SHERIFF APPEAL COURT

[2019] SAC (Civ) 25
EDI-B1341-17

Sheriff Principal M Stephen QC
Sheriff Principal M Lewis
Appeal Sheriff N Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in an appeal in the cause

EXPLORE LEARNING LIMITED

Pursuer and Appellant:

against

SOCIAL CARE AND SOCIAL WORK IMPROVEMENT SCOTLAND
(COMMONLY KNOWN AS THE CARE INSPECTORATE)

Defender and Respondent:

Appellant: Lindsay QC; Shepherd & Wedderburn
Respondent: Logan, advocate; Social Care and Social Work Improvement Scotland

31 May 2019

[1] Explore Learning Limited ("the appellant") operates a network of learning centres throughout the UK. This case relates to its operation within Sainsbury's Supermarket at Blackhall, Edinburgh. The appellant lodged summary applications at Edinburgh Sheriff Court under section 75 of the Public Services Reform (Scotland) Act 2010 ("the 2010 Act")

appealing decisions by the respondent to cancel the registrations of the care service provided by the appellant at Sainsbury's Supermarkets at Blackhall and Murrayfield (both Edinburgh) and Darnley (Glasgow). The reason given by the respondent for cancelling registration was due to it not being persuaded that the service provided falls within the definition of "day care of children" as set out in section 47 and schedule 12 para 13 of the 2010 Act. This case is to be the lead action.

[2] The respondent, whose full title is Social Care and Social Work Inspectorate Scotland (SCSWIS) is commonly known as the Care Inspectorate and is a statutory body constituted by section 44 of the 2010 Act. It is the statutory successor to the Scottish Commission for the Regulation of Care ("Care Commission") which had operated in terms of the Regulation of Care (Scotland) Act 2001 ("the 2001 Act"). The 2001 Act was repealed by the 2010 Act. The statutory framework is designed to regulate providers of social care including those providing day care of children. Regulations have been made under both the 2001 and 2010 Acts. The 2001 Act and its associated regulations were in force when the appellant was first registered with the Care Commission in 2005 in respect of the Blackhall premises as providing "day care of children".

[3] An evidential hearing took place over two days in September 2018. The appellant challenges the decision of the respondent set out in their letter of 25 October 2017 ("the decision letter") to cancel its registration. The sheriff required to consider whether the respondent as the decision maker had exceeded its powers; erred in law; failed to have regard to all relevant and material considerations, or had reached a decision which was irrational or *Wednesbury* unreasonable. The sheriff's interlocutor of 9 October 2018 dismissing the application and confirming the decision of the respondent is now appealed to this court.

Background

[4] The appellant has been registered with the respondent and its predecessor, the Care Commission, as a provider of "day care of children" at its premises within Sainsbury's Supermarket at Blackhall since 2005. The appellant was originally registered under the 2001 Act by the Care Commission on 14 December 2005. The appellant's registration was transferred to the respondent effective from 1 April 2011 and is subject to the scheme set up by the 2010 Act and administered by the respondent. The respondent is a creature of statute and requires to operate within the statutory code provided by the 2010 Act and its associated secondary legislation.

[5] The appellant contends that its operation at Blackhall "*provides care to children aged between 4 and 14 years of age as its primary purpose in a learning or educational setting*". Before us there was no dispute that the appellant provided Maths and English tutoring at Blackhall and advertised its services as such. The question whether a service is registrable as providing 'day care of children' depends on whether its primary purpose satisfies such provision. By 2013 the respondent had formed the view that the appellant may no longer be providing "day care of children" and there began a series of meetings and protracted correspondence with the appellant and its solicitors as to the correct interpretation of paragraph 13 of schedule 12 of the 2010 Act and regulation 4 of the Social Care and Improvement (Scotland) (Excepted Services) Regs 2012 (SSI 2012/44) ("the 2012 Regs") which introduced 'the primary purpose exception'. Eventually, in 2017, the respondent, having regard to material presented by the appellant material by which the appellant marketed its services, and the inspection reports prepared by its own staff, came to the decision that the service at Blackhall was not registrable. The respondent decided that, although the service did provide elements of care, its primary purpose was education.

[6] After a false start in May 2017, the respondent gave its decision to cancel the appellant's registration in a letter dated 25 October 2017. That decision and the reasons given by the respondent are the subject of this appeal. The fundamental question is whether the service provided by the appellant at Blackhall is a registrable service in terms of the statutory code.

Statutory Framework

[7] **PUBLIC SERVICES REFORM (SCOTLAND) ACT 2010**

44 Social Care and Social Work Improvement Scotland

(1) There is established a body to be known as Social Care and Social Work Improvement Scotland (in this Part referred to as "SCSWIS"), which –

(a) is to exercise the functions conferred on it by this Act or any other enactment, and

(b) has the general duty of furthering improvement in the quality of social services.

(2) SCSWIS must, in the exercise of its functions, act –

(a) in accordance with any directions given to it by the Scottish Ministers, and

(b) under the general guidance of the Scottish Ministers.

(3) The Scottish Ministers may vary or revoke any direction given under subsection (2)(a).

(4) Schedule 11 (which makes further provision about the status, constitution, proceedings etc of Social Care and Social Work Improvement Scotland) has effect.

45. General principles

(1) SCSWIS must exercise its functions in accordance with the principles set out in the following subsections.

(2) The safety and wellbeing of all persons who use, or are eligible to use, any social service are to be protected and enhanced.

(3) The independence of those persons is to be promoted.

(4) Diversity in the provision of social services is to be promoted with a view to those persons being afforded choice.

(5) Good practice in the provision of social services is to be identified, promulgated and promoted.

47. Care Services

(1) In this Part, a "care service" is any of the following-

(l) day care of children.

49. Power to modify key definitions

The Scottish Ministers, after consulting such persons (or groups of persons) as they consider appropriate, may by order –

(a) modify –
  (i) section 47(1),
  (ii) schedule 12,
(b) modify –
  (i) the definition of social work services in section 48,
  (ii) the definition of social work services functions by adding an entry to or removing any entry from schedule 13.

64 Cancellation of registration

…

(4) Where a person providing a registered care service ceases to provide the service, SCSWIS may cancel the registration of the service.

71. Further provision as respects notice of proposals

…

(3) SCSWIS must give any person who provides a service registered under this Chapter notice of a proposal to cancel the registration (other than in accordance with an application under subsection (1)(b) of section 70).

…

(5) A notice under this section must give SCSWIS's reasons for its proposal.

73. Notice of SCSWIS's decision under Chapter 3

…

(3) If SCSWIS decides to implement a proposal in relation to which it has given a person a condition notice or a notice under section 71, it must give that person notice of the decision.

…

(5) Subject to subsection (6), a decision to implement a proposal in relation to which a condition notice has been given or of which notice has been given under section 71(1) or (3) does not take effect-

(a) if no appeal is brought, until the period of 14 days referred to in section 75(1) has elapsed, and

(b) if an appeal is brought, until that appeal is finally determined or is abandoned.

75. Appeal against decision to implement proposal

(1) A person given notice under section 73(3) of a decision to implement a proposal may, within 14 days after that notice is given, appeal to the sheriff against the decision.

(2) The sheriff may, on appeal under subsection (1), confirm the decision or direct that it is not to have effect; and where the registration is not to be cancelled may (either or both)-

(a) vary or remove any condition for the time being in force in relation to the registration,

(b) impose an additional condition in relation to the registration.

SCHEDULE 12

CARE SERVICES: DEFINITIONS

13

"Day care of children" means, subject to paragraphs 14(b) to 17, a service which consists of any form of care (whether or not provided to any extent in the form of an educational activity), supervised by a responsible person and not excepted from this definition by regulations, provided for children, on premises other than domestic premises, during the day (whether or not it is provided on a regular basis or commences or ends during the hours of daylight).

The Social Care and Social Work Improvement Scotland (Excepted Services) Regulations 2012

4. Day care of children

There is excepted from the definition of "day care of children" in paragraph 13 of schedule 12 to the Act any service unless its primary purpose is the provision of care to children.

Grounds of Appeal

[8] At the appeal hearing senior counsel for the appellant confirmed that he no longer insisted on the grounds of appeal which were critical of the sheriff's analysis of the effect of the 2011 order (Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions Order 2011), or the case based on the appellant's article 1 protocol 1 convention rights. His argument addressed the following: (i) that the sheriff ought to have concluded that the respondent misapplied the definition of "day care of children"; (ii) procedural unfairness; (iii) that the respondent ought to have regarded its decision as discretionary, not mandatory; (iv) a failure to consider the cumulative effect of reasons; (v) proportionality and best practice and (vi) unfairness to other applicants.

"Day care of children" – definition

[9] It was contended on behalf of the appellant that the sheriff had erred in her approach to the definition of "day care of children". The sheriff and the respondent had erred by focusing on the exception set out in regulation 4 of the 2012 Regulations, and the sheriff ought to have started with the definition provided in the primary legislation (schedule 12, paragraph 13 to the 2010 Act) which gives the principal definition. Subsidiary or secondary legislation cannot derogate from the statutory provision which is a very wide definition and specifically envisages education to be part of the service ("*whether or not provided to any extent in the form of an educational activity*"). This is permissive and allows a significant educational component. The regulation provides an exception however that must be construed against the context of the wide statutory definition. The regulations must be read against the statutory context and should not override the statutory definition. Counsel for the appellant submitted that had the sheriff properly considered the wide permissive statutory definition

she ought to have held that the respondent erred to a material extent in its interpretation of and application of the statutory definition of "day care of children" to the services provided by the appellant at Sainsbury's in Blackhall.

[10] Counsel for the respondent commended the sheriff's analysis of the statutory provisions which defined "day care of children". She was correct to observe that the provisions must be read together and by focusing on the primary purpose exception the sheriff identified the crux of the issue namely, whether a service requires to be registered. She correctly identified and applied the test and reached the conclusion that the respondent had not erred in its interpretation. The respondent had applied the primary purpose test correctly in the decision letter. The respondent had considered the statutory provisions acknowledging that day care could include educational activities but it rightly observed that if education was the primary purpose of the service then it was not registrable.

"Day care of children" - decision

[11] The definition of "day care of children" may be found in paragraph 13, schedule 12 of the 2010 Act. The definition is in two parts and both parts must be satisfied before the service meets the definition. It means *"…a service which consists of any form of care (whether or not provided to any extent in the form of an educational activity) and not excepted from this definition by regulations*". As both parts or legs require to be satisfied it is necessary to look at the regulations which the Scottish Ministers had power to make in terms of section 104 of the 2010 Act. This is a wide power, and the 2010 Act expressly permits the Scottish Ministers to modify key definitions in the primary legislation. Any modification so made is therefore not a subsidiary definition, but is expressly provided to be a replacement for the primary definition. Regulations have been made in respect of support services (para 1 of

schedule 12); nurse agencies (para 4 of schedule 12) and "day care of children" with which this case is concerned. Regulation 4 introduces a primary purpose exception which requires to be applied when considering the statutory definition. In effect the regulations import the primary purpose exception into the statutory definition. Unless the service has as its primary purpose the provision of care to children the educational element is of little moment. Therefore, the statutory definition requires both legs of the test to be met.

[12] In our opinion, the appellant's submission is misconceived. The definition is wholly contained within primary legislation. It sets out the two tests to be met. One test is not subsidiary to the other. The regulations are the manifestation of Scottish Ministers exercising their powers under the 2010 Act to control the services to be regulated and which services are to be excepted from the wide definition of day care of children. If the primary purpose of the service is not the provision of care to children it does not fall within the definition – and is not registrable.

[13] There is no error in the sheriff's approach. As both legs require to be satisfied it matters little whether the analysis begins with the primary purpose exception or not – however, as the first part of the definition is expressed so widely it is both rational and sensible to check first of all whether the care provided by the service is caught by the exception or not.

[14] The definition is therefore clearly met, and this ground of appeal falls to be rejected.

Procedural unfairness/Breach of sections 71 and 73

[15] Senior counsel for the appellant challenged the sheriff's finding that the respondent's decision to cancel the registration of the appellant had been carried out fairly. This, it was submitted, was a material error of law. The respondent gave notice of the proposal to cancel

the appellant's registration by letter of 6 March 2017 in fulfilment of its obligations in terms of section 73(3) of the 2010 Act. However, it was submitted that the appellant had not been given notice of all matters which the respondent was treating as adverse to its continued registration and therefore the appellant was not given fair notice or an opportunity to consider and answer the respondent's true reasoning. In particular, the respondent omitted to make any reference in that letter to five specific reasons "disclosed" by counsel for the respondent during oral submissions before the sheriff. The five reasons are as follows:-

(a) The respondent did not consider that the appellant had ever provided day care of children services;

(b) The respondent was unaware of how the appellant had been able to obtain its registration in 2005;

(c) The respondent believed that maintaining the appellant's registration would be unfair to other parties who provided tutoring and whose applications for registration had been refused;

(d) The respondent considered that maintaining the appellant's registration would impose a disproportionate burden upon the respondent; and

(e) The respondent was of the opinion that the appellant had breached National Care Standards 3, 6, 9 and 10.

Due to the respondent's failure to disclose these reasons there had occurred a clear breach of the common law rules of procedural fairness in addition to a breach of its obligation in terms of section 71(3) to give notice of its reasons in support of their proposal to cancel registration. The respondent required to give notice and that notice must refer to all of the material reasons for the proposed cancellation. In this case the respondent had been selective as to which reasons it chose to disclose. In these circumstances the respondent's failure to fulfil its statutory duties means that the decision to cancel the appellant's registration is vitiated and appeal should be allowed.

[16] These reasons do not appear in the letter of 6 March 2017 or in the decision letter. The sheriff records the submission particularly as to the national care standards at paragraph [38] of the note. The alleged failure to comply with care standards had not been picked up in the annual inspection reports nor is any reference made to them in the answers lodged by the respondent to the summary application.

[17] Senior counsel relied particularly on the first and second of these undisclosed reasons. The respondent's position appeared to be that registrable services had never been provided by the appellant. This is of particular relevance when considering whether the respondent had erred in its approach to their statutory function in terms of section 64(4) of the 2010 Act which deals with cancellation of registration. The respondent required to consider the situation where a person or body providing a registered care service '*ceases*' to provide that service. There is a clear distinction to be made when a regulator is considering deregistration compared with a new application for registration. If the respondent considered that the appellant never provided registrable services it is difficult to envisage how the respondent could fairly and objectively approach its section 64(4) duty which is concerned with a registered care provider "ceasing" to provide the service.

[18] The respondent's decision should be considered a nullity due to failure to disclose full reasons. The notice must set out all the material reasons (*Ritchie* v *Aberdeen City Council* 2011 SC 570 following *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345). Not only must the decision maker disclose all material reasons but failure to do so means that the statutory purpose of section 71, which is to give notice, cannot be fulfilled. The purpose of the notice is to improve the decision making by allowing an informed decision to be made. The notice requirement is also designed to provide those affected by the proposed decision an opportunity of answering the considerations raised in the section 71(3) notice. If

the notice fails to make reference to all the material reasons the statutory purpose cannot be fulfilled and will instead be defeated with the result the respondent will make the decision in ignorance of the affected party's position. Had the respondent disclosed these full reasons the appellant would have submitted a detailed response refuting or explaining these concerns. Further, as no reference was made to the undisclosed reasons in the decision letter the appellant is unable to challenge these in the appeal process before the sheriff.

[19] Further, natural justice required that the party affected by the decision must have an opportunity of participating effectively in the decision making process (*R* v *Secretary of State for the Home Department Ex P. Al-Fayed* (No 1) [1998] 1 WLR 763). The party affected must be given fair notice so that he can make representation and answer any matters which could be treated as adverse to that party (*PRC* (*Iraq*) v *Secretary of State for the Home Department* [2013] CSOH (128)). Counsel relied particularly on *Pagliocca* v *Glasgow District Licensing Board* 1994 SC 561. See also *Ritchie* (*supra*).

[20] In response counsel for the respondent pointed out that the basis or reasons for the respondent's decision not to continue the registration are set out in the decision letter (6/5 of process). The respondent as the decision maker required to set out proper and adequate reasons for its decision dealing with the substantial question and issue which is – is the service provided by the appellant a registrable service? That is the question which the respondent required to address, and did so. It is the decision letter and nothing else which forms the respondent's reasoning and it was the decision letter which the sheriff had to consider and decide whether it forms a proper basis on which to cancel registration or not. In *Ritchie* the court affirmed that the decision maker's reasons must set out the material considerations; his evaluation of them and the essence of the reasoning that led to the decision made.

[21] The five reasons referred to as "undisclosed reasons" were not material to the respondent's position or the sheriff's decision. These were not new matters. They were comment or background. It was not obvious to the respondent in 2017 how registration had come about in 2005. However, it is not known what material was available to the Care Commission then. These considerations are quite immaterial as the respondent required, in the exercise of its statutory function, to make an evaluation in 2017. The respondent is a new statutory body and what may or may not have happened in 2005 is irrelevant.

[22] The appellant had been given notice of the third consideration (unfairness to other tutoring organisations) in the letter of 6 March 2017. The duties incumbent on the respondent by way of inspecting and reporting are obvious and inspecting unregistrable service providers is an unnecessary waste of resources. The Annual Inspection Reports are lodged in the Appendix, and demonstrate the extensive resources which would be wasted in discharging such a function.

[23] The fifth reason related to the National Care Standards. The comment as to the care standards was made in response to an argument advanced by the appellant to the effect that because the service complied with the care standards it should be deemed to be a care service. However, the service provided by the appellant does not comply with all the care standards: for example, it has no outdoor playground and does not take pupils on trips (see standards 3 and 9). However, this was not the basis of the decision not to register. It is simply a statement of fact about the care standards which apply to day care of children in a nursery, for example, as opposed to a tutoring service. The reference to the care standards was made to repudiate an argument made on behalf of the appellant. It did not form part of the respondent's decision. This ground of appeal should be rejected.

Decision on procedural unfairness/breach

[24] This ground of appeal challenges the sheriff's assessment that the process of cancelling the registration was carried out fairly. In our view the sheriff made no error.

[25] The respondent issued the letter of 6 March 2017 to the appellant in implement of its duty in terms of section 71(3) of the 2010 Act (Notice of a Proposal to Cancel the Registration). The notice required to give the respondent's reasons for its proposal (section 71(5)). That letter made clear that the respondent had for some time been doubtful whether the services being provided by the appellant were currently eligible to be registered. The appellant had been informed of these concerns in 2013 and it was acknowledged that there had been discussions on the subject since then. It was noted that the appellant proposed to make an approach to the Scottish Government in relation to establishing a voluntary register for services such as those operated by the appellant, as happened in England with OFSTED. However, notwithstanding that approach, the appellant and its solicitors had set out their views in detail that the services remained eligible for registration. It was clearly noted that the appellant wished to ensure that parents using the service provided by the appellant could continue to have the facility to make payment or part payment using childcare vouchers or tax credit which methods were only available to those using 'registered care services'. The letter went on to identify the core issue whether the services offered and provided by the appellant are capable of falling within the definition of "day care of children" as set out at paragraph 13 of schedule 12 to the 2010 Act particularly having regard to the primary purpose exception. Having explained its approach to the interpretation of that definition, and having concluded that the primary purpose of the appellant's services is the provision of education in the form of Maths and English tutoring, the respondent stated: "*We must be guided by the definition (and exceptions thereto) laid down by*

the Scottish Parliament in relation to care services in Scotland and cannot therefore regard the registration status of your services in England as relevant". The respondent concludes: "*In our view, whatever the position may have been when the services concerned were registered they do not now fall within the definition of day care of children services*". The writer considered the terms of section 64(4) of the 2010 Act and reached the view that the services are not registrable services, and registration would be cancelled. Having reached that decision the respondent stated: "*While it seems to me that we provided ample opportunity for you to set out your position when we met on 31 January, we are prepared to allow you an opportunity to make representations in writing, should you wish a final opportunity to persuade us that the three services referred to above are eligible to be registered under the 2010 Act*."

[26] Detailed representations were made on behalf of the appellant. There followed correspondence between the appellant and respondent during March and April 2017. The first, but flawed, decision letter is dated 31 May 2017. That letter together with the final decision letter of 25 October 2017 which is in the same or similar terms, addressed five specific issues raised by the appellant in the representation on registration lodged with the respondent in response to the letter of 6 March 2017, and refused registration.

[27] The propositions which can be derived from an analysis of the decision letter and the section 73(3) letter of 6 March 2017 are:

(1) That the respondent considered the five reasons given in the appellant's representations made in response to the respondent's letter of 6 March 2017. The five reasons are: (a) manner of service provision; (b) content of services; (c) age profile of users; (d) additional support needs of some users; and (e) staff and training. Having considered these reasons the respondent rejected the appellant's argument that provision of care is the primary purpose of the service.

(2) The fact that the service provided by the appellants may or may not comply with some or all of the National Care Standards is also incidental and does not mean that a registrable service is being provided. The standards are set by Scottish Government. The respondent states: "*Although the standards may create an expectation that learning and development is an integral part of children's care, education is not the primary purpose of a day care of children service*".

(3) The respondent took into account the National Care Standards; the principles set out at section 45 of the 2010 Act; the SSSC Code of Practice and the Scottish Regulators' Strategic Code of Practice. Under reference to inter alia paragraph 2 of the code and the commitment to the five principles of better regulation, the respondent did not consider that the code allows them to register and regulate that which is not registrable.

(4) Having regard to the five principles of better regulation the respondent did not consider that continued registration would be transparent, proportionate or demonstrated targeting of regulation where it is needed. It would be inconsistent with refusals given to others who provided tutoring services.

(5) The decision to cancel registration of the appellant's service provided at Blackhall was due to the appellants having ceased to provide day care of children.

It is clear from the decision letter that the respondent considered whether a registrable service is provided by the appellant. They came to their own view, having regard to the legislation, that the primary purpose is Maths and English tutoring and the service therefore falls outwith the definition of day care of children. The respondent considered the legislation and the regulatory regime under which it must operate and decided in terms of section 64(4) that the registration ought to be cancelled as the provider had ceased to

provide day care of children. The respondent considered whether it should continue the registration despite the primary purpose being tutoring and determined that it should not do so for the reasons given.

[28] The five 'undisclosed reasons' fall to be considered against that background and context. Plainly, the respondent did not rely on any of the five "reasons" which the appellant complains about to support the decision to cancel registration. In any event, the enumerated reasons were referred to by the respondent either in their decision letter, the letter of 6 March 2017 or in other correspondence with the appellant since the process of deregistration began in 2013. Reasons (a) and (b) which relate to the original registration in 2005 were touched upon in the letter of 6 March 2017 which also emphasised that the respondent requires to consider whether the services currently being provided by the appellant are eligible to be registered. Whatever the respondent may think or speculate about how registration came about with their predecessor in 2005 is quite irrelevant to an assessment in 2017, and cannot fetter that decision. The third reason or 'consistency' reason is referred to in all of the relevant letters, 6 March 2017, 31 May 2017 and the decision letter of 25 October 2017. The fourth reason, namely that maintaining registration would impose a burden on the respondent, is a matter of comment and derives from the statutory regulatory code which requires those registered to be inspected and reported upon. It is simple recognition of the obvious fact that every registration has a cost, and pointless or unjustified registrations are rightly to be discouraged. The fifth and final reason relates to the National Care Standards (in particular Standards 3, 6, 9 and 10). Whether or not the appellant met these care standards was not relied upon by the respondent in making the decision to cancel registration. It is plainly a riposte to the appellant's contention that compliance with care standards requires the service to be deemed a care service. In fact the appellant's operation

cannot comply with all the care standards especially those which are relevant to day care of children in a nursery, such as providing an outdoor play area. The argument that the appellant met the National Care Standards and therefore must be treated as providing care services is incorrect both in fact and law. These statements, described as "undisclosed reasons" by the appellant are truly not reasons at all but either comment or background. They had no direct relevance to the decision which involved an analysis of what services the appellant provided for children at Blackhall. The five statements form no part of the respondent's decision-making or reasoning. In our view, the five points are irrelevant in the context of the decision. The respondent required to follow the statutory requirement to consider whether service providers provide a registrable service. They did so. Accordingly, in our opinion, there is no breach of the statutory requirements placed upon the respondent in terms of sections 71 and 73 of the 2010 Act.

[29] The appellant's common law submission must also fail because the five statements were not the basis for the decision. It is evident from the letters of 6 March and 25 October 2017 that the respondent identified the core question and reasoned that the day care of children definition was not met at Blackhall where the appellant provided tutoring in Maths and English. Procedural fairness required the respondent to set out its reasoning or thinking on this matter which it did in the letter of 6 March 2017. There followed significant dialogue when full and detailed representations were made on behalf of the appellant which were considered but rejected by the respondent giving full reasons. The respondent required in its decision letter to set out "*the essence of the reasoning that has led him to his decision*" (*Ritchie* at para [12]). The respondent did so by answering the core issue – is the appellant providing a registrable service? It is for the respondent as the decision maker to determine what considerations are material in coming to its decision (*Ritchie supra)*. In our opinion the

appellant's argument on procedural unfairness is misconceived. This ground of appeal falls to be rejected.

Section 64(4) of the 2010 Act and Respondent's Discretion

[30] It was argued on behalf of the appellant that section 64(4) is limited in its scope to the situation where a person who is or has been providing a care service "ceases" to provide that service. Accordingly, the provision has no application in the circumstances of the present case where the respondent claims the appellant had never provided day care of children despite its registration with the Care Commission in 2005. If the appellant had never been a provider of care there could never be a cessation. As section 64(4) is the only statutory provision relied on by the respondent the decision is therefore unlawful and the appeal should be allowed.

[31] In any event, the relevant provision does not require the respondent to de-register care providers even if they cease to provide a registrable care service. The respondent and therefore the sheriff erred in failing to recognise that the regulator had a discretion to allow registration to continue. Nothing had changed with regard to the appellant's operation at Blackhall. There were, therefore, no new circumstances which would alter the regulator's approach to the primary purpose exception (which was similarly part of the definition of day care of children in 2005) when the appellant was registered.

[32] Further, the respondent failed to recognise that it would not be acting ultra vires, but had a discretion to maintain or continue the appellant's registration whether or not registrable care services were provided by it. The use of "may" in section 64(4) confers on the respondent a discretion which must be exercised reasonably having regard to all material factors and circumstances. The respondent was not required to cancel the

appellant's registration. Section 59 of the 2010 Act governs registrations. It does not prohibit persons who are not providing a registrable service from being registered by the regulator.

[33] Accordingly, the respondent and also the sheriff failed to distinguish a new application from cancelling an existing registration. The appellant had been registered for 12 years. The respondent had failed to consider the negative impact on the appellant's business; prejudice to the appellant and third parties, especially parents and children, who benefited from the service provided by Explore Learning; the lack of prejudice to the respondent in maintaining the registration and the absence of any material change in circumstances since the initial registration. The respondent had failed to take into account these material factors in exercising its discretion as to cancellation. It failed to have proper regard to the scheme of the 2010 Act which *inter alia* is concerned with care and protection of children. Maintaining or continuing registration meets that objective and reassures parents and others using the appellant's services. Reference was made to *Donaldson* v *Renfrewshire Council* [2011] CSIH 66.

[34] In reply counsel for the respondent pointed out that Part 5 of the 2010 Act and in particular section 44(1) circumscribes the respondent's duties and functions. The statutory regulatory regime limits the respondent to exercising certain functions under the Act and enforcing the regulatory scheme. Section 45 sets out the principles by which the respondent must exercise its functions; section 46 defines social services as both 'care services' and 'social work services'. Care Services include the 'day care of children'. Section 64 is an integral part of the statutory scheme by which the respondent must operate and regulate care services.

[35] The respondent submitted that the appellant's approach to section 64(4) would mean that it was virtually impossible to deregister or cancel the registration of an organisation which no longer provided care services. There is no other provision in the Act which would

allow cancellation of registration. This would lead to an absurd situation and was inconsistent with the regulatory scheme. If a mistake had been made and a service registered that was not a "care service" then the respondent would be unable to review and correct that mistake. The respondent would be obliged then to continue inspecting the service and preparing reports for no purpose. The sheriff adopted a correct construction. Section 64(4) may be construed to include 'review'. While "ceases" might normally imply that the service once existed, that missed the point that the respondent required in terms of the statutory scheme to make a determination in light of the relevant information as to whether the service was one that required to be regulated under the statutory scheme. If it was not a care service in 2017 it is immaterial whether the appellant ever provided such a service or not. The respondent can only make the assessment at the time they make the determination. This interpretation of the provision is consistent with the approach adopted by the UK Supreme Court in *Davies* v *Scottish Care Commission* [2013] UK SC 186. In *Davies* the court required to construe a badly drafted regulation and held that the Act and any subordinate legislation required to be construed in a manner that allowed the orderly transition of existing public services from one statutory body to another. The sheriff's approach was correct in construing the provision as being "*wide enough to allow the respondent to review registered services and cancel the registration of a service which does not meet the statutory tests*".

[36] The respondent as regulator required to enforce the scheme. Properly analysed the respondent was not exercising a discretionary function in cancelling the service, but required to refuse registration where a service did not qualify for registration. The sheriff was correct to focus on the definition of day care of children and whether the services provided by the appellant fell within that definition.

Decision on Discretion

[37] The first argument seeks to limit the scope and the effect of section 64(4) in two respects – firstly, that it only has application where there has been a material change to the services provided since initial registration and secondly, that section 64(4) can have no application in the specific circumstances of this case where the respondent's position is that the appellant had never provided day care of children despite its initial registration in 2005 with its predecessors. The sheriff rejected that argument and concluded that "*section 64(4) is wide enough to allow the respondent to review registered services and cancel the registration of a service which does not meet the statutory tests. The requirement for inspections and reports is a burden on both the appellant and the respondent where the service does not require to be registered. Nor is it proportionate, and it is accordingly not in accordance with best regulatory practice (section 54(3) of the 2011 Act)*."

[38] We consider that the sheriff was correct to take that approach. The respondent being a creature of statute (Part 5 of the 2010 Act) must act in accordance with the statutory scheme and principles. It must operate within the regulatory framework which includes registration and cancellation of registration. To accord section 64(4) such limited scope would defeat the proper exercise of the regulatory function of the respondent and is contrary to common sense. It would require non-care providers to be registered in perpetuity even if the original registration was permitted by another regulator or an error had been made at the point of registration. It would defeat the purpose of good regulatory practice. The respondent's duty is to regulate the quality of social services. It must exercise its functions in accordance with its statutory purpose (section 44(2)). The Scottish Ministers, in pursuance of their powers in terms of section 49, have promulgated the regulations which include the primary purpose exception (2012 Regulations). In doing so they have stipulated

the services which fall to be registered and regulated by the respondent, which must act in accordance with the statutory scheme. In our opinion the question the respondent required to answer was whether the service provided by the appellant required to be registered and then regulated under the statutory scheme. In discharging its function the respondent was obliged to apply the definition of care services and in particular "day care of children" as set out in section 47(1)(l); schedule 12 paragraph 13 as modified by the Scottish Ministers in the 2012 Regulations.

[39] The appellant's argument would mean that once a provider was registered then, as long as the service remained unaltered, that regulation would exist in perpetuity. We cannot accept that the intention of Parliament was to deny the regulator a proper and effective means of reviewing and, if appropriate, cancelling registration. Further, we accept that the use of the word "may" does not introduce a discretionary power but instead serves to introduce a pragmatic power to allow for remedial measures to be taken. It allows the regulator to refrain from requiring registration to be cancelled pending an improvement notice or other measure being complied with whilst avoiding the whole expense of deregistration and reapplication for registration. Section 64(4) is a new provision in the 2010 Act which is not present in the 2001 Act. It would be entirely in accordance with the regulatory scheme to provide a pragmatic solution which avoided mandatory deregistration where a service provider required to make short term improvements or modifications to the service (such as during times of staffing crises; pregnancy, etc). That interpretation is consistent with section 64(4) being an effective and pragmatic measure. Accordingly, the use of the word "may" does not confer upon the respondent a discretion to register a non-care provider. It appears to us that section 64(4) is apt to cover with the situation where, for

whatever reason, someone providing a care service no longer or ceases to provide the service.

[40] *Davies* v *Scottish Commission for the Regulation of Care* (*supra*) was concerned with the transfer of functions from the Care Commission to the Care Inspectorate and the identity of the proper respondent in appeals against notices issued to cancel registration in terms of section 17(3) of the 2001 Act (the equivalent to section 73 of the 2010 Act). The notices related to the appellants' operation of a children's nursery being a 'care service' within the meaning of both the 2001 and 2010 Act. The facts of that appeal are quite different from – indeed almost the converse of – this case where the nursery required to be registered to continue its business. It is a criminal offence under both the 2001 and 2010 Act to provide a care service whilst not registered (section 80 of the 2010 Act). In *Davies* the UKSC required to interpret the transitional orders and required to draft in words which, due to inadvertence, were missing from secondary legislation, to give effect to an orderly transfer of public services from one regulatory body to the new regulatory body. This involved the court construing both the primary and secondary legislation and correcting drafting errors. It is not necessary in this case to add words to section 64(4) to achieve the intention of Parliament. The provision which must be seen in its regulatory and statutory context allows the respondent to cancel registration where a care provider is no longer a care provider. No special meaning requires to be allocated to the expression "ceases". It means 'stop' or it comes to an end. The cancellation function lies solely with the respondent, which requires to assess whether a service provider is within or outwith the statutory scheme. In our opinion the provision requires to be interpreted in a manner conducive to the respondent's statutory function to regulate those who provide registrable care services. Unlike *Davies* the

appellant in this case can and does provide services, which are the same or similar to the Blackhall operation, unregistered in other locations.

[41] *Donaldson* is of no assistance to the appellant in circumstances where there the respondent is following statutory requirements and has given reasons why the test for day care of children has not been met. The respondent's decision to cancel the appellant's registration neither conflicts with the statutory definition nor previous decisions of the Care Inspectorate.

Cumulative reasoning

[42] The appellant submitted that properly construed the respondent had considered the appellant's five supporting reasons separately, and had erred in failing to consider them cumulatively, and that the sheriff had erred in finding otherwise. The appellant had made specific reference to five aspects of their service in support of the contention that they provide care of children, namely

(a) Manner of service provision

(b) Content of service

(c) Age profile of service users

(d) Additional support needs of some users and

(e) Staff training.

The respondent did consider each of these factors but in isolation and individually ("atomised"). This was an error and the decision arrived at was unlawful as the respondent ought to have considered the cumulative effect of all five issues (see *Gnanam* v *Secretary of State for the Home Department* [1999] Imm AR 436). There was no evaluation of the cumulo effect.

[43] The respondent's submission on this ground was short. The atomising point is not a good one. There is no need for the decision maker to explain that they had looked at points cumulatively. The decision maker simply had to address the question of whether the appellant provided a registrable service.

Decision on cumulative reasoning

[44] We have already rejected the proposition that the respondent was exercising a discretion when determining whether to cancel services. We agree with the sheriff's assessment that the respondent had a significant amount of material upon which to base its substantive decision. Not only did it have the representations on registration from the appellant but it also had sight of correspondence and records of meetings going back four years. The respondent had regard to the University of Reading Report, the appellant's own publicity material and its own Inspection Reports. Its decision can only be challenged if it were one which no reasonable decision maker could have reached. That proposition is not made out, nor is the submission that the respondent failed to consider the cumulative effect. There was no requirement to explain how the material was treated. The question was whether the available material was sufficient to justify the decision. We do not find the case of *Gnanam* to be of assistance. The tribunal in *Gnanam* required to make an assessment by weighing up factors, material or otherwise, and assessing their impact. The cumulative effect of the facts and circumstances were important in deciding whether the 'unduly harsh' standard had been met. By contrast the determination the respondent required to make had nothing to do with the cumulative effect or impact but rather whether on the material available the test for 'day care of children' had been met. This ground of appeal falls to be rejected.

Proportionality

[45] It was contended on behalf of the appellant that the sheriff also erred in law in holding that it was not proportionate and not in accordance with best regulatory practice to allow the appellant's service to continue to be registered. The sheriff had no evidence on which to make any findings as to proportionality or best regulatory practice. She wrongly proceeded on a bare submission made on behalf of the respondent that continuing registration would place a disproportionate burden on the respondent. There was no material to support this submission such as the cost of maintaining registration or how much time and staff resources would be required. These were all relevant to the question of proportionality. On the other hand, the appellant submits that maintaining its registration was proportionate due to the reassurance it provides to parents that their children will be cared for safely and to a high standard. It allowed eligible parents to use child care vouchers or the child care element of working tax credit to off-set the cost. Additionally, registration would provide reassurance to the appellant's employees that they were working in a suitable environment and to the appellant's investors that Explore Learning were appropriately regulated.

[46] The respondent adopted the sheriff's reasoning. There was no need for evidence of matters which are obvious from the statutory scheme.

Decision on proportionality

[47] The issue of proportionality has already been raised as one of the five undisclosed reasons. Both the letter of 6 March 2017 and the decision letter itself make clear that the

respondent did not consider that the Regulators' Code of Practice nor the issues raised on behalf of the appellant give them licence to continue to register and regulate that which is not registrable. That is an important consideration for a statutory body funded by public funds. In our view, no evidence is required to underpin the comment made by the sheriff on this point. It is obvious from a straightforward reading of the statute that every registration has a cost and therefore pointless or unjustified registrations are rightly to be discouraged. It is not open to the respondent to extend the regulatory scheme. That would be a matter for Parliament. As matters stand only those providing registrable services fall to be regulated. Registration calls for regulation which requires inspection and reporting. The suggestion made on behalf of the appellant that a statutory scheme permits the continued registration and regulation of noncare providers is conceptually difficult to accept. This ground of appeal falls to be rejected.

Unfairness

[48] This ground of appeal criticises the comment made by the sheriff that the respondent "*was entitled to treat the appellant in a similar manner to other services whose application for registration had been declined on the basis that their primary purpose was tutoring*". There was no evidence which would have entitled the sheriff to make this finding. The sheriff therefore erred in so doing. The sheriff's error arose from treating a submission made by counsel for the respondent as fact or as evidence of fact. This amounts to mere assertion of unfairness. The sheriff erred in holding the respondent was entitled to treat the appellant in a similar manner to the other applicants whose registration had been declined on the basis that their primary purpose was tutoring.

Decision on unfairness

[49] The respondent adverted to the issue of unfairness and consistency in its letter to the appellant of 6 March 2017 and in the decision letter. It appears that this was also discussed at a meeting between the parties. The respondent comments that to seek to maintain the registration of the appellant would run counter to the principle of consistency having recently declined to register other service providers whose primary purpose is the provision of tutoring. No exception appears to have been taken to that and no challenge made in the representations on registration. However, the comparison with other tutoring providers is merely comment. The respondent had to determine whether the appellant was providing day care of children. It decided that question and, in its opinion, the appellant therefore does not need to be registered. The treatment of applications for registration by other tutoring providers is given as one of the responses to the suggestion made by the appellant that the respondent should overlook the failure to satisfy the statutory test for registration and continue their registration nonetheless. In our opinion, this was an ancillary matter, did not constitute a finding by the sheriff, and is a distortion of what the sheriff was saying. It does not ground any appeal.

[50] We refuse the appeal and adhere to the sheriff's interlocutor of 9 October 2018. Expenses will follow success. Parties were agreed as to sanction for the employment of counsel for the appeal.