**Opinion of Counsel**

**For**

**Scottish Association of Self-Caterers**

**Regarding Licensing or Regulation of Short Term Holiday Lets**

**Background and Instructions**

I refer to the email of 2 December 2021 of 12.21 pm asking for an Opinion in light of developments. I will refer to Short Term Lets as “STLs.”

That email was in the following terms.

“*Good afternoon Scott,*

*Further to your recent involvement in this matter, when the consultation was cancelled, the matter has now raised its head again as the SSI is now back with Committee. The reason the ASSC had decided not to go ahead with your Opinion was due to a amendments made by the Scottish Governments tidying up a coupler of the issues we had previously referred them to and removing over provision given this was not a preexisting consideration in the 1982 Act and given the planning SSI already enforced, addressed that. The issue has raised its head as the ASSC are concerned the SSI in its current forms still allows over provision to be a consideration while it does not state actual over provision as a consideration. Please see link to the SSI as laid.*

[*https://www.legislation.gov.uk/sdsi/2022/9780111052396/data.pdf*](https://www.legislation.gov.uk/sdsi/2022/9780111052396/data.pdf)

*Fiona Campbell, the Chief Executive of the ASSC, is giving evidence to the Committee on Tuesday 7th December 2021 and would welcome an Opinion from you prior to doing so. I appreciate this is a tight timescale and did try to call earlier this week but you went straight to voicemail so I was not sure if you were in court. Given the background reading here has already been done could you let me know of you could produce an Opinion in the time scale.  Also, if you are able to do so, could you confirm a fixed fee for an Opinion on the basis there would not be opportunity at this stage to consult before Tuesday therefore any fee should relate solely to the Opinion on the basis I will make it clear to the client any additional consultation or amendment will encore further fees from you.*

*The link to the BRIA is at* [*https://www.gov.scot/publications/short-term-lets-business-regulatory-impact-assessment/pages/8/*](https://www.gov.scot/publications/short-term-lets-business-regulatory-impact-assessment/pages/8/)*.*

*Kind regards,*

*Jo.”*

Before these developments and to help put this in context I was originally instructed as follows

*“Scott,*

*As we discussed, I am instructed by the Association of Scotland’s Self-Caterers (ASSC).  I have been asked by their Chief Executive, Fiona Campbell, to seek a Consultation with you and thereafter an Opinion from you on the legality of the current SSI as proposed by the Scottish Government.  The SSI has something of a history and while I do not expect you would need to consider in any detail the previous consultation documents, it would be worthwhile being aware of the background here.*

*Fiona and I are both on the Scottish Government Short Term Let Working Group – I have saved the Scottish Government page with information on this in the Sharefile.  The hospitality trade groups left the Working Group in August of this year as they felt their issues were not being properly listened to and I have also saved the ASSC press release on this. As we discussed, due to the fact I am on the Law Society Licensing Committee and also on the working group, I do not want to forward you information which I have obtained from either of those sources.  I therefore asked Fiona to forward me various information in order that we can ensure the information you are being provided with is that which the ASSC holds, and there can be no suggestion there is an issue due to my other involvement in other aspects.  The rest is public information.*

*As well as licensing, time the Scottish Government proposed a planning SSI, the Control Area Regulations on 14 December 2020. The Control Area Regulations were laid at the Scottish Parliament and were approved by it on 24 February 2021.  They came into force on 1 April 2021.*

*By way of background, in 2016, the Regulatory Review Group undertook a review of the regulatory environment within Scotland for key sectors which included the Tourism sector.  This was aimed at sectors affected by digital disruption to “ensure that it remains appropriate to encourage and support innovation while maintaining a level playing field”.  In November 2016, the Minister for Business, Innovation and Energy approved their recommendation that an independent expert advisory panel be established to advise Scottish Ministers on how Scotland could position itself to take advantage of the opportunities of the collaborative economy and the challenges that may bring.*

*As a result, in April 2017 the Scottish Government set up the Expert Panel on the Collaborative Economy (“EPCE”).  In summary, its remit is to provide advice, expertise and experience for policy development.  It should identify how Scotland could benefit from the “collaborative economy” and ensure that regulation introduced, and current at that point, is fit for purpose.  It should also ensure that the wider economic, social and community impacts, including taxation, social inclusion and employment conditions are taken into account.  That is interesting as part of the issue the ASSC has with the proposals on the licensing SSI is that it fails to do that and, arguably, fails to propose legislation which is within the remit of the original Panel which set the SSI in motion. Interestingly, at its first meeting on 4th May 20201, the Minutes (copy in the Sharefile) reflect that the introductory remarks from the Chair, Helen Goulden of Nesta, included reference to the remit, namely “The panel’s membership has a diverse range of interests and will be guided by data and evidence. A key element of the panel’s remit is to advise how to balance the challenges and the opportunities and to ensure that emerging business models don’t have any unfair competitive advantage over traditional business models.”*

*The Remit and Key Consideration of the EPCE was confirmed in their terms of reference referred to and included in the agenda and minutes of its first meeting on 4th May 2017 (copy in Sharefile) as follows:*

*·         Remit: Members of the Scottish Expert Advisory Panel on the Collaborative Economy will: Provide advice, expertise and experience to on-going policy development on the collaborative economy; Make recommendations to Scottish Ministers on how Scotland can position itself to take advantage of the opportunities of the collaborative economy and overcome any regulatory, economic and social challenges.*

*·         Key Considerations: In conjunction with the Scottish Government, the panel has identified that the key considerations are how to: ensure that regulation is fit for purpose and that an appropriate balance is struck to allow competition to flourish; protect and empower consumers and identify clear routes to redress; develop digital leadership skills to enable Scotland's business base to digitally transform and compete in the evolving market place; prepare Scotland’s current and future workforce for the digital workplace by ensuring they can access courses to gain or update skills; and ensure that the wider economic, social and community impacts, including taxation, social inclusion and employment conditions are taken into account and embedded into the final recommendations.*

*In January 2018 the Panel reported that peer-to-peer accommodation expanded the range, choice and flexibility of accommodation for tourists in Scotland and welcomed the positive contribution which it made to Scotland's economy and highlighted number of issues and challenges in relation to peer-to-peer accommodation and short-term lets.  I will provide you with a separate note on that but for completes have put a copy of the report in the Sharefile.*

*In July 2018 the Scottish Government published its response to the Expert Panel’s report, copy in Sharefile, which included the establishment of a Short-Term Lets Delivery Group.  The Short-Term Lets Delivery Group was established “to assess the evidence base and the impact, positive and negative, of short-term lets; identify the existing powers local authorities have and explore whether further measures are required. The Group comprised officials from across relevant areas of government including: better regulation, community empowerment, economy, housing, licensing, planning, tax and tourism.”*

*I attach a link to the Scottish Government page on the Short Term Lets process to date as it contains most of the relevant information.* [*https://www.gov.scot/publications/short-term-lets/*](https://www.gov.scot/publications/short-term-lets/)

*There was an initial Consultation in our around April 2019.  See the Consultation document in the Sharefile.  This did not attract a significant amount of feedback, however, there were consultation responses.  The ASSC then approached Gilson Gray in relation to the second consultation phase and sought assistance.  We were not specifically instructed at that stage, but had provided some guidance in relation to the content of the Consultation and suggestions about framing responses.*

*This second consultation attracted a lot of responses from other trade bodies include Airbnb and also from various Councils throughout Scotland. The ASSC response is attached.*

*The second consultation resulted in a SSI being drafted to amend the Civic Government (Scotland) Act 1982.  The SSI in its drafted form was placed before the Scottish Government Committee in the usual method of transition of a Bill through the Scottish Government’s legislation process.  The SSI was not supported and it was deemed to have too many material defects to proceed.  The SSI had to be lifted, as it cannot be amended, and redrafted.*

*In anticipation of the SSI being approved a Working Group for the Scottish Government had been set up.  I am a member of this, but not on the basis of providing any instructions simply as a volunteer to try to pull together the Written Guidance in respect of the SSI.  Originally there was to be one set of guidance, however, this was then broken down into two sets, one being for operators and one being for local licensing authorities and those using the legislation in a professional capacity.  There is current draft Guidance for hosts and operators and guidance for licensing authorities, both in the Sharefile.*

*Due to the Licensing SSI having to be re-laid and redrafted first, Councils will now have until 1 October 2022, rather than the originally stated April 2022 deadline, to establish a licensing scheme for short-term lets. Under the current proposed legislation, all hosts and operators would be required to apply for a licence by 1 April 2023 and all short-term lets would have to be fully licensed by 1 April 2024.*

*In relation to this instruction, I would be grateful if you would consider the matter specifically raised in our discussion earlier this week which may be matters of competency.  The SSI laid, but later lifted has now been amended to the current form.  The form and SSI is available online, and I attach a copy.  As you will see the provision was introduced in between the SSI being lifted and the new drafting. I appreciate you need to consider your time on this, therefore, will give you some indication of the matters the ASSC wishes to consider.  Over and above that, I would also ask that you consider any other matters you may believe to be relevant in relation to the proposed SSI.  You will see from the Consultation response to the current Consultation, but also previous Consultation responses from the ASSC which are attached that they have sought to introduce a registration system, similar to the Landlord Registration, instead of the licensing scheme.  Their proposal is that the registration scheme is in place, and provides an exemption under the Licensing Scheme.  If an operator/host is a member of the registration scheme and can produce their registration number, they are then exempt from requiring a short term let licence.  This has not been taken up by the Scottish Government and has been largely ignored.*

*The main questions which have arisen in relation to competency of the SSI is overprovision and the consistent reference to other pieces of legislation throughout the drafted SSI.*

*Overprovision is an issue as it is not clear from the SSI, as drafted, what ill the Scottish Government are seeking to cure by introducing overprovision.  The 1982 Act is very different from the Licensing (Scotland) Act 2005.  The current general licensing system in the 1982 Act, now made more robust by the introduction of Control Areas and other provisions in the proposed planning SSI, mean the two systems are quite different, but there does seem to be confusion in the mind of the Scottish Government between these systems.  For a period of time in the Written Guidance, the Scottish Government were referring to Licensing Board instead of Licensing Committee.  There are a number of other areas in the drafting, and in discussions, where it does seem clear that the Scottish Government do not fully either understand the difference between the two licensing systems or have not perhaps properly expressed that understanding into the drafting of the SSI and the Written Guidance.  There is no mischief we can see in relation to overprovision, however, if you can see a justification for overprovision, it would be useful to consider your view on this.  The question of overprovision is one of the main areas where I have identified there may be a possibility of challenging the SSI as a whole.*

*Another area is the use of other legislation particularly in relation to the mandatory conditions.  There is a great deal of reference to other legislation, for example, fire safety legislation.  I have a concerns that the requirement for certain documentation to be produced in a matter of competency of an application not enforcement.  The mandatory conditions are in place and require certain documentation to be in place for the Licence could be granted.  It could be read that these documents require to be in place at application, therefore, the lack of such documents, such as a Risk Assessment or Energy Performance Certificate, would render the application not competent which would result in the licensing section returning the application to the applicant, or their agent, for the appropriate documentation to be obtained and lodged.  We do need to consider the timing of that and whether that is what the mandatory conditions require.  Even if it is the case that these documents do not have to be with the application but have to be produced prior to grant, that remains a matter of competency and not of enforcement, which is not properly reflected in the SSI and is not the view of the SG.  Andrew Mott with SG, the civil servant leading the SSI’s, has made it clear in meetings that he regards the other legislation referred to as tools to allow enforcement and is not prepared to stand corrected despite that having been raised at various meetings, including a meeting of the Law Society of Scotland Licensing Committee with the SG where he was in attendance.*

*The ASSC are keen to establish that, were the SSI to be produced to the relevant Scottish Government Committee in its current form and be passed in its current form despite the issues highlighted, could there be a legal challenge to the SSI and what form would that take.  Could you confirm your anticipated fee for the Consultation and following Opinion.*

*As I also discussed, I anticipate the ASSC would want to use your Opinion to place before the Committee which considered the SSI in its original form as laid.  They would want to be able to provide your Opinion to show the MSP’s on the Committee that the SSI is flawed and the reasons why it is flawed.  They would hope to use that to achieve the SSI, again being lifted, amended and re-laid.  If possible, they would hope to secure support from opposition and other MSP’s to have the proposed registration system put in place and that to act as an exemption to the licensing system.  They have some feeling that if they were able to show that the SSI was not competently drafted for a second time, the registration scheme may have more appeal as it is significantly simpler.  While the Licensing Scheme may still require to be put in place, the registration scheme would not deal with overprovision and the Licensing Scheme could be significantly simplified.  The expectation is the vast majority of short term let operators would register, thereby, resulting in a very small number of Licences being required.*

*Kind regards,*

*Jo.”*

**Issues for my consideration**

Of course the opinion, as originally instructed, was not required.

Matters have moved on and I understand the focus of the present matter is the use of an over-provision test.

The issue is whether an overprovision test can be derived from the 1982 Act.

In short, for the following reasons, it can. However before I deal with that, it may be useful to set out the following on planning.

**Planning -Material Considerations and Non-Material Considerations**

Section 25 of the Town and Country Planning (Scotland) Act 1997 states that a Planning Authority’s decision on a planning application must be made in accordance with the Development Plan, unless material considerations indicate otherwise. That is the general planning position.

SDD Circular 3/2013 contains, in Annex A, a useful discussion of Material Considerations in planning decision making. Ultimately though the Circular is only guidance and it is for the Courts to decide on a case by case basis what is material. That being said much of what is in the Circular reflects caselaw from the Courts.

“ Annex A: Defining a Material Consideration

*1. Legislation requires decisions on planning applications to be made in accordance with the development plan (and, in the case of national developments, any statement in the National Planning Framework made under section 3A(5) of the 1997 Act) unless material considerations indicate otherwise. The House of Lord's judgement on City of Edinburgh Council v the Secretary of State for Scotland (1998) provided the following interpretation. If a proposal accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the proposal does not accord with the development plan, it should be refused unless there are material considerations indicating that it should be granted.*

*2. The House of Lord's judgement also set out the following approach to deciding an application:*

* *Identify any provisions of the development plan which are relevant to the decision,*
* *Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies,*
* *Consider whether or not the proposal accords with the development plan,*
* *Identify and consider relevant material considerations for and against the proposal, and*
* *Assess whether these considerations warrant a departure from the development plan.*

*3. There are two main tests in deciding whether a consideration is material and relevant:*

* *It should serve or be related to the purpose of planning. It should therefore relate to the development and use of land, and*
* *It should relate to the particular application.*

*4. The decision maker will have to decide what considerations it considers are material to the determination of the application. However, the question of whether or not a consideration is a material consideration is a question of law and so something which is ultimately for the courts to determine. It is for the decision maker to assess both the weight to be attached to each material consideration and whether individually or together they are sufficient to outweigh the development plan. Where development plan policies are not directly relevant to the development proposal, material considerations will be of particular importance.*

*5. The range of considerations which might be considered material in planning terms is very wide and can only be determined in the context of each case. Examples of possible material considerations include:*

*……*

**Compatibility with existing uses, e.g. the mix of uses found in town centres, such as shops, offices and cafes, can be mutually beneficial**

**- Economic benefits, e.g. creation of jobs**

- **The needs of an area (employment, commercial, social or leisure facilities, affordable housing)** …..”

Accordingly the planning system already recognises that housing and related needs *can* be planning considerations. An application for planning consent under section 26B *may* engage considerations of relative housing need and pressure on local housing availability.

Section 26B of that Act covers STL let control areas. Of note as regards planning permission and paragraph 13 of the proposed SSI on STL licensing, this obliges an STL applicant / operator to have made an application for planning permission (paragraph 13(a) or that they already have it (paragraph 13(b)).

It must also be understood that section 26B is a provision which allows an area to be deemed an STL let control area i.e. an STL will require planning permission.

Of course not all STL applications will be in STL let control areas and so even if need was a matter for the planners, not licensing, the section 26B system does not extend to all localities within which STLs might seek to operate. That is an argument **in favour** of a licensing control on overprovision at least as regards STLs **not** in let control areas.

It should though be noted that under section 26B(5), the definition of an STL may differ from that in the STL licensing system and in any event Regulations are still to be made under section 26B(6). It has to be borne in mind though that in the liquor licensing system the existence of planning permission for a pub did not mean that, for the purposes of licensing overprovision , a Licensing Board was obliged to grant a licence.

Overprovision is not the same as planning merit and indeed under the STL system it is a “given” that an operator in a STL let control area must, as a condition of their licence, have, or be applying for such permission. The STL SSI does therefore expressly recognise that in licensing terms there is a link to the separate planning system.

Moreover it can be maintained that *need* as a planning consideration does not necessarily exhaust scope for consideration of overprovision as a separate STL consideration. Overprovision is not the same as demand or need or lack of need. The decision to designate a locality as a let control area may point to a planning view that planning permission is needed given the proliferation of STLs, but that may not raise quite the same issues as a licensing test of overprovision.

While planning merits might include issues such as local housing supply issues (whether in favour of STLs or pointing the other way), a licensing authority is not bound by assessments of need made by the planning authority for planning purposes).

 It can, if there is a sufficient basis for it, take a different view. While the scope for taking a different view may often be quite narrow, nevertheless that scope exists. Whether it *should* exist is another matter but that would require legislative provision to exclude overprovision from licensing.

Although I believe that in law an argument can be made that overprovision as a licensing consideration is a separate matter from planning consent in a let control area under section 26B, whether that is a desirable or sufficiently workable outcome might be a matter for debate.

It is perfectly open to argument that given the use of let control areas and the section 26B system it is not necessary for the licensing system to consider overprovision as the issues are so closely linked that in substance the role of the licensing authority on overprovision is very limited-if indeed necessary.

**I express that as a policy argument not as an argument compelled by law.**

It could be for example that as with section 50 certificates under the Licensing (Scotland) Act 2005 that the existence of planning consent for an STL is deemed to be conclusive of certain matters, here any question of need, demand or overprovision.

This might be subject to two caveats which I will call “the exceptions” -

1. STL applications where planning consent has not yet been secured in a let control area (see paragraph 13 of the draft SSI) ; and

2. STL applications in an area where there is no let control designation.

In those cases one might argue that the licensing authority should have a role in relation to overprovision.

**Analysis of the 1982 Act on overprovision**

I note that Article 2(5) and 5 of the licensing SSI applies Schedule 1 of the 1982 Act to STL applications. Schedule 1 includes paragraph 5(3) which provides with my added emphasis-

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

*(a)  the applicant or, where the applicant is not a natural person, any director of it or partner in it or any other person responsible for its management, is either—*

*(i)  for the time being disqualified under section 7(6) of this Act, or*

*(ii)  not a fit and proper person to be the holder of the licence;*

*(b)  the activity to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant or renewal of such a licence if he made the application himself;*

*(c)  where the licence applied for relates to an activity consisting of or including the use of premises or a vehicle or vessel, those premises are not or, as the case may be, that vehicle or vessel is not suitable or convenient for the conduct of the activity having regard to—*

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

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

*(iii)  the kind of persons likely to be in the premises, vehicle or vessel;*

*(iv)  the possibility of undue public nuisance; or*

*(v)  public order or public safety; or*

***(d)  there is other good reason for refusing the application;***

*and otherwise shall grant the application.”*

Such types of tests are found, in express terms, in the primary sections of the 1982 Act as regard taxis (section 10(3)) and private hire cars (section 10(3A). It might be said that section 10(2) is not quite overprovision as opposed to *“no unmet significant demand.”* The private hire test does require consideration of both numbers and demand of such vehicles.

Can it though be said that the general scope of the 1982 Act could permit a refusal on the grounds of overprovision of STLs even if not-as with taxis and private hires a test that is expressly stated ?

**In my view, the answer to that first question must be in the affirmative. I provide my reasons below.**

There is of course a second question and that is whether assuming that such a test is *intra vires* the 1982 Act, could it be said as a matter of the exercise of legislative discretion that the inclusion of such a test would be irrational or unreasonable in the *Wednesbury* sense? Is it a *Wednesbury* reasonable policy choice?

On the first question, although not expressed as a specific ground of refusal in the 1982 Act on “other good reason”, paragraph 5(3)(d) of Schedule 1 of the Act has been held to include overprovision by the Inner House –see *Kilmarnock and Loudon DC v Noble Organisation,* 1993 SLT 759.

There a licensing authority, appealed against the decision of the sheriff referring an application for a public entertainment licence under section 41 of that Act, back for further consideration, arguing that he had erred in holding that a petition with some 376 objectors' signatures was not a competent objection and ought not to have been entertained. Each of the 15 pages of signatures was headed with: "Kilmarnock does not need a bigger arcade (Plaza converted into amusements)".

It was argued that it gave a sufficient ground of objection, namely over-provision, which although not specifically mentioned as a ground of refusal, was another "good reason" in terms of para. 5(3) (d) of Sch. 1 to the 1982 Act.

The premises were already being operated by the applicants as a place of public entertainment together with a snack bar. Adjacent to them were other premises occupied by the applicants which were being operated by them as the Plaza wine bar.

The proposal was to close the wine bar with its restaurant and discotheque area and to increase the number of electronic machines in the premises from 91 to 170, thus increasing substantially the area used as a place of public entertainment within the meaning of [section 41 (2)](https://uk.westlaw.com/Document/I276EDA20E44A11DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=25e03228b4ea420a839f23605fb53123&contextData=(sc.DocLink)) of the Act.

As was argued in that case for the licensing authority under reference to an earlier case-

*“ Counsel for the licensing authority submitted that the sheriff had misdirected himself as to the proper construction of the words used in the document. He contended that they gave a sufficient indication of the ground of objection, which was that if the application were to be granted it would result in an over provision of places of public entertainment in Kilmarnock. He pointed out that the grounds of refusal in para 5 (3) (c) did not include over provision, but he submitted that there could be no doubt that this was another “good reason” for refusing an application in terms of para 5 (3) (d). If authority was needed on this point it was to be found in The Noble Organisation v City of Glasgow District Council (No 3) where at p 216D the Lord Justice Clerk agreed that over provision of similar facilities in the locality could fall under head (d) of the subparagraph.*

The Court then said-

*“….in the language of para 5 (3) of the Schedule, as the licensing authority is entitled to refuse an application if there is “some other good reason” for doing so than the particular reasons listed there.”*

As can be seen there was an earlier case involving the Noble Organisation -*The Noble Organisation v City of Glasgow District Council (No 3)* 1991 SC 131-where “other good reason” included overprovision.

What goes to overprovision in a given locality would be for the licensing authority to determine but plainly questions of numbers and demand might have a role to play. The 1982 Act test of overprovision may not be dissimilar from the test in section 17(1)(d) of the Licensing (Scotland) Act 1976.

 That test was of course a broad discretionary one-essentially one of the licensing “experience” of the Board as to when a state of overprovision was reached and the caselaw gave little, if any guidance on when such a state was reached (*Caledonian Nightclubs Ltd v City of Glasgow District Licensing Board* 1996 SLT 451, HL).

Accordingly there are two Inner House decisions which make it clear that in principle para. 5(3)(d) is wide enough to include the ability of the licensing authority to consider “*over provision of similar facilities in the locality,”* **but neither of those cases nor indeed the similar test under the 1976 Act gives much guidance on how overprovision is approached.**

Accordingly even if an application survives the other tests in paragraph 5(3)(a)-(c) such as there being a fit and proper applicant, suitable premises, no safety/ nuisance issues, if there remains “other good reason”, then that can include overprovision.

**As I understand matters though, earlier discussions in relation to the then draft SSI led to an acceptance from Scottish Government that overprovision should not form part of the scheme.**

The concern must be that standing the caselaw interpretation, there is a risk that it could be re-incorporated by default given the blanket inclusion of para. 5(3)(d).

**Of course it would be open for an amendment to be made which qualified para. 5(3) (d) by providing that “other good reason” did not include overprovision or any test or approach similar to that or perhaps only allowed it to be applied to “the exceptions”.**

**If lawful- what are the merits of an overprovision test?**

Of course by importing overprovision by the “back door” under para. 5(3) (d), it might be said that it is a blunt instrument, as more recent examples of how overprovision should be approached in a licensing system are more sophisticated.

So for example in relation to liquor licensing a Licensing Board must have, under section 7 of the Licensing (Scotland) Act 2005, a properly evidenced and supportable overprovision policy, arrived at after due consultation and having had regard to statutory guidance and which it must take account of when deciding whether or not to grant or refuse on grounds of overprovision under section 23(5) (e).

One of the reasons section 7 was introduced was that under the previous Licensing (Scotland) Act 1976 section 17(1) (d) overprovision as a licensing test had become somewhat disreputable.

Unlike overprovision under section 23(5) (e) of the Licensing (Scotland) Act 2005, any overprovision test in para. 5(3) (c) is not hedged with statements of the considerations (numbers/ size/ capacity or other) which inform whether overprovision has been reached. There is no requirement to have a policy on overprovision such as a 2005 Act section 7 policy which would be consulted on and be informed by both that process and relevant evidence and be published.

The overprovision provisions in the Licensing (Scotland) Act 1976 (section 17(1) (d)) became problematic because overprovision became just a numbers game and led to arbitrary and opaque decisions. There may be an argument that overprovision via para. 5(3)(d) absent any guidance in the caselaw or legislation on what constitutes overprovision would lead to the same problems as befell the 1976 Act.

For example as the Guidance under section 142 of the 2005 Act says-

***“****Overprovision: the previous law*

*29. In terms of Section 17(1)(d) of the Licensing (Scotland) Act 1976, a Licensing Board must refuse an application for a new licence if, having regard to: "(i) the number of licensed premises in the locality at the time the application is considered; and (ii) the number of premises in respect of which the provisional grant of a new licence is in force, the Board is satisfied that the grant of the application would result in the overprovision of licensed premises in the locality."*

*30. The Nicholson Committee's Report concluded that this approach to overprovision results in a* ***"largely arithmetical exercise" which is "imprecise and unworkable in any meaningful sense".***

Unlike overprovision under section 23(5) (e) of the Licensing (Scotland) Act 2005, any overprovision test under para. 5(3) (d) is not hedged with any statements of the considerations numbers/ size/ capacity or other, which inform whether overprovision has been reached.

Under para. 5(3)(d) there is no requirement to have a policy on overprovision such as a 2005 Act section 7 policy which would be consulted on in and advance, be informed by that and relevant evidence and be published.

As noted by contrast the overprovision provisions in the Licensing (Scotland) Act 1976 (section 17(1) (d)) became problematic because overprovision became just a numbers game and led to arbitrary and opaque decisions with attendant cynicism about Board decision making.

Accordingly a power to have overprovision as a basis for refusal for STLs may be unattractive if it rested simply on para. 5(3) (d). It could, absent a properly derived policy on overprovision, become “just a numbers game.”

 Moreover absent a policy on overprovision it may be unclear just what evidence a local authority relied on when deciding if a state of overprovision arose or what considerations it had regard to in deciding if, in a given case, there was overprovision, perhaps such as the number of similar facilities and demand.

In that regard the guidance under the 2005 Act notes that a statutory overprovision policy-

*“34….*

*• allows Licensing Boards to take account of changing market trends, such as the development of so-called "hybrid" premises;*

*• provides potential entrants to the market with a clear signal that they may incur abortive costs if they intend to apply for a licence in a locality which the Licensing Board has declared to have reached overprovision;*

 *• improves public and licensed trade confidence in a system by setting out clearly the grounds on which overprovision should be determined.*

 *• recognises that halting the growth of licensed premises in localities is not intended to restrict trade but may be required to preserve public order, protect the amenity of local communities, and mitigate the adverse health effects of increased alcohol consumption resulting from growing outlet density.*

*50. The Licensing Board's policy should be expressed in such a way that interested parties are left in no doubt as to the reasons for its adoption, including the evidence upon which the Board relied and the material considerations which were taken into account.”*

A system like Section 7 and related Guidance is lacking under paragraph 5(3) (d).

As a counter to this it might be said that in the exercise of discretion a local authority could develop an overprovision policy to shape how it would approach overprovision as an issue under para.5(3) (d), but is not, as with a Licensing Board under the 2005 Act, obliged to do so.

It could for example, have a policy that in general where an STL is sought for let control area, if planning consent is secured then it will in general not refuse an application on overprovision grounds absent some exceptional feature or change in material circumstances in the locality. This would give weight to the section 26B let control area system.

Absent such a policy an applicant who was refused a licence would need to argue that in an individual case it was unreasonable of the licensing authority to refuse an application on overprovision grounds if section 26B consent had been secured. Such cases would be fact sensitive and given that in law there is scope for a different view to be taken on overprovision for licensing purposes whatever the planning position, there could be no guarantee that such an appeal would succeed.

**Suitability Refusals**

I want to mention something on this for clarity. Where the basis of refusal is suitability, other considerations might arise where planning has approved a premises as suitable in planning terms, it can be difficult albeit not impossible, for a licensing authority to then go onto refuse a licence based on suitability. This might suggest it is not in general desirable for there to be two regimes looking at suitability.

So for example where a Council decides that premises are suitable in planning terms for a use, a licensing authority is not bound by that. These are two different regimes and approval for one purpose, while no doubt a material consideration in terms of suitability for a related purpose is not conclusive-see *JE Sheeran (Amusement Arcades) Ltd v Hamilton DC* 1986 SLT 289 (Council not bound by allowance of planning consent by Secretary of State), but where a different view is to be taken there would need to be a proper basis for that-*Leisure Inns (UK) Ltd v Perth and Kinross District Licensing Board,* 1993 SLT 796. Accordingly there can exist two different systems addressing suitability and while the licensing authority should be slow to depart from a planning assessment of suitability, it can, if there is material to support a reasoned difference in view, do so.

In making this point there will be areas where there is a degree of crossover between the role of the Council as authority and the Council or Scottish Ministers planning authority. The courts do recognise shades of grey and questions of degree here. The most cautious approach would be to recognise that there may be areas already regulated by the “other regime” and not to tread on that.

Where there is a degree of cross-over if the matter is properly for the other regime, then that is left to the other regime. Where there is an element which can be regarded as falling within the STL regime then the Council can consider it provided that it only has regard to STL considerations in so doing and it is not an indirect route to e.g. planning control by another route (*Di Ciacca v Scottish Ministers*, 2003 SLT 1031). So for example planning in the context of a STL let control area would already be dealt with via the system in section 26B of the Town and Country Planning (Scotland) Act 1997 and Regulations under section 26B (6) of the same.

I would stress though that suitability is ***not* the same as**overprovision. Premises may be suitable but still lead to overprovision. Of course it may be argued that where the planning authority has issued planning consent for an STL it did so against the application being in a let control area and accordingly any discretion on the part of the licensing authority to refuse on suitability grounds is a narrow one.

By the same logic given the nature of a let control area it might be argued that the same approach should be taken to an overprovision refusal as many of the same issues (if often not all) might be bound up with planning.

**Judicial Review of the SSI?**

Looking at the three accepted grounds of judicial review-irrational exercise of power, illegality/ *ultra vires* and procedural error, my views are as follows.

As for any illegality challenge or *ultra vire*s, given that para. 5(3) (d) is wide enough to cover “any other good reason” and that can include considerations of overprovision, I do not see any prospect of a successful challenge on that basis.

Put short the 1982 Act as the primary legislation as interpreted by the Courts to date is wide enough to include under para. 5(3)(d), such a test. As such it would be impossible to argue that overprovision is *ultra vires* the scope of the 1982 Act and as such any SSI made under that Act.

A JR of an SSI is particularly difficult given the width of discretion afforded to the legislature in approving such an instrument. For that reason challenges based on irrationality (which could include arguments that it was irrational, as a policy choice, to include overprovision as an implied basis for refusal), would be very hard to make out.

The intensity of review is particularly low in a rationality challenge in this context. Where delegated legislation has been approved by Parliament that in itself probably raises a presumption of reasonableness ( *Rae v Hamilton* (1904) 6 F (J) 42) and in this context would probably require that it be shown that the provision was “manifestly absurd” and that would only arise in “extreme and extraordinary circumstances” (see *Clyde and Edwards, Judicial Review*, para. 21.17 and caselaw cited therein).

Although there may be policy arguments to be made that overprovision be carved out from the SSI as a basis for refusal given the “other good reason” caselaw and the policy arguments as to why that test should not be applied, it does seem to me that it would be very hard indeed to run an irrationality challenge.

I doubt very much if the circumstances could be seen as extreme or exceptional.

There is probably still (just) a sufficient “judgment gap” between planning consent under section 26B and overprovision under para. 5(3) (d). While the gap may often be a very narrow one and while there may be arguments that planning assessments under section 26B should preclude overprovision as an issue under para. 5(3) (d), that is a policy choice and it is not the only one open to Scottish Government.

As for procedural impropriety, I do not see a basis. While no doubt to date matters have not been handled as well as they might have by Scottish Government, I do not see any breach of prescribed procedure or natural justice at common law to hang an argument on.

**Final**

In summary, it seems to me that as overprovision could “sneak back in” via para. 5(3)(d) and there appears to have been a wish to exclude that at an earlier stage, the remedy would appear to be one of having the SSI changed to reflect the view that for the purposes of STL licensing, overprovision is not a basis for refusal under para. 5(3) (d) (save perhaps if it comes to it, “the exceptions”), and indeed on a “belt and braces basis”, otherwise.

**The Opinion of**

**Scott Blair**

**Advocate**

**Terra Firma Chambers**

**6 December 2021**