Neutral Citation No: [2024] NIKB 74 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **HUM12604** *Delivered:* **26/09/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GO2BSA LIMITED
FOR JUDICIAL REVIEW

Donal Sayers KC & Lara Smyth (instructed by McCann & McCann Solicitors) for the Applicant
Denise Kiley KC & Andrew Brownlie (instructed by Belfast City Council Legal Services) for the Respondent

---

HUMPHREYS J

Introduction

[1] The applicant is a limited liability company which carries on the business of property investment and lettings. It owns a particular property at 77 Rugby Avenue, Belfast ('the property') in respect of which it holds a House in Multiple Occupation ('HMO') licence.

[2] The applicant purchased the property in November 2014. In May 2023 it considered selling the property and sought clarification from Belfast City Council ("the council"), the respondent to these proceedings, as to the circumstances in which it could continue to operate as an HMO following any transfer of ownership.

[3] The council advised that upon the transfer of ownership any application in respect of the HMO licence made by the purchaser would be treated as a new application rather than the renewal of an existing licence. On this basis, it was said, the council would require to be satisfied that the occupation of the property as an HMO would not constitute a breach of planning control in order for the new licence to be granted.

[4] It is this decision which is the subject of challenge in these judicial review proceedings, as well as the means by which the council could be satisfied in relation to the issue of planning control.

The applicant's evidence

[5] Michael McMahon, director of the applicant company, has sworn three affidavits. In the first, he sets out the history of the property. It was renovated in 2001 with the assistance of a grant of £30,000 from the Northern Ireland Housing Executive ('NIHE'). It operated as an HMO thereafter and was included within the Statutory Registration Scheme for HMOs in Northern Ireland formerly administered by the NIHE. Correspondence dated 17 January 2001 from the NIHE states:

> "The Housing Executive is satisfied that the above property … is a House in Multiple Occupation as defined by Article 75 of the Housing (NI) Order 1992."

[6] Mr McMahon deposes to the fact that there has been no change of use of the property for over 20 years.

[7] On 1 April 2019 the Houses in Multiple Occupation Act (Northern Ireland) 2016 ('the 2016 Act') came fully into force. Inter alia, it introduced a licensing regime for HMOs which became the responsibility of local councils.

[8] Since the property was registered in the NIHE scheme immediately prior to 1 April 2019, it was treated pursuant to the Houses in Multiple Occupation (Commencement and Transitional Provisions) Order (Northern Ireland) 2019 as having been issued with a licence under the 2016 Act.

[9] The licence was further renewed for a period of five years on 8 February 2023.

[10] The May 2023 email correspondence passing between the applicant and the council included the following exchange:

> Q. "This property has an HMO licence but does not have planning permission or a CLUD. Is planning permission required to successfully transfer over the HMO for a potential sale?"
>
> A. "Planning permission is required when an application is received from a proposed new owner or new owner. This is because they are deemed to be new applications."
>
> Q. "This property does not have a CLUED or planning permission. Just to confirm, are you saying that a

CLUED or planning permission is required before complete a HMO licence transfer?"

A. "Yes, if they make an application for a new licence the lack of planning permission or CLUED will mean the application will be cancelled."

[11] Mr McMahon states that he was advised by an estate agent that the property was worth £350,000 on the basis the HMO licence could be transferred. However, if the transfer could not be effected, it would be valued at £175,000.

The legislative provisions

[12] Section 7 of the 2016 Act provides that every HMO must be licensed under the Act and such licences are issued by the council for the district in which the HMO is situated.

[13] Section 8 governs applications for licences and states:

"(1) An application for an HMO licence is to be made to the council by the owner of the living accommodation in question.

(2) The council may grant the licence only if it is satisfied that—

(a) the occupation of the living accommodation as an HMO would not constitute a breach of planning control (see section 9);

(b) the owner of the living accommodation, and any managing agent of it, are fit and proper persons (see section 10);

(c) the proposed management arrangements for the living accommodation are satisfactory (see section 11);

(d) the granting of the licence will not result in overprovision of HMOs in the locality in which the living accommodation is situated (see section 12); and

(e) the living accommodation is fit for human habitation and—

(i) is suitable for occupation as an HMO (see section 13) by the number of persons to be specified in the licence as mentioned in section 7(3)(c), or

(ii) can be made so suitable by including conditions in the licence under section 14."

[14] Section 9(1) defines the "breach of planning control" referenced in section 8(2)(a) in accordance with section 131 of the Planning Act (Northern Ireland) 2011 ("the 2011 Act").

[15] Section 20 of the 2016 Act is concerned with the renewal of licences:

> "(1) Where the holder of an HMO licence makes an application in accordance with this section for it to be renewed, the council may renew the licence.
>
> (2) An application to renew a licence must be made before the licence ceases to have effect.
>
> (3) The provisions of this Part apply to applications to renew a licence (and decisions on such applications) as they apply to applications for a licence (and decisions on such applications).
>
> (4) But the following provisions do not apply to applications to renew—
>
> (a) sections 8(2)(a) and 9 and paragraphs 5 to 7 of Schedule 2 (breach of planning control);
>
> (b) sections 8(2)(d) and 12 (overprovision)."

[16] By virtue of this provision, on an application to renew, the council is not concerned with the issues of breach of planning control and overprovision.

[17] Section 28 of the 2016 Act deals with the issue of change of ownership and the transfer of licences. It provides:

> "(1) A licence may be transferred to another person only in accordance with this section.
>
> (2) Accordingly, except as set out in subsection (3), where—

(a) there is a transfer of ownership of a licensed HMO,

(b) as a result of the transfer there is a new owner (or more than one), and

(c) no person who was a licensee before the transfer continues to be an owner after it,

the licence ceases to have effect on the date of the transfer.

(3) If—

(a) there is a transfer of ownership of a licensed HMO, and

(b) before the date of the transfer, the proposed new owner (or any of them) applies for a licence in respect of the HMO (a "new licence"),

the licence which is already in effect in respect of the HMO ("the existing licence") is to be treated as being held, from the date of the transfer, by the person or persons who made the application for the new licence ("the transferee").

(4) But the existing licence ceases to have effect on the date mentioned in subsection (5).

(5) That date is—

(a) if the transferee's application is granted, the date from which the new licence has effect (determined in accordance with section 19(1) or (4)(a));

(b) if the transferee's application is refused—

  (i) one month after the last date on which the decision to refuse the transferee's application may be appealed in accordance with section 67(4), or

  (ii) if such an appeal is made, one month after the date on which the appeal is finally determined.

(6) Subsection (4) and (5) are subject—

(a) to sections 23 (revocation) and 27 (surrender), which provide for a licence in certain circumstances to cease to have effect earlier than as provided by this section, and

(b) if the transferee dies, to section 29, which provides for a licence in certain circumstances to cease to have effect earlier than, or later than, as provided by this section.

(7) In this section—

"transfer of ownership" includes the creation of a new estate;

"new owner" means a person who is an owner after the transfer but was not an owner before it."

[18] Section 131 of the 2011 Act defines a breach of planning control as either:

"(a) carrying out development without the planning permission required; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted."

[19] Section 169 of the 2011 Act deals with certificates of lawfulness of existing use or development ('CLEUD'):

"(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

that person may make an application for the purpose to the appropriate council specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

(3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—

(a) the time for taking enforcement action in respect of the failure has then expired; and

(b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

(4) If, on an application under this section, the council is provided with information satisfying it of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the council or a description substituted by it, the council must issue a certificate to that effect; and in any other case it must refuse the application.

(5) A certificate under this section must—

(a) specify the land to which it relates;

(b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 23(3)(e), identifying it by reference to that class);

(c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

> (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

The respondent's approach to applications

[20] The council has set out in evidence the procedure adopted by it in relation to HMO licence applications. The application form for new licences and for renewals is the same and is submitted via an online portal. Applications are processed by the council's HMO unit which sends a copy to a number of statutory agencies. There is also a requirement to advertise in local newspapers.

[21] The HMO unit considers the various requirements set out in section 8 of the 2016 Act. In relation to the question of breach of planning control, Mr Bloomfield, the manager of the unit, deposes as follows:

> "In order to determine whether the occupation of the living accommodation as an HMO would constitute a breach of planning control, officers make a request to the Council's Planning Service for confirmation of Planning Permission or CLEUD. If there is nothing in place, then officers cannot be satisfied that there has not been a breach of planning control and therefore a new licence cannot be granted."

[22] Mr Bloomfield explains that in order to grant a CLEUD, planning service usually has to be satisfied that a property has operated as an HMO continuously for a period of five years. Proof is normally sought by way of tenancy agreements, insurance certificates or affidavits from tenants.

[23] In the event that council officers cannot be satisfied by the means indicated, an automatic refusal decision in relation to the HMO licence follows. In other cases, a decision is then made as to whether the application can be determined by the HMO unit under the scheme of delegated authority or whether it should go to the licensing committee of the council for consideration. In the event of refusal, an appeal lies to the county court under section 67 of the 2016 Act.

[24] In terms of renewal applications, it is recognised that the issues of planning control and overprovision are not relevant to the determination. The questions of the fitness of the applicant, the condition of the property and the satisfactory arrangements for property management are all required considerations.

[25] When an application concerns a change of ownership, the council has explained that in the event a vendor holds a live licence, the transfer of ownership will not be regarded as resulting in overprovision. The council's guidance states:

> "In circumstances where an application has been received from the prospective owner before the expiry of the existing licence such licence remains in place until the prospective owner's application has been determined. In such cases this is effectively a transfer of an existing licence to another person and would not result in overprovision."

[26] However, on the council's analysis, the issue of breach of planning control is required by law to be considered in all cases involving a change of ownership. Mr Bloomfield specifically avers:

> "The Council has never approached applications for a change of ownership in the same way as renewal applications." (para [19], 1st affidavit)

The evidence relating to other cases

[27] This claim is the subject of robust challenge by the applicant. The evidence reveals that in July 2020 there was an exchange of emails between the council and a Mr Hogg, the prospective owner of an HMO in Belfast. Mr Hogg raised a query about the transfer of the HMO licence to him and was informed by the council on 2 July 2020:

> "What you need to do is put in an application for a licence and pay the fee BEFORE you become the legal owner and before the current licence expires. This way we will treat your application as a renewal and planning permission will not be required as part of the application process."

[28] This evidence casts real doubt on the accuracy and veracity of the assertion made in paragraph [19] of Mr Bloomfield's first affidavit. Despite having sworn a further affidavit some three months after this evidence was relied upon by the applicant, Mr Bloomfield chose to provide no explanation for the apparent contradiction.

[29] Mr McMahon made a Freedom of Information Act request in March 2024 seeking information on all HMO licences issued in Northern Ireland in October and November 2023. This resulted in a response dated 19 March 2024 from the council which included details in respect of 12 properties transferred by an individual to various limited companies. It was apparent that, in ten of these cases, the properties benefitted neither from planning permission nor a CLEUD. The council's solicitor wrote on 29 April 2024:

> "I confirm that the applications relating to those properties were made after a change of ownership. However, they each involved unusual and complex factual circumstances. They were determined on that basis and do not reveal any

> earlier policy approach of the Council to treat applications for change of ownership as renewals."

[30] Mr Bloomfield swore a further affidavit in July 2024 once the materials relating to these properties had been placed before the court by the applicant. In it, he repeats the claim of "unusual and complex circumstances" and states that these applications were dealt with "on an exceptional basis."

[31] The circumstances said to give rise to this exceptional treatment were that each of the properties was previously owned by an individual who transferred ownership to limited companies in which he was a director between 2017 and 2020. Following these transfers, the individual had successfully applied to renew the HMO licences in his own name. As a result, the council wrote on 26 July 2022 advising the individual that the HMO licences had been "deemed invalid."

[32] On 28 July 2022 the sale of one of the subject properties to a third party completed. That purchaser had submitted an application for a HMO licence on 23 June 2022 but, as a result of the deemed invalidity of the owner's HMO licence, this was treated as a new application under section 8 and was refused on the ground of overprovision. The purchaser appealed to the county court. As a result of these proceedings, the council invited the previous owner to "regularise" this, and the other licences affected, by submitting fresh applications which would be treated as renewals. Mr Bloomfield states that this course of action was taken:

> "… in the interests of fairness and in light of the particular facts and circumstances, particularly bearing in mind the technical nature of the error made by the individual and the nexus between the individual and the limited company."

[33] As a result of treating these fresh applications as renewals, the question of breach of planning control did not arise for consideration.

[34] Despite the fact that this exceptional course of action was adopted in or around September 2023, at or about the same time that these judicial review proceedings were launched, Mr Bloomfield strikingly fails to explain why this was not referenced in his first affidavit. Indeed, he did not seek to resile from the absolute position adopted at paragraph [19] of his first affidavit nor to explain where the ability to depart from the statutory scheme in light of "exceptional circumstances" derives from.

[35] It would appear that the only "unusual and complex circumstances" which were attendant upon the transactions in question related to the transfer of ownership by an individual to a limited company of which he was a member and/or director. Neither of the adjectives adopted could be said to be apposite. There is nothing unusual at all about a property investor or developer transferring his estate to a limited company. This is a relatively common course of action, often to take

advantage of the different taxation regime. Equally, such transactions are straightforward and the documents in these cases suggest nothing which could properly be described as complex.

The duty of candour

[36] The maintenance of the highest standards of public administration require the parties to judicial review applications to comply with the duty of candour. This means that a public authority is obliged to assist the court with full and accurate explanations of all facts relevant to the issues which the court is required to decide. This duty continues throughout the proceedings. The rationale for this is clear:

> "… the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law." (*R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at para [20])

[37] I am not satisfied that the duty of candour has been complied with in this case. The reader of the first affidavit sworn by the respondent was informed that the council had <u>never</u> approached change of ownership applications in the same manner as renewals. This was readily dispelled by reference to the Hogg transaction and the information generated through the FOI requests. At no time has Mr Bloomfield taken the opportunity to rectify the matter or provide a proper explanation to the court as to the reason for the original sworn averment.

[38] This is wholly unacceptable. The court is at liberty in such a case to draw an adverse inference in relation to the reliability of the respondent's evidence as a whole.

The grounds of challenge

[39] The applicant contends that the impugned decision is unlawful for the following reasons:

(i) That the respondent has misdirected itself in law in determining that on a transfer of ownership the council must be satisfied that the occupation of the property as an HMO would not constitute a breach of planning control in order to retain the HMO status;

(ii) That the respondent misdirected itself in law by deciding that it could not be satisfied in relation to the breach of planning control issue in the absence of planning permission or a CLEUD; and

(iii) The respondent's decision constitutes a disproportionate and unjustified interference with the applicant's rights under article 1 of Protocol 1 of the ECHR ('A1P1') and is thereby contrary to section 6 of the Human Rights Act 1998.

[40] In relation to the first ground, it is the applicant's contention that, on the proper construction of section 28 of the 2016 Act, the mechanism of transfer of an HMO licence followed by the grant of a licence to the new owner amounts to a renewal of an existing licence rather than the grant of a new HMO licence. It is therefore argued that the issue of breach of planning control ought not to arise in the case of a transfer resulting from change of ownership.

The interpretation of the 2016 Act

[41] The issue in hand is one of statutory interpretation. In *R (O) v Secretary of State for Home Department* [2022] UKSC 3 Lord Hodge stated:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:
>
> > 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They

> should be able to rely upon what they read in an Act of Parliament.'

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other

> persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

[42] The words in section 28 of the 2016 Act make it clear that an HMO licence can be transferred but only in accordance with the procedure laid down in the Act. It cannot be sold or disposed of in any other way. In order to trigger the statutory transfer, a prospective owner of the property must make an application in advance of the purchase completing. Such an application cannot be determined until after completion and therefore any purchase of an HMO must be effected 'at risk' in that the purchaser cannot be sure that right to use the property as an HMO will persist. If no application is made by a prospective owner, then the HMO licence ceases to have effect at the date of the transfer.

[43] It is noteworthy that in the cases referred to above involving the disposal of properties by an individual to limited companies, there were no such prospective owner applications. By operation of law, those HMO licences ceased to have effect at the date of the transfer. They could not be 'deemed invalid' by the council since that language indicates some form of decision making by that body. There is, in law, no such decision to be made.

[44] If the prospective owner has made the application, the HMO licence held by the vendor is treated as being held by the purchaser from the date of transfer of ownership. This is the 'transfer of licence' referred to in section 28(1). This is described in the Act as 'the existing licence' and it remains in effect until either:

(i) The date the 'new licence' takes effect if the application is granted;

(ii) One month after the last date for an appeal of the refusal of an application pursuant to section 67; or

(iii) If there is such an appeal, one month after the appeal is finally determined.

[45] The Act is therefore quite explicit in distinguishing between the 'existing' and the 'new' licences. If the legislature had wished to treat the situation as one of renewal, it could easily have done so by using a similar mechanism to that in section 26. This section deals with change of ownership where at least one person who was a licensee continues to be an owner following that change. In such circumstances, the legislation provides, at section 26(6), that the council must:

> "…treat an application under subsection (5) as an application to renew the licence made jointly by the existing licensee and the new owner."

[46] The words of the statute are clear and capable of only one interpretation. Section 28 permits of the transfer of an extant licence in limited circumstances and states that such a licence ceases to have effect in the event that the new owner's application is granted. Such a grant results in a 'new licence.' This is not the language of renewal which appears in sections 20 and 26 of the Act. When these sections are read together, it is evident that the legislature intended that the change in ownership of an HMO (save in the circumstances prescribed by section 26) results in an application for a new HMO licence. As a result, the council must be satisfied as to all the issues set out in section 8 rather than the more limited questions which must be addressed on a section 20 renewal.

[47] I was invited to consider some extraneous materials in order to ascertain the background, context and policy of the legislation. However, I did not find that the words of the statute were ambiguous or uncertain and therefore the use to which such materials can be put is necessarily limited.

The planning control issue

[48] The Planning (Use Classes) Order (Northern Ireland) 2004 came into force on 29 November 2004. This introduced a requirement to have planning permission in order to use a property as an HMO. The position remains unchanged under the 2015 Use Classes Order.

[49] By virtue of the Transitional Provisions Order 2019, the property in question in these proceedings was treated as having been issued with an HMO licence under section 7 of the 2016 Act. The question of breach of planning control did not arise.

[50] Since, on the applicant's evidence, the property has been in use as an HMO since before 2004, there has been no requirement for any application for planning permission for a change of use. The applicant therefore says there has been no breach of planning control within the meaning of section 131 of the 2011 Act.

[51] If the transfer of ownership does give rise to an application for a new HMO licence, then the issue of breach of planning control must be considered under section 8. The question then arises whether the council can lawfully state that the applicant for the new licence must produce either planning permission or a CLEUD failing which the application would be 'cancelled.'

[52] There can be no doubt that production of a valid extant planning permission would resolve the planning control question. Equally a CLEUD could be used to satisfy the requirement. That is not, however, called for by the statutory provision. Rather section 8(2)(a) provides that the council may grant a licence only if it is satisfied

that occupation as an HMO would not constitute a breach of planning control. Under questioning from the court, counsel for the respondent accepted that there could be exceptional circumstances whereby the council could be so satisfied even absent a valid planning consent or CLEUD. That is not, however, the position which has been adopted prior to the court hearing. The council has said explicitly that the failure to provide one of these two documents would result in the automatic failure of the application for an HMO licence.

[53] This position is not sustainable as a matter of law since it constitutes the adoption of a blanket policy and thereby unlawfully fetters the council's discretion. A CLEUD may well be an effective means of demonstrating the lack of breach of planning control, but it cannot be the only method. If, for instance, an applicant was able to produce tenancy agreements, surveyor's reports, insurance certificates, photographs, statements from landlords, tenants and agents alike, all of which demonstrate beyond peradventure that the property has been in use as an HMO since before November 2004, it would defy all logic to reject the application. The applicant's challenge on this ground therefore succeeds.

A1P1

[54] A1P1 provides:

> "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[55] As was made clear in *Sporrong and Lonnroth v Sweden* [1982] 5 EHRR 35 there are three distinct rules:

(i) The principle of peaceful enjoyment of property;

(ii) The right not to be deprived of possessions save in defined circumstances; and

(iii) The entitlement of the state to control the use of property in accordance with the general interest.

[56] The respondent asserts that an HMO licence does not give rise to any A1P1 right since it is not a possession within the established meaning of that concept. It is argued that the applicant's hope of increased market value of the property by reason of the existence of the licence is merely a hope of future income which does not equate to an enforceable right.

[57] In *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 Lord Bingham observed:

> "Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the first protocol and future income, not yet earned and to which no enforceable claim exists, which may not." (para [21])

[58] I have been referred to cases from England & Wales which are said to support the respondent's contention, including *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin) in which Kenneth Parker QC stated:

> "How should a licence or permission be treated under A1P1? It seems to me that certain licences or permissions are "assets", that is, they have a monetary value and can be marketed for consideration, either through outright sale, "leasing", or sub-licensing. Milk quotas would fall within this category as well as certain spectrum licenses which Ofcom allows to be assigned or sub-licensed for consideration. A more difficult case is a licence which has been acquired at a "market" price, but which may not be assigned or sub-licensed. The best-known examples are perhaps the 3G spectrum licences which were auctioned to five telecommunication operators for £22.5 billion (see "The Auction of Radio Spectrum for the Third Generation of Mobile Telephones", a Report by the Comptroller and Auditor General HC 233 Session 2001-2002 19 October 2001), but which under the conditions of acquisition could not be assigned or sub-leased (although Ofcom now has proposals to permit such transactions). The value of the licences would no doubt have been treated as assets with monetary value in the accounts of the operators, and it seems to me that it would be well arguable that such licences, although not marketable as such, could properly be treated as assets having a monetary value so as to qualify as "possessions" under A1P1. Tricky issues might arise if such assets became fully amortised or lost market value.

However, there are other licences or permissions that are neither marketable nor have been obtained at a "market" price, that is, a price representing what is thought to be the value of net discounted future cash flows that the licence might generate. Such a licence in one sense has a value to the holder because, without it, he cannot carry on the licensable activities. However, such licences do not seem to me to be "assets" having monetary value in the sense required by A1P1. Such licences do not as such represent a distinct asset having a monetary value.

Furthermore, to treat such licences as "possessions" would, in my view, risk introducing unjustified distinctions into what is already a fairly complex area of law. Once a "possession", the licence enjoys a status under A1P1: any interference must be justified as proportionate, and damages may be awarded if the interference is not justified. The damages are likely to be substantial because economic interests have been putatively destroyed or impaired. That higher protection would, however, depend solely upon whether the economic activity in question, which has been the subject of interference, was a "licensable" one. But I have difficulty in seeing any rationale for giving a higher protection by reason of that fact alone. It is true that commentators have often observed that licensing may constitute a barrier to entry and thus raise industry profits above the competitive level, but that could hardly be a good reason for according higher protection under the Convention and HRA to licensable activities. If licensable activities enjoyed higher protection, the result in Countryside Alliance (that the expectation of future earnings was not a possession) could have been different if hunting had first been a licensable activity and the effect of the ban in the Hunting Act 2004 had been to make such licences worthless. However, such a distinction would seem largely fortuitous and I cannot see merit in a system which would treat these two situations differently. It might be thought unfair that a professional person such as a barrister cannot capitalise future earnings and therefore enjoy "goodwill" as a protected possession. However, to address any such unfairness by treating the barrister's practice certificate as a "possession" would seem to me to risk creating unjustified discrimination against those carrying on an unlicensed activity who also do not or cannot capitalise future earnings." (paras [74] – [76])

[59] In that case, the court found that a licence permitting an individual to work as a door supervisor was not a possession since it had no monetary value and was not marketable or transferable.

[60] This argument faces a formidable hurdle in light of the judgment of Girvan J in *Re Landlords Association for Northern Ireland's Application* [2005] NIQB 22. The learned judge held that the imposition of a charge or fee for the registration of HMO properties (under the old NIHE scheme) engaged A1P1. In order to depart from this decision, I would need to be persuaded that it is clearly wrong.

[61] Importantly, section 28 of the 2016 Act does permit the transfer of HMO licences, albeit in limited circumstances. On the evidence in this case, the existence of such a licence, and its ability to transfer, can significantly enhance the value of the property.

[62] For this reason, and by operation of the principle of judicial comity, I am satisfied that an HMO licence comes within the definition of 'possession' for the purposes of A1P1.

[63] The next question which arises is whether there has been any unlawful interference with the peaceful enjoyment of the possession. Secondly, and relatedly, is the applicant a victim for the purposes of the Human Rights Act?

[64] It is, of course, unlawful for a public authority to act in a manner incompatible with any Convention right but section 7(3) of the Human Rights Act provides:

> "If the proceedings are brought on an application for judicial review, the applicant is to be taken to have sufficient interest in relation to the unlawful act only if he is, or would be a victim of that act."

[65] In the instant case, there has been no application for a transfer of the HMO licence for the subject property pursuant to section 28 of the 2016 Act. In any event, the 'victim' of any adverse determination under the Act would be the future owner rather than the applicant. As matters stand, however, the outcome of any such application is unknown. A future purchaser could, for instance, obtain a CLEUD or otherwise satisfy the council that there had been no breach of planning control and thereby obtain the grant of a new HMO licence.

[66] At its height, the applicant's case is that the property's market value has been adversely affected by the stance taken by the council in relation to the HMO licence. Such a conclusion remains speculative. Any purchaser will have a degree of reticence in relation to the purchase of an HMO since he would still have to satisfy, inter alia, the fit and proper person test.

[67] As Lord Mance said in *Re Northern Ireland Human Rights Commission's Application* [2018] UKSC 27:

> "the Convention test of victimhood requires an individual applicant to have been actually affected by the alleged violation, and does not contemplate a kind of actio popularis relating to the interpretation or application of Convention rights." (para [68])

[68] There is scope for potential victims to bring actions relating to breach of Convention rights. In *Re Taylor's Application* [2022] NICA 21, the Court of Appeal recently reviewed the caselaw and McCloskey LJ stated:

> "In *Senator Lines GMBH v Austria and Others* [2006] 21 BHRC 640 the Grand Chamber of the ECtHR, in determining whether the particular application was admissible, reflected on the concept of "potential victim." Referring to concrete examples in its jurisprudence, the court recalled one case where an alien's removal had been ordered but not enforced and another where a law prohibiting homosexual acts was capable of being, but had not been, applied to a certain category of the population which included the applicant. The judgment continues, at page 11:
>
> 'However, for an applicant to be able to claim to be a victim in such a situation he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient …'" (para [19])

[69] In this case, the applicant relies on conjecture and assumption. I am not satisfied that it enjoys victim status for the purposes of the HRA nor that any unlawful act has, as yet, occurred.

[70] The claim of breach of the right established by A1P1 is therefore dismissed.

Conclusion

[71] For the reasons set out, the applicant's claim on ground (ii) succeeds and I intend to make a declaration to that effect.

[72] Grounds (i) and (iii) of challenge are dismissed.

[73] I will hear counsel as to the wording of the declaration and on the issue of costs.