made its first recommendation on 23 January 2003 there remained certain documents that had not been disclosed to the first applicant, namely those documents that were furnished after the Council meeting of 3 February 2003. However, those documents were furnished to the first applicant prior to the Council meeting of 3 March

2003, which resulted in the decision to refuse the application. The applicant appeared before the Council on 3 March 2003 and therefore had the opportunity to make representations to the Council after having been furnished with all the documents.

[14] The issue therefore resolves to the consideration of the decision-making structure whereby an applicant first appears before the Committee before it makes its recommendation to the Council and then appears before the Council, which makes the final decision. The applicant contends that real decision-making lies in the Committee which considers the details of the application and that as the Council either affirms or rejects or refers back the Committee's recommendation there is no detailed scrutiny before the Council. Accordingly the applicant contends that the provision of additional documents to the first applicant after the Committee had affirmed its recommendation to the Council on 10 February 2003 did not afford the first applicant adequate disclosure or an oral hearing or the opportunity to challenge the representations against the application.

[15] First of all it is necessary to consider whether the Council at its meeting of 3 February 2003 had intended that the omitted documents be furnished to the first applicant so that representations might be made to the Committee before it reconsidered its recommendation to the Council. That that had not occurred would have been apparent to the Council on 3 March 2003 upon consideration of the minutes of the Committee of 10 February 2003 which record (at page F1006) that the full reports of the earlier Committee meetings would be included in the minutes of the meeting of 10 February 2003 that would be sent to the applicant with the letter inviting them to make representations to the Council on 3 March 2003. The Committee minutes were approved and adopted by the Council on 3 March 2003 and it must be the case that had the actions of the Committee been other than in accordance with the requirements of the Council on the reference back on 3 February 2003, then that shortcoming would have been noted on 3 March 2003. Accordingly, I conclude that the Council did not intend that the first applicant should have the opportunity to make representations to the Committee prior to its reconsideration of the recommendation that would be made to the Council.

[16] However, it remains to be determined whether the opportunity afforded to the first applicant to make representations to the Council on 3 March 2003 met the applicant's right to know and to respond. The applicant contends that Council meetings are a rubberstamp of Committee meetings. Consideration of the minutes of Council meetings would indicate that that is not the case. A large amount of business is transacted but it is apparent that there are different approaches adopted in relation to the business of the different Committees and different parts of the business of each Committee. Voting patterns also indicate different groups

have different views on some items of business. In relation to the Health and Environmental Services Committee meeting of 10 February 2003 one aspect of the Committee business dealing with an entertainment licence was referred back to the Committee for further consideration. I do not accept the applicant's contention that the absence of opportunity to make representations to the Committee prior to 10 February 2002 rendered the procedure unfair and prevented the first applicant from having an opportunity to make fully informed representations to the effective decision-maker.

Illegality before Belfast City Council

[17] The first applicant's challenge to the lawfulness of the Council's decision included grounds concerned with the position of objectors [grounds 2(a) and (b)].
The first matter concerns objections being received outside the statutory time limit of 28 days as stated in paragraph 10(15) of Schedule 2 to the 1985 Order. Paragraph 10(18) provides that in considering any application for the grant of a licence the Council shall have regard to any representation of which notice has been sent to it under paragraph 10(15) being a notice within 28 days of the date of application.

[18] The report from Building Control Service stated that written representations comprising 70 letters were lodged as a result of the public notices of application by 6 premises and all but one of the letters were received outside the 28 day period. The scope of the objections received from the objection lodged within 28 days is not stated. The Committee considered all the grounds of objection. The first applicant contends that the 28 day time limit is mandatory so that consideration of objections received after the 28 day limit render the decision invalid. The respondent contends that the 28 day limit is directory and not mandatory.

[19] The equivalent English legislation contains the same provisions as paragraph 10(15) and 10(18) and has been the subject of different judicial interpretations. In *R v City of Chester and Others ex parte Quietlynn Limited* (unreported 14 October 1983) Woolf J dealt with the Judicial Reviews of the decisions of six local councils that had refused sex shop licences and this included consideration of the status of objections in two of the cases where the objections had been received by the local councils outside the 28 day limit. Woolf J stated that it was perfectly proper for the local council to take into account the objections, although made out of time. The overall position was stated to be that the authority was required to have regard to objections made in accordance with paragraph 10(15)(being objections from what he described as a "statutory objector"); however the authority must be entitled to take account of relevant information which comes into its possession, even though it is not from a statutory objector; in respect of

such non statutory information the authority must act fairly and if necessary give the applicant notice of material on which it proposed to rely.

[20] An appeal from Woolf J to the Court of Appeal is reported as *R v Preston Borough Council, ex parte Quietlynn Ltd* [1984] 83 LGR 308. The 28 day issue was considered in one of the cases under appeal where the objection had been notified to the local council before the application had been submitted, so the statements in the Court of Appeal on late application were obiter. Simon Brown LJ stated (at page 313) –

> "The position, in my judgment, is as Woolf J found. Subparagh (15) does not restrict the giving of notice of objection before the application, but it does restrict the giving of late notice of objection" (underlining added).

[21] The issue arose again in *R v Metropolitan Borough of Sefton ex parte Quietlynn Limited* (1985) 83 LGR 461 where Forbes J was dealing with Judicial Reviews in relation to twenty three decisions concerning sex shop licences. The above statement of Simon Brown LJ was interpreted as meaning that the 28 day time limit was mandatory. In discussing the above decision of the Court of Appeal in *Preston Borough Council* Forbes J stated –

> "Further it seems that Stephen Brown LJ accepted the view that the local authority should not take into account "late" objections, ie those notified later than 28 days from the date of the application. Although he does not say so, this must be because paragraph 10(18) requires the local authority to have regard to objections properly notified under paragraph 10(15). It would indeed be strange if Parliament, having carefully set limits for the notification of objections and enjoined local authorities to have regard to such objections, should at the same time have expected local authorities to have a discretion to have regard to objections irrespective of whether they conformed to the time limits or not. The combination of paragraph 10(15) and paragraph 10(18) seems to me to show that Parliament was intending to say to

> objectors, "put your objections in before 28 days; if they come in late they will not be entertained by the local authority". It seems that this was the view of the Court of Appeal in referring to paragraph 10(15) as not restricting the giving of notice before the application and adding, 'but it does restrict the giving of late notice of objection'."

[22] On appeal from Forbes J in six of the cases the issue of late notices of objection was not considered by the Court of Appeal. The decision is reported as *Quietlynn Ltd v Peterborough City Council and Others* [1986] 85 LGR 249.

[23] In *Quietlynn Ltd v Plymouth City Council* [1987] 3 WLR 189 Justices convicted the appellant company of trading as a sex establishment after being refused a licence, the local authority having taken account of objections received outside the 28 day time limit. The Crown Court allowed an appeal on the basis that the refusal of the licence was invalid because of the consideration of the late objections. On appeal to the Divisional Court it was held that the Crown Court did not have jurisdiction to determine the validity of the refusal of the licence on the ground of late objection being taken into account. The Divisional Court found that the local council had a duty to consider objections made within 28 days and a discretion to hear objections made outside the 28 days, and the local council had a duty to give the applicant an opportunity to deal with all objections taken into account, whether made before or after 28 days.

[24] In making the above finding Webster J in delivering the judgment of the Divisional Court disapproved of the dictum of Forbes J set out above to the effect that the 28 day time limit was mandatory. Webster J preferred the approach of Woolf J referred to above to the effect that the local council had a discretion to consider late objections. Forbes J had relied on the words of Stephen Brown LJ in the Court of Appeal to the effect that paragraph 10(15) does "restrict" the giving of late notice of objection. The Divisional Court in *Quietlynn Ltd v Plymouth District Council* concluded that by the word "restrict" in relation to late notices of objection Stephen Brown LJ meant only to refer to the fact that an objector who gave late notice had no statutory right to have his objection taken into account, and that Forbes J had misinterpreted the words of Stephen Brown LJ (at page 203H).

[25] The applicant contends that the 28 days for objections is mandatory and that Forbes J's approach was correct. Carswell LCJ reviewed the issue

of mandatory and directory provisions in the Court of Appeal in *Re Robinson's application* [2002] NI 206. Although Carswell LCJ dissented and the majority view prevailed in the House of Lords, his discussion of the mandatory/ directory debate remains unaffected. Carswell LCJ adopted the approach of Lord Woolf MR in R -v- Immigration Appeal Tribunal ex parte Jeyeanthan (1999) 3 All ER 231. To adapt for the present case the question posed in *Re Robinson's Application* at page 204c - The question can therefore be posed in terms, not whether the provision of paragraph 10(15) is mandatory or directory, but whether on its proper construction the statute discloses an intention that failure by an objector to give notice to the Council stating in general terms the nature of any representation in relation to the application for the licence, would deprive the Council of power to consider the representation when notice is given after the end of the period.

[26] I prefer the approach of Woolf J (at paragraph [19] above), and I consider the words of Stephen Brown LJ (at paragraph [20] above) are to be interpreted as set out by Webster J in the Divisional Court (at paragraph [24] above). Accordingly I hold that the 28 day period specified in paragraph 10(15) imposes a duty on local councils to consider objections received within that period and a discretion as to the consideration of objections received outside that period.

[27] The applicant contends that the Council did not exercise discretion to consider the late objections. The existence of 69 late objections was brought to the attention of the Council in accordance with a general practice of informing the Council of that matter. I consider that the purpose of drawing this matter to the Council's attention must be to inform the Council of the late objections so that it might be determined whether they are to be considered. By electing to consider all objections in such circumstances the Council exercised its discretion.

[28] The applicant's further challenge in relation to objectors was that oral representations were heard from groups who had not objected to the application and in relation to whom the applicant was not given notice in general terms. This complaint concerns representations made on behalf of the Methodist Church in Ireland and an officer of a Christian based organisation as disclosed in the minutes of the Committee meeting of 18 November 2002. The applicant has not established that either one of those groups had not given notice to the Council. However all but one of the objections were stated to be out of time so one or other (or perhaps both) of those making oral representations had given notice of objection outside the 28 day limit.

[29] The applicant contends that it was not given notice of the general terms of the representation as required by paragraph 10(16). The Council

letters giving notice of objection and the report of Building Control Service summarising the objections and the minutes of the meeting of 18 November 2002 were available to the applicant prior to the Council meeting of 3 March 2003. The head of Building Control avers that the general terms of any objections to the application were contained in this material provided to the applicant before the meeting of the Council of 3 March 2003. I have no reason not to accept that position. Accordingly the applicant had notice of the terms of the objections.

The relevant locality before Belfast City Council

[30] The first applicant challenged the decision of Belfast City Council that the appropriate number of sex establishments in the relevant locality should be nil [ground 2(c)].
An application for the grant of a licence must be refused by the Council if any of the five grounds at paragraph 12(1) applies and may be refused by the Council if any of the four grounds at paragraph 12(3) applies. By its decision of 13 March 2003 the Council refused the application under paragraph 12(3)(c) having determined that the number of sex establishments in the relevant locality should be nil. In addition the Council refused the application under paragraph 12(3)(d) on the ground that the grant of the licence would be inappropriate having regard to the character of the relevant locality and further under paragraph 12(3)(a) and (b) on grounds relevant to the management of the business.

[31] There are two aspects to paragraph 12(3)(c), namely the Council considers the relevant locality and determines the number of sex establishments appropriate for that locality. The Council determined the relevant locality as having an undefined boundary on a 600m radius from a centre point from Gresham Street. The radius of 600m was chosen because it represented a comfortable walking distance from boundary to premises and the comfortable walking time of 10 minutes based on 13 minutes per kilometre (20 minutes per mile). Additionally the locality of 113 hectares (0.44 square miles) in area was arguably the minimum possible area in proportion to the size of Belfast and in relation to its location in the city. The applicant objected to the arbitrary character of a fixed radius to determine the relevant locality and compared the term "locality" to the terms "neighbourhood" or "vicinity" that apply to licensed premises or pharmaceutical licences.

[32] In *Re Boots the Chemist Limited's Application* [1994] NIJB 11, Carswell LJ dealt with an application to be placed on the official list of providers of pharmaceutical services under the Health and Personal Social Services (General Medical and Pharmaceutical Services) Regulations (Northern Ireland) 1973 which entitled the Health and Social Services Board to grant an application only if satisfied that the provision of pharmaceutical

services at the premises was necessary or desirable to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located. In making comparisons with applications for off licence facilities under the Licensing (Northern Ireland) Order where the adequacy of such facilities in the "vicinity" of the premises had to be considered, Carswell LJ stated that there were two important conclusions to be drawn.

> (1) There is no sensible distinction between a vicinity and a neighbourhood. The authorities in the field of licensing law in which the proper context of a vicinity are discussed are therefore relevant in the present context.
>
> (2) A neighbourhood is an area defined by physical and social factors, and its extent remains the same whatever the context in which one comes to consider it. The respondent contends that locality is broader than vicinity and refers to paragraph 12(3)(d)(i) and (ii) where regard is had to "the character of the relevant locality" and "the use to which any premises in the vicinity are put".

[33] In *Quietlynn Limited -v- Peterborough City Council* (1986) 85 LGR 249, the Court of Appeal dealt with six appeals against the refusal of Forbes J to quash decisions of local authorities refusing licences for sex shops under equivalent legislation in section 2 in Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982. A number of matters arise from the decision of the Court of Appeal in relation to the issue of "relevant locality".

First, the relevant locality is a question of fact to be decided upon the particular circumstances of a particular application. In the majority of cases it will not be necessary to come to any conclusion as to what is the precise extent of the locality since the characteristics of the area which is undoubtedly within the locality will be sufficient to decide the matter one way or another. On this point the Court of Appeal adopted Woolf J in *R v City of Chester ex parte Quietlynn Limited* (unreported 14 October 1983).

Second, "the locality" does not need to be defined in terms of drawing boundaries on a map. The Council assumed that all premises can be said to be situated in a locality, a common expression which does not carry with it any connotation of precise boundaries and that this locality will have a character.

Third, the Council will ask what is the character of the locality in which the premises are situated or what number of sex establishments are appropriate for the locality. They are simple questions which invite relatively simple answers and it is these answers and not a definition of boundaries which will form the basis of the reasons for refusal which

should be given to the applicant when a ground of refusal is paragraph 12(3)(c) or paragraph 12(3)(d)(i).

Fourth, the Council took as the relevant locality an area of one-third of a mile radius from a church that was a prominent landmark 150 yards from the applicant's premises. While it was not necessary for the Council to define the locality in any way, it was permissible to indicate the sort of area that they had taken into account in deciding upon the appropriateness of having sex shops in the locality.

[34] I accept the four matters set out above and adopt that approach. It is not necessary to set down a definition of the relevant locality nor is it impermissible to indicate the area that the Council has considered. The issues are the character of the locality and the number of sex establishments appropriate to that locality.

[35] The first applicant contends that the character of the locality stated by the Council was unduly wide and could apply to all localities in the Council area and was indicative of an improper motive of refusing all licences. The character of the relevant locality was such that it included the City Hall and an area of Central Belfast together with places of religious worship, educational buildings being schools and libraries, and entertainment and licensed premises. The Council's letter of decision was stated in wider terms. The Council was entitled to reach a decision on the character of the relevant locality and to determine the number of sex establishments appropriate to that locality. It has expressed its conclusions by reference to general considerations that may apply to many localities but it was entitled to do so. The Council is not entitled to impose a blanket ban on licences for sex establishments within its area. However the Council weighed relevant natters and reached a conclusion it was entitled to reach and I have not been satisfied that the Council applied a blanket ban to the issue of licences.

The European Convention

[36] The applicants advanced arguments that the respective decisions to refuse the licences constitute breaches of the right to property under Article 1 of the First Protocol of the European Convention and the right to respect for private life under Article 8. Although leave had been refused the applicants sought to advance arguments that the decisions constitute breaches of the right to freedom of expression under Article 10.

[37] Article 8 and Article 1 of the First Protocol were described by Carswell LCJ in *Re Stewarts Application* [2003] NI 149 at paragraph [26] as being "intertwined" when the Court of Appeal was considering an application for Judicial Review of the grant of planning permission. While the reference to "intertwined" was appropriate in the circumstances of the

case then under consideration I do not accept that Carswell LCJ intended to convey that the Articles are necessarily intertwined in all cases.

[38] Article 1 of the First Protocol provides –

> (1) Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of estate to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[39] Article 1 of the First Protocol comprises three distinct rules. The first rule states the principle of peaceful enjoyment of property. The second rule covers deprivation of possessions and subjects it to certain conditions. The third rule recognises that States are entitled to control the use of property in accordance with the general interest.

[40] The applicants identify two "possessions" for which they claim protection. First, there is the property itself in which the business is to be carried on and secondly, there is the business itself in respect of which the applicants' claim a pecuniary right. The applicants contend that these possessions have been interfered with under each of the three rules in Article 1 of the First Protocol in that they are denied peaceful enjoyment under the first rule, deprived of the business under the second rule and subject to the control of the use of the property and the business under the third rule.

[41] The applicants rely on *Pialopoulos v Greece* [2001] 33 EHRR 39 where building prohibitions and attempts to expropriate property involved restrictions on the applicant's rights to use their possessions by being deprived of the plot and amounted to an interference under Article 1 of Protocol 1. That interference was not justified as there was no reasonable balance between the public interest and the protection of the applicant's rights.

[42] The respondents contend that Article 8 and Article 1 of the First Protocol are not engaged. On the respondents approach it would only be in exceptional cases, of which the present are not examples, that the Articles could be engaged. The comparison is made with planning decisions where it is contended that the Articles are not engaged unless "a

person is particularly badly affected by development" per Carswell LCJ in *Re Stewarts Application*[2003] NI 149. The Court of Appeal considered a challenge by a local resident who had objected to a grant of planning permission. The applicant applied for Judicial Review of a decision of the Planning Appeals Commission that planning permission be granted for the erection of a building beside the applicant's dwelling house. The Court of Appeal, at paragraph [26], stated in relation to Article 8 and Article I of Protocol 1 that -

> "These provisions are intertwined to an extent and can be considered together. It appears clear enough in principle and also consistent with the European jurisprudence that both may be engaged if a person is particularly badly affected by development carried out in consequence of a planning decision made by the State: see, eg, *S v France* (Application no 13728/88) and cf the discussion by Sullivan J in *R (Malster) v Ipswich Borough Council* [2002] PLCR 251. Under each provision there is a saving permitting the State to act in the public interest. It has to carry out a proper balancing exercise of the respective public and private interests engaged in order to satisfy the requirement that it act proportionately."

[43] I do not accept that the Court of Appeal was setting down a general threshold for the engagement of the Articles based on an applicant being "particularly badly affected" by the action to which objection is taken. It is necessary to consider the character of the dispute. In the present case the essence of the dispute relates to the system of control of the use of applicants' premises. Such a dispute differs in character from that which relates to the impact on an applicant and/or his premises of permitted development undertaken by a third party. The threshold of the applicant being "particularly badly affected" applies to such interference with an applicant's property or person by third party development. The two cases cited by the Court of Appeal are examples.

[44] In *S v France* the applicant had obtained compensation from a domestic tribunal for the nuisance arising from the development of a nuclear power station near her home. In relation to Article 1 of Protocol 1 the case did not involve the control of use of property but a level of nuisance affecting the value, sale and use of the property so as to amount to a partial expropriation. In considering the balance of public and private interests the ECommHR took account of the amount of compensation and held that there was no appearance of a violation of Article 1 of Protocol 1. In relation to Article 8 it was found that the level of nuisance could affect private life and was interference that had to be justified under Article 8 (2). The ECommHR concluded that, bearing in mind the compensation the

applicant had received a reasonable consideration for the nuisance and the interference was justified.

[45] In R (Malster) v Ipswich BC the applicant challenged the grant of planning permission for a new grandstand at the local football ground. Sullivan J noted, at paragraph 88, that whilst severe environmental pollution may result in a breach of Article 8 (Lopez Ostra v Spain [1994] 20 EHRR 227, and Guerra v Italy [1998] 9 EHRR 235) it was considered doubtful that the shadowing effect upon the applicant's garden crossed that threshold, in view of fact that the Council's own standards were not infringed. On the assumption that the threshold was crossed it was held that interference was justified under Article 8(2). Further it was found, at paragraph 89, in consideration of Article 1 of the First Protocol that the football club was equally entitled to the enjoyment of its possessions and should not be prevented from redeveloping the north stand unless there were good reasons for refusing planning permission in the public interest.

[46] The respondents contend that the exceptional circumstances required by the threshold that the applicant be "particularly badly affected" also applies to the application of the Articles to a refusal of planning permission. A decision of the planning authority refusing permission would directly curtail the development of an applicant's premises and those circumstances would be more akin to the present case. In *Re Green's Application* [2003] NIQB 54 concerned an application for Judicial Review of a refusal of planning permission to the applicant. Kerr J, at paragraph [24], referred to *Re Stewarts Application* and stated in relation to Article 8 and Article 1 of Protocol 1that "a similar exceptional effect would be required where the applicant claims that the denial of planning permission engaged these provisions".

[47] Further, In *Re UK Waste Management Limited's Application* (2002) NI 130 concerned the Court of Appeal in consideration of a proposal for the refusal of planning permission for the applicant's landfill waste disposal site where the applicant alleged a breach of Article 1 of the First Protocol. Carswell LCJ stated (at page 143F):

> "The appellant's peaceful enjoyment of its property has not been disturbed in any ordinary sense of the words. It has not been enabled to use it as it would wish, but that is not in our view an interference with "peaceful" enjoyment, which connotes some kind of invasion of the property. Still less is there deprivation of the appellant's possessions, which involves permanent extinction of ownership rights".

[48] In *Re Green's Application* and *Re UK Waste Management Limited's Application* the Court was dealing with the operation of the planning system and not with a licensing system for business activities that involves the control of use of existing premises. While it requires exceptional circumstances to engage the Articles in relation to the effect on the applicant of the grant of planning permission to a third party I am satisfied that that is not the threshold that applies to the direct effect of the refusal of a licence to carry on business activities. Where the refusal of the licence will have direct effect on the use of the property concerned and the economic interest in the business concerned, it is not apparent why such effect should only engage the protection of Article 1 of Protocol 1 in exceptional cases where there is a particularly adverse effect on the party concerned. I am satisfied that the control of the use of the applicants' premises and businesses in the present cases engages Article 1 of the First Protocol.

[49] When Article 1 of Protocol 1 is engaged in a particular case by the operation of a system of control of the development of land or of permitted uses of land or by a system of licensing particular trades, any interference must be in the general interest and satisfy the requirements of proportionality. A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's rights and the search for such a balance is inherent in the whole of the Convention. *Sporrong and Lonnroth v Sweden* [1982] 5 EHRR 35. It is this fair balance that the applicants contend has not been achieved in the present cases.

[50] As with the planning process the type of balancing exercise weighing the respective public and private interests is inherent in the assessment carried out by local councils. In the present cases the applicants contend that there has been no identification of the public interest that warrants the conclusion that the number of sex establishments appropriate for the relevant locality should be nil. In the case of the first applicant the public interest matters appear in the Council's letter of decision and are taken from the Services Report as discussed in the minutes of meetings included in the papers. In the case of the second applicant the public interest basis for the decision is set out in the consultant's report which was adopted by the Council.

[51] The applicants contend that there was no public interest contrary to the applicants' interests and that social and moral objections to sex establishments were illegitimate concerns as Parliament had introduced a legislative scheme that permitted sex establishments thereby rejecting the social and moral objections. I accept that the concerns outlined by the respondents are legitimate concerns. Further they are not concerns that

have been removed from the considerations of local councils by the introduction of the legislation. They are concerns that the local councils may take into account as they consider individual applications. They are not matters that the local councils are entitled to employ as a basis for a policy of rejecting every application. However the applicants contend that the local councils are operating such a policy of blanket rejection of all applications.

[52] I am satisfied from a consideration of the processing of the present applications that the respondents have engaged in the exercise of determining the character of relevant localities and the appropriate number of sex establishments in those localities. The determination of such character may take into account relevant social and moral considerations that would render it inappropriate to locate a sex establishment in a locality, namely the presence of religious establishments within the locality or the social effect of such a sex establishment on schools in the locality. Having completed that exercise the respondents have reached a conclusion that they were entitled to reach. I am not satisfied that the Councils are operating a blanket rejection of licences for sex establishments on social or moral or other grounds.
Further I am satisfied that the respondents have established that a fair balance has been struck between the applicants' interests and the public interest.

[53] Article 8 provides that –

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a Public Authority with the exercise of this right except such as in accordance with the law and it is necessary that democratic society, in the interests of national security, public safety or the economic well being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the right to the freedom of others".

[54] Article 8 includes concern for the right to respect for private life. The second applicant contends that the refusal of a licence concerns the development of relationships in a business setting and amounts to an interference with the Article 8 right. The concept of private life was considered by the ECtHR in *Niemietz v Germany* [1992] 16 EHRR 97 which involved the search of a lawyer's office on foot of a warrant. The search was found to constitute an interference with rights under Article 8 and to impinge on personal secrecy to an extent that was disproportionate so

there was a breach of Article 8. The ECtHR stated that respect for private life must comprise to a certain degree the right to establish and develop relationships with other human beings and there was no reason in principle why private life should be taken to exclude activities of a professional or business nature, as it in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world. This is especially so in the case of a person exercising a liberal profession where it may be difficult to establish when the person ceases to act in a professional capacity (paragraphs 29 to 30).

[55] In the circumstances of the present cases I have rejected the threshold of an applicant being "particularly badly affected" in relation to Article 1 of the First Protocol and I also reject that threshold in relation to Article 8. The second applicant is not prevented from carrying on business in the premises but from trading in particular items. Further he is not carrying on a profession where the work becomes part and parcel of life to the degree that it becomes impossible to know the capacity in which he may be acting. I am not satisfied that the actions of the respondent are capable of amounting to interference with the right to respect for private life. Accordingly I am not satisfied that Article 8 is engaged.

[56] However if Article 8 is engaged and the actions of the respondent amount to interference, such interference must be justified under Article 8(2). The interference is in accordance with the law and the relevant legitimate aim concerns the protection of morals. The issue is whether the measures undertaken are necessary in a democratic society in that they correspond to a pressing social need and are proportionate to the legitimate aim. For the reasons set out above in relation to the proportionality of the actions of the respondents under Article 1 of the First Protocol I am satisfied that any interference with the right to respect for private life is justified.

[57] Article 10 provides that:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontier. This article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are

> prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[58] The applicants rely on Autronic -v- Switzerland (1990) in relation to licences to receive broadcasts as establishing that commercial profit-making corporate bodies can engage Article 10. The right to freedom of expression includes the freedom to impart information and ideas without interference by public authority. The refusal of a licence to the applicant impacts on the imparting of certain information by the applicants and I will assume that that impact constitutes interference with the right to freedom of expression under Article 10. On that basis the interference must be justified under Article 10(2).

[59] The measures in question are prescribed by law. The relevant legitimate aim is the protection of morals. Again the issue is proportionality. For the reasons given above in relation to Article 8 (2) I am satisfied that any interference with the right to freedom of expression is justified.

[60] By reason of the matters set out above I have not been satisfied that any of the applicants' grounds can be established. Accordingly the applications for Judicial Review are dismissed.