OUTER HOUSE, COURT OF SESSION

[2023] CSOH 35

P1081/22

OPINION OF LORD BRAID

In the Petition

of

(FIRST) PETER RALPH AVERBUCH; (SECOND) DICKINS EDINBURGH LIMITED; (THIRD) RESERVE TRAVEL LIMITED; (FOURTH) EDINBURGH SC (SELF CATERING) LIMITED

Petitioners

for

Judicial review of the City of Edinburgh Council Short Term Lets Licensing Policy

Petitioners: Ross KC, R Anderson; Gilson Gray LLP
Respondent: Mure KC, Blair; City of Edinburgh Council

8 June 2023

Glossary of terms

The 1982 Act	Civic Government (Scotland) Act 1982
The 1997 Act	Town and Country Planning (Scotland) Act 1997
The 2022 Licensing Order	Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022 (SSI 2022/32)
The 2023 Order	Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Amendment Order 2023 (SSI 2023/73)
The 2021 Control Order	Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021 (SSI 2021/154) (as amended by SSI 2022/33)
The 2009 Regulations	Provision of Services Regulations 2009

Short-term let (STL)	(As defined more fully in article 3 of the 2022 Licensing Order) – the use of residential accommodation provided by a host in the course of business to a guest for commercial consideration, other than a tenancy: such as, for example, Airbnb lets.
Home letting[1]	An STL consisting of the entering into of an agreement for the use, while the host is absent, of accommodation which is, or is part of, the host's only or principal home.
Home sharing	An STL consisting of the entering into of an agreement for the use, while the host is present, of accommodation which is, or is part of, the host's only or principal home.
Secondary letting	An STL consisting of the entering into of an agreement for the use of accommodation which is not, or is not part of, the licence-holder's only or principal home.
The respondent	City of Edinburgh Council.
BRIA	Business and Regulatory Impact Assessment.
Tenement	In this opinion, for convenience, a tenement or a shared-main door property.

Introduction

[1] This petition arises out of the growth in recent years, specifically in Edinburgh, of short-term lets and government's desire to regulate that activity. The first petitioner owns (or co-owns) three properties in Edinburgh which are let on STLs, two of which are in tenements. The second and third petitioners each manage a portfolio of properties let on STLs, some or the majority of which are in tenements. The fourth petitioner is a property marketing company which markets properties for STLs, most of which are in tenements. All of the lettings entered into by the petitioners or their clients are secondary lettings. The petitioners challenge the legality of the respondent's STL licensing policy, which it adopted on 29 September 2022. The particular aspects of the policy under challenge are, first, what the policy describes as a rebuttable presumption against granting licences for secondary

[1] This, and the terms "home sharing" and "secondary letting" all as defined by paragraph 19A of Schedule 1 of the 1982 Act, introduced by paragraph 17 of Schedule 2 of the 2022 Order.

letting in tenements; second, where such a licence is granted, the restriction of the period of licence to one year (in contrast to the three year period for home letting and home sharing); third, the absence of any regime for temporary licences for secondary letting, irrespective of the nature of the property; and fourth, a requirement in respect of all secondary lets (whether in a tenement or not) that bedrooms, living rooms and hallways must be covered by a suitable floor covering such as a carpet or similar.

[2] In brief, the petitioners seek the following decrees of declarator in respect of the policy: that it is irrational and oppressive at common law; that it is in breach of regulations 15, 16 and 18 of the 2009 Regulations; and that it amounts to an unlawful and disproportionate interference with the interests of the second to fourth petitioners under article 1 of the First Protocol of the ECHR. They also seek reduction of the policy.

[3] The respondent opposes the petition. Its position, in brief, is that the policy is a rational and proportionate response to the issues posed by short-term letting in Edinburgh.

[4] Both parties lodged affidavits, along with a welter of information, for the substantive hearing. Thus, for the petitioners, I had the benefit of affidavits from Peter Averbuch (the first petitioner); Karin Brook, a director of the second petitioner; Craig Douglas, the sole director and majority shareholder of the third petitioner; Glen Ford, a director and co-owner of the fourth petitioner; Kevin MacDonald, chartered accountant (who gave evidence about the goodwill in the second petitioner); and from sundry clients and guests of the fourth petitioner, singing its praises. I also had the benefit of affidavits for the respondent, from David Given, the respondent's Chief Planning Officer and Head of Building Standards; and Andrew Mitchell, its Head of Regulatory Service. It is not suggested that any of these witnesses is anything other than credible and reliable. There are too many productions to

list in full but, apart from the policy itself, particular mention was made of the documents showing the responses to the respondent's two rounds of consultation on short-term letting; the Scottish Government's dual BRIA on the 2021 Control Order and the 2022 Licensing Order; the Policy Notes for each of those Orders; the Report to the respondent's Regulatory Committee for its meeting of 29 September 2022 (at which the policy was approved); the Scottish Government's guidance on short-term letting and a blog written on behalf of the second petitioner entitled "12,000 Airbnbs in Edinburgh – Fact or Fiction?". Accounts for the second to fourth petitioners, showing the value to them of short-term letting, were also lodged.

Background

[5] It is not disputed that the STL market has grown rapidly in recent years, nor that the growth has attracted much public interest and comment, nor indeed that some regulation by licensing is appropriate. Where the parties do take issue is in relation to the size of the secondary letting market in Edinburgh, and the extent to which it has a negative impact on the city and its residents. On the first of these issues, Mr Mitchell's initial evidence was that, before the pandemic, the STL market in Edinburgh was estimated as being anywhere from 5,000 to 16,000, with Airbnb claiming 13,200 properties on its books alone in 2019. In his supplementary affidavit, he tempered this somewhat by referring to the most recent figure from Airbnb of 8,000 hosts advertising STLs in Edinburgh. Mr Given provided a figure of 8,739 entire property STLs listed on Airbnb in March 2019. In his supplementary affidavit, he accepts that there has been a drop since then, but states that even a figure of over 4000 would be a considerable number, which is true. The second petitioner's blog,

referred to above, suggests that the true figure is considerably lower, perhaps as low as 1,781 entire homes available for at least 140 days per year, as at June 2022. Various points can be made arising out of all this. The Airbnb figure (whatever it is) merely forms part of the total number: not all hosts use Airbnb. On the other hand, some Airbnb hosts also use other platforms to advertise their property. As Mr Mitchell points out, the absence of a licensing regime (until now) means that no truly accurate figure can be given. However, as the petitioners expressly acknowledge, there is a sufficient number of secondary lets in Edinburgh to justify regulation, which is necessary to promote quality and avoid bad practice.

[6] Turning to the second contentious issue, the extent of any negative impact caused by STLs, senior counsel for the respondents pointed to a number of documents which discussed the concerns raised in response to the various consultation exercises carried out, and to the affidavit evidence given by Mr Mitchell and Mr Given. For example, he referred to the Analysis of Reponses to the consultation exercise carried out by the Scottish Government in 2019, which showed that those responding to the consultation tended to favour treating secondary letting differently from other forms of short-term letting (paragraph 32); that Edinburgh was identified as an area which had problems associated with short-term letting (paragraph 47); and that damaging community effects (such as the loss of communities) were identified, as well as problems with anti-social behaviour including loud noise and noise at anti-social hours, littering, a lack of maintenance by STL landlords, inability to contact absentee landlords, increase in wear and tear due to increased footfall caused by STL guests, and security issues (paragraphs 67 and 68). At paragraph 69, another common theme was noted to be an adverse effect on property pricing. The dual BRIA explained the

research which had been carried out by the Scottish Government: 197 residents had been surveyed across different areas. In Edinburgh one of the most prevalent concerns raised by "many resident and community participants" was around the daily disruption caused (paragraph 51), including noise at antisocial hours by a constant stream of visitors. At paragraph 52, mention was made of the concerns raised about the impact that STLs have on the character of areas and sustainability of communities.

[7] The respondent also carried out its own research into how best to regulate STLs, including a two-stage consultation exercise, all as described by Mr Mitchell in sections 5, 6, 7 and 8 of his affidavit. The responses to the consultation informed the approach the respondent took to devising its policy. A full description of the consultations and the responses to them is given in the report to the regulatory committee meeting of 29 September 2022. The headline points arising from the consultation are that there were 1903 responses to the first round and 1039 to the second round; 59% (1,126 in number) of those who answered the question thought that tenements were not suitable as short-term lets (it is instructive to compare this with the figures for other types of property as follows: detached properties - 406; semi-detached properties - 852; bungalows – 474; terraced properties – 941; new builds – 865). One of the questions asked was whether temporary licences should be introduced: 46.11% answered yes, and 53% no. The type of issue which residents were concerned about included: security, noise, no community attachment and the erosion of the availability of affordable housing. One comment noted was: "Any property type can be suitable if properly managed."

[8] As regards complaints investigated by the respondent, this was spoken to by Mr Mitchell and Mr Given. No reliable statistics are available, and Mr Mitchell said that, in

any event, in the absence of regulatory powers, the respondent had not previously encouraged complaints. Most complaints were about secondary letting in a tenemental or "other shared residential space". Mr Given's evidence was that the number of breaches of planning control investigated was 229 in 2019, dropping to 164 in 2022.

[9] The affidavit evidence given by the petitioners paints a somewhat different picture (or, given the relatively low number of complaints spoken to by Mr Given, perhaps the same picture viewed from a different perspective). They speak of few neighbour complaints of anti-social behaviour in tenement properties managed by them, and of those complaints which have been made, being addressed promptly. Their properties are generally well maintained. Most guests arrive during the day and are personally greeted (avoiding the need to use key safes, one source of complaint). Not all short term lets are to tourists: some are to longer-term guests, such as corporate guests working in Edinburgh or families needing temporary accommodation for a few months.

[10] It would be wrong to suggest that short-term letting has only negative impacts on Edinburgh. As the BRIA acknowledges in section G, the tourism sector makes a significant contribution to the Scottish economy, and short-term letting makes an important contribution, for example, by offering more affordable accommodation.

[11] What to take from all of this? As already acknowledged, there is no doubt that the issues identified in the various consultation exercises carried out justify regulatory intervention, and the introduction of a licensing scheme. At the same time, as the evidence as a whole demonstrates, the problems, even those which have arisen in tenements, are by no means universal and many, indeed most, of them are capable of being addressed by the imposition of conditions. It is also noteworthy that not all of the concerns which were raised

related to tenements: as the figures quoted above show, at least some respondents to the consultation thought that other types of property were also unsuitable. It may be observed that broadly speaking two types of concern emerged from the consultations; those which related to the manner in which individual properties were being utilised, resulting in, for example, anti-social behaviour and poor maintenance; and broader concerns relating to the wider impact on communities of a preponderance of STLs in a particular area, such as a fall in property prices or a loss of communities.

[12] Following the consultation, the government decided to tackle regulation in two ways, the one in parallel with the other. This it did by amending the planning legislation, through the 2021 Control Order; and, at around the same time, by amending the 1982 Act, by virtue of the 2022 Licensing Order. There is no room for doubt that these legislative changes were intended to complement each other, each to address different aspects of the issues perceived to arise from short-term lets. The policy notes for both orders, insofar as material, are in identical terms and both contain the following paragraphs (emphasis added):

> "4. The Scottish Government's purpose in the regulation of short-term lets is to ensure that local authorities have appropriate regulatory powers to balance the needs and concerns of their communities with wider economic and tourism interests.
> 5. The Licensing Order establishes a licensing scheme **to ensure short-term lets are safe and address issues faced by neighbours**; and to facilitate local authorities in knowing and understanding what is happening in their area as well as to assist in handling complaints effectively.
> 6. The Licensing Order is complemented by the Control Area Regulations [ie the 2021 Order] which makes provision for local authorities to designate control areas. The purpose of control areas is to help manage high concentrations of secondary letting (where it affects the availability of residential housing or the character of a neighbourhood); **to restrict or prevent short-term lets in places or types of building where it is not appropriate**; and to help local authorities ensure that homes are used to best effect in their areas."

[13] In November 2021, the Government also issued a BRIA covering both the planning and licensing aspects of short-term lets (the dual BRIA). The dual BRIA stated at paragraph 39 that the primary motivation for introducing this legislation is "**to enhance guest and neighbour safety**" (emphasis in original), with parallels being drawn with the Scottish landlord register for private tenancies and the licensing for Houses in Multiple Occupation; at paragraph 41, that "The primary concern stemming from a lack of regulation is that people may unwittingly stay in accommodation that is unsafe"; at paragraph 42, that "It may even be possible that a licensing scheme could boost overall demand for STLs by providing consumers with increased confidence in the functioning of the STL market."; and at paragraph 57, that the powers to be given to local authorities were twofold: the legislation sought to address the issues by:

> "… giving local authorities discretionary powers through: the Licensing Order to ensure that short-term lets are safe and to minimise nuisance for neighbours and communities; and through the Control Area Regulations to designate parts of their local authority as control areas in which concentrations of short-term lets and loss of amenity can be addressed."

The BRIA does not convey any sense that the introduction of a licensing regime was intended, or likely, to cut off a significant portion of the STL market by preventing tenement properties being used for short-term letting.

Legislative framework

[14] The effect of the changes introduced by the two Orders is that short-term letting is now governed by two legislative regimes. It is subject to planning controls under the 1997 Act, as amended, and it is also an activity which falls to be licensed by local authorities under the 1982 Act, as amended. I will look at each regime in turn.

Planning

[15] The 1997 Act provides that:

- planning permission is required for development of land: section 28;
- the making of any material change in the use of any buildings is development: section 26;
- carrying out development without the required planning permission or failing to comply with any condition or limitation subject to which planning permission has been granted constitutes a breach of planning control: section 123(1)(a) and (b);
- the issue of an enforcement notice or the service of a breach of condition notice constitutes taking enforcement action: section 123(2);
- a planning authority may designate all or part of its area as a short-term let control area: section 26B(1).

Specifically in relation to STLs:

- in an STL Control Area, the use of a dwelling house for the purpose of providing short-term lets is deemed to involve a material change of use of the dwelling house: section 26B(2).

[16] Notwithstanding the foregoing, planning permission is not always required. That is because:

- no enforcement action may be taken at the end of the period of 10 years commencing with the breach: 1997 Act, section 124(3);

- it may be possible to obtain a certificate of lawfulness of existing use or development: 1997 Act, section 150;
- the lawfulness of any use, operations or other matter for which a certificate is in force under section 150 shall be conclusively presumed: 1997 Act, section 150(6).

One difference between the grant of planning permission and the issue of a certificate of lawfulness of use is that where the latter occurs, the planning authority does not have the ability to attach any conditions to the use of the land.

[17] In June 2021 the Scottish Government published draft planning guidance: "Short term lets: planning guidance for hosts and operators". The website page on which it is published states: "This guidance is now out of date. A new version will be available in March 2022." As of May 2023, there is no new guidance. That observation aside, the guidance contains detailed advice for hosts and operators as to when planning permission will be required, and what steps must be taken. It repeats the policy objectives set out in the policy notes to the 2021 and 2022 Orders.

[18] Utilising the procedure set out in the 2021 Control Regulations, the respondent designated the whole of the City of Edinburgh as an STL Control Area with effect from 5 September 2022, by virtue of a Notice of Designation dated 5 August 2022. In terms of that Notice, the use of an entire dwelling that is not a principal home as a short term let (that is, any secondary letting) is, from the effective date, a material change of use requiring planning permission (or a certificate of lawfulness of use).

[19] It is important to appreciate the extent to which the designation of Edinburgh as an STL control area will likely impact upon the use of property for STLs. As the respondent's proposed guidance to business states, it is unlikely that planning permission will be

supported in an area which is wholly residential, nor will it generally be supported in a street "which has a quiet nature" or which has low ambient noise. The guidance also observes that once planning permission is granted, the respondent cannot control (through planning) how it is used, for example by restricting numbers of occupants, or by setting limits on how a property is let (the unspecified implication being that those are matters to be regulated, if at all, by licensing).

Licensing

[20] The STL licensing regime is contained in the 2022 Licensing Order which was made under sections 3A, 44(1)(b), 44(2)(a), (b) and (d) and 136 of the 1982 Act. It is not necessary to refer to any of these provisions in any detail. The 2022 Order (which itself has been amended by the 2023 Order) amends the provisions of Schedule 1 to the 1982 Act as they apply to STL licences. The effect of the 2022 Order is that a short-term let on or after 1 October 2022 is now an activity for which a licence is required under part 1 of, and Schedule 1 to, the 1982 Act. The following features of licences granted under that Act may be noted:

- Scottish Ministers may prescribe mandatory conditions: section 3A;
- a licensing authority may determine conditions to which licences granted by them are to be subject, known as "standard conditions": section 3B;
- in granting a licence, a licensing authority may disapply or vary any standard conditions, or impose additional conditions: Schedule 1, paragraph 5(1A);
- it is an offence to do anything for which a licence is required without having a licence, or to breach a condition attached to a licence: section 7;

- a licensing authority is obliged to refuse to grant a licence where the activity in question consists of the use of premises and, in the opinion of the authority, the premises are not suitable for the conduct of the activity having regard to (*inter alia*) the location, character or condition of the building, or the possibility of undue public nuisance: Schedule 1, paragraph 5(3)(c)(i) and (iv);
- an authority is also obliged to refuse to grant a licence where the applicant would not be able to secure compliance with the mandatory conditions: Schedule 1, paragraph 5(3)(ca);
- a licence is normally granted for a period of 3 years, but may be for a shorter period, or, in the case of a short-term letting licence, a longer one: Schedule 1, paragraph 8(2);
- a licence may be varied, suspended or revoked: Schedule 1, paragraphs 10 and 11;
- where a licence has been refused, an applicant may generally not reapply for a further year: Schedule 1, paragraph 6;
- a licensing authority may grant a temporary licence for up to 6 weeks (or longer if a full licence is granted: Schedule 1, paragraph 7;
- a licensing authority may grant a temporary exemption from the requirement to obtain an STL during a specified period, not exceeding 6 weeks in any 12 month period.

[21] In March 2022, the Scottish Government published guidance: "Short Term Lets in Scotland Licensing Scheme Part 1 Guidance for Hosts and Operators". It repeats the mantra in the policy notes that the purpose of the licensing scheme is to ensure basic safety

standards are in place across all short-term lets in Scotland, while also providing discretionary powers to licensing authorities to address the needs and concerns of local communities: It states that "improved visitor experience and confidence will benefit tourism and the economy".

The relationship between planning and licensing

[22] As can be seen from the above description of the two regimes, licensing and planning have different functions. Senior counsel for the petitioners submitted that planning regulated the development of land, whereas licensing ought to be concerned with the licensee, activities on the land and safety. Senior counsel for the respondent took a somewhat more expansive approach to the differences, pointing out that planning permission runs with the land, and no planning conditions can be imposed which are intended to meet the ends of a local authority's separate functions such as licensing or housing. Planning permission lasts indefinitely (generally) whereas a licence is granted for a specific period. The nature and extent of a proposed activity is a licensing concern. Licensing is a much more flexible tool than planning to manage how land is used for an activity. Counsel illustrated this by pointing to paragraph 5(3) of Schedule 1 to the 1982 Act setting out the grounds on which a licence may be refused, and to a licensing authority's entitlement to attach such conditions to an STL licence as it thought fit, in terms of Schedule 1, paragraph 5(1A) and (2).

[23] It is worth noting at this stage that one of the grounds for refusal of an STL licence is that the applicant would not be able to secure compliance with the mandatory licence conditions (Schedule 1, paragraph 5(3)(ca)(i)). These include, where the premises are in a

short-term let control area, that an application has been made for planning permission and has not been determined, or planning permission has not been granted: 2022 Order, article 6 and Schedule 3, paragraph 13. In other words where an applicant does not already hold planning permission, the licensing authority, before considering the application, can insist that planning permission be applied for.

[24] A central issue in this petition is the extent to which the respondent, as licensing authority, is entitled to have regard to amenity issues (commonly, the province of planning) in formulating its policy. The relationship between planning and other statutory regimes was discussed by Lord Reed in *Di Ciacca* v *Scottish Ministers* 2003 SLT 1031, paragraphs 32-46. The following principles emerge. The relationship between planning and another statutory regime such as licensing may be difficult to determine: areas of jurisdiction may (in rare circumstances) be mutually exclusive but more commonly the two sets of powers complement each other: paragraph 32. The relationship in any particular case will depend upon the specific circumstances: paragraph 34. Lord Reed observed that the objectives of two regimes, and the policies pursued, may be different. While the particular matter being considered in that case was whether the liquor licensing legislation had restricted the powers of the planning authority (Lord Reed concluding that it had not), it equally follows, as a matter of generality, that a decision taken by a planning authority need not restrict a licensing authority in the manner which it chooses to exercise its discretion in any particular case. However, in paragraph 46, Lord Reed observed that while a planning authority could not grant planning permission where it had unresolved planning concerns, the existence of a particular regime may, in particular circumstances, resolve the concerns of the planning authority, and such circumstances will exist where the other regime can

reasonably be relied upon to address the remaining concerns. An example of such a case was *Gateshead Metropolitan Borough Council* v *Secretary of State for the Environment* [1994] 1 BLR 85. Again there is no reason in principle why the converse should not apply: in other words, that a licensing authority may leave certain legitimate concerns which it might otherwise have, to the planning authority.

[25] A number of other cases were cited by counsel, underscoring the distinction between licensing and planning, and illustrating the principle that a decision by one cannot fetter the discretion to be exercised by the other; for example, *J E Sheeran (Amusement Arcades) Limited* v *Hamilton District Council* 1986 SLT 289, where it was said that a licensing body discharging a different statutory function for a different purpose was perfectly entitled to reach a different decision on a particular matter from that reached in a planning appeal.

[26] With these principles in mind, I now turn to consider the relationship between planning, and the licensing of STLs under the 1982 Act. The first and obvious point is that already made, which is that the two governing pieces of legislation were both amended at around the same time with the specific intention that the two regimes should complement each other, as the policy notes to both orders, the dual BRIA and subsequent guidance all make plain. As counsel for the petitioners submitted, there is a design: the two schemes are, and always were, intended to be integrated. The legislative intention to create an integrated scheme can also be seen from the legislation itself. The 2022 Order contains cross-references to the planning regime; in particular, paragraphs 7(3) to (7) of Schedule 1 regulate the position where an applicant who is a host prior to 1 October 2022 may, in the opinion of the licensing authority, be in breach of planning control by using premises as an STL. In such a case the local authority may notify the applicant that it will suspend consideration of the

application for a licence for 3 months and require the applicant to submit an application for planning permission or for a certificate of lawfulness of use. Separately, one of the reasons a local authority can give for refusing a licence is that the applicant would be unable to comply with the mandatory conditions, one of which is that it must hold planning consent (or presumably, a certificate of lawfulness). In other words, the legislative intention is that planning permission should be applied for first, and if it is not (or is refused) then a licence cannot be granted.

[27] I take from the foregoing that in relation to the regulation of STLs, and in particular secondary lets, in Edinburgh, the question of whether there should be secondary lets in a particular area, or in a particular type of building, is one for the planning authority. Although the licensing authority need not consider an application at all if planning permission has not been applied for, and may refuse an application if there is no planning permission, once it *has* been established, by planning, that a particular property is suitable for STL (including secondary letting) the function of the licensing authority is (as the policy notes say) to ensure that STLs are safe for visitors, and to address issues raised by neighbours. Indeed, the latter function presupposes that there are neighbours whose issues fall to be addressed, in other words, that there is an STL in the first place.

[28] It follows from all of this, of course, that not only is it not oppressive and irrational for a local authority to have separate, but complementary, planning and licensing regimes (and to charge a fee for each), but such an approach is envisaged by the legislation.

The respondent's STL licensing policy

The law

[29] Before considering the policy itself, I will set out the principles surrounding a licensing authority's entitlement to have, and to follow, a policy. There is no dispute that the respondent is entitled to have a policy. A licensing body is entitled to lay down a general policy which it follows in coming to individual decisions: *Sagnata Investments Limited* v *Norwich Corporation* [1971] 2 QB 614 at 626 G-H; *Calderwood* v *Renfrewshire Council* 2004 SC 691.

[30] The purpose of a policy is to inform the public of the approach which will be followed unless there is good reason to depart from it. It is intended to guide both the decision maker, and applicants, and to secure consistency: *Tesco Stores Limited* v *Dundee City Council* 2012 UKSC 13, per Lord Reed at paragraph 18. The purpose is also to enable informed decisions to be taken: *R (Lumba)* v *SSHD* [2011] UKSC 12.

[31] A policy may be legitimate even where it is so precise it could be called a rule: *Sneddon* v *Renfrewshire Council* 2009 SC 539. Where there is a policy, its meaning is to be determined objectively in occurrence with the language used: *Tesco Stores Limited*, above. A policy may allow for exceptions in "exceptional circumstances" and leave those circumstances undefined: *R* v *North West Lancashire Health Authority*, *ex parte A* [2000] 1 WLR 977, per Auld L.J at 911, citing in *Re Findlay* [1985] AC 318, Lord Scarman at 335-336. However, if a policy errs in its treatment of the ordinary position a provision for exceptional circumstances will not save it: *North West Lancashire Health Authority*, Auld L.J at 992 (in that case the court, in quashing a policy, had regard to evidence which showed that the policy was at odds with medical opinion which gave rise to it).

[32] Exceptions to a policy may be seen as destructive of that policy: "…even a few or perhaps one, departure might be seen as destroying the policy itself" – *Cinderella's Rockafella's Limited* v *Glasgow District Licensing Board* 1994 SCLR 591, Lord Prosser at 599. That said, the law recognises that the concept of a policy is that it points in a particular direction to which there can be exceptions. Thus in *Sneddon*, above, the court observed, at paragraph 49, that the licensing authority in that case had been prepared to consider whether there was something exceptional in the applicant's case which ought to lead to his being excepted from the policy.

[33] Having a policy in place does not imply pre-determination of an application, merely a pre-disposition to what the policy supports. A policy pre-disposition is normal and unobjectionable. There is a practical onus on an applicant to show why the application should be granted as an exception to policy: *Glasgow City Council* v *Bimendi* 2016 SLT 1063 at [28].

[34] Finally, while a policy may set out normal practice, for example (in the context of immigration) that a person will normally be detained in certain prescribed circumstances - which serves as a guide both to the decision maker and to the person in respect of whom the decision is to be taken as to what may normally be expected - the policy need not and usually does not say anything about the burden of proof; for it to do so, by referring to a presumption (rebuttable or otherwise), is to confuse the distinction between normal practice, and a legal presumption which may arise in legal proceedings: *R (Lumba)*, above, Lord Dyson at [42].

The terms of the policy

[35] The policy was agreed on 29 September 2022, following the two periods of public consultation referred to earlier. The policy states, at paragraph 1.3, that it provides information on certain areas including, relevant to this petition, licence duration and renewal; temporary licences; and additional conditions. Paragraph 1.4 states that the respondent will have regard to the terms of its policy when determining applications. Paragraph 1.5 states that the key aims of licensing are the preservation of public safety and order, and the prevention of crime; and that a specific licensing scheme for STLs allows the respondent to exercise appropriate control and regulation to ensure any STL premises licensed meet the requisite safety standard.

[36] Paragraph 4.1 contains the time periods for which an STL licence will be granted: one year for secondary letting, and three years for all other forms of STL. Paragraph 4.2 makes clear that the policy covers not only applications for grant of a licence but also applications for variation or renewal. It also stipulates that in applications for a secondary letting licence, proof of planning permission (or that it is not required) must be provided with the application. That planning permission is required for secondary letting is reinforced by paragraphs 4.10 to 4.12, which all appear under the heading "Links With Planning".

[37] Paragraphs 4.13-4.15 lie at the heart of the petitioners' objections to the policy and I will set them out in full:

> "4.13 The Council has consistently called for the regulation of the STL sector through the introduction of a licensing scheme...The Council believes that tenemental accommodation, or those with a shared main door, are unsuitable for secondary STL due to their character, location and risk of creating undue nuisance. The Council also has concerns in relation to the risk that anti-social behaviour may be exacerbated

within tenement or shared main door accommodation given the close proximity of other residential accommodation and communal areas.

4.14 For the purposes of this policy, secondary letting in tenement or shared main door accommodation is considered as unsuitable and there will be a rebuttable presumption, as defined in paragraph 2.9 of this policy, against the grant of a licence in such circumstances.

4.15 The Council may take certain factors into account when determining whether an application for secondary letting in tenement or shared main door accommodation be granted as an exception to its policy. Factors which may be considered include, but are not limited to the evidence of the following:

- Neighbours consent/support
- Length of time previously operated
- Frequency of bookings or intensity of use of accommodation
- System to prevent neighbour concerns
- Low level of complaints"

[38] The definition of "rebuttable presumption" in paragraph2.9 is that:

"where an application falls outside of policy or is otherwise inconsistent with it …an applicant understands that this in effect places a practical onus on them to show why their application should still be granted notwithstanding the policy."

[39] At paragraphs 4.17 to 4.23 the policy deals with temporary licences. 4.20 states that it is considered unsuitable for temporary licences to be issued to accommodation used for secondary letting. There is a further rebuttable presumption against the grant of temporary licences in such circumstances. No guidance is given as to the circumstances in which the presumption might be rebutted. Notwithstanding the presumption against temporary licences for secondary letting, the policy provides, at paragraphs 4.24 to 4.30, for the grant of temporary exemptions (for a single continuous period of up to 6 weeks) to all types of STL, including secondary letting, in certain circumstances including the Festival and Fringe Festival, Christmas and Hogmanay[2].

[2] The requirement that the period must be continuous is curious, and not mandated by the legislation. It means, for example, that the same host could not offer an STL to visitors to the city for both the Festival and Christmas/Hogmanay; and whether six weeks is required for either event is debatable. However, the policy is not challenged on this ground.

[40] Paragraph 4.37 provides that the respondent will have 12 months to determine an application (albeit I was told it has set itself a target time of 72 days). The mandatory conditions are set out in appendix 1, and the additional conditions in appendix 2. The latter include STL 9 which provides, for secondary lets only, that the licence holder must ensure that the bedrooms, living room and hallway in the premises are covered by a suitable floor covering such as a carpet or similar floor covering.

[41] The fees for secondary letting for 2022/23 are set out in a table. The fee varies according to the maximum occupancy. It is sufficient to note that for occupancy up to three persons, the fee is £653 for either a new licence or a renewal, and for four to five persons, it is £1089. (In passing, I observe that for other forms of STL, the fee is £120 per occupant for a new one year licence and £360 for a three year renewal).

[42] It is convenient at this point to turn to Mr Mitchell's evidence about the policy. In relation to the rebuttable presumption, he states at paragraph 12.4 of his affidavit that an applicant for "any" type of licence who can demonstrate that the relevant activity is well run and causes or is likely to cause no issues of safety, nuisance or amenity would have a reasonable prospect of being granted a licence. He repeats this at paragraph 12.6, where he states:

> "I expect that STL licences will be granted for secondary letting in some tenements or in accommodation with a shared main door…I would expect any well run businesses who can show good management arrangements and no history of a problem to have reasonable prospects of obtaining a STL licence…My view applies to all types of STL, be it home sharing, home letting and secondary letting even in tenements or shared main door accommodation."

[43] That evidence is consistent with the position adopted by the respondent in its answers to the petition, namely, that well run businesses are likely to satisfy the requirements of the STL licensing scheme. Further, on the evidence, reasons for departing

from the policy need not be exceptional. It is instructive to note that in the passage quoted above, Mr Mitchell draws no distinction between secondary lets and other types of STL, notwithstanding that the rebuttable presumption applies to one, yet not the other.

Challenges to the policy at common law

The rebuttable presumption

Submissions

[44] Senior counsel for the petitioners submitted that the rebuttable presumption amounted to no more than a statement of normal practice that it would normally refuse an STL licence for secondary letting in a tenement, which had been disavowed by Mr Mitchell in his evidence and for that matter in the answers to the petition. This was destructive of the policy: *cf North West Lancashire Health Authority* and *Cinderalla's Rockafella's*, above. Applicants were given no real guidance as to what they must do to overcome the presumption, and were unable to take informed decisions on the basis of the policy. Insofar as certain factors were listed in paragraph 15, it was unreasonable, irrational and oppressive to require an applicant who already had planning permission to produce yet further evidence to justify their application being granted.

[45] The petitioners' characterisation of the presumption appeared to be accepted by senior counsel for the respondent, who submitted that paragraph 4.14 simply set out a predisposition whilst at the same time explaining that it may be displaced. Applicants were assisted, first, by the reference in paragraph 4.15 to the sort of factor that might be relevant and, second, by being informed in the definition of rebuttable presumption that there was a practical onus on them to show why the application should still be granted. The case law

showed that it was permissible to have a policy which permitted of exceptions. "Exceptional" reasons for departing from a policy simply meant that there was a reason which justified exception from the policy. Mr Mitchell's evidence showed that there were likely to be exceptions for well run businesses such as those of the petitioners.

Decision in relation to the rebuttable presumption

[46] I prefer the submissions for the petitioners on this matter. While *R (Lumba)* appears to discourage any notion that a policy should contain any reference to presumptions, the fact that the respondent's licensing policy does contain such a reference is not necessarily fatal to it, albeit it is somewhat clumsily expressed (the reference to what an applicant understands seems unnecessarily cumbersome), since that is simply another way of stating what will normally happen. What *is* destructive of that part of the policy is that it is clear from both Mr Mitchell's evidence, and the respondent's answers, that refusal is not what will normally happen. (In this regard, Mr Mitchell appears to tacitly recognise that the reference in paragraph 4.13 of the policy to the respondent's belief that all tenemental accommodation is unsuitable for secondary STL letting is simply not supported by the consultation or research.) There must come a point when there are so many exceptions to a policy that it ceases to be a policy at all. In some cases, as Lord Prosser pointed out in *Cinderella's Rockafella's Limited*, above, a few or even one departure might be destructive of the policy; in other cases, more than a few might be required: it is impossible to stipulate a precise number. However, where, as here, there is an expectation that well-run businesses will be granted a licence, and there is no suggestion that, in running their businesses well, the petitioners are exceptional in some way, it must be anticipated that there will be more than a

few departures from the policy, so that the grant of a licence cannot be regarded as exceptional, as that term is normally understood. The rebuttable presumption will not in fact achieve consistency, nor will it assist applicants in knowing whether or not an application is likely to be granted.

[47] For that reason alone, that part of the policy is unlawful. However, even if it had truly been the respondent's position that the grant of an STL licence for secondary letting in a tenement would be granted only exceptionally, there is a still more fundamental objection to the policy, which is that, as discussed above, at paragraphs 26 and 27, it is not the function of the respondent's licensing authority to decide that a licence should not be granted because a property is of a particular type or is in a particular area. Given the complementary nature of the regulatory regime as a whole, those are decisions for the planning authority. If planning permission is granted, the primary function of the licensing authority is then to regulate how the STL property should be operated safely and in such a way as to address potential nuisance, rather than to determine whether the property is of a suitable type or in a suitable area. Indeed, that is recognised by the respondent' draft planning guidance. For the respondent to adopt a normal practice of not granting an STL licence for premises in a tenement, even where planning permission had been granted, is irrational and contrary to the purposes of the overall statutory scheme. It would be perverse and oppressive for the respondent, upon receipt of a licensing application, to require an applicant to obtain planning permission for a tenement property; and thereafter, planning permission having been obtained, to refuse the licence for no other reason than that the property was in a tenement. Putting that another way, if the planning authority has decided that a particular property or area is suitable for short-term letting, it is not for the licensing

authority to gainsay that on the basis of a blanket approach based upon the type of property, or the area in which it is situated; to take such an approach would be to go beyond the scope of the licensing regime in relation to STLs. None of this is to say that *in an individual case* the respondent is not entitled to have regard at all to the question of amenity, or to the location of the premises. Plainly in terms of the 1982 Act, and the case law cited above, it is. It may be, too, (without expressing a concluded view on the point) that the respondent is entitled to draw a distinction between cases where planning permission has been granted (and where amenity has been considered) and cases where there is simply a certificate of lawfulness of use, and consequently, no consideration of amenity at the planning stage; however the policy does not seek to draw such a distinction. See also *Leisure Inns (UK) Limited* v *Perth and Kinross District Licensing Board* 1991 SC 224, per LJC Ross at 233 -234, where Lord Justice Clerk Ross said that a licensing authority was entitled to consider amenity; but that, where it was plain that it had already been taken into account by the planning authority in granting planning permission, the licensing authority should be slow to find that any detrimental effect on amenity was to be apprehended. I take from this case that a licensing decision in a particular case to refuse a licence because amenity would be adversely affected is lawful, if there is material to justify it; but a general policy of refusing licences on that ground is not.

[48] The final criticism of the rebuttable presumption, which may simply be another way of expressing the point already made, is that nowhere does it require the respondent to take into account the grant of planning permission as a material consideration.

[49] For all of these reasons, I conclude that the provisions of paragraphs 4.13 to 4.15 are irrational, since they do not support the statutory purpose of the licensing regime. As such, they are unlawful.

Temporal limitation

Submissions

[50] Here the challenge is to the one year limit imposed in relation to secondary letting in contrast to the three year period for other forms of STL (and HMO's). The petitioners submit that this too is irrational and *Wednesbury* unreasonable, because:

a) it is an unfair and unjustified inequality of treatment between different properties.

b) application fees are non-refundable. The dual BRIA proceeded on the assumption that STL licences would be granted for three years. The fee for a secondary let STL licence is the same as for a three year licence.

c) it prevents service providers from accepting bookings more than one year in advance, which is particularly unfair for the respondent at 12 months to reach a final decision on the application from an existing operator.

d) it is not rationally connected to any aim of public safety.

[51] The respondent submits that one year licences are permitted by the 1982 Act: Schedule 1, paragraph 8. The respondent's policy is that new licences are not normally granted for more than one year. Secondary lettings in tenements will need more frequent inspections due to the need to ensure that the properties remain of a safe standard. The respondent intends to review the matter after 18 months to examine whether a longer period might be appropriate for renewals; where a one year licence is issued (the respondent having been satisfied that circumstances to overcome the rebuttable presumption had been

made out), a renewal would be most likely and there was no reason why operators could not take bookings more than one year in advance.

Decision in relation to the temporal restriction

[52] The reasons for the restriction to one year are set out at paragraph 4.24 of the report to the respondent's regulatory committee meeting of 29 September 2022. It states that secondary letting is likely to be more intensive, and the need to ensure that the properties are and remain of a safe standard justifies the need for more regular inspections and greater scrutiny, particularly important in the early stages of the licensing regime where the licensing authority has had no chance to check the compliance standards. A policy of restricting initial grants to a period of one year is said to be consistent with the existing policy where new licences are not normally granted for longer than one year. Mr Mitchell elaborates upon this at paragraphs 13.2 to 13.7 of his affidavit. He states that the respondent's approach to secondary letting is consistent with its approach in other licensing regimes where there might be anticipated to be problems, or safety issues, although the examples he cites, such as taxi licences, which are restricted to one year to tie in with MOT and inspection at point of renewal, or HMO licences where there is a history of complaints, do not seem to be entirely in point. However, he does confirm that the respondent intends to monitor and inspect secondary lettings more regularly than other types. He goes on to say that the respondent will keep the policy under review and may in the future review the policy by considering a longer period of licence for renewal.

[53] None of this entirely explains why the policy provides that the normal period of licence for home letting and home sharing will be three years, even for new licences granted

from inception of the new regime (although, as pointed out above, the fee Schedule appears to envisage that even those will be granted a one year licence initially, which is curious). In relation to HMO licences, where the current policy is to grant three year licences on renewal, the policy appears to be that new licences are granted for one year.

[54] Nonetheless, I have concluded that this part of the policy is not irrational. The petitioners' main objection is a claimed inability to take bookings more than one year in advance. However, on this issue I prefer the respondent's submissions, although that is, in part, because of the respondent's declared position at the hearing, that a licence once granted is likely to be renewed, other than on a material change of circumstances. If there is a material adverse change of circumstances, the respondent has the power to revoke or suspend a licence in any event, whatever its duration, and to that extent uncertainty is inherent in the system (as there must be in any activity which is licensed). Further, any uncertainty about the ability to honour future bookings more than a year in advance would always exist in the final year of a licence. To the extent that the petitioners face more uncertainty than they did before, that is merely a feature of the fact that short-term letting is now licensed, rather than something which flows from the respondent's policy. Recognising that the respondent is entitled to have regard to amenity issues in attaching conditions to a licence, and that planning permission is unlimited in duration, it is not irrational for the respondent to wish to scrutinise a secondary letting licence after a year. As for the respondent potentially taking a year to reach a final decision on an application, the length of the licence is immaterial. The reasons for distinguishing between secondary letting, and other forms of STL in relation to the duration of a licence are not irrational. The temporal restriction in the policy is, for these reasons, not unlawful at common law.

Temporary Licences

Submissions

[55] The petitioners submit that the absence in the policy of any indication of any factor which may be relevant to an application for a temporary licence for secondary letting, and the policy decision to have a rebuttable presumption that secondary letting should be excluded from the scope of temporary licences, is unintelligible, particularly where temporary exemptions may be granted. The respondent justifies the rebuttable presumption by reference to paragraph 7 of Schedule 1 to the 1982 Act, which disapplies the provisions of that Schedule relating to public notification, the opportunity for objections and the ability of the respondent to make inquiries beyond consulting police and fire services. Further, the respondent points to paragraph 7(6) of Schedule 1, whereby a temporary licence may last for longer than the usual six-week maximum where the holder also applies for a full licence. Mr Mitchell explains the rationale in his affidavit at 8.4.5 as being that the 1982 Act allows for the possibility of an operator seeking to continue operating on temporary licences, and that the absence of any statutory right to object could have the effect of allowing secondary lettings to operate without the public having the right to object "for many months or indeed at all." Insofar as the rebuttable presumption is concerned, Mr Mitchell does not go so far as he does in relation to full licences, but he does state, at paragraph 8.4.4, that similarly to the position for full licences, the policy allows for exceptions and that "again it will be for any applicant to demonstrate why this aspect of the policy should not apply to their particular application". Mr Mitchell also points out that the non-statutory guidance issued by the Scottish Government notes that licensing authorities need not issue temporary licences.

Decision in relation to temporary licences

[56] Dealing with Mr Mitchell's evidence first, his rationale is not entirely easy to follow. The 1982 Act states (Schedule 1, paragraph 7(6)) that a temporary licence is not capable of being renewed, so any fear of an operator applying for and obtaining serial licences, if that is what he is getting at, would appear to be unfounded. The further fear that an applicant may operate on a temporary licence for months with no right for the public to object at all also appears to be unfounded, since the temporary licence could last for more than six weeks only if the applicant had also applied for a full licence, which does entail a right for the public to object. Even a temporary licence would still require to be subject to the mandatory conditions, including the requirement to have planning permission, so by definition, the holder of a temporary licence would alrea1y hold planning permission.

[57] Insofar as the non-statutory guidance is concerned, it is true that it states, correctly, that a licensing authority may decide to grant temporary licences; in other words, it has a discretion in that regard and may lawfully decide not to do so. However the guidance goes on to say that the Government expects licensing authorities to develop and publish a policy setting out (among other things) the authority's criteria for issuing temporary licences. Had the respondent decided not to issue temporary licences at all, it could not have been faulted. The difficulty it faces is that it has decided that it will issue temporary licences for all forms of STL other than secondary letting, but the purported rationale for the distinction (an inability to object, and the prospect of a temporary licence lasting for months) applies equally to the forms of STL for which a temporary licence is available. That is irrational. To the extent that the respondent's concerns are founded on general concerns about

amenity, the observations made above in relation to full licences apply equally here: it is irrational, where planning permission has already been granted, and where the function of licensing is to address safety and neighbour concerns, to have a general policy that temporary licences will not be granted. Further, although Mr Mitchell does not say so in such definite terms as in relation to full licences, he does give the impression in his affidavit that notwithstanding the policy that temporary licences will not be granted, they often will be granted, rendering the policy essentially meaningless since no indication is given of the circumstances in which they might be granted, or what an applicant must demonstrate in order to obtain one.

[58] For these reasons, I have come to the view that the policy is also unlawful at common law insofar as it does not provide for the grant of temporary licences for secondary letting.

Floor coverings

[59] The point here is a short one. The petitioners submit that condition STL 9 is an irrational and arbitrary exercise of the respondent's discretion. Home sharing and letting, which may also give rise to noise, are not subject to that condition; whereas, conversely, the condition is not limited to tenements but applies indiscriminately across all types of accommodation. The condition is related to nuisance rather than to the policy aim of achieving safety standards, but is oppressive and disproportionate since there may be no noise issue to be remedied. The respondent submits that the condition is a reasonable response to residents' concerns about noise as expressed in complaints and at consultation. Applicants could request that the condition should not be applied. It was not so unreasonable a condition that no reasonable authority could impose it. Reference was made

to what was said to be similar conditions imposed by other authorities, although, as senior counsel for the petitioners pointed out, all of these applied a more discerning approach to the problem, seeking to identify properties where noise might be an issue, with the exception of Perth and Kinross, which has a similar approach to that of the respondent.

Decision in relation to floor coverings

[60] Mr Mitchell states in his affidavit that STL 9 is intended to reduce noise disturbance for neighbours, which he asserts is consistent with paragraph 5.24 of the Scottish Government's guidance. However, while noise reduction is a legitimate aim, the guidance also states that only conditions which are strictly necessary in the specific circumstances should be attached to a licence. The guidance further states that an authority should consider conditions to minimise noise impact "particularly" in relation to flatted, detached or semidetached dwellings (ie, not simply for tenements); thus it is clear that the noise it has in contemplation is not restricted to noise caused by clattering on wooden floors. Even a brief perusal of the policies adopted by other licensing authorities shows that the respondent has not properly applied its mind to this issue at all. By way of example, the floor-covering policies of Argyll & Bute Council, East Ayrshire Council, East Renfrewshire Council and West Dunbartonshire Council are all directed towards the impact of noise in a property below the licensed premises. Some of those local authorities also refer not just to carpeting but to suitable underlay. By contrast, the respondent has adopted a scattergun approach which is too broad, and a disproportionate means of addressing the issue which it is seeking to address. Further, on one view the policy is too vague as to what is meant by a suitable floor covering: for example, is underlay required (and if so, is it required even in a ground

floor property? *Cf* the other policies referred to). Quite simply, insufficient attention has been paid to the framing of STL 9. To the extent that the policy requires carpets for *all* secondary lets, including ground floor flats and detached houses, I consider that it is irrational and, to the extent that it could expose a licence holder to significant expense for no good reason, it is oppressive and does go beyond what is necessary to control noise.

Miscellaneous issues

[61] Before leaving the common law rationality arguments, I should deal with certain other points raised in the pleadings, and in the notes of argument.

The respondent's actions in formulating the policy

[62] Aside from the rationality of the policy itself, the petitioners aver that the respondent has acted oppressively and irrationally in the manner in which it has introduced its licensing policy. In particular, the petitioners complain that it is irrational to apply different policies to the same activity in inconsistent ways, and to introduce the licensing policy while the planning policy is still out to consultation and the combined effect of the two regimes is unknown. In this context, the petitioners complain about the need to repay repeat fees. This aspect of the case was not pressed in either the written or oral argument, but for the avoidance of doubt, and lest it be thought I have overlooked the point, I do not find that there is anything irrational or oppressive about the manner in which the respondent has acted. It should be evident from what I have already said that the respondent is not only entitled, but bound, to have two separate regimes, and I do not see anything irrational or

oppressive in its having introduced the licensing policy when it did, or in expecting applicants to pay two sets of fees.

The HMO regime

[63] Reference was made to the regime for licensing HMOs, which are generally accepted to be broadly analogous to STLs, at least insofar as they involve the letting of property, very often in a tenement, to unrelated persons. The HMO scheme was formerly regulated under the 1982 Act although is now regulated under housing regulation. While parallels can undoubtedly be drawn, there may be some validity in Mr Mitchell's point (echoed in the answers to the petition) that the difference between HMOs and STLs is that the use of the former is a residential use, whereas the latter is a commercial activity. That said, Mr Given, at paragraph 24 of his affidavit, suggests that use as an HMO may be classified as non-residential. Nonetheless I accept that there is a difference between the two activities, and whether it can properly be described as fundamental or not, it is sufficient to justify a different approach at least in relation to the duration of a licence. Accordingly, the treatment of STLs cannot be categorised as irrational simply on the ground that it differs from the treatment of HMOs, the more so since STLs are a newly licensed activity, and the respondent's approach of keeping it under review is a reasonable one.

Fee Structure

[64] The fee structure itself is not under challenge by the petitioners, inasmuch as the court is not being asked to reduce that. Rather the differing fees for HMOs and STLs were referred to in the context of the petitioners' argument that it was irrational to treat STLs in a

different manner from HMOs. Nonetheless, a comparison of the respective fee structures perhaps shows a lack of consistency. For HMOs, a one year licence for five people is £689 and a three year licence £1,089. The more occupants there are, the smaller the difference between a one year licence and a three year licence. For an STL for four or five people, the fee for a one year licence is £1,089 (that is, the same as for a three year HMO licence). No figure at all is given for a three year STL licence – Mr Mitchell states at 13.5 of his affidavit that this would be left to the committee to consider (which I would observe, in passing, does not exactly enable an applicant to make an informed decision as to what duration of licence to apply for). However, it is noteworthy that (unlike the position for HMOs) the fees for a three year licence for home sharing and home letting are precisely three times as much for a three year licence as for a one year licence (for five people, the annual figure would be £600). That all said, the respondent's entitlement to charge a fee derives from paragraph 15 of Schedule 1 to the 1982 Act, which lists various criteria to be taken into account in determining the fees to be charged. I do not have material from which I can conclude that the fees charged by the respondent are unreasonable, irrational or oppressive having regard to those criteria. (The decision to charge three times the annual fee for a three year licence, for other forms of STL, may be more difficult to justify, particularly standing the approach taken to HMOs, but that is not the challenge which is made.)

The Provision of Services Regulations 2009

[65] The 2009 Regulations implement Council Directive 2006/123/EC on services. The parties agree that the respondent's STL licensing regime, as contained in the 1982 Act as

amended, the 2022 Order and the respondent's STL licensing policy, constitutes an "authorisation scheme" for the purpose of the regulations.

[66] The regulations are retained EU law and the court must continue to have regard to the underlying Services Directive and to decisions of the Court of Justice for the purpose of interpreting them (European Union (Withdrawal) Act 2018 sections 1B(7), 2, and 6(7)). Any question as to the meaning or effect of the regulations is therefore to be decided, so far as they are relevant to it, in accordance with any retained case law and any retained general principles of EU law: s 2(3).

[67] The purpose of the Services Directive is found, *inter alia*, in recital 43: while maintaining the requirements on transparency and the updating of information relating to operators, it is:

> "to eliminate the delays, costs and dissuasive effects which arise…from unnecessary or excessively complex and burdensome procedures, the duplication of procedures,...the arbitrary use of powers by the competent authorities,…the limited duration of validity of authorisations granted and disproportionate fees and penalties."

[68] Turning to the regulations themselves, the affidavits lodged on behalf of the various petitioners establish that each of them is the provider of a service, defined in regulation 2 as any self-employed economic activity normally provided for remuneration: see *R (Gaskin)* v *Richmond upon Thames* [2019] PTSR 567 at [58]-[63], [71]-[72] per Hickinbottom LJ; cases C-724/18 and C-727/18 *Cali Apartments SCI* and *HX* v *Procureur General* ECLI:EU:C:2020:743, [2020] 1 CMLR 29.

[69] Regulation 14, which implements the terms of article 9 of the Directive, provides that a competent authority must not make access to a service activity or the exercise thereof subject to an authorisation scheme unless: (a) the scheme does not discriminate against the

provider in question; (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; and (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because inspection after commencement of the service activity would take place too late to be genuinely effective.

[70] Regulation 15, which implements the terms of article 10 of the Directive, provides, insofar as material:

> "15 - (1) An authorisation scheme provided for by a competent authority must be based on criteria which preclude the competent authority from exercising its power of assessment in an arbitrary manner.
>
> (2) The criteria must be -
> non-discriminatory,
> (a) justified by an overriding reason relating to the public interest,
> (b) proportionate to that public interest objective,
> (c) clear and unambiguous,
> (d) objective,
> (e) made public in advance, and
> (f) transparent and accessible."

[71] Regulation 16, which implements the terms of article 11, provides, insofar as material:

> "16 – (1) An authorisation granted to the provider of a service by a competent authority under an authorisation scheme must be for an indefinite period, except where –
> (a) the authorisation –
> (i) is automatically renewed, or
> (ii) is subject only to the continued fulfilment of requirements,
> (b)…
> (c) a limited authorisation period can be justified by an overriding reason relating to the public interest."

[72] Regulation 18, which implements the terms of article 13, provides, insofar as material:

> "18 – (1) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must –

(a) be clear,
(b) be made public in advance, and
(c) secure that applications for authorisation are dealt with objectively and impartially.

(2) Authorisation procedures and formalities provided for a by competent authority under an authorisation scheme must not –
(a) be dissuasive, or
(b) unduly complicate or delay the provision of the service."

[73] The requirements of clarity and non-ambiguity were considered in *Cali Apartments*, above, the court holding that there must be no doubt as to the scope of the conditions and obligations imposed by local authorities, so that they could not apply a concept within the scheme arbitrarily: paragraph 99. The scheme must not go beyond what is necessary to achieve its objective: paragraph 86.

Submissions on the regulations

Petitioners

[74] The petitioners' position is that the respondent's policy contravenes the regulations insofar as it: (i) provides for a rebuttable presumption against the granting of a secondary letting licence; (ii) restricts the duration of a secondary licence to a period of one year; and (iii) does not provide for the granting of temporary licences for secondary letting. In summary, senior counsel for the petitioners argued that regulation 15 was contravened because the criteria are unclear, not justified by the objective of ensuring safety and (at least in relation to the duration of the licence) discriminatory. The respondent would not be able to discharge its functions in an objective and non-arbitrary manner. Regulation 16 was contravened because the policy is neither that licences will be granted for an indefinite period, nor that they will be automatically renewed subject only to the continued fulfilment of licensing requirements. Regulation 18 was contravened because the policy is dissuasive,

unduly complicated and thus "may well" delay provision of the service. In support of all of these arguments, counsel prayed in aid the petitioners' affidavit evidence, in particular: the first petitioner's affidavit, paragraphs 11 and 13, where he referred to the costs of applying for a licence annually, the impact upon his mortgage, the difficulty in planning ahead and the perceived inability to offer bookings more than 12 months ahead; the affidavit by Karin Brook for the second petitioner, paragraph 19, where she said that most of her clients viewed the application process both for planning and the STL licence itself to be so fraught with uncertainty that they were unwilling to fund the cost of the application process; the affidavit of Craig Douglas for the third petitioner, paragraphs 19 and 20, where he referred in general terms to the difficulties caused by the need to obtain both planning permission and an STL licence and said that a survey of the third petitioner's clients showed that 95% of them intended to sell their property if unable to short-term let it; and the affidavit of Glenn Ford for the fourth petitioner at paragraphs 16 and 17, where he complained about the higher cost of a licence in Edinburgh in comparison with other local authorities, exacerbated by the need to apply for a licence annually.

Respondent

[75] Senior counsel for the respondent submitted in response that the criteria in the policy were justified by an overriding reason relating to the public interest, as is clear from the various consultation responses; the terms of the 2021 and 2022 Orders, including the categorisation of secondary letting as a distinct type of letting; the Scottish Government's guidance; and the provisions for refusal in paragraph 5(3) of Schedule 1 to the 1982 Act. The 2022 Order promoted social policy objectives of the type identified in the article 9 of the

directive and regulation 14. The policy could not lead to an arbitrary exercise of discretion. The rebuttable presumption was proportionate since it instructs applicants of the existence of a practical onus that is reasonable to impose in order to ensure that in respect of premises prone to potential nuisance, the respondent could take steps to ensure that the premises and their location are suitable, the risk of nuisance minimised and that neighbours are protected. The test was whether the respondent's exercise of discretion was "manifestly disproportionate": *R (Poole)* v *Birmingham City Council* [2021] PTSR 1705 at 29-39, citing *R (Lumsdon)* v *Legal Services Board* [2016] AC 697). There was no basis for the argument that applications would not be dealt with objectively and impartially. The presumption was not duplicative, because applications for planning permission and for a licence were dealt with by different committees; nor, properly understood, did the policy have dissuasive effect.

[76] As regards duration, any difference in treatment was justified, proportionate and objective. There were social and economic policy reasons that justified the provision in the 1982 Act regarding the duration of licences. In the particular case of STLs, the time limits were justified by the aims of promoting safety, minimising nuisance and impacts on amenity and empowering the respondent to monitor compliance with conditions. There was no reason why the duration of one year should dissuade persons wishing to operate an STL from applying. Applicants could seek a longer period, and the policy would soon be reviewed. This provision of the policy need not delay any provision of secondary letting services.

[77] As regards temporary licences, paragraph 7 of Schedule 1 remained applicable in principle and the respondent may grant a temporary licence for such period not exceeding six weeks as it may determine. The policy placed a practical onus on applicants to justify the

grant of a temporary licence in the case of secondary letting. For the same reasons as set out above, this was not in breach of any of the regulations relied upon by the petitioners.

Decision on the regulations

[78] Insofar as the rebuttable presumption against the grant of an STL licence for secondary letting is concerned, I consider that it fails to meet the criteria in regulation 15. First and foremost, insofar as the policy fails to set out the reality of the respondent's approach to STLs for secondary letting, it cannot be said to be clear and unambiguous. It does not clearly convey the import of Mr Mitchell's evidence that for well run businesses a licence is likely to be granted. The reference to a rebuttable presumption obfuscates the difference between an evidential presumption that a certain state of facts is presumed to exist, unless an applicant can overcome it by proving other facts, and a statement of normal practice. In fact, the justification advanced for the rebuttable presumption, which I have repeated verbatim in paragraph 65, is, when analysed carefully, hard to understand: how can the respondent take steps to ensure that a particular property is in a suitable location – it either is, or it is not – and, if the respondent is of the view that it is not, how can an applicant possibly overcome that? The formulation of the argument in this way simply underlines that the rebuttable presumption in this context is not an easy concept to understand. Beyond that, it is neither justified by an overriding reason relating to the public interest nor is it proportionate to the public interest objective of the 2022 Order of ensuring public safety. Insofar as there is a public interest in protecting the amenity of an area that is achieved by the need to obtain planning permission. Where there is planning permission, it is manifestly disproportionate to adopt, as usual practice, a policy position that an STL licence will

nonetheless be refused. Such an approach is an unnecessary duplication which renders the entire process unduly complicated.

[79] As for the rebuttable presumption in relation to temporary licences for secondary letting, the policy is not clear and unambiguous, nor is it proportionate, or justified by an overriding public interest, all for the reasons given above.

[80] The provisions regarding duration are less straightforward. I refer to the discussion above at paragraphs 52 to 54, which applies equally here. While I have drawn attention to some inconsistencies, or curiosities, in the respondent's reasoning, I am unable to say that a policy of granting new licences for a period of one year only is manifestly disproportionate to the aim of ensuring public safety. I do not think that a policy which adopts a different approach to different types of property can necessarily be described as discriminatory of applicants for an STL secondary letting licence, but even if it can, such a differing approach is justified by the reasons set out by Mr Mitchell in his affidavit. Thus, regulation 15 is not breached by the policy. Turning next to regulation 18, I do not consider that it is breached either. The policy in this regard is clear, made public in advance and does not infringe the requirements of objectivity and impartiality.

[81] Nor do I think that the one year restriction on the grant of a new licence can properly be regarded as part of the "procedures and formalities" provided for by the respondent, but even if that is wrong, I do not agree with the petitioners that it is unduly complicated or dissuasive or that it is likely to delay the provision of the service. The service will commence at the same time, whether a one year or a three year licence is granted.

The principal argument mounted by the petitioners is what is said to be a difficulty in taking bookings more than a year in advance, which I have also discussed, and rejected, at

paragraph 48 above. While the petitioners' witnesses all make valid points in their affidavits, I would observe that, at least in part, their concerns derive from the anterior need to obtain planning permission as much as from the policy itself.

[82] Where I do have more difficulty is in regard to what the policy says, or more accurately, does not say, about renewals. On the face of the policy the same provisions apply to renewals as to initial applications. There is nothing in the policy itself to indicate that a licence once granted is likely to be renewed if the applicant continues to comply with the conditions, or that the period of renewal may be longer than one year. This may be contrasted with the respondent's acknowledgment during the hearing that not only would renewals be likely, the respondent would be in difficulty if it refused to grant a renewal for a tenement property where there had been compliance with the licence. Given that the respondent has gone on record with that approach, I consider that the omission of such a statement from the policy does contravene regulations 15, 16 and 18. The published policy does not clearly and unambiguously set out the basis on which renewal applications will be considered. The policy as published (although not the respondent's actual position) contravenes regulation 16. To the extent that the respondent not only requires annual applications, but has not clearly stated that renewals are likely to be granted, that is dissuasive. A potential applicant who is faced not only with having to apply annually but with the added uncertainty of whether each annual application is likely to be granted may well be dissuaded from making an application in the first place.

[83] For these reasons, and to the extent only that the policy does not state that renewals will normally be granted except upon a change in circumstances, I find that the policy contravenes regulation 15(1) since it is not clear and unambiguous. It contravenes

regulation 16 because it does not make clear that renewal is subject only to the continued fulfilment of requirements. To the extent that it can be regarded as an authorisation procedure or formality, it also contravenes regulation 18.

Protocol 1, Article 1

[84] Article 1 of the First Protocol to the ECHR provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."

[85] The second to fourth petitioners argue that the effect of the policy will be to completely destroy their respective businesses and financial resources such that the policy amounts to an unlawful and disproportionate interference with their possessions in breach of their A1P1 rights. It is sufficient, for the A1P1 argument to succeed that only one of those petitioners is able to demonstrate such interference. Dealing with the second petitioner first, Ms Brook's affidavit evidence is that the income generated from the second petitioner makes up the vast majority of her family's income. The business has been built up over a period of 30 years. The business's clients all operate on what will now be a short-term let basis, some in tenements in Edinburgh City Centre. She considers that most of the second petitioner's clients will be deterred from applying for an STL licence, partly because of the difficulty for many of them in obtaining planning permission or a certificate of lawfulness of use; and partly because of the licensing process itself and the limitation of licences to one year rather than three. She views the policy and regime as catastrophic for the second petitioner's

business. The business's accountant, Kevin MacDonald, in his affidavit, values the goodwill in the second petitioner as being between £150,000 and £200,000. Accounts of the second petitioner have been lodged in process.

[86] For the third petitioner, Mr Douglas' evidence is that it manages 50 properties in Edinburgh, all but two in tenements. He anticipates that only five of the properties will qualify for a certificate of lawful use, and even if they do, they will be refused licences because they are in tenements. This will have a massive effect on the third petitioner's business. Accounts of the third petitioner have been lodged in process.

[87] For the fourth petitioner, whose accounts have also been lodged, Mr Ford anticipates less of an issue with regard to his clients obtaining planning permission – he estimates that 80% of the properties he manages having been operational as short-term lets for ten years or more, but none of his clients have yet applied for a licence. His main concern is with the rebuttable presumption. If licences were applied for and refused, the fourth petitioner's business would be lost.

[88] Thus, each of the second to fourth petitioners argue that the effect of the respondent's policy will be to cause irreparable damage to their respective businesses. There is no dispute that such damage could in principle amount to an interference with their possessions within the meaning of A1P1: the parties agree that "possessions" extends beyond real rights in immovable property to a wide range of economic interests, including a person's financial resources: *Axa General Insurance Company Ltd* v *Lord Advocate* [2011] UKSC 46). The assets of a business may include goodwill, and measures that diminish its value may engage A1P1: *R (Malik)* v *Waltham Forest NHS Primary Care Trust* [2007] EWHC 1800 (Admin) 1800, paragraph 29; see too *Van Marle* v *The Netherlands* (1986) 8

EHRR 483, where a refusal to register the applicants as certified accountants, which reduced the income and value of their business, was held to constitute an interference with the applicant's A1P1 rights (albeit one which was justified). The petitioners also found upon *Sunbeam Fishing Ltd* v *Secretary of State for Environment, Food and Rural Affairs* 2023 SLT 369 in support of the proposition that where a licence is interfered with in some way, it is the interference with the various economic interests connected with the underlying business which engages A1P1.

[89] Nor is it in dispute that for any interference to be justified, it must be provided for by law, in the public interest and proportionate. The petitioners submitted that none of these requirements were met. While the interference did not require to be provided for by statute, it required to be satisfied by certain qualitative requirements, notably accessibility and foreseeability in its effects: *Spacek sro* v *Czech Republic* (2000) 30 EHrr 1010, paragraph 54; *Axa*, above, paragraph 119. As regards public interest and proportionality, reference was made to the arguments already made in respect of common law irrationality. The policy did not fit with any proportionality analysis. The policy did not have the legitimate aim of meeting safety standards. Less intrusive measures were available.

[90] Senior counsel for the respondent did not ultimately argue that the second to fourth petitioners did not have possessions within the meaning of A1P1 (departing from his note of argument in this regard) but submitted that any interference was merely indirect, and in any event was provided for by law, was in the public interest and was proportionate. He further submitted that the claim that the petitioners' A1P1 rights were infringed was speculative and premature, no licences yet having been applied for and refused. This being an *ab ante*

challenge, it could not be said that the policy would give rise to an unjustified infringement in all or almost all cases: *cf Christian Institute* v *Lord Advocate* [2016] UKSC 51.

Decision on A1P1 case

[91] In relation to that last point, it is of course not the refusal of a licence *per se* which is said to infringe the petitioners' rights, but a combination of the disinhibiting effect of the policy such that owners will simply not apply for a licence but will "shut up shop" of their own accord; coupled with what is said to be a likely refusal of licences for those who do apply. Nonetheless, I agree with the respondent that, at the present time, the petitioners' claim under A1P1 is premature and speculative. It is not yet known how many of the petitioners' respective clients will apply for licences, and of those who do, how many will be successful: in other words, how the rebuttable presumption will be operated in practice.

[92] The petitioners face further difficulties with this branch of their case. To the extent that their businesses may suffer detriment because owners are discouraged from applying it is clear from their affidavit evidence that such discouragement arises not merely from the policy but from the new regulatory regime as a whole and the requirement to obtain planning permission. Further, if an STL is unable to continue because of a failure to obtain planning permission or a certificate of lawful use, that is not down to the policy, but to the change in planning law and the decision to designate the whole of Edinburgh as a Control Area. Those aspects of the change in the law are not challenged in this judicial review.

[93] Further still, the petitioners complain about the policy as a whole, not simply those parts of it which I have found to be irrational at common law, or contrary to the 2009 regulations. For the reasons given in the above discussion of those branches of the

case, I do not find the temporal restriction to be a disproportionate interference, and the difficulty in holding that the rebuttable presumption in itself constitutes such interference is that, as is apparent, it seems unlikely that it will in fact be operated as a blanket ban, which perhaps is simply another way of making the *Christian Institute* point.

[94] Given that I have found that the A1P1 claim is premature and speculative, I find it unnecessary to express any further view on the legality, proportionality and public interest arguments, or to mention the authorities cited in relation to those arguments.

Disposal

[95] In summary, I have found that the policy is unlawful at common law, in respect of the rebuttable presumption, the lack of provision for temporary licences and the requirement to supply floor coverings in terms of STL 9. I have also found that it breaches the 2009 regulations in respect of these matters (other than the floor coverings), and in respect of the omission of the respondent's renewals policy. I propose to put the case out by order to discuss the precise wording of the orders to be made in light of this opinion.