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Judgment: approved by the Court for handing down | *Delivered:* **29/04/2008**
*(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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RE CENTRAL CRAIGAVON LIMITED

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GILLEN J

The application

[1] This is an application by Central Craigavon Limited ("the applicant") to quash a decision of the Department of the Environment (Planning Service) ("the respondent and/or the Department") made on or about 1 February 2008 whereby it determined that an application of reserved matters permission by the applicant was invalid and returned the application to the applicant.

Background

[2] The applicant is the owner of the Rushmere Shopping Centre, Craigavon. On 23 February 2005 the applicant made an application for outline planning permission ("OPP") to develop lands adjacent to the existing Rushmere Centre with a view to extending the centre and providing a basement car park with associated site works. Four drawings were submitted along with outline planning permission namely PAC1 (showing the site boundary), PAC2 (showing an illustrative lower ground level plan), PAC3 (showing an illustrative mall level plan) and PAC4 (showing an illustrative perspective view). After the expiry of the statutory time limits for determination of the application, the applicant appealed to the Planning Appeals Commission (PAC) by way of a non-determination appeal under Article 33 of the Planning (Northern Ireland) Order 1991 ("the 1991 Order").

[3] Drawings PAC1-4 depict a two storey extension with one level of car parking and one level of retail shopping at existing mall level. The

application itself and PAC3 described the total gross internal floor space of the extension as 6295 square metres.

[4] The appeal was allowed by the PAC and outlined planning permission was granted. This was subject to conditions which included at condition number 2 the following:

> "2. The development shall be carried out generally in accordance with plans PAC 2, 3 and 4."

It is to be noted at this stage that notwithstanding a request from the Department, the PAC did not include a condition in respect of a quantum of retail floor space.

[5] On 14 December 2007, the applicant submitted an application for approval of those matters reserved by the outline planning permission. In the reserve matters application the applicant proposed – rather than a single level retail extension – a double storey extension to the centre although with the same footprint and a similar exterior image to that shown in the illustrative drawings provided to the PAC. By way of a separate full application a further level incorporating a cinema and five restaurants was sought.

[6] The application for reserved matters approval described the development as an "extension to existing shopping centre, including basement car park and associated sight works". It contained proposals for a development with 14,787 square metres of gross internal floor space, spread over two retail areas and car parking (both internal and external) spread over two levels.

[7] The Department and the applicant's representatives then entered into correspondence and discussion about the reserved matters application. It soon became clear that the Department considered that the development proposal showing 14,787 square metres of gross retail floor space with decking parking below could not be considered to be "in general accordance with" condition 2 or the development proposal illustrating 6,295 square metres of gross retail floor space on one level with single level parking below. The Department therefore concluded that the proposal as submitted was not a reserved matters application. It was the Department's view that the current application was so far removed from the approved proposal that it did not fall within the ambit of the outlined permission and could not be considered a reserved matters submission.

Statutory framework

[8] Article 20 of 1991 Order provides where relevant as follows:

"20.-(1) Any application to the Department for planning permission –

(a) shall be made in such manner as may be specified by a development order;

(b) shall include such particulars, and be verified by such evidence, as may be required by a development order or by any directions given by the Department thereunder.

(2) Provision shall be made by a development order for regulating the manner in which applications for planning permission to development land are to be dealt with by the Department and in particular –

(a) for requiring the Department before granting or refusing planning permission for any development to consult with the district council for the area in which the land is situated and with such authorities or persons as may be specified by the order;

(b) for requiring the Department to give any applicant for planning permission, within such time as may be specified by the order, such notice as may be so specified as to the manner in which his application has been dealt with.

(3) Paragraphs (1) and (2)(b) shall apply to the applications to the Department for any consent, agreement or approval of the Department required by a condition imposed on a grant of planning permission as they apply to applications for planning permission."

[9] It is also relevant to draw attention to Articles 34-36 of the 1991 Order which relate to the duration of a planning permission and serve again to distinguish between outline planning permission and reserved matters. These articles provide as follows:

"35.-(1) In this article and in Article 34 outline planning permission means planning permission granted in accordance with the provisions of a development order, conditional on the subsequent approval by the Department of the particulars of the

proposed development (in this Article referred to as 'reserved matters').

36.-(2) For the purposes of Article 35(2) a reserved matter shall be treated as finally approved when an application for approval is granted, or, where there is an appeal under Article 32 on the date of the determination of the appeal."

[10] The Planning (General Development) Order 1993("GDO") sets down the form and content of each type of application. Article 2 defines "reserved matters" as follows:

"Reserved matters in relation to an outlined planning permission or an application for such permission, means any of the following matters in respect of which details have not been given in the application, namely –

(a) siting.
(b) design.
(c) external appearance.
(d) means of access.
(e) the landscaping of the site."

Article 9 of the 1993 Order provides as follows:

"**Application for approval of reserved matters**

9. An application for approval of reserved matters –

(a) shall be made on a form issued by the Department and shall give sufficient information to enable the Department to identify the outline planning permission in respect of which it is made;

(b) shall include such particulars and be accompanied by such plans and drawings as are necessary to deal with the matters reserved in the outline planning permission; and

(c) shall be accompanied by six additional copies of the form, plans and drawings submitted

> with it, except where the Department indicates that a lesser number is required."

[11] Provision is made for the Department to give notice of its decision within a period of two months from the date of the application being received. I am satisfied that in the event of the Department refusing the application or not making a determination within the statutory time, the applicant can enforce his right of appeal to the PAC under Articles 32 and 33 of the 1991 Order. This applies to reserved matter applications as well as applications for outline planning permission.

[12] I pause to observe that in this instance, I was initially attracted to the view that this dispute between the applicant and the Department should not have been entertained by this court as a matter of discretion on grounds of case management given the availability of such an obvious alternative remedy by way of appeal to the PAC. I was somewhat surprised to learn at the outset of the case however that the applicant had obtained the agreement of the respondent to the suggestion that due to the delay in the PAC processing appeals this did not constitute an effective alternative remedy. Attention was drawn to the affidavit of Angela Morrison, Planning Consultant on behalf of the applicant who had said at paragraph 33 of her affidavit of 3 April 2008:

> "In any event, an appeal to the PAC (if available) is not likely to be heard and determined for some 2½ years, as the PAC's case load and time frames currently stand."

Whilst the joint submission of both parties (Mr Maguire QC on behalf of the Department indicating that he was not in a position to rebut the assertion by the applicant), has been sufficient to deter me from employing what seemed to be an obvious avenue of redress rather than the last resort of judicial review, I make it clear that I am so acting purely because of the assertions of counsel and I make no finding whatsoever to the effect that such a delay does in practice exist. This is therefore not a precedent for such a step being taken in any future case and does not constitute a finding that the PAC does delay in hearing such matters. Moreover the role of the Judicial Review Court in reviewing the impugned decision is different to the role which the PAC would play in exercising its powers under Article 33 of the 1991 legislation. Accordingly any finding I make is not intended to influence the PAC in any manner should an appeal on this subject come before it in the future.

The applicant's case

[13] Mr Scoffield made the following arguments in the course of a comprehensive skeleton argument augmented by oral submissions to me.

[14] The Department had imposed a procedural hurdle by setting up a process of validation which was extra-statutory and ultra vires Article 9 of the GDO which sets out only three requirements when lodging an application for reserve matters permission. These requirements are that the application is on the appropriate form with sufficient information, that the application includes such particulars and plans/drawings as are necessary to deal with the matters reserved in the outline permission and finally is accompanied by six copies of the forms, plans etc.

[15] It was Mr Scoffield's submission that had Parliament intended that the Department could invoke some form of guillotine in unmeritorious cases then it would have expressly said so following the pattern in other legislation eg. the Police Ombudsman legislation. It was his submission that unmeritorious cases can be dealt with very swiftly through the normal statutory process without any waste of public money or official time. It was not Mr Scoffield's submission that the Planning Service could not decide that an application on reserve matters was out with the ambit of the outline planning permission. The question was when it was entitled to take such a step. It was his argument that there was no provision for it being performed at the outset.

[16] Alternatively counsel submitted that if there is any legislative warrant for a validation procedure, it could only be a method of checking whether the correct details have been provided and the correct form used as required by Article 9 of the GDO. Validation, if it permissible at all, must be confined to determining whether the three requirements set out in Article 9 of the GDO had been met. In this instance the Department had moved from a mere administrative checking procedure into consideration of the substance of the application. It was improper to do so without requiring the applicant to be involved. Thus the applicant is unable to provide further information to the Department, to persuade the Department of the planning merits of the development or to make representations on the material considerations which should be taken into account and the weight accorded to them. This was particularly strong in this instance where not only did the experts on behalf of the applicant consider that the matter was within the realm of the outline planning permission granted eg. the applicant's planning consultant and architect, but even the Planning Service had contained a coterie of people who felt that the application should be validated(see paragraph 17 of the affidavit of Ms Hamill the senior professional and technical officer with the Craigavon Divisional Office of the Planning Service).

[17] Counsel relied upon Heron Corporation v Manchester City Council (1978) 3 AER 120 ("Heron's case"). In that case outline planning permission had been granted, subject to an express condition (unlike the present case) limiting total ground floor space of all uses in the development to one million square feet. In the application for approval thereafter the developers annexed

a schedule showing a total of 1050265 square feet which should be increased by another 47329 square feet for external wall thickness. Of that increase Lord Denning said:

> "I cannot read that schedule as part of the application or as disclosing any intention to break the conditions laid down in the planning permission. It was, as Sir Douglas Frank said, for information only."

[18] In the event that counsel was driven to accept the validation process, Mr Scoffield submitted that the Department could only be entitled to take the draconian step of refusing to validate if any decision that the reserved matters application was within the ambit of OPP would plainly be Wednesbury irrational .In this case he submitted that the Department had approached this matter in a Wednesbury irrational manner.

[19] Counsel relied, inter alia, on affidavit evidence from the applicant's professional planning consultant that the reserved matters scheme "is in general accordance with the approved outline drawings and from his architect that it was "substantially in accordance "with the OPP.

[20] It was counsel's argument that the Department having failed to persuade the PAC to impose a floor space condition was now trying to impose such a condition. Floor space restriction was irrelevant in this reserved matter application. References in PAC2, 3and 4 were for illustrative purposes only and accordingly should not be used to restrict the applicant unduly (see Slough case below). In any event floor space was not within the definition of reserved matters in the GDO .

Conclusion

The Ambit test

[21] I commence by finding that an application which is made for approval of a reserved matter, must be within the ambit of the outline planning permission and must be in accordance with any conditions annexed to the outlined permission. An applicant cannot at his own instance modify the permission. Only the planning authority can do that. If the applicant desires to depart in any significant respect from the outline permission or the conditions annexed to it, he must apply for a new planning permission (see Lord Denning in Heron Corporation v Manchester City Council (1978) 3 AER 1240 at page 6 ("Heron's" case) cited with approval by Glidewell LJ in R v Hammersmith and Fulham London BC, ex parte Greater London Council (1986) JPL 528 ("Hammersmith case"), Inverclyde District Council v Lord Advocate (1982) 43 P and CR 375 and Orbit Development (Southern) Limited v Secretary of State for the Environment 1996 JPLB 125 ("Orbit's case").

[22] Mr Scoffield did not challenge the above proposition in principle but rather the stage at which it should be applied. It was his case that the test should be applied at the end of the planning process and not, as in this instance, at the outset.

[23] I pause to observe however that I found no attraction in Mr Scoffield's proposal that the principle should be read in light of the comments of Bridge LJ in Heron's case where he cited with approval a test adopted by Thesiger J in Cardiff Corporation v Secretary of State for Wales(1971) 22 P and CR 718. In that case the court asked whether documents submitted as an application for approval of reserved matters were "fairly capable "of being interpreted as such an application. I respectfully share the view of Glidewell LJ in the Hammersmith case who said of this approach.

> "I note however that Thesiger's decision was concerned with the nature of the documents submitted, not with their content. In my view ,with the greatest respect to Lord Bridge, this test is not of assistance, at any rate in the present case."

Accordingly I have followed Lord Denning's approach exclusively.

Reserved Matters and the Ambit test

[24] I recognise that the issue of gross floor space cannot be brought within the meaning of the definition of reserved matters defined in article 2 of the GDO i.e. site, design etc (see paragraph 10 of this judgment). See Newbury DC ex parte Chieveley Parish Council (1999)PCLR51 ("Newbury case"). Indeed article 2 the GDO provides a quite separate definition of "floor space".

[25] That is however a wholly distinct concept from the need to ensure that the reserved matters come ab initio within the ambit of the outline planning permission. If the scale of the development and or the scale of the proposed floor space can be said to be out with the ambit of the OPP ,it is not protected by the fact that the design etc remains the same albeit the same design/siting/appearance etc may be factors militating against such a finding in the particular circumstances.

Early Determination

[26] I am unpersuaded by Mr Scoffield's submission that the absence of any reference in the 1991 Order or the GDO to a process of initial "validation "precludes the Department from initially determining if the application is within the ambit of the OPP without fully processing the application once the applicant has complied with the administrative requirements of articles 7,9

and 10 of the GDO. Whilst the court must have due regard for the substantive and procedural norms explicit in the legislation, a purposive construction of legislation points to the avoidance of a meaningless procedure wasteful of public expense and draining on resources which would oblige the Department to process a reserved matters application which was patently outside the ambit of the OPP and was doomed from the start. Such an imperative would involve a physical acceptance of the application, administrative retention of the fee, consultation of various public and statutory authorities, the assembling of personnel to consider the merits of the application and an arrival at the final determination in an instance where it was apparent the application was doomed from the outset because it did not constitute a valid reserved matter. I find no statutory restriction, express or implied, requiring the Department to postpone such a decision on jurisdiction until some late stage in the process. In these circumstances I therefore found it unsurprising that in Heron's case there was no attempt to raise the argument now mounted by Mr Scoffield that it is impermissible to decide at the outset whether the reserved matters were within the ambit of the OPP .

Procedural Fairness

[27] I see no element of procedural unfairness in such an early determination. It is clear from the correspondence in this case that the applicant was not deprived of the conventional discussions with the Department officials before it made this determination. Moreover the applicant has protection against such a premature decision and return of the application in that he has a right of appeal to the PAC under article 33 of the 1991 Order by virtue of the failure of the Department to determine the application. See Geall v SS Environment [1998]EWCA Civ 1040 and R v Bath and North East Somerset District Council [1999]EWCA Civ 1493 per Pill LJ.

Construing Planning Permission and Conditions Attached

[28] I respectfully adopt the approach summarised by Keene J in R v Ashford BC ex p Shepway DC (1999) PLCR 12 ("the Ashford case") and cited with approval in Moore on Planning Law 10th edition at paragraph 16.13, namely that the general rule is that in construing a planning permission which is clear unambiguous and valid on its face, regard may only be had to the planning permission itself ,including the conditions on it. See also Slough BC v Secretary of State for the Environment (1995) JPL 1128 ("Slough's case") and Braintree DC v Secretary of State for the Environment (1997) JPL 217.

[29] This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. The reason for not having regard to the application is that the public should be able to rely on a document which is plain on its

face without having to consider whether there is any discrepancy between the permission and the application (see Slough's case at page 1128).

[30] Equally it must be said that it does not follow that an enlargement of the application site in the reserved matters renders it ipso facto invalid. This is particularly relevant in the present instance where the outline planning permission records that the development shall be carried out "generally in accordance with plans PAC2, 3 and 4". I accept the principle set out in Slough's case where Stuart Smith LJ said:

> "It does not follow that an enlargement of the application site is ipso facto invalid. The rationale for saying that it may be invalid was explained by Forbes J in Bernard Wheatcroft Ltd v Secretary of State for the Environment (1980) 43 P and CR233 in that if the enlargement is so substantial it would deprive those who should have been consulted of an opportunity to make representations and objections."

[31] In Slough's case, having obtained OPP for 1055 square metres in circumstances where the permission was silent on the floor area permitted, the respondent sought reserved matter approval including a floor area of 1530 square metres i.e a 45% increase. The court refused to quash an approval of the reserved matters application. The court made it clear that when the detailed application is considered the size of the development can be properly reduced having regard to such reserved matters as siting, design and internal appearance etc. However I find no inconsistency between these decisions and the principle set out in Heron's case to the effect that it is a question of fact whether the reserved matters are within the ambit to the OPP. As I will indicate in paragraph 37 below this is a matter of fact and degree to be determined by the Planning authority subject to the Wednesbury rationality test .

The Role of the Court

[32] It is important to recognise that the jurisdiction of the court in Judicial Review is a supervisory one and different from ordinary adversarial litigation between private parties or an appeal/rehearing on the merits. The question on supervisory review is not whether the court disagrees with what the public body has done but whether there is some recognisable public wrong. The court is not charged with the duty of evaluating the evidence and finding the facts as a check on what the Planning Service has done in this instance. It is, in my view, confined to determining whether the Department has acted unlawfully by misdirecting itself in law as to the nature of the duty to consider a reserved matters application or has acted irrationally in defiance of logic so that no sensible planning authority who had applied its mind to

the question to be decided could have arrived at this decision. See Reid v Secretary of State of Scotland [1999] 2AC 512 at 541f-542a. Hence the observation of Stuart Smith LJ in Slough's case at para 1133 that such decisions by the planning authority "can only be challenged on well known principles applicable to judicial review".

[33] Thus that there was some argument within the Department as to whether this application was out with the OPP before the final decision was taken does not render the eventual decision irrational. It is completely normal for there to be some measure of debate within the Planning Service before a final decision was reached.

[34] I pause to observe that I find no warrant for Mr Scoffield's argument that the Department can only make a determination that the reserved matters are outside the ambit of the OPP if any decision to the contrary would be Wednesbury unreasonable. Such a proposition would run contrary to the tenor of the ambit test referred to in Heron's case per Lord Denning, the Hammersmith case which cited Lord Denning with approval and the Orbit case where the case note specifically refers to the judge declaring that he "did not find the judgment (*of the planning inspector that the Council had been justified in refusing to determine an application that was not compatible with the OPP*)was irrational".

[35] There is of course ample authority for the proposition that the task of *interpreting* the outline planning permission is a matter of law for the court (see Newbury's case and Braintree's case). But that is a separate issue from the question as to whether the application for detailed approval in the submitted reserved matters is within the scope of the OPP. That is a matter of fact and degree for the planning authority to decide (see page 132 of the Hammersmith case and Braintree's case at page 223.)

[36] I gratefully adopt the summary on this issue by the editor of the Journal of Planning and Environment Law 1997 at the termination of the report of Braintree's case at page 227 who comments on that case as follows

> "While many decisions in planning law are questions of fact and degree for the decision maker, the authorities are settled that the meaning of a grant of planning permission is a question of law for the courts. This follows from the fact that once the permission has been granted the Town and Country planning legislation invests the planning authorities with no statutory power to exercise a discretion or judgment as to the meaning of the permission ……. It might therefore seem to follow that the question as to whether an application for reserve matters comes

> within the ambit of an outline grant should equally be a matter of law for the courts. However in this context the local planning authority is carrying out a statutory function and although it cannot have a policy or discretion as to whether the application should or should not come within the terms of the outline planning permission, it is required to make a judgment. It would therefore seem right (as the authorities cited by the Deputy Judge indicate) that the courts should only interfere if the judgment is one that cannot be fairly made on the facts."

The Role of the Planning Authorities

[37] In my view decisions, as in the instant case, as to whether the enlargement of the floor space in the reserved matters is so substantial that it is outside the ambit of the OPP must in the first place be a matter for the decision of the planning authorities .It is for that body to construe the grant of the OPP and determine its ambit as a matter of fact and degree.

Dismissal of the Application

[38] In this case I consider that it was within the reasonable exercise of the Department's discretion to conclude that the proposed enlargement of floor space from 6297 square metres to 14787 square metres was so substantial as to merit a conclusion that it was out with the ambit of the OPP and in particular condition 2. The decision cannot be set aside as unreasonable. If members of the public viewed this OPP and observed the plans attached to condition 2 which record plainly on their face that the retail floor space is 6297 square metres, I consider they would be entitled to say that the proposed reserved matters were not what they understood the OPP to have granted. To accede to the reserved matters with a vastly increased floor space would indicate to the public at large that they had not been able to rely on the permission and conditions granted. It may not be uncommon for applicants to submit plans, as in this case, with the OPP application for "illustrative purposes" or for there to be an expected measure of flexibility to be allowed in proposed reserved matters. However where those proposals are so far in excess of what is contained in plans attached as a condition to the actual OPP, I consider that the Department is entitled to conclude that the proposals are outside the ambit of the permission granted and to determine this at an early stage without wasteful and unnecessary further enquiry.

[39] If condition 2 is to have any meaningful substance it demands a close perusal of the plans at PAC 2.,3 and 4. Otherwise what would be the point of attaching the plans to the conditions? Even a cursory glance by a member of the public would reveal the arguably profound difference in the floor space

indicated in the conditions and the reserved matters. Whilst the overall size of the footprint, the use, and the site may be similar (although I note that car parking is now on 2 levels whereas it was only underground parking in the OPP) the increase in floor space is 135%. I am satisfied that the fact that the PAC did not specify a floor space (other than to attach the plan showing 6297 square metres to the condition) does not accord a blank cheque to the applicant to create whatever floor space he wishes. This change in my view constitutes a rational basis for the Department's decision that there had been a material alteration which was outside the ambit of the OPP. It seems to me that the decision of the Department that these reserved matters were not in "general compliance " with the conditions imposed was one that could be fairly made on the facts and thus their decision to return the application was lawful and not Wednesbury unreasonable .

[40] I therefore dismiss this application.