OUTER HOUSE, COURT OF SESSION

[2023] CSOH 86

P585/23

OPINION OF LORD BRAID

In the Petition of

(FIRST) IAIN MUIRHEAD AND (SECOND) DICKINS EDINBURGH LIMITED

Petitioners

for

Judicial Review

Petitioners: J Findlay KC, A Sutherland; Burness Paull LLP
Respondent: Mure KC; City of Edinburgh Council

1 December 2023

Introduction

The issue

[1] Section 26B of the Town and Country Planning (Scotland) Act 1997 provides:

> "(1) A planning authority may designate all or part of its area as a short-term let control area...
>
> (2) In a short-term let control area, the use of a dwellinghouse for the purpose of providing short-term lets is deemed to involve a material change of use of the dwelling house."

[2] Utilising that provision, the respondent designated the whole of the city of Edinburgh as a short-term let control area with effect from 5 September 2022. The issue raised by this judicial review is the scope of subsection (2), and whether it has any

retrospective effect, *viz*, does it apply in cases where a change of use to a short-term let had already occurred before 5 September 2022, as the respondent contends; or, as the petitioners argue, does it have effect only where there is a change of use occurring on or after that date? Note that we are dealing here only with agreements for the use of accommodation which is not, or is not part of, the operator's only or principal home, also known as secondary letting.

[3] Before going further, it is worth pointing out that the correct meaning and effect of section 26B is mired in confusion. As will be seen, the petitioners' view that it is not retrospective but applies only to future changes of use is shared by the Scottish Government, no less, which has issued guidance to that effect. Meanwhile, the respondent has issued guidance reflecting its contrary view that section 26B applies in respect of any future use, even where a change of use occurred before 5 September 2022. Whichever view is correct, that is not a happy situation for any existing short-term let operators in Edinburgh who might be reliant on official guidance in the management of their affairs.

The orders sought

[4] The first petitioner is the sole director and shareholder of a company which owns three properties in Edinburgh used for secondary short-term lets. The second petitioner is a property management company which provides such lets in Edinburgh. They seek (i) declarator that the use of a dwellinghouse within a short-term let control area for the purpose of providing short-term lets is not deemed to involve a material change of use of that dwellinghouse in terms of section 26B(2) where that use predates the designation of the area as a short-term let control area (in other words, that their interpretation of section 26B is the correct one); (ii) declarator that the adoption by the respondent on 19 April 2023 of an amendment to its "Guidance for Business" was irrational insofar as it proceeded upon a

material error of law; and (iii) reduction of that amendment to the guidance. The petitioners found upon three grounds of challenge to the policy as amended: first, that it proceeds on the retrospective application of section 26B, which is said to be a material error of law; second, that the treatment of the designation of a short-term let control area as having retrospective effect is irrational and inconsistent with the respondent's approach to planning control; and third, that insofar as the guidance places a uniform requirement on all applicants for a licence to obtain either planning permission or a positive confirmation from the respondent that planning permission is not required, it is unlawful.

[5] The respondent opposes the petition, essentially on the ground that its interpretation of section 26B is correct, and that the provision, properly construed, does not truly have any retrospective effect (or, if it does, that it does not do so unfairly). On that basis, it maintains that its guidance is not based upon any error in law, nor is it unlawful. The respondent also denies that it has acted irrationally. However, the respondent does not contend that, if the petitioners' interpretation is the correct one, the orders sought should not be granted.

The respondent's guidance

[6] At the heart of the case is the respondent's non-statutory planning guidance, "Guidance for Businesses", the purpose of which is to interpret the policies set out in the Edinburgh Local Development Plan (LDP) and to assist businesses in preparing applications to change the use of a property or carry out alterations to a business premises. The guidance is a material consideration for the purposes of planning applications and also sets out how the respondent will deal with the planning aspects of licensing applications. As mentioned above, on 19 April 2023 the respondent's planning committee resolved, following a period of consultation, to adopt a change to that guidance. The guidance as amended sets out the

respondent's interpretation of its LDP and the provisions of the 1997 Act relating to *inter alia*, the provision of short-term lets.

[7] The critical section of the guidance, stating the respondent's view as to the correct interpretation of section 26B, is at page 7:

> "The city-wide Edinburgh Short-term Let (STL) Control Area came into force on 5 September 2022, which means that the use of a residential property for short-term let accommodation will constitute a change of use requiring planning permission provided that [it meets certain criteria]...In Edinburgh, due to the STL Control Area, to lawfully operate a secondary let STL under an STL licence, there will be a need to either have planning permission in place, or an ongoing application for planning permission, or have it in place confirmation [*sic*] from the Council that planning permission is not required. In the event that the planning application and any related appeal is refused, the STL licence holder cannot lawfully continue to operate the secondary let STL in terms of their licence."

The guidance goes on, at page 9, to provide guidance as to the application of LDP policy Hou 7. It is not necessary to recite its terms: it is sufficient to note that the general approach taken to applications for a change of use to short-term letting is restrictive.

[8] Finally, reference was made in the course of the hearing to the respondent's short-term let application form which, in Part 2, asks applicants whether they have planning permission to operate as a short-term let; which can be answered "yes" by providing details of the reference number of either the planning permission reference or a certificate of lawful use. If the question is answered "no", applicants are then asked whether they have recently applied for planning permission - and if answering that question "yes", are asked to provide details of the date the application was submitted and the planning application reference number. However, if that question is also answered "no", the form contains this blunt message: "an application for Secondary Letting cannot be considered without the required planning permission information." Thus, on the face of it, an applicant who does not have planning permission or a certificate of lawful use, and who has not applied for planning

permission, is discouraged from applying for an STL licence, since the respondent's stated position is that an application would not be considered.

Background

What is a short-term let?

[9] A short-term let (STL) is a form of tenancy (or other agreement) whereby, in return for commercial consideration, residential accommodation is provided to a tenant (or guest) for a limited period of time, which is not intended to form the tenant's (or guest's) main residence: typically, although not invariably, a short-term holiday let, for terms of several days to several weeks.[1] As already noted, a secondary STL is such an agreement where the accommodation is not, or is not part of, the operator's only or principal home.

The legislative history

[10] Prior to the enactment of section 26B, there was little regulation of short-term letting in Scotland. There was no requirement to obtain a licence, and the use of a dwellinghouse for short-term lets did not of itself require planning permission, unless it involved a material change of use of the property. Whether the use of a dwellinghouse for short-term letting does amount to a material change of use is a question of fact and degree depending on the individual circumstances of the accommodation: *Moore* v *Secretary of State for Communities and Local Government* [2013] JPL 192; *Cameron* v *Scottish Ministers* [2020] CSIH 6.

[11] The issues arising from a proliferation of secondary short-term letting in Scotland generally, and Edinburgh in particular, have long been a matter of debate, resulting in

[1] A statutory definition is contained in regulation 2 of the Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021, but the description in the text is sufficient for present purposes.

regulation by legislation on two fronts: planning, and licensing. It is not necessary in this opinion to give a full account; a brief summary will suffice.[2] On the planning front, the Scottish Government ran a consultation from 29 April 2019 to 19 July 2019 on its proposal to control short-term lets. On 20 June 2019, the Scottish Parliament passed section 17 of the Planning (Scotland) Act 2019, which amended the 1997 Act by introducing section 26B, which came into force for the purposes of making regulations thereunder on 18 May 2020, and fully into force on 1 April 2021, on which date the Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021 also came into force. Those regulations enabled planning authorities to designate control areas, the purpose of which was (according to the accompanying policy note) to help manage high concentrations of secondary letting[3] (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. On the licensing front, on 27 January 2022, in exercise of powers under the Civic Government (Scotland) Act 1982, the Scottish Ministers made the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022, the effect of which was to make short-term letting a licensed activity, such that operators now require to apply for, and obtain, a licence. The policy note for the 2022 Order states that the purpose of the licensing scheme was 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 handing complaints effectively.

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[2] For a fuller description of the factual and legislative background see paras [5] to [28] of my opinion in *Averbuch* v *City of Edinburgh Council* 2023 SLT 665, which concerned a challenge to the respondent's licensing policy.

[3] An STL consisting of the entering into of an agreement for the use of accommodation which is not, or is not part of, the operator's only or principal home.

[12] The only aspect of the licensing regime to which it is necessary to draw attention (since it relates to the petitioners' third ground of challenge) is that all short-term licences are subject to the mandatory conditions set out in Schedule 3 to the 1982 Act. Mandatory condition 13 provides:

> "Where the premises is in a short-term let control area for the purposes of section 26B of the [1997 Act], the holder of the licence must, where the use of the premises for a short-term let requires planning permission under the 1997 Act, ensure that either –
>
> > (a) an application has been made for planning permission under the 1997 Act and has not yet been determined, or
> >
> > (b) planning permission under the 1997 Act is in force."

Article 7 of the 2022 Order (dealing with transitional provisions), as amended, provides:

> "(3) Paragraphs (4) to (7) apply to applications received by a licensing authority prior to 1 October 2023 from a relevant person where the licensing authority considers that use of the premises for a short-term let would constitute a breach of planning control for the purposes of the Town and Country Planning (Scotland) Act 1997 by virtue of section 123(1)(a) or (b) of that Act.
>
> (4) The licensing authority may, as soon as reasonably practicable after receipt of the application, notify the relevant person that—
>
> > (a) the licensing authority will suspend their consideration of the application for a period of three months beginning on the date of the notice,
> >
> > (b) the relevant person must, within that three month period, submit an application for planning permission or apply for a certificate of lawfulness of use or development which would, if granted, remedy the considered breach, and
> >
> > (c) the relevant person must notify the licensing authority that an application has been made in accordance with sub-paragraph (b)."

[13] As for the designation of Edinburgh as a short-term let control area, the respondent decided to consult on its proposal to make such a designation on 11 August 2021. In November 2021, it published a revised version of its "Guidance for Businesses". In February 2022 it issued its Statement of Reasons and Background Report in connection with

its proposal. In section 4.4 of the Statement of Reasons, in support of its proposal that the designation cover the entire council area, the respondent stated (among other things):

> "A City wide Control Area would:
>
> - Provide clarity on the need for planning permission for change of use of an entire dwelling house to an STL within Edinburgh".

At least read in isolation, the emphasis in that sentence is on the need for planning permission for change of use, not existing use.

[14] Scottish Ministers approved the proposed designation on 27 July 2022, in a letter from the Assistant Chief Planner to the respondent's chief planning officer. The letter included the following passage:

> "A change of use of a dwelling to a short-term let after the designation of the control area will be deemed to be a material change of use by virtue of section 26B of the Act.
>
> Where the change of of (*sic*) a dwelling to a short-term let took place before the designation of the control area the existing rules will apply. These require planning permission for a change of use of property where that change is a material change in the use of the property."

[15] On 5 August 2022 the respondent published its Notice of Designation of the short-term let control area, with a designation date of 5 September 2022, on which date it duly came into effect. The Notice included the following text:

> "Upon the designation taking effect, use of an entire dwelling that is not a principal home, as a short-term let will be a material change of use requiring planning permission, in accordance with Section 26B of the [1997 Act] and the [2021 Regulations]."

As can be seen, that reflected the respondent's interpretation of section 26B that it applied to *all* use as a short-term let on or after 5 September 2022, and was not restricted to those cases where the change of use itself first occurred on or after that date.

[16] The Scottish Government, too, has published, or issued, material containing its (contrary) view of the meaning of section 26B, foreshadowed in its letter of 27 July 2022. Paragraph 8 of its policy note to the 2021 Regulations states:

> "Planning permission is required for any material change of use of a building or land. Outside of a control area, it continues to be the case that it is for the planning authority to consider whether any change of use of a dwellinghouse is material and therefore requires planning permission on a case-by-case basis. Within a control area designated by a local authority, *such a change of use* will always require planning permission [emphasis added]."

Paragraph 2.1 of Planning Circular 1 of 2021, "Establishing a Short-term Let Control Area", contained identical wording. That circular was replaced by Planning Circular 1/2023: Short-term Lets and Planning, which states, at 2.1, that the guidance is primarily concerned with the change of use of a dwellinghouse to use for short-term lets and whether this change is a material use for the purposes of planning. At paragraphs 3.1 and 3.2 the following appears:

> "3.1 Whether a property is inside or outside of a control area, it continues to be the case that any change of use of a dwellinghouse which is a material change of use would require planning permission. A change of use of a dwellinghouse to use for short-term lets *occurring after a planning authority has designated an area as a control area* (emphasis added) will, (with some exceptions...) be deemed a material change and therefore always require planning permission.
>
> 3.2 The purpose of control areas is to ensure that all changes of use of dwellinghouses to use for the purpose of short term letting are brought within the scope of the planning system without the need to consider if a particular change of use is or is not a material change of use."

Similar language appears in section 4, under the heading "Establishing whether a planning application is needed". Section 4.3 states:

> "Section 26B is not retrospective, meaning that the designation of a control area does not, in itself, retrospectively deem any previous change of use of a dwellinghouse to use for short-term lets within that area to be a material change of use. Section 26B applies where a change of use of a dwellinghouse occurs after designation of a control area. However, it is important to bear in mind that section 26B does not replace the existing requirements of the 1997 Act in respect of the need for planning

> permission for a material change of use. This means that material changes of use to short-term letting whether before or after the designation of a control area would require planning permission."

Finally, the Scottish Government guidance "Short Term Lets in Scotland: Planning Guidance for Hosts and Operators" states at paragraph 2.6 that certain changes of use from a house or flat to a short-term let within a SLTCA are automatically considered to be material; then, in paragraph 2.7:

> "It is important to note that section 26B is not itself retrospective, but also that it does not replace or alter any of the requirements for planning permission under section 26. This means that:
>
> - Outside a STLCA, planning permission is required if the relevant planning authority consider the change of use to be material.
>
> - Within a STLCA, the planning authority may consider that a change of use which is not automatically material under section 26B nevertheless constitutes a material change of use under section 26 and therefore requires planning permission. For example, it predates the designation of a control area or is a change of use from a previous use other than a dwellinghouse."

It is plain, then, that the Scottish Government's view is that section 26B does not require planning permission to be applied for, even in a control area, where the change of use took place before the designated date. That view is diametrically opposed to that of the respondent. But which view is correct?

Retrospectivity – the law

[17] There is a general presumption that Parliament does not intend legislation to be retrospective: *Sunshine Porcelain Potteries Pty Ltd* v *Nash* 1961 AC 927. As Lord Reid put it in that case at 938:

> "Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that."

However, the strength of the presumption varies according to circumstances, with a particular emphasis on fairness, having regard to vested rights or interests. As Lord Staughton said in *Secretary of State for Social Security* v *Tunnicliffe* [1991] 2 All ER 712, the true principle is that:

> "Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

[18] It is not necessarily the case that a statute which alters existing rights or interests is truly retrospective; as Lord Rodger of Earlsferry pointed out in *Wilson* v *First County Trust Ltd* [2004] 1 AC 816, at paragraph 188 (talking there about retroactivity rather than retrospectivity), the statute book contains many statutes which are not retroactive but alter existing rights and duties only prospectively, from the date of commencement. As Lord Rodger went on to point out at paragraph 192, there is no general presumption that legislation does not alter existing legal rights, the very purpose of legislation being to alter the existing legal situation, which will often involve altering existing rights for the future. However, at paragraph 193 he, too, recognised, as had Lord Staughton, that often a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect.

Planning: the legislative framework

[19] To understand the legislative intent behind section 26B, it is instructive to have regard to the framework of the 1997 Act. It regulates development, rather than use, of land.

The salient provisions are as follows. Section 28(1) requires planning permission for the carrying out of any development of land. Section 26(1) provides that development includes a material change in the use of any land; and, by virtue of section 27, such development shall be taken to be initiated at the time when the new use is instituted. Section 44 provides that without prejudice to the provisions of the Act as to duration, revocation or modification of planning permission, any grant of planning permission shall enure for the benefit of the land and for all persons for the time being interested in it. Section 71(1) is worth setting out in full, so far as material, since it provides a mechanism whereby a planning authority may require a previously permitted use to be stopped:

> "If, having regard to the development plan and to any other material considerations, it appears to a planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity) –
>
> > (a) that any use of land should be discontinued...
> > they may by order –
> >
> > > (i) require the discontinuance of that use."

Where such an order is made, a right to compensation arises under section 83 of the Act.

[20] Section 123 provides that carrying out development without the required planning permission constitutes a breach of planning control. By virtue of section 124(3), no enforcement action may be taken for a breach of planning control which consists in the change of use of a dwelling house to the provision of short-term lets after the end of the period of 10 years beginning with the date of the breach. Section 128 provides for the content and effect of an enforcement notice, where there has been a breach of planning control. Section 130 provides for an appeal against an enforcement notice, the grounds including that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters said to

constitute the breach. Section 150 enables any person who wishes to ascertain whether any existing use of land or buildings is lawful to make an application to the planning authority for a certificate of lawfulness of use (CLU). In terms of section 150(2), use is lawful if no enforcement action may be taken in respect of it, whether because no development was involved or because the time for enforcement action has expired. In terms of section 150(6), the lawfulness of any use for which a certificate is in force shall be conclusively presumed.

The Parliamentary debates

[21] Since they were referred to in submissions, I will briefly mention the debates in the Scottish Parliament pertaining to the legislative history of section 26B. A fair reading of the debates, particularly at the third stage of the Planning Scotland Bill, is that the particular mischief targeted by what is now section 26B was the time expended and difficulties encountered by planning authorities in determining whether a change of use from a dwelling house to short-term letting was material or not. The main focus of the debate was whether any change in the law deeming such a change of use to be a material change should apply throughout Scotland or be restricted to control areas; the latter argument prevailing. The debates are of limited assistance in construing the parliamentary intention behind section 26B, only ministerial statements being of any value in that regard: *Pepper* v *Hart* [1993] AC 593 (and then, only if the provision is ambiguous, and only where the ministerial statement is clear). The respondent wished me to attach some weight to what was said by the Minister during the second debate, when he listed four reasons why he was unable to support two amendments to the Bill proposed by Andy Wightman MSP, the third of which was that neither amendment would affect existing second homes or short-term lets. However, while the debates at both the second and third stages provide some interesting

background as to how section 26B came about - as the result of an amendment by a Conservative MSP - and the context against which it was enacted, the ministerial statement, which was not in any event made in reference to the provision under discussion, was not sufficiently clear that any weight whatsoever can be attached to it, and I do not intend to refer to the debates again.

Submissions

Petitioners

[22] The bulk of the submission of senior counsel for the petitioners was devoted to their first ground of challenge: that the respondent's interpretation of section 26B was wrong. Section 26B should be construed as applying only to changes of use after 5 September 2022. To hold otherwise would involve a significant innovation upon the structure of the Act, under which it was change of use (when it was material), rather than use itself, which required planning permission. The Scottish Parliament was unlikely to have effected such a significant change without having expressly made that clear. The section interpreted as contended for by the respondent would have some retrospective impact, which was sufficiently unfair that Parliament cannot have intended that to have been the case. There were four possible scenarios in each of which an operator could have been lawfully using a dwelling house for secondary short-term lets immediately prior to 5 September 2022:

(i) the change of use to a secondary short-term let occurred before 5 September 2022 but did not constitute a material change of use in terms of section 26 of the 1997 Act;

(ii) a material change of use to use as a secondary short-term let was made with the benefit of planning permission (which permission would be spent, and could not

be used again to justify a further change of use: *Cymon Valley BC* v *Secretary of State for Wales and another* 1987 53 P & CR 68);

(iii) the operator had obtained a CLU for the use prior to 5 September 2022 that such use on a previous date was lawful;

(iv) the change of use was material and was made without planning permission but the material change had taken place more than 10 years prior to 5 September 2022 and was therefore immune from enforcement action in terms of section 150 of the 1997 Act.

The operator in all of these scenarios would, on the respondent's interpretation of section 26B, require to apply for planning permission, which cannot have been the intention. The respondent appeared to maintain that only the first scenario would give rise to a requirement to obtain planning permission but it was not clear on a reading of the section why that should be so, and the respondent's interpretation required a considerable gloss to be placed on the wording. Further, the respondent's application of section 26B would amount to an unlawful interference with the petitioners' possessions, contrary to Article 1 of Protocol 1 of the European Convention on Human Rights. This was not a free-standing ground of challenge but was prayed in aid in support of the interpretation argument: it was unlikely that the Parliament would have intended to make such an interference. Finally, counsel acknowledged that Parliament had the power to make the change contended for by the respondent; it was the petitioners' position that it had not in fact done so.

[23] As for the second ground of challenge, that the respondent had acted irrationally, the petitioners founded upon a planning enforcement notice issued by the respondent which appeared to proceed on the basis that section 26B did not have retrospective effect.

[24] As for the third ground of challenge, the essence of the submission was that the respondent's policy not to process applications unless (a) planning permission was in place, (b) an application for planning permission was pending or (c) the respondent had confirmed that planning permission was not required, imposed further requirements beyond those contained in mandatory condition 13 and Article 7. Where there had been no material change of use, or if a past material change of use was immune from planning enforcement, planning permission was not required and an applicant for a short-term let licence would not be in breach of mandatory condition 13. The policy proceed upon an incorrect assumption that if planning permission was not in place, there would be a breach of planning control.

Respondent

[25] Senior counsel for the respondent submitted that the legislative purpose behind section 26B was to hand to planning authorities the power to control use of housing for short-term lets and hence to balance the needs of their communities with the economic benefits the sector can bring. The usefulness of the measure would be emasculated on the petitioners' interpretation, since it would fail to affect existing short-term lets. The wording was in any event clear: the use of a dwelling house for the purpose of providing short-term lets as from 5 September 2022 was a deemed change of use, which therefore involved development for which planning permission was required. It applied only prospectively, from the date when the control area came into existence, and did not affect the use of a dwelling house for the provision of short-term lets before 5 September 2022. To the extent that the provision might be seen as retrospective, because it required operators to apply for planning permission for a change of use which had in fact occurred before 5 September 2022,

it did not operate unfairly: the respondents were not removing from the petitioners any rights protected by law. In relation to the petitioners' four scenarios, it was not unfair to require operators who did not already hold planning permission, or a certificate of lawful use, to apply for planning permission should they wish to use their property for short-term letting on or after 5 September (scenario (i)). Operators who already had planning permission (scenario (ii)) would not require to apply again, notwithstanding the deemed change of use on 5 September: to hold otherwise would be taking *Cymon Valley* too far. As for scenarios (iii) and (iv), the great majority of CLUs were on the basis that more than 10 years had passed since the change of use had occurred. The respondent's view was that a CLU was sufficient for the purposes of the scheme and did not require an application for planning permission in those circumstances. In relation to scenario (iv), immunity from planning enforcement was not affected by the respondent's interpretation of section 26B. The provision did not operate unfairly.

[26] As regards the second ground of challenge, the respondent was entitled to serve enforcement notices, as it had done, catering for the possibility that either its, or the Scottish Government's, interpretation of section 26B was the correct one. That was not irrational. The third ground of challenge should also fail. The respondent's policy sought to do no more than open up a dialogue with applicants for a licence as to whether planning permission was required or not.

Decision

[27] This is essentially an exercise in construction. Before even considering the issue of retrospectivity, the starting point is to consider section 26B within the scheme of the 1997 Act as a whole. Planning permission is not required for use of land *per se*, but only for

development, which includes a material change of use *from* use A *to* use B: where planning permission is granted for a material change of use, it is spent as soon as the change has been effected: *Cymon Valley*, above. In that case, planning permission had been granted for change of use of premises to use as a fish and chip shop, which was implemented. The premises were subsequently used as an antique shop. The question then arose as to whether the original planning permission permitted a further change to use as a Chinese takeaway (for planning purposes, the same as fish and chips) but it was held by the Court of Appeal that the original permission was spent once the change of use was implemented. It is also worth bearing in mind that the Act envisages that planning permission be applied for *before* any development takes place, that is, in the case of a material change of use, before the change takes place, not after. Thus, while the Scottish Parliament *could* have deemed a change of use to have occurred *from* use B *to* that same use B, with the effect that short term letting which was lawful immediately before midnight on 4 September 2022 ceased to be lawful immediately after midnight because of the deemed change of use, one might expect such a significant provision to have been made in express terms, given the fundamental innovation to the scheme underlying the Act which that would entail (the more so, when planning authorities already have the power, under section 71, to order an existing (and lawful) use of land to be discontinued on amenity grounds). Subsection (2) can more sensibly be read as applying only to a proposed future change of use, without doing any major damage to the language used. Finally, there is the basic point that where change of use from a dwellinghouse to use as a property providing short term lets had already occurred before 5 September 2022, the property in question was, by definition, no longer being used as a dwellinghouse when the Act came into force, and section 26B could have no application to it anyway. Section 26B, on its terms, applies only to properties being used as

a dwellinghouse on or after that date, and therefore could only ever apply to changes of use after that date. The respondent's argument would perhaps have carried more weight had section 26B referred to residential accommodation, but it does not.

[28] Further, the respondent's proposed interpretation leads to inconsistencies, highlighted by the four scenarios advanced by the petitioners in submissions. If there was a deemed change of use for all properties already lawfully being used for short-term lets, to that same use, there is no logical basis for differentiating between properties according to how that lawfulness was acquired - be it by the grant of planning permission or a non-material change of use or otherwise - nor does section 26B(2) attempt to so differentiate. In other words, the petitioners are correct in submitting that planning permission would need to be applied for in each of the four scenarios. The respondent argues that it would not require a fresh planning application on any of scenarios (ii) to (iv) but that argument does not have any principled basis, instead proceeding on an apparent recognition that the Parliament cannot fairly have intended there to have been a deemed material change of use in those situations; but if not in those, then why in scenario (i)? Even if there might be an argument that where planning permission had been granted, that permission might cover the deemed change of use (although it is not clear why that should be so, standing *Cymon Valley*, above: the respondent's argument in this regard seems to be predicated not so much on the planning permission not being spent, as on there being no further deemed change of use where planning permission had been granted for a previous change of use; but either there is a deemed change of use across the board, or there is not), the same cannot be said about certificates of lawful use. Consider the example of two operators each using a property for short-term letting on 4 September 2022 and each doing so lawfully because the change of use in each case was not material. One had the foresight to apply for and obtain a

certificate of lawful use (which merely declares that the use is lawful) but the other did not. It is not at all obvious why they should be in a different position from each other as of 5 September 2022. Either, both should be entitled to continue using their property as a short-term let, or both should not. There is either a deemed change of use affecting both, or there is not. But the respondent would have it that the operator with a certificate of lawful use need not apply for planning permission, perhaps recognising that to hold otherwise would be to affect retrospectively the acquired rights of the operator in question; whereas the other operator would be bound to do so. That is not only unfair, but illogical.

[29] This leads on to the issue of retrospectivity. The first question is whether section 26B is retrospective to any extent even on the respondent's interpretation. The respondent argues that the provision is prospective only, since it applies only to operators who use their property for short-term letting on or after 5 September 2022. That argument is superficially attractive but loses its potency when one remembers that it is not use, but change of use, which gives rise to a need for planning permission. On the respondent's approach, on any view, even if consideration were restricted to scenario (i), the provision would apply where a change of use had already occurred before 5 September 2022. An operator who had already effected a non-material change of use would be required to apply for planning permission by virtue of the further deemed change of use. On that basis the provision clearly would have retrospective effect; and that that is so is seen even more clearly when scenarios (ii) to (iv) are brought into the equation, as they must be: even operators who had already been granted planning permission, or who had applied for and obtained a certificate of lawful use, would be caught.

[30] However, it does not follow that section 26B necessarily does not have the retrospective effect contended for. As the authorities cited above show, it is open to a

legislature to enact legislation having retrospective effect if it wishes to do so. The question is whether it has done so here. I take from the authorities that, in determining what the legislative intention was, the court should have regard to whether the provision, if held to be retrospective, would affect vested or established rights or interests, and if so whether it would do so in a manner which was unfair to those individuals or businesses concerned. The greater any unfairness, the stronger the presumption that the legislature would not have retrospectively affected those rights without making it expressly clear that that was its intention. The petitioners argued that the original change of use was an event having legal consequences, in particular, a right to continue using the property for the new use unless ordered to discontinue that use under section 71 of the Act (in which event a right to compensation would arise); and to have the materiality of any future change of use measured against the new use, rather than the previous use as a dwellinghouse. It was unfair in those circumstances to require an application (or a further application) for planning permission. The respondent argued, under reference to Lord Rodger in *Wilson*, above, that no-one had a vested right to continuance of the law as it stood in the past; and that it was not unfair on operators to require planning permission in respect of future use where none had been applied for in the past.

[31] I prefer the petitioners' submissions. Whether there has been either a non-material change of use, or a grant of planning permission, or a certificate of change of use, or non-enforcement for 10 years, it is incontrovertible that an event has occurred having legal consequences. Further, the operator in each case would be entitled to conduct their affairs on the premise that such use would be allowed to continue indefinitely, subject to the planning authority's section 71 power. The respondent's argument on fairness was very much predicated on its argument that section 26B did not apply to the latter three of the

petitioners' scenarios, which I have already found it does. The respondent cannot escape the unfair consequences of the provision simply by choosing not to apply it in those circumstances where it recognises it would be unfair to do so. The nail in the coffin of the respondent's fairness argument is that its approach would deprive the operators concerned of any right to obtain compensation (were planning permission to be refused), which right they would otherwise have were the section 71 route pursued.

[32] For all these reasons, I find that the Scottish Parliament did not intend that section 26B should have retrospective effect by requiring planning permission to be applied for where there had already been a change of use. Had that been its intention, it would have made that clear in express terms, or at least, language which was clearer than that used.

[33] I do not agree with the respondent's argument that this interpretation emasculates section 26B of much of its usefulness: as I have pointed out, the particular mischief struck at was the amount of resource required of planning authorities in determining whether a change of use is material or not. Further, for what it is worth, there is not a hint in the Scottish Government material that it considers that the provision is not useful even on the basis that it applies only to future changes of use. It will of course remain open to the respondent to take enforcement action against any past material change of use for which planning permission was not obtained, or indeed to take action under section 71, on amenity grounds, should it consider that to be justified. As for the respondent's objection that it does not have any visibility of properties where a change of use has already occurred before 5 September 2022, the licensing scheme now in operation ensures that it does have full visibility of properties which are being used for short-term letting.

[34] Having found that the petitioners' interpretation of section 26B is to be preferred, it is unnecessary to say very much about Article 1 Protocol 1, which was ultimately relied on by

the petitioners only as a further aid to interpretation, not as a free-standing ground of challenge. Suffice to say that, as the respondent accepts, the right to peaceful enjoyment of one's possessions, and not to be deprived of them except in the public interest, is a right which extends to a wide range of economic interests and assets, including a person's financial resources: *Axa General Insurance Company Ltd* v *Lord Advocate* [2011] UKSC 46. A control of use of such possessions may amount to an interference under A1P1. Interference is justified if it is provided for by law, justified as being necessary in the public interest and proportionate. The petitioners argued that the retrospective application of section 26B in the manner contended for would have failed each of those requirements. Counsel for the respondent did not accept that, but it is unnecessary to decide whether the petitioners are correct or not: I accept that the possibility of a successful challenge under A1P1 was such that the Parliament is unlikely to have intended section 26B to have retrospective effect without having done in clear and express terms; but since I have already found that anyway, the A1P1 argument does not add anything.

[35] I can deal briefly with the remaining two grounds of challenge. I do not agree with the petitioners that the respondent has acted irrationally in the manner it has gone about enforcement. Reference was made to a Planning Enforcement Notice, which referred both to section 26B and to materiality under section 26. While I do tend to agree that arguably the wording of the Notice could have been confusing to the recipient, and that the respondent could have made clearer that it was relying on two separate strands of argument - that section 26B applied, but that if it did not, the change in use had been material in any event - there is nothing irrational about the respondent adopting what Scottish pleaders would call an *esto* approach; that if its primary contention was wrong, nonetheless it was

entitled to succeed on a different ground. (The Notice might betray a lack of confidence by the respondent as to whether its interpretation was correct, but that is a different issue.)

[36] Turning to the third ground of challenge, the material part of the guidance is the passage which states that (reading short and correcting the grammar) in Edinburgh an STL licence holder will need to have either planning permission, or an ongoing application for planning permission, or confirmation from the respondent that planning permission is not required. In passing, I observe that this appears to be incomplete, since it does not reflect the respondent's view as communicated at the hearing, that a certificate of lawful use would also suffice, but that is not the ground of challenge. Rather, the challenge is that the guidance goes further than mandatory condition 13, which, somewhat tautologically, merely requires planning permission where planning permission is a requirement. The problem here is not so much with the wording of the guidance, as with the respondent's view as to when planning permission is not required. If the respondent's view on that changes (as it will need to, in light of this opinion), the respondent will then be obliged to confirm, in each of the petitioners' scenarios (i) to (iv) that an application for planning permission is not required. Accordingly, I do not consider that there is anything inherently wrong or irrational about this aspect of the guidance. To the extent that it may lead to a dialogue between an operator and the respondent as to whether a previous change of use in scenario (i) was in fact material, and thence to enforcement action, there is nothing objectionable about that. It does not follow from the fact that a previous change of use is not automatically deemed to have been material, that it is deemed to have been non-material. As I have already made clear, subject to the inability to enforce a breach of planning control after 10 years, the respondent has not lost the right to challenge a change of use before 5 September 2022 as being in breach of planning control. Accordingly, this ground of

challenge does not so much fail, as add nothing to the ground of challenge which I have already upheld and which will result in reduction of the amendment to the guidance in any event.

[37] Of course, the petitioners also criticised the wording of the STL application form, to which I have drawn attention in para [8]. I do not agree with the submission made by senior counsel for the respondent that the wording of the application form is designed simply to open a dialogue with applicants for an STL licence as to what the planning permission is, since, as I have pointed out, the form actively discourages anyone from applying who does not have either planning permission (or a CLU) or an application in the pipeline. That does in my view go too far, since it fails to recognise that there will be cases where planning permission is not required. However, the petitioners are not seeking reduction of the application form.

Disposal

[38] The petitioners' first ground of challenge having succeeded, I will sustain the petitioners' pleas-in-law, repel the respondent's pleas-in-law, and grant the orders of declarator and reduction which are sought. The respondent's senior counsel having accepted that expenses would follow success, I shall also find the respondent liable in the expenses of the petition.