

**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH**

**[2019] SC EDIN 54**

Case No: B707-18

JUDGMENT OF SHERIFF FIONA LENNOX REITH, QC

in Summary Application

under

The Civic Government (Scotland) Act 1982, schedule 1, paragraph 18

by

MAGEED ABDALLA

Pursuer

against

THE CITY OF EDINBURGH COUNCIL

Defenders

**Pursuer: Mrs Mundy; Johnson Legal, Edinburgh  
Defenders: Ms McLaren, City of Edinburgh Council**

**Edinburgh 17 June 2019**

The sheriff, having resumed consideration of the cause, sustains the pleas-in-law for the defenders, repels the plea-in-law for the pursuer and refuses the appeal; finds the pursuer liable to the defenders in the expenses of the appeal; allows an account of expenses to be given in and remits the account, when lodged, to the Auditor of Court to tax and to report.

**Introduction**

[1] The pursuer applied for a second-hand dealer's licence in terms of section 24 of the Civic Government (Scotland) Act 1982 ("the 1982 Act") on 3 July 2017. The

defenders' licensing sub-committee ("the committee") met to consider the pursuer's application on 1 May 2018. At this meeting the committee refused the pursuer's application in terms of paragraph 5(3)(c)(i) and (d) of Schedule 1 to the 1982 Act on the grounds that the premises were not suitable for the licensable activity and that there was other good reason for refusing the application. It is in relation to that decision that the pursuer lodged an appeal by way of summary application under paragraph 18 of Schedule 1 to the 1982 Act inviting the court to reverse the committee's decision. The reasons were given in the statement of reasons, which is referred to for its terms. This is both number 5/1/1 of process and number 6/1 of process.

[2] In terms of paragraph 18(7) of the 1982 Act, the court may uphold an appeal only if it considers that the licensing authority, in arriving at their decision, (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. The grounds for the appeal in this case are grounds (b), (c) and (d).

[3] In summary, the first ground of appeal (in article 10 of condescendence) is to the effect that the committee based their decision on an incorrect material fact. This is averred to be that the pursuer's home was not suitable for the licensable activity. A further "error of fact" is said to be that, of photographs referred to by the committee, the pursuer had been responsible for only three of the vehicles shown. [It was also averred that the statement of reasons discloses that the committee was in some doubt as to whether the pursuer had permission from Housing Services to operate a business from his home. However, this argument was not insisted on in submissions on behalf of the pursuer. In any event, it was not a fact which was determined to be incorrect or material by the committee, and the issue of whether or not the pursuer had this

permission was not given as a reason for refusing the licence. I have, therefore, not addressed this issue further.] The committee were also said to have based their decision on what were said to be these incorrect material facts in concluding that there was other good reason for refusing the application. The second ground of appeal (in article 11 of condescence) is that the committee acted contrary to natural justice in that they are said to have incorrectly taken account of a late objection. The pursuer had also been questioned about photographs which it is averred had not been provided to the pursuer in advance and which had been “ruled inadmissible” by the committee. The third ground of appeal (in article 12 of condescence) is that, in reaching their decision, the committee exercised their discretion in an unreasonable manner, but no specification was given in relation to this.

[4] This case called before me on 26 February 2019. At the outset the defenders raised a preliminary issue in relation to the question of evidence being led at the hearing by the pursuer. The defenders’ primary position was that no evidence should be led and that the matter should be resolved on the basis of submissions alone. However, the defenders’ alternative submission was that, if a hearing of evidence was to be permitted, it should be limited to disputes regarding what evidence was before the committee on 1 May 2018. Particular reference was made to *Habib v Central Fife Area Sub-committee* 2008 SLT (Sh Ct) 57.

[5] Having considered the parties’ submissions and the documentation in the case against the background of paragraph 18(7) of Schedule 1 to the 1982 Act, which provides that, in considering an appeal under paragraph 18, the sheriff may hear evidence, I came to the view in the exercise of my discretion that it would be appropriate for the court to hear evidence, but limited to disputes about what evidence

is said to have been before the committee on 1 May 2018. I was not persuaded that it would be appropriate for the court to hear evidence beyond that. On that basis, I was satisfied that evidence should be limited to the following five areas of dispute:

1. Whether or not the pursuer was provided with notice of the late objection from Drumbrae Community Council in advance of the committee meeting;
2. Whether or not the pursuer objected to the late objection from Drumbrae Community Council being taken into consideration;
3. The level of detail the pursuer provided to the committee regarding how his business would operate;
4. The level of detail the pursuer provided to the committee of the discussion between the pursuer and the representatives of Police Scotland;
5. The level of detail the pursuer provided to the committee regarding ownership of cars surrounding his tenancy.

[6] The parties entered into a joint minute of admissions, number 16 of process, which is referred to for its terms. The evidential hearing took place on 26 February and 29 and 30 April 2019. Evidence was led from the pursuer himself. The defenders led in evidence Andrew Mitchell, Regulatory Services Manager, and Caitlin Allan, solicitor at City of Edinburgh Council.

### **Statutory provisions**

[7] Section 24(1) of the 1982 Act provides that a licence, known as a “second-hand dealer's licence”, is required for carrying on business as a second-hand dealer.

[8] Schedule 1 to the 1982 Act reads:

“3.—

(1) Any objection or representation relating to an application for the grant or renewal of a licence shall, subject to sub-paragraph (2) below, be entertained by the licensing authority if, but only if, the objection or representation —

- (a) is in writing;
- (b) specifies the grounds of the objection or, as the case may be, the nature of the representation;
- (c) specifies the name and address of the person making it;
- (d) is signed by him or on his behalf;
- (e) was made to them within [28] days of whichever is the later or, as the case may be, latest of the following dates —
  - (i) where public notice of the application was given under paragraph 2(7) above, the date when it was first so given;
  - (ii) where the application relates to a licence for an activity which is wholly or mainly to be carried out in premises and the authority have specified a date under paragraph 2(6) above, that date;
  - (iii) in any other case, the date when the application was made to them.

(2) Notwithstanding sub-paragraph (1)(e) above, it shall be competent for a licensing authority to entertain an objection or representation received by them before they take a final decision upon the application to which it relates if they are satisfied that there is sufficient reason why it was not made in the time required under that sub-paragraph.

4.-

(1) In considering an application for the grant or renewal of a licence, a licensing authority may make such reasonable inquiries as they think fit and include the results of these inquiries in matters they take into account, but where they intend so to include any of these results they shall notify the applicant of that intention...

5.—

(1) Where an application for the grant or renewal of a licence has been made to a licensing authority they shall, in accordance with this paragraph —

- (a) grant or renew the licence...
- (c) refuse to grant or renew the licence...

(3) A licensing authority shall refuse an application to grant or renew a licence if, in their opinion —

- (a) the applicant or, where the applicant is not a natural person, any director of it or partner in it or any other person responsible for its management, is...
  - (ii) not a fit and proper person to be the holder of the licence;...

(c) where the licence applied for relates to an activity consisting of or including the use of premises... those premises are not...suitable or convenient for the conduct of the activity having regard to—

(i) the location, character or condition of the premises or the character or condition of the vehicle...;

(ii) the nature and extent of the proposed activity;...

or

(d) there is other good reason for refusing the application; and otherwise shall grant the application...

“18.—

(1) Subject to sub-paragraph (2) below, a person who may, under this Schedule, require a licensing authority to give him reasons for their decision may appeal to the sheriff against that decision...

(7) The sheriff may uphold an appeal under this paragraph only if he considers that the licensing authority, in arriving at their decision —

(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.

(8) In considering an appeal under this paragraph, the sheriff may hear evidence by or on behalf of any party to the appeal...

(9) On upholding an appeal under this paragraph, the sheriff may —

(a) remit the case with the reasons for his decision to the licensing authority for reconsideration of their decision; or

(b) reverse or modify the decision of the authority...”

## **Summary of evidence**

### *Pursuer*

[9] In evidence-in-chief the pursuer confirmed that he had previously seen the letter dated 13 November 2017 from Police Scotland to the defenders, number 6/5 of process. This had been written after he had applied for a second-hand dealer’s licence. The police had interviewed him. At the committee meeting, under reference to the

letter from the police, he told the committee that there might be cars in the drive, but that it was not something he would normally do.

[10] In relation to the defenders' statement of reasons at paragraph 3, the pursuer initially told the court that he didn't remember exactly if he had been asked by the committee if they should take account of the objection from the community council. He later told the court that he had told the committee that, when he had received the email about the late objection from Mr Wright on behalf of the community council, he had said that it was "out of the deadline". The committee had said that they would decide. He waited for the committee to tell him whether they accepted it or not. When the committee accepted it, he just talked about it. Because they had accepted it he could not do anything about it. Mr Wright was comparing the pursuer's work with other businesses on the other side of Drumbrae Park. The pursuer told the committee that he was not a mechanic and that he was not going to repair cars outside his house. He would not be making any traffic because his business will be online.

[11] He had objected to a letter, number 6/14 of process, from Mr Gaffney to the defenders, which had enclosed photographs. He confirmed that this had been sent to him before the committee meeting. He told the committee that these photographs were under police investigation. Mr Gaffney had come onto his property and taken the photographs. In relation to his business, he told the committee that he was doing his job online "like Gumtree". The committee had "interrogated" him about the photographs which are part of 6/14 of process. The pursuer had been surprised about this because, two or three minutes earlier, when Mr Wright had tried to refer to them, the committee had said to Mr Wright that he was not to do so as the pursuer had not seen them. The pursuer told the committee that the photos were not representing what

was happening there. He then confirmed to the court that – contrary to an averment in article 11 of condescendence that they had not been provided to him prior to the committee meeting – he had in fact seen the photographs about five days before the committee meeting, but that this had not concerned him because, so far as he knew, they were out of time. He confirmed that he had told the committee that they should “look down” or “look to the bottom of” the photographs because they were all illegal and that, if they were to look at one of the photographs, then why not all of them. He had wanted them to realise that the photographs were illegal.

[12] In relation to the photographs showing “vehicle 1” and “vehicle 2”, the pursuer had told the committee that these two cars belonged to a friend. Both were parked in his driveway. The photograph of “vehicle 3” shows his own car. In relation to “vehicle 4”, he told the committee that this was his ex-wife’s car. He told the committee that photographs showing “vehicle 5” and “vehicle 6” were not his cars. He did not tell the committee that they belonged to a friend. He confirmed that the last three photographs in this production were also looked at by the committee. These photographs were taken at a different time. These were taken in front of his house. In relation to the photograph showing a bonnet up (referred to at paragraph 10 of the statement of reasons), he told the committee that he had not been repairing the car; he had just been opening the bonnet. He denied telling the committee that he thought it belonged to tenants. He also told the committee that the three photos showed the same car and that the car had been abandoned there. He had tried to move it. It had not started. He had towed it away.

[13] The pursuer confirmed that, after Mr Wright had spoken to the committee on behalf of the community council, he, the pursuer, had been asked to comment on their

objection. He told the court that he had just left it to the committee to decide if they could take this evidence into consideration. This was in relation to what was said in paragraph 8 of the statement of reasons about the opening and closing of doors. In relation to paragraph 9 of the statement of reasons, he had told the committee that he had worked as a statistician for the NHS for 16 years, not 10 years as they have noted. In relation to this same paragraph, he told the committee that buyer and seller exchanges would take place online "like Gumtree", not that he was going to sell "on Gumtree". In relation to the reference to two cars towards the end of that paragraph, he told the committee that the story of the two cars had come from the police who had visited him. He told the court that he had never said to the police that he would be selling and buying cars. He had just agreed with a suggestion by the police. What was said about the two cars had come from the police. I asked him to clarify whether he had told the committee that the police letter was wrong and he replied "no, no, no". He confirmed that he had not made it clear to the committee that this information about two cars had come from the police. He had agreed with the police suggestion about two cars in his driveway, but this was not something he was intending to do. His position was that none of the committee members had asked him anything about his business. He told them his business would be online. He told them that he was not going to wash or repair cars outside his house.

[14] In relation to paragraph 12 of the statement of reasons, he told the committee that he had permission from Housing Services to operate a business from his home, but that the committee had not taken this into consideration. According to the pursuer, they said that they would wait for another two weeks for him to bring the letter confirming the permission but suddenly they made the decision.

[15] In cross-examination, the pursuer confirmed that he had told the committee that it was the police who had recommended to him that he should have two cars for sale stored in his driveway. In relation to paragraph 10 of the statement of reasons, the pursuer confirmed that he had asked the committee to consider all of the photographs, but explained to the court that this had only been because he was asking them to see that they were illegal.

### *Defenders*

[16] The first witness led on behalf of the defenders was *Andrew Mackay Mitchell*, Regulatory Services Manager with City of Edinburgh Council. In evidence-in-chief, he confirmed that he had attended the committee meeting dealing with the pursuer's case on 1 May 2018. His first role had been to present the application to members and to set the context. Secondly, if his department had any issues, he would speak to these issues and answer any questions that members might have. From his recollection, the pursuer had not objected to the late objection from Drumbrae Community Council or to the letter from Mr Gaffney, but he had made a point about the objection from Drumbrae Community Council being late. The implication was that it ought not to be considered, but there was no detail as to why not.

[17] Mr Mitchell was referred to the statement of reasons, number 6/1 of process. He confirmed that the facts in the statement of reasons aligned with what he remembered as having taken place before the committee. The level of detail provided by the pursuer about his business was sparse. He could not recall anything of substance in the pursuer's response to the evidence from the police about the letter which was before the committee. In relation to discussion of the photos before the

committee, his recollection was that the committee had been fundamentally concerned about how many vehicles might be there and whether the photographs were illustrative of a problem prior to the grant of a licence. He thought there had been a number of attempts by committee members to get to the bottom of what the photographs were or meant.

[18] In relation to paragraph 12 of the statement of reasons, Mr Mitchell confirmed that the pursuer had been asked by the committee if he was going to be trading in the street. One of the fundamental matters about which the committee was concerned was whether the vehicles would be kept or maintained on the street. He did not recall the photographs having been referred to by the pursuer as being inadmissible.

[19] Mr Mitchell did not recall the pursuer saying that he was objecting to Mr Wright being at the committee meeting. The pursuer did not use the word "objection" in any context. He did not remember the pursuer asking the committee to consider only the legality of the photographs.

[20] In relation to the permission (referred to in paragraph 12 of the statement of reasons) that the pursuer said he had received from Housing Services, when Mr Mitchell was asked whether he recalled the committee saying that they would continue the matter for two weeks for it to be produced (as alleged by the pursuer), he responded "absolutely not". His clear recollection was that a number of members of the committee had repeatedly tried to get information from the pursuer about his business. They had been asking questions attempting to reconcile the pursuer's explanations about how he would operate his business as against the concerns expressed by the police and licensing enforcement. Mr Mitchell thought members had been expressing concerns about the impact of numbers of vehicles associated with the

pursuer's business on the locality. Members were asking if the locality was really suitable for that sort of licensable activity. He thought the photographs were being used by the committee as an example of a fundamental concern that they had about whether or not the location was suitable. The locality was already quite crowded with cars. Mr Mitchell was asked whether the committee "ignored the fact" that the pursuer had said that his business would be online. His recollection of the committee was that they appeared unconvinced by what the pursuer was saying in response to their concerns.

[21] In cross-examination, Mr Mitchell confirmed that Sergeant Young, who had appeared on behalf of the Chief Constable at the committee meeting, had in effect narrated the terms of the letter from the police before the committee. Concerns were expressed about the suitability of the property in view of the restricted space and that, if the committee were minded to grant the licence, an additional condition would be sought restricting the number of vehicles to two. The committee had already heard from Licensing Enforcement. They had raised concerns in their memo, number 6/6/1 of process, about the size of the property and had made a recommendation in terms of a maximum of two vehicles. He confirmed that he remembered the meeting reasonably well. Mr Mitchell didn't think that the pursuer had understood the implications of the licence he was seeking. He remembered thinking that the pursuer had attended without legal representation and that he would have been well advised to have obtained legal representation because he struggled to understand the concerns relating to the licensing system. The pursuer's position was inconsistent. Why would you seek a "premises-based" licence if your business was going to be online? It was apparent to Mr Mitchell that the committee was unconvinced by the pursuer's responses. He did

not think that the committee found the pursuer's position (that his business was going to be solely online) credible. Mr Mitchell thought that the committee had preferred the evidence of the police and the objectors. The police letter had said "mainly online".

[22] In relation to the second last sentence of paragraph 10 of the statement of reasons about the photographs and involvement of the police, Mr Mitchell was asked whether the pursuer might have said that it was illegal. Mr Mitchell's recollection was that the pursuer had not objected to the photographs on the basis that they were illegal. He recalled the pursuer telling the committee that his business would be website-based. The committee asked a number of questions attempting to get to the bottom of how the pursuer's business would operate.

[23] In relation to the final sentence of paragraph 12 of the statement of reasons (which reads "The applicant submitted that he would not sell or work on a car in the street and that all of his business would be carried out on the internet"), this was what the pursuer said and it was for the committee to decide what weight to give to that. Mr Mitchell told the committee that the second-hand dealer's licence the pursuer had applied for in relation to the property was to sell vehicles. In his letter dated 30 October 2017, number 6/4 of process, the pursuer had said that he would be selling second-hand cars. The pursuer was asked by the committee to respond to issues raised by the objectors, the police and Licence Enforcement. He was also asked to clarify his business model. Mr Mitchell's position was that the pursuer had applied for a premises-based licence to sell second-hand cars. That is a physical licence under the Act. Therefore the committee were addressing whether the premises he was seeking a licence for would be suitable. So far as Mr Mitchell could see, the committee did not accept the pursuer's position that his business would be online.

[24] In relation to the photographs of cars, Mr Mitchell confirmed that he clearly remembered a discussion, but did not think that the detail that was being put to him in cross-examination was before the committee.

[25] In relation to paragraph 11 of the statement of reasons, the pursuer told the committee that one vehicle was his and one vehicle was his ex-wife's. The pursuer had also said that another of the vehicles was his friend's. Mr Mitchell agreed that this paragraph did not mention the pursuer's ex-wife. He did not recall the pursuer providing any other level of detail. Mr Mitchell accepted that the pursuer possibly did, but he did not recollect the pursuer doing so. Mr Mitchell confirmed that he was sure that the pursuer did not use the phrase "illegality" in relation to the photographs. Mr Mitchell was asked if he had understood everything that the pursuer had said and he replied that he believed that he had.

[26] In re-examination, Mr Mitchell confirmed that it seemed to him that the committee did not find the pursuer's explanation to be credible about the operation of the business.

[27] The second and final witness led on behalf of the defender was *Ms Caitlin Allan*, solicitor, City of Edinburgh Council. Ms Allan was legal adviser to the committee at the meeting of the committee on 1 May 2018. She has been solicitor for the Council dealing with licensing work for 15 years. She attends as legal adviser to the committee in terms of procedure and the way the committee is run. On 1 May 2018 she took notes and advised the committee in relation to any legal questions arising. She drafted the statement of reasons, number 6/1 of process. She thought it represented what had happened at the meeting. She did not recollect the pursuer objecting to the late consideration of the objection from the community council. If he

had done that she would have noted this. Similarly, if he had objected to Mr Wright, she would have noted this and it would have been in the statement of reasons as well. She had no recollection of this. In her experience, a committee is able to take into account late objections. In relation to the statement of reasons, there was a letter from Police Scotland. This was all of the information provided to the committee about the interview between the pursuer and the police. She had no recollection of the pursuer providing information to the committee beyond this as to what may have happened between himself and the police. She did not think that the pursuer had said to the committee that what the police had said in their letter about his storing only two cars had come from the police. In relation to the statement of reasons not saying if the committee had been accepted that the pursuer had had permission to operate a business at home, Ms Allan confirmed that this matter had been raised. The pursuer told the committee that he had the letter but that he did not have it with him. That was an end of the matter. The committee did not ask any further questions about this issue. It would have been for the pursuer to provide the letter to the committee if he wished to demonstrate that he had that permission. However, it did not appear to be a material consideration so far as the committee was concerned. In relation to the photographs provided by Mr Gaffney, Ms Allan recalled reference being made to the photographs at the meeting, but she could not recall who referred to them. She did not recall the pursuer saying that he had not had notice of the photographs. She did not recall him saying that the letter with the photographs had been received out of time. The pursuer did not object to the photographs being considered. He did not ask for a continuation of the committee meeting so that he could have time to consider them. She thought that he had been asked questions about a particular photograph and that

he had indicated to the committee that, if they were going to consider one photograph, they should look at all of the photographs tabled. He had had concerns that some of the photographs had been taken by someone who had gone onto his property to take them. She had no recollection of his having said to the committee that the photographs were “illegal”. She also did not recall the committee stating that the photographs were inadmissible and should not be considered. If he had objected she would have taken note of this and this would have been reflected in the statement of reasons. The pursuer had made a fairly short submission as set out at paragraph 9 of the statement of reasons.

[28] In relation to whether the committee asked questions about the pursuer’s business, they asked about the storage of cars, about maintenance and the cleaning of cars and how and where that would take place. In relation to the photographs, the committee were trying to understand who the vehicles belonged to and the impact of his proposed business.

[29] The statement of reasons is not *verbatim* but it is fairly comprehensive to reflect the main issues raised and discussed at the meeting and the main considerations when the committee made their determination.

[30] In relation to information about how the business would operate and upon whom the onus lies, Ms Allan said that it was for the pursuer to provide the committee with any information he felt would support the application and how the business would operate. In relation to the suggestion by the pursuer that he was “interrogated” by the committee about his ownership of cars, Ms Allan said that there was a lot of discussion about the ownership of the cars but, in relation to whether it was “like an interrogation”, Ms Allan said “no, certainly not”.

[31] In relation to paragraph 14 of the statement of reasons about the vehicles seen in the photographs, Ms Allan said that what was in the statement of reasons was a reflection of the notes she had taken. Her recollection was that the pursuer had said that two of the vehicles belonged to him and that the other four belonged to friends or to people he knew. She did not recall him saying that one of the vehicles belonged to his ex-wife. In relation to the mention of a silver car, Ms Allan had no recollection of the pursuer saying that all of the photographs containing a silver car showed the same car. If he had said that, Ms Allan confirmed that this would have been reflected in the statement of reasons.

[32] In so far as the pursuer was also saying that the committee should have investigated the information in the letters from objectors alleging that he was already trading as a second-hand trader, Ms Allan was asked whether in her experience the committee would investigate this and she said "no". They determine matters on the basis of material before the committee, although they could have asked officers to investigate if they felt they needed clarification. However, ultimately, they determine applications on the basis of material provided. She confirmed that in this case the committee decided not to ask officers to investigate. The committee can convene an additional meeting if they are of the view that there is not enough information to enable them to make a determination.

[33] She had not had any difficulty understanding the pursuer's accent. In her experience, if the committee had had a difficulty understanding his accent, they could have done a number of things such as slow proceedings down or, if there was a particular language problem, they could arrange for a translator to appear. In

summary, therefore, her position was that the statement of reasons was an accurate reflection of what happened before the committee.

[34] In cross-examination, Ms Allan was referred to the pursuer's production, number 5/1/2 of process. She confirmed that this appeared to be a letter from the housing officer to the pursuer granting permission for him to work as a second-hand car dealer in principle from home. Ms Allan was also referred to emails attached, and it was suggested to her that these showed that the letter had been emailed to Gillian Moore at the Council. However, Ms Allan was unable to confirm from the small image attached that this was the same letter. She agreed that the picture looked similar, but she could not say for certain whether it was the same. She also pointed out that, although the letter had been sent to part of the Council (the trading standards officer), the representative of Licensing Enforcement at the meeting was not aware of the letter having been sent.

[35] Ms Allan was then referred to the letter from Mr Gaffney, number 6/14 of process. Ms Allan confirmed that this did not say when the photographs had been taken. Not all of the objectors had turned up for the meeting. Ms Allan did not recall Mr Gaffney speaking to his letter. The objectors had referred to the photographs.

[36] Mrs Mundy asked whether there was any information before the committee about when the photographs were taken. There was an objection on the basis that this was not relevant to any of the issues which I had ruled upon on day one to the effect that the issues had to be about matters which were before the committee. With some hesitation, I decided to allow the question subject to relevancy and competency. Ms Allan confirmed that the committee did not have any information about when the photographs were taken.

[37] Ms Allan did not know if any of the objectors were aware that the pursuer's business would be carried out online.

[38] In relation to the statement of reasons, number 6/1 of process, at paragraph 9, Ms Allan was asked whether the pursuer had said "like Gumtree" or whether it was possible that he had said that. She could not recall. She would have to say that he told the committee what is in the statement of reasons as that is what she noted. However, it was possible he had said that, as the statement of reasons is not a *verbatim* account. Her recollection was that the pursuer said that buying and selling would take place online.

[39] In relation to paragraph 12 of the statement of reasons, although the pursuer submitted that all of his business would be carried out on the internet, the application was to carry out a second-hand dealer's business at his home address, and that is what the committee was considering.

[40] In relation to paragraph 14 of the statement of reasons, although the pursuer had said that his business would be on the internet, the application was to carry on a second-hand dealer's business from his home address and she thought the committee had concerns about where the cars would be stored. She agreed that the committee had information that he had a driveway with space for two cars.

[41] In relation to the photographs, her recollection was that the pursuer was concerned about the way the photographs had been taken and not the photographs themselves.

[42] In relation to the late objection (referred to in paragraph 3 of the statement of reasons), it was a matter for the committee to determine whether they were satisfied

about the reasons for it being late. If the pursuer had objected, this would have been reflected in the statement of reasons.

[43] Ms Allan did not recall the pursuer saying that one of the two cars belonged to his ex-wife. Her recollection was that he had told the committee that the two cars were his. However, she accepted that it was possible that he had said what had been put to her about this to the committee, but it was not something that she recollected. As to whether the pursuer was asked about the management of his business, Ms Allan said that he was asked questions about the cars identified in the photographs and who they belonged to. The committee had had concerns about where second-hand cars would be stored. There were concerns about the number of cars in the area and the impact on the community of further cars being introduced into the area.

[44] Ms Allan did not recall any evidence that the pursuer had been reported to the police for trading without a licence. She confirmed that a number of objectors had referred to a business already being operated. He appeared to be responsible for a fairly large number of vehicles in the area already. There were a number of vehicles on and around his property where the cars to be traded by him would be stored.

[45] In relation to whether the committee did not believe him, Ms Allan referred to the statement of reasons. In relation to the question of how the storing of cars was relevant to the operation of an online business, Ms Allan said that the cars would have to be stored somewhere.

[46] Paragraph 5 of the statement of reasons dealt with the submission by the police representative. The police representative made a short submission in relation to the letter from the police.

[47] In re-examination, in relation to the letter from the housing department confirming whether or not the pursuer had permission to operate a business from his home (referred to in paragraph 12 of the statement of reasons), Ms Allan confirmed that this was not a fundamental part of the decision by the committee. In her experience, the committee takes into account objections without objectors being present. Ms Allan confirmed that it was not simply a question of the pursuer's version as against the objectors on the day. The committee had copies of written objections and papers in front of them as well.

### **Summary of submissions**

#### *Pursuer*

[48] There is no reason to consider that the pursuer lied in his evidence to the committee and to the court. Mr Mitchell mentioned that the pursuer had been asked numerous questions to find out about how he would operate his business. Ms Allan did not recall any such questions. Ms Allan should be preferred as she was noting what had been said. Her recollection was that all questions of the pursuer had been in relation to the photographs. Mrs Mundy was not saying that either of the defence witnesses had been lying but, if there was a conflict, the pursuer should be preferred. In his evidence the pursuer had said that he had objected to the photographs being put before the committee on the grounds that they were "illegal". Mr Mitchell and Ms Allan did not recall this. Mr Mitchell said that the pursuer had been very exercised that they had been taken by someone who had come into his garden. There was evidence that the rest of the photographs had been raised by the pursuer. His evidence was that he had been objecting to the committee looking at the photographs. Mrs

Mundy invited the court to accept this. She accepted that all of the witnesses had attempted to be truthful. She was not criticising the witnesses.

[49] *In relation to the ground of appeal under paragraph 18(7)(b) (that the committee based their decision on any incorrect material fact), it is agreed in the joint minute that, in the statement of reasons, the committee refused the application as it was concerned about the suitability of the premises for carrying out the proposed business given the residential nature of the area and the lack of space for the pursuer to store cars for sale and that it would be difficult to clean or maintain vehicles stored on the pursuer's premises given the restricted space.*

[50] In terms of paragraph 5(3) of Schedule 1 to the 1982 Act, reading shortly, the licensing authority shall refuse an application to grant or renew a licence if, in their opinion ... (c) the premises are not suitable for the conduct of the activity having regard to (i) the location, character or condition of the premises or (ii) the nature and extent of the proposed activity. Mrs Mundy submitted that the committee did not have regard to paragraph (ii) and the nature and extent of the proposed activity. The committee required to have regard to both.

[51] I was reminded that, in paragraph 7 of the joint minute, it was agreed in relation to the nature of the activity that the pursuer had advised the committee that everything would be carried out online. He told the court that he had said to the committee that his business would be "like Gumtree". It was also agreed in paragraph 7 of the joint minute that the pursuer had submitted to the committee that he would not store cars for sale outside his property, that he was not a mechanic and would therefore not be carrying out the repairs of cars at his property and that all of his business would be carried out on the internet. That was the nature of the business of

the proposed activity relevant to paragraph (ii). In her submission, the committee had wholly failed to “have regard” to the nature and extent of the proposed activity when they were making their decision.

[52] In paragraph 14 of the statement of reasons, the committee stated that the pursuer could not manage his existing business effectively. The committee were saying effectively there that he could not manage his existing vehicles and so how could he manage more? This was irrelevant to the online business for which he was applying for a licence to operate. There was, therefore, nothing before the committee to allow them to conclude that the premises were not suitable for the business he wanted to operate. As a result, the committee’s conclusion was based on an incorrect material fact, namely that the premises were not suitable. Mrs Mundy did not dispute that this was a “conclusion”, but she submitted that it was also an incorrect material fact.

[53] The other incorrect material fact was the issue of the photographs. At paragraph 15, in the first sentence, the committee referred to the pursuer already being responsible for a “large number” of cars on and around his property. The pursuer’s evidence was that he had not accepted responsibility for all the cars. He accepted that he had a car himself and that there was one for his ex-wife and one for a friend. It was clear from Mr Mitchell that one of the cars belonged to the appellant’s ex-wife. The court was invited to accept that. The pursuer was not responsible for “a large” number of cars. The pursuer had accepted that he was responsible for three cars. He said that he told the committee this. If the court accepts this, three is not a large number of cars. The court was also invited to accept the pursuer’s evidence that the car on the jack was the same car as the other photographs showing a silver car. Mrs Mundy also

submitted that there was no information before the committee about when the photographs were taken. The committee had not considered whether he was already operating a business. She therefore questioned what relevance there was about the number of cars the pursuer had at some stage outside his house.

[54] *In relation to the ground of appeal in paragraph 18(7)(c), (namely that the committee acted contrary to natural justice), in paragraph 5 of the joint minute it is agreed that the committee received a late objection from Mr Wright, chair of the Drumbrae Community Council, and that they received an additional letter from Mr Gaffney in support of his objection and enclosing photographs dated 15 April 2018. The pursuer's position was that he did not have proper notice of the photographs. He said that he had received them about five days before the meeting. They were used by Mr Wright in his submission. Mr Gaffney did not appear. The pursuer's position was that, when there was consideration of Mr Wright's late objection, it was stated by the committee that the photographs would "not be admitted". If the court accepts that it was accepted by the committee that Mr Wright should not refer to the photographs which were submitted late, it would be a breach of natural justice for the committee then to have regard to them when making their decision. They were received very late and they had been "ruled inadmissible".*

[55] *In relation to the ground of appeal in paragraph 5(3)(d) (namely that the committee exercised their discretion in an unreasonable manner), Mrs Mundy submitted, under reference to *Ward v City of Dundee Council* 1999 (Sh Ct) SLT 56, at page 58, that the correct test is set out there:*

*"Both parties agreed that it was not for me merely to substitute my own decision for that of the committee and that the correct test was that laid down by Lord President Emslie in *Wordie Property Co v Secretary of State for Scotland**

1984 SLT 345, namely that the court will not interfere unless it is satisfied that the decision was so unreasonable that no reasonable authority could have reached it”.

[56] There was no material before the committee which entitled them to conclude that the application should be refused. They failed to have regard to the nature and extent of the activity as submitted by the pursuer, namely online. They failed to deal with the material placed before them by the pursuer as to the nature of the business to be operated by him. No reasonable committee would have refused the application. The committee had heard from the pursuer that his business would be operated online, but they chose to listen to objectors who referred to an entirely different business and preferred that evidence.

[57] The defenders had also refused the licence on the basis that there was other good reason for refusing the application, namely paragraph 5(d) to Schedule 1 of the 1982 Act. Mrs Mundy referred to paragraph 15 of the statement of reasons and the reference there to the pursuer already being responsible for a large number of cars on and around his property and that they were not satisfied that he would be capable of operating his business without causing a disruption or nuisance to local residents. This was the same as saying that they were not satisfied about where he would store the cars. She submitted that in reality this was the same ground, namely that the premises are not suitable. This was therefore not an appropriate ground for refusing this application. There was no evidence to allow them to draw this conclusion about the operation of his business. In *The Noble Organisation Ltd v City of Glasgow District Council* (no. 3) 1991 SLT 213 the Inner House considered the meaning of “other good reason” in paragraph 5(3)(d) of Schedule 1 to the 1982 Act. At page 216, letters C-D, the Lord-Justice Clerk (Ross) said:

“I agree with counsel for the defenders that an “other good reason” must be something other than any of the eight circumstances described in (a), (b) or (c) of para 5(3)”.

In that case the licensing committee had considered the number of objections irrespective of whether they were relevant. At page 217, Lord Murray said that in his opinion the defenders were correct in maintaining that there was no warrant in logic or in the scheme of the Schedule for taking the same objections into account twice, once under subparagraph (3)(c) and once under subparagraph (3)(d). Mrs Mundy submitted that here too the defender could not say that something they had already taken into account (people objecting to the suitability of the premises) could be taken into account again on the basis of “other good reason”. She accepted that this would be an error of law (which was not a ground of appeal in the present case). However, Mrs Mundy submitted that, at page 217, letters K-L, Lord Morison had described this as being an unreasonable exercise of a *quasi*-judicial function. This was, therefore, a question of reasonableness of the exercise of discretion as well as an error of law. In the present case, this was an unreasonable exercise of discretion. It is unreasonable for the committee to use the same set of facts to justify two different grounds for refusing the application. Having held that the premises were not suitable, the committee then dealt with the photographs tabled indicating that the pursuer was unable to manage the vehicles for which he was already responsible without causing disruption to local residents. At paragraph 15, it is recorded that the committee was not convinced that the pursuer would be capable of operating his business without causing a disruption or nuisance to local residents. This is not another “good reason” in reality. Mrs Mundy accepted that the pleadings had not given notice of this argument, but she

submitted that it was an argument as a matter of law which did not require to be in the pleadings.

[58] The objections would have been relevant if there had been an issue about whether the pursuer was a fit and proper person to be granted a second-hand dealer's licence in relation to the way he was operating his existing business, but there was no suggestion before the committee that they had refused the licence on the basis that the pursuer was not a fit and proper person to hold a licence.

[59] In paragraph 16 of the statement of reasons, it was said that the committee had decided to give greater weight to the objections than to the pursuer's submissions.

However, the objections were not relevant to the online business that the pursuer said he was operating. Objections were directed to difficulties if there were to be more cars, but they were not directed to operation of an online business where all dealings and buying and selling would be online and so there would be no cars, no repairs, no washing and no storage. At paragraph 9 of the statement of reasons, it is recorded that the pursuer told the committee that the objections were opinions that were not based on fact and that he would not store cars outside his property. Mrs Mundy's submission was that, given the information the pursuer had given the committee about the business being online, the objections were on the wrong premise. The objections were therefore not relevant, also bearing in mind that the committee had not refused the licence on the ground that the pursuer was not a suitable person to hold the licence.

[60] Mrs Mundy also referred to *Din v City of Glasgow District Licensing Board* 1996 SLT 363 in support of the proposition that the onus is not on the pursuer to show that the premises are suitable. In the present case, it is agreed that the pursuer told the committee that his business would be online, but the committee still found that the

premises were not suitable. They seem to have held that there was an onus on him. At paragraph 14 of the statement of reasons, the committee say that they were not satisfied about how the pursuer would operate his business. In terms of paragraph 5(3) to Schedule 1 to the 1982 Act, a licensing authority shall refuse an application if one of the grounds in paragraph 5(3) is found by the committee to apply, but otherwise they shall grant the application. No reasonable committee could have been satisfied that the premises were not suitable on the basis of the objections given the online nature of the business (as the pursuer had said it would be). The committee either simply ignored or disbelieved what the pursuer had said, but the statement of reasons did not say that. It was never put to the pursuer by any of the committee members that he was operating his business illegally. Reference was also made to *Risky Business Ltd v City of Glasgow Licensing Board* 2000 SLT 923.

[61] Mrs Mundy submitted that the court was not simply entitled to overturn the decision of the committee and that the court had a discretion. However, she submitted that, in this case, there was a clear failure in the reasoning of the committee which would justify the court in finding that the appeal should be granted.

[62] The court was, therefore, invited to repel the defenders' pleas-in-law and to sustain the omnibus plea-in-law for the pursuer in all its parts. The court had had the benefit of hearing the pursuer and of seeing the objections. The court should, therefore, grant the application. Expenses should follow success.

### *Defenders*

[63] Ms McLaren provided a detailed written submission, number 17 of process, which is referred to for its terms, supplemented by brief oral submissions.

[64] In summary, the court was invited to accept Mr Mitchell and Ms Allan as being credible and reliable witnesses. Both were truthful bearing in mind that it had been almost a year since the committee meeting. In the event of conflicts in the evidence as between the pursuer on the one hand and Ms Allan and Mr Mitchell on the other hand, the latter should be preferred. The court was invited to refuse the appeal and, accordingly, to repel the plea-in-law for the pursuer and to sustain the pleas-in-law for the defenders. It was agreed that expenses should follow success.

[65] I was reminded of the general principles to be applied in determining licensing appeal cases. These included the following propositions: (1) that it cannot be the obligation of the Board to respond in detail to each and every point of evidence or submission which is raised in the course of proceedings; (2) that the decision regarding what weight to attach to the evidence presented to them is a matter for the committee; (3) that it is not possible for the sheriff hearing an appeal to substitute their views for those of the committee; and (4) that the decision of the committee should not be overturned unless it is a decision that is so unreasonable that no other committee would have made the same decision.

[66] Authorities cited in support of the defenders' submissions in this respect were: *Din v City of Glasgow District Licensing Board, supra*; *Middleton v Dundee City Council* 2001 SLT 287; *Wordie Property Co v Secretary of State for Scotland, supra*; *Ward v City of Dundee Council* 1999 SLT 56 and *Rannachan v Renfrew District Council* 1991 SLT 625.

[67] Ms McLaren then turned to the issues upon which evidence was allowed to be led. In relation to whether or not the pursuer objected to the late objection from Drum Brae Community Council being taken into consideration, the pursuer was provided with notice of the late objection from the community council and Mr Mitchell and

Ms Allan gave evidence to the effect that there were no objections by the pursuer to this late objection being considered by the committee (or to the photographs being considered). If there had been, Ms Allan would have recorded this in the statement of reasons. Their evidence should be accepted and preferred to that of the pursuer. In relation to the level of detail the pursuer provided to the committee regarding how his business would operate, the pursuer and Ms Allan said that there had been questions from the committee about the ownership, storage and cleaning of vehicles and where this would take place. Mr Mitchell also gave evidence that the committee asked questions about the suitability of the property and that they had made numerous attempts to get to get a better understanding of what the business was. In relation to the level of detail of the discussion between the pursuer and the representatives of Police Scotland, Ms Allan and Mr Mitchell confirmed that the police representative had spoken to their letter, number 6/5 of process. The pursuer had not given evidence to the committee about his interactions with the police. In relation to the level of detail provided to the committee regarding ownership of cars, Ms Allan had stood by the position as stated in the statement of reasons. However, Ms McLaren noted that Mrs Mundy had stated in her submissions the matter was irrelevant as all of the business would take place online.

[68] There had also been a number of matters raised in evidence which went beyond those allowed above. In so far as Mrs Mundy had submitted that the committee had “ruled” that the photographs were “inadmissible” but had then referred to them, I was invited to reject this submission. On record it was averred that the pursuer had not had notice of these photographs. However, the pursuer accepted in his evidence that he had seen the photographs five days prior to the committee meeting on 1 May 2018.

Mr Mitchell and Ms Allan gave evidence to the effect that the pursuer did not say to the committee that the photographs were illegal, and Ms Allan told the court that the committee did not rule that the photographs were inadmissible. If he had been objecting, she would have recorded it in the statement of reasons. In relation to the suggestion that the pursuer had advised the committee to look at all of the photographs but only because he wished the legality of the photographs to be considered (and not to look at ownership of the vehicles), the evidence of Ms Allan was that this was not the case.

[69] *In relation to the ground of appeal under paragraph 18(7)(b) (that the committee based their decision on any incorrect material fact),* all of the matters referred to in the pursuer's submissions had been discussed at the committee meeting on 1 May 2018. The pursuer, objectors and other relevant parties were given the opportunity to speak to these. The pursuer was invited by the committee to give his response to the objections raised. He advised the committee that his business would operate online only (as recorded in paragraphs 9 and 12 of the statement of reasons). He stated that he would not store cars connected to the business at the property (paragraph 9 of the statement of reasons). The committee sought clarification from him regarding ownership of vehicles in the photographs attached to Mr Gaffney's letter of 15th April 2018 (number 6/14 of process). The pursuer gave his account of what vehicles he owned and/or was responsible for. It is accepted that there is dispute between what the pursuer says he told the committee and what Ms Allan recorded. However, the committee had before it both written objections and verbal submissions, and from objectors who provided information contrary to the pursuer's position. A number of the letters of objection made reference to congestion within the street and to the pursuer already being

responsible for a number of vehicles. Some of the letters of objection also made reference to the pursuer already selling second-hand cars from the street surrounding his property. At the meeting on 1st May 2018 the committee also heard from Mr Wright, representing Drum Brae Community Council, and from two other objectors.

It is recorded at paragraph 14 of the statement of reasons that the committee were not satisfied that the pursuer had addressed the concerns in relation to how he would operate his business in a small area. They were also not convinced by his assurance that he would not store or work on cars for sale in the street and that the premises were large enough for the licensable activity. At paragraph 15 it is recorded the committee were not satisfied with the pursuer's assurance he would not store cars for sale on the street or carry out maintenance of such cars on the street if he was granted a licence. They were also not satisfied that he would not cause a disturbance or nuisance to local residents when local residents were already experiencing problems with the number of cars that the pursuer was storing in and around his property.

[70] It was submitted on behalf of the defenders that the committee did not base their decision upon any incorrect material fact as suggested by the pursuer. They had information from both the pursuer and from other sources. The committee decided that they preferred the information presented from other sources to that of the pursuer. It cannot be said that the committee had no information before them to entitle them to draw the conclusion that the pursuer was responsible for a large number of cars in and around his property. Even if there was disagreement between the details of ownership/responsibility noted in the statement of reasons and what the pursuer said he told the committee, there was also the information from the objectors and other

sources available to the committee. The committee were entitled to reach the decision they did based upon the information before them. This position is supported by *Habib v Central Fife Regulation Sub-Committee, supra*. That was a case in which an authority had simply preferred one body of evidence before them and reached their decision on that basis and the court held that they had been entitled to do that on the basis of the material before them. It was held that the decision could not be challenged as being based on an incorrect material fact. In *Hughes v Hamilton District Council* 1991 SLT 628, a decision of an Extra Division, Lord McCluskey, delivering the opinion of the court, stated at page 632, letters C-D:

“Once there is relevant material before a licensing authority the question as to the weight to be attached to that material and the significance of any other balancing factors must be for the authority to assess.”

[71] The defenders submitted that the decision of the committee was not based on any incorrect material facts. Even if it was decided that the committee had based their decision on an incorrect fact, the court would have to be satisfied that it was material to the committee’s decision. Thereafter, the court still had the discretion as to whether or not the appeal should be allowed.

[72] *In relation to the ground of appeal in paragraph 18(7)(c), (namely that the committee acted contrary to natural justice),* paragraph 3(2) of Schedule 1 to the 1982 Act provides that it shall be competent for a licensing authority to entertain an objection or representation received by them before they take a final decision upon the application to which it relates if they are satisfied that there was sufficient reason why it was not made in the time required. Having considered the reason for it being late, namely that no notice of the application had been given to the community council and that local concerns about the application had only been raised at their last meeting, the

committee considered there was sufficient reason for the late objection from the community council and accordingly determined it would take the objection into consideration. This is a matter for the committee to determine. The committee accordingly did not act contrary to natural justice. In any event, despite averments to the effect that he had not received notice of the objection prior to the committee meeting, the pursuer accepted in evidence he had received it prior to the committee meeting, albeit that it was out of time.

[73] At the stage of submissions, Mrs Mundy had also submitted that the pursuer “had not had proper notice” of the photographs. Again, although it had been averred that the pursuer had not been provided with these prior to the committee meeting, he accepted in evidence that he had received the photographs about five days before the meeting. I was reminded that Mr Gaffney’s letter of 15th April 2018 had enclosed photographs in support of his objection dated 28th January 2018 which had been intimated to the pursuer by letter dated 30th January 2018 along with the other objections and representations lodged. Although the letter of 15th April 2018 contained the photographs, it did not introduce any new points that were not already covered in the letter of 28th January 2018 which the pursuer had already seen. The photographs were a visual illustration of the points raised. The pursuer did not advise the committee that he had not had sight of these, that he required more time to consider them or that he considered their use to be unfair. He was asked questions about the photographs and was provided the opportunity to present his version of events. It is recorded in paragraph 10 of the statement of reasons that the pursuer’s position was that, if the silver vehicle in the photographs was to be considered, all of the photographs should be discussed. The pursuer accepted in his evidence to the

court that he had told the committee that all of the photographs should be considered. This was also confirmed by Ms Allan. The pursuer said his motivation for doing so was expressed to the committee as being a desire that they should only consider the legality of the photographs, but his position was not accepted by Mr Mitchell or Ms Allan. The pursuer did not suffer prejudice as a result of the photographs being considered.

[74] In so far as Mrs Mundy had submitted that the committee had ruled the photographs to be inadmissible, the evidence of Mr Mitchell and Ms Allan also did not support the position that the photographs had been deemed inadmissible.

[75] *In relation to the ground of appeal in paragraph 5(3)(d) (namely that the committee exercised their discretion in an unreasonable manner)*, in so far as the pursuer had advanced an argument to the effect that the committee had had no proper basis for the part of their decision relating to paragraph 5(3)(d) of the Act, maintaining that the refusal on the ground of "other good reason" has been based on the same facts as had been used to justify refusal under reference to paragraph 5(3)(c)(i), I was reminded first of all that this was not pled on record and that the court should, accordingly, reject this argument now. It would in any event be an error in law (which was not a ground of challenge) and would not be a use of unreasonable discretion as contended for in submissions. In any event, a distinguishable reason had been given by the committee, namely that reference was made to the large volume of vehicles stored out-with the pursuer's property. The committee were not satisfied he would not store or work on vehicles on the street. The committee were looking at the activity spreading beyond the premises. So this cannot be said to be the same ground as suitability of the premises.

[76] In so far as it had been suggested that the committee ought not to have taken into account the objections which were said to have been irrelevant as the business was to operate online only, and were therefore based on the wrong premise, the defenders submitted that it was not unreasonable to consider these objections. The objectors gave accounts of what they observed to be the pursuer's activities already and provided opinions about the impact that granting a second-hand dealer's licence would have. These objections included observations about how the property would be used for the licensable activity. The pursuer had applied for a second-hand dealer's licence to sell cars. Although the pursuer told the committee that it would all be online, he did not say that that he had made the objectors aware of this. Mr Mitchell confirmed that in his letter dated 30th October 2017, number 6/4 of process, to the defender in relation to his application for a licence, the pursuer had said that he would be selling second-hand cars but that he had not qualified this to say that he would be selling cars exclusively online. Accordingly, the objectors cannot be criticised for the basis of their objections in the circumstances. The committee, having heard that the business would all be online from pursuer, preferred the evidence of the objectors. This was not unreasonable.

[77] In so far as the pursuer complained that the committee had (1) ignored how his business would operate and failed to seek further information from the pursuer regarding how his business would operate and (2) failed to investigate whether or not illegal trading had been taking place as suggested in the letters of objections, it was – as Ms Allan had explained – for the pursuer to make his case to the committee. If he considered that there was information that was important to support his position he should have lodged it. He was made aware of the objections and representations that

had been made in relation to his application. If he considered there was further information he wanted to provide to the committee, he could have asked for a continuation to do so. As explained by Ms Allan, normally the committee is prepared to grant continuations to obtain further information where they think this appropriate unless there is a time pressure under which they must determine the application.

Paragraph 4(1) of Schedule 1 to the 1982 Act states that, in considering an application to grant or renew a licence, a licensing authority may make such reasonable enquiries as it thinks are fit. Accordingly, the enquires that are to be made during the meeting are a matter for the committee. On this occasion the committee did not consider this necessary and made the decision based on the information before them. The committee was entitled to take this approach based on the information that was presented to them both verbally and in writing.

[78] The committee acted reasonably in their dealings with the pursuer. They provided notice of issues arising prior to the meeting and followed protocol for considering the late objection from the community council. They heard from the objectors and asked the pursuer for his version of events. The pursuer took the opportunity to address the committee. There was sufficient material before the committee to allow them to reach the decision they did. Further, it was not an unreasonable decision based upon that material. The committee were entitled to proceed with the hearing before them in the way which they did and were entitled to consider whatever evidence they saw fit and to attach such weight to that evidence as they saw fit. The inquiries the committee carried out in determining an application was also a matter for them. Taking account of all of the material before them, the

committee could not have been said to have reached a decision that was so unreasonable that no other licensing authority could have reached it.

[79] In conclusion, the licensing authority is the correct body to make a determination on such an application. The sheriff, in considering an appeal, cannot substitute his or her views for that of the committee. Accordingly, any additional information presented to the court, which was beyond what the committee heard, should not be considered. The court should, therefore, disregard matters which were not discussed at the committee. The court should also disregard the matters not averred on record. The court should, therefore, dismiss the appeal. However, if the court found that one or more of the grounds of appeal had been made out, the case should be remitted back to the committee in terms of paragraph 18(9)(a) of Schedule 1 to the 1982 Act for reconsideration of their decision. There were no compelling reasons to remove from the licensing authority responsibility for taking such a decision. The pursuer has not made out a case for the court to simply grant the licence.

[80] The sheriff should only take the step of reversing a decision and determining an application him or herself in three situations. The first of these is where there could be no other outcome than a decision to the opposite effect of that originally reached by the licensing authority. This would apply in cases where the court has decided that the decision of the licensing authority cannot stand and there was no material before the committee which could justify the refusal. The second of these is where the conduct of the hearing has been so improper or so contrary to natural justice that the sheriff considers that the licensing authority cannot now safely be trusted to deal with the case again. The third of these is where, by reason of change of circumstances or lapse of time, it would not be appropriate to remit. None of these situations applied.

[81] Further authorities cited in support of the defenders' submissions were:

*Loosefoot Entertainment Limited v City of Glasgow Licensing Board* 1991 SLT 843;  
*Matchurban Ltd v Kyle & Carrick District Council* 1995 SLT 505; *Risky Business Ltd v City of Glasgow Licensing Board, supra*; *McLuskie v City of Glasgow District Council* 1993 SLT 1102.

### **Objection renewed**

[82] In submissions, Ms McLaren renewed the objection she took in the course of cross-examination of Ms Allan when Mrs Mundy had asked whether there was any information before the committee about when the photographs were taken and which I allowed under reservation of all issues of relevancy and competency. This was on the basis that it was not on record and was not relevant to any of the issues which I had ruled upon on day one to the effect that the issues had to be about matters which were before the committee. Having considered the objection in the light of the evidence and submissions, I take the view that the objection is well-founded. In particular, there is no evidence that this was an issue raised before the committee. I therefore sustain it and exclude the evidence led relative to this issue.

### **The principal areas of fact in dispute**

[83] Evidence was to be limited to the five areas of dispute set out at paragraph [5] above. I now deal with these below. There were also more minor matters in dispute dealt with elsewhere in so far as I have considered them to be relevant.

*Whether or not the pursuer was provided with notice of the late objection from Drumbrae Community Council in advance of the committee meeting?*

[84] Despite express averments to the contrary, the pursuer ultimately accepted that he was provided with notice of this late objection by email dated 25 April 2018, number 6/22 of process, prior to the committee meeting.

*Whether or not the pursuer objected to the late objection from Drumbrae Community Council being taken into consideration?*

[85] Having considered the evidence of the pursuer, Ms Allan and Mr Mitchell, I am not satisfied that the pursuer did object to the late objection from the community council being taken into consideration. The pursuer's evidence about whether he had objected was inconsistent and less than clear. By contrast, the evidence of Ms Allan and Mr Mitchell was clear that he made no such objection. I accept Ms Allan's evidence that, if he had objected, she – taking notes to draft the statement of reasons – would have recorded this. Ms Allan and Mr Mitchell both gave their evidence in a careful and measured manner and made concessions where it was appropriate to do so and I had no reason to think that each was other than credible and reliable in all material respects in relation to the points which mattered. There was one matter about which I think that Ms Allan was mistaken. This was in relation to one of the cars in the photographs belonging to the pursuer's ex-wife rather than also to him. Ms Allan accepted that it was possible that the pursuer had told the committee this, as was confirmed by Mr Mitchell. That apart though, where the evidence of the pursuer was in conflict with the evidence of the witnesses for the defenders, I accepted and preferred the evidence of the latter. There were troubling inconsistencies in the

pursuer's evidence both internally and when compared with evidence from other sources such as the letter from the police, number 6/5 of process, which recorded that he would be operating "mainly online". That is not the same as all of the business operating online, and I was not impressed by the pursuer's attempts to suggest that what was said in that letter from the police (in particular about storing two cars in his driveway) had been the police's idea. I did not accept his evidence about this. It also seems too much of a coincidence that the photographs showed two cars in his driveway. In any event, although he gave inconsistent evidence about what he had told the committee in relation to the letter from the police, when I sought to clarify what his position was, he expressly confirmed to me that he had not told the committee that the content of the letter from the police was wrong. The position, therefore, is that the committee simply had the letter as it is. This included the passage which reads: "He will operate mainly online...He will occasionally buy and sell cars himself and these will be stored on his driveway, which has capacity for two cars." Having seen and heard the pursuer's evidence, I regret to say that I had real doubts about the reliability of the pursuer and, in some respects such as in relation to his assertion that his business would all be carried out online, I did not feel that I could regard his evidence as even credible.

*The level of detail the pursuer provided to the committee regarding how his business would operate?*

[86] There were detailed averments in article 6 of condensation about the pursuer's business. However, there was no suggestion that the pursuer provided all of this information to the committee. The statement of reasons records details provided

to the committee by the pursuer, for example, that everything would be carried out online, that he would not be storing cars for sale outside his property, that he would not be carrying out repairs of cars at his property, that he would not be causing any traffic and that he would not sell or work on cars in the street. It was not clear from the pursuer's evidence what other detail, if any, he says he provided to the committee about how his business would operate other than that, according to him, he told the committee that buyer and seller exchanges would take place "like Gumtree" rather than "on Gumtree" as recorded at paragraph 9 of the statement of reasons. Ms Allan's position was that it was possible he had said this as the statement of reasons is not a *verbatim* account. However, it was not explained to me how this would have been material to the committee's decision to refuse the application, and this certainly is not evident to me. In all the circumstances, I am not persuaded that it was. The main point was that the pursuer was telling the committee that everything would be carried out online, but they had other information (such as from the police) which fed into their assessment that led them not to be satisfied about his assurances. In my view, on the material before them – which included the written objections and other documentation and having heard from the objectors themselves – they were well entitled to reach this view.

[87] In the event, the real complaint appeared to be that the committee did not ask the pursuer enough questions about his business if they had any concerns about it, which is a rather different matter. The pursuer submitted that, although Mr Mitchell had mentioned the pursuer having been asked numerous questions to find out about how he would operate his business, Ms Allan had not recalled "any such questions". However, I am not satisfied that Ms Allan went as far as saying this. It was also

submitted for the pursuer that Ms Allan's recollection was that "all questions" of the pursuer had been in relation to the photographs. In the light of Ms Allan's evidence, I do not accept this. These points apart, ultimately, on this whole matter, I accept and prefer the submissions advanced on behalf of the defenders on this matter. Ms Allan told the court that it was for the pursuer to make his case to the committee. If he considered there was information that was important to support his position he should have lodged it. He was made aware of the objections and representations that had been made in relation to his application. If he considered there was further information he wanted to provide to the committee, he could have asked for a continuation to do so. With all of this I agree. Paragraph 4(1) of Schedule 1 to the 1982 Act makes this clear. Enquires that are to be made are a matter for the committee. I am satisfied that the committee was entitled to take the approach which they did.

*The level of detail the pursuer provided to the committee of the discussion between the pursuer and the representatives of Police Scotland?*

[88] I refer to paragraph [85] above. The pursuer confirmed to me that he had not told the committee that the letter from the police, number 6/5 of process, was wrong. I do not accept that he provided the committee with any detail of any discussion there may have been between himself and the police. Ms Allan had no recollection of the police providing information to the committee beyond what was in the letter. I accept her evidence about this.

*The level of detail the pursuer provided to the committee regarding ownership of cars surrounding his tenancy?*

[89] I have already summarised the evidence given by all witnesses about what the pursuer is said to have told the committee about cars, particularly those shown the photographs before the committee. Ms Allan told the court that what was in the statement of reasons about cars was a reflection of the notes she had taken. Her recollection was that he had told the committee that two of the cars were his (as opposed to one of them belonging to his ex-wife), but that it was possible that he had said this. Mr Mitchell recalled the pursuer saying that one of the cars belonged to his ex-wife. In view of Mr Mitchell's confirmation of the pursuer having told the committee this, I am prepared to accept the pursuer's evidence about this point. However, it was not explained to me why this would have been material to the committee's decision. I am not satisfied that it was. Apart from one car being the pursuer's ex-wife's rather than his, I am satisfied that what is recorded in the statement of reasons (including at paragraphs 11, 14 and 15) about ownership of cars is the detail which was provided to the committee by the pursuer and which was a reflection of the notes Ms Allan says she took. This includes the issue of photographs showing a silver car. Ms Allan had no recollection of the pursuer saying that all of the photographs containing a silver car showed the same car. If he had said that, Ms Allan confirmed that this would have been reflected in the statement of reasons. I accept her evidence about this. I am not persuaded that the pursuer told the committee that they all showed the same car.

## Decision

[90] I agree with and accept Ms McLaren's analysis of the general principles to be applied in licensing appeal cases summarised at paragraph [65] above, Mrs Mundy having confirmed that she took no issue with it.

[91] In terms of paragraph 18(7) of Schedule 1 to the 1982 Act the sheriff may uphold an appeal under this paragraph *only* (emphasis added) if he considers that the licensing authority, in arriving at their decision, *inter alia* (b) based their decision on any incorrect material fact; (c) acted contrary to natural justice; or (d) exercised their discretion in an unreasonable manner. The grounds are therefore limited: *Habib v Central Fife Area Sub-committee, supra*, at paragraph [12].

### **Whether, in arriving at their decision, the committee based their decision on any incorrect material fact?**

[92] The pursuer's application for a licence was refused *inter alia* in terms of paragraph 5(3)(c)(i) of Schedule 1 to the 1982 Act which provides that "a licensing authority shall refuse an application to grant a licence if, in their opinion, ... where the licence applied for relates to an activity consisting of or including the use of premises..., those premises are not...suitable...for the conduct of the activity... having regard to (i) the location, character or condition of the premises..." It was not refused on any of the other four alternative grounds, such as that provided in paragraph (c)(ii), namely the nature and extent of the proposed activity.

[93] In article 10 of condescendence the pursuer avers, first of all, that the incorrect material fact was "that the pursuer's house was not suitable for the licensable activity." In point of fact, the committee did not in the statement of reasons state that the

pursuer's "house" was not suitable; they recorded that their conclusion was that the "premises" were not suitable. It is, in any event, difficult to see how "the pursuer's house" would differ from a conclusion that "the premises" are not suitable for the licensable activity, which is what they require to consider. Indeed, Mrs Mundy accepted that the averment in article 10 of condescence was a conclusion, but she submitted that it is also a fact. However, a conclusion that premises are not suitable for the licensable activity is based upon an assessment of relevant material which leads to a particular judgment that premises are, or are not, suitable for the licensable activity: *c.f. Habib v Central Fife Area Sub-committee, supra*, per Sheriff Holligan at paragraph [14].

As Sheriff Holligan said there:

"There is a distinction between facts upon which a judgment is made and the judgment itself. The former can be corrected if the facts are wrong, the latter is not so easily disturbed...it seems to me that what the solicitor for the pursuer invites me to do is not to deal with an incorrect material fact which appears in the decision but to rehear the case and reach my own view on the material before me, material which was not before the committee...I do not consider that para 18(7)(b) permits the pursuer, in effect, to re-litigate the whole matter before me."

In my view, the pursuer is trying to achieve an effective re-hearing in the present case as well (including inviting me to grant the licence myself rather than remitting the case back to the licensing authority), and I am not persuaded that this is appropriate.

[94] In relation to the pursuer's submission to the effect that the committee failed to have regard to paragraph (ii) of paragraph 5(3)(c) and the nature and extent of the proposed activity, I do not consider that this is well-founded. It is recorded in the statement of reasons that the pursuer's position was that he would not store cars for sale outside his property, that he was not a mechanic and would therefore not be carrying out the repairs of cars at his property or on the street and that all of his

business would be carried out on the internet. The committee simply did not accept what he had said about the nature and extent of the proposed activity. They were perfectly entitled not to do so in the light of the other material before them, including the letter from the police, number 6/5 of process, and other material such as the objections, both written and verbal. It was for the committee to assess all of this material and to reach conclusions in the light of it. The implication of what appeared to be Mrs Mundy's position before me was that the committee were in effect obliged to accept the pursuer's statements and assurances. I do not agree.

[95] Even if the pursuer told the committee that business exchanges would take place "like Gumtree" rather than "on Gumtree", nothing was said to persuade me why this would have been material.

[96] It was said that the issue of the photographs was another incorrect material fact in the context of what the committee had recorded at paragraph 15 of the statement of reasons about the pursuer already being responsible for a "large number" of cars. I refer to paragraph [89] above in relation to the detail provided by the pursuer to the committee regarding ownership of cars. These were shown in the photographs. Apart from accepting that the pursuer referred to one car as being his ex-wife's rather than his, I have accepted that what is recorded in the statement of reasons (including at paragraphs 11, 14 and 15) about ownership of cars is the detail which was provided to the committee by the pursuer. In the circumstances, I am not persuaded that there was any incorrect material fact in this regard.

**Whether, in arriving at their decision, the committee acted contrary to natural justice?**

[97] On record the pursuer's ground of challenge was that the pursuer had had no advance notice of the objection from the community council and that he had not been provided with the photographs in advance of the meeting. However, the pursuer departed from both positions in evidence. Perhaps wisely, the issue of the alleged late notice of the objection from the community council was not insisted upon in submissions. In any event, I accepted the defenders' submissions (as recorded at paragraph [72] above) about this. In relation to the photographs, by the stage of submissions, the pursuer's position was that he had not had "proper notice" of the photographs. He had received them about five days before the meeting. On this matter, I accept and prefer the submissions for the defenders. The pursuer did not say to the committee that he had not had sight of these (as indeed he could not because he had seen them), that he required more time to consider them or that he considered their use to be unfair. He was asked questions about the photographs and was provided the opportunity to present his version of events. It is recorded in paragraph 10 of the statement of reasons that the pursuer's position was that, if the silver vehicle in the photographs was to be considered, all of the photographs should be discussed. The pursuer gave evidence to the court to the effect that his motivation for this was a desire that they should only consider the legality of the photographs, but I am not persuaded that the pursuer told the committee this.

[98] Even the pursuer did not give evidence that the photographs were "ruled inadmissible" by the committee. If the committee made such a ruling, Ms Allan would

have recorded this. I, therefore, reject this ground of argument as advanced in submissions.

**Whether, in arriving at their decision, the committee exercised their discretion in an unreasonable manner?**

[99] I deal first with the pursuer's argument to the effect that the committee had had no proper basis for the part of their decision relating to paragraph 5(3)(d) of the Act, it being submitted that the refusal on the ground of "other good reason" had been based on the same facts as had been used to justify refusal under reference to paragraph 5(3)(c)(i). The first observation to make is that this was not a ground of criticism advanced on record. In any event, I take the view that this would be an error of law (which is not a head of challenge in the present case) rather than an unreasonable exercise of discretion. In relation to the passage founded on by the pursuer from the opinion of Lord Morison in *The Noble Organisation Ltd v City of Glasgow District Council (no. 3)*, *supra*, at page 217 in support of the proposition that this could also amount to an unreasonable exercise of discretion, I noted that this was his lordship's characterisation of the committee in that case giving effect to objections however misconceived or irrelevant they might be, rather than of a committee taking the same objection into account twice. I further note that, at page 216, taking something into account again on the basis of "other good reason" was described by the Lord Justice-Clerk (Ross) as being an "error of law". I also accept the defenders' submissions that a distinct reason had been given by the committee for the refusal under the ground in paragraph 5(d), namely that reference was made to the large volume of vehicles stored out-with the pursuer's property. The committee were not

satisfied he would not store or work on vehicles on the street. In other words, the committee were looking at the activity spreading beyond the premises. This could, therefore, not be said to be the same ground as the suitability of “the premises”.

[100] In relation to the pursuer’s submission to the effect that the objections were not relevant, I have to observe first of all that this was not a ground of criticism advanced on record. In any event, I accept and prefer the defenders’ submissions on this issue. The pursuer had applied for a second-hand dealer’s licence to sell cars. Although the pursuer told the committee that it would all be online, he did not say that that he had made the objectors aware of this. For example, in his letter dated 30th October 2017, number 6/4 of process, to the defenders in relation to his application for a licence, the pursuer had said that he would be selling second-hand cars but he had not qualified this to say that he would be selling cars exclusively online. I agree with Ms McLaren for the defenders that the objectors cannot be criticised in the circumstances and that the committee, despite having been told by the pursuer that his business would all be online, were nevertheless entitled to prefer the other evidence before them. This included the letter from the police, number 6/5 of process, and the evidence of the objectors.

[101] The pursuer also submitted that there was no material before the committee which entitled them to conclude that the application should be refused, that they failed to have regard to the nature and extent of the activity as submitted by the pursuer (namely online), that they failed to deal with the material placed before them by the pursuer as to the nature of the business to be operated by him and that no reasonable committee would have refused the application. The complaint advanced was that the committee had heard from the pursuer that his business would be operated online, but

that they had chosen to listen to objectors who referred to an entirely different business and had preferred that evidence. The committee either simply ignored or disbelieved what the pursuer had said, but the statement of reasons did not say that. As I have already indicated at paragraph [94] above, it was for the committee to assess all of this material and to reach conclusions in the light of it. The pursuer's position before me appeared to be that the committee was in effect obliged to accept the pursuer's statements and assurances. I do not agree. The committee simply did not accept what he had said. They were perfectly entitled not to do so in the light of the other material before them. In my opinion, it is clear from the statement of reasons that they had regard to the nature and extent of the activity as had been explained to them by the pursuer (see, for example, paragraphs 9 and 12 of the statement of reasons) and they dealt with the material placed before them by him as to the nature of the business he proposed to operate. For example, at paragraphs 13, 14 and 15 of the statement of reasons, the committee make clear what their view was about not being satisfied that the pursuer had addressed the committee's concerns, not being convinced by his assurances and not being convinced by his submissions that he would be capable of operating his business without causing a disruption or nuisance to local residents as referred to in paragraph 15 of the statement of reasons. In all the circumstances, I am satisfied that there was material before the committee to entitle them to reach these conclusions.

[102] In relation to the pursuer's contention that the committee seem to have held that there was an onus on the pursuer, I do not accept this. As explained by Ms Allan, it is if objectors have raised points that the pursuer requires to address these points.

[103] The pursuer also complained in submissions that it was never put to him by any of the committee members that he was operating his business illegally. However, this was not a determination the committee made and so I am not satisfied that this was a good ground of complaint.

[104] In all the circumstances, and taking account of all of the material before them, I am satisfied that the committee were entitled to reach the conclusions they did.

### **Effect**

[105] For the reasons I have given, I shall sustain the pleas-in-law for the defenders, repel the plea-in-law for the pursuer and refuse the appeal.

[106] Even if the pursuer had been successful, I would not have been satisfied that there were such compelling reasons that it would have been appropriate to remove from the licensing authority responsibility for taking such a decision and for the court simply to have granted the licence applied for by the pursuer. The defenders submitted that the sheriff should only take the step of reversing a decision and determining an application him or herself in the three situations set out at paragraph [80] above. No issue was taken with these propositions by the pursuer. I agreed with the defender that none of these situations applied. I would add that, although the court has had the benefit of hearing the pursuer and has had the benefit of seeing the written objections (to the extent that they had been lodged as productions for the appeal), I was not addressed in detail on the written objections. I had also not heard from the objectors from whom the committee heard.

[107] Parties were agreed that expenses should follow success.