

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2022] SC GLW 25

A1549-18

JUDGMENT OF SHERIFF TONY KELLY

in the cause

J (AP)

Pursuer

against

THE GLASGOW HOUSING ASSOCIATION LIMITED, WHEATLEY HOUSE,
25 COCHRANE STREET, GLASGOW, G1 1HL

Defender

Pursuer: Sutherland, Advocate

Defender: Upton, Advocate

Glasgow, 4 August 2022

The Sheriff having resumed consideration of the cause repels the pursuer's pleas in law numbered one and two; sustains the defender's third plea in law and dismisses the action; appoints the cause to a hearing on expenses.

NOTE

[1] I heard a debate on the defender's first to fourth pleas-in-law. These are directed towards the competency of the action, time-bar and pleas directed to the relevancy and specification of the pursuer's averments, concluding for dismissal of the action failing which exclusion of certain of the pursuer's averments from probation.

[2] Mr Upton, Advocate, appeared for the defender and Mr Sutherland, Advocate, for

the pursuer. I am grateful to counsel for the presentation - both written and oral - of their respective arguments. I should also record my gratitude for the considerable assistance given by others in the preparation of various bundles and other work necessitated by the compressed timetable following upon the opposed motion hearing.

The pleadings

[3] The pursuer seeks declarator that she was unlawfully discriminated against in contravention of the Equality Act 2010 and in particular that the defender: (i) failed to make reasonable adjustments in exercise of a public function; (ii) indirectly discriminated against her in terms of section 19 of the Act; (iii) discriminated against her by treating her unfavourably because of something arising in consequence of her disability, in terms of section 15 of the Act, and (iv) failed to comply with the public sector equality duty in terms of section 149 of the Act.

[4] In Article 2 of condescence the pursuer narrates in general terms the allocations policy in force at the relevant time of her dealings with the defender. She describes Group 2 as forming those with priority need. Those include, for example, those households that were homeless, priority clearance cases, community care applicants, exceptional housing need, management transfers preventing homelessness and below tolerable standard. Group 5 required properties without stairs for medical priority applicants with mobility difficulties or other medical needs who required a ground floor or level access property. The pursuer avers that the number of the properties available for those within Group 5, for those with restricted mobility, "was very low and would become available on an *ad hoc* basis". She describes the process in relation to properties becoming available. A bidding process generally awarded a property to an applicant who had been on the waiting list for

the longest period of time. For those within Group 2, a successful bid could be expected within approximately 12 weeks.

[5] Group 5 properties included a limited amount of properties considered suitable for disabled persons but did not constitute all of the available housing stock held by the defender. Applicants within Group 5 would typically wait at least six months or more before they are available to bid successfully for a property. The pursuer avers:

“As a result of the low numbers of properties in Group 2 that were suitable for a person with restricted mobility, such as the Pursuer, a person with restricted mobility in Group 2 would require to wait considerably longer within Group 2 for a property than a person in Group 2 who did not have restricted mobility.”

[6] The pursuer’s personal circumstances are the subject of averment in Article 3 of condescence with details of the impairment of her physical and mental health. She registered with the defender in July 2017, and was placed in Group 5 under its allocation policy. She approached Glasgow City Council in September and again in October 2017. On 17 November 2017, she was accepted as a homeless person by Glasgow City Council in terms of section 31(2) of the Housing (Scotland) Act 1987. Glasgow City Council were required to secure her permanent accommodation.

[7] In Article 4 of condescence the pursuer describes how Glasgow City Council owns no housing stock and transfers to registered social landlords, by virtue of a section 5 referral, applicants such as the pursuer who are found to be homeless in terms of section 31(2) of the Housing (Scotland) Act 2001. There are a number of protocols between the defender and Glasgow City Council.

[8] In Article 5 of condescence, the pursuer narrates that when she was referred by Glasgow City Council to the defender she was told that she should remain in Group 5 as she has accrued some waiting time within the Group. In June 2018, she was moved to Group 2.

She lost the credit for the waiting time that she had accrued until that time. An offer of permanent accommodation was received in July 2018. She moved into a property in August 2018.

[9] The statutory provisions are cited in Article 6 of condescence together with the following averments:

“A person who was homeless and who did not have restricted mobility would typically wait for approximately 12 weeks before they were able to bid successfully for the tenancy of a Group 2 property. Because of the low number of ground floor properties allocated in Group 2, the Pursuer would have been required to wait significantly longer than a person who was not disabled before she would have been able to bid successfully for permanent accommodation. This advantageous outcome was so well known that GCC staff advised the pursuer that she was better to remain in Group 5, notwithstanding the smaller proportion of properties allocated to Group 5 when compared to Group 2, and notwithstanding the fact that a person in Group 5 required to wait significantly longer than a person in Group 2 to be housed under the defender’s allocation policy

...

The pursuer was...at a particular disadvantage compared with homeless persons who did not have restricted mobility. She was treated unfavourably in her ability to secure the provision of permanent accommodation form (sic) the defenders compared with the homeless person who did not have restricted mobility”.

[10] In Article 7 of condescence the pursuer mounts a separate case in terms of section 29(7) of the 2010 Act against the defender for their failure to make reasonable adjustments. The pursuer avers that:

“The defenders were in breach of their obligation to make reasonable adjustments under section 29(7)(b) of the 2010 Act. The pursuer was substantially disadvantaged by the Defenders system of housing allocation which resulted in a disabled homeless person wait much longer than a non-disabled homeless person before being able to secure that accommodation was made available to them. Separatim, the pursuer was also substantially disadvantaged by not being permitted to bid on a property advertised for Group 2 whilst homeless but allocated to Group 5. It would have been a reasonable adjustment to the Defenders housing allocation policy for it to have permitted a person in Group 5 who was also homeless to be able to bid for any suitable permanent

accommodation regardless of which Group the property been allocated to.”

[11] In Article 8 of condescence, the PSED in terms of section 149 of the 2010 Act is referred to. The defender’s failures in this regard are said to consist of the following:

“It was or ought to have been aware of the fact that its housing allocation policy resulted in disabled homeless persons including the Pursuer requiring to wait longer for permanent accommodation to be made available than would be the case for a homeless person who was not disabled. Despite this knowledge the Defenders took no action to remove or minimise the disadvantage suffered by disabled persons in securing accommodation for homeless disabled persons in comparison with the timescale for non-disabled homeless persons. It did not take steps to meet the needs of disabled homeless persons that were different from non-disabled homeless person. It did not consider whether were auxiliary aids that could have been provided to assist homeless disabled persons with restricted mobility to access ground floor properties that were not accessible to disabled homeless persons with restricted mobility.”

[12] The pursuer pleads that she has suffered loss, damage and injured feelings in Article 9 of condescence.

Defender

[13] Mr Upton’s submission is dealt with in paragraphs 38 to 58, at pp. 10-14 of his Note of Argument. He essays the various averments, contained in Articles 2, 4, 5 and 6 of condescence, in connection with waiting times. It was illogical to compare waiting times between Group 5 and Group 2 as they featured different types of properties. Within Group 2 there were the various types of properties. It was important to compare like with like. That would be to compare the waiting times for a tenant such as the pursuer to secure level access properties within Group 5 as against securing similarly accessible properties in Group 2. The pursuer did not address the defender’s policy. It was a reasonable one to achieve the purpose of expediting offers to those identified with mobility issues in Group 5. The upshot

of the pursuer's averments was that those in Group 2 waiting for access to all types of property would clearly be accommodated quicker than those who were competing for a smaller group of properties i.e. those on the level. For Mr Upton this was a consequence of architecture: properties were built vertically, a greater number would exist above, than at ground level. The averments at the end of Article 8 of condescendence did not save the pursuer's case. The averments as a whole were irrelevant.

[14] Counsel sought to illustrate the illogicality of the pursuer's position. She was not comparing like with like when seeking to challenge the difference in treatment between properties of all kinds in Group 2 as against level access properties in Group 5. For the defender this was axiomatic – a product of architecture and of the availability of supply. The pursuer's latest Minute of Amendment bringing in a reference to auxiliary aids did not assist.

Pursuer

[15] Once declared to be homeless (and not intentionally homeless) the pursuer suffered a detriment or disadvantage because those persons who were not disabled were housed quicker than the pursuer. That could be illustrated with reference to different sets of circumstances in different settings. Non-disabled homeless persons were housed within a period of around 12 weeks. The pursuer waited considerably longer. There were several underlying reasons why that should be so in connection with obligations incumbent upon the defender to comply with Scottish Government guidance, but that treatment by others in a similar situation who were non-disabled amounted to discrimination. Mr Sutherland referred to *R (on the application of Nur) v Birmingham City Council* [2021] HLR 41. The pursuer was not required to compare and contrast the ability to access level access properties in and

between Group 2 and Group 5. It was enough to say looking at the pool of homeless persons those who did not have protected characteristics of disability were housed quicker.

Decision

[16] Although the attack upon the relevancy of the pursuer's pleadings was wide ranging, at base it came to be focussed upon the manner in which the pursuer had cast her complaint about the delay in being housed when compared with those who did not possess her protected characteristic. It is helpful, in my view, to analyse the defender's submissions through the prism of the pursuer's separate bases of claim. She seeks a number of declarators that set out in discrete headings what her action is concerned with. I will deal with these in turn.

[17] Sections 20 and 21 of the 2010 Act provides;

“20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

...

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

[18] Section 20 imposes a duty to make reasonable adjustments. Section 21(1) declares that a failure to comply with the section 20 requirement "is a failure to comply with a duty to make reasonable adjustments". Section 21(2) provides that such a failure is itself a form of discrimination.

[19] Under section 20, the reasonable adjustments duty has three aspects. Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison to persons who are not disabled, there exists a duty to take reasonable steps to avoid the disadvantage (section 20(3)). The second relates to where a physical feature puts a disabled person at a substantial disadvantage in in comparison to persons who are not disabled (Section 20(4)). This does not arise for consideration in this case. The third aspect is a requirement where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison to persons who are not disabled. In such circumstances there exists a duty to take reasonable steps to avoid the disadvantage (section 20(5)).

[20] Identification of a provision, criterion or practice is a fundamental requirement of section 20(3). It is not permissible simply to assert that the pursuer was substantially disadvantaged or that an adjustment should reasonably have been made, without first identifying what the provision, criterion or practice was. The pursuer has to specifically aver what provision, criterion or practice puts her at a substantial disadvantage.

[21] Losing the benefit of time spent waiting in Group 5 is the subject of concession. For the pursuer this was construed as an admission of a provision, criteria or practice. The pursuer goes on in her written note at para. 5 to state that:

“This places disabled persons at a substantial disadvantage because those who are homeless will not be able to obtain the benefit of reasonable preference (Cond. 2), as a homeless person in Group 2 provides, and no priority was afforded to the pursuer, over other disabled persons in Group 5 who had already applied to GHA directly”.

This appears to recognise that the pursuer’s complaint is multi-factorial. Some of the content of that submission, however, is not the subject of averment on Record. There is substance in the defender’s criticisms that the pursuer has failed to identify the provision, criteria or practice which is the subject of the duty to make reasonable adjustment. The change in the defender’s manner of dealing with applications is not a matter that assists the pursuer in this endeavour. This failure is a significant issue for the pursuer in this aspect of her case. Without the critical averment, as to what provision criteria or practice should have been altered, this chapter of the pursuer’s case is flawed. Accordingly I consider that this aspect of the pursuer’s case is irrelevant.

[22] Section 19 of the 2010 Act provides:

“19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

[23] Section 19 of the 2010 Act defines indirect discrimination. This occurs when a person A applies to a person B a provision, criterion or practice which is discriminatory in relation to (for present purposes) B's disability (the protected characteristic). Section 19(2) provides that a provision, criterion or practice is discriminatory in relation to B's disability if the following conditions are met: (a) A applies the provision, criteria or practice to persons who are not disabled; (b) the provision, criterion or practice puts a person with whom person B shares the characteristic (in this case disability) at a particular disadvantage when compared with persons with whom B does not share the characteristic; (c) the provision criteria or practice puts person B at a disadvantage.

[24] The pursuer fails to point to a provision, criteria or practice which she says operates to her detriment. That omission is fatal to this aspect of her case. It is not enough for the pursuer to aver overall what occurred to her and leave to inference what the provision, criterion or practice was. That has to be the subject of specific averment. It is not. This aspect of the pursuer's case is irrelevant.

[25] In the pursuer's written note, she contends that section 136 places the burden of proof on the defender. However, it is for the pursuer in the first place to plead a relevant

case that would, accepting her averments *pro veritate*, enable the court to conclude that there has been a *prima facie* unlawful act in terms of section 19. Only then does the duty to make reasonable adjustments in terms of section 19 arise.

[26] Section 15 of the 2010 Act provides:

“15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

[27] Although complaining of the lack of logic in the comparison chosen by the pursuer, in essence the defender here complains that the appropriate comparator has not been selected by the pursuer. This is governed by section 23 of the 2010 Act, which provides:

“23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.”

[28] The pursuer complains of the time taken to house those in Group 2 when compared with the time taken to house those in Group 5. For the defender that is not logical because there is a disparity in the volume of housing that may be allocated. As a matter of common sense there are more housing units above the ground than at ground level.

[29] There is a material difference between the groups selected for comparison purposes. On the one hand there is the group to which the pursuer belongs. The wider group - and greater in number - has as its target for occupancy a necessarily greater number of properties. That does not arise by virtue solely as a matter of construction but rather

because there are a greater number of properties that are open for occupancy which are not circumscribed by the requirement that they have to house a disabled person (the protected characteristic in issue here). Those in the situation of the pursuer who possess the protected characteristic of disability cannot seek to be housed in the wider housing stock. On one view it explains the time lag between the two groups. Those like the pursuer have a narrower and smaller number of houses to choose from. The wider group have a wider selection because they have the wider number of houses available to them. This means the court is not being asked to compare like with like. By selecting this group as comparator the court will be hampered in its attempt to ascertain whether the differentness in treatment is on the grounds of the protected characteristic. The pursuer fails because her choice of comparator is materially different from her circumstances (Section 23(1)).

[30] Section 149 of the 2010 Act provides:

“149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Section 114(1) of the 2010 Act provides:

114 Jurisdiction

(1) The county court or, in Scotland, the sheriff has jurisdiction to determine a claim relating to—

(a) a contravention of Part 3 (services and public functions);

- (b) a contravention of Part 4 (premises);
- (c) a contravention of Part 6 (education);
- (d) a contravention of Part 7 (associations);
- (e) a contravention of section 108, 111 or 112 that relates to Part 3, 4, 6 or 7."

Section 118 of the 2010 Act provides

"118 Time limits

(1)... proceedings on a claim within section 114 may not be brought after the end of—

- (a) the period of 6 months starting with the date of the act to which the claim relates, or
- (b) such other period as the county court or sheriff thinks just and equitable."

Section 156 of the 2010 Act provides:

"156 Enforcement

A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law."

[31] The arguments about section 149 of the 2010 Act developed considerably in the course of the diet of debate. The defender contended initially that the pursuer's case did not interrupt the operation of prescription due to the initial writ at the point of its commencement being so wholly lacking in specification such that it was incapable of amounting to "a claim". Reference was made to Johnston, *Prescription and Limitation*, 2nd Ed. at paragraph 5.14. Mr Upton marked the evolution of the pursuer's pleadings in this regard. The time-bar said to apply to this claim was to be found in section 118 of the Act, that was six months "starting with the date of the act to which the claim relates".

[32] In reply, Mr Sutherland, relied upon sections 114 and 118 of the 2010 Act to submit that the six month time limited provided for in section 118 had no application to claims

brought in terms of section 149.

[33] Towards the close of the diet of debate, Mr Upton placed reliance upon section 114 of the 2010 Act. He submitted that the Sheriff Court had no jurisdiction to deal with a claim brought under section 149.

[34] Mr Sutherland was taken somewhat by surprise by that development. It was agreed that in order to allow him to respond to an argument he had not expected to face, further time would be afforded to him to submit a note. In that note the pursuer contends that section 149 is not a claim to which section 114 applies. Therefore, the time limits in section 118 are not applicable to this action. Reliance was placed upon *M v Fife Council* 2016 SC 556. The pursuer notes where section 149 may be invoked – in judicial review proceedings and as a defence to proceedings raised against a public authority (*Forward v Aldwyck Housing Group* [2020] 1 WLR 584). The pursuer states that section 149 may be invoked “to demonstrate that there has not been a reasonable adjustment made which could have been made”.

Decision: Section 149 of the 2010 Act

Jurisdiction

[35] The defender in reply tabled a profound challenge contending that this aspect of the pursuer’s case was incompetent in this court. I agree with that proposition. On a plain reading of the statute it is correct. For the pursuer, it was said that there was no positive prohibition in the Act and that in *M v Fife Council* the PSED featured in argument before the Court. The pursuer’s pleadings in this action were said not to be disapproved by their Lordships *dicta* in *M*. In fact, the discussion in that case about the content of the section 149 PSED duty appears to have been prompted by the intervention of the Commission for

Equality and Human Rights (see [48]). However, at [84] the court observes there did not appear to be any reference to section 149 before the sheriff.

[36] The pursuer has a crave for a declarator for a breach of the PSED: crave 1.d. The basis of that is articulated in Article 8 of condescendence. It is set out as a standalone breach of statutory duty. If it were simply included as a form of support to the main cause(s) of action, the case would not be pled in the way that it is. I agree with the defender's ultimate submission that this court does not have jurisdiction to adjudicate upon the issue focussed in crave 1.d. about a breach of section 149 of the 2010 Act.

[37] The claims the sheriff has jurisdiction to determine are listed in section 114(1) of the 2021 Act. The sheriff's jurisdiction is exhaustively provided for in section 114(1).

Section 149 is not included. The decision of the Extra Division in *M v Fife Council* did not decide this point. It was not the subject of any argument or submissions before the Inner House. Their Lordships do not deal with this point in the course of the opinions. The height of the pursuer's submission is that this course of action is not the subject of criticism in *M*. That is unsurprising in light of the submissions made in that case. The breach of statutory duty under section 149 was not the subject of a separate crave before the sheriff in *M*.

Rather, it was used to support the cause of action in the case, namely the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 and the Supporting of Children's Learning Code of Practice (Revised Edition) 2010. The pursuer's arguments are misconceived. This court has no jurisdiction to deal with this cause of action.

Time Bar

[38] As I have decided that this court does not have jurisdiction to deal with the pursuer's claim under section 149, I propose to deal briefly with the defender's argument on time bar

though it does not strictly arise for a decision. The Defender focused upon the evolution of the pursuer's pleadings in order to seek to demonstrate that the pursuer had not, at the point of the operation of the time bar, distilled in her pleadings the basis of a relevant claim such as would operate to stop the clock ticking for the purposes of time bar. I am not attracted to this analysis not least because Professor Johnston in *Prescription and Limitation* states that such an exercise would not be fruitful save in exceptional cases: "such cases would no doubt be extreme", see paras.5.13 and 5.14. Professor Johnston sees no reason why in principle what the defender contends for could not come to pass:

"where a claim wholly misses the point and completely fails to identify the obligation on which it proceed it should not be held to be a relevant claim".

Professor Johnston goes onto note that ought not to be too rigidly applied "[p]rovided the claim can be connected with the obligation". Where amendment has been allowed the interruption of prescription should date from the day the action was raised. For Professor Johnston:

"If there was the substance of an action there will in most cases have been the substance of a relevant claim".

[39] In my view this is not one of those extreme cases where the matters referred to at the outset of the proceedings bore no resemblance to what is now before the court. In other words there was and is a connection between the claim and the obligation (claim).

[40] In light of my decision on the pursuer's case I can take the remaining arguments for the defender in relatively short compass.

Specification

[41] Mr Upton referred to Article 9 of condescence and submitted that the averment of the pursuer having a "substantially greater chance of achieving an allocation" was to

qualify what the pursuer had previously stated, that she had “little or no chance” (at the opening of Article 9 of condescendence). That did not meet the minimum threshold of what was necessary to make a relevant claim.

[42] Mr Upton relied upon the wealth of information provided by the defender in connection with the property within the locality that was the subject of focus by the pursuer. The pursuer had not sought further information, for example, by way of commission and diligence.

[43] Mr Upton went on to complain about the lack of causation, linking the averments in relation to how the pursuer was said to have suffered (the detriment or disadvantage) that she complained of. There was no reference to other properties in the locality of C, to the particular type of property that the pursuer sought (a level access or ground floor property).

[44] Mr Upton came to focus upon a particular averment at the end of Article 3 of Condescendence which he said was irrelevant, that was to the effect:

“There were ground floor properties that were suitable for the pursuer in C. which became available for letting during the periods 17 November 2017 and 23 July 2018 which were not available to persons bidding for properties in Group 2 or 5”.

In Mr Upton’s submission this was an inconsequential aside not logically connected to a case on Record and ought to be excluded from proof.

Pursuer

[45] For the pursuer, Mr Sutherland said that to characterise the pursuer’s averments in relation to her damages claim as loss of chance was erroneous. The pursuer averred that she had suffered discrimination, and suffered loss and harm which sounds in damages.

[46] In connection with specific averment that was the subject of criticism in Article 3 of

condescendence, Mr Sutherland submitted that this was pertinent in an assessment of the overall allocation within and between the Groups and may well have a bearing on other aspects of the pursuer's case.

Decision: Loss of chance

[47] It is understandable that the defender would seek to characterise the pursuer's averments of loss being about a loss of chance. This is what she says in Article 9 of condescendence. She does, however, go on to say more. The defender's unlawful discrimination is said to have caused the pursuer "loss, damage and injured feelings", apart from being deprived of the chance – "a substantially greater chance" - of securing accommodation. The pursuer also describes the deterioration of her mental health and provides detailed averments to flesh out that assertion. The delay in securing accommodation, she avers has resulted in frustration and distress and desperate steps taken by her resulting in the approaches to various organisations. This culminated in a period of crisis for the pursuer. Taking those averments in Article 9 of condescendence as a whole I consider that if the pursuer's case had been allowed to proceed I would not have deleted these averments. Leaving the flaws I have ruled upon to one side, for the purposes of this branch of the defender's submission, if the pursuer established that she was deprived of a substantially greater chance of achieving accommodation as a result of the operation of a properly framed claim for discrimination, and that gave rise to the consequences that she avers, then that would sound in damages.

Academic

[48] Mr Upton submitted that the action is incompetent because it is academic. He relied

upon the well-known dictum of Lord Justice-Clerk Thomson in *Macnaughton v Macnaughton* Trs 1953 SC 387 at 392:

“The courts are neither a debating club nor an advisory bureau...it is only with live and practical issues that the court is concerned.”

[49] Mr Upton submitted the declarator in the abstract would be academic. The pursuer seeks damages in reparation. Mr Upton sought to characterise that as a loss of chance and relied upon Volume 15 of the *Laws of Scotland: Stair Memorial Encyclopaedia* at paragraph 909.

Decision: Academic

[50] Leaving the frailties of the pursuer’s case to one side the action is not otherwise academic. The pursuer brings before the court a series of complaints that she says gave rise to consequences that sound in damages. The declarator is not one in the abstract. A declarator may in certain circumstances be sufficient redress in that the court, if it pronounces such an order, may vindicate the pursuer’s rights; see, for example, *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406; [2004] Q.B. 1124. I heard no argument about a bare declarator being incompetent: see for example, *R. v Secretary of State for the Home Department Ex p. Salem*. [1999] 1AC 450. Instead the defender founded upon the proposition that the declarator sought is one devoid of meaningful content. This is not made out. The declarator is coupled with a crave for damages (which was the subject of a separate attack). Taken as a whole the action would not otherwise be academic.

Conclusion

[51] The pursuer’s case fails because in relation to her section 19 and 20 claims she has been unable to identify a provision, criterion or practice. Her case based on section 15 falls

foul of section 23(1) in that the selected comparators' circumstances are materially different from the pursuer's. Her case based on a breach of section 149 PSED cannot proceed in the sheriff court as this court does not have jurisdiction to determine it. For these reasons her action falls to be dismissed.

[52] As requested to by parties I shall appoint a hearing on expenses. If there is an agreed position parties may intimate that to the sheriff clerk and that diet may be discharged.