

Oasis Retail Services Ltd(appellant)

V

Derry City and Strabane Council (respondent)

Before Her Honour Judge McCaffrey

1.This is an appeal by the appellant company , Oasis Retail Services Ltd. (“Oasis”) against a decision of Derry City and Strabane District Council (“ the Council”) to refuse their application for an amusement permit under Art. 108(1) (ca) of the Betting, Gaming, Lotteries and Amusements (NI) Order 1985 (“the 1985 Order”) in respect of premises at Unit 23, Richmond Centre, Londonderry. In the course of the hearing, I heard evidence from a number of witnesses for both the appellant and the respondent and had various documents , including minutes of Council meetings, plans for the premises and planning documents , opened to me.

Background and Evidence

2.The history of the matter is as follows. The Richmond Centre, where the unit the subject of this application is sited, is a shopping centre in Londonderry which gives onto Shipquay Street and Ferryquay Street within the historic walled city and close to the Diamond in the centre of the city. There is also access via a pedestrianised area on to Orchard Street and to the neighbouring Foyleside Shopping Centre. It was built in the 1980’s and is very much a building of its time, having a brown concrete façade.

3. While the Richmond Centre is now operating at virtually full capacity, Unit 23 has lain vacant since Dunnes Stores relocated their city centre store to Foyleside in 2001. Following this the premises were internally reconfigured and access to unit 23 was then no longer possible from within the Richmond Centre, but only from Shipquay Street. This may, in the view of the centre manager, have contributed to the challenge of finding a suitable tenant for the premises. Shipquay Street runs from the Guildhall Square to the Diamond and is distinctive because it is probably one of the steepest city centre streets in these islands. In recent years, the Council has sought ,through the Townscape Heritage Initiative, to restore buildings around the top of Shipquay Street in a way they consider compatible with its location as a key thoroughfare within the city walls. While Mr Monaghan, the Regeneration Manager with the Council, considered that the unit should be a primary commercial frontage, but he said that THI said they had no plans for regeneration/redevelopment regarding unit 23.

4. In March 2014, Oasis applied for planning permission for change of use for unit 23 to an amusement/gaming centre for persons aged 18 and over. That application was refused by DOE Planning Service on 4 December 2014 and Oasis appealed. The ground for refusal at the time was that the proposed use was contrary to the policy set out in the Derry Area Plan 2011 (“DAP”), in that the change of use would result in a loss of retail floor space in Shipquay Street, erosion of choice and convenience of shopping. By the time the appeal was heard by the Planning Appeals Commission (“PAC”) in June 2015, responsibility for planning had passed to the local authorities, in this case, the Council. The Council therefore defended the appeal. The PAC decided to grant the appeal and in so doing, considered the DAP, which had to be given primacy in planning law from April 2015. In particular, the PAC found that, given that Shipquay Street had 60% of ground floor frontage either in retail use, or last used as retail, change of use for Unit 23 would not cause the area overall to be dominated by non-retail uses and there would not thereby be a significant loss of ground floor retail space.

5. Oasis made its application for an amusement permit to the Council on 10 December 2015. That application envisaged that the premises would operate 7 days a week from 9am to 12 midnight Monday to Saturday and 11.30am to midnight on Sundays. There would be 12 jobs created and a total investment of £.75 million. Plans were submitted which showed there would be approximately 70 seats within the centre and that the facilities would include provision of sandwiches, snacks and tea and coffee for customers. A subsequent plan was submitted which showed 100 machines. Mr Trimble, for Oasis, indicated that this was because of the time lapse between the application and the appeal and changes in design layout. It was his evidence that when opening new premises, Oasis would not start with a huge number of machines. He said their typical operation was in the range of 70-80 machines. He also stressed that Oasis fitted out their premises to a high standard and maintained them accordingly. He said he had been round all the local offerings in the city and he considered that there was nothing of a similar standard.

6. In accordance with the regulations, Oasis was required to advertise its application in local newspapers and following this, 3 letters of objection and a petition (treated as one objection) were received by the Council. Because of the objections, the matter was referred to the Health and Community Committee of the Council, which met on 11 February 2016. None of the objectors attended the meeting. There was no police objection to the proposed amusement permit. There was no statutory reason for the application to be refused, as the application by Oasis met all the requirements in Art.111 of the 1985 Order.

7. The Council wrote to Oasis on 24 February 2016, stating that the Health and Community Committee had decided that the application should be refused for 4 reasons :

1. The location of the proposed arcade was unsuitable and did not fit with the City Centre Development Plan ;
2. The proposed arcade is in close proximity to an area where youth congregate;
3. The proposed arcade is in close proximity to a similar development at Bank Place.
4. They also noted that in the view of the Committee there were adequate facilities within the City Centre Locality and no need for further provision of gaming facilities.

8. Oasis was given the opportunity to be represented at a meeting of the Committee before a final decision was taken and made its representations to the Committee on 10 March 2016. Their application was however refused. No additional reasons for the refusal were given.

9. It is relevant to note that on 11 December 2015, an application had been received for an extension to the existing amusement premises at 5 Bank Place. That application was in relation to premises at 1-2 Bank Place, owned by a Mr Heaney, who also owns the premises at 5 Bank Place. There were no objections and so the matter did not come before the Health and Community Committee, but was dealt with administratively under delegated powers and a provisional grant of licence was given. The Health and Community Committee does not seem to have been made aware that an application made after that of Oasis was in fact passed without it coming before the Committee and prior to Oasis' application being refused, in part at least on grounds of adequacy of provision in the City Centre location. Indeed, when the Committee was provided with a report of licensing activity in December 2015 and January 2016, the application was referred to as an amusement permit application and a renewal application, not an application to extend premises or for new premises, which may have caused some confusion. The Council ratified the decision to make a provisional grant of an amusement permit in relation to the Bank Place Premises, apparently without being expressly advised that another application had previously been received for the city centre and was recommended for refusal.

10. One of the grounds on which the Council turned down Oasis' application was that the Council felt there were adequate gaming facilities within the City centre and no need for such further provision. It was outlined to me at

the hearing that there are 5 licensed gaming premises within the city centre, including the existing premises at Bank Place. Two of these are located at William Street, one in Strand Road and one in Duke Street. A sixth is at The Bellagio, part of the Brunswick Complex in the Pennyburn area. I was also advised that there are two premises at Bridgend in Co Donegal which house amusements and which have slot machines which accept sterling coins, pay prizes in sterling and which also change currency for customers. I am advised that the cars parked in the car park of those premises shows the bulk of the customers are from Northern Ireland. Ms Thompson, who gave evidence for Oasis, said that on inspection, the Bridgend premises were superior in terms of their finish, fixtures and fittings. She gave an evaluation of each of the existing premises in the city and provided photos of them. They were mostly much smaller than the premises proposed by Oasis and the facilities were limited. I was also shown photos of the type of development proposed by Oasis and, without going into a comparative assessment of each venue which may involve criticising any other premises, it is fair to say that the standard of presentation proposed by Oasis and the amenities they propose would be of a superior standard. In addition, it was suggested that the proposed development would enhance the appearance of that part of Shipquay Street: While the signage for the proposed premises and windows would be discreet and opaque, there would be increased lighting on the street and the premises would be occupied, rather than shuttered and closed, as at present.

11. At the hearing, the main emphasis of the Council's objections seems to have altered from the original grounds. At their meeting with Oasis in March 2016, they focused on their concerns about losing retail frontage in Shipquay Street, concerns that young people who were in and around the shopping centre would be drawn into the proposed amusement premises and that the premises may also attract vulnerable people who were using other advisory services in and around the area of the Diamond. They were also concerned about the number of other less prestigious premises in the city centre. At the hearing, the evidence given by Alderman McClintock, the Mayor, focused on the city's tourist industry and said that Shipquay Street was in fact the main route for tourists walking from the Guildhall Square to the Diamond and on to St Columb's cathedral and the city walls. As such, she considered that the use of Unit 23 as an amusement arcade was not in keeping with plans for the walled city area. She accepted that there were other places to access the walls and that anyone walking round the walls could also see Bank Place.

12. As regards the vulnerability of young people to be drawn into the premises, they would only be open to persons aged 18 and over. Mr Trimble

gave evidence that all staff are trained to enforce this rule strictly and also that their research showed that their average customer tended to be in the thirty-plus age bracket. I am also satisfied from Mr Trimble's evidence that Oasis takes its responsibilities to keep to the law very seriously.

Relevant Law

13. Article 111 of the 1985 Order, which governs the grant of amusement permits, states as follows:

- “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.*
- 3. A district council shall refuse an application for the grant of an amusement permit, unless it is satisfied –*
 - (a) in a case where there is in force a resolution passed by the council as mentioned in Article 110(2)(a) or (b) which is applicable to the premises to which the application relates, that the grant of the permit will not contravene that resolution; and*
 - (b) that the applicant is a fit person to hold an amusement permit; and*

- (c) *that the applicant will not allow the business proposed to be carried on under the amusement permit to be managed by, or carried on for the benefit of, a person other than the applicant who would himself be refused the grant of an amusement permit; and*
 - (d) *that there is in force in respect of the premises a fire certificate.*
- 4. *Without prejudice to its power to refuse to grant an application for an amusement permit on any ground, a district council may refuse to grant an amusement permit in respect of premises, other than premises used wholly or in respect of premises, other than premises used wholly or mainly for the provision of amusements by means of gaming machines, if it is satisfied that, by reason of the purposes for which, or the persons by whom, or any circumstances in which the premises are or are to be used, it is undesirable that gaming machines should be used for providing amusements on those premises.*
- 5. *A district council shall grant the amusement permit subject to the condition –*
 - (a) *that the premises are not to be used for an unlawful purpose or as a resort of persons of known bad character; and*
 - (b) *where there is in force a resolution passed by a district council as mentioned in Article 110(2)(c) which is applicable to the premises to which an application for the grant of an amusement permit relates, that the number of gaming machines which may be made available for gaming on the premises shall not exceed such number (being a number not exceeding the number specified in the resolution) as the council may determine.*
- 6. *A district council may grant the amusement permit, subject to the condition –*
 - (a) *in the case of an amusement permit in respect of premises other than premises used wholly or mainly for the provision of amusements by means of gaming machines, that the number of gaming machines which may be made available for gaming on the premises shall not exceed such number as the council may determine;*

- (b) *in the case of an amusement permit in respect of premises used wholly or mainly for the provision of amusements –*
 - (i) *that the premises are illuminated in the manner specified by the council; or*
 - (ii) *that advertising of, and window displays on, the premises are in the form specified by the council; or*
 - (iii) *that such notices are displayed and such information given on the premises as the council specifies in relation to any condition to which the amusement permit is subject.*

7. *The grant of an amusement permit shall not be invalidated by any failure to comply with paragraph 3(a) or 5(b) and no duty of a district council to comply with paragraph (3)(a) or (5)(b) shall be enforceable by legal proceedings.*

8. *The Department may, by order subject to affirmative resolution, substitute for the fee specified in paragraph (1)(a) such other fee as may be specified in the order”.*

2. *By Art. 119, appeals against the refusal of grant of an amusement permit lie to the county court, whose decision is final. Case law confirms and the parties agreed that the appeal is a hearing de novo and accordingly, the parties could- and did- raise additional issues other than those raised in the initial application.*

3. *The other relevant legislation is contained in regulations under the Order.*

The Amusement Permit (Prescribed Premises) Regulations (Northern Ireland) 1986, state inter alia:

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) *.....”.*

The Amusement Permit (Additional Grounds for Refusal) Regulations (Northern Ireland) 1993 state, inter alia –

2. *These regulations shall apply to an application for the grant of an amusement permit for premises within the meaning of regulation 2(a) of the Amusement Permit (Prescribed Premises) Regulations (Northern Ireland) 1986(b).*
3. *These regulations shall apply to an application for the provisional grant of an amusement permit as they apply to an application for the grant of such a permit.*

Failure to comply with procedure

2. *Where a district council is not satisfied that the applicant for the grant of an amusement permit has complied with the procedures set out in the Schedule, it shall refuse to grant that permit.*

Representations from third parties

3. *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 the date that application.*

14. Both Counsel have helpfully referred me to the relevant caselaw. In this case issues arose about the matters of which the Council could take account when deciding to grant or refuse an amusement permit, the question of adequacy of provision and identification of “need” and also about the weight to be given to the decision of the PAC in deciding on the appropriate use of the premises and in particular, the suitability of the location of an amusement premises within the historic walled city.

15. Taking the first of these issues, Mr McCollum referred me to the decision of Maguire J in the case of **Re Oasis Retail Services Ltd** (13/1/2017), where it was confirmed that it is not necessary to establish need for amusement premises, although the presence of other premises and the facilities provided by them is relevant. In **Re O’Connor’s application**, [1991]NI 77, Murray LJ stated as follows:

2. *The council must consider each individual application on its merits and must not adopt a blanket decision, eg a decision to refuse all applications on the basis that gaming machines are undesirable and should not be permitted.*
3. *The sub-divisional commander is unrestricted as to the grounds on which he may object to the proposed application, eg traffic, moral danger to young people, adequacy of existing gaming facilities, unsuitability of premises etc.*
4. *Likewise, the council is unrestricted as to the ground upon which it may refuse an application and it may do so even if the sub-divisional commander makes no representation, but the council's decision is, in general, subject to the "Wednesbury" principles ie the well-known principles enunciated in the case of Associated Provisional Picture Houses Limited –v- Wednesbury Corporation [1948] 1 KB 223. The effect of these, put shortly, is that the Council must not take into account a matter which the law does not allow to be taken into account and it must not leave out of account a matter which the law says is to be taken into account. Finally, even if the Council keeps within the four corners of its legal powers its decision is liable to be quashed by the Court if it comes to a conclusion so unreasonable that no reasonable authority could ever have come to it.*
5. *Whether the application relates to an amusement arcade or pleasure fair premises, the Council has no discretion to grant the application and must refuse it if it is not satisfied about the fitness of the Applicant or any other matter referred to in Article 111(3).*
6. *If the application relates to pleasure fair premises but not if it relates to an amusement arcade, the Council, before deciding to grant the application, should, inter alia, consider in particular whether it is undesirable that gaming machines should be used in the premises in question on any of the grounds specified in Article 111(4), for example, the persons who are to use the premises. If it is satisfied that such undesirability exists, it may refuse the application".*

16. The appellant argued that the issue raised by the Council, suggesting that the proposed use of Unit 23 for an amusement premises was "unsuitable" and did not fit with the City Centre Development plan, had effectively been resolved by the PAC decision. The Council argued it was not and it was open to the court to come to a different conclusion to that of the PAC. Both counsel had referred me to the comments of Carswell LCJ, as he then was in *Re Ava Leisure Ltd's application for Judicial Review* [1991] NI 203, where he said :

“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 issue of premises for the purpose of an amusement arcade. That 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”.

17. In **Donnelly v Regency Hotel Ltd [1985] NI 144**, the same judge commented:

“I do not think the Court ought to absolve itself of its own statutory task of deciding upon suitability by placing complete reliance on 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”.

18. Mr Foster urged me to take account of the fact that the decision to refuse the application had been taken by the elected City Council on a cross-community basis and without any objection. He referred me to the judgment of Goddard CJ in the case of *Stepney Borough Council v Joffe [1949] 1 KB 599*, where he said :

“That does not mean to say that the court of appeal...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 judgement was right.”

Judgment

19. Having considered all the arguments put in this matter, there are a number of points which concern me about the refusal of this amusement permit.

20. The first is that the process by which the application was refused was, in my view, flawed. The application lodged by Oasis was referred to the Health and Community Committee of the Council, because there were objections to it. This delayed the whole process and allowed the application lodged by Mr Heaney for 1-2 Bank Place, in which there were no objections, to be dealt

with under delegated powers. It was referred to in a report to the Council as a renewal application and an application for an amusement permit. Significantly, the Health and Community Committee was not advised that this application had been lodged after the Oasis application which they intended to refuse and one of the grounds for refusal of the Oasis application was the existence of other gaming premises at 5 Bank Place. Mrs McClintock agreed that she would expect that each application should be dealt with in turn. Mr Gallagher, another councillor, agreed that he would expect the Councillors to be made aware if another application was to be approved under delegated powers when an earlier, similar application was potentially being refused. Neither was clear if there was a procedure for delegated decisions to be deferred pending any resolution of an application where there were objections. I consider that the provisional grant of a permit for the extended premises at Bank Place should not have been used, even in part, as a ground for refusal of the amusement permit for Unit 23, given that the latter application was lodged first.

21. Secondly, in relation to the planning considerations and the council's argument that the proposed development is not in keeping with the City Centre Plan, this is at odds with the decision of the PAC, which was decided in accordance with the Derry Area Plan. The PAC was satisfied that planning permission for an amusement arcade at this location would not adversely affect the retail character of Shipquay Street, which is already 60% retail. During the planning process, it was noted by the case officer that the NI Environment Agency considered that the proposed use would not have a detrimental impact to the character of the historic conservation area. As Counsel has reminded me, I am not obliged to follow the views of the Planning Appeals Commission, but they do have particular expertise in this area and so I would depart from their views on a planning issue only for the most compelling reasons. It does not seem to me that the reasons put forward by the Council are most compelling. They suggest in effect that the use of premises in a modern, concrete building for an amusement arcade would not be in keeping with the Council's plans for the historic walled city. First of all, most of the buildings within the historic walled city were built well after the walls themselves, in many cases hundreds of years after, so the suggestion that the city will be "restored" is not feasible. While the aim of regenerating this part of the city is laudable, and tourism is certainly to be encouraged, one must bear in mind the reality that all city centre streets in this city -and in most others- will have many and diverse businesses and uses. Mr Monaghan conceded that the Heritage Initiative had no plans for unit 23 and he agreed it was not a particularly attractive building. He

pressed the case for retail use, although it has lain empty for the last 16 years. In these circumstances where the Council cannot show a good reason to depart from the views of the PAC, I do not consider it proper to depart from its finding. It seems to me completely desirable that city centre premises should be occupied and open for business, rather than shuttered and closed. I am satisfied on the basis of what I have heard that Oasis would ensure that its signage and shop front are appropriate for the area and that the overall effect will be positive for the street frontage.

22.. I note also Mr McCollum's suggestion that the Council, being now the planning authority, is effectively seeking to usurp the role of the PAC by its refusal of an amusement permit, which would effectively overturn the PAC decision on change of use for unit 23 . I make no comment on that, save to say that it would of course be undesirable and indeed improper for a Council to use the licensing process for such a purpose, if it were indeed the case.

23. The premises are located in proximity to an area where youths congregate and vulnerable people may be in the vicinity seeking advice at a number of venues or living in housing nearby. I accept the case made by the appellant that its policy and practice in running an adult business with strict adherence to the age limit would address this concern. It is also unclear that there is any real problem with youths congregating in the area, apart from times when catching buses or visiting the Richmond Centre, which has no direct access to the subject premises.

24. Adequacy of existing provision and Need. Given what I have said above about the premises at 1-2 Bank Place and that application, I consider that that it should not be taken into account in considering the question of need. I remind myself that there is no statutory requirement to consider the adequacy of the current provision or for the appellant to demonstrate need before an application can be granted, although other facilities in the area can be taken into account in deciding if the permit should be granted. I do not accept the argument put by Mr Foster that the appellant must demonstrate need or prove that the existing provision is inadequate. Unlike other licensing regimes applicable to liquor licensing, bookmakers and so on, there is no such requirement and no binding authority which would compel me to require it. There has been no detailed study done by the appellant or the Council on the question of need. The Council view seems to have been more that they did not consider more gaming premises were morally desirable. However I also take on board that there are premises in Bridgend, Co. Donegal, which attract a considerable percentage of their trade from Northern Ireland customers and it would be preferable if that

business remained in local businesses on this side of the border. Given the sort of service offered by Oasis, the scale of the proposed operation and the high standard of its premises, I consider that it will provide a different type of offering to that currently available and accordingly I grant the appeal. I order that Oasis Retail Ltd shall be granted an amusement permit for the premises at Unit 23, Richmond Centre, Londonderry, for a centre with a maximum of 70 gambling machines.

HHJ E M McCaffrey

23 June 2017