SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

[2020] DUN 38

DUN-B748-19

NOTE BY SHERIFF JILLIAN MARTIN-BROWN

in the cause

GIOVANNI VALENTE

Pursuer

against

FIFE COUNCIL

Defender

Pursuer: Gray; Williams Gray Williams
Defender: Munro; Fife Council

Dundee, September 2020

NOTE

Introduction

[1] This is an appeal under section 159 of the Housing (Scotland) Act 2006 against the decision of the defender to refuse the pursuer's application for a House in Multiple Occupancy ("HMO") licence for premises in St Andrews, Fife. The dispute concerned: (i) whether it was competent for the court to grant the licence; and (ii) whether the decision of the defender was justified in all the circumstances.

Procedural history

[2] The defender refused to grant the HMO licence on 30 September 2019. The pursuer lodged the initial writ at court on 31 October 2019 and served it on the defender on 21 November 2019. The pursuer failed to appear at the hearing on 16 January 2020 and the cause was allowed to drop from the roll, with no expenses due to or by either party.

[3] The pursuer moved to re-enrol the cause due to error on the part of the pursuer's agent, which was unopposed. A hearing was assigned for 24 April 2020 but due to the COVID-19 restrictions, the cause was sisted. A teleconference hearing was subsequently assigned for 20 August 2020, with written submissions required in advance.

[4] The defender lodged written submissions and authorities in advance of the teleconference hearing. The pursuer lodged authorities only and did not lodge written submissions. Having considered the advance written submissions and the oral submissions in teleconference, I refused the appeal, upheld the decision of the defender and found no expenses due to or by either party. I have been asked to provide a note outlining my reasoning to assist with future appeals on similar issues.

Competency

[5] The pursuer craved the court to reverse the decision of the defender and grant the pursuer an HMO licence for the premises in St Andrews for five persons. The defender submitted that the court's options were limited to: (i) confirming the decision with or without variations; (ii) remitting the decision, together with reasons for doing so, to the local authority for reconsideration; or (iii) quashing the decision.

[6] Section 159(6) of the Housing (Scotland) Act 2006 provides:

"159 Part 5 appeals

…

(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)."

[7] As highlighted by Sheriff T Welsh QC in *Fieldman* v *The City of Edinburgh Council* [2020] SC EDIN 28, HMOs have been removed from the ambit of the Civic Government (Scotland) Act 1982. Paragraph 18(9) of schedule 1 of the 1982 Act provides that:

"18 Appeals

…

(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)."

[8] I am therefore of the view that it is not competent for me to reverse the decision of the defender and grant the pursuer an HMO licence. The options available to me are set out in section 159(6) of the 2006 Act in plain words on the page. There is no equivalent of para 18(9)(b) of the 1982 Act and it follows that Parliament has chosen to narrow the options available to a sheriff under the 2006 Act to: (i) confirming the decision with or without variations; (ii) remitting the decision, together with reasons for doing so, to the local authority for reconsideration; or (iii) quashing the decision.

[9] However, even if I am wrong in that regard, I refuse the pursuer's appeal and confirm the decision of the defender without variations for the reasons set out below.

Background facts and circumstances

[10] At the hearing before the defender's Regulation and Licensing Committee ("the Committee") on 30 September 2019, there was no dispute as to the suitability of the applicant in terms of section 130 of the 2006 Act. Nor was there any dispute that the property was (or could be made) suitable for use as an HMO. The sole issue was whether the granting of the HMO licence would result in the overprovision of HMOs in the locality in which the accommodation was situated.

[11] The pursuer averred that the property in question was a three bedroomed detached bungalow in a residential street. The pursuer had previously rented the property to two occupants from May 2015 to May 2019. Livingstone Crescent was an entirely residential street with 23 properties, two of which had an HMO licence. The surrounding area was residential.

[12] The pursuer averred that in advance of submitting the application for the HMO, he sought planning consent for a proposed extension to his property, which was granted in November 2018. He also applied for a building standards warrant in respect of alterations to the property, which was granted in December 2018. No objections were lodged by neighbours.

[13] The defender's overprovision policy came into effect on 11 April 2019. The pursuer averred that he amended his proposals and took steps to make the house HMO compliant by utilising two of the three bedrooms as double occupancy rooms and obtained fire, safety and compliance clearances. The pursuer's application for a five bedroom HMO in

Livingstone Crescent, St Andrews was received by the defender on 15 May 2019 and validated on 24 May 2019. The pursuer averred that by that point, he had incurred costs of around £10,500. One notice of objection was received within the 21 day period, but late objections were allowed by the Committee.

[14] The application was refused on 30 September 2019 in terms of section 131A of the 2006 Act on the grounds that there was overprovision of HMOs in the locality and the granting of the licence would be contrary to the defender's policy on overprovision in the St Andrews locality.

Pursuer's submissions

[15] The pursuer submitted that on 11 April 2019 the defender implemented an overprovision policy which ran contrary to its stated objectives, which were to increase the availability of housing for families. By restricting the provision of HMOs, the council had placed more (and not less) pressure on the housing stock as the net result was that more 1-2 bedroomed properties would be occupied by students and 3-4 bedroomed properties would be occupied by only two individuals, leaving empty bedrooms which was contrary to the national and local policy.

[16] The pursuer submitted that the defender was applying and operating that policy in such a manner that they had completely fettered their discretion because it was a blanket policy rather than a guide and therefore the policy and its application were *ultra vires.* In the letter of 26 February 2020 setting out written reasons for the decision, the defender stated that there was a presumption that no more new applications for HMOs should be granted within the defined area and the onus was on the applicant to persuade the committee that the licence should be granted. The pursuer submitted that the defender had unthinkingly

followed a policy without really considering the submissions put forward in support of an exception.

[17] The pursuer also submitted that initially, only one notice of objection was received within the 21 day period allowed for objections. That objection letter was then countersigned by further respondents. The defender advised the respondents that this was incompetent and ostensibly allowed them the opportunity to correct the error and subsequently further objection letters were received late but allowed by the council. The pursuer submitted that this was prejudicial and unfair.

Defender's submissions

[18] The defender submitted that the issue for consideration for the defender was whether the granting of the HMO licence would result in the overprovision of HMOs in the locality in which the accommodation was situated. One factor taken into account was the increase in the number of HMOs within the locality at the time of hearing in September 2019 compared to when the policy was first introduced in April 2019. After refusing the licence, the defender produced a notice of decision and subsequently a letter of written reasons. The defender exercised its discretion reasonably in the circumstances.

[19] In relation to the late objections, the defender submitted that the objections were similar in nature and any prejudice to the pursuer was minimal. The pursuer had an opportunity to peruse the representations and address the concerns raised by the further respondents at a hearing. The defender was entitled to consider the representations, although late.

Legislation

[20] Section 131A of the 2006 Act provides:

> "131A Overprovision
> (1) The local authority may refuse to grant an HMO licence if it considers that there is (or, as a result of granting the licence, would be) overprovision of HMOs in the locality in which the living accommodation concerned is situated.
>
> (2) In considering whether to refuse to grant an HMO licence under subsection (1), the local authority must have regard to—
> (a) whether there is an existing HMO licence in effect in respect of the living accommodation,
> (b) the views (if known) of—
> (i) the applicant, and
> (ii) if applicable, any occupant of the living accommodation,
> (c) such other matters as the Scottish Ministers may by order specify.
>
> (3) It is for the local authority to determine the localities within its area for the purpose of this section.
>
> (4) In considering whether there is or would be overprovision for the purposes of subsection (1) in any locality, the local authority must have regard to—
> (a) the number and capacity of licensed HMOs in the locality,
> (b) the need for housing accommodation in the locality and the extent to which HMO accommodation is required to meet that need,
> (c) such other matters as the Scottish Ministers may by order specify."

[21] Schedule 4 of the 2006 Act, introduced by section 129, sets out the procedural requirements relating to an application for an HMO licence. It provides:

> "Representations
> 4(1) A written representation about an application for an HMO licence is valid only if it—
> (a) sets out the name and address of the respondent,
> (b) is signed by or on behalf of the respondent, and
> (c) is made on or before the deadline for making written representations.
>
> (2) The deadline for making written representations is—
> (a) where one or more notices of HMO application has or have been—
> (i) displayed in pursuance of paragraph 2(2) or (7), or
> (ii) served under paragraph 2(9)(b) or 3(2)(b),
> the latest date specified in any such notice as the date by which written representations must be made, or

(b) where no such notice is given, the date which is 21 days after the date on which the application is made.

…

Consideration of application

8 (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."

Decision

[22] Parties were agreed that the test for judicial intervention in decisions of administrative tribunals such as the Committee, as highlighted by Sheriff T Welsh QC in *Fieldman*, was set out in the well-known case of *Wordie Property Co. Ltd* v *Secretary of State for Scotland* 1983 S.L.T 345. In *Wordie*, Lord President Emslie explained at p.347 that

> "*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.*"

[23] Lord President Emslie also explained at p. 348 that the duty of a decision maker was to

> "*give proper and adequate reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court 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.*"

[24] In *Elder* v *Ross and Cromarty District Licensing Board* 1990 S.L.T 307, Lord Weir explained at p. 311 that

> "*Where a statutory body having discretionary power is required to consider numerous applications there is no objection to it announcing that it proposes to follow a certain general policy in examining such applications. Indeed, in certain circumstances it may be desirable to achieve a degree of consistency in dealing with applications of similar character. Moreover, there is nothing wrong with policies being made public so that applicants may know what to expect. However, such a declared policy may be objectionable if certain conditions are not fulfilled…the individual circumstances of each application must be considered in each case whatever the policy may be.*"

[25] Applying those principles to the present case, there appear to me to be three issues: (i) whether the Committee erred in taking into account the late representations; (ii) whether the Committee considered the individual circumstances of the pursuer's application; and (iii) whether the Committee gave proper and adequate reasons for its decision.

[26] Dealing firstly with the issue of late representations, the terms of schedule 4, para (8)(1) of the 2006 Act entitled the Committee to consider late representations if satisfied that it was reasonable for the respondents to make representations after the deadline. The letter of 26 February 2020 explained that there was one initial representation within the deadline that contained a petition style attachment with the signatures of others. The defender's HMO licensing team advised the initial respondent and those further respondents who signed supporting his letter of representation that this would be considered as one objection to the application. Each person who signed the supporting letter was advised that if they wished to make their own representation, it would require to be in the format set out in the legislation. Thirty persons put in late representations and therefore the Committee had to decide whether it was reasonable for each of the further

respondents to make a representation after the deadline for doing so. The reason put forward was that those making representations did not know what constituted a valid written representation.

[27] I am of the view that the Committee acted reasonably in accepting the late representations. The further respondents did not know what constituted a valid written representation, but after it was drawn to their attention they put in individual representations within a very short timescale. The objections, though not identical, were very similar in nature. The pursuer was aware that thirty people had attempted to object and had an opportunity to consider and address the concerns raised by the further respondents at the hearing. The decision to allow the late representations, in my opinion, struck a balance between fairness to the further respondents and fairness to the pursuer in complying with the procedural requirements set out in schedule 4 of the 2006 Act.

[28] Turning to the second issue of consideration of the individual circumstances of the pursuer's application, the defender was entitled to follow an overprovision policy which had been made public so that applicants knew what to expect. The effect of the overprovision policy introduced by the defender on 11 April 2019 was that there was a rebuttable presumption that no further HMO licences would be granted within the defined area. The defender would still accept applications for HMOs but the onus was now on the applicant to persuade the defender that the granting of his application would not result in the overprovision of HMOs within the locality.

[29] The terms of section 131A of the 2006 Act set out the matters to which the Committee had to have regard. They took into account that there was no existing HMO licence in effect in respect of the property. They took into account the applicant's views by inviting the pursuer to attend the hearing and listening to the oral representations made on

his behalf by his representative that the Council's aims would not be achieved by the policy as implemented. They also took into account that the pursuer had incurred significant expense obtaining planning and building warrant applications at the end of 2018, although the HMO application was not submitted until May 2019, after the policy had come into effect in April 2019. The views of any occupants of the living accommodation were not known and therefore not considered. The Committee had reference to the overprovision policy and that the locality was the whole of St Andrews, not just the street that the application referred to. They took into account the fact that HMO numbers had increased since the policy had been implemented (from 1,046 in April 2019 to 1,065 in September 2019). They accepted that HMOs were a key element of housing in St Andrews and played a significant role in meeting the housing needs in the area, but balanced that against the aim of trying to address the unique housing pressures in St Andrews. They also took into account the written representations made by the initial and further respondents.

[30] The unanimous decision of the Committee was that they were not persuaded there was adequate justification to depart from applying the overprovision policy. Having complied with the terms of section 131A, I am of the view that the Committee considered the individual application of the pursuer on its merits, rather than simply applying a blanket policy. I do not consider that the decision of the Committee was based upon a material error of law; nor do I consider that irrelevant considerations were taken into account; nor that they failed to take into account relevant and material considerations. Instead, I am of the view that the Committee acted reasonably in reaching their decision.

[31] Finally, turning to the reasons for the Committee's decision, the letter of 26 February is seven pages long and includes an explanation of how the Committee reached their decision on allowing late representations; details of the submissions on behalf of the

pursuer; the objections by the initial and further respondents; the terms of the overprovision policy; the number of HMOs in the locality; and the contribution that HMOs make to the housing need in the locality. I am therefore of the view that the letter of 26 February gives proper and adequate reasons for the Committee's decision. It leaves the informed reader in no real and substantial doubt as to the reasons for their decision and what material considerations were taken into account.

[32] Having found no flaw in the process or reasoning of the Committee, I refused the appeal and confirmed the decision of the defender without variations. The defender did not seek expenses so I found no expenses due to or by either party.