

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 63

EDI-B379-18

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

STEPHEN ARMSTRONG

Pursuer

against

CITY OF EDINBURGH COUNCIL

Defender

**Pursuer: Party**

**Defender: McEwan; Morton Fraser, Solicitors, Edinburgh**

Edinburgh, 1 November 2018

The sheriff, having resumed consideration of the cause, refuses the appeal; and assigns the cause to a hearing on expenses on 22 November 2018 at 10.00am within the Sheriff Court House, 27 Chambers Street, Edinburgh.

**Note**

**Introduction**

[1] In this summary application under section 159 of the Housing (Scotland) Act 2006 (“the 2006 Act”), the pursuer appeals against the refusal by the defenders of his applications for licences to operate houses in multiple occupation (“HMO”) at 13/3F2 Falcon Avenue, Edinburgh and 16/1F2 South Clerk Street, Edinburgh (“the properties”).

[2] The applications in question were lodged as long ago as 27 February 2015. They were initially refused by the defenders because they were unable to arrange an inspection of the properties with the pursuer present. It appears<sup>1</sup> that the licences were refused both because the defenders concluded that the pursuer was not a fit and proper person to be authorised to permit persons to occupy any living accommodation as an HMO (section 130 of the 2006 Act) and because they could not be satisfied as to the suitability of the living accommodation (section 131). Those decisions were appealed to this court, the appeal being determined by Sheriff Welsh: *Armstrong v CEC* (B411/16), dated 3 Feb 2017.

### **The pursuer's disability**

[3] It is a matter of agreement between the parties that the pursuer suffers from a disability, namely, Asperger syndrome, which results in (among other things) a rigidity of thinking on his part. This has the effect that what might be seen as awkwardness in others is an inability on the pursuer's part to change his approach in relation to certain matters – specifically, in the context of this appeal, to how the defenders ought to go about arranging, and carrying out, an inspection of the properties. When the previous appeal called before Sheriff Welsh, it proceeded by way of proof, Sheriff Welsh finding as a fact that the pursuer suffered from Asperger syndrome, and that there were reasonable adjustments which the defenders could have, but had not, made in order to prevent him being discriminated against because of this disability. Specifically, he held that those reasonable adjustments were (1) for the pursuer's wife to attend synchronised inspections of the pursuer's two flats, that being something which she offered to do during the course of the previous appeal hearing; and (2) for a written list of items to be dealt with to be forwarded to the pursuer

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<sup>1</sup> See Sheriff Welsh's judgment in *Armstrong v CEC* (B411/16) dated 3 Feb 2017, para. 8.

after the inspections. Accordingly, Sheriff Welsh allowed the appeal and remitted the case back to the defenders for reconsideration, in terms of section 159(6) of the 2006 Act. In doing so, he concluded by opining that if, having made the said further adjustments the defenders were still denied access, they would be entitled to refuse the applications. That was of course true, since, if the same ground for refusal continued to exist after making the reasonable adjustments which the court held were required, then it is almost inevitable that the same decision would be reached, there having being no other identified flaw in the decision-making process. However, that comment also served as a clear signal to the pursuer as to the likely consequence of the defenders still being unable to carry out an inspection of the properties. Sheriff Welsh did not set any date by which the defenders must, after reconsidering the decisions, confirm, vary, reverse or revoke them, nor did he modify any procedural steps which would otherwise be required by or under any enactment (see section 159(8) of the 2006 Act).

### **The current appeal**

[4] Disappointingly, the parties find themselves once again in the position they were in at the time of the first appeal. There has still been no inspection carried out by the defenders of either of the properties, and the applications have once again been refused. As an aside, it appears that the defenders have not so much confirmed, varied, reversed or revoked their original decision as reached an entirely new decision<sup>2</sup>, albeit arriving at the same result as before, but nothing was made of that by either party, although this is an issue to which I will return. On this occasion, though, the applications have been refused solely under reference

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<sup>2</sup> Although there were two decisions, they were in identical terms, and it is convenient, from this point on, to refer to it as “a” decision.

to section 131 of the 2006 Act, there no longer being any suggestion that the pursuer is not a fit and proper person, and so to that extent the original decision has indeed been reconsidered and varied, albeit the decision to refuse the licences remains unaltered.

### **The decision**

[5] Unfortunately, and unsatisfactorily, there is some dubiety over the date of the decision to refuse the pursuer's applications. The defenders' position on record, and in the statements of reasons dated 5 April 2018, is that the applications were refused on 16 January 2018. However, in their letters to the pursuer dated 22 February 2018 (one relating to each property) (nos. 9 and 10 of the pursuer's inventory), the defenders stated that the applications had been reconsidered and determined on 12 February 2018. As it happens, nothing turns on this discrepancy but it is unfortunate that it has arisen at all, particularly as no contemporaneous documentation has been produced vouching which of the dates is in fact correct.

[6] As far as the reasons for the decision are concerned, the letters of 22 February 2018 stated that in the absence of an inspection the defenders were unable to assess the suitability of the property in terms of section 131(2) of the 2006 Act and had therefore determined to refuse the applications. In the more detailed statements of reasons dated 5 April 2018 (nos. 6/1 and 6/2 of process), reference was again made to the failure to inspect. The defenders stated, having previously referred to Sheriff Welsh's judgment, and to the history of their having tried to arrange inspections, to no avail:

“...the Council was therefore of the view that all reasonable steps had been taken to inspect the property and to ensure that reasonable adjustments had been made to assist the applicant with the application and inspection process. Despite these steps it had not been possible for Council officers to assess the condition of the property and the Council could not therefore be satisfied that the property was suitable for

occupation as an HMO. The Council accordingly determined that the material before it indicated that the ground of refusal as set out in section 131 of the Housing (Scotland) Act 2006 had been shown to exist and the application was refused.”

That last sentence was a misrepresentation of the statutory test, since section 131 (in contrast to section 130) does not contain grounds for refusal; rather, it sets out the circumstances in which a licence may be granted, which is not the same thing, albeit it does perhaps set a somewhat lower bar for the defenders to clear if they are not to grant a licence. For present purposes it is perhaps sufficient to note, however, as previously pointed out, that in contrast to its original decision, the defenders no longer assert that the pursuer is not a fit and proper person to hold a licence. Purely and simply, their position is that, as they have been unable to inspect the properties, they are unable to conclude that the properties are suitable and accordingly have refused the applications.

### **The debate**

[7] The case called before me for a hearing on 26 September 2018. The pursuer represented himself (as he had done at the original appeal) and the defenders were represented by Ms McEwan, solicitor. There was some initial discussion about the nature of the hearing, since there was no indication in the interlocutor appointing it as to whether it was to be an evidential hearing or not. As I have previously alluded to, the first appeal proceeded by way of proof. However, Ms McEwan assured me that this issue had been the subject of some discussion at a previous hearing and that Sheriff Noble had determined that the hearing should proceed on the basis of submissions only. The hearing duly proceeded on that basis. While it emerged that one or two facts were not agreed (such as whether or not the pursuer had received the defender’s letter of 26 September 2017) none of those turned out to be of particular significance. There was also some discussion as to the status of

Sheriff Welsh's decision, and whether it was determinative to any extent of the issues before me, the proceedings being unusual in that while this was an entirely separate appeal, it pertained to the same application as the first appeal (and also, at least on one view, to some extent at least, to the same decision, on the basis that that original decision was simply to be reconsidered). Both parties were content to proceed on the basis that I was not bound by Sheriff Welsh's decision but was free to reach my own view. It makes no difference to my ultimate decision, but, for reasons which I give below, I do not think that is entirely correct. That said, there was also at least tacit agreement that to the extent that Sheriff Welsh had made findings in fact – such as to the extent of the pursuer's disability – it would be pointless to have a further proof, and I do proceed on the basis that Sheriff Welsh's findings on the facts are binding on parties, and on me.

### **Factual background**

[8] The following factual background is not contentious. Following Sheriff Welsh's previous decision, the case was sent back to the defenders, albeit they did not receive it until about June 2017, the defenders having lodged an appeal to the Sheriff Appeal Court, which they subsequently abandoned. The defenders subsequently tried to arrange an inspection of the properties, by writing to the pursuer. In particular, they wrote to him on 10 August 2017 proposing an inspection of the properties at 10 am on 28 August 2017. That letter (no. 6/3 of process) included the following paragraphs:

“The Council would expect that as licence holder you facilitate the inspections by being present, or alternatively nominate an agent to attend the inspections. It is my understanding, arising from the proceeding before the sheriff that your wife might be able to assist by attending the inspections on your behalf. I can confirm that the Council would be content with that arrangement.

If the above arrangements are not suitable then the Council would of course consider any reasonable alternative you may seek to put forward”.

[9] That letter was written by Andrew Mitchell. No response was received from the pursuer. On 25 October 2017, Stuart Hathaway, licensing team leader, wrote to the pursuer again (no. 6/6 of process), introducing himself as the person who was to be the pursuer’s sole point of contact, giving his contact details and going on to state the following:

“I would like to propose the following dates and time to carry out inspections for two of your HMO properties as follows:

- Friday 3 November 2017 or Friday 10 November 2017;
- 16/1F2 South Clerk Street, Edinburgh 10.00;
- 13/3F2 Falcon Avenue, Edinburgh 11.00.

Please contact me directly to confirm which date for inspections are (*sic*) convenient for you or telephone me... to arrange an alternative date and time”.

[10] No response having been received from the pursuer to that letter either, Mr Hathaway wrote to him again on 18 December 2017 (no 6/7 of process), referring to both of the foregoing letters and stating the following:

“The Council have made reasonable adjustments to assist you in complying with the inspection process and would expect that as licence holder you facilitate the inspections by being present, or alternatively nominating an agent to attend the inspections.

As we have no response from yourself in relation to this we are now recommending these applications be refused”.

[11] Finally, for completeness, when the present appeal first called in court (coincidentally, before Sheriff Welsh) it was recorded in the interlocutor that a query had arisen as to whether or not the defenders had written to the pursuer’s wife direct. Parties could not agree on precisely what was said to Sheriff Welsh on that occasion but it was a matter of agreement before me that the defenders did not write to her direct, their position being that, in their view properly, all correspondence sent by them was directed to the pursuer.

## The law

[12] Section 124 of the 2006 Act provides –

“(1) Every house in multiple occupation (“HMO”) must be licensed under this part unless it is exempted by or under section 126, 127 or 142.

(2) A licence under this part (an “HMO licence”) is a licence granted by a local authority authorising occupation of living accommodation as an HMO”.

[13] Section 131 of the Act provides –

“(1) The local authority may grant an HMO licence only if it considers that the living accommodation concerned –

(a) is suitable for occupation as an HMO, or;

(b) can be made so suitable by including conditions in the HMO licence.

(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 –

(a) its location;

(b) its condition;

(c) any amenities it contains;

(d) the type and number of persons likely to occupy it;

(da) whether any rooms within it have been subdivided;

(db) whether any rooms within it have been adapted and that has resulted in an alternation to the situation of the water and drainage pipes within it;

(e) the safety and security of persons likely to occupy it and;

(f) the possibility of undue public nuisance”.

[14] Section 158 of the Act provides-

### “158 Notice of decisions

(1) This section applies to any decision by the local authority –

(a) to grant an HMO licence (with or without conditions) or to refuse to do so,

...

(2) The local authority must serve notice of a decision falling within paragraphs (a) to (c) of subsection (1) on –

(a) the applicant or, as the case may be, the licence holder.”

[15] Insofar as material, section 159 of the Act provides –

### “159 Part 5 appeals

(1) Any decision of a local authority to which section 158 applies may be appealed by summary application to the sheriff.

...

(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) The sheriff may not determine the appeal in a manner described in subsection (6)(b) where the decision appealed against is a decision to serve an HMO amenity notice.

(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.

[16] Paragraph 5 of schedule 4 to the Act provides –

“(1) The local authority may make such enquiries about the application as the authority thinks fit.

(2) The local authority must make a report of any matter arising from any such enquiries which the local authority considers relevant to the determination of the application”.

[17] Paragraph 6 of schedule 4 to the Act provides –

“(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)”.

[18] Paragraph 8 of schedule 4 provides –

“(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)...”.

[19] Paragraph 9 of schedule 4 provides –

“(1) The local authority must decide whether to grant or refuse an application for an HMO licence within 12 months of receiving the application.

...

(6) If the local authority does not determine an application for an HMO licence within the period mentioned in subparagraph (1) (or that period as extended), the authority is to be treated as having decided to grant the HMO licence unconditionally”.

[20] Section 20 of the Equality Act 2010, insofar as material, provides –

“(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section... [applies]; 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”.

### **Pursuer’s submissions**

[21] The pursuer made nine distinct points in support of his submission that the appeal should be allowed. Each of these was dealt with discretely, that is with Ms McEwan making her response before the pursuer moved on to his next point. In that way, the pursuer was able to present his case as effectively as he could. I therefore set out the submissions in like manner. Briefly, the pursuer’s nine submissions, and the responses thereto, were as follows:

(1) The defenders’ overall policy was unreasonable and had no basis in the 2006 Act.

There was no basis for requiring the landlord or an authorised representative to attend an inspection in all cases. It was wrong to say, as Sheriff Welsh did, that there was a duty of inspection. It was merely a power. There were other steps a local authority could take in order to satisfy itself whether or not accommodation was suitable to be licensed as an HMO.

Ms McEwan’s response was to refer to section 131 of the 2006 Act, and to submit that the policy was reasonable. There were items listed in section 131 on which only the landlord could comment. While it was perhaps overstating the position to say that there was a duty to inspect, nonetheless the defenders had a wide

discretion in deciding what enquiries to conduct and how to conduct those enquiries.

- (2) The applications ought to be determined either on the basis of suitability of the applicant (section 130) or the suitability of the accommodation (section 131).

They should not be decided on the basis of the applicant's relationship with the defenders. The present applications had become "stuck" due to the inability to inspect. The decision to refuse was disproportionate.

Ms McEwan rested on her response to the pursuer's first point, to which she had nothing to add.

- (3) The defenders had failed to contact the pursuer's wife to arrange an inspection.

The pursuer found it difficult to discuss the proposed inspection with his wife himself, and did not see why he should.

Ms McEwan responded that while the defenders were content for the pursuer's wife to be present, they were not obliged, nor indeed entitled, to write directly to her.

- (4) There was in fact no single point of contact, which was a cornerstone of the defenders' supposed adjustments for the pursuer's disability. The pursuer pointed to various items of correspondence from the defenders from a number of different people, on a variety of topics. He did not receive a purported letter of 5 September 2017 informing him of the supposed single point of contact. In any event, and slightly inconsistently, he submitted that a single point of contact was of no particular benefit to him. It was not an organisational difficulty he had, so much as an inability to adjust his thinking to be able to accept that there was a necessity for him to be involved in any way in the arranging of the inspections.

Ms McEwan responded that the single point of contact was only ever intended to be in relation to the multiple occupancy applications. It would be a challenge for the defenders to ensure that all correspondence on every topic went through one person.

- (5) There was in substance no difference between what the defenders did this time and what they did last time. They had not made any real further adjustment. On that basis, the appeal should again be allowed, as it was last time.

Ms McEwan responded that the defenders had done what Sheriff Welsh had asked of them. The appeal this time should be refused.

- (6) The adjustments made did not address the pursuer's actual disability which was rigidity of thinking. A further reasonable adjustment would be for the defenders to write directly to the tenants. He would give the tenants the necessary authority.

Ms McEwan referred to the Equality Act 2010. She accepted that reasonable adjustments had to be made. The defenders had done what was asked of them by Sheriff Welsh. They had tried to arrange synchronised visits and they were agreeable to the pursuer's wife attending. They had also made repeated attempts to arrange the visits. Further, if considering whether further adjustments ought to be made then the court should also consider whether those adjustments would make any difference. It could not be assumed that the pursuer would co-operate in either instructing or authorising the tenants to cooperate, given his reluctance or inability to speak to his wife about the visits which had been proposed.

The pursuer responded by saying that what the defenders had done could not really be described as adjustments, since they had always offered synchronised appointments. They had not in fact adjusted their policy or practice.

- (7) There was no proof that the defenders had delegated authority to Mr Mitchell to decide the applications (but the pursuer has no pleadings on this point, which I therefore decline to discuss further). The pursuer also made reference to the discrepancy as to the date of the decision. Assuming that the decision was made on 12 February 2018, it came more than 12 months after Sheriff Welsh's judgment. The 12 month period in paragraph 9 of schedule 4 had therefore been exceeded. The application should be deemed to be accepted.

Ms McEwan submitted that the 12 month period in paragraph 9 had no application. That paragraph could not be read in the way contended for by the pursuer. In any event, even if it did apply, the 12 months could only run from the date when the papers went back to the committee which was in June 2017, following the lodging of an appeal which was subsequently abandoned. The decision was reached well within that 12 month period.

- (8) Under reference to paragraph 6 of schedule 4, the defenders had taken into account material which had not been notified to the pursuer, including certain of his own letters. They had also taken into account a report not seen by him.

Ms McEwan responded that no report, in the sense meant by paragraph 5 of schedule 4, had been prepared because the local authority had not been able to carry out an inspection. As far as paragraph 6 was concerned, it related to representations made by third parties, not by an applicant himself. There had

been no breach of those provisions. The defenders had not taken into account any material of which the pursuer was unaware.

- (9) The decision, whether taken on 16 January or 12 February 2018, was not notified to the pursuer until 22 February. That was not within the seven days required by section 158(11). Accordingly, the decision was invalid.

Ms McEwan accepted that notice was not given within 7 days, but drew a distinction between section 158 and the provisions of paragraph 9 of schedule 4, providing for deemed acceptance if the time limit were not complied with. The failure had no effect.

## **Discussion**

[22] It seems to me that the starting point is to understand what precisely the previous appeal decided, and the nature of the task thereafter to be undertaken by the defenders. To understand that, it is necessary to have regard to the terms of section 159 of the 2006 Act, which sets out the sheriff's powers on determining an appeal. The sheriff may either confirm the decision, with or without variations (subs. (6)(a)); or remit the decision, together with the sheriff's reasons for doing so, to the local authority for reconsideration (subs.(6)(b)); or quash the decision. Here, Sheriff Welsh took the second of those options, that is, he remitted the decision for reconsideration, together with his reasons for doing so, which were solely directed to the defenders not having made sufficient adjustments to counter the pursuer's disability. The further reasonable adjustments which Sheriff Welsh said should be made were, first, the synchronisation of visits to occur on the same day, and, second, the provision of a written list of snagging issues for the pursuer to deal with, following the carrying out of the inspections. Sheriff Welsh made it clear that if, those adjustments having

been made, the pursuer still refused to provide access for an inspection, the defenders would be entitled to refuse the licences. Accordingly, the basis upon which the defenders were to reconsider their decision was clearly delineated by Sheriff Welsh's decision. It is important also to have regard to the terms of section 159(8) which provides that the sheriff, on allowing an appeal, may set a date by which the local authority must, after reconsidering the decision, confirm, vary, reverse or revoke it. While no such date was set here, that provision makes clear that the original decision has not been quashed, but still stands, subject to reconsideration by the local authority who may either confirm it (in which case it continues to stand), vary it or revoke it. These provisions make clear that where a decision is remitted for reconsideration, the local authority does not require to go back to square one in dealing with the application with a view to reaching an entirely new decision without reference to the original one, but is entitled to take the original decision as its starting point, having regard to the sheriff's reasons for remitting it for reconsideration. If that is correct, then it seems to me that if a local authority does what is required of it by a sheriff allowing an appeal then, in the absence of any further procedural or legal error in relation to the reconsideration, it is not open to another sheriff to reach a different view on the merits of the original decision, and remit it for reconsideration on an entirely different ground. The regime for appeals does not permit repeated bites of the same cherry.

[23] That said, the decision to (in effect) confirm the original decision is clearly a decision which is amenable to appeal. The real question for me is whether there has been some flaw in the reconsideration process. To stick with the metaphor at the end of the last paragraph, the pursuer is entitled to a bite at a different cherry, albeit perhaps one growing on the same branch. The pursuer's submissions fall into three distinct categories. First, he argues that

certain errors of law were made in relation to the reconsideration of the first decision. In particular the following issues arise from his submissions numbered 7, 8 and 9:

- (1) whether the defenders' failure to decide the licence applications within a year of Sheriff Welsh's decision resulted in the applications being deemed to have been granted;
- (2) whether the delay in issuing a decision letter invalidates the second decision;
- (3) whether the defenders took into account material they ought not to have taken into account.

[24] Second, certain of the submissions made by the pursuer are no more than a re-run of the arguments advanced before Sheriff Welsh. These can be distilled into the following issues, namely:

- (1) whether the defenders are entitled to insist that a landlord be present, and whether they have a duty to inspect at all (submissions 1 and 2);
- (2) whether the defenders have made sufficient adjustment for the pursuer's admitted disability (submissions 4, 5 and 6).

[25] Finally, there is an issue as to whether the defenders have in fact made the adjustments desiderated by Sheriff Welsh (submission 3).

[26] I will consider each of these in turn, starting with the three alleged errors of law.

*Did the defenders breach a requirement to decide the applications within a year?*

[27] This issue can be dealt with relatively swiftly. The pursuer's argument falls away as soon as it is appreciated that the task being carried out by the defenders was not to reach a decision on the applications of new, but to reconsider the original decision. The terms of paragraph 9 of schedule 4 simply have no application. The decision which was being

reconsidered, that is, the original decision, *was* reached, within a year of the applications being lodged. There is therefore no question of a deemed granting under paragraph 9. That paragraph cannot reasonably be read in the manner contended for by the pursuer, namely to require a decision to be reached within a year of remit to the licensing authority following a successful appeal. Indeed, were that the meaning intended by Parliament, there would have been no need for section 159(8), which provides that on remitting a decision the sheriff may set a date by which the local authority must complete its task. The clear implication from that provision is that if the sheriff does not do so, there is no set date. Further, the existence of that power is sufficient safeguard against a local authority taking an undue length of time to reach a decision. The fact that no date was set in the present case is nothing to the point. It would have been open to either party to request that a date be set. In the absence of one, there was no time limit incumbent upon the defenders.

[28] For completeness, even if, as the pursuer contends, paragraph 9 of schedule 4 can be read as imposing a one-year time limit upon return of a case to the local authority following a successful appeal, such a limit could only reasonably be implied to run from the date when the local authority received the case back from the Sheriff Court (or Sheriff Appeal Court, in the event of an appeal). In the present case, the papers were not received until June 2017, following an abortive appeal by the defenders. That being so, the date of the decision, whether it was 16 January or 12 February 2018 easily fell within the period of 12 months.

[29] Accordingly, the pursuer's submission that the defenders did not decide his applications timeously, resulting in a deemed granting of his applications, has no merit.

*Whether the delay in issuing the decision letter invalidated the decision to refuse?*

[30] Section 158(11) states that a notice of decision to which that section applies must be served within seven days of the decision. Section 158(1)(a) applies to any decision to grant or to refuse to grant an HMO licence. Accordingly, the notices of the decision ought to have been served within seven days which, on any view, was not done. However, I do not consider that it can follow that a failure to do so invalidates the decisions. I read the terms of subsection (11) as directory rather than mandatory. Were it otherwise, then even a decision to grant a licence would be invalid if a notice were not served within seven days and that simply cannot be correct. Further, as Ms McEwan submitted, if the intention of the legislature was that a failure to serve a notice of refusal should result in a deemed granting, one would have expected to see a provision similar to paragraph 9 of schedule 4, but there is no such provision.

[31] Accordingly, the pursuer's submission that the decisions to refuse are invalid because he did not receive notice within seven days, also has no merit.

*Whether the defenders took into account material they ought not to have taken into account?*

[32] It is entirely clear that the defenders based their decision on their inability to arrange an inspection of the properties. There was no report in the sense meant by paragraph 5(2) of schedule 4. The pursuer's submission that copies of his own letters ought to have been sent to him is untenable. Paragraph 4 of the schedule, as Ms McEwan submitted, deals with representations made by a third party. There were no such representations. The sole basis upon which the defenders reached their decision was their inability to inspect the properties, and they did not take into account any material which the pursuer had not seen.

[33] Accordingly, there is no merit to this part of the pursuer's submission. The pursuer has therefore failed in his challenge to the legality of the decision to confirm the original decision.

[34] Next I turn to the pursuer's submissions on the broader merits of the defenders' position, being the second category of issues identified above.

*Whether the defenders are entitled to insist that the landlord be present, and do they have a duty to inspect?*

[35] This has previously been dealt with by Sheriff Welsh, who, having heard evidence, found that the defenders' policy to insist on inspections at which the landlord was present was reasonable. For the reasons given above, I do not consider that it is open to me to take a different view in the context of this appeal. However, even if I am wrong on that, and it is open to me to reach my own view, I would come to the same result as did Sheriff Welsh. Paragraph 5(1) of schedule 4 entitles the local authority to make such enquiries "as the authority thinks fit". One of the matters which the local authority must consider is the suitability of the living accommodation (section 131(2)(b)) and it is difficult to see how that could ever be done without an inspection being carried out. Accordingly, whether it is correct to characterise the defenders as having a power, or a duty, to inspect, is largely academic. Equally, I do not see how the defenders can be criticised for having a policy that landlords be present. Even if it might be argued that a decision could be reached in some cases without that being done, it cannot be argued (and expressly was not argued by the pursuer) that no reasonable authority could adopt that position. The fact is that the defenders do have that policy and the real question is whether or not they made sufficient

adjustment to it to take account of the pursuer's admitted disability, the issue to which I now turn.

***Whether further reasonable adjustments ought to be made: section 20 of the Equality Act 2010***

[36] Section 20(3) of the Equality Act 2010 imposes a requirement, where a practice of a person puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The defenders accepted that that provision did impose a requirement on them to adjust their usual practice, which they say they have done in the manner envisaged by Sheriff Welsh. The pursuer essentially made two points about this at the appeal hearing. The first was that the so-called adjustments allegedly made by the defenders were not adjustments at all, or in any event were not adjustments which addressed his particular disability. As far as the single point of contact was concerned, he submitted, in apparently contradictory terms, that he did not need it but that it had not been done anyway. As for the synchronised visits, he submitted that that was done in all cases, so was not an adjustment. His second point was that a further adjustment ought to have been made, namely that the defenders ought to deal with his tenants at any inspection. It seems to me that there are two answers to all of this. First, the previous appeal determined that no further reasonable adjustments were required, beyond those mentioned by Sheriff Welsh, which decision was not appealed by the pursuer. It is therefore not open to the pursuer to argue in the context of the present appeal that further reasonable adjustments ought to have been made. Second, even if that is wrong, I am not persuaded that the further adjustment sought by the pursuer is an adjustment which it was reasonable for the defenders to have to take to avoid

the disadvantage suffered by the pursuer. In the first place, whatever the position might be in relation to other properties owned by the pursuer, it was not reasonable for them to have to make a further adjustment in this case, following the resolution of the previous appeal and the explicit offer by the pursuer's wife, with whom he resides and who does not suffer from a disability, to attend synchronised inspections. Second, it is not unreasonable to expect the pursuer to be involved to some extent in the arranging of the inspection of properties which he owns and for which he has applied for an HMO licence.

Notwithstanding his disability, there is no suggestion that the pursuer lacks capacity or understanding of what it is that the defenders require. Nor is it unreasonable to expect him to communicate his position in writing to the defenders. He is after all more than capable of writing to them about other points of dissatisfaction, as the productions demonstrate. Any disadvantage which he is at is therefore not substantial. The corollary of this is that it is unreasonable to expect the defenders to have to deal with the tenants to the complete exclusion of the pursuer, even if the tenants were to attend the inspections. Such an adjustment would not be a reasonable one for the defenders to have to make. Further, as pointed out by Ms McEwan for the defenders, there is no reason to suppose that even if that further adjustment were made, it would make any difference. If the pursuer is unable even to communicate the date of inspection to his wife, with whom he resides, why should one assume that he is able to communicate with his tenants about inspections? Indeed that would be more onerous, since instead of one synchronised inspection with one person, there would be inspections with different people which would be more, not less, onerous to organise. Accordingly, I find that on this occasion there has been no breach of the Equality Act 2010, there being no further adjustments which the defenders ought to have made.

*Have the defenders in fact made the further adjustments suggested by Sheriff Welsh?*

[37] This is the third category of issue identified above, and it differs from the previous one in that it focusses not on whether there are further adjustments which the defenders ought to have made, but whether they have in fact made the adjustments which Sheriff Welsh considered to be reasonable. In one respect, of course, the defenders have not made one of the adjustments – committing any snagging list to writing – but that is because they can only do that once they have been able to carry out an inspection, and that stage has not yet been reached. The real issue here is whether the commitment to allow the pursuer’s wife to attend inspections extended to a commitment to write to her direct to make the arrangements. This was not expressly covered in Sheriff Welsh’s judgment, but it is implicit in what I have said above that it is not unreasonable for the pursuer to be expected to communicate the arrangements with his wife. If he were unable to do that, then he was capable of telling the defenders that they should write to her direct, but he did not do that either.

[39] Accordingly, I have reached the view that the defender did in fact make the adjustments desiderated by Sheriff Welsh, insofar as they were able to do so, and that there was nothing further which they need have done. In particular, there was no requirement on them to write directly to the pursuer’s wife, at least in the absence of a request by the pursuer that they do so.

**Decision**

[40] It follows that all of the pursuer’s challenges to the defenders’ decision to again refuse his licences, fail. There was no legal error in the manner in which the second decision was reached. There were no further adjustments which the defenders ought to have made.

They did make reasonable adjustments. Any disadvantage suffered by the pursuer was not substantial given that he resides with his wife, the proposed attendee at the inspections. The defenders remained unable to inspect the properties. They were therefore entitled to reach the decision to refuse the licences. Accordingly, there is no basis in law for my disturbing the defenders' decision on this occasion, and the appeal must fail.

### **Expenses**

[41] To ensure no unfairness to the pursuer, I have set down a hearing on expenses. I should however point out that expenses ordinarily follow success. If parties can reach an agreement as to expenses before the date of the hearing, then there will be no need for the pursuer to appear at it.