

Challenging unlawful whole-home short-term lets in Edinburgh

Planning Permission

- “Letting on short term basis to visitors - planning permission required because material change of use from residential occupation“- [Neil Collar, Senior Partner, Brodies Edinburgh LLP](#).
- “In cases of short term commercial leisure apartments, the Council will not normally grant planning permission in flatted properties where the potential adverse impact on residential amenity is greatest” - [Edinburgh City Council Guidance for Businesses](#)
- The Planning Department regularly turns down applications for holiday lets in flatted and non-flatted properties due to impact on neighbour amenity. Applications can be seen at the [on-line planning portal](#).
- Edinburgh City Council is serving increasing numbers of enforcement notices for [unauthorised changes of use](#). The process is slow, very expensive to the council and often reliant on evidence supplied by neighbours.
- If business owners are unwilling to seek planning permission, neighbours can [report the possible breach](#).

Title Deeds

- Most properties have title deeds which restrict the use of the property to a “private residence”. Many will specifically prohibit commercial use, multiple occupation, hotels and hostels, and nuisance.
- Landmark cases: Nemcova v Fairfield Rents Ltd [2016] and Flat A, 20 Nottingham Place, Westminster [2016] concluded that AirBnB-style short-term lets breached lease clauses in flats relating to: private residence, nuisance and annoyance; depreciation of the character of the property; voiding communal insurances.
- Anyone with restrictions who wishes to use their property as a commercial short-term let should apply to the [Scottish Lands Tribunal](#) for the title to be varied. An application is £125.
- If neighbours want to obtain an interdict against a neighbour who is in breach of their title deeds they will need to raise an action with the Sheriff Court. This will cost in the region of £15-25k. That said, if the action was successful, expenses are likely to be awarded which would cover much of these fees.
- Most home insurance policies include [legal expenses insurance](#) covering title deed breaches. Given the overwhelming number of enforcement decisions which have been upheld by the Scottish Government Reporters, there is an increasing chance these cases may be taken on.
- [Crowdfunding](#) a test case is also being increasingly discussed as an action to protect communities by giving access to residents to legal expenses insurance.
- Examples of evidence useful for future legal or planning enforcement action include: letters to business owners raising concerns (it is useful to formally request the business seeks Planning and Lands permission); diary recording the number of lets and issues; screenshots from letting sites corroborating level of letting to reviews; reports of antisocial behaviour reported to the Community Safety Team or Police.

Actions by Edinburgh City Council / Scottish Government.

- The [#HomesFirst](#) campaign highlights many of the issues associated with short-term letting in Edinburgh and other locations. It includes useful links and testimony from families living close to short-term lets.
- Edinburgh City Council published [Short Term Letting in Edinburgh](#) which details their concerns about short-term letting on safety; supply and affordability of housing; nuisance and anti-social behaviour (especially in tenements); and taxation burdens.
- The report recommends a 45 day short-term letting allowance. Short-term letting above this would require a planning change of use. [Since this recommendation, 30 days of regular very-short term letting was found unlawful by the DPEA in the Ratcliffe Terrace case described on the next page](#).
- 45 days of very short-term lets represents the following undesirable scenarios: an occupancy of 75% over July and August (average hotel room occupancy in Scotland is 71%); or letting almost every weekend over a period of 6 months; or 45 one-day lets with same day changeovers.
- Restricting the number and turnover of lets, as well as (instead of) the number of days is needed to protect neighbour amenity and to be compatible with previous Reporter decisions.
- Edinburgh City Council have written to the Scottish Government requesting the introduction of a licensing system and policy changes at a national level.

Summary of DPEA decisions (planning appeals) in Flatted Properties

✓ 2019 - [7-8 Baxters Place, Edinburgh, EH1 3AF](#)

- "...the occupation of the premises as a whole, and of each unit individually, is significantly different from that which would arise at individual flats occupied by permanent residents."

✓ 2018 - [1081 Sauchiehall Street, Flat 3/2, Glasgow, G3 7UE](#)

- "...the inevitability of permanent residents regularly encountering strangers in communal (but still private) areas of the building, is a further indication that the nature of the use of the flat for short term letting markedly differs from that of other residential flats in the same building."
- "priority must be given to addressing the currently detrimental effect upon amenity being experienced by permanent residents..."

✓ 2018 - [63/2 Bread Street](#), ✓ [63/3 Bread Street](#), ✓ [63/11 Bread Street, Edinburgh, EH3 9AH](#)

- "the number of arrivals and departures, the likelihood of increased noisy activity late in the evening, increased activity as a result of the cleaning of the property and the likelihood of an increased use of the communal drying area, would be greater than that would be expected..."

✓ 2018 - [2F2, 52 Morningside Road, Edinburgh, EH10 4QP](#)

- "...the property is akin to guest house accommodation... alters the character of the tenement."

✓ 2018 - [Flat 8 19 Old Fishmarket Close, Edinburgh, EH1 1RW](#)

- "... there is an important distinction to draw between external ambient noise, which is a characteristic of a city centre location such as this, and sources of noise and disturbance from within the building itself."

× 2018 - [17 Old Fishmarket Close, Edinburgh, EH1 1RW](#)

- "...the proposal would represent a material change of use which requires planning permission... I find it particularly significant that the flat benefits from its own external door."
- "Objections raised in representations to the application referred to the lack of available residential accommodation in the Old Town... In the absence of any policy or evidential basis for considering this matter further, this is not an issue which I consider can be pivotal to my assessment in this case."

✓ 2018 - [Flat 8 , 22 Newhalls Road, South Queensferry, EH30 9TA](#)

- "Short term tenants of flat 8 would have different and unfamiliar patterns of movements... I have some sympathy with the concern that the short term occupants would have access to the common parts in particular the hallway and the garden." - **108 days letting**.

✓ 2018 - [Flat 15, 71 Ratcliffe Terrace, Edinburgh, EH9 1SU](#)

- "In 2018, therefore, the 14 periods of short-stay commercial visitor use took place over period of some 22 weekends... I consider this pattern of use to be significant as weekends are the time when residents of 71 Ratcliffe Terrace will be most likely to spend time at home with a reasonable expectation that they will be able to enjoy the amenity of their flats with a minimum of disturbance..." - **44 days in 2017, 30 days in 2018**.

✓ 2018 - [3F1, 14 Chancelot Terrace, Edinburgh. EH6 4SS](#)

- "A material change in the character of a use may be caused by circumstances that subsist for a significant period of time but not all of the time... has had a material effect upon the character and intensity of the established residential use, as well as upon the potential for noise and disturbance..." - **134 days letting**

× 2018 - [Flat 1, 1 South Gyle Mains, Edinburgh EH12 9HS](#)

- This case allows an appeal, dismissing the relevance of the Gallowgate case stating that it was the combination of the subdivision of a duplex apartment into two SSCVAs that constituted a change of use.
- ✓ Co-owners of the building were not consulted despite obligation to notify those with a "interest in the land".
- ✓ Neighbours have reported antisocial behaviour and requested enforcement.

✓ 2015, 2016 - [Flat 5, 2 Eyre Place, Edinburgh, EH3 5EP](#)

- The short-term nature of lets, common access, and layout of the block increasing conflict between customers and permanent residents are material factors affecting residential amenity.

✓ 2013 - [Flat 1/3, 332 Gallowgate, Glasgow G4 0TX](#)

- "short term lets are more likely to attract people who have no responsibility for the property other than paying the going rate, which is at odds with the quieter lifestyle of the more permanent tenants or owners nearby."

Summary of Case Law - Enforcing Title Deeds

In **Scotland** it is necessary to prove both "title" (a breach of title deeds), and "interest" (the breach has material detriment to the "value" or "enjoyment" of the property).

Title seems to be a given, guidance on what constitutes "material" detriment is limited. Most legal firms have little experience with STLs and it is important that they are informed of the most recent cases.

Most home insurance policies include cover for legal expenses for breaches of title deeds.

✓ 2015, 2018 (appeal) - [701 Courtenay House, London \[2015\] LON/o0AY/LBC/2015/0021](#)

- Short-term lettings of a room breached three covenants "as a private residence for occupation by a single household", "carrying out a trade, business or profession", and "nuisance, damage, annoyance".
- "he is not permitted to use the Property otherwise than as a private residence for a single household in any circumstances. Furthermore, he cannot run a business in the Property and this he is also clearly doing both by letting out rooms for commercial gain."

✓ 2016 - [Flat A, 20 Nottingham Place, Westminster \[2016\] EWLVT LON LV FFT 00BK 0020](#)

- Short-term lettings breached five covenants: use as a private residence; sub-letting; nuisance and annoyance; depreciation of the character and reputation of the property; voiding communal insurances.
- "the presence of nearby hotels and hostels is a different matter to "constantly" having different unknown people coming in and out of the communal areas of a private residential building."

✓ 2015, 2016 (appeal) - [Nemcova v Fairfield Rents Ltd, London \[2016\] UKUT 303 \(LC\)](#)

- Landmark case. First to conclude that very short-term lets breaches the "private residence" covenant.
- This case found just **seven short-term lets** a breach of the conditions associated with the building.
- "Such a restriction is likely to have significant benefits for the lessees of the Building who would, we have no doubt, prefer to live with other owner-occupiers or long term tenants as opposed to those using a flat in the Building on a short term let for, perhaps, only a few days."

✓ 2012 - [Moore v Secretary of State for Communities and Local Government and Suffolk District Council](#).

- Starting from first principles, without the assistance of any authority, whether the use of a dwellinghouse for commercial letting as holiday accommodation amounts to a material change of use will be a question of fact and degree in each case, and the answer will depend upon the particular characteristics of the use as holiday accommodation.
- As a matter of common sense, this particular use for holiday lettings is very far removed from the permitted use as a dwellinghouse and a material change of use has occurred.
- This was a large house in entirely private grounds and a change of use was deemed to have occurred.

✓ 2011 - [Kettlewell v Turning Point Scotland 2011 SLT \(Sh Ct\) 143](#)

- Material detriment found to value (10% reduction) and enjoyment (increased traffic and parking issues).

✓ 2008 - [Smith v Lawrence LTS/TC/2008/18; 2009 GWD 6-104](#)

- Rejected an application by a property company to vary a title condition in a Musselburgh home to permit student occupation due lack of control, and impact on: noise, traffic, parking and property values.
- "The immediate effect might increase values as the market is opened to more landlords, longer term the attraction for families may be gradually reduced, with an effect on saleability and values."

× 2007, 2008 (appeal) - [Barker v Lewis 2007 SLT \(Sh Ct\) 48; affd 2008 SLT \(Sh Ct\) 17](#)

- Unsuccessful interdict against a proprietor operating a B&B from her large detached home.
- Incidents (smoking, antisocial hours, parking issues, intrusion) on 10% of days deemed immaterial.
- The sheriff indicated that an increase in the level of business by 60% would result in material detriment.
- Furthermore, a few more serious incidents might well have gone the pursuers' way.

- ✓ Malcolm Combe notes the incomparability of this case in [Land law responses to the sharing economy: short-term lets and title conditions](#): "...Airbnb will not necessarily have the presence of a live-in host that a traditional B&B will have. Such a presence might bring a certain amount of control (not to mention a cooked breakfast) that is not present in a short-term letting of a whole property. As such, even before the less stringent interest to enforce case law is considered, Barker v Lewis might be distinguishable."

Human Rights: Human Lives, A Guide to the Human Rights Act for Public Authorities.

- Article 1 of Protocol 1: Right to peaceful enjoyment of your property - Requires public authorities to strike a fair balance between the general interest and the rights of individual property owners.
- Article 8: Right to respect for private and family life - Public authorities may also need to consider whether there are situations putting them under obligation to take active steps to promote and protect individuals' Article 8 rights from systematic interference by third parties, for example, private businesses.
- The UN Special Rapporteur for Adequate Housing regularly comments on the [negative impacts](#) of AirBnB.

Other notes

- **Context** - All of the case law (but the first three) refer to detached properties, with owners/carers living onsite.
- **Change in nature of "holiday" lets** - Previously "holiday lets" involved families staying a week or two in a detached property on holiday. Now, they involve (unrelated) groups, staying a few days, in residential areas, usually flats, as a hotel alternative. This greatly increases the likelihood and impact of disturbances.
- **Maintenance burdens** - Most tenements are self-managed. Absent commercial operators profit at the expense of residents who voluntarily manage cleaning, gardening, refuse and repairs for shared buildings.
- **No worse than a noisy family?** - "the risk of a noisy family is one, under the titles, the pursuers are bound to take. They are **not bound** to take the risk of noisy guests in a B&B" - [Interest to Enforce Real Burdens](#).
- **Mental health impacts** - "If wherever you're living feels unsafe, uncomfortable or insecure, you might constantly feel stressed, anxious, panicked or depressed." - [MIND](#)
- **Loss of privacy** - Sharing communal spaces and gardens with fee-paying strangers breaches reasonable expectations of privacy and reduces residents' ability to enjoy these spaces.
- **Loss of security** - Short-term lets cause significant security impacts as keys to communal buildings are handed to hundreds of customers a year. Residents cannot identify who is "allowed" to be there and who are intruders. This insecurity is advertised by the use of key safes, often without the necessary permissions.
- **Value** - Estate agents report that sellers are giving instructions [not to sell](#) to STLs to protect communities.
- **Voiding insurances** - Short-term letting will breach the conditions of most normal [mortgage](#) and [insurance](#) policies. This was demonstrated in court in this [case](#).
- **Key safes and insurance** - Can void [home](#) and [building insurance](#). It is the policy of most [care organisations](#) that key safes are only fitted with permission of all property owners in the building.
- **Key safes and planning permission** - May need planning permission for installation on listed buildings. See the enforcement notice at 1 Upper Bow ([18/00206/ELBB](#)). Edinburgh City Council are removing those fitted without permission to public property. The damage to stone work is [evident](#).
- **Business rates** - Short-term lets are liable for [business rates](#) if they are **advertised** for >140 days per year.
- Impact on rental market - The movement from long term to short-term rental
- **Unlawful listings** - This New York research paper finds that [two-thirds of income](#) on AirBnB comes from likely illegal listings.