Northern Ireland Unreported Judgments

In Re Ava Leisure Limited (Application for Judicial Review)

COURT OF APPEAL (CIVIL DIVISION)

CARSWELL LCJ, NICHOLSON LJ, COGHLIN J

15 JUNE 1999

15 June 1999

CARSWELL LCJ

Introduction

This is an appeal from a decision of Kerr J given on 26 November 1998, whereby he granted an application by Ava Leisure Ltd, the respondent in this appeal, for judicial review of a decision of Mr FG Brown, sitting as a deputy county court judge in Belfast on 18 May 11, 1998. On that occasion the deputy county court allowed an appeal from a decision of the appellant Belfast City Council (the Council), in which it refused to grant a provisional amusement permit to the respondent in respect of premises at 35 Ann Street, Belfast under the provisions of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (the 1985 Order). Kerr J held that the deputy county court judge had been in error in his conclusions about the matters which the Council could properly take into account in determining whether to grant a permit and remitted the matter to him to reconsider the appeal in accordance with the rulings which he set out in his judgment.

The Statutory Provisions

Under the 1985 Order an amusement permit is required for the use of gaming machines on premises other than certain specified categories. By Article 109(1) the grantee of the permit is to be the occupier of the premises. The district council is the granting authority under Article 111, paragraphs (1) and (2) of which provide:

"111. - (1) An application for the grant of an amusement permit shall be made by the person who is, or by any person who proposes to be, the occupier of the premises for which the amusement permit is sought to the district council for the district in which those premises are situated and the applicant shall -

(a) attach to the application a fee of £8.50; and

(b) serve a copy of the application upon the sub-divisional commander of the police sub-division in which those premises are situated.

(2) Subject to paragraphs (3) and (4), 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."

Application may be made under Article 113 for the provisional grant of a permit where premises are about to be constructed, altered or extended, and the provisionally granted permit may subsequently be made final when the conditions attached to it have been fulfilled.

Appeals against the refusal of amusement permits are dealt with in Article 119:

119. - (1) Not less than 14 days before a district council -

(a) refuses to grant, or renew, an amusement permit; or

(b) grants an amusement permit subject to a condition specified in Article 111(6) or renews an amusement permit subject to a condition specified in Article 115(7); or

(c) imposes a requirement under Article 118;

the council shall serve notice of its intention to so refuse, grant, renew or impose the requirement on the applicant or, as the case may be, the holder of the amusement permit.

(2) Every such notice shall state the grounds on which the district council intends to so refuse, grant, renew or impose the requirement under Article 118 and shall contain an intimation that if, within 14 days after the service of the notice, the applicant or, as the case may be, the holder of the amusement permit informs the council in writing of his desire to show cause, in person or by a representative, why the application should not be refused or granted or renewed subject to a condition or the requirement not imposed, as the case may require, the council shall, before so refusing granting, renewing or imposing the requirement, afford him an opportunity to do so.

(3) If the district council, after giving the applicant or, as the case may be, the holder of the amusement permit an opportunity of being heard by it, decides to refuse the application or to grant or renew the application subject to a condition or to impose a requirement under Article 118, it shall serve notice of the decision on the applicant or, as the case may be, the holder of the amusement permit, and such notice shall inform him of his right to appeal under paragraph (4) and of the time within which the appeal may be brought.

(4) A person aggrieved by a decision refusing an applicant for the grant or renewal of an amusement permit, or granting such an application subject to a condition specified in Article 111(6), or renewing such an application subject to a condition specified in Article 115(7) or imposing, a requirement under Article 118 may, within 21 days from the date on which notice of the decision is served on him, appeal to the county court.

(5) The decision of a county court on an appeal brought under paragraph (4) shall be final, and the district council shall give effect to that decision."

The Factual Background

On 7 February 1997 the respondent, which operates a number of amusement arcades in Northern Ireland, applied to the Council for the grant of a provisional amusement permit in respect of the premises 35 Ann

Street, Belfast, which had thitherto been occupied as a shoe shop. It is situated on the southern side of Ann Street, about half way between Arthur Square and Victoria Street. The premises are small: the area of the ground floor is 49 square metres and the frontage is 3.35 metres wide.

The respondent applied on 31 January 1997 to the Planning Service of the Department of the Environment for planning permission to change the use of the premises to that of "an adult amusement centre". The application had not been determined by 15 April 1997, on which date the respondent, treating the failure to determine it as a deemed refusal under Article 33 of the Planning (Northern Ireland) Order 1991, appealed to the Planning Appeals Commission. The appeal was heard by a member of the Commission, Mrs DS Fitzsimons, on 31 July 1997 and she submitted her report on 26 August to the Commission, which allowed the appeal and granted planning permission subject to certain conditions.

In her report the commissioner concentrated mainly on the contents of the Belfast Urban Area Plan and the Development Guidance Note DGN 8a "Control of Non Retail Uses in Belfast's Main shopping Area." She concluded that Ann Street is not a prime retail street but is rather a secondary retail street a conclusion which was not challenged. She was of opinion that the crucial issue was the potential effect of the development on the amenity and character of the surroundings. An important consideration was whether an amusement centre would break up an otherwise continuous shopping frontage, and on that issue the commissioner stated:

"In my view the scale of the proposal and the size and proposed treatment of the frontage mean that the amusement centre would not break up the shopping frontage to an unacceptable extent."

She considered that the blanket ban introduced by DGN 8a was out of step with the statutory plan and with changes to the leisure industry since 1985, and concluded:

"I have not been persuaded that the change of use of this small unit to an amusement centre would cause such a break up on the retail frontage of Ann Street that it would have an adverse impact on the shopping function of the street. Neither have I been persuaded that in the context of para 4.3 of DGN 8a the proposal would have an 'adverse effect on the character and function of existing commercial uses'. This would be the first such amusement centre located in the street and any later applications for amusement centres would have to be considered in the light of the cumulative impact on the shopping function of the street. In coming to my conclusion I have considered the argument that the existing unit is not viable as a shop but have given this issue little weight since, in my view, it could be reunited with the unit from which it was severed not long ago. I have also taken account of the fact that any changes to the frontage of the unit and any new signage will require further permission from the Department."

The commissioner recommended that the appeal be allowed and the Commission accepted her recommendation and allowed the appeal by notice dated 19 September 1997. The material part of its conclusion was as follows:

"The analysis by the appointed Member of the various planning documents which might be taken to have relevance to the proposal is broadly endorsed by the Commission. It is noticed that DGN 8A states that 'within the shopping area identified on the map (within which the appeal site lies) future applications are likely to be refused on the basis that they will. have an adverse effect on the character and function of existing commercial areas'. However, having regard to the limited street frontage of the proposal the Commission is not persuaded that the adverse effects envisaged in DGN 8A would result if the proposal were approved."
The Challenges to the Council's Decision

By letter dated 4 August 1997 the Council informed the respondent, pursuant to Article 119 of the 1985 Order, that it intended to refuse the application on the grounds -

"that the proposed amusement arcade would detract from one of the best secondary retail locations in Belfast and that many of the shops now located in the street attracted young customers and the proposed use would therefore be inappropriate."

The respondent was given the opportunity to address the Council and accepted the invitation. The Council decided nevertheless to refuse the application and so notified the respondent by letter dated 5 November 1997, which set out the grounds for refusal in the same terms as those contained in the letter of 4 August.

The respondent on 14 November 1997 served a notice of appeal against the Council's decision, giving as its grounds:

"(i) the alleged detraction from one of the best secondary rental locations in Belfast is a planning consideration and the respondent [Council] did not have jurisdiction to refuse the application on this ground;

(ii) alternatively, the respondent erred in concluding that the proposed amusement arcade would so detract;

(iii) further, the respondent erred in concluding that as shops in Ann Street attracted young customers the proposed use would be inappropriate."

By letter dated 5 February 1998 the Council's Legal Services Department informed the respondent's solicitors that the Council intended on the hearing of the appeal to rely on three further grounds for refusing the application for the amusement permit:

"(i) there are already sufficient places of amusement in the area, which adequately cater for the demand and/or need for premises of this type;

(ii) that the proposed location of the premises, situate in a pedestrianised retail area of the city centre, and on a direct pedestrian route from the new bus station to the city centre is inappropriate;

(iii) that the siting of an (sic) amusement type premises in the proposed location would have an adverse and detrimental effect on the future development of Ann Street."

The respondent's solicitors notified the Council that the respondent proposed to object to the introduction of further grounds, and at the hearing before the deputy county court judge counsel put forward the objection. The judge held, for the reasons which he set out at pages 11-12 of his written judgment given on 18 May 1998, that the respondent was entitled at the hearing of appeal to rely on such further grounds. He proceeded to hear evidence and argument and reserved his decision. It was argued before him that the Council in deciding whether to grant an amusement permit was not entitled to take into account planning considerations, which were a matter for the planning authority, and that it must accept the conclusions reached by the Planning Appeals Commission on such matters. The Council submitted, on the other hand, that the effect on retail business in Ann Street was not a planning consideration in the strict sense, but related rather to the area of commercial estate agency. It further contended that it was in any event open to the Council to take into account planning considerations and to make its own judgment upon them. The judge ruled that the Council was entitled to take into account matters of a planning nature, such as the impact on existing businesses and the flow of traffic. He expressed his conclusions in the following terms:

"I am satisfied, having heard the evidence, and, taking into account the views of individuals representatives and the local groups, that the grant of an amusement permit to Ava, thus enabling it to establish an amusement centre in Ann Street, would create an unacceptable risk to the current and possible further viability of

retailers in Ann Street and would jeopardise the future development of the street as a location for retail outlets. The evidence clearly establishes that Ann Street is a gateway to the City and notwithstanding the high standard which Ava clearly maintains in its centres, the establishment of an amusement centre in such a street as Ann Street would have an impact on how the public view Ann Street as a retail location and jeopardise the potential expansion of Belfast City Centre for retail outlets.

In conclusion therefore I am satisfied that notwithstanding the fact that the Appellants obtained planning permission to use the premises as an amusement arcade, the evidence clearly establishes that the Respondent was justified in refusing to grant the Appellants an amusement permit because of the adverse and detrimental effect the opening of such a centre would have on the current retail viability of Ann Street and its future development. Accordingly I dismiss the appeal."

By Article 119(5) of the 1985 Order the decision of the county court is to be final, but the respondent on 16 June 1998 made an application for judicial review of its decision. The grounds set out in its statement were the following:

"(a) The learned Deputy County Court judge acted unlawfully and ultra vires his powers by refusing to allow the Applicant's appeal under Article 119(4) of the Order on the ground that the opening of an amusement arcade in Ann Street, Belfast would have an adverse and detrimental effect on the street's current retail viability and its future development.

(b) The ground on which the learned Deputy County Court judge relied is a planning consideration which had already been considered and adjudicated upon by the Planning Appeals Commission in its decision of 19 September 1997 whereby Planning Permission for use of the premises as an amusement arcade was granted.

(c) Where parliament has conferred jurisdiction on the Planning Appeals Commission to determine whether to grant or refuse Planning Permission, the reason given for dismissing the Appeal was not within the competence of the Court.

(d) Since the only ground on which the learned County Court judge relied upon to refuse the Appeal was a ground he was not competent to consider he should be directed by this Honourable Court to decide the Appeal in the Applicant's favour.

(e) Under Article 119(1) and (2) of the Order, where a Council intends to refuse an Amusement Permit it is required to serve notice of its intention on the Applicant stating the grounds on which it intends to refuse the permit. If he so desires the Applicant is then given the opportunity of being heard by the Council. In such circumstances an Applicant will make submissions based on the grounds on which the Council intends to refuse the Permit. The introduction of new grounds on which the Council intends to rely on Appeal means that the Applicant has been deprived of the opportunity of addressing the Council on those grounds prior to its decision. The intention of the legislature is that all grounds on which the Council intend to rely should be disclosed to the Applicant so that he may make representations to the Council to show cause why the Application should not be refused."

The application was heard by Kerr J, who gave a written judgment on 26 November 1998, in which he granted the application and remitted the matter for rehearing before the deputy county court judge, to reconsider it and reach a decision in accordance with the rulings set out in his judgment. On the issue of fresh grounds, he upheld the ruling of the deputy county court judge. On the main ground, he held that the impact on retail shopping in Ann Street gave rise solely to planning considerations. Such considerations fell to be determined only by the planning authority or Planning Appeals Commission and the Council was not entitled

to have regard to them in determining applications for amusement arcade licences. In doing so the Council was in error and its decision should be set aside.

The Council appealed by notice dated 5 January 1999, whereby it contended that Kerr J was wrong in law in his conclusions on the main grounds. The respondent by counter-notice dated 20 January 1999 challenged the judge's conclusion that the Council was entitled to advance further grounds for its refusal to grant a permit on the appeal to the county court.

Fresh Grounds on Appeal

Article 119(4) provides simply for an appeal to the county court, and we consider that in these circumstances, as Curran J held in Belfast Corporation v Goldring [1954] NI 107, it takes the form of a rehearing in which the county court should hear evidence de novo. It follows in my opinion that the court is entitled to take into account all grounds which may be advanced, and that the parties are not confined to the evidence or arguments which were brought before the Council. If this were not so, the court would, as Kerr pointed out at page 12 of his judgment, be unable to give any consideration to matters, possibly compelling or even conclusive, which emerged for the first time after the Council's decision was made.

I respectfully agree with the approach adopted by the majority of the English Court of Appeal in a case involving very similar considerations, Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614. That was an appeal under the Betting, Gaming and Lotteries Act 1963 to quarter sessions against a local authority's refusal of a permit for the provision of amusements with prizes. The local authority had followed the general policy which it had previously adopted of refusing all such applications. The recorder held that he could deal with the matter de novo with an unfettered discretion, heard evidence on the merits of the application and allowed the appeal. The Court of Appeal, Lord Denning MR dissenting, upheld his decision, with one qualification.

Edmund Davies and Phillimore LJJ accepted the proposition, which stemmed from the decision of Lush J in R v Pilgrim, (1870), LR 6 QB 89, that where a statute gives a right of appeal without limiting the inquiry, the matter is at large and the appellate tribunal is to rehear the whole matter and give its judgment on all the evidence that is brought before it. Were it not so, the right of appeal would be illusory, being in effect confined to the point of law whether the local authority had material before it upon which it could properly find as it did. The court did not consider, however, that the views earlier formed by the licensing authority should be entirely disregarded by the appellate tribunal. It took the view that the proper approach was that enunciated by Lord Goddard CJ in Stepney Borough Council v Joffe [1949] 1 KB 599 at 602-3:

"That does not mean to say that the court of appeal, in this case the metropolitan magistrate, ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter, and it ought not lightly, of course, to reverse their opinion. It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right."

I consider that the principles adopted by the Court of Appeal in Sagnata Investments Ltd v Norwich Corporation are applicable to appeals of the present kind. It follows accordingly that the deputy county court was correct in allowing the Council to rely upon the grounds set our in its letter of 5 February 1998.

Planning Considerations

Mr Weir QC for the Council sought to draw a distinction between considerations relating solely to planning and those relating to commercial estate agency. It is established that in deciding on the grant of planning

permission a planning authority should leave out of account the harm which the proposed development might do to private interests. He submitted that matters concerning the value of property in Ann Street, the major ground to which the Council had regard in refusing the application, fell into the latter category. Accordingly, if the Council was, as the respondent contended, required to accept the decision of the Planning Appeals Commission on purely planning matters, it was still entitled to refuse the application on the ground of adverse effect on the value of the other traders' premises in Ann Street.

In so submitting he placed reliance upon the decision in Esdell Caravan Parks v Hemel Hempstead Rural District Council [1966] 1 QB 895, where the Court of Appeal drew a distinction between "planning considerations" and "site considerations" in the context of the grant of site licences for caravan parks. It was clear that in that context there was a potential conflict between the functions to be exercised by the planning authority in granting permission for the use of land for the purpose of a caravan park and those of the local authority, which had the power to impose conditions when granting site licences. The court resolved it by holding that the planning authority should direct their attention to matters in outline, leaving the site authority to deal with all matters of detail. It may be necessary to draw such a distinction for the purpose of the legislation relating to caravan parks, although it may be seen from such cases as Babbage v North Norfolk District Council (1990) 59 P & CR 248 how difficult it may be in particular cases to differentiate between planning, considerations and site considerations. It is far from straightforward to apply the distinction in other contexts. For example, in Stringer v Minister of Housing and Local Government [1971] 1 All ER 65 at 77 Cooke J expressed the view that in principle "any consideration which relates to the use and development of land is capable of being a planning consideration", a statement which was approved by the Court of Appeal in Clyde & Co v Secretary of State for the Environment [1977] 3 All ER 1123 at 1127. Again, in Great Portland Estates plc v Westminster City Council [1984] 3 All ER 744 at 750 Lord Scarman said that the human factor is to be taken into account in planning control. It accordingly seems to me a matter of great difficulty to draw a valid distinction between considerations which relate solely to planning and those which concern only the value of neighbouring property and to accept that a local authority determining whether to grant an amusement permit may have regard to the latter but not the former.

I consider rather that the conclusion of the deputy county court judge was right when he held that the local authority may take into account planning considerations and is not bound to accept in its entirety the decision of the planning authority on the use of premises for the purpose of an amusement arcade. This is not to say that it should be anything but slow to differ from the views of the planning authority, to which such decisions are entrusted because of its expertise in that field. An analogy may be found in the field of liquor licensing, where the court, when considering the suitability of premises, is free to reach its own determination of matters entrusted to statutory agencies, such as planning. It will, however, pay very substantial regard to the agencies' decisions, as I stated in Donnelly v Regency Hotel Ltd [1985] NI 144, 151:

"I do not think that the court ought to absolve itself of its own statutory task of deciding upon suitability by placing complete reliance upon the determination of a statutory agency, however skilled and experienced in a technical field the latter may be. It may, however, legitimately take the view that it will be slow to reach a conclusion which is at variance with the considered decision of a competent agency such as a planning authority acting within its own sphere, even if in principle it is entitled to do so."

The deputy county court at page 10 of his judgment put the matter in the following manner:

"If the Council could not take into account matters such as location, structure, character and impact on neighbours and surrounding area, it would have very little left on which to exercise its discretion. The Legislature did not provide for such a limitation and in my view to imply same would be to impose an almost meaningless discretion on the Council."

I agree with this expression of opinion and consider that it shows that the legislature in entrusting the decision on the grant of permits to the district council did not intend that the sphere of their consideration should be so limited.

I accordingly am of opinion that the deputy county court judge was correct in the matters which he took into account in hearing and determining the appeal from the Council's decision. I do not consider that an order for Judicial review of his decision should be made and I would allow the appeal.

NICHOLSON LJ

I agree.

COGHLIN J

I agree.

Appeal allowed.