Judicial review of decision of the Planning Appeals Commission - PPS1 and PP55 - precedent effect if permission granted for a change of use to comparison shopping retailing – whether impact of precedent properly considered.

Ref:	**GIRC4191**

Judgment: approved by the Court for handing down (subject to editorial corrections)	*Delivered:*

2004 No. 38

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY WINDSOR SECURITIES LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE PLANNING APPEALS COMMISSION DATED 17 DECEMBER 2003

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GIRVAN J

[1] On 23 January 1998 the Department of the Environment for Northern Ireland ("the Department") granted outline planning permission under Application U-1995-0285-0 permitting development of retail warehouse units on a site fronting Shore Road, Newtownabbey. The permission was subject to conditions one of which was that the gross floor space of the proposed retail warehousing should not exceed 40,000 sq ft and no individual unit should be less than 10,000 sq ft in gross floor space, the reason for that condition being expressed to be to control the scale and nature of the retailing activity to be carried on at the location so as not to prejudice the continuing viability of established commercial centres. By another condition (condition 5) the floor space comprised in retail warehousing should be used only for the retail sale and ancillary storage of items listed and for no other purpose. The items listed covered DIY materials, garden materials, furniture etc. and such items as the department determined fair within the category of bulky goods. The expressed reason for that condition was to control the nature, range and scale

of the commercial activity to be carried on at the location and to secure a satisfactory mix of land use.

[2] The site was developed with four 1,000 sq metre retail warehouse units and ancillary parking and was completed as a cost of about £4,000,000. However the retail warehouse units were not marketed successfully since they were built. In May 2002 consent was granted to change the use of unit 1 to a health and fitness club. The other continued to be marketed unsuccessfully and are still vacant. The applicant lodged an application with the Department in September 2002 seeking to vary condition 5 of the planning consent to allow an unrestricted range of non-food goods to be sold from the warehouse development. The purpose of the application was to widen the range of goods that could be sold at the remaining units so that it encompassed all non-food items. The Department failed to make a decision within two months of the lodging of the application and the applicant lodged a statutory appeal with the Planning Appeals Commission ("the Commission") in December 2002. A public hearing took place in June 2003, the hearing being before one the Commissioners, Mr Scott, who recommended that the condition should remain in place and that the appeal be dismissed. The Commission as a corporate body by its decision issued on 17 December 2003 dismissed the appeal.

The Commission's Reasoning

[3] The Commission concluded that the proposal represented a "major retail development" within the terms of Planning Policy Statement 5: Retailing in Town Centres (PPS5). Paragraph 39 of PPS5 indicates that town centres are the preferred location for major comparison shopping (the present proposal relating to "comparison shopping" within the meaning of the policy) and requires applicants to demonstrate that other potential town centre sites have been thoroughly assessed. Paragraph 39 states a presumption against comparison shopping in out-of-centre locations. The area of the subject site at Abbey Centre was an out-of-centre development. The proposal, in the view of the Commission "must satisfy the criteria set out in paragraph 39". There was no accessibility issues in the Commission's view and it also accepted the existing shopping provision would be enhanced. Criterion 1 of paragraph 39 was thus satisfied. Criterion 2 requires that the proposal should be unlikely to lead to a significant loss of investment in existing centres. Criterion 3 requires that the development should be unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping functions. The Department raised the issue of the precedent of a permission in this case in relation to other retail warehouses in the locality and referred to the consequent effects on Abbey Centre, other centres including Glengormley, schemes in the City Centre, Ballyclare and Carrickfergus. The Commission considered that while the impact of the proposals of itself was relatively limited on the evidence presented, the

Commission considered that the proposal would create a wide ranging precedent for retail warehousing floor space on a significant scale. In the Commission's view if consent was granted the proposal would be likely to lead to a loss of investment in existing centres as identified by the Department and to have an adverse effect on their vitality and viability. The decision of the Commission concluded:

> "The Commission finds that the proposal represents an out-of-centre development which is likely to lead to a significant loss of investment and to impact adversely on existing centres".

The Applicant's Challenge

[4] Mr Deeny QC (who did not appear before the Commission) argued that the Commission clearly misdirected itself when it expressed itself in the term "proposals must satisfy the criterion set out in paragraph 39". The Commission had, he said, fallen into the error considered by the Court of Appeal in *R v Belfast Chamber of Trade and Commerce* (the so called D5 decision) which made clear that the criteria set out in PPS5 are not mandatory, statutory requirements and that the decision maker must have regard to any countervailing factors which might call for the granting of permission. (It would also follow that they would have to have regard to any countervailing factors which might call for a refusal of permission even if the criterion themselves might be satisfied.) Mr Deeny argued that the decision indicated that the Commission as the relevant decision maker had concluded that if the criteria were not satisfied planning permission should be refused whereas they should have taken into account countervailing factors which included the fact that the building was built, it was merely a change of use that was being sought, it was a suitable land use, the proposal added to consumer choice and there were no objections.

[5] Counsel further argued that the tenth paragraph of the decision accepted that the impact of the proposal taken on its own was relatively limited and he argued that this was indeed an understatement in view of the fact that the retail impact evidence was that it was only 2%-4%. This was inconsistent with the conclusion in paragraph 12 that the development was likely to lead to a significant loss of investment and to impact adversely on existing centres. The Commission's reliance on precedent as being the factor that weighed against the application was, he argued, misconceived. This had the effect of requiring the applicant to establish that not only would the proposal itself not lead to significant loss of investment in other existing centres but also that nobody else would use it as a precedent in the future. Mr Deeny sought to rely on paragraph 59 of PPS1 (Planning Policy General Principles) which provides that the guiding principle is that development should be permitted having regard to the development plan and to all

material considerations unless the proposed development would cause "demonstrable" harm to interests of acknowledged importance. A speculative fear of precedent was not demonstrable harm, he argued.

[6] As the argument developed Mr Deeny argued that reliance on the danger of the precedent value of a permission failed to take accounts of paragraph 58 and 60 of PPS5.

[7] Paragraph 58 provides that:

> "In considering the impact of major retail development proposals on the vitality and viability of existing centres, the Department will consider the incremental effects of the new development on existing centres, where appropriate. The Department will also take into account the likely cumulative effects of recently completed retail developments and outstanding planning permissions for retail development where appropriate."

Paragraph 60 provides:

> "The Department will normally require that all applications for out of centre or out of town retail development over 1,000 sq metre gross retail floor space should be accompanied by information on its likely trading impact on existing centres including consideration of the cumulative effects of the proposal, recently completed retail developments and outstanding planning permissions for retail development where appropriate…"

If planning permission were granted here (which counsel argued it should be because taken on its own, apart from its precedent effect, the development was acceptable) the permission would not cause demonstrable harm because of the precedent value of the decision since in the event of any later application the Department was required to take into account the cumulative effect of that later proposal with the recently completed retail developments and outstanding planning permissions which would include the hypothetical permission granted in the present case. Accordingly the granting of permission here would not set a damaging precedent. A later applicant could be refused permission if his application taken with the existing retail developments and outstanding planning permissions would cause deleterious impact on existing centres. The Commission had not addressed the effect of paragraph 58 and 60 in relation to its reliance on precedent on this point.

[8] In resisting the applicant's case Mr Larkin QC relied on the affidavits of Ms Campbell, Deputy Chief Commissioner of the Commission, who presided in the Commission when it reached its determination. Her affidavit represent a robust defence of the decision reached and she expresses thinking behind the decision in a more forthright way than in the decision itself. In neither of her first two affidavits does she state in terms that her affidavit is made with the authority of each of the other Commissioners who participated in the decision making process. In paragraph 8 of her affidavit she states that the Commission found that the proposal failed to satisfy the second and third criteria of paragraph 39 of PPS5. The Commission acknowledged that a failure to satisfy one or more of the criteria of paragraph 39 would not necessarily lead to a rejection of a proposal but it considered the proposal's failure in respect of the second and third criteria against the general objectives of PPS5. In relation to the setting of a precedent she reiterated that if permission were granted this would amount to a precedent on a significant scale. Notwithstanding that it found the impact of the proposal itself to be relatively limited and a number of the criteria in paragraph 39 of PPS5 were satisfied the Commission took the precedent effect into account. In a second affidavit Ms Campbell stated that the Commission's decision on the issue of precedent were unambiguous. It found the effect of the proposal of itself would be relatively limited and therefore not harmful but the determining issue in the appeal was the extent and scale of the precedent that would be established if the proposal was granted.

[9] Mr Deeny QC argued that the Commission by the affidavit of Ms Campbell had gone beyond mere elucidation of its reasoning. In *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302 the Court of Appeal reviewed the authorities on the question of a decision maker seeking by affidavit evidence to amplify or extend its reasons for arriving at a particular decision. It is clear that in the words of Hutchinson LJ:

> "The court should at the very least be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise".

He went on to state that:

> "The court can, and in appropriate cases, should admit evidence to elucidate, or exceptionally, correct or add to the reason; but should consistently with Steyn J's observations in *ex parte Graham* be very cautious about doing so".

In the present case the first two affidavits of Ms Campbell add nothing of relevance to the decision in so far as the Commission sought to base its

decision on the precedent effect of the decision. In so far as the affidavit purports to state that the Commission was aware of a residual power to grant permission even if all the other criteria in paragraph 39 were satisfied but that the Commission had weighed the matter up and decided to reject the application the affidavit is not inconsistent with the decision. It seems apparent from the reasoning of the decision that the question of precedent weighed with the Commission and tipped the scales against the application. What appears to have led to the conclusion that the criteria were not satisfied was because of the impact of the precedent. If the decision in respect of the precedent is incorrect then the decision requires reconsideration. The dangers of a decision maker appearing to seek to give added strength to its decision is that the decision maker acquires the appearance of bias leading parties to conclude that it would not be capable of fairly reconsidering the matter if the court considered that the decision should be reviewed. That arises in this case. Since I am going to quash the decision for the reasons set out below I shall direct that a differently constituted quorum of the Commission reconsider the appeal in the light of this ruling.

[10] In the third affidavit dealing with the question of the effect of paragraphs 57 et seq in relation to the precedent issue Ms Campbell gave evidence which indicates that in the Commission's thinking the Commissioners took paragraph 57 et seq into account and construed those provisions in such a way that they made no difference to their view as to the impact of the precedent effect of the decision if planning permission were granted. For reasons set out below I am satisfied that the Commission misconstrued those provisions and accordingly failed to properly take into account those provisions in relation to the question of the application for planning permission. Mr Larkin argued that the applicants had not taken the point now argued by Mr Deeny in the present application and therefore it should not be able to rely on the point in the present application to judicially review the decision of the Planning Appeals Commission. Since however according to the affidavit of Ms Campbell the Commissioners were influenced by an erroneous interpretation of PPS 5 the decision makes clear that the decision-making process was flawed even if the point had not been specifically raised or argued by the applicant.

[11] In relation to the question of the precedent effect of a decision, in *Poundstretcher Limited v SSE* (1998) 3PLR69 at 74F, David Widdicombe QC sitting as a Deputy High Court Judge said that:

> "I accept Mr Hobson's proposition that where precedent is relied on, mere fear or generalised concern is not enough. There must be evidence in one form or another for the reliance on precedent. In some cases the facts may speak for themselves. For instance, in the common case of the rear extension of

> one of a row of terrace houses it may be obvious that other owners in the row are likely to want extensions if one is permitted. Another clear example is sporadic development in the county side."

Mr Deeny argued that in the present case all that could be relied on by the Commission and the Department to justify a refusal was a mere fear or generalised concern and there was no real evidence for reliance on precedent as a ground for refusal.

[12] If planning permission is granted in the present case for the proposed development other applicants in a similar position to the applicant seeking planning permission for similar developments will doubtless seek to call in that permission and support of their application. The question arises as to whether a planning permission in the present case (which taken on its own might be justified) should be refused because of this fear. Any subsequent applicant for planning permission would, however, face the implications raised by paragraphs 58 and 60 of PPS5 referred to above. Neither the Commission nor the single Commissioner in the decision properly considered the effect or implication of those provisions of the policy on the question of the precedent effect of a permission in the present case. It seems to me that paragraphs 58 and 60 of PPS5 must be taken into account when considering the question of the precedent effect. If the applicant has made out a case for permission taking his application on its own merits the permission will in itself present later applicants not so much with a precedent that assists them but an added hurdle which they must overcome if they are to succeed in their application. It would clearly be open to the Department (if a further application is made by another party following a permission in this case and relying on the fact that permission had been granted in this case to strengthen its argument) to seek to resist the application relying on para 58. As each succeeding application proceeds the hurdle facing later applicants become higher the more permissions are granted. Construing para 58 in this way means that the effect of the precedent value of a permission in the present case is different from the effect it appeared to have to the Commission on their reasoning.

[13] Inasmuch as the Commission failed to properly consider the impact of paragraphs 58 and 60 in relation to the precedent argument the decision requires to be reconsidered. Accordingly I shall quash the Commission's decision and remit the appeal to a Planning Appeals Commission for reconsideration in the light of this ruling. It will, of course, bear in mind the ruling of the Court of Appeal in the D5 case.