Neutral Citation No: [2018] NICA 32	*Ref:* DEE10675
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 24/9/2018

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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2014 No 62897/01/A01

BETWEEN:

OASIS RETAIL SERVICES LIMITED

Appellant;

-and-

BELFAST CITY COUNCIL

Respondent.

BELFAST LEISURE COMPANY LIMITED

First Notice Party;

-and-

HAZELDENE ENTERPRISES LIMITED

Second Notice Party.

IN THE MATTER OF AN APPLICATION BY OASIS RETAIL SERVICES LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN RESPECT OF A DECISION MADE BY THE BELFAST CITY COUNCIL (LICENSING COMMITTEE) ON 14 MARCH 2014 GRANTING AN AMUSEMENT PERMIT TO BELFAST LEISURE COMPANY LIMITED AT 24/28 BRADBURY PLACE, BELFAST

AND IN THE MATTER OF AN APPLICATION BY OASIS RETAIL SERVICES LIMITED FOR JUDICIAL REVIEW OF A DECISION MADE BY BELFAST CITY COUNCIL (LICENSING COMMITTEE) ON 6 OCTOBER 2014 GRANTING AN AMUSEMENT PERMIT TO HAZELDENE ENTERPRISES LIMITED FOR PREMISES AT 25/41 BOTANIC AVENUE, BELFAST

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Before: Sir John Gillen, Deeny LJ & Treacy LJ

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DEENY LJ (delivering the judgment of the court)

[1] This is an appeal by Oasis Retail Services Limited ("Oasis") against the judgment and orders of Maguire J dated 13 January 2017. That judgment related to two different decisions of the Licensing Committee of Belfast City Council ("the Council") granting amusement permits in respect of two quite different applications but in the same area of Belfast.

[2] The first application of Oasis was filed with an Order 53 statement on 17 June 2014. The Order 53 statement records that Oasis is "a company owning and operating 13 amusement arcades in Northern Ireland. Included in this number are premises at the corner of Nos. 1-7 Donegall Road and 14 Shaftesbury Square in Belfast. The applicant has been operating amusement arcades since 1968." Oasis sought an order of certiorari to bring into the High Court and quash the decision of the Council dated 19 March 2014 to provisionally grant an amusement permit to "Mavericks" a trading name for Belfast Leisure Company Limited for premises at 24-28 Bradbury Place, Belfast which is stated to be about 80 metres from the appellant's premises identified above.

[3] On 27 November 2014 Oasis brought a further application for leave pursuant to Order 53 with regard to the decision of the same Committee and Council to grant an amusement permit on 6 October 2015 to Hazeldene Enterprises Limited (Hazeldene). This was in respect of premises at 25-41 Botanic Avenue, Belfast, the former Arts Theatre. It was said to be two minutes from the appellant's premises and again certiorari was sought.

[4] These two leave applications were adjourned a number of times and then ultimately listed before Maguire J together on a rolled up basis i.e. he would decide whether leave should be granted for judicial review in either case and, if leave was granted, whether the court should grant the relief sought. On 13 January 2017 the judge upheld the decision of the Council with regard to Bradbury Place and refused leave to apply for judicial review in respect of that permission on the ground of delay on the part of Oasis.

[5] The judge did grant leave to apply for judicial review in respect of the Botanic Avenue permission but dismissed the challenge substantively saying the following at [101] (iii):

> "The court simply is not satisfied that the respondent failed to consider the issue of the impact of cumulative impact/proliferation of permits in relation to the character and amenity of the area or the issue of the fitness of the second respondent to hold a permit. The ancillary issues referred to above,

such as the failure to grant an adjournment, are also dismissed."

[6] The judge went on to indicate that he would have substantially have decided the Bradbury case in the same way even if there had been no delay.

[7] Oasis appeals both of these decisions and the consequent orders to this court. Before us the appellant was represented by Liam McCollum QC with Hugh O'Connor. The respondent was represented by David Scoffield QC with Ms Denise Kiley. The first named notice party was represented by Philip McAteer and the second named notice party by Stewart Beattie QC. We are obliged to counsel for their learned oral and written submissions.

Statutory and policy background

[8] The statutory and policy background to these two amusement permits is admirably set out by Maguire J in his learned judgment. We are content to set out what he said in this connection.

> "[4] The statutory regime at issue in these proceedings is that relating to the power of the respondent to grant or refuse amusement permits. This is governed by the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 ("the 1985 Order"). Articles 109-121 deal specifically with amusement permits. Article 111 of the 1995 Order outlines the process for making an application for an amusement permit. Article 111(2) provides:
>
> > 'Subject to paragraphs (3) to (4B), where an application is made for the grant of an amusement permit, the district council, after hearing representations, if any, from the sub-divisional commander upon whom notice is required by paragraph (1) to be served, -
> >
> > (a) may grant the amusement permit; or
> >
> > (b) may refuse to grant the amusement permit.'

Paragraph 3 of Article 111 outlines the circumstances in which a district council shall refuse an application for a grant of a permit. It provides:

> 'A district council shall refuse an application for the grant of an amusement permit, unless it is satisfied –
>
> (a) in a case where there is in force a resolution passed by the council as mentioned in Article 110 (2) (a) or (b) which is applicable to the premises to which the application relates, that the grant of the permit will not contravene that resolution; and
>
> (b) that the applicant is a fit person to hold an amusement permit; and
>
> (c) that the applicant will not allow the business proposed to be carried on under the amusement permit to be managed by, or carried on for the benefit of, a person other than the applicant who would himself be refused the grant of an amusement permit; and
>
> (d) [repealed]
>
> (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.'

[5] Notably –

(i) There is no statutory obligation requiring the decision maker to consider the effect of a grant of a permit on the surrounding neighbourhood;

(ii) There is no provision requiring the decision maker to consider the issue of adequacy of demand for premises of this type in the locality – a requirement commonly found in other licencing schemes.

The Respondent's Policy

[6] The respondent on or about 1 May 2013 put in place what it describes as its Amusement Permit Policy ('the policy'). It runs to some 15 pages. This notes that applicants for permits are normally required to first obtain planning permission for an amusement arcade before applying for an amusement permit. The policy is described as designed 'to serve as a guide for Elected Members, Council officers, applicants and the wider public on applications for amusement permits in the Belfast City Council area'. The idea behind the policy is to introduce greater clarity, transparency and consistency to the decision making process.

[7] The policy notes that the ground it occupies overlaps in terms of many of the issues, such as location, structure, character and effect on neighbours, with planning considerations. While the council would be slow to differ from the views of the planning authority, it was entitled to do so and was not bound to accept the decision of the authority. The policy outlines five criteria which the council will typically consider when assessing the suitability of a location for a proposed amusement arcade. Nonetheless, it is indicated that the council will take into account any matter which it deems relevant. Moreover, it is stated in the policy that '[t]he Council may also depart from the policy where it appears appropriate or necessary, although it is envisaged that this will only happen in exceptional circumstances'.

[8] The objectives of the policy are stated to be to:

'1. Promote the retail vibrancy and regeneration of Belfast.

2. Enhance the tourism and cultural appeal of Belfast by protecting the image and built heritage.

3. Support and safeguard residential communities in Belfast.

4. Protect children and vulnerable persons from being harmed or exploited by gambling.

5. Respect the need to prevent gambling from being a source of crime and disorder.'

[9] To meet the above objectives the Council when determining applications will assess each application on its own merits. However, in particular, regard will be had to the legal requirements of the 1985 Order. Four matters in this connection are referred to in the policy. The first encompasses the character, reputation and financial standing of the applicant. The second relates to the nature of the premises and the activity proposed. The third involves consideration of the opinion of the police. The fourth requires consideration of the submissions from the general public. Under each of these heads, the policy contains passages dealing with justification and clarification. Unsurprisingly, the first factor has the aim of ensuring that players are protected from illegal or unscrupulous operators. As regards the second, specific reference is made to ensuring that the nature of the premises proposed is appropriate for the location in question. This is said to involve "careful consideration of the following matters: how premises are illuminated; the form of advertising and window display; and how notices are displayed on the premises". The aim is to ensure that the premises do not openly encourage gambling. In relation to the third factor, the view of the police is said to command significant weight both as to the assessment of the

applicant and as to the location of the premises. The suitability of the area for an amusement arcade is expressly a matter on which the police view is to be ascertained. It is envisaged that the police opinion would be expressed by the completion of a short questionnaire on the applicant and the premises. Taking into account the views of the public, the fourth factor, is said to be consonant with the process of advertising the receipt of applications in the press with a view to enabling those who wish to respond to do so. Reference is made to the council carefully considering submissions received, 'from neighbouring properties … residents, businesses or any other interested party'.

[10] The criteria for assessing the suitability of a location are, under the policy, five-fold. The following will typically be used in the assessment:

(a) The impact on the retail vitality and viability of Belfast City.

(b) The cumulative build-up of amusement arcades in a particular location.

(c) The impact on the image and profile of Belfast.

(d) The proximity to residential use.

(e) The proximity to schools, youth centres and residential institutions for vulnerable people.

[11] Each of the above criteria is in the policy explained in more detail. Applications affecting the retail vitality and viability of Belfast City Centre are subject to strict control. It is unnecessary to say more about this as neither of the applications with which the court is concerned fall into this category. Under the heading of cumulative build-up, it is stated that 'the Council will limit the number of amusement permits it grants to one per shopping or commercial frontage and one per shopping centre'. This is reinforced by the statement in the policy that 'where this number of permits has already been granted, or exceeded, no more amusement permits will be

considered'. By way of justification and/or clarification, the policy indicates that as the council wish to promote retailing, it is anxious to avoid a cumulative build-up or clustering of amusement arcades in a particular location. Some definition is given in the policy as to what a shopping or commercial frontage amounts to. It can, the policy explains, be defined as 'a group of mainly ground-floor businesses that shares a continuous frontage and which is usually separated from other frontages by a different road or street name'. Reference is also made to a Planning Guidance Note DCAN 1 which refers to the need to consider the cumulative impact in terms of taking into account the effect of large numbers on the character of the neighbourhood as well as to PPS 5 on Retailing and Town Centres which refers to a requirement to avoid a 'clustering' of non-retail uses. The other three criteria in the list above are all largely self-explanatory. Under (c) *supra* it is stated that amusement permits would not be granted at locations that are regarded as tourism assets or as gateway locations in Belfast City Centre. In respect of (d) in the list reference is made to the council seeking to prevent amusement arcades opening in predominantly residential areas. Finally, as regards criterion (e), it is noted that the council believes that a precautionary approach is required in respect of applications made near locations where children, young persons and vulnerable people congregate.

[15] DCAN1 is a document which was promulgated by the Department of the Environment for Northern Ireland in 1983. It relates to the subject of Amusement Centres and provides planning advice and guidance. It consists of some 9 paragraphs. At paragraph 3 it refers to factors which call for consideration on a planning application for an amusement centre. The first factor mentioned is 'its effects on the amenity and character of its surroundings'. This is expanded on at paragraph 4 where reference is made to such effects which are described as diverse. The relevant passage goes on:

> 'They will usually depend on the location of the proposed amusement centre in relation to other development, its appearance, the kind of amusements to be provided, the noise likely to be produced and the hours of operation". Later in the same paragraph it is commented that "[i]n areas where one amusement centre may not be out of place, it would be permissible to take into account the effect of larger numbers on the character of a neighbourhood". At paragraph 5, in the context of towns where there is no provision for areas for amusement or entertainment, the advice note goes on "amusement centres are usually best sited in districts of mixed commercial development'."

Grounds of appeal

[9] The appellant's grounds of appeal are as follows:

[10] The principal ground of appeal was that the Council had been wrongly advised by officials and an expert retained by them as to the correct interpretation of the Council's policy to avoid cumulative build-up of amusement arcades in a particular location. The appellant contended that the Committee had been misled by being told that this criterion was complied with because: "there are no other amusement arcades on this commercial frontage". That was a report of Suzanne McCreesh, Senior Council Environmental Health Officer, dated 4 September 2013, (page 68, trial bundle 1) dealing with criterion 2 of the policy. It was contended that the Council had received such erroneous advice at both the Bradbury hearing and at the Botanic hearing.

[11] The judge saw that there was force in this application and concluded that the interpretation of the policy put forward by Oasis was the correct one i.e. that it could not be properly limited to a consideration of whether or not there was already an arcade on a commercial frontage. But he concluded at [91] that he was not persuaded "that it has been established on the balance of probability that the committee members failed to consider the case of the objector which was put to them in relation to the proliferation of permits and the accumulative build-up of permitted premises in the area. In the Bradbury case they had been addressed by a planning consultant. In the Botanic case they had been addressed by senior counsel. The court has no reason to believe that the members of the committee would either not have been interested in the submissions made to them or could not appreciate the

disadvantages which might arise in an area where the number of permits was proliferating. On the other hand it is not difficult to understand that the committee, while fully appreciating that in an area like this where there may exist evidence of a clustering of permits, might take the view that, in itself, this would not necessarily be fatal to an application for a further permit as the area may nonetheless be viewed as a mixed one not unsuitable for such activity. "

[12] With regard to the Botanic application only Oasis in its written skeleton argument emphasised the number of machines which were to be operated at the Botanic premises, if permitted. Oasis submitted that this issue of the numbers of the machines in a particular arcade was a material consideration, relevant to the decision of the Council but which had not been taken into account by it.

[13] Thirdly, and again relating only to the Botanic permission, Oasis contended that there had been procedural unfairness and bias in the hearing of the application in this regard on 6 October 2014. They were critical of a report which had been furnished to the Council. They said that their complaint of the unfitness of the application was not properly dealt with. The planning consultant was excluded from the meeting because they were only allowed three persons whereas five persons on behalf of the applicant were allowed into the hearing. Most importantly they complain that, contrary to a timetable which had been set up in advance the applicant, Hazeldene, had been permitted to produce "a whole series of surveillance reports" on a number of the objector's premises at the last minute. Oasis sought but was refused an adjournment on this ground. Other matters were not pursued before us.

[14] It is convenient to deal with these three issues separately. In the case of each the court has taken into account the submissions of the applicant and of the respondents and the judgment of the court below.

[15] The court must also take into account with regard to the Bradbury Place appeal the finding of the learned judge that there was delay on the part of the then objector, Oasis, which separately grounded a refusal of its judicial review application.

Cumulative impact

[16] A central thrust of the submissions of the appellant and Mr McCollum's skilful exegesis of the policy and history of the matter, was that the Committee took into account an erroneous understanding of one of their five key criteria. They failed, in his submission, to appreciate that they had to consider the cumulative impact of the number and scale of additional permissions for amusement arcades. To put it another way they unlawfully fettered their discretion because they were, wrongly, advised as to the proper application of the policy. Support for his contention is to be found at several places in the papers. The minutes of the Special

Licensing Committee meeting held on Monday 6 October 2014 are to be found at trial bundle 2 pages 166ff. The Report of Council officers to the Committee is set out in extenso in the minutes.

[17] That report correctly records at para 2.34 that the Council in determining applications for amusement permits may take into account planning considerations but should be slow to differ from the views of the planning authority. The report goes on to address the five criteria in the Council's own policy which fell to be applied by the Committee on behalf of the Council.
At 2.39 we find the following.

> "(b) Cumulative build-up of amusement arcades in a particular location: <u>there are no other amusement arcades on this commercial frontage</u>.
> *Complies with this criteria*." (sic) (emphasis added)

[18] The learned judge found at paragraphs [78] to [86] of his judgment that this was a misstatement of the policy. The presence or otherwise of another amusement arcade on a commercial frontage was a factor within assessing cumulative build-up but the reference to the Council was a strong one "which could be viewed as limiting criterion two and giving it a meaning restricting its application to the one per street frontage situation. The judge concluded that the policy, properly interpreted, required the issuing of the proliferation of permits and the effect of the same on the character and amenity of area to be more broadly considered.

[19] Having made that finding the judge proceeded to consider "whether the cumulative build up in the sense referred to by the court was considered by the respondent in these cases". It is not now in dispute that the judge's view of the policy was correct. He was therefore required to consider whether the Council had been alerted to a correct view out of one of its own five criteria.

[20] He proceeded to consider that at paragraphs [87] to [91] and concluded that the court had not been persuaded on the balance of probabilities "that the Committee members failed to consider the case of the objector which was put to them in relation to the proliferation of permits and the accumulative build-up of permitted premises in the area".

[21] With great respect, however, what the judge did not do was consider the other side of the coin - whether the Council Committee had taken into account a wrong interpretation of its policy constituting an irrelevant or improper consideration.

[22] If we go back to the *fons et origo* of modern judicial review, *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 AER 680 one will

see that this is a necessary factor for the court to take into account. I quote from Lord Greene MR at page 682F:

> "When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.
>
> What, then, are those principles? They are perfectly well understood. The exercise of such discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. … For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."

[23] In this case we know that the Council was misled by its own advisers as to the meaning of one of its five key criteria. To lead to a quashing of the decision such an irrelevant consideration need not be the sole or dominant influence on the decision provided it is material and substantial: *De Smith Woolf and Jowell Judicial Review* 6-086 (1993): that is trite law. The correct question was not whether the Committee had also had the benefit, as the judge found, of the opinions of the planning consultant and the senior counsel acting for Oasis and the availability of location maps and

other information. The question was whether following the misleading opinion provided in writing to the Committee that was corrected at their meeting so that they correctly understood their own policy when they came to make a decision. As pointed out above the decision was not unanimous, certainly in the Botanic case.

[24] One therefore must look to see whether there was material to reach such a conclusion i.e. that the irrelevant and improper consideration had been excluded from their consideration as well as consideration given to the correct view of the policy advanced on behalf of the applicants.

[25] There is nothing in the judge's findings to justify such a conclusion. On the contrary he points out that the respondent did not in advance of the hearing before him file affidavit evidence, for example by the chairperson of the Committee, on the very point the court was now considering. Equally well he points out that the minutes of the respective meetings could have dealt with the issue but did not notwithstanding its obvious importance to the objector.

> "While the court has read the affidavits of Mr Hewitt and Mr Downey filed by the respondent in this case they do not deal in a substantial way with a deliberative stage of the decision-making process".

Given the judge's finding to that effect on a correct view of the law that is an end of the matter. He has found that an irrelevant and improper consideration i.e. the erroneous version of their policy recommended to them by their expert planner was put before them. It would be extraordinary if that did not carry weight with some or all of the Committee. They are, presumably, lay people in this regard and entitled, indeed obliged, to give weight to the expert advice they received. They were told, wrongly, that the cumulative impact criterion was met because there was no other arcade in the frontage. The judge did not find that there was evidence on the balance of probabilities that they had been disabused of that.

[26] We have taken into account the lucid submissions of Mr Scoffield QC for the Council. To a large extent they echoed the findings of the judge as summarised above and to be found in his judgment.

[27] One of the points relied on there is that the witness for Oasis, Ms Diana Thompson of MBA, a leading planning consultant correctly stated the law to them, as Mr McCollum QC did in the Botanic hearing. However one cannot expect the Council's Committee to have concluded that those two persons retained by the objector were right and the advice they themselves were getting from neutral officials and a planner was wrong. There would have really had to have been a minute, as the judge said, or an affidavit from the Committee to prove such a conclusion.

[28] A development control office's professional planning report was drawn to our attention, signed by Mr P Kelly, relating to this application. But it was disputed that that report was before the Committee. Consequent to the hearing confirmation of what was before the Committee was sought. Initially the City Council offered to provide an affidavit setting that out. They then withdrew that offer. This court directed that it did require an affidavit verifying what was before the Committee at the two applications. Through some breakdown in communication this direction was not actually complied with until Ms Nora Largey, on behalf of the City Council, swore an affidavit received by the court on 14 June 2018. It then transpired that the control officer's report included in the papers before the Committee related to a completely different application at 22 Shaftesbury Square. The report by P Kelly (which did not repeat the error about cumulative impact) was not before the Committee. Mr Scoffield also sought to rely on the affidavit of Dr Tony Quinn, of Braniff Associates, a planning consultant who was advising the Council. He admits at paragraph 15 that, as recorded in the minutes, the way in which he approached it was to deal with the restriction of one arcade per commercial frontage or shopping centre. At paragraph 19 he asserts that cumulative build up "was considered within the context of all the criteria stated in the permit policy, together with other considerations brought before the Council, including those raised by objectors".

[29] The need for wider consideration partly stems from the Department's advice note DCAN1. At paragraph 22 Dr Quinn says:

> "I do not accept that there is a requirement for me to specifically direct councillors of the Licensing Committee to the contents of an advice note prepared by and intended for use by the planning authority."

At paragraph 27 he says:

> "In my experience I have never encountered a situation when DOE planning restricted the number of amusement centres on the basis of concerns for cumulative build up."

It is clear therefore that Dr Quinn was not, at the time of the hearing before Maguire J, resiling from his earlier erroneous view of the Department's policy. He was defending it.

[31] The conclusion that the Council's officers had not resiled from their earlier erroneous presentation of the policy on cumulative impact is supported most graphically by the Council's own submission at first instance. At that stage they were still adhering to Dr Quinn's view of the policy. That is why the judge had to make a ruling on the matter. As Gillen LJ said *ex arguendo* the Council had undergone a Damascene conversion from its earlier misapprehension of its own

policy. But that did not take place between the time of the letter of Suzanne McCreesh or the statement of policy by Dr Quinn and the decision of each Committee. It only took place after the hearing at first instance. Neither the written submissions of counsel at that time nor the pre-trial correspondence made the case that was now being made to this Court of Appeal.

[32] It can be seen therefore that consistent with the judge's findings of fact but on a correct view of the law it is clear that this Committee were misdirected as to law by their own advisors and that misdirection was not resiled from by the time they made the decision.

[33] We will consider the appropriate remedy for this in due course.

Numbers of machines

[34] The second ground of appeal on behalf of Oasis has been outlined above i.e. that the Committee had not taken into account the number of machines to be operated at the Botanic premises. Oasis submitted that the number of machines was a material consideration. We consider this a well-founded submission. The impact on the character of location is bound to depend to a significant degree on the size and scale of a proposed new amusement arcade. A café or restaurant which wished to put 2 or 3 of these machines upstairs for the entertainment of some of their clientele would need to get a permit but they would be entitled to argue that this would have no impact on the character of the location. How can one say the same about the Hazeldene proposal here to make 240 such machines available at their Botanic Avenue premises? Mr Beattie QC for Hazeldene, with his customary good judgment and candour, did accept that such was the case. He acknowledged that the nature of the permit issued by the Council expressly provides a maximum number of machines to be permitted in an arcade. He further acknowledged that the Committee had not received advice from officials or experts on their behalf on this point.

[35] However, he was able to draw our attention to the minute of the meeting of 6 October 2014 dealing with his client's application. At page 180 of trial bundle 2 there is an extensive minute relating to his own submissions on behalf of his client to the Committee. In the concluding paragraph we find this:

> "In response to a number of questions from the Members, Mr Beattie confirmed that the amusement arcade would, if licensed, operate from 9.00 am to 11.30 pm from Monday to Saturday and from 12 noon to 11.30 pm on a Sunday. In terms of any reduction in the number of gaming machines, he pointed out that the allocation of 227 machines had been based upon the available floor space and that it would be unlikely

> that all of the machines would be in use at any one time. He added that, whilst the Police Service of Northern Ireland had objected to the number of gaming machines stipulated within the application for the Bingo Club Licence it offered no objection in relation to that proposed within the amusement arcade."

[36] Mr Beattie therefore submitted that it was clear that the Committee had actually considered this aspect of his client's application. The issue in law is whether the decision-maker failed to take into account a relevant consideration or took into account an irrelevant consideration. On the evidence here the Committee was alert to this factor. We therefore reject this ground of appeal on behalf of Oasis.

[37] The third ground of appeal have been set out at paragraph 13 above and relate to the issues of procedural fairness with regard to the meeting of 6 October 2014. We have considered the submissions of counsel with regard to this matter. Mr McCollum complained that he had not been granted an adjournment on one of several grounds set out in the minutes of the meeting at pages 167 and 168. One of those was that surveillance reports which had been submitted by Hazeldene had been accepted after the date stipulated by the Building Control Service. However, it is clear from the minute of the meeting that the Committee properly considered this application and refused it on the grounds that it did not attach any weight to the content of the late submissions of Hazeldene and that sufficient time had already elapsed and excessive time would be lost if the matter was adjourned. We agree with the learned judge's finding on this matter.

[38] Oasis complains that they were only permitted to have three persons present at the Committee hearing but an officer of the Council avers on affidavit that he was not aware that they had a fourth person and that there would not have been a difficulty about her attending either. At most this was a misunderstanding and not a ground for quashing the decision.

[39] It is important for a Committee to follow due process, particularly when they are acting in a quasi-judicial capacity as here. But we find no ground to differ from the judge's conclusion in favour of the City Council.

Delay in bringing judicial review of Bradbury Place permit

[40] On 13 January 2017 the judge refused leave to Oasis to bring an application for judicial review with regard to the Bradbury Place permit on the ground of delay. The application had been brought within three months but only two days before the three months provided by Order 53. The City Council and Mr McAteer's client contended that there was delay on the part of Oasis; the application was not brought promptly and no explanation for this delay had been given. The judge addressed

this at paragraphs 58 and 71 to 75 and 99 to 101 of the judgment. He took the view that the judicial review applications before him in the context of compliance with Order 53 Rule 4 should be viewed as analogous to such applications in respect of the grant of planning permissions. He accepted the citation to him of *Musgrave Retail Partners (NI) Limited Application* [2012] NIQB 109 and *In Re Wilson's Application* [1918] NI 415. It was implicit in his findings that promptitude was of particular importance between commercial rivals and in a situation of this kind. "If disputes of the nature of the Bradbury case are to be litigated by judicial review the court expects full compliance with the need to act promptly".

[41] We have taken into account Mr McCollum's submissions with regard to this issue but we are not persuaded that there is any error in the conclusion reached by the judge. In any event the issue of delay is one decided by a judge in the exercise of his discretion where this court will be loath to interfere. We therefore reject the appeal against the judge's finding in favour of the Bradbury place permit, notwithstanding that the issue of cumulative impact was put before the Committee of the Council wrongly by those advising the Committee. The judge's decision was consistent with that of Gillen J in *Re McDonnell* [2007] NIQB 125 and my own decision *In Re SK (A Minor)* [2017] NIQB 9.

Remedy

[42] Belfast City Council made a decision to grant an amusement permit to Hazeldene's application at Botanic Avenue on the basis set out in the report to the Council, that one of its five key criteria relating to cumulative impact was complied with because the application would lead to the only arcade on that particular shop frontage. It is now accepted that that is an erroneous interpretation of the Council's own policy.

[43] It bears, therefore, some close comparison with the facts of *In Re Barry Gilligan and Others* [2003] NICA 10. Carswell LCJ, delivering the judgment of this court, upheld the view of the judge that the interpretation of the policy by the decision-maker there was neither lawful nor reasonable. He concluded as follows:

> "We accordingly hold, as did the judge, that the Department has misinterpreted and misapplied its policy in an important respect. It was clearly a material part of the Department's consideration in giving planning permission for the development, and it could not be regarded as having been so tangential or peripheral that it would have made no difference to the outcome if it had been correctly approached."

[44] Applying that decision to the situation before this court it cannot be disputed that the cumulative policy was of importance as it was one of the five key criteria

identified by the Council itself. Again it could not be regarded as so tangential or peripheral that it made no difference to the outcome if it had been correctly approached. The Committee divided in this decision. Some members may have reached a different conclusion if they had been properly advised of the meaning of the policy by officials.

[45] The recent decision in the Court of Appeal in the *Department of Education v Cunningham* [2016] NICA 12 is relevant:

> "In the planning context, where very substantial sums of money may be at stake it is advisable to maintain a precautionary approach. The same might be said of public procurement. The price of probity is eternal vigilance. A test of 'substantial doubt', as formulated by Lord Brown on behalf of their Lordships is appropriate. No doubt that might also be appropriate in certain other situations. But this appeal is concerned principally with the allocation of resources: whether a very small school requiring enhanced subsidy be closed or could it be operated as an integrated school, where financial and economic considerations also play an important part."

In my view a licensing matter of this sort with commercial objectors is the sort of 'other situation' contemplated by this court where a precautionary approach is appropriate. This is not to suggest that there was any impropriety disclosed here. In fact there is no criticism of the Council's Committee here but only of the advice it received regarding a key policy.

[46] In all the circumstances we conclude that the proper course is to uphold the appeal of the appellant Oasis to the extent of quashing the decision of the City Council to grant a permit for the amusement facility at Botanic Avenue. In regard to the grant of permission for an amusement facility at Bradbury Place, as stated above, we uphold the decision of the judge.