SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2018] SC DUN 52

B673/16

SUMMARY APPLICATION UNDER THE CIVIC GOVERNMENT (SCOTLAND) ACT 1982, SCHEDULE 1, PARAGRAPH 18

JUDGMENT OF SHERIFF GEORGE ALEXANDER WAY

in the cause

THORSTIEN ERIK THORESEN, residing at 15 Atholl Street, Dundee

Pursuer

against

DUNDEE CITY COUNCIL, having its offices at 21 City Square, Dundee

Defenders

Act: Adrian Stalker
Alt: Scott Blair

Dundee 31 August 2018

The Sheriff, having resumed consideration of the cause; refuses the application and finds the applicant and pursuer liable to the respondents and defenders in the expenses of the cause as taxed; sanctions the employment of Junior Counsel and remits an account, when lodged, to the Auditor of Court to tax and report in due course.

NOTE

Introduction

[1] I am grateful to each counsel for their helpful written submissions (copies of which were lodged in process, should be referred to as required, and are deemed incorporated here for the sake of brevity). The submissions were extensive and it should be understood that I have considered every point and reference to authority contained within them even if I do not specifically narrate that hereafter. It was agreed that the cause should be disposed of on the basis primarily of the written submissions and accordingly I did not require oral

testimony. There was no dispute as to the material facts. For ease, I refer to Mr Thoresen as "pursuer" and Dundee City Council as "defenders" throughout, following the submissions of counsel.

[2] This is an appeal by way of summary application under paragraph 18 of schedule 1 to the Civic Government (Scotland) Act 1982 ("the Act"). It concerns the defenders' refusal to alter the conditions of the pursuer's taxi licence. The pursuer is a taxi driver in Dundee. He currently drives a wheelchair accessible vehicle ("WAV") which features on the defenders' list of approved accessible vehicles. The pursuer has held a taxi licence issued by the defenders since 2004. Since November 2003 it has been a condition of the defenders' standard taxi licence (condition 32) that all new vehicles should be WAVs. The majority of licences granted prior to this date were saloon type vehicles. The defenders' policy, refined following a public consultation in 2012, aims for a mixed fleet comprising around 60% WAV and 40% saloon cars. This allows for WAVs to service the needs of certain disabled passengers, but recognises that some elderly and ambulant disabled passengers find saloons easier to access.

[3] By way of an email dated 27 May 2016, the pursuer applied for a variation of his taxi licence to allow his current WAV to be substituted by a saloon-type vehicle. The defenders have the power to vary licences under paragraph 10(1) of schedule 1 to the Act. Within his email the pursuer made specific reference to his age and the financial burden of continuing to run a WAV.

[4] The defenders considered this application at a meeting of its licensing committee on 1 September 2016. The pursuer was represented by his solicitor, Mr Muir, who argued in favour of the application. The pursuer was subsequently notified by letter of the defenders' decision to refuse this application and of his right of appeal under the Act. The pursuer

sought a statement of reasons under paragraph 17 of schedule 1 to the Act. A letter dated 12 September 2016 from the defenders' licensing solicitor, Mr Woodcock, provided the committee's reasons.

[5] The pursuer appeals to this court on the grounds that the defenders, in arriving at their decision of 1 September 2016:

a. erred in law; and

b. exercised their discretion in an unreasonable manner.

[6] The pursuer invites the court to:

a. uphold the appeal on the grounds set out above;

b. thereafter remit the case to the defenders for reconsideration of their decision, with the reasons for the Court's decision, under Schedule 1, paragraph 18(9)(a) of the Act; and

c. to find the defenders liable to the pursuer for the expenses of the application, and to sanction the employment of junior counsel by the pursuer for the purposes of the proceedings, under section 108 of the Courts Reform (Scotland) Act 2014.

[7] The defenders resist the appeal and invite the court to:

a. dismiss the pleas in law for the pursuer; and

b. uphold the pleas in law for the defenders.

[8] The defenders agree with the pursuer that:

a. expenses should follow success;

b. sanction for the employment of junior counsel be granted; and

c. in the event that the pursuer succeeds on any or all of the grounds advanced, that the matter should be remitted for reconsideration in terms of Schedule 1, paragraph 18(9)(a) of the Act.

Submissions

[9] As noted above, counsel for each party provided written submissions which were of considerable assistance. To aid the narrative I will summarise the position that each party advanced.

Pursuer

[10] Mr Stalker for the pursuer begins by summarising the procedural history of the application to vary the pursuer's taxi licence and the Council's subsequent refusal and issuance of a statement of reasons ("SoR"). These circumstances are not disputed, nor is the contention that the Council's SoR should be regarded as definitive in stating the defenders' reasons for refusing the application (*Azhar* v *Dundee City Council* [2017] SC DUN 32, at [28], citing *Midlothian District Council* v *Kinnear* 1993 GWD 3-1931; *Loosefoot Entertainment Ltd* v *City of Glasgow District Licensing Board* 1991 SLT 843, at 84).

[11] The Council's mixed fleet policy, aiming for a split of around 60% WAVs and 40% saloons, is then discussed, with a particular focus on the circumstances giving rise to the adoption of said policy. Reports to the Council's licensing committee dated 20 December 2011 and 23 October 2012 (along with a report of 31 March 2011 which was included as an appendix to the 20 December report: 6/1/4 and 6/1/6) were incorporated into the defenders' pleadings and are said to both describe the policy and the reasons for its adoption.

[12] It is submitted that the relevant passages, for the purposes of this appeal are:

a. report of 31 March 2011: paragraphs 1.1, 2.1, 7.7;

b. report of 20 December 2011: paragraphs 2.1, 2.3, 4.1 to 4.3, and 5.1 to 5.4 (read in light of the minute of the licensing committee's meeting on that date (defenders' production 6/1/5));

c. report of 23 October 2012: paragraphs 1.1, 2.1, 2.3, 4.1(ii), 6.2 (read along with the relevant minute (defenders' production 6/1/7)).

[13] Mr Stalker argued that the following points, as regards the policy, may be derived from these passages:

a. In operating a policy under which a mixed fleet of WAVs and saloon cars is maintained, one of the two principal issues for the licensing authority is the fairness of requiring WAV operators to place more expensive vehicles on service whilst other operators are allowed to have less expensive saloon cars. (The other principal issue was whether a percentage of WAVs of less than 100% is compatible with the Public Sector Equality Duty under section 149 of the Equality Act 2010); report 20 December 2011. (para 5.1)

b. Because of the importance of these two issues in the process of adopting a policy on the granting of taxi licences, the defenders sought an opinion from senior counsel on the options under consideration. (para 5.2)

c. It was the Council's understanding of the advice from senior counsel, that she considered that a mechanism should be introduced to address any perceived inequality caused by allowing some operators to place less expensive vehicles on service. (para.5.3)

d. Accordingly, the licensing committee considered that, "It will be necessary to devise a method for allocating licences to address any economic unfairness arising from the lower capital and running costs of saloon cars as opposed to WAVs."(para 5.4)

e. The committee sought a report to address the issue of, "how the licences for the vehicles in the mixed fleet were to be allocated fairly" (para 5.5)

f. Therefore, it was accepted by the defenders that, in order for a "mixed fleet" policy to operate fairly, it would have to incorporate a mechanism, to address the inequality caused by allowing some operators to place on service less expensive saloon cars, as opposed to more expensive WAVs.

g. It follows that the introduction of a mixed fleet policy, without such a mechanism (hereafter the "economic fairness mechanism"), would operate unfairly, as regards those licensees required to use WAVs, and who wished to use saloon cars because of the lower running costs, but were not permitted to do so.

[14] Mr Stalker submits that the documents produced by the defenders do not demonstrate that any economic fairness mechanism was (or has subsequently been)

adopted. It is noted that the defenders decided, at a meeting of 23 October 2012 (6/1/7 of Process):

a. to set a target of a taxi fleet comprised of 40% saloon cars and 60% WAVs as constituting a proper balance…;

b. to commission an unmet demand survey…;

c. that new taxi licences be issued to any applicants prepared to put WAVs on service…until such time as any numerical limit on taxis was imposed, whereupon proposals would be submitted to the committee as to how the respective percentages…could best be achieved.

[15] Point c., it is submitted, merely describes the means by which the defenders hoped to bring the percentage of WAVs up to 60%, not the mechanism for addressing inequality in the cost of running a WAV, as opposed to a saloon car.

[16] Moving on to the pursuer's application to vary his licence, Mr Stalker submits that, although brief, it contains enough information to enable the defenders to recognise that it engages one of the principal issues for them, in operating a mixed fleet: the fairness of requiring WAV operators to place more expensive vehicles on service whilst other operators are allowed to have less expensive saloon cars. The defender's SoR explains the background to the policy at paragraph three. However, there is no mention of any economic fairness issue.

[17] At paragraph 4, the letter then summarises the submission made by the pursuer's agent on his behalf at the licensing committee meeting on 1 September, which included contentions that:

a. the policy is fundamentally unfair;

b. there is an inequality in the costs of WAVs as opposed to saloon cars;

c. there is not a level playing field;

d. this unfairness is recognised in the report to the licensing committee in 2011;

e. there should be an exception to the current policy because of the unfair differences in prices already referred to; and

f. the pursuer cannot afford to put a WAV on the road.

[18] At paragraph 5, the defenders state their reasons for refusal. These begin:

> "Having considered the submission by Mr Muir on behalf of his client, the Committee decided unanimously that the application should be refused. There were two aspects to the argument put forward on behalf of Mr Thoresen. Firstly, it was being argued that the policy was unfair and should not continue to be applied. Mr Muir submitted that the Committee should either go for 100% WAV or 100% saloon and thereby effectively abandon the previous decision in 2012 to aim for a balanced fleet. The Committee was satisfied that its decision in 2012 fulfilled its duty as a public authority under the Equality Act 2010 to have regard to the interests of disabled service users and to make reasonable adjustments to its policies to accommodate this. The proposal in 2012 which was ultimately adopted was also based upon advice received at that time from Senior Counsel…Accordingly, the Committee was satisfied that its policy was lawful. Secondly, Mr Muir suggested that his client should be an exception to the policy because the policy itself was unfair, primarily having regard to the difference in prices between saloon cars and WAVs."

[19] Mr Stalker submits that there are several points that may be taken from this passage:

a. the committee recognised that the primary contention made on behalf of the pursuer was that the operation of the policy was unfair to WAV operators in the position of the pursuer;

b. in describing the adoption of the policy, and characterising it as "lawful", the committee makes no reference to the defenders' own recognition, in 2011, that an economic fairness mechanism would be required. That is notwithstanding the fact that the committee was referred to the 2011 report in which that requirement was described;

c. in referring to the advice of senior counsel, the committee did not recall that the defenders had, in 2011, understood senior counsel to advise that an economic fairness mechanism should be introduced, if the mixed fleet policy was adopted;

d. the committee did not question the pursuer's assertion that the operation of a WAV was more expensive, and that he could not afford to operate a vehicle of this type.

[20] That the committee did not question the pursuer's assertion that WAVs were more expensive and that the pursuer could not afford to operate a vehicle of this type, Mr Stalker

draws a contrast with the comments of the defenders' committee as reported in *Azhar* v *Dundee City Council* (see paragraph [7]), where the defenders sought to argue reasons why Mr Azhar could operate a WAV economically.

[21] In this case, the committee simply decided that it:

> "did not accept that the policy should be abandoned and it could see nothing in Mr Thoresen's individual circumstances to persuade it to set the policy aside in this case. When he applied for his licence in 2004, he was well aware of the condition which would be attached to the licence requiring a WAV to be placed on service. Mr Thoresen chose to proceed on this basis of his own free will. The Committee recognised that Mr Thoresen is 64 years old and took note of his argument that he could not afford to buy another vehicle. However, there is no suggestion in the submission on his behalf that he was being discriminated against as a result of his age. The complaint is that all saloon operators have an unfair advantage over all WAV operators, regardless of age. Nevertheless, the Committee was not persuaded that this outweighed the interests of the wider travelling public who made it clear in their responses to the Committee's consultation in 2011 that they preferred to have a balanced fleet."

[22] The pursuer submits that this amounts to a refusal, by the defenders, to recognise the unfairness that is identified in their own reports and decisions leading up to the adoption of the policy, as described above, or the need to have any mechanism to deal with that unfairness.

[23] Mr Stalker argues that this was made clear by the SoR's concluding passage:

> "Whilst it could no doubt be argued that granting this individual application in isolation would have no major effect on the maintenance of the balanced fleet, the Committee felt that Mr Thoresen's circumstances were not sufficiently exceptional to justify such a move. Indeed, to grant the application could lead to a number of other operators, who are no doubt in the same position as Mr Thoresen, making similar applications and thereby threatening to undermine the whole basis of the policy. In the circumstances, the Committee decided that the application should be refused."

[24] An economic fairness mechanism might be incorporated into the operation of the policy by the way in which the defenders treat applications for licences, or applications for variation by operators seeking to transfer from a WAV to a saloon car, on economic grounds. However, there is no indication, in the letter of 12 September 2016 that, having adopted the mixed fleet policy in 2012, the defenders are prepared, in the operation of that

policy, to deal with applications for variations so as address the economic unfairness to WAV operators in the position of the pursuer. There is no indication in that letter that the committee recognises that an issue of economic unfairness to operators such as the pursuer actually exists.

[25] For the reasons already stated, the pursuer submits there is no economic fairness mechanism in the operation of the policy. Therefore, it does not operate fairly. The committee understood that the pursuer's primary position as being a request that the defenders operate the mixed fleet policy fairly, by allowing an application in these circumstances, failing which, it ought to abandon the mixed fleet policy.

[26] It is submitted that, in operating the mixed fleet policy unfairly, and as a consequence refusing the pursuer's application for a variation, the defenders have exercised their discretion under paragraph 10(1) of schedule 1 of the Act unreasonably, in consequence of that unfairness. In *Piper* v *Kyle and Carrick District Council* (1988 SLT 267, at 269C) the court said:

> "The sheriff correctly stressed that the committee should examine each particular appeal on its merits and should follow any policy in a rational and fair way and should not act capriciously or in an arbitrary manner. We agree that the sheriff has correctly described the approach which the committee should follow in an application of this kind."

[27] In *Cashley* v *City of Dundee District Council* (1993 SC 543) the Court said:

> "In deciding to have regard to spent convictions [the council] were deliberately adopting a policy; and we have no doubt that justice required that that policy be applied fairly and evenly in all cases where the applicants had spent convictions.
>
> We do not wish it to be thought that the court requires an inflexible uniformity of approach in relation to such a matter. But where the difference in approach from one case to another suggests, as it does here, that the policy has been applied in an arbitrary fashion, and where the statement of reasons gives no satisfactory explanation for the different application of the policy in the only case where it appears to have been applied severely, namely that of the applicant, it appears to us

> that the licensing authority must be held to have exercised their discretion in an unreasonable manner.
>
> …In essence, our view is that when the licensing authority came to consider the application by the appellant and decided to apply to it the same general policy on previous convictions as they were applying to all applications by persons with such convictions, it was their duty to apply that policy fairly and even-handedly. In our opinion, it is not clear that that happened in this case. On the contrary, it appears not to have happened. Accordingly, the authority, in considering the appellant's application, appear to have failed to apply to that consideration the same policy that they applied to other cases to which the policy also fell to be applied. Thus, the consideration of the appellant's case was flawed by that failure. In these circumstances, the authority have not exercised their discretion in a reasonable manner."

[28] For the reasons already stated, Mr Stalker contends that the defenders have not operated their policy fairly, and accordingly they have, as in *Cashley*, "not exercised their discretion in a reasonable manner". Accordingly, the appeal should be allowed and the case remitted to the defenders for reconsideration.

Defenders

[29] For the defenders, Mr Blair's reply falls into three broad areas:

a. jurisdiction;

b. competency; and

c. attack on the SofR – error of law and reasonableness.

Jurisdiction

[30] The defenders contend that the substance of the pursuer's complaint made on appeal is that the policy is unfair because of the lack of an allocation mechanism as between WAV and non-WAV licences. Putting aside the issue that the actual argument advanced to the defenders' committee was that a mixed fleet was in itself unfair (which is a different point and is caught in any event by the argument under paragraph 18(2)), the issue raised by the

pursuer is not a matter which this Court has jurisdiction to deal with. This is a court of appeal where the appeal is limited to the four grounds, only two of which are relied on, error of law and unreasonable exercise of discretion.

[31] This not an appeal at large but what the pursuer seeks to do is to argue that the policy is unfair because it does not have within it a means to allocate licences as between WAV and non-WAV applicants or as is the case here an existing WAV licence holder who wishes to vary his licence.

[32] Mr Blair notes that in arriving at its WAV policy the defenders took the advice of senior counsel and paid due regard to their duties under equalities legislation. He argues that in formulating the balance to be struck in deciding whether there ought to be a WAV policy and if so whether it is 100% or, as here, some lesser proportion of the fleet, equality law requires the defenders to do that at the point at which the policy is determined.

[33] That is when the court can assess whether they have had due regard to the statutory goals and so whether going forward the policy is lawful and reasonable under the DDA and subsequently the 2010 Act. It also plainly follows, in the defenders' submission, that the interests of the disabled community are the major consideration here. The case of the pursuer seeks to dilute the policy that was arrived at. Either the policy is bad (wholesale) or bad in parts because it does not, in his submission, have built into it a means by which an existing operator of a WAV can move over to having a non-WAV vehicle. Either way the interests of disabled people are engaged either because the wholesale abandonment of the policy will lead to that result or the development of a mechanism of allocation would in itself have the clear potential to impact on the 60/40 allocation. Any challenge to the established policy cannot but have an effect on the interests of the disabled community

when balanced against the interests of the wider non-disabled community and the trade (both "pro" and "anti" policy elements). That is why the challenge that is made ought to be by way of petition for judicial review.

[34] It is not desirable for the Sheriff Court to enter into wider issues of policy. As is often the case a policy will be long established and will have been consulted on before it was arrived at. This is exactly the position here. It is likely that many operators will have made business decisions based on it. It is known that many members of the public support the policy. It is evident that the policy was arrived at after widespread public consultation which included members of the trade but plainly also given the nature of the exercise the wider community, including the disabled community. It would be wholly inappropriate for that work to be undone via this Sheriff Court appeal. Those who expressed their views during consultation by definition are not (and are not capable of being) parties to this appeal. These concerns were reflected by Mr Justice Scott Baker (as he then was) in *R (Chorion)* v *Westminster City Council* [2002] EWHC 1104 (Admin); [2002] LLR 538 (31). There he said:

> "(20) The present case is not a challenge to the claimant's policy, which has indeed already been the successful subject of judicial review application. The Queen on the Application of Chorion plc v Westminster City Council [2001] EWHC Admin 754, [2002] LLR 27. When a policy is formulated there are certain procedures that require to be followed, including consultation with interested parties. This case is not about the lawfulness of the claimant's policy but about its application.
>
> "(21) How should a Crown Court (or a magistrates' court) approach an appeal where the council has a policy? In my judgment it must accept the policy and apply it as if it was standing in the shoes of the council considering the application. Neither the magistrates' court nor the Crown Court is the right place to challenge the policy. The remedy, if it is alleged that a policy has been unlawfully established, is an application to the Administrative Court for judicial review. In formulating a policy the council will no doubt first consult the various interested parties and then take into account all the various relevant considerations."

[35] Of material importance to this is that this is not simply a licensing policy. It is derived from duties imposed by the Disability Discrimination Act 1995 as amended by the 2005 Act of the same name and as carried forward by the (mostly) consolidating Equality Act 2010. It is clearly founded on equality law considerations. One can see that the policy was arrived at so as to seek to meet the public sector equality duty under section 149 of the 2010 Act when the defenders are making decisions on licensing applications. Their policy is an expression of how that balance is to be struck and they are entitled to seek to maintain the 60/40 split. That was an exercise which required them to have due regard to the defined interests of the disabled community at the time when the policy was arrived at. It is an equality law driven policy and as such turns on equality law considerations. It is a fixed factor in the range of considerations which the defenders are to apply when determining a specific application. They are entitled to apply it.

[36] In seeking to meet that duty the policy is designed to balance the interests of the disabled community whether they need a WAV or as was found during consultation disabled persons who do not need a WAV or have a positive reason not to wish to use one given their specific disability with that of the non-disabled community and of course those who wish to operate a taxi licence.

[37] However this is a licensing appeal and the court does not have jurisdiction to determine whether in exercising a function which is driven by the duty imposed by the 2010 Act, the defenders have acted unlawfully or unreasonably. This is essentially a question of whether the balance struck in terms of policy aimed at promoting the public sector equality duty was lawful and reasonable. That policy is logically anterior to any individual application which might involve consideration of that established policy. The issue of

reasonableness is clearly engaged with having regard to the interests of all concerned as with the disabled community it is not enough to just have "regard", that regard must be "due" and it is noted what that means. Regard at the time policy is formulated; conscious and rigorous regard; open minded regard; at the forefront of policy development and not a "rear-guard action". To seek to argue now that the policy arrived at after that process is unreasonable is a matter which can only be done via a petition for judicial review.

[38] Judicial review is about ensuring that the decision maker stays within the bounds of the jurisdiction delegated to them. See *West* v *Secretary of State for Scotland* 1992 SC 385 (32).

[39] The jurisdiction here is the determination of whether there ought to be a limit on numbers in terms of section 10(3) of the 1982 Act and this plainly must logically engage the issue of how the 60/40 split can be maintained given such a limitation. It is clear that the defenders are, if they are satisfied that there is no significant unmet need in their area for taxis, entitled to have such a policy and so in exercising their licensing function to have such a policy are duty bound to have due regard to the defined interests of the disabled community.

[40] The complaint now maintained is what the defenders got wrong was having a mixed fleet policy which did not have within it a mechanism to allocate or re-allocate licences as between WAV and non–WAV operators. Such a mechanism is plainly capable of going to the aims of the policy and the issue of what weight was given to the duty of having due regard to the relevant interests of the disabled in the formulation of that policy. Such a mechanism could plainly have disability impact considerations. If the suggested mechanism is weak in design it could readily dilute the appropriate provision of WAV vehicles. Further it may be formulated in a range of ways which could impact on how the duty of having due

regard was met. How are the interests of the disabled and the trade who would wish such a mechanism to be fairly balanced in terms of such a mechanism? What factors might be relevant?

[41] The attack is very much about process and what considerations the defenders ought to have had regard to developing their policy. The present policy is a policy driven by (external to licensing) equality law considerations. Indeed these are core to it. These considerations must by law be built into the policy when it has been formulated. The time for attack is the point of formulation. The pursuer could plainly have raised the matters he now wishes to do when he made his application for variation and could have challenged any decision of the defenders either not to abandon their policy, or to implement suggested allocation criteria and judicially review any decision that was arrived at (or not).

Competency

[42] Mr Blair argued that one can only argue on appeal a case which has been made before the licensing authority. The pursuer has not availed himself of the procedures made available to him for stating his case. He was not entitled to an oral hearing but he got it. That was his opportunity to present his case. This is founded on paragraph 18(2) of Schedule 1 of the 1982 Act.

[43] Indeed this fits with the policy of paragraph 18 as a whole which stresses that the appeal is focussed on any SoR (provided or ordered by the Sheriff on appeal); is on limited grounds and is subject to time limits as to the lodging of an appeal. It is not an appeal at large. It is an appeal on limited grounds from an expert first instance licensing authority which ought to be the natural forum for the determination of licensing applications.

[44] Appeal to this Court is not an opportunity to present arguments never advanced to the licensing authority in coming to a decision and giving reasons for that decision and not some decision that it might have reached on arguments never made.

[45] The case that is now presented on the merits of the position of the pursuer is wholly different from the case presented to the defenders. He is advancing an argument on the merits of his application when this appeal is only concerned with an appellate review of what the defenders decided based on the material that was provided and the submissions made. Reasons can only be inadequate when measured against the actual circumstances which generated those reasons.

[46] The complaint has evolved via the Minute of Amendment into an argument that the policy ought to contain a mechanism for allocation of WAV and non-WAV vehicles. This was not the argument presented before the defenders. It is clear from the SoR that the submission was that one either had to have 100% WAV or 100% saloon to have fairness having regard to alleged price differentials.

[47] The application made by the pursuer simply asserted he could not afford a new WAV. This changed and then evolved into the 100% either way argument at the hearing before the defenders. It has now changed again. The argument was that the only fair policy standing the absence of such a mechanism was that the policy had to be 100% WAV. Quite how that would assist the pursuer who maintains he cannot put in service another (new) WAV is not, in any event, made clear by that argument.

Statement of Reasons and Reasonableness

[48] In approaching a SoR, the practical onus is on the pursuer, when faced with *prima*

facie significant material, to deal with it in an adequate way. In terms of incorrect material fact, as per Sheriff Gordon QC in *Loosefoot Entertainments Ltd*, "…once again the question is basically whether the board had grounds for coming to its decision." It cannot be maintained that this view is plainly wrong here; no case of incorrect material fact has been pled.

[49] First, as the policy is lawful the defenders were entitled to apply it. The policy is the background to the decision that was reached and the informed reader and the court, knowing that, can see why the decision was reached. The policy is plainly lawful and attack made on it is about poorly evidenced price comparisons.

[50] Second, they do not need to justify the policy as it plainly is lawful and a lawful policy is in itself a valid reason for refusal as it contains the essence of reasoning per *Calderwood* (2004 SC 691). It encapsulates the essence of why the pursuer's application was refused.

[51] Third, it is evident that they did listen to a case for an exception to policy and did consider the application for variation on the merits. The merits were self-evidently poor. They did not agree the policy was unfair and that it should no longer be applied. It is plain that they considered any case for an exception. The SoR contains a self-direction to that effect.

[52] Fourth, the reasons are adequate having regard to what was in issue. The defenders do rehearse the background to the policy, namely that there is a public desire for a mixed fleet and that the split is 60/40. This all flows from rational policy decisions that were taken earlier in terms of background to this application.

[53] The attack on the policy is misconceived. The pursuer maintains that the absence of

an allocation test as between WAV and non-WAV is (i) unfair and that (ii) the defenders themselves had already identified this as an issue and had so failed to take into account a relevant consideration thereby rendering their decision unreasonable.

[54] This simply misunderstands the nature of the policy. The 2011 Reports are part of the evolution of the policy that was arrived at on 23 October 2012. Any split as between WAV and non-WAV may have financial implications depending on which side of the split the operator falls. It is not inherently unfair to have such a split and it is not inherently unfair to operators that some cars may (depending on a range of considerations be more or less expensive to run than others). This is all the more so in relation to operators who like the pursuer came into the market knowing that the defenders were not likely to grant licences to saloon type cars. He had a clear opportunity to assess then make a business decision against the background of that policy.

[55] When it was refined on 23 October 2012, he was already in the 60% and indeed traded until May 2016 when he made his variation application. The 2011 Reports are neither to be understood as supporting the contention of the pursuer in themselves or when seen as part of the wider policy development process.

[56] Fifth, it is plainly the case that change in one is not per se going to have a major effect on maintenance of a balanced fleet but policy is not just a guideline. It is more than that and it was for the defenders to decide what weight to place on policy and what weight to place on other considerations.

[57] As advanced, the submission of the pursuer was that the policy had to be 100% either way to be fair. Licensing policy can be applied like a rule provided someone comes along with something that is a proper basis for an exception which does not undermine the

rationale for the policy. Plainly, the mind of the defenders was "ajar" and not closed.

[58] It is plain by "exceptional circumstances" what the defenders mean. They refer back to the submission made by the pursuer's solicitor, Mr Muir. Per *Calderwood* they do not need to rehearse the submissions again in explaining why these did not amount to "sufficiently exceptional circumstances." They just do not see why his circumstances are exceptional. Given the paucity of material and the approach taken by the pursuer, the defenders did not need to say more. They were invited to abandon a lawful policy which they did not do. The pursuer's application if granted would impact on the policy objective. It is not in truth an exception at all. It would remove a WAV from the fleet. Per *Hughes* v *Hamilton DC* (1991 SC 152) a trivial impact on the amenity was still enough to justify a finding of not fit and proper. Here the reduction of the WAV fleet by one vehicle may be slight but this is about a matter of judgement and the weight to be afforded to the policy aims and where the pursuer can still trade.

[59] There was no material before the defenders to show that the vehicle was not safe or that replacement was imminently needed before he reached 67 years of age. The matter of weight is for the defenders and their approach was not evidently perverse against the basis of the background here.

[60] Sixth, the complaint of the pursuer is artificial. He does not aver what factors the defenders ought to have had regard to in terms of what fair allocation would be. It is difficult to see how he could in any event as the pursuer did not make that argument to the defenders. It is clear that issue was not about allocation but lawfulness and reasonableness of a mixed fleet policy. On that view the issue of there being unfairness in the approach of the defenders is wholly artificial.

[61] Further what factors would the pursuer advance? He has no averments to say what test should be applied to allocation, just that there "should have been a test and that the absence of a test means that the decision was unreasoned and so unreasonable".

[62] How can the court come to a reasoned view that the approach of the defenders was, as averred, arbitrary and irrational when the pursuer does not seek to aver what factors the defenders ought to have had regard to beyond saying there needs to be an unspecified allocation test. This is a circular argument.

[63] Seventh, and perhaps linked to point eight, it was perfectly proper for the defenders to take into account that the pursuer already operated a WAV vehicle. What the defenders plainly did was to have regard to that fact in considering that a move to a saloon vehicle would have the potential to impact on the mixed fleet and so make an inroad into the 60/40 policy. It was hardly irrelevant and the weight to be given to his already operating a WAV was plainly a factor for the defenders to weight, something they did.

[64] Eighth, per *Greene King plc* v *Dundee City Licensing Board*, 24 February 2011 (Sheriff Principal Dunlop QC at para 16), reasons which seek to maintain the policy itself are lawful and adequate. In that case, to have made an exception to their policy on hours to permit the 10am opening of pubs would have had the potential to undermine broader policy objectives (there health, here disability).

[65] Like here, if persons came to the defenders and argued that their, somewhat generally asserted, financial position was enough to form a basis for an exception one can see why the policy, which has proper and laudable public aims, could well begin to lose traction. It is not the case that the defenders are saying here that no case ever brought on the same grounds would succeed. They are simply making the point that to allow an exception

could lead to applications which could threaten to undermine the whole policy.

[66] As the maintenance of the policy is a proper position to take up it does not follow that this shows the error in approach. The absence of a test as averred by the pursuer does not detract from this notion that the policy would be undermined as there was no need for same given the background already narrated.

[67] It is legitimate to consider the effect of making an exception to policy where there is no proper basis for doing so in case it encourages more applications which could undermine policy. This is implicit in the idea of a policy being more than just a guideline and being a rule which can be applied with relative strictness.

[68] Mr Blair concluded by urging that the appeal should be refused but, if the Court was against him, then the proper course was to remit the decision back to the defenders' committee. There was no dispute between counsel that this would be the correct approach in such circumstances and so no more needs said.

Decision

[69] The grounds on which an appeal in terms of paragraph 18 of Schedule 1 of the Act may be brought are set out in sub-paragraph 7. To succeed, the pursuer must demonstrate that, in coming to the decision in question, the defenders:

a. erred in law;

b. based their decision on any incorrect material fact;

c. acted contrary to natural justice; or

d. exercised their discretion in an unreasonable manner.

[70] The pursuer does not rely upon either b or c but contends that the defenders erred in

law and exercised their discretion in an unreasonable manner. Mr Stalker offers the court the following proposition. If the Council's mixed fleet policy is to operate fairly, then it must have an economic fairness mechanism. It is not the case that it has an economic fairness mechanism. Therefore, it is not the case that the Council's mixed fleet policy operates fairly. This is a logically valid argument. Following from this, Mr Stalker argues that if the Council's mixed fleet policy does not operate fairly, then, by applying this unfair policy, the Council has failed to exercise their discretion in a reasonable manner. Thus, it is argued that limb (d) of the test is made out and the appeal should be allowed.

[71] First, I note that, in relation to limb (a), the specification of the precise error of law that is alleged is somewhat lacking. Moreover, I accept Mr Blair's submissions to the effect that the nature of these appeals is neither a rehearing at large, nor an opportunity to impugn the defenders' policies *per se*. An attack on the adoption of a particular policy is, in my view, more appropriate to be raised by way of petition for judicial review. These proceedings are designed to provide a check on the decision making process followed by the defenders' licensing committees. Mr Stalker's submissions, on this point, are properly directed at the Council's failings with regard to the policy not, in my opinion, to the operation of it by the relevant committee. I prefer the submissions of Mr Blair and, therefore, I am content to find that the defenders did not err in law during their consideration of the pursuer's application to vary his licence.

[72] An error of law may be a sufficient condition to result in unreasonableness, but it is not a necessary one. Given that I must, therefore, turn my attention to the narrower point of whether the defenders exercised their discretion in an unreasonable manner. The bar that the pursuer must overcome is a high one. As it was put in *Latif* v *Motherwell DLB* 1991 SLT

414, it will be made out only if the decision was one that, *"no reasonable board, having taken into account all the relevant circumstances, could have adopted"*. It is not enough that this Court might disagree with the conclusion reached by the committee on a particular application.

[73] I, again, prefer the submissions of the defenders on this point. This is not to say that I would have necessarily come to the same conclusion on these facts but that is not the issue here. Whether the variation of one licence has a statistically meaningful impact upon an arithmetical balance that must be, to some degree always in flux, is not for me to say. It seems to me to be reasonable for a committee to also be concerned about, or at least consider in their deliberations, the potential as well as perceived impact on the WAV policy; often called the "floodgates" principle. The nature and extent of the pursuer's perceived change in circumstances, his emerging financial position and years of prior service are clearly relevant circumstances for the committee to reflect upon. The committee had before it these facts that underlay the pursuer's application. They knew that he had already given years of service to the community driving his WAV vehicle. They knew his emerging financial position and his present age. They knew they could make an exception to the policy, if they considered the circumstances warranted such a decision.

[74] It seems to me that that they had all the relevant facts and circumstances before them. There is nothing to suggest that they did not reflect upon them, apply their minds to the circumstances and the arguments for and against, before they came to a conclusion. This is in contrast to the position in *Azhar* v *Dundee City Council* (cited above) where I held that the committee had simply not applied their minds to the relevant issues. The committee, in this case, have set out their reasons for reaching the conclusion that they did, in a straightforward manner. They had regard to the Council policy, the pursuer's personal

circumstances, weighed up the arguments and resolved to refuse the variation. I can find no evidence that persuades me that the committee did not act in a rational and fair way towards the applicant. The decision was not capricious or arbitrary. I simply cannot hold that the high bar has been crossed, so as to find that no reasonable committee could have reached the decision that the defenders did in this case. The appeal, accordingly fails on both grounds.

[75] Counsel were agreed on how I should dispose of expenses. The interlocutor I have pronounced reflects this and there is no need for a further hearing.