Neutral Citation: [2017] NIQB 13 | *Ref:* **MAG10045**

Judgment: approved by the Court for handing down | *Delivered:* **13/01/2017**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY OASIS RETAIL SERVICES LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS MADE BY BELFAST CITY COUNCIL (LICENSING COMMITTEE) ON

19 MARCH 2014 GRANTING AN AMUSEMENT PERMIT TO BELFAST LEISURE COMPANY LTD AT 24-28 BRADBURY PLACE, BELFAST

6 OCTOBER 2014 GRANTING AN AMUSEMENT PERMIT TO HAZELDENE ENTERPRISES LTD FOR PREMISES AT 25-41 BOTANIC AVENUE, BELFAST

_____

MAGUIRE J

Introduction

[1] The applicant in the proceedings before the court is a limited company whose full title is "Oasis Retail Services Limited". It is in the business of owning and operating amusement arcades in Northern Ireland. This judicial review concerns a challenge by the applicant company ("the applicant") to two decisions of Belfast City Council's Licensing Committee ("the respondent"). These decisions involved the respondent granting amusement permits in respect of two different applications. The first related to an application by Belfast Leisure Ltd in respect of premises at 24-28 Bradbury Place, Belfast. The grant was made by the respondent on 19 March 2014. Hereinafter this grant will be referred to as "the Bradbury permission". The second related to an application by Hazeldene Enterprises Ltd in respect of premises at 25-41 Botanic Avenue, Belfast. The grant was made by the respondent on 6 October 2014. Hereinafter this grant will be referred to as "the Botanic permission".

[2] The application for judicial review made by the applicant in respect of the Bradbury permission was initiated on 17 June 2014. In contrast that made in respect of the Botanic permission was initiated on 27 October 2014.

[3] For reasons which are not entirely clear both cases have been listed together for hearing on a rolled up basis so that before the court is the issue of whether leave should be granted for judicial review in either case and, if leave is granted in either, whether the court should grant the relief sought. In these proceedings the applicant was represented by Mr Liam McCollum QC; the respondent was represented by Mr Scoffield QC and Ms Kiley BL; the first notice party was represented by Mr Philip McAteer BL; and the second notice party was represented by Mr Beattie QC.

Amusement Permits

[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.

[12] In respect of the policy, the respondent has filed an affidavit from Dr Tony Quinn who is the Planning Consultant engaged by it for the purpose of advising and preparing it. While the policy is there to speak for itself, the deponent has provided background information as to the circumstances of its creation and

adoption. Dr Quinn also notes that he advised on the Council on each of the applications which are before the court.

[13] The court has considered this affidavit in full but will draw attention, in particular, to those parts of it which provide elucidation of what Dr Quinn considers it means in respect of cumulative build up.

[14] The following points stand out:

- At paragraph 14 it is stated that the Council's Permit Policy generally considers it inappropriate to seek to determine how many amusement permits should be permitted in a given area.

- At paragraph 15 it is stated that the policy "considers the issue of cumulative build up in the context of its impact on retailing". Accordingly, "the Council seeks to prevent a clustering of amusement centres along a shopping frontage – hence the restriction of one per commercial frontage and one per shopping centre".

- At paragraph 26 it indicates that "the number of amusement centres that choose to locate in a particular area is a commercial decision by the operators".

- At paragraph 27 the deponent states that "with a view to introducing a degree of clarity and certainty for prospective applicants on how the Council views the issue of cumulative build up, the Permit Policy unequivocally states how many will be permitted along a commercial frontage. Hence the 'one per commercial frontage' component of the Permit Policy, far from encouraging proliferation and clustering of arcades, now introduces a layer of control which will help to prevent amusement centres from forming a cluster on a commercial block within the City Centre".

Development Control Advice Note (DCAN1)

[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".

The Bradbury permission

[16] As noted above the application for an amusements permit in respect of the above related to premises at 24-28 Bradbury Place, Belfast. These premises are close to premises of the judicial review applicant's at 1-7 Donegal Road and 14 Shaftesbury Square, Belfast and to one other permitted premises, as well as the Botanic Avenue premises in respect of which an application for an amusement permit was pending. The Bradbury Place premises had been used as a fast food outlet but on 23 September 2013 the Belfast Leisure Company Ltd ("the first notice party") obtained planning permission for a change of use of the premises to a coffee shop and amusement arcade. While this application for planning permission was advertised in the usual way the applicant appears not to have seen it. In this circumstance the applicant did not object to it.

[17] By the date of the consideration of the planning permission application, the Council's new Amusement Permit Policy had been introduced. In a consultation response to the Planning Service the Council's Building Control Service indicated to Planning Service that it had considered the application under the new policy and found that "the application complies with all assessment criteria for the suitability of the location as laid down in the…Council's Amusement Permit Policy". In the body of the response, each criterion was referred to individually and commented on in terms of compliance. The second criterion, as described in the response, was that "of cumulative build-up of amusement arcades in a particular location". Under this heading it was stated that "[t]here are no other amusement arcades on this commercial frontage. Complies with this criterion".

[18] The matter was then considered by the Development Control Officer in the Planning Service responsible for the application. In his report he referred to the assessment of policy and other material considerations. In terms of policy, he listed, *inter alia*, DCAN1. Referring to the issue of effects on amenity and character of its surroundings, he stated that "[t]he proposal is acceptable given its location along a commercial terrace". The district, he said, was predominantly a commercial area. Later in his report, he noted that amusement centres are best located in an area of mixed commercial development. He concluded that "[t]he amusement arcade will not affect the character of the area". The report also noted that Building Control had

offered no objections to the application. In these circumstances, his conclusion was that the scheme should receive planning permission. In the light of this, the Development Control Group also recommended approval.

[19] At or about the same time as the matter of the grant of planning permission was being considered within Planning Service, the Council's Town Planning Committee, in their role as a consultee, was also considering it. In advance of a meeting of the committee which was held on 19 September 2013 a briefing note was provided to the committee by the Head of Building Control. This outlined the background and referred to the aims of the new policy, reciting, in particular the five criteria for assessing the suitability of the location. Each of the five criteria were set out in this document taken, it would appear, from the consultation response provided by the Council to the Planning Service. As regards the second criterion the response cited above was repeated as was the conclusion. The briefing document recommended that the committee note that the proposed amusement arcade complied with the five assessment criteria in the policy and further recommended that this should be the committee's response to Planning Service.

[20] The Town Planning Committee met on 19 September 2013 and noted the position without comment.

[21] Against this background, planning permission was granted on 23 September 2013.

[22] On 15 November 2013 the first notice party then applied for an amusement permit from the respondent. This came to the attention of the applicant which duly lodged an in time objection to the application. The terms of this raised two grounds of objection. One related to the issue of the suitability of the first notice party to hold a permit (of which the court need say no more as this issue shortly afterwards faded away) while the other referred to the "significant number of premises/businesses with the benefit of amusement permits in the locality of the [first notice party's] premises". The objection went on the say that "as a consequence there is no need for an additional business of this nature". The respondent committee briefly considered the matter on 22 January 2014 and it was decided that there should be a hearing before the committee. This was later arranged for 19 March 2014.

[23] In advance of the meeting the committee members were provided with a substantial briefing note about the case from the head of Building Control. This set out in some detail the background. It noted that the application was for a total of 45 gaming machines each paying out a maximum cash prize of £25. Admission was to be restricted to persons aged over 18. A location map was provided. The objector's objection was summarised. It was noted that the police had no objection to the application. A copy of the planning approval was appended to the note. The members were told that they may take into account planning considerations but should be slow to differ from the views of the planning authority. It was also indicated that they could take into account such matters as location, structure, and

impact on neighbours and the surrounding area. The Amusement Permit Policy was summarised. The five locational criteria were set out and discussed in the same way as in previous documents. As far as criterion 2 was concerned the committee members were told exactly the same as was contained in the previous Building Control documents already referred to above. As before, the briefing recommended that the application complied with all assessment criteria for the suitability of the location as laid down in the policy.

[24] At the meeting on 19 March 2014 a variety of persons attended. On behalf of the applicant a director of the company, Mr Trimble, a solicitor acting on behalf of the company, Kirsty Mairs, and a planning consultant, Diana Thompson were present. The first notice party was represented by a Mr McCausland and by a solicitor, a Mr O'Hare. The Head of Building Control was also present as was Dr Quinn, who was there, it seems, to assist the committee with the policy. The committee was addressed by most of the above and, in addition, the committee had been provided with copies of the various written submissions. On the second day of the judicial review hearing it emerged that the committee had also been provided with photographs and maps relating to the application. In particular, one of the maps provided details of the land uses in the area surrounding the application site. Another map located on it the presence in the local area of other permitted premises or premises where there was an application for a permit outstanding.

[25] While the minutes of the meeting provide a general summary of events at the hearing the court has also seen a speaking note of the submissions of Diana Thompson, the objector's expert planning consultant.

[26] This speaking note is of assistance in terms of defining the nature of the objector's objection. The core of the objection was clearly the second criterion (criterion (b)) within the list of 5 criteria dealing with the issue of location. Substantial portions of the text of this aspect of the policy were quoted by Ms Thompson, in particular, those portions dealing with cumulative build up, shopping or commercial frontages, the limit on the number of permits in respect of the issue just mentioned, and DCAN1 and what was said about it in the policy. Perhaps the key passages were as follows:

> "Oasis has read the Planning Officer's (sic) Case Officer report and cannot find any evidence that proliferation of amusement centres was considered, much less assessed. It follows that there was a clear failure to take into account a material consideration in the planning process. The licensing committee have the opportunity to fill that gap.
>
> The extent of the neighbourhood is not defined in DCAN1 but logically it must extend further than a 'single commercial frontage' which is the area that the Council

> Officer relies on to make her judgment that there is no cumulative build up in the area.
>
> The proliferation issue must be carefully assessed with this application, otherwise an undesirable precedent will be caused that will make it almost impossible to resist permit applications on commercial streets where there is no existing provision".

[27] The Building Control Manager's oral submission, as noted in the minutes of the meeting, said that the Planning Service had confirmed that it had, in assessing the application, taken into consideration its Development Control Advice Note 1 and was of the view that the this location complied with the Advice Note, in that it was situated in an area of mixed commercial use.

[28] Dr Quinn's contribution is also summarised in the minutes. He had indicated his view that the application complied with the five assessment criteria "in terms of … being situated within the greater City Centre area, being the only arcade on that commercial frontage and being situated away from residential properties, schools and youth centres". It is then noted that he reminded the committee that the purpose of Criterion 2 of the Policy was to promote retail vibrancy and to avoid a clustering of non-retail uses in the retail cores or in district centres.

[29] The court need not set out other contributions in this judgment as they were of a more general character and do not go the heart of the controversy in this case.

[30] Having heard the various submissions, the respondent decided to grant the first notice party's application. The minutes do not disclose any of the deliberations of the committee in the light of what it had heard at the hearing.

[31] In respect of the Bradbury permission the judicial review application seeks an order quashing the respondent's decision of 19 March 2014. The grounds on which such relief is sought can be crystallised as follows. Firstly, the decision is said to irrational. It is argued that the decision making process did not adequately assess or consider the issue of cumulative build-up and created an undesirable precedent. Second, it is alleged by the applicant that the respondent failed to take into account the effect of larger numbers of amusement arcades on the character of the neighbourhood. This was a material matter which the respondent failed to consider. Thirdly, the applicant impugned the Amusement Permit Policy if it was responsible for the above situation.

The Botanic Permission

[32] As noted above, the application relating to this permission was made to the respondent by Hazeldene Enterprises Limited ("the second notice party") on 25 April 2014. As in the case of the Bradbury application, the premises in question

are close geographically to the judicial review applicant's premises at 1-7 Donegal Road and 14 Shaftesbury Square, Belfast, as well as two other permitted premises. The Botanic Avenue premises for many years had been known as the "Arts Theatre". The second notice party had, before making its application to the Council, applied for planning permission for the use of the second floor of the premises as an amusement arcade. This put in train the usual process for considering such applications. Consultation responses were sought, *inter alia*, from the City Council and the application was advertised. A response was received from the Council dated 29 November 2013. Among the matters dealt with in it was the compliance of the application with the Council's Amusement Permit Policy and, in particular, with the five criteria for assessing the suitability of the location. As in the Bradbury case, the author addressed each of the criteria in turn. In respect of criterion (b) cumulative build-up of amusement arcades in a particular location, the letter stated that "[t]here are no other amusement arcades on this commercial frontage. Complies with this criterion".

[33] A number of objections were received in respect of the application. One of these came from the present applicant for judicial review. This objection raised several issues, one of which was that relating to the build-up of permits in the area. Another objector raised the same issue. This objection came from a group called "Action for Community Transformation". When the matter came to be considered by the Development Control Officer for the purpose of the compilation of a report by him on the application, he considered all of the information which the application had generated. The report produced by him was detailed and addressed a range of issues and objections. The issue the court is concerned with is that of cumulative build-up of permits. In respect of this, the author, referring to the latter's objection, said:

> "I assume that the writer is making a point of proliferation of arcades within the local area. This particular point is covered within the consultation response of Belfast City Council Building Control section. They indicate that there is no other arcade within the commercial frontage in this location and was therefore satisfied with the proposal".

[34] The matter is then left and the author went on to consider other issues. When he discussed the applicant's objections he returned to the issue towards the end of his report. He dealt with it in the following way:

> "The final point relates to proliferation of arcades in this area. DCAN1 speaks of it being permissible to take into account the effect of larger numbers of arcades on the character of a neighbourhood. However, it is silent on the specific numbers and distances between such premises. The objector speaks of other centres within

> 160m and 320m of the proposed site. However, it is my opinion and that of Building Control, when they spoke of cumulative build-up of arcades that the distances between the site and other similar businesses are significant to ensure that there is no proliferation of arcades in the immediate area".

[35] In his recommendation, the Development Control Officer said that the application should be approved.

[36] The matter then came before the Development Control Group which met on 14 January 2014. The recommendation was approved and the group concluded that the proposal was in compliance with policy, including DCAN1.

[37] While the group on 11 March 2014 carried out a reconsideration of its decision, as a result of which it affirmed its earlier view, the issue of proliferation is no more than touched on without anything significant being said about it.

[38] In these circumstances a planning permission was granted on 25 March 2014.

[39] It was not long after the receipt of planning permission that the second notice party made its application to the respondent for an amusement permit in respect of the Botanic premises. Its publication in local newspapers attracted an objection from the applicant but otherwise there were no objectors. The applicant was informed by the respondent that if it wished to submit any documents in support of its objection it should do so before 24 September 2014. This timetable was adhered to by the applicant. A substantial volume of material was filed. The applicant's objection, in substance, was two-pronged: first of all, it questioned the suitability of the second notice party to hold an amusement permit ("the fitness issue") and, secondly, it made the case that there were a significant number of premises which had the benefit of amusement permits in the locality of the subject application ("the proliferation issue"). This objection stated that "as a consequence, there is no need for an additional business of this nature".

[40] The respondent set a date, 6 October 2014, for the hearing of the application. By this date the judicial review proceedings involving the Bradbury permission had been begun and were awaiting a leave hearing before this court.

[41] Very shortly before the date of the hearing the second notice party filed a substantial volume of documentation of its own mostly directed to the issue of the fitness of the applicant for judicial review (Oasis) to hold an amusement permit.

[42] In view of these developments Oasis at the last moment applied administratively to the respondent for an adjournment of the proceedings but was told that it would have to make its application on the day of the hearing. On the day of the hearing the parties assembled with their legal representatives and

Mr McCollum QC made the applicant's application for an adjournment because of the upcoming judicial review leave application and the late receipt of materials from the second notice party which he indicated his client needed time to consider. Mr Beattie QC for the second notice party resisted this application. Notably, on the issue of the importance of the new material his client has only just filed, Mr Beattie accepted that the issue of the objector's fitness was not relevant to the resolution of the second notice party's substantive application.

[43] The respondent committee determined that the application should proceed to hearing. It took the view that to delay the hearing because of the judicial review in the Bradbury case might create prejudice to the second notice party and on the issue of the late receipt of documents it held that it would attach no weight to them.

[44] As in the Bradbury case, prior to the hearing, the respondent had been provided with a substantial briefing document from the Building Control Service which provided a summary of the case and included relevant background information. The application, it was noted, concerned 227 gaming machines each of which had a maximum case prize of £25. Only those who were 18 or over could gain admission to the premises. The objection of the objector was summarised. The written material relating to the objection was provided to the committee. As noted in the earlier case, photographs and maps were provided by officials which identified the premises in question. A map depicting land uses in the area and a map showing the location of existing permits and applications for permits yet to be determined were provided. The applicant's premises at Donegal Road and Shaftesbury Square were marked on the latter map.

[45] The briefing note set out the police view of the application. The police stance was one of no objection to the application. The police said they were not aware of any criminal convictions in the last 20 years which could affect the case. One of the directors of the applicant company had received fines and an absolute discharge before that date. The police were not in possession of complaints regarding the applicant for the permit and had not been called to any incidents at the premises involving the applicant.

[46] A section of the briefing document dealt with the Amusement Permit Policy of the respondent. Its objectives were summarised and each of the five criteria dealing with location was commented on. As regards cumulative build-up, it was noted that there were no other amusement arcades on the commercial frontage. There was compliance, the briefing document said, with this criterion. The conclusion, as regards the policy, was that the application complied with all the assessment criteria for the suitability of the location.

[47] The briefing document indicated to the committee that the application must be refused unless the respondent was satisfied that the applicant for the permit was a fit person to hold an amusement permit.

[48] The course of the substantive hearing can be traced from the minutes of the meeting. It is clear that Mr McCollum for the judicial review applicant raised with the committee the proliferation issue and the impact of a build-up of permits on the character and amenity of the area. As regards the fitness issue, he appears simply to have indicated that his client's views had been set out in full in writing and he did not propose to repeat them.

[49] The minutes next refer to advice from Dr Quinn, the committee's adviser on the policy. He is noted as saying that the application complied with the five assessment criteria. There is no direct reference in the minutes to any response by him to Mr McCollum's client's argument on proliferation.

[50] The submissions of Mr Beattie for the second notice party were summarised in the minutes. While he engaged substantially with the fitness issue, there is no sign in the minutes of any submissions made by him on the proliferation issue.

[51] In the light of the hearing the committee determined to approve the application subject to a range of conditions which the court need not go into.

[52] The applicant's judicial review challenge in respect of the Botanic permission was initiated on 27 October 2014. It seeks from the court an order quashing the permit granted. The grounds on which such relief is sought can be crystallised as follows. Firstly, it is claimed that the decision of the respondent granting the permit was irrational in that the issue of cumulative build-up was not considered or assessed as it should have been. In addition, the decision made has created an undesirable precedent which would make it almost impossible for the respondent to resist further permit applications on any single commercial frontage where there is no existing provision. Secondly, it is alleged that the respondent failed to take into account the effect of larger numbers of amusement arcades on the character of the neighbourhood. Thirdly the applicant seeks to impugn the Amusement Permit Policy both in terms of its adoption and how subsequently it was deployed in the course of the decision making process. Fourthly, it is argued that there was procedural unfairness in the hearing of the application by the respondent in that at the last moment it is alleged that the committee allowed the second notice party to adduce a substantial volume of evidence of which the applicant had no or limited notice and refused to adjourn the proceedings to enable the applicant for judicial review to make a response. Fifthly, it is said by the applicant that the respondent completely ignored compelling evidence in relation to the fitness of the second notice party to hold a permit.

The submissions of the parties

The applicant

[53] For the applicant, Mr McCollum QC identified the central issue in each case as being concerned with the growth of "clustering" and "proliferation" of permits in

the one area. He said that in both cases there had been a cumulative build-up of permissions which the respondent failed to consider or assess. If the same had been considered and assessed, irresistibly the outcome would have been that the notice parties' applications would have been refused as in each case the applicant had already been operating amusement arcades only a little distance away from the respective application sites. Mr McCollum stressed that this point was not one about the inadequacy of demand. He accepted that this test was not part of the statutory scheme for amusement permits. Rather his case was based on a failure to give effect to the respondent's own policy which he submitted required the issue of cumulative build-up to be taken into account, which on the facts of the cases had not occurred.

[54] It was important, counsel submitted, that the purpose behind this crucial part of the policy was borne in mind. This purpose was related to the role of proliferation of permits leading to the diminishment in the amenity and character of a local area. There was a clear requirement for the respondent, he argued, to take the location of existing amusement arcades into account.

[55] In respect of the applicant's interpretation, Mr McCollum relied on the language of the policy and specifically on the references to the provisions of planning policy such as DCAN1 and PPS5. The policy imported these into the assessment as relevant and material sources which required to be considered.

[56] In respect of the second case before the court, in addition to the above submissions, it was alleged that there had been a failure by the respondent to deal with the issue raised by the applicant to the effect that there was evidence which showed that the second notice party was not a fit person to hold an amusement permit. In this context, Mr McCollum, while accepting that there was no issue about the applicant's fitness as it was an objector, argued that the second notice party's fitness had been placed very much in issue by material which his client had provided to the Council. This purported to show a lack of knowledge on the part of relevant staff related to the second notice party about the operation of gaming machines; allegedly unlawful betting opportunities being provided in related arcades; and alleged non-disclosure of a key person's involvement in other permitted premises. When making the decision impugned in these proceedings, counsel argued, the respondent had simply failed to deal with this issue.

The respondent

[57] Mr Scoffield QC for the respondent made the global claim that there had been no error in the respondent's approach to its decision making. He did, at the same time, make a number of specifically targeted submissions.

[58] Firstly, he argued that a time point arose in respect of the Bradbury permission. The respondent's decision in that case in favour of the first notice party had been made on 19 March 2014 but no judicial review challenge was mounted until 17 June 2014. In these circumstances, counsel argued that the case should be

treated in an analogous way to that which applied to challenges to planning permissions. It had been established that in that context speed was of the essence and this approach should also, Mr Scoffield argued, apply to a licence of this sort. In fact there had been substantial and unexplained delay in the mounting of the Bradbury judicial review. The challenge was not made promptly, as required by Order 53 Rule 4 of the Rules of the Court of Judicature. Indeed no application had been made until just 2 days before the outer limit of 3 months referred to in the rule. Contrary to the operation of well-established authorities in this area, there had been no attempt to justify or excuse such delays as had occurred. Indeed, the matter had not been addressed by the applicant on affidavit as would be usual. Nor had an extension of time been sought. Given these facts the court should dismiss the application on this basis alone as in a situation like the present which involves trade rivals competing for advantage the value of legal certainty should be the guiding light.

[59] Mr Scoffield also raised a second point about time, distinct from that just discussed. It related to what appeared, he said, to be an attack by the applicant on the respondent's policy. On a proper analysis, counsel argued that the real goal of the applicant was to hole the policy below the water line but such a challenge, it was submitted, should not be permitted by the court. The applicant had been well aware of the development of policy by the respondent. When the making of the policy became a matter for public consultation, the applicant had made a submission in that process. The applicant would have known the outcome in policy terms when it was settled in May 2013. Consequently the matter which the applicant wished to challenge had been settled by that date and time for such a challenge concomitantly would run from that date. Yet no challenge to the policy, counsel pointed out, took place until 17 June 2014 long after the time for prompt challenge and long after the period of 3 months as the outer period for challenge had expired. When the challenge came it did so in the guise of a challenge to a trade rival's successful application for an amusement permit. The case therefore was one of fatal delay and any challenge to the policy of the respondent should be ruled out on this basis.

[60] Thirdly, Mr Scoffield argued that the main challenge in the two cases was one based on irrationally of the outcome in each case. In this area, counsel advocated that the court should adopt no more than a light touch form of review as this was appropriate to the nature of the subject matter under consideration which very much depended on an assessment of local issues by a local authority decision maker which had evident expertise and experience of the sort of issue concerned. Indeed, Mr Scoffield went further and also argued that the court should, in evaluating the correct approach for it to take, bear in mind that the respondent's decision makers were democratically elected councillors answerable to the local electorate. For this reason too, a wide latitude should be afforded by the court to the respondent and the court should only intervene if a clear breach of public law principles could be identified.

[61] Fourthly, in respect of the issue of cumulative build-up, it was counsel's submission that the applicant had wrongly identified the case as one involving simply keeping the number of permits down. This was not the respondent's view of the situation. The policy was not about protecting the interests of existing permit holders or restricting competition. Rather it was concerned with promoting retailing. The respondent, Mr Scoffield reminded the court, could not bring into the equation the issue of need, as the 1985 statutory scheme had advertently left that concept out, as the court in the case of Re O'Connor's Application [1991] NI 77 had confirmed. While the issue of the character of the area was initially one for the planning authority to consider, and the respondent was not obliged to consider it in view of this, he accepted that DCAN1 and PPS 5 were relevant. In his submission, the councillors had considered this aspect and it was plain that the councillors had before them more than sufficient information to identify the presence of other potential or actual permit holders and the pattern of land use in the area in question. The issue of whether the area would be damaged by the grant of the permits at issue and as to whether the character or amenity of the area would suffer was well before them and clearly did not deter them from reaching the decisions they reached.

[62] Fifthly, it was the consistent argument of the respondent that it was important for the court to read the policy as a whole. Such an approach, it was suggested, would quiet concerns that the character of the area was left unaddressed in the policy. The suitability of the area as a location for the grant of permits could be traced through the various factors and criteria highlighted in the policy. It was accepted that nonetheless a premium was placed on a consideration of the issue of continuous shop frontages as defined in the policy. Shop frontages were attractive to shoppers whereas the presence of amusement arcades could create less appealing facades. Hence there was a need for control and a measure of strictness about the presence of this form of development in the City Centre or beside tourist attractions or in proliferation or in proximity to established residential usages. However, there was no reason why amusement arcades should be viewed as out of place in non-residential mixed areas, such as that at issue in the present case. A general rule that there be only one per commercial frontage as that was defined was not unreasonable.

[63] Sixthly, Mr Scoffield argued that the use of particular words in the policy drafted in strong terms should not be regarded by the court as establishing that the policy should be read as unduly rigid or inflexible. This argument, counsel noted, had not been advanced by the applicant and in these circumstances it was argued that the court should not be astute to intervene. But, in any event, the court on careful analysis of the policy could see that the individual language of particular provisions had consistently to be tested against the liberal use of terminology which stressed that particular formulations were no more than a guide dealing with typical situations but without tying the hands of the respondent. The policy, it was suggested, was replete with references to the ability of the committee to deviate from it where it judged it appropriate to do so.

[64] Seventhly, counsel dealt with a procedural point which had been raised by the applicant in the context of the Botanic permission. In that case one issue which had arisen was in relation to the provision initially by the applicant but then later by the second notice party of evidence about each other's fitness to be a licence holder. The applicant's material had arrived just a few weeks before the hearing. It had been provided to the second notice party whose response to it had been received on the eve of the hearing. On the day of the hearing the respondent was placed in a difficult situation when the applicant indicated that it wished to respond to the material it has just received which had been submitted by the second notice party. An application that the hearing be adjourned for this purpose was made on the applicant's behalf. The committee decided, in Mr Scoffield's submission perfectly properly, to proceed with the hearing on the basis that it would not take into account the material which had been filed by the second notice party. Such material, in the committee's view, as it related to the fitness of an objector, was not necessary for the hearing. On this basis the hearing proceeded. This, counsel argued, was a perfectly lawful way for the respondent to have dealt with the situation and involved no procedural impropriety.

[65] Eighthly, Mr Scoffield submitted that there was no basis for any conclusion that in the Botanic case the respondent had failed to consider the material submitted by the applicant directed at the issue of the fitness of the second notice party to hold and operate an amusement permit. The material was before the committee and the committee had heard submissions about it. The police had not objected to the second notice party's application on fitness grounds. In these circumstances the committee plainly had concluded that there was no basis for impugning the applicant's fitness.

The Second Notice Party

[66] Mr Beattie QC appeared for the second notice party and his concern therefore was with the lawfulness of the Botanic permission. In these circumstances the major matter which he addressed related to the allegation that the respondent had failed to deal with the applicant for judicial review's argument presented to it that the second notice party was unfit to hold an amusement permit.

[67] Mr Beattie was at pains to point out that the allegation which had made against his client had not been ignored by the respondent. To demonstrate this he took the court to the minutes of the meeting of the committee on 6 October 2014 which contained a briefing document which had been supplied by officials to the committee members. From these materials, it was submitted that it was clear that the committee had been addressed by counsel for the second notice party and counsel for the judicial review applicant on the adjournment issue which is referred to above at paragraph [39]. Mr Beattie pointed out that at paragraph 2.3 of the briefing document there is reference to a summary of the objector's objection to the application. This contains a bullet point which makes clear that one of the grounds of objection was the issue of "the suitability of the applicant (the second notice

party)". It is then stated that "the objector has concerns with regards to the applicants ability to run the property having due regard to the Betting, Gaming, Lotteries and Amusements (NI) Order 1985". There then follows reference to the committee having been provided with the letter of objection and to clarification which had been sought on behalf of the committee in respect of the issue of suitability. At paragraph 2.11 and 2.12 of the same document there is then a summary of certain aspects of a previous application made by the second notice party in relation to a bingo club licence in respect of the first floor premises at the Botanic Avenue address. At paragraph 2.18 Mr Beattie drew attention to a summary of the materials in respect of the objection of the objector. It is noted at paragraph 2.19 that a copy of the objector's submission was provided to the committee. At paragraph 2.26 there is summary of the police view. The police offered no objection to the application and provided the following information:

> "1. They are not aware of any criminal convictions for the applicant. Mr Burns, a director for the company, has received two offences, which indicate fines and two further entries located have an absolute discharge. All are over 20 years old.
>
> 2. They are not in possession of complaints regarding the applicant to which statements have been recorded.
>
> 3. Police have not been called to any incidents at 25-41 Botanic Avenue in regards to this applicant.
>
> 4. They are not aware of an amusement permit application being made by the applicant for premises elsewhere before".

At paragraph 5.1 of the briefing document the committee was told that "the fitness of the applicant to hold a permit having regard to his character, reputation and financial standing" was something the committee must have regard to.

Later, it is indicated at paragraph 5.4 that the committee must refuse the application unless satisfied that the applicant is a fit person to hold an amusement permit.

[68] The Minutes of the meeting then contain references to the oral submissions of counsel for each party before them. Mr McCollum, who appeared for the objector, reminded the committee that his client objected to the fitness of the second notice party to hold an amusement permit. It is said then that counsel advised the committee that the objections had been set out in full in writing and that he did not propose to repeat them. Mr Beattie (who appeared before the committee for the second notice party) addressed the committee and his submissions on the fitness issue were summarised in the minutes. It is unnecessary to set these out here.

[69] Ultimately the committee granted the permit sought.

[70] In view of all of this Mr Beattie submitted to the court that it could not be maintained that the issue of fitness had been overlooked by the committee as it was abundantly clear that the matter was the subject of written advice and submissions before them. The weight the committee gave to individual factors was a matter for the committee. The judicial review applicant's complaint in this area that the issue was ignored or glossed over was unsustainable. Rather, in his submission, on a proper analysis, the applicant's complaint was that it simply disagreed with the outcome of the committee's consideration of the issue.

The First Notice Party

[71] Mr Philip McAteer BL appeared for the first notice party before the court. His concern was with the applicant's attack on the Bradbury permission. The major issue developed by counsel related to the argument (already opened to the court by Mr Scoffield and summarised above) that the judicial review application should be dismissed on grounds of delay.

[72] In the course of counsel's detailed submissions it was pointed out that the applicant could, if it had so wished, have challenged the grant of planning permission in respect of the Bradbury premises but had declined to do so. Rather it had let matters simply go on. Mr McAteer was strongly of the view that the issue of delay in a case like this was to be analysed in a materially similar way to that which applies in the context of planning applications. He relied on the case of Musgrave Retail Partners (NI) Ltd's Application [2012] NIQB 109 as authority supporting the correct approach to the issue of delay. In his submission, this case had many parallels with the present case with the result that the application for judicial review should be dismissed. Counsel also relied on In Re Wilson's Application [1989] NI 415 for support for the proposition that where there was delay in mounting a judicial review application it was for the applicant to provide a sufficient account for all periods of delay. This has not been done in this case, he commented.

[73] In addressing the issue of lack of promptitude Mr McAteer relied on the following factors:

(i) The application for judicial review was only made 2 days before the expiry of a period of 3 months from the date of the matter arising.

(ii) There could be no doubt that the applicant would have been aware of the outcome over an extensive period before any action was taken.

(iii) Throughout the applicant had the benefit of legal advice.

(iv) Prior to the decision of the committee the applicant was well aware of the precise issues before the committee and was aware of the earlier grant of planning permission and the grounds for that.

(v) The relevant points have also been the subject of written and oral submissions on the applicant's part before the respondent.

(vi) As the situation was one of commercial rivalry, the applicant had full knowledge that the taking of judicial review proceedings would adversely affect the commercial interests of the first notice party.

(vii) There was a special edge to the requirement of promptitude in circumstances where the applicant had chosen not to challenge the grant of planning permission.

[74] Counsel also submitted that this was not a case in which the court should entertain any argument to extend the time. No explanation for the delay had been given so that the court could not conclude that the delay was excusable. Insofar as it was suggested that the court should accept that time should be allowed for the applicant to take advice and to consider its options in the light of professional guidance this could not be at the expense of the well-established time limits in judicial review proceedings in this context. In any event, little time, it was submitted, would be needed for this purpose given the professional legal and planning advice available to the applicant throughout the development of events.

[75] In respect of competing public interests Mr McAteer relied on the value of legal certainty which was the factor which promoted the need for speed where an application for judicial review was in prospect. There was no true public interest involved in the court simply extending the time and letting the applicant proceed. Insofar as any public purpose might be served by the court's consideration of the issues arising from the respondent's policy, this could be catered for by the judicial review proceedings relating to the Botanic permission and there was no need whatsoever to permit the application against the Bradbury permission to proceed.

Legal Principles

[76] The relevant legal principles governing an application for judicial review are now well known and do not require recitation in every case. However, for the avoidance of doubt, the court considers there is some value in this case in a short recital of key principles relevant to this type of case.

[77] First of all, it is well established that the burden of proof to establish unlawful conduct by the respondent in an application of this sort rests with the applicant. Secondly, the role of the court in judicial review is supervisory only. In particular, the court is not concerned with the merits of the decision or decisions at issue. The court will not intervene unless a public law wrong has been established. Thirdly,

issues which concern the weight to be attributed to various factors in the decision making process will generally be for the decision maker and not the court, subject only to a rationality challenge. Fourthly, the parameters of the judicial review application will ordinarily be set by the pleaded case contained in the applicant's Order 53 Statement. Fifthly, it is for the decision maker to establish the intensity of the inquiry it undertakes, subject only to the criterion of Wednesbury unreasonableness. Consequently, the court should not intervene merely because it can be said that further inquiries could sensibly have been made. It is only if no reasonable authority could have been satisfied that it possessed the information necessary for its decision that the court could intervene.

The Issues

(i) Cumulative Build-up

[78] This is the central issue in these cases.

[79] It appears to the court that there are two sub-issues which the court must determine in order to reach a conclusion on this issue. The first is whether cumulative build up as it affects the amenity and character of a local area is a material factor in the context of the respondent's decision making process and the second is, if it is, whether in fact the respondent properly dealt with it in these cases.

[80] There could, it seems to the court, be no plausible dispute that the suitability of the location of premises for which an amusement permit is sought is a central factor to the respondent's consideration of any case before it for an amusement permit. It is obvious that some locations will be more appropriate for premises of this kind than others. It is therefore perfectly sensible for an authority such as the respondent dealing regularly with issues of this type to seek to give guidance about the sort of factors which commonly have to be considered.

[81] In the court's view, the issue of the proliferation of permits in a particular location and its impact on the character and amenity of the local area can easily be identified as a factor which would regularly arise. This is because there will be circumstances where one permit in a given area may be acceptable but a clustering of such permits in a given area may be deleterious to the character or amenity of the area. In the court's view, it is difficult to see how a local councillor sitting on a committee to determine whether or not to grant an amusement permit would not want to evaluate the state of play as regards the number and location of permitted premises in the subject area together with information about pending applications. To leave such a consideration out of account, it seems to the court, would mean that the application would not be being properly considered. If there are no other permits which fall to be considered then, no doubt, the focus will be on other aspects of suitability but, if there are other relevant licensed arcades either already in existence or in prospect, this surely raises for consideration the issue of actual or potential cumulative impact. Where this is so, it seems to the court, it is essential to

the function being performed that it be considered. Such a consideration does not mean that in circumstances where there is an impact on the character and amenity of the area it will follow that the application will not be granted. But it will mean that the issue needs to be addressed and is not overlooked. Where there are a number of amusement arcades within a small area this may not be inappropriate but in some cases the accumulated effect of a clustering of such premises may so take away from the character and amenity of an area that the application should be refused. This, the court hastens to say, does not in any way involve restoration of a needs test for an application of this sort. It is well settled that in respect of amusement permits the legislation advertently does not include such a test and the court makes clear that it does not regard what it is saying in respect of cumulative impact as being the reinstatement of need through a back door. In the court's mind, there is a clear distinction between the concepts of an applicant having to establish a need for a licenced amusement arcade and that of a licensing committee considering how the character and amenity of an area is affected by a cumulative build-up of licensed premises.

[82] Unfortunately, it has to be said in this case that the distinction the court has just sought to make does not appear to have informed the objections of the applicant in either of the cases before it, as it is evident from the terms in which the objections in each case were cast that the applicant was wrongly of the belief that need had a part to play. The court makes clear that no such argument was made to the court by Mr McCollum in these proceedings and it is the court's understanding that Mr McCollum did not make any such argument when he appeared before the Council's committee.

[83] An important aspect of this issue is whether the Council's policy has failed to treat the cumulative impact issue in the way described as a material issue. This has given the court some concern as there appears to be a degree of uncertainty in the policy about this.

[84] The court has carefully considered the terms of the policy. At least in respect of this aspect of the matter the policy, in the court's eyes, could have been better drafted. However, notwithstanding this, the court is inclined to the view that the language of the policy does treat the issue as a material one. The court reaches this conclusion because:

(i) The passage at the bottom of page 2 and the top of page 3 speaks of the overlap with planning law in relation to various issues including "location, structure, character and impact on neighbours and the surrounding area". This sentence is written against the background that there is no dispute that the relevant planning guidance is DCAN1 and this guidance, in the court's view, clearly alludes to the issue of cumulative impact on the character and amenity of an area as being one which can be taken into account. It seems to the court to be inconceivable that the author of the policy was unaware of this especially as the policy goes on to say that the "policy is framed to be broadly

consistent with regional planning guidance on amusement arcades". Moreover, the policy also refers to it being "tailored to take into account local considerations particular to Belfast, including the location of existing amusement arcades".

(ii) It is evident from page 6 of the policy that the police's opinion is being sought *inter alia* on the issue of the location of the premises.

(iii) The involvement of the general public, also referred to at page 6 of the policy, speaks about the need to take into account the views of neighbours, residents, businesses and other interested parties. These views would not commonly be about whether there is or is not a street frontage which is absent a permit and more likely would be concerned with the suitability of the arcade in the area in question, an aspect of which could be the issue of cumulative build up.

(iv) The language in which criterion 2 at page 6 is expressed "Cumulative build-up of amusement arcades in a particular location" suggests that the matter under consideration is a material matter in the context of the policy.

(v) At the bottom of page 7 and the top of page 8 there appear to be conflicting messages provided in respect of what criterion 2 refers to. However, the language deployed in the second paragraph of the justification and clarification found at page 8 suggests strongly, by its explicit references to DCAN 1, that to take into account the effect of larger numbers on the character of a neighbourhood is a relevant factor within the policy.

[85] At the same time as drawing attention to the above matters the court acknowledges that, especially in relation to the last matter ((v) in the list above), an alternative view may be tenable. Under this view, it appears that the emphasis is on the shop frontage provisions and the test to be applied. The court accepts that the reference to the Council limiting the number of amusement permits it grants to one per shopping or commercial frontage is a strong one, which could be viewed as limiting criterion 2 and giving it a meaning restricting its application to the one per street frontage situation.

[86] On this aspect of the case the court concludes that the issue of the proliferation of permits and the effect of same on the character and amenity of the area is a material factor which is catered for within the policy. If, contrary to this opinion, the better view should be that the policy does not cater for it, the position would then, in the court's view, be that the policy would be likely to be defective.

[87] In these circumstances the court will now consider whether the cumulative build up in the sense referred to by the court was considered by the respondent in these cases.

[88] On this issue the burden of proof rests squarely on the applicant and, it seems to the court, the right approach is to have regard to the full range of materials in reaching a conclusion. The absence of a direct reference to this issue, for example in the context of the committee's deliberation on the application, should not be treated, by itself, as establishing that the members of the committee neglected to consider the issue, especially if there were materials available to the committee which dealt with the matter. In this regard, the court finds it difficult not to give weight to the fact that the committee in both cases had before them substantial information about the background to the applications including, and importantly, location maps which clearly indicated the land uses in the area together with the locations of already permitted premises and premises in respect of which a permit application was pending. The members therefore could see at a glance what the state of play in respect of permits in the area was. The committee members were also aware that the planning authority had already considered the matter which is information they were entitled to take into account, though on an issue of this sort it was for them to form their own judgment. Additionally, the court can take judicial notice of the fact that each of the applications related to an area of Belfast which would be well known to councillors and to those who reside in the city. Above all, the court must also factor in the undoubted fact that the committee members had the benefit of an extensive briefing paper as well as not just an oral hearing, in which the objector expressed its view, but also the provision of written materials provided in advance of the hearing. Against this background, the court has asked itself whether the applicant has been able to demonstrate that on the balance of probability the issue was ignored and left unassessed.

[89] The applicant's argument, in this area of the case, in effect, is that the committee members will have had their attention diverted from the question of the impact of cumulative build up and its effect on the character and amenity of the area by reason of the concentration that had been placed on the 'commercial frontage' issue *viz* whether the terms of the policy dealing with this aspect had been met. The court can see that such a possibility is not fanciful. Certainly, this issue is referred to in the briefing paper and in the course of the hearing the advice the committee received was that each of the applications was consistent with this policy. The question is whether the committee's consideration amounted to no more than an enquiry of fact – whether there were other amusement arcades on the relevant commercial frontage? On one view, if the answer to this question was that there were not, this would signal the end of the issue. In these circumstances the impact of clustering on the character and amenity of the area may become lost and go unconsidered.

[90] The court also bears in mind that there would have been no obstacle to the respondent in advance of the hearing filing affidavit evidence (for example, by the chairperson of the committee) on the very point the court is now considering showing that this matter was the subject of consideration by the committee and that it had concluded (if that be the case) that the character and amenity of the area was not unacceptably affected by the applications before it. Equally, the minutes of the

respective meetings could have dealt with the issue, instead of being silent on it, 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 the deliberative stage of the decision making process.

[91] The court's assessment is that it is 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 cumulative 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.

The claim that the policy is irrational

[92] In view of the conclusions the court has reached in respect of the matters discussed under the last heading this issue does not strictly arise as the court is of the view that the policy can be read as embracing the proliferation issue in the sense in which this issue has been discussed above.

[93] If the court is wrong in respect of the finding above, and as a result the policy excludes such consideration, in the court's opinion, this would be likely to lead to the conclusion that the policy is defective in this respect.

[94] The court makes it clear that the issue of whether or not the 'one permit per frontage' approach evidenced by the policy is unlawful did not form part of the challenge, as argued by Mr McCollum. In these circumstances the court will abstain from commenting on it save to observe that there may be circumstances where the respondent, in the light of this judgment, might have to ensure a lawful reconciliation between the adherence to this approach and the need to take into account the effect of a proliferation of permits in a local area which impacts on the character and amenity of an area.

The alleged failure to deal with the objector's case on fitness

[95] This claim arises in the Botanic permission case only. The applicant's claim was that the council completely ignored compelling evidence demonstrating the unfitness of the second notice party to hold an amusement permit.

[96] The court has already set out the factual claim and counterclaim as between the applicant and the second notice party in respect of this issue. In the court's opinion the allegation has not been proved and neglects the materials which Mr Beattie, for the second notice party, took the court through.

[97] There is simply insufficient evidence to demonstrate that the claim made by the applicant has been made out. On the contrary, the committee clearly was briefed about the issue and heard submissions from senior counsel for the second notice party and the now applicant for judicial review in respect of it. The respondent also was in receipt of information from the police about it. In these circumstances to allege that the matter was not addressed appears to conflict with the reality of the hearing before the committee. It seems to the court that the issue of the fitness of the second notice party to hold a permit must have been decided in favour of the second notice party. This is because it is plain that the committee were told that they had to make a decision on this issue and that no permit could be granted unless it reached a conclusion on it which favoured the second notice party. This is what most likely occurred. If this is correct, this ground of judicial review cannot be viewed as established. It is regrettable that the minutes of the meeting did not clearly record the facts that (a) the issue was considered by the committee and (b) that having considered it the committee decided the issue in the applicant for a permit's favour and rejected the objector's submissions to the contrary because, for example, it accepted the view of the police.

The failure to grant an adjournment

[98] This ground of judicial review also only applies to the Botanic permission case. The facts of the issue have sufficiently been set out above. The material lodged on the eve of the hearing by the second notice party about the objector, in the court's opinion, was perfectly properly viewed by the respondent as unnecessary as the issue of substance was the fitness of the second notice party, not the fitness of the objector. In these circumstances the court is unconvinced that the failure to grant an adjournment was legally wrong or had any materially significant consequence for the fairness of the proceedings.

Delay in the initiation of these proceedings

[99] This point arises on the submissions of the respondent and first notice party in the context of the Bradbury submission. The basis for those submissions has sufficiently been described above.

[100] The court is of the clear view that the current judicial review applications in the context of compliance with Order 53 Rule 4 should be viewed as analogous to judicial review applications in respect of the grant of planning permissions. Consequently, the approach taken by the courts in respect of planning judicial reviews should apply equally to a case of this type. This means that the approach of

the court in the Musgrave case, cited by Mr McAteer, can be applied to the present context.

[101] On this aspect the court finds the submissions of Mr Scoffield and Mr McAteer convincing. For the reasons put forward by Mr McAteer set out above, the court has no difficulty in reaching the conclusion that the application for judicial review in the Bradbury permission case was not made promptly. In the court's view there has been no convincing explanation advanced as to why this was and in the circumstances of this case the court sees no reason why it should extend the time for the making of the application. In particular, the court accepts that there would be no public interest to be served by the extension of time as the policy can be considered in the Botanic permission case in any event if in fact the substantive issues require ventilation. 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.

Delay in challenging the policy

[102] On the view the court has taken of this matter, the argument raised by Mr Scoffield on this point does not need to be finally determined. However, the court is minded to stress that a direct challenge to the terms of a newly arrived at policy should ordinarily be taken promptly with time running from the date when the policy is promulgated. This will apply particularly where the proposed applicant desires to question the legality of a policy which he, she or it has expressed opposition to in an accompanying consultation exercise. However, the court acknowledges that it is difficult to lay down hard and fast rules in this area as later events which involve the application of a policy to the direct detriment of a party because of the terms in which the policy has been devised may, at least in some circumstances, have the effect of starting the time clock for judicial review at the point when the deleterious effect is first felt. There may of course be other circumstances where a similar approach may have to be taken. Consequently, much will depend on the facts of each case.

Rigidity of Policy

[103] This issue does not arise in this case on the basis of the two Order 53 Statements and the arguments which have been made by the applicant in this case. In these circumstances it should not be thought that the failure of the court to address this issue should be regarded as an endorsement of the legality of the language used in the policy as a whole or of particular passages found within the policy.

Conclusion

[104] The court decides as follows:

(i) It will grant leave to apply for judicial review in respect of the Botanic permission in respect of the matters discussed above.

(ii) It will refuse leave to apply for judicial review in respect of the Bradbury permission on ground of delay.

(iii) It will dismiss the challenge to the Botanic permission. 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.

(iv) It will indicate that, even if it had granted leave in respect of the Bradbury permission in respect of any of the matters discussed above, it would substantively have decided the case in the same way as it has decided the Botanic case.

[105] While no challenge was made in these cases in respect of the failure of the respondent to give reasons for the decisions it has made (and the court therefore has refrained from considering this point at any length) the good sense which lies behind a decision maker outlining briefly how it has dealt with central issues about which it has heard argument is hard to gainsay, even in the case, as here, of a committee decision. A simple statement of explanation for its decisions might have avoided this litigation and, if it is practicable to do so, there may be much to be said for some alteration of what appears to be current practice.