Neutral Citation No. [2014] NIQB 116 | *Ref:* **GIL9397**

Judgment: approved by the Court for handing down | *Delivered:* **10/10/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Leisure Arcades Ltd's Application [2014] NIQB 116

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

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

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GILLEN LJ

Summary

[1] This is an application for judicial review by Leisure Arcades Limited ("the applicant "and represented by Mr McHugh in these proceedings) of a provisional grant of an amusement permit in respect of premises at 38 William Street, Derry to Fortuna Enterprises Limited (the Notice Party) by the Derry City Council ("the Council"), at a special meeting of the Council's Environmental Services (Licensing) Committee ("the Committee") on 23 January 2014. Leave has been granted by Treacy J on 6 June 2014 at which hearing he had disposed of an objection that the application was out of time.

[2] The decision to make the grant was effected pursuant to the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (the 1985 Order)

[3] The applicant is a limited liability company that operates an amusement arcade at 15 William Street, Derry, operating there for 12 years without incident. It is the applicant's case that the granting of this permit would have a direct impact on its business.

[4] Mr McMillen QC appeared with Mr Henry on behalf of the applicant, Mr Sayers appeared on behalf of the Council and Mr Foster appeared on behalf of

the Notice Party Fortuna Enterprises Limited. I am grateful to counsel for their carefully drafted skeleton arguments well augmented by skilful oral submissions in front of me.

The statutory and regulatory framework

[5] The relevant provisions of the 1985 Order are as follows.

- Article 2(2) provides a definition of "premises" as "including any place" *tout court.*
- Article 111 provides, inter alia, for an application for an amusement permit for the purposes of Article 108(1)(ca) (amusement with prizes machines with a maximum prize value of £25). The present case concerns the provisional grant of an amusement permit for the purposes of Article 108(1)(ca).
- Article 111(3)(e) sets out one of the conditions for which a District Council shall refuse an application. By that provision it is required:

> "… 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."

- Article 113(1), under the heading "Provisional Grant of Amusement Permits" governs the present application dealing with situations where premises used wholly or mainly for the provision of amusements are about to be constructed, altered or extended etc.

[6] Where relevant the Amusement Permit (Prescribed Places) Regulations (Northern Ireland) 1986 provide at Regulation 2:

> "The premises in which gaming by means of a gaming machine in accordance with the conditions of Article 108 of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 is authorised by an amusement permit shall be:
>
> (a) Premises used wholly or mainly for the provision of amusements by means of gaming machines; or
>
> (b) Premises used wholly or mainly for the purposes of a pleasure fair consisting wholly or mainly of amusements."

[7]Where relevant, the Amusement Permit (Additional Grounds for Refusal) Regulations (Northern Ireland) 1993 requires public notice to be given by way of newspaper advertisement when applying for an amusement permit. Regulation 3 provides that:

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

[8] Whilst no opportunity to appear before the Council is required by the Regulations in respect of amusement permits, nonetheless Derry City Council website indicates that in such cases:

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

[9] The Council's Standing Orders require the councillors be given three days' notice of a meeting but no similar notice is provided for objectors.

The factual background

[10]It was clear that the planning permission which had been obtained for the premises at 38 William Street stipulated that the ground floor gaming area was restricted to 56.65 square metres and that the accompanying ground floor café area would occupy 65.66 square metres. The building comprises a ground floor and first floor which are included in the planning permission plans and a second floor which is not included in the plans.

[11] The applicant and other objectors became aware of the Notice Party's application for a permit from a newspaper notice in July 2013.

[12] The applicant instructed his solicitors to lodge a notice of objection to the application with the Derry City Council. At the same time a number of other interested groups wrote to the Council setting out objections to the grant.

[13] In August 2013 the applicant's then solicitor filed a written objection to the application for a permit with the Council.

[14] It is the applicant's case that no further progress occurred until 17 January 2014 when the applicant's solicitor received a letter dated 15 January 2014 from the Council stating that the Committee would meet on 23 January 2014 to consider the application for a permit. It is a major part of the applicant's contentions that the

short period of notice was unreasonable and should have led to an adjournment of the meeting.

[15] The applicant's solicitor forwarded the notification to Mr McHugh on behalf of the applicant on the afternoon of Friday 17 January 2014 but he did not apparently receive the e-mail until the morning of Monday 20 January 2014.

[16] Mr McHugh contends that after having regular contact with his solicitor during the course of the ensuing days, he understood that an adjournment of the hearing before the Council would be forthcoming.

[17] After a number of e-mails passing between the solicitor and the Council's Licensing Officer Mr Shaun Austin the latter informed the solicitor that an adjournment application could only be made at the meeting itself.

[18] It is Mr McHugh's contention that his solicitor advised him that Mr Austin would raise the adjournment request at the outset of the hearing before the Council. Paragraph 10 of the applicant's skeleton argument declares as follows "She also discussed the sort of matters that Mr McHugh could or should raise if an adjournment was not granted".

[19] Due to a pre-existing appointment, the solicitor for Mr McHugh was not able to attend the Council meeting. Accordingly Mr McHugh personally attended before the Committee on 23 January 2014. The issue of the adjournment was not raised at the outset by Mr Austin or Mr McHugh.

[20] Mr McHugh contends that during the course of the meeting he was approached by the Council's senior solicitor and asked if he was seeking an adjournment. The Committee then considered the application to adjourn but refused to do so and thereafter moved into private session where it voted in favour of granting the application.

The role of the applicant's former solicitor

[21]Understandably the current solicitors acting for the applicant had sought to obtain an explanation from his solicitor at the time as to her recollection of the events leading up to the meeting. Belatedly the court was furnished with a letter dated 25 September 2014 from that solicitor which made the following points:

- The applicant had presented himself as pessimistic regarding prospects of a successful objection and regarded himself as an outsider in an application process that he expressed as largely predetermined.

- The original objection had been stated briefly recognising that objections can take time to assemble and a further objection was likely to come at a later stage. The solicitor had advised Mr McHugh that he

should consider meeting with councillors and lobbying them to raise his concerns.

- The application process was "checked" during 2013 (although contact from Mr McHugh was limited).

- There was no further contact from the Council until the letter received on 17 January 2014.

- The practice in Belfast City Council is apparently that objections received within 28 days must be considered and the Council gives several weeks notice of meetings to allow timely arrangements to be made for representation.

- Upon notice being given of the committee meeting in this instance, the solicitor spoke to the licensing officer and was told he had become aware on 4 January 2014 of the decision to list the matter for hearing and "had no meaningful explanation why no steps were taken by him to notify the parties until letters were posted on 15 January 2014 … We vigorously asserted that the timeframe was wholly unreasonable."

- Mr McHugh "has inadvertently overlooked the fact that there were detailed discussions regarding the issue of alternative representation at the Council meeting when it became apparent that we were unable to act in the matter given the exceptionally short notice and an already existing longstanding prior commitment." Express discussion had taken place as to his option of instructing another firm and he was advised he might consider retaining the services of a solicitor local to Derry with knowledge of licensing matters and that a local representative could be important in presenting the matter to the councillors. "Mr McHugh declined to adopt this course and indicated that he would attend at the meeting along with numerous other unrepresented objectors".

- To assist him, the solicitor claimed that she had sent out an e-mail to Mr McHugh containing steps he should take to protect his position given that he had chosen this course of action.

[22] I pause to observe that Mr McMillen on behalf of his client took issue with certain of these assertions e.g. that an email of instructions was ever sent to him, making the point that this was a self-serving somewhat defensive letter drafted in light of certain perceived criticisms made of the solicitor at the review hearing .

The submissions of the parties

The applicant's contentions

[23] Mr McMillen submitted on behalf of the applicant:

- Whilst as a general proposition the Committee does have a discretion on the issue of adjournments, it failed to take into account the importance of the matter from the applicant's point of view and the dramatic effect upon its business, the complexity of the legal issues, the need for expert evidence on the matter e.g. a surveyor, the length of the inactivity between July 2013 and January 2014, the shortness of the notice and the consequent inability of the applicant to secure relevant documentation from the Notice Party.

- The Committee erroneously appeared to consider that it could only adjourn the meeting during the course of the formal hearing itself. This led to the applicant being placed in a situation where the request was considered at a stage when it was much less likely to be granted. i.e. when the meeting was well underway.

- The Council failed to consider all relevant matters on the adjournment e.g. the prejudice to the applicant, the complexity of the legal issues etc. In short the applicant was deprived of a fair hearing.

[24] On issue of the statutory requirements, Mr McMillen contended:

- The application for a permit must be for premises which are used *wholly or mainly* for the provision of amusements by means of gaming machines. In the event the application by the Notice Party was for the entirety of the premises at 38 William Street, Derry and was not confined to the ground floor area where the gaming machines were to be found .

- The report prepared for the Committee by the licensing officer Mr Austin, and which was the basis of its consideration, seemed wedded to the concept of "a gaming area" rather than the statutory test of "the premises" being wholly or mainly used for gaming

- The actual amusement permit, which was granted in the wake of the Committee decision, itself grants permission for premises at 38 William Street, Derry "being premises of the following kind, namely premises to be used wholly or mainly for the provisions of amusements by means of gaming machines "instead of being a grant merely for "the ground floor premises"

- In short the grant of the permit does not accord with the legislative requirements because the premises as described are not "wholly or mainly" used for the provision of gaming machines. Even if the ground floor area was taken as a whole, there was still no evidence before the Committee as to whether this area was to be mainly for gaming. What portion was to be used mainly as a café? What portion was to be used mainly for gaming? The Committee has relied on the applicant's statement in his application form that the premises were to be wholly or mainly for gaming and the plans attached to the planning permission application. There was no informed discussion of the statutory criteria.

- The Committee had been directed to consider the gaming area vis-à-vis the café area in deciding if the statutory test was met. Instead the gaming area should have been compared against the entirety of the premises which would include the first and second floors.

- The Council had failed to adequately consider the general vicinity in the context of whether or not there was an inadequacy of provision of gaming machines. Their attention seems to have been confined to William Street alone.

- The Council failed to take into account current policy with regard to the development of Derry city centre as a safe environment for children and young people to carry out a range of activities. There is nothing to suggest the Committee considered the premises in relation to its effect on the locality or the aspirations of the city.

The contentions of the respondent

[25] Mr Sayers made the following points on behalf of the respondent:

- There was no lack of adequate notice in this instance. The Council's Standing Order requires that councillors be given three days' notice of a meeting and that was observed. There is no statutory or regulatory requirement to permit persons who had made representations to attend a Council meeting and it follows that there is no such requirement to facilitate legal representation. Insofar as the Council's practice is that persons making representation will be given the opportunity to appear before the Council, that opportunity was given and availed of by Mr McHugh.

- Ample opportunity had been given to Mr McHugh to prepare his representations since notice was given publicly in July 2013. The applicant had filed a notice of intention to object by letter dated 6 August 2013 through its solicitor. The meeting on 23 January 2014 is

thus not the primary means by which representations were taken by the Council.

- At the Committee meeting on 23 January 2014, Mr McHugh was offered an opportunity to address the meeting but declined. There was before the court an affidavit from Mr Sean Carr, a councillor who was authorised by the Committee to make the affidavit on its behalf and which declared at paragraph 24:

> "I explained to Mr McHugh that the Committee was not acceding to the requests for an adjournment, and I asked him if he wished to make any representations on his own behalf. Mr McHugh indicated that he did not, as he believed that the points that he wished to make had been addressed by the objectors who had already spoken."

- Knowles on Local Authority Meetings (7th Edition, 2014) at paragraph 6.38 declares:

> "It is unquestionably bad practice to cancel or abandon or postpone any meeting once it has been validly convened."

- The application before the Committee was the subject of a detailed report from the licensing officer. He had drawn the attention of the Committee to the different uses proposed for the ground floor of the building. It was quite clear that the gaming area – distinct from the café in terms of use with the provision of toilet facilities for each and designed in a manner to facilitate control of entry to the gaming area – was the place in respect of which an amusement permit was sought and this place constituted premises required to satisfy Article 111(3)(e).

[26] On the issue of the definition of premises and propriety of the application itself Mr Sayers made the following points:

- Invoking R v Secretary of State, ex parte Anderson (QBD 14 October 1988), there was no reason why a room separately occupied should cease to be premises because it is contained within the structure of a larger building which is also premises. Mr Austin had addressed this in his report to the Committee.

- The Council had granted permission for the premises referred to by Mr Austin in the report prepared by him. It is this decision which is the subject of the current application.

Submissions on behalf of the Notice Party

[27] Mr Foster made the following submissions:

- "Premises" is conceptually a chameleon and there can be premises within premises. That is what has happened in this instance.

- There is a clear physical divide as shown on the planning approval map between the café area and the gaming area.

- The Notice Party had no right to be heard at the Council meeting and therefore they had no opportunity to meet any of the points raised by the objectors.

- Mr McHugh has made inadequate efforts to process his objection since July 2013. Moreover he made inadequate efforts to secure the presence of alternative lawyers for the hearing before the Committee.

Consideration

[28] I commence by reminding myself that the judicial review jurisdiction of the High Court is supervisory or "long stop" jurisdiction. It also has a large discretionary content which contributes to its value. (See R v Panel on Take-overs (1989) 1 All ER 509 at 526C.)

[29] As a general proposition, a decision of whether or not to adjourn a meeting convened by a Council is a matter for the exercise of discretion by that Council. This court will not intervene only on the ground that it thinks it would have reached a different decision. It must be satisfied that the Council, in the exercise of its discretion, was wrong in principle or, which is usually the same thing, that it resulted from a self-misdirection. (See R v Panel on Take-overs case at 526G).

[30] In my view it was not unfair, unjust or unreasonable for this Committee to adhere to the timetable that it fixed in this instance. Whilst the time between notice and hearing might have been longer (and this Council might take the opportunity to review the kind of notice given by other Councils in similar circumstances), it was not so short as to persuade this court that something has gone wrong of a nature and degree which requires the intervention of this court.

[31] The fact of the matter is that the applicant had been well aware of the application for a permit for several months, had retained the services of a solicitor who had already made representations to the Council and who had given Mr McHugh general advice, of which he had not availed, to meet with councillors to lobby his concerns.

[32] Moreover Mr McHugh had not availed of the opportunity (and indeed, according to his former solicitor, the legal advice) to engage alternative local solicitors. This was not a complicated matter in terms of the need to urge on the Committee the arguments pointing to the need for an adjournment. I am satisfied that a professional solicitor could have picked up the arguments both for an adjournment and the substantive objections in a short time. Other than to make some contact, according to Mr McMillen, with a solicitor in Belfast which was not replied to, I am not satisfied he made any other effort. If, which I doubt, he did assume that an adjournment would be granted, there was no reasonable foundation for such an assumption.

[33] In the event Mr McHugh was not deprived of the opportunity to address the Committee. He has not challenged the assertion by Mr Carr that having been afforded the opportunity to do so, he declined. I find this difficult to understand given the weight of the points made by Mr McMillen before me today in terms of the effect it would have on his business etc.

[34] This is not a case of an objector who was entirely at sea in such a forum. He had previous experience of applications for a permit (as far back as 2002) and presumably had encountered regular renewals pursuant to Article 115 of the 1985 Order. He had been party to a court case before Her Honour Judge Philpott QC in January 2005 when he had successfully appealed the refusal of an amusement permit for his premises at 15 William Street, Derry. At that hearing, there was discussion of matters such as adequacy and proximity, arguments which he wished to raise on the instant occasion.

[35] Moreover, as paragraph 10 of Mr McMillen's skeleton argument reveals, his solicitor had also discussed with him the sort of matters that he "could or should raise if an adjournment was not granted". To some extent this rhymes with the suggestion of that solicitor in the correspondence before me that she had set out in an e-mail steps he should take to protect his position.

[36]The principle of fairness should inform such Committee hearings. What fairness requires however will vary according to the nature of the proceedings. I see nothing unfair in the decision of the Committee to deal with the issue of adjournment at a stage other than the commencement. Not only is it a matter within the discretion of the Committee as to what procedures they adopt but it can readily be seen that it might have been advantageous to at least let the other objectors who were present raise their concerns before turning to Mr McHugh and dealing discretely with his desire for an adjournment at that stage.

[37] Similarly I find nothing unfair about a decision being taken that the question of an adjournment should be considered at the Committee meeting itself. Helpfully Mr Sayers drew my attention to Knowles on Local Authority Meetings (7th Edition, 2014) where at paragraph 6.38 it states:

> "It is doubtful whether a Council meeting, once convened, may properly be postponed in any circumstances: see Smith v Paringa Mines Ltd (1906), in which it was held in a company case that the postponement of a general meeting of shareholders was inoperative without special power to postpone being given by the regulations governing the meeting and therefore resolutions passed at a gathering of shareholders held in pursuance of the notice were valid and effective. It is unquestionably bad practice to cancel or abandon or postpone any meeting once it has been validly convened."

[38] Whilst the authority relied on by Knowles may be quite different factually from the instant case and is over 100 years old, the fact of the matter is that it is perfectly reasonable for a Council to conclude that an application for an adjournment should only be made when all the councillors are present and all the objectors who have been notified have turned up. I can find nothing inherently unreasonable in so concluding in individual cases or as a matter of general practice.

[39] I am satisfied that the decision was soundly reasoned. There was no material consideration which had not been drawn to the attention of the Committee in form or in substance.

- There was no criticism of the suitability or fitness of the Notice Party,
- The planning permission had been drawn to its attention,
- There was no objection by the only specified consultee the Police Service of Northern Ireland pursuant to Article 111(2) of the 1985 Order,
- Objectors(5 of the 9 who had objected appeared) were heard,
- Local councillors are well aware of the locality or vicinity of this application together with current policy re the development of the city. Indeed I note that one councillor had specifically raised the need to consider the fact that a number of businesses already existed within the area of a similar nature and that there should be no further need to increase that type of business with gambling machines to add to social problems which already existed. Hence I find no reason to suggest that the objector's case was not properly listened to or considered.
- The applicant was given an opportunity to dilate upon any ground of objection he wished to raise. He had been afforded months since the original application to assemble any expert evidence.

[40] I turn finally to consider the challenge to the grant of the permit on the basis of a breach of the statutory requirements regarding the premises.

[41] My opinion on this aspect of the case has been informed by an illuminating discussion of the issues in the decision of MacDermott LJ in R v Secretary of State ex parte Anderson cited above. In that case the applicant had sought to develop an

amusement arcade at the front of premises which had formerly been a snooker club within the terms of the 1985 Act and the 1986 Regulations. MacDermott LJ cited with approval the observations by Scrutton LJ in Frost v Caslon (1929) 2 KB 138 at 147 where he said:

> "In dealing with this point I can see no reason why a room separately occupied should cease to be premises because it is contained within the structures of a larger building which is also 'premises'."

[42] MacDermott LJ noted that nowhere in the relevant legislation is the word "premises" qualified by the adjective "separate" or any similar adjective. Courts should not underestimate the resonance of simple language. The purpose of this legislation providing for Amusement Permits is to ensure that this form of gaming is controlled, that reasonable standards of accommodation are provided and that permitted places can be subject to inspection and supervision by the police and Council. The law has a bias toward the rational .The concept of premises within premises is no impediment to this purpose.

[43] The order has defined premises in an extremely wide fashion and as MacDermott LJ said at page 3:

> "It would be quite wrong to seek to control the granting of such permits by any judicial definition. This is especially so when the means of control is to be found in Article 112(1) of the Order(*which permits the Council to ensure the permit holder makes appropriate alterations as the Council may specify to ensure that the premises are suitable)*.

[44] Hence, applying those principles to this case, I find no difficulty in the Committee concluding that the area of the ground floor to be used for gaming purposes was "premises" within the premises of the whole ground floor or the overall structure.

[45]That is precisely, in my view, the approach which the licensing officer adopted in his report to the Council. In particular at paragraph 3.1.3 of that report dealing with the "type of premises" the report stated:

> "The applicants have indicated that the premises are to be used wholly or mainly for the provision of gaming machines thus complying with [the 1986 Regulations at 2(a)] (*this referred to the type of premises under the 1986 Regulations and was not as Mr McMillen contended an unsubstantiated assertion by the applicant*). However the plans of the premises show the

> proposed amusement premises, containing 12 No. gaming machines, on the ground floor which is shared with a café fronting on to William Street. The planning permission for the proposed development of the premises restricts the gaming area to 56.65m^2 while the proposed café would occupy 65.6m^2. Plans of the premises are attached … and a copy of the planning permission is attached …"

[46] I am satisfied that this description captures conceptually the wide definition of "premises" which can incorporate the "gaming premises" within the premises of the ground floor. The planning permission map expressly refers to the gaming area irrespective of the fact that the address is given as 38 William Street, Derry. The Committee can have been in no doubt that the premises for the purposes of the gaming area was restricted to 56.65 square metres , that area was clearly wholly or mainly used for gaming and these were the "premises "for which the grant was being made . Thus the licensing officer has been correctly and clearly using "premises" in two different contexts i.e. the plans of the overall premises and "the proposed amusement premises" consistent with Article 111(3)(e) of the 1985 Order.

[47]The fact that the permit itself refers to the one address (rather than" the ground floor of the premises") is perhaps a reflection of the format of the permit prescribed in Article 114 of the 1985 Order which broadly refers to "the address of the premises for which it is granted". In any event the application before me is a challenge to the decision of the Council on 23 January 2014 where it is absolutely clear at the conclusion that the grant has been for 38 William Street, Derry "as outlined within the above report". The above report, which is a reference to the report from the licensing officer, makes it crystal clear that the premises in contention are "the proposed amusement premises".

Conclusion

[49] I have concluded that there is no foundation for this application and that the decision made by the Committee on 23 January 2014 was a valid, fair and proper decision. I therefore dismiss the applicant's case. I shall invite counsel to address me on the issue of costs.