SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2020] SC EDIN 28

B1132-19

JUDGMENT OF SHERIFF T WELSH QC

Summary Application under section 159 of the Housing (Scotland) Act 2006

in the cause

ELIZABETH FIELDMAN, residing at 139 Lanark Road, West Edinburgh, EH14 5NZ

Pursuer

against

THE CITY OF EDINBURGH COUNCIL, having its principal offices at City Chambers, High Street, EH1 1YJ

Defender

Pursuer: Edward, Sol Av, Dentons Edinburgh
Defender: McLaren, Sol, Edinburgh Council, Edinburgh

Edinburgh, June 2020

The issue

[1] The pursuer holds a number of house of multiple occupation [HMO] licences in Edinburgh. The present case relates to one at Flat 3F2, 44 Montpellier Park, Edinburgh [the property]. The defender is the relevant local authority authorised to licence occupation of living accommodation as an HMO, in terms of section 124(2) of the Housing (Scotland) Act 2006. The applicant has held HMO licences in respect of different properties in Edinburgh since 2009. She has had nine licences with various renewals of these over the years. The property in question was first licensed as an HMO in July 2017. That licence expired on 30 September 2018 and the current appeal relates an application for a new license in respect of the same property dated 26 September 2018. After sundry procedure before the

defender's licensing sub-committee the pursuer was refused an HMO for the property for certain stated reasons on 18 October 2019. The pursuer appeals that decision as *ultra vires* of the committee and unfair in the circumstances. The pursuer craves that the decision of the committee is quashed or remitted back for reconsideration and in her second plea-in-law asserts that the decision of the committee ought to be reversed by the court and a conditional licence granted.

The regulatory scheme

[2] Because the pursuer asserts it is competent for the court to reverse the decision of the committee and grant a conditional licence, I require to describe the regulatory scheme created for HMO licencing in Part 5 of the Housing (Scotland) Act 2006 [the Act]. This contains a stand-alone statutory scheme which is intended *inter alia* to regulate the grant, use of, control, enforcement, renewal, termination and appeal in respect of HMO licences in Scotland. Before this came into force on 31 August 2011, the regulation of HMO licences was dealt with under the omnibus licensing provisions in the Civic Government (Scotland) Act 1982 section 4 and Schedule 1.

[3] The new scheme is bespoke. Briefly stated, it defines what an HMO is (s125). It imposes an obligation on owners of houses in multiple occupation to obtain a licence (s124). It creates a licencing authority (s124(2)) and imposes an obligation on it to maintain a public register of HsMO which is open to public inspection (s160). The content and duration of licences is regulated (s133 and s134). Provision is made for the revocation or variation of a licence (s138 and s139). The procedure to be followed at the licencing hearing is set out in schedule 4 to the Act. A suite of offences (s154) and penalties (s156) is created and a duty on local authorities as licencing authorities to clamp down on abuse of HMOs, if such is

brought to their attention, is created and imposed (s144 to s153) by the Act. Thus, on the face of it a comprehensive regulatory regime has been created.

[4] Section 131 of the Act provides:

> "(1) The local authority may grant an HMO licence only if it considers that the living accommodation concerned—
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> (a) is suitable for occupation as an HMO, or
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> (b) can be made so suitable by including conditions in the HMO licence.
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> (2) In determining whether any living accommodation is, or can be made to be, suitable for occupation as an HMO the local authority must consider—
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> (a) its location,
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> (b) its condition,
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> (c) any amenities it contains,
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> (d) the type and number of persons likely to occupy it,
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> (da) whether any rooms within it have been subdivided,
>
> (db) whether any rooms within it have been adapted and that has resulted in an alteration to the situation of the water and drainage pipes within it,] 1
>
> (e) the safety and security of persons likely to occupy it, and
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> (f) the possibility of undue public nuisance."

[5] The HMO licence in the present case was not renewed because the defender's licencing committee considered that the condition of the property at the date of the decision was unsuitable for occupation as a HMO. Having decided to refuse to renew the HMO licence the defender is obliged in terms of s158 of the Act to serve a copy of that decision on the pursuer and other parties affected by it. The pursuer has a right of appeal against the decision in terms of section 159 of the Act, which in so far as relevant provides:

> "(1) Any decision of a local authority to which section 158 applies may be appealed by summary application to the sheriff
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> …
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> (6) The sheriff may determine the appeal by—
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> (a) confirming the decision (and any HMO licence or order granted or varied, or requirement made, in consequence of it) with or without variations,
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> (b) remitting the decision, together with the sheriff's reasons for doing so, to the local
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> authority for reconsideration, or
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> (c) quashing the decision (and any HMO licence or order granted, or variation or requirement made, in consequence of it)
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> …
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> (8) On remitting a decision the sheriff may—

> (a) set a date by which the local authority must, after reconsidering the decision, confirm, vary, reverse or revoke it.
> (b) modify any procedural steps which would otherwise be required by or under any enactment (including this Act) in relation to the reconsideration"

Section 158(1)(a) of the Act relates to any decision by the local authority to grant an HMO licence (with or without conditions) or to refuse to do so. An HMO license expires 3 years after it is granted (or such shorter period of not less than 6 months as may be specified in the licence), section 134(1)(b) of the Act. The licence cannot be renewed or extended but the holder can during the currency of an existing HMO licence apply for a new licence in respect of the same property, which is what happened in the present case.

[6] As directed by section 129(3) of the Act, schedule 4 sets out the procedural requirements relating to how an application for an HMO licence is made, processed, and decided by the local authority. The local authority enjoys wide scope and authority to make inquiries into whether such a licence should be granted:

> "5 *Inquiries*
> (1) The local authority may make such inquiries about the application as the authority thinks fit.
> (2) The local authority must make a report of any matter arising from any such inquiries which the local authority considers relevant to the determination of the application."

The applicant has certain procedural rights to see and respond to relevant documents and reports relating to the application and inquires made by the local authority prior to any hearing:

> "6 *Applicant's opportunity to respond*
> (1) The local authority must give the applicant a copy of—
> (a) any valid written representation,
> (b) any late written representation which the authority intends to consider, and
> (c) any report made under paragraph 5(2).
> (2) A copy representation or report given under sub-paragraph (1) must be accompanied by a notice specifying the period (of not less than 7 days from the date

on which the notice is given) during which the applicant may give a written response to the local authority on any matter set out in the copy representation or report."

If an oral hearing is convened the applicant and relevant others are entitled to be heard and participate in the process in accordance with the principles of immediacy and fairness:

"7 *Hearings*
(1) The local authority may decide to hear oral representations about the application.
(2) If the local authority decides to hold such a hearing, it must invite—
(a) the applicant,
(b) each respondent who has made a valid written representation or a late written representation which the authority intends to consider, and
(c) any other person it thinks fit, to make oral representations.
(3) An invitation under sub-paragraph (1) must be given not less than 7 days before the proposed hearing."

These rights are further enhanced by the statute which directs the local on what material must be taken into account before making a determination in every case whether lodged timeously or not:

"8 *Consideration of application*
(1) Before determining an application for an HMO licence, the local authority must consider any—
(a) valid written representations (unless withdrawn),
(b) reports made under paragraph 5(2),
(c) written responses given by the applicant in pursuance of paragraph 6(2) (within the period specified in that paragraph), and
(d) oral representations made in pursuance of paragraph 7.
(2) The local authority must not consider any written representation which is invalidated by paragraph
(a) or (b) of paragraph 4(1).
(3) But the local authority may consider a late written representation if it is satisfied that it was reasonable for the respondent to make the representation after the deadline for doing so."

Schedule 4 sets a time limit within which the decision must be made, which is 12 months, unless an extension is granted by a sheriff, failing which, the application is to be treated as having been granted unconditionally:

"9 *Time limit for determining application*
(1) The local authority must decide whether to grant or refuse an application for an HMO licence within 12 months of it receiving the application.

(2) The period mentioned in sub-paragraph (1) may be extended by the sheriff, on summary application by the local authority, by such period as the sheriff thinks fit.
(3) The sheriff may not extend a period unless the local authority applies for the extension before the period expires.
(4) The applicant is entitled to be a party to any proceedings on such a summary application.
(5) The sheriff's decision on such an application is final.
(6) If the local authority does not determine an application for an HMO licence within the period mentioned in sub-paragraph (1) (or that period as extended), the authority is to be treated as having decided to grant the HMO licence unconditionally.
(7) Sub-paragraph (6) does not affect the local authority's power to vary or revoke an HMO licence granted in pursuance of that sub-paragraph."

The relevant facts

[7] No evidence was led. Parties were content that I should decide the case based on the written record contained in the pleadings and supporting productions. Accordingly, one would think the undisputed relevant facts should easily be capable of discovery from the statement of reasons (SOR) letter dated 18 October 2019. However this task is far from easy. The SOR is a rambling and unfocused minute about two meetings. It describes those who attended, what materials they had, the nature of their contributions, the procedure followed and elliptically the reasons for refusal to grant the new HMO application. According to Ms McLaren the SOR misascribes views and utterances to Councillor Rose which actually came from Councillor Fullerton. However, what can be garnered and said about the reasons for refusal contained in the SOR is this:

i. There were two meetings to consider this application. The first on 19 August 2019. The second was on 16 September 2019.

ii. At the first meeting the committee had a copy of the HMO licence application, written objections and written responses from the pursuer to the objections. The

pursuer and an objector were present and addressed the committee. Not all the objectors from the building where the property is situated were present.

iii. During the hearing an issue arose about a defective building warrant completion certificate for the property. By the second meeting inquiries had been made in the interim and this issue proved to be unfounded. Accordingly, the building warrant formed no part in the decision to refuse the HMO licence application.

iv. Over both meetings, concerns were raised about fire safety issues. By the second meeting it was recognised that although it would be preferable to have had a further report on this matter the committee noted that in the absence of further detail the fire risk was not a matter to which it could give material consideration at that time. Accordingly, fire risk played no part in the decision to refuse the application.

v. Over both meetings an issue emerged about possible attic encroachment by the property which related to the positioning of a partition wall between the property and its adjoining neighbour. At the second meeting this was recognised to be a conveyancing/title issue, if it was an issue at all. Accordingly, the encroachment issue played no part in the decision to refuse the HMO licence application.

vi. At the first meeting the main objector made a number of complaints. These related to (1) non-payment of common charges due by the pursuer over many years (2) the noise from footfall coming from the property, the objector being of the opinion that an HMO licence for 6 persons was excessive (4) lack of appropriate floor covering to deaden noise from within the flat (5) the fire alarm going off and the pursuer not being available to turn it off (6) mess being left in

the stairwell and in the back garden by occupants of the property (7) too many visitors to the property during the Edinburgh Festival 2018 (8) the unauthorised conversion of the building at the entrance to the attic whereby the pursuer without consent of the other owners in the building repositioned the median line of the attic. It was suggested that the attic conversion encroached into the space above the bedroom of the objector's daughter by approximately 12 inches. The objector suggested that these issues had been ongoing for some time. Most of the flat owners in the building had signed the objection. The objector explained that one of the owners lived in Switzerland and another in Canada or else perhaps the objection would have had seven signatures, not five.

vii. The pursuer replied and stated her position about common charges over the years. She indicated to the committee that she had an exemption from the requirement for carpets and floor coverings and she had correspondence regarding this. At the second meeting [para 20 of the SOR] the Committee noted "that noise transfer to the neighbour was a major concern for it". With regard to the floor coverings the pursuer's position was that she had an ongoing collateral dispute with the local authority to have an exemption from the floor coverings requirement which she secured for the original licence extended to the new licence application. Hence there had been a delay in doing that floor covering work in case it was not necessary.

viii. At the close of the first meeting the committee decided to continue the hearing for further information. The SOR reads

> "The Committee queried if a more robust report could be obtained. Mr Mitchell [the defender's regulatory manager] confirmed that it would be possible to go and re-inspect the property and more fully set out the

department's position in a tenancy management report. Thereafter, following some further brief discussion regarding the content of such a report, the Committee agreed unanimously to continue the application to the meeting of the Licensing Sub-Committee of 16 September 2019 to allow officers to inspect and report back on the property. *The report was to include clarification of the position regarding the building warrant completion certificate, the floor coverings in the property and the ownership of the roof space in the property.*" [Emphasis added].

ix. On 29 August 2019 a further inspection by the Defender's licensing and public safety officers took place. A supplementary report by Mr Mitchell was considered at the licensing sub-committee meeting on 16 September 2019 setting out findings and recommendations. The recommendations at paragraph 1.2 were that, if the committee was minded to grant the application, a condition should be added stating that:

   a. Maintenance was to be carried out on the timber staircase to the upper level to reduce excessive creaking and movement noise when using the staircase
   b. Carpet and good quality underlay should be fitted in the lower hallway and the connecting staircase to the upper level
   c. And cushioned vinyl should be fitted in the kitchen and bathroom to address concerns that the Property is not suitable as an HMO
   d. All of this to be completed within a three month time period.

x. At the second meeting on 16 September 2019 the objector raised the question of whether the pursuer was a fit and proper person to hold an HMO licence. The committee duly considered this matter. This related to the objections the committee heard at (vi) above in the context of a lack of proper management of the tenants in the flat, by the pursuer. However, the committee attached no

weight to the suggestion that the pursuer was not a fit and proper person to hold a HMO licence. Accordingly, fitness to hold a licence formed no part in the decision to refuse the HMO licence application in the context of the pursuer being a fit and proper person to hold a licence.

xi. The committee at paragraph 23 of the SOR stated:

> "The Committee considered carefully the written submissions and all that it had heard. The Committee's Convenor asked members if there were any proposals in respect of the application. Councillor Rose (*Sic*) noted that much evidence and information had been led in relation to the suitability of the property and that the report before the Committee raised similar issues. With particular emphasis on the issues set out in paragraph 1.2 of the report he was not persuaded that the property was suitable for use an HMO. He had concerns about the property and was not persuaded that the deficiencies could be corrected by adding conditions to make it suitable. He would require the issues raised at the meeting and in particular those set out in paragraph 1.2 of the report to be resolved before the application was determined and would require assurances or a further report on the issue of fire safety. He did not think that the property was suitable as an HMO with particular reference to paragraph 1.2 of the report and was not happy to follow the recommendations set out in paragraph 1.4 giving three months to resolve matters. These works should be done before the property could be considered suitable and before any licence was granted."

xii. At paragraph 25 of the SOR there is stated:

> "The Committee considered the written submissions before it and all that it had heard. The Committee was of the view that its concerns about the suitability of the property as an HMO had not been addressed satisfactorily and, there being no other proposals other than that by Councillor Rose, was therefore of the unanimous decision that the application should be refused."

xiii. At paragraph 27 of the SOR the following is stated:

"The Committee also considered the submissions in the letter of objection relating to the applicant's response to noise and antisocial behaviour at her property. The Committee expressed concerns that the applicant had not provided any information about steps she had taken to manage tenants or to respond to neighbour complaints about antisocial behaviour but was of the view that there was not enough specific evidence before it to demonstrate that the applicant's alleged failure to act demonstrated that she was not a fit and proper landlord."

xiv. The reasons the committee gave for refusing the application are found at paragraphs 28 and 30 of the SOR.

xv. At paragraph 28 the SOR states:

> "The Committee considered the submissions heard and the terms of the report in relation to the condition of the property and the ongoing noise issues from the property. The Committee noted that Council officers had inspected the property on 29th August 2019. The Committee noted the terms of paragraph 3.6 of the report which stated that the measurements of the property taken at the inspection indicated that the partition wall extended into the neighbouring property and that this had been confirmed by the applicant. The Committee noted that, putting aside the issues relating to ownership or consent for positioning of the wall, the position and physical properties of the partition wall were material considerations in assessing the suitability of the property. Sound transfer from the property was a significant issue for the neighbours and the inspection had highlighted a number of problems with the partition wall that *could be* contributing to the noise transfer problem. The Committee noted that paragraph 3.8 of the report set out a number of matters that *could* improve the acoustic separation properties of the partition wall and was of the view that these required further investigation *and if necessary* remedial works to be carried out before the property could be considered suitable." [Emphasis added]

xvi. At paragraph 30 the SOR states:

> "The ongoing problems with excessive noise from the property was also a material consideration for the Committee. The Committee noted paragraph 1.2 of the report which set out work that was required in the property and which, if implemented, could go some way to addressing the problems of sound transfer. It was noted that that the requirement to install carpets and cushioned vinyl flooring in the property had first been raised with the applicant in November 2018. The Committee was not persuaded that allowing a further three-month timescale for the matters set out in paragraph 2.1 (*Sic*) to be addressed would be appropriate given that the problems of noise transfer had been ongoing for some time and continued to be an issue for the objectors. The Committee was of the view that solutions were need for these problems before a licence could be granted. Given the lack of noise-reducing measures that had been implemented and the need for further investigation to identify work *that would help* mitigate noise transfer problems the Committee was of the view that the property could not be considered suitable in its current state. The Committee determined that the matters set out in paragraph 2.1 (*Sic*) should be addressed before a licence was granted as the property, in its current condition, could not be considered suitable for use as an HMO. The Committee was not convinced that adding conditions to a licence would address these issues given that the problem of

> noise transfer was ongoing and that it considered that measures to address this problem should be in place before a licence was granted." [Emphasis added].

Submissions

[8] Mr Edward for the pursuer reviewed the factual background to the case. His submission was two-fold. In the first place he stated the decision reached by the Defender's licensing sub-committee on 16 September 2019 was one which no reasonable committee could have reached in the circumstances based upon the facts before the committee at that time. He relied on *Wordie Property Co Limited* v *Secretary of State of Scotland* 1984 SLT 345 and *The Noble Organisation Limited* v *City of Glasgow District Council* (No3) 1991 SLT 213). Secondly he stated the Defender's licensing sub-committee erred in law in reaching their decision to refuse the licence in failing to provide adequate reasons for their decision in their statement of reasons dated 18 October 2019; taking into account matters which they should not have taken into account and failing to take into account matters which they should have taken into account. He relied on *Associated Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1KB223 and *Loosefoot Entertainment Limited* v *City of Glasgow District Licensing Board* 1991 SLT 843. He also referred to 4 authorities decided in relation to HMOs. He said in *Brian and Ann Anderson* v *Fife Council* B92/05 the issue was whether the objections to licence and other factual background material formed sufficient basis for the licensing sub-committee to refuse a licence on the basis that the proposed HMO would adversely affect the amenity of the area by way of noise and disturbance etc. The sheriff decided that the background material established quite firmly the existing nature of the locality and why it would be under threat from the proposed change in use and HMO licence and therefore the decision of the licensing sub-committee fell within its discretion and the appeal fell to be

refused. By contrast in the case of *Adriana Valente* v *Fife Council* B101/06 a similar application for an HMO for use by students in St Andrews the sheriff decided that the relevant background and objections did not provide a reasonable basis for rejecting the licence application and that the licensing sub-committee had exercised their discretion in an unreasonable manner and the appeal should be allowed on that ground. The sheriff in his decision reversed the refusal of the licence subject to conditions that would meet the proper concerns and interests of the respondents. He said in *Dr and Mrs Killen* v *Dundee City Council* B623/07 the sheriff decided that the licensing committee were entitled to reach their own interpretation of a Home Zone under the Transport (Scotland) Act 2001 and the Home Zones (Scotland) Regulations 2002 and where the committee had found that the granting of an HMO licence within a Home Zone was questionable the committee could within its powers enunciate a policy of no HMOs in Home Zones and provided that policy was justified and explained in accordance with their powers they were entitled to do so. However in *Jennifer Cooper* v *Dundee City Council* B622/07 the sheriff decided that the licensing committee had acted out with its powers by taking into account previous instances of disturbance which took place when the property was an HMO in different ownership for the purposes of refusing the present application. In both the cases where the refusal of the licence was overturned the court positively ordered the Licensing Authority to grant the applications where necessary subject to conditions. The HMO cases cited were all decided under the Civic Government (Scotland) Act 1982.

[9] Mr Edward invited me to quash the decision of the committee and grant the HMO licence in the first place subject to the conditions mentioned in the report by Andrew Mitchel dated 16 September 2019. If I were not persuaded so to do he invited me to remit the case back to the committee for re-consideration.

[10] For the defender Ms McLaren submitted the committee had considered all relevant material and reached a decision which it was perfectly entitled to do in law. That decision could only be quashed if there was some error in law relating to the way the law was interpreted or if it was a plainly wrong decision. It was not open to the court to re-hear the application *de novo* and make a new decision. Ms McLaren invited me to confirm the decision of the committee as there had been no error in law and it was not suggested the decision was plainly wrong but rather that it was unreasonable and *ultra vires* in a *Wednesbury* sense. Rather than grant the craves sought by the pursuer I was invited to remit back to the committee, if I was against the defender in principle.

Discussion

[11] In my opinion the purpose of Part 5 of the Housing (Scotland) Act 2006 is to create a self-contained scheme for the licencing of houses in multiple occupation. The Policy Memorandum which accompanied the Bill stated, in respect what became part 5 of the Act, that it "Re-enacts the existing system for the licensing of houses in multiple occupation, with some changes to its details, thus overcoming the limitations caused by its position within the structure of the Civic Government (Scotland) Act 1982." Therefore, I proceed upon the basis that my jurisdiction and power is entirely based on statute. This is not a judicial review but the jurisprudence relating to judicial review is relevant and helpful. It seems to me there are two questions which I have to ask. Firstly, upon what basis could I interfere with the decision of the committee? Secondly, if I am prepared so to do what are my powers?

Upon what basis can the decision be quashed?

[12] In relation to the first question the principles are well established. However, I require to take judicial notice that this is not a judicial review but that I am exercising a statutory jurisdiction. There are two well known cases which map out the terrain and set the parameters for possible judicial intervention in the decision of an administrative tribunal such as the present committee. In *Wordie Property Co Ltd* v *Secretary of State for Scotland*, 1984 S.L.T. 345 *per* Lord President (Emslie) set out the test thus.

> "There is, and now can be, little dispute as to the scope of such appeals as these for the law is well settled. A decision of the Secretary of State acting within his statutory remit is ultra vires if he has improperly exercised the discretion confided to him. In particular it will be ultra vires if it is based upon a material error of law going to the root of the question for determination. It will be ultra vires, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly, it will fall to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it. It will also fall to be quashed if it, or any condition imposed in relation to a grant of planning permission, is so unreasonable that no reasonable Secretary of State could have reached or imposed it. These propositions, and others which are not of relevance for the purposes of these appeals, are, it appears to me, amply vouched by many decided cases including *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation , Ashbridge Investments Ltd. v. Minister of Housing* and *Local Government , Anisminic v. Foreign Compensation Commission , Coleen Properties Ltd. v. Minister of Housing and Local Government , British Airports Authority v. Secretary of State for Scotland , and Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* ."

In an equally well-known case Lord President Gill stated:

> "[11] In the now classic formulation of Lord President Emslie, the duty of the decision-maker in a case of this kind is:
>
> > 'to give proper and adequate reasons for [the] decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it' (*Wordie Property Co Ltd v Secretary of State for Scotland* , pp 347, 348; cf *Mirza v City of Glasgow Licensing Board* , Lord Justice-Clerk Ross, p 457C-D).

> A consideration is material, in my opinion, if the decision-maker decides that it is one that ought to be taken into account. The court may of course interfere if he perversely disregards a consideration that in the view of the court is manifestly material.
>
> [12] The decision-maker, having taken a particular consideration into account, may in the event decide that other considerations outweigh it. Such a consideration, being thus outweighed, is not a determining consideration; but it is material nonetheless because it has formed part of the decision-making process. In fulfilling his duty to give proper and adequate reasons, the decision-maker need not engage in an elaborate and detailed evaluation of each and every point that has arisen at the hearing. But his statement of reasons must identify what he decided to be the material considerations; must clearly and concisely set out his evaluation of them; and must set out the essence of the reasoning that has led him to his decision.
>
> [13] The general principles governing the matter are well established; but in every case the validity of the decision complained of must turn on the wording of the statement of reasons." *Ritchie v Aberdeen City Council*, 2011 S.C. 570"

[13] Having read the SOR it seems to me the committee refused the licence ostensibly for three reasons that I can discern. To begin with, I note that the committee made it clear that noise transfer was a major concern in respect of this property (para 20 of the SOR). Firstly, it was suggested noise was caused by the behaviour of the occupants of the property. The objector complained about this. It is not as clear as it could be to me that this kind of noise was a reason for refusal because it seems to have been considered at the second meeting in the context of the pursuer's fitness to hold a licence. The committee said at paragraph 27:

> "The Committee expressed concerns that the applicant had not provided any information about steps she had taken to manage tenants or to respond to neighbour complaints about antisocial behaviour but was of the view that there was *not enough specific evidence* before it to demonstrate that the applicant's alleged failure to act demonstrated that she was not a fit and proper landlord."[Emphasis added].

Be that as it may, secondly, noise was a reason for refusal according to the SOR because of the construction of the partition wall in the attic which may have allowed sound transfer from the property into an adjacent flat owned by the objector (para 28 of SOR). The third reason given for refusal was that the committee was not prepared to allow more time for the

noise reducing recommendations in the supplementary report to be implemented on the basis that this work should all have been done before the application was submitted in the first place (para 30 of SOR).

[14] Accordingly, it seems to me that a material consideration given by the committee for the refusal of the licence in this case related to the issue of possible sound transfer between the property and the adjacent objector's property. But quite separately, the committee considered the wider issue of noise and nuisance (complained of by the objector) created by occupants of the property over the years, both within the property and within the common parts of the building. Although it appears the committee did not consider there was sufficient specific evidence of this complaint to justify the committee holding that the pursuer was not a fit and proper person to hold a HMO licence.

[15] The basis for the decision relating to sound transfer between the property and its adjacent neighbour is to be found in the supplementary report of 29 August 2019 submitted by Andrew Mitchell. At paragraph 3.8 of his report he says the following in relation to the partition wall:

> "There are a number of constructional contributing factors relating to the wall that *could* be improved to increase the acoustic separation properties of this wall. Please note that further investigation, *by a suitable qualified engineer*, *would be necessary* to give specific guidance … All of these issues *could* reduce the acoustic insulation properties of this framed wall construction." [Emphasis added].

My reading of this part of Mr Mitchell's report is that he is saying he has conducted a visual inspection only. He has not done sound tests and furthermore he is not suitably qualified to express an opinion on the question of acoustic insulation. In those circumstances, I do not consider his report provides a proper factual basis for the committee to include it as part of its decision-making process. In this respect the decision of the committee was *ultra vires* in that there was no proper factual basis to support the conclusion it reached that

> " … the inspection had highlighted a number of problems with the partition wall that *could* be contributing to the noise transfer problem. The Committee noted that paragraph 3.8 of the report set out a number of matters that *could* improve the acoustic separation properties of the partition wall and was of the view that these required further investigation *and if necessary* remedial works to be carried out before the property could be considered suitable." [Emphasis added].

Mr Edward also suggested that this report only became available at the second meeting and there was therefore insufficient time available to rebut the material suggestion it contained. To that extent, he said, the decision was unfair. I agree that it was unfair to be confronted with a technical issue at the second meeting without notice and sufficient time to investigate and challenge it. Mr Edward suggested that the report to the committee had gone beyond the remit of what had been requested at the first meeting. To that extent it was *ultra vires* of the committee to take into account paragraph 3.8 and 3.9 of the report. The committee enjoys a wide power to make inquiries in terms of paragraph 5 of schedule 4 of the Act. The power cannot be unlimited. In my opinion paragraph 3.8 and 3.9 are *ultra vires* in a *Wordie Property* sense because the content amounts to speculation from an unqualified source in relation to a material issue which was prejudicial to the pursuer.

[16] However, the third ground the committee gave for refusing the new HMO licence related to the failure of the pursuer to fit appropriate floor coverings in the property to address complaints from neighbours relating to noise coming from hard surfaces in the property. The pursuer argued that she had secured a carpet exemption for the original licence and that she had been trying to persuade the local authority that this should continue to apply. Mr Edward argued that the committee failed to attach sufficient weight to the fact that the pursuer had only delayed putting in more carpet in the lower hall and soft vinyl in the kitchen and bathroom because she was involved in a lengthy separate process to secure a carpet exemption for the new HMO licence. I considered Mr Edward's submissions on

this point but I am of the opinion that the committee is perfectly entitled to conclude that the property is not suitable for an HMO licence on the basis it is not properly carpeted and floor covered in the lower hall kitchen and bathroom given the complaints relating to noise from the neighbours. The committee was entitled to take into account that the pursuer had repeatedly been asked to address this issue by the defender and had failed to do so even if that was because she was trying to negotiate an exemption from the carpet and floor covering policy of the defenders. It is a matter for the committee what weight it attaches to the failure on the part of the pursuer, including the reasons she gave for it, to adequately carpet and floor cover the property and when that should be done in the application process. In my opinion there is no basis upon which I can interfere with the decision of the committee on this ground.

[17] Accordingly, I have reached a mixed conclusion that the committee made a decision it was perfectly entitled so to do in respect of the floor coverings (and possibly the wider noise nuisance complaints relating to the occupants although in my opinion that is not clear) but in one material respect took into account a report for which there was an inadequate basis in fact, from an unqualified source. However, I have no way of knowing how material the three factors I have identified were in driving the committee to its conclusion. Having decided that the general evidence about noise and nuisance over the years from the objector was insufficient to establish that the pursuer was unfit to hold an HMO licence the committee may have given that matter no further consideration and reached its conclusion on the basis of the noise transfer material provided by Mr Mitchell in his supplementary report and the failure to have the floor covering work done before the application was submitted.

[18] In these circumstances, Ms McLaren invites me to confirm the decision of the committee because it was entitled to make it, there being no error of law, according to her. On the other hand Mr Edward invites me to quash the decision because it is vitiated by the content of Mr Mitchell's report relating to the partition wall, which he says was *ultra vires* and unfair. He invites me to grant the new licence thereby reversing the decision of the committee or alternatively I should remit the matter back to the committee for reconsideration.

Powers under the new regulatory scheme

[19] [19] This takes me to the second issue I require to decide which relates to my powers under the Act. As I indicated previously, part 5 of the Act contains a free-standing code, the purpose of which is to regulate HMO licences. HMOs have been removed from the ambit of the Civic Government (Scotland) Act 1982. That is important because the Act directs the sheriff to dispose of an appeal like this one in a particular way which is not the same way as is contained in the scheme available under the 1982 Act. The 1982 Act provides, in paragraph 18 of schedule 1 as follows:

> "(7) The sheriff may uphold an appeal under this paragraph only if he considers that the licensing authority, in arriving at their decision—
>
> (a) erred in law;
>
> (b) based their decision on any incorrect material fact;
>
> (c) acted contrary to natural justice; or
>
> (d) exercised their discretion in an unreasonable manner
>
> …
>
> (9) On upholding an appeal under this paragraph, the sheriff may—
>
> (a) remit the case with the reasons for his decision to the licensing authority for reconsideration of their decision; or
>
> (b) reverse or modify the decision of the authority,
>
> and on remitting a case under sub-sub-paragraph (a) above, the sheriff may—
>
> (i) specify a date by which the reconsideration by the authority must take place;

> (ii) modify any procedural steps which otherwise would be required in relation to the matter by or under any enactment (including this Act)."

The 1982 Act regulates a miscellany of different kinds of local authority licences including taxi licences, second-hand dealers licences, knife dealers licences, metal dealers licences, street traders licences, indoor sport entertainment licences, boat hire licences, window cleaner licences and many more. The very wide power given to the sheriff in paragraph 18(9) of schedule 1, of that Act (including the power to reverse) is not repeated in section 159(6) of the Housing (Scotland) Act 2006 which provides:

> "(6)The sheriff may determine the appeal by—
> (a)confirming the decision (and any HMO licence or order granted or varied, or requirement made, in consequence of it) with or without variations,
> (b)remitting the decision, together with the sheriff's reasons for doing so, to the local authority for reconsideration, or
> (c)quashing the decision (and any HMO licence or order granted, or variation or requirement made, in consequence of it)."

Thus, I am directed to determine this appeal in a more limited way by either confirming the decision, or remitting the decision back to the committee for reconsideration with my reasons for so doing or quashing the decision. While I do have a limited power in terms of section 159(6)(a) of the Act to modify a confirmed decision, in my opinion, I have no statutory power to reverse a decision of the committee. Thus, the committee having decided to refuse the HMO licence, the Act makes it clear the sheriff has no power to reverse that decision and grant the licence. The only way a reversal can be achieved, on the face of the Act, is by remitting the case back to the committee in terms of section 159(8) [see para 24 below]. This to my mind reflects correct procedure in principle as the summary application to the sheriff is an appeal from a decision of the licencing committee of the local authority. It is not an application for a licence. The experts in granting such licences are the local authority regulatory officers and the licencing committee, not the sheriff.

[20] In one respect however, I would reserve my position in relation to a blanket ban on judicial reversal of a decision to refuse an HMO in a case where the appeal was based on a decision that was plainly wrong (which is not the ground of appeal in this case) because I was not addressed in sufficient detail on that possibility.

[21] Thus, it seems to me I have no power to grant Mr Edward's primary invitation which was to quash the decision of the committee and grant the new licence myself subject to the remedial work recommendation made by Mr Mitchell, in his report at paragraph 1.2. Equally, it seems to me it would be wrong to confirm the decision of the committee, which Ms McLaren invited me to do, if it were made on the basis of information supplied which lacked a proper factual basis from a suitably qualified source, about sound insulation contributing to noise bleed between the adjacent properties. Further the extent to which noise/nuisance from the occupants of the property over the years played a determinative part in the decision to refuse licence as distinct from the decision to hold it was not established that the pursuer on the evidence before the committee was unfit to hold a HMO is unclear.

[22] The case is further complicated because Mr Edward suggested that between the refusal and the appeal, the recommendation of the supplementary report of Mr Mitchell had been implemented in whole or in part and the pursuer was willing to have the property re-inspected to see if the work done addressed the problem identified so far as floor coverings are concerned. Ms McLaren rightly stated that I myself could not take that factor into account in deciding the appeal, because that factor was not before the committee. I agree with that submission and I do not do so.

[23] Accordingly, I consider the appropriate way to dispose of the appeal in fairness to all parties concerned is to remit the matter back to the committee for reconsideration on the

basis of the information before it, with a direction from me, to exclude from its consideration that part of Mr Mitchell's report at paragraph 3.8 and 3.9 which deals with sound insulation and the partition wall. In so doing it would be for the committee to decide whether it is necessary to re-inspect the property to ascertain if the recommendation in Mr Mitchell's report at paragraph 1.2 relating to floor coverings have now been satisfied and whether that now makes any difference to the original decision to refuse grant of licence. On reconsideration it is open to the committee to "confirm, vary, reverse or revoke" its original decision. The important thing is that the committee makes it clear what its decision is and the reasons for that decision.

Conclusion

[24] In terms of section 159(6)(b) of the Act I shall remit the case back to the committee for reconsideration. In doing so I want to make it clear to the pursuer that it remains open to the committee to refuse the application for a new HMO licence on the basis of the material before it relating to noise and nuisance complaints about the occupants and or the failure to have the floor coverings down before the application was heard, notwithstanding the fact that such remedial work may have now been done, even without the supplementary information provided by Mr Mitchell at paragraph 3.8 and 3.9 of his report. Whether it does refuse to grant or not is a matter for the committee. I should also make it clear that this decision does not give the pursuer a right to be heard again before the committee. This remittal sends the case back to the committee to reconsider its decision in the light of the judgment. The net result could be a grant or a refusal of the HMO licence without hearing further from the pursuer but that is a matter for the committee to decide, not me.

Timing

[25] I heard this appeal just before the CV-19 lockdown emergency legislation was introduced by the Scottish Parliament. This has had a marked impact on the way in which court cases are heard. I think it would be helpful if I fixed a timetable for reconsideration by the local authority committee in terms of section 159(8)(a) of the Act. This provides that:

> "On remitting a decision the sheriff may—
> (a) set a date by which the local authority must, after reconsidering the decision, confirm, vary, reverse or revoke it,
> (b) modify any procedural steps which would otherwise be required by or under any enactment (including this Act) in relation to the reconsideration"

Therefore, I shall order that the local authority must after reconsidering the decision in light of my judgment, confirm, vary, reverse or revoke its original decision by 31 August 2020.

[26] In addition, it occurs to me that the committee may require clarification of detail. Of course it may not but that is a matter for the committee. If the committee does require to hear from the pursuer or her agent then so that all parties including the committee have coronavirus compliant access to justice I shall order that the committee's procedure in relation to reconsideration (whatever the committee decides that should be) mirrors the general provisions of schedule 6 paragraph 1(7)(h) of the Coronavirus (Scotland) Act 2020 which makes modifications to the way licencing hearings can be held under schedule 1 of the Civic Government (Scotland) Act 1982, so that in the event of an oral hearing being considered necessary by the committee, the pursuer may be heard remotely by telephone or video link, in addition to making written representations. I must stress however that the committee may take the view there is no need to hear further from the pursuer in this case and that it can issue a decision with reasons after considering this judgment. It is very important that the committee and those legally qualified assisting in the formulation of the reasons set down clearly the reasons for the decision, whatever that may be.

[27] Mr Edward did not invite me to direct that a committee differently constituted from the one which made the decision to refuse should be convened. I have considered that matter and I do not think it is necessary. The remittal is for reconsideration by the committee of the decision to refuse. It is not for a rehearing of the case. If the committee is of the view the decision would have been the same even without the evidence of Mr Mitchell in relation to noise transfer via the partition wall it is free to confirm the decision to refuse. If the excision of that material would have made a difference then the committee is free to vary, reverse or revoke the decision it made to refuse.

Interlocutor

[28] I sustain the third *esto* plea-in-law for the defender and grant the second crave of the pursuer to the extent of a remittal.

Expenses

[29] In view of the fact there was mixed success I shall order there are no expenses due to or by either party.