



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 74

P352/20

OPINION OF LORD FAIRLEY

In the Petition of

JON SHARP

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

Petitioner: O'Rourke QC, Welsh; Ennova Law

Respondents: Crawford QC, Irvine; Scottish Government Legal Directorate

23 July 2020

Introduction

[1] The emergency restrictions which were imposed in response to the COVID-19 pandemic led to the temporary closure of many businesses across the United Kingdom.

From March 2020 onwards, the Scottish Ministers introduced a range of measures intended to provide financial support to such businesses in Scotland. These measures included non-domestic rates reliefs, hardship funds and grants.

[2] This petition concerns grant support which was introduced by the Scottish Ministers for businesses operating in the retail, hospitality, and leisure ("RHL") sector. As more fully described below, that grant support evolved over the period between March and June of

2020. By early June, the aggregate amount of grant funding which could be claimed by a qualifying RHL business was determined by two factors: (i) the number of properties from which the business had traded at the qualifying date; and (ii) the respective rateable values of those properties. Specifically, from 8 June 2020 qualifying RHL businesses which had traded:

- 1) from a single property with a rateable value of between £18,001 and £51,000 were entitled to a single grant of £25,000;
- 2) from a single property with a rateable value not exceeding £18,000 were entitled to a single grant of £10,000; and
- 3) from multiple properties were entitled to receive a full grant (of either £25,000 or £10,000 depending on rateable value) for the first property operated by the business, and 75% of the full grant (ie £18,750 or, as applicable, £7,500) for each eligible property thereafter.

No grant was payable in respect of any property with a rateable value in excess of £51,000.

No grant was payable in respect of any property with a rateable value of less than £18,000 if the cumulative rateable value of all properties operated by the business exceeded £500,000.

[3] The petitioner owns and operates six coffee shops in Edinburgh. Five of his shops have rateable values in the £18,001 to £51,000 range. The sixth shop has a rateable value of less than £18,000. Under the RHL grant scheme described above, the petitioner has accordingly received an aggregate RHL grant of £107,500 made up of one grant of £25,000, four grants of £18,750 and one grant of £7,500. In this petition for judicial review, the petitioner submits that the 25% reduction to each of the grants paid to him in respect of the second and subsequent properties of his business is unlawful. He seeks reduction of the policy of the Scottish Ministers to restrict grants paid in respect of second and subsequent

properties of RHL businesses in that way. He submits that he had a legitimate expectation that a full 100% grant would be paid in respect of all six of his properties. He submits that the decision of the Scottish Ministers to restrict the amount of the grant payable in respect of second and subsequent properties is irrational. In advancing these arguments, the petitioner relies heavily upon statements made by the Chancellor of the Exchequer on 17 March 2020, and by Cabinet Secretaries at a sitting of the Scottish Parliament on 18 March 2020. It is necessary, therefore, to look in some detail at those statements within the context of the evolution of the RHL grant support in Scotland.

The origins and development of RHL grant support in Scotland

[4] On 11 March 2020 the World Health Organisation declared COVID-19 to be a pandemic. On the same day, the Chancellor of the Exchequer presented his Budget to the UK Parliament. In the course of his Budget speech the Chancellor announced that:

“...any eligible retail, leisure or hospitality business with a rateable value below £51,000 will, over the next financial year, pay no business rates whatsoever...”

I am providing, to any business currently eligible for the small business rates relief, a £3,000 cash grant per business.”

[5] On 14 March, the Scottish Government issued a news release announcing a 75% rates relief for RHL properties with a rateable value of under £69,000, grants of “at least £3,000” to small businesses, a 1.6% rates relief for all properties (effectively reversing the proposed uplift in the poundage for 2020-21) and a fixed rates relief of up to £5,000 for all pubs with a rateable value of less than £100,000.

[6] On 17 March 2020, the Chancellor made a further announcement about an expanded package of business support measures which he proposed to introduce in England. These

included loan schemes, an expansion of non-domestic rates reliefs and further grants. In the course of his announcement on 17 March, the Chancellor stated:

“I announced last week that for businesses in the retail, hospitality and leisure sectors, with a rateable value of less than £51,000, they will pay no business rates this year.

Today, I can go further and provide those businesses with an additional cash grant of up to £25,000 per business – to help bridge through this period.

Additionally, I am also today extending the business rates holiday to all businesses in those sectors, irrespective of their rateable value.

That means that every single shop, pub, theatre, music venue, restaurant – and any other business in the retail, hospitality or leisure sector – will pay no business rates whatsoever for 12 months, and if they have a rateable value of less than £51,000, they can now get a cash grant as well.

I also announced last week that we would be providing £3,000 cash grants to the 700,000 of our smallest businesses.

In light of the new circumstances, and to support their cash flow, today I can increase those grants to £10,000.

Taken together, on top of the unlimited lending capacity I have already announced, this is a package of tax cuts and grants, in this financial year, worth more than £20 billion.

...

Local authorities in England will be fully compensated for the costs of these measures, and the devolved administrations will receive at least £3.5 billion in additional funding as a result to provide support to businesses in Scotland, Wales and Northern Ireland.”

[7] It was anticipated that delivery of financial support to qualifying businesses would be effected through local authorities. Quantification of the funding to be provided to the Scottish devolved administration for business support was to be achieved through the application of the Barnett formula. The Barnett formula provides a means of calculating block grant funding for Scotland for devolved matters where there are comparable spending programmes in England or in England and Wales. It does so by the application of a

percentage calculated by reference to relative population size. The current percentage for Scotland is 9.7%. Where UK Government departmental budgets are increased or decreased, an equivalent (or “consequential”) adjustment is made to the budget of the Scottish devolved administration using the applicable Barnett percentage. These are referred to either as “Barnett consequentials”, or simply “consequentials”.

[8] On the afternoon of 18 March 2020, the Scottish Cabinet Secretary for Economy, Fair Work and Culture delivered a statement to the Scottish Parliament. The statement included the following passage:

“I welcome the further support that was announced by the chancellor, and the Scottish Government will pass all consequentials to businesses to help them through this challenging period. The First Minister has already confirmed that every penny that we receive will go to support Scottish businesses and their employees, and I confirm today that we will replicate the package of measures in full.

We have already confirmed our intention to effectively freeze the poundage rate next year, and I confirm today that we will mirror the package of measures that was announced by the chancellor. This will ensure that small businesses that receive the small business bonus scheme or rural relief will be eligible for a £10,000 grant. We will provide 12 months’ relief for properties in the hospitality, leisure and retail sectors, and we will provide a £25,000 grant for hospitality, leisure and retail properties with a rateable value between £18,000 and £51,000.”

The Deputy Presiding Officer then allowed questions on the statement. Those questions were answered by the Cabinet Secretary for Economy, Fair Work and Culture, the Cabinet Secretary for Finance and the Cabinet Secretary for Rural Economy and Tourism.

[9] In response to a question from Donald Cameron MSP about the mechanics of accessing support, the Cabinet Secretary for Finance stated:

“On the specific questions that Donald Cameron has asked, my colleague Fiona Hyslop has confirmed that we will mirror what was in the announcement that the UK chancellor made yesterday. I confirm that details will be put online so that businesses can identify quickly and easily whether they are eligible. We will use the rates system, as the English local authorities will, to distribute the grants as quickly and effectively as possible – the £10,000 grants for all small businesses that are in receipt of the small business bonus or the rural bonus, and the £25,000 grants for

businesses in the hospitality sector, with that being defined, again, by the rates system.”

Responding to a question from Sandra White, MSP about the timing of financial assistance, the Cabinet Secretary for Finance stated:

“Sandra White mentioned clubs and pubs which, along with music venues, cinemas, studios and galleries, are all classified as retail and therefore would qualify for 100 per cent rates relief, irrespective of their rateable value. Some of them will also be small businesses and so will get the £10,000 grant. We recognise the huge challenge facing those businesses and we want to get the money to them as quickly as possible.”

[10] The Cabinet Secretary for Rural Economy and Tourism responded to a question by stating:

“...I very much welcome the specific measures that have been announced for businesses in hospitality, leisure and retail, including the small business bonus rural relief grant of £10,000 and the £25,000 grant for hospitality, leisure and retail properties with a rateable value of between £18,000 and £51,000. Those measures go far more towards what is required than the UK Government’s initial response did. I do not say that with any criticism; it is a developing scene, and it is now obvious that the initial UK response was not adequate and has been substantially enhanced.”

The Cabinet Secretary for Economy, Fair Work and Culture also responded to questions, stating *inter alia*:

“...The rates relief for the hospitality industry for the year and the £25,000 grant will be very important measures for many areas. They will give people a bit of confidence, time to plan and time to talk to their banks to see what is possible...

...I reiterate that we are providing 12 months of rates relief for properties in the hospitality, leisure and retail sectors, and we will provide a £25,000 grant to hospitality, leisure and retail properties that have a rateable value that is between £18,000 and £51,000. That will capture a great number of businesses...

...We have responded rapidly...After the announcement only yesterday evening by the UK chancellor, we have responded immediately with a commitment to replicate all the measures in relation to rates relief, but we accept that there is more to be done.”

[11] At 1626 hours on 18 March 2020, the official Scottish Government website

www.gov.scot published a news item summarising and quoting extracts from the statement

to Parliament earlier that day by the Cabinet Secretary for Economy, Fair Work and Culture.

Two points expressly bullet pointed in that news item were:

“£10,000 grants for small businesses in receipt of the Small Business Bonus Scheme or Rural Relief

£25,000 grants for hospitality, leisure and retail properties with a rateable value between £18,000 and £51,000”

[12] On 19 March 2020, a different official website of the Scottish Government, www.mygov.scot published an article entitled “Help with non-domestic rates in Scotland during coronavirus (COVID-19)”. The article referred to the 100% rates relief for all occupied properties in the RHL sector. It provided guidance on where information about the application process could be found. On the subject of grants, it stated:

“Grants

Retail, hospitality and leisure businesses with a rateable value between £18,000 and up to and including £51,000 will be able to apply for a one-off grant of £25,000.

A one-off grant of £10,000 will also be available to small businesses who get:

- Small Business Bonus Scheme relief
- Rural Relief

You can also get this grant if you applied for Nursery Relief or Disabled Relief but are eligible for the Small Business Bonus Scheme.

You can only apply for one grant – even if you own multiple properties.”

[13] On 24 March 2020, the Scottish Government published further details of eligibility for the grant schemes on its www.gov.scot website, stating:

“The one-off grants are designed to help protect jobs, prevent business closures and promote economic recovery, and more than 90,000 ratepayers across Scotland will be able to benefit...

Two types of grant are now available to ratepayers:

- a one-off £10,000 grant to ratepayers of small businesses

- a one-off grant of £25,000 available to retail, hospitality and leisure business ratepayers with a rateable value between £18,001 and £50,999...

... The one-off £10,000 grant is available to ratepayers of small businesses in receipt of the Small Business Bonus Scheme (SBBS) or Rural Relief, or eligible for SBBS in receipt of Nursery Relief or Disabled Relief and with a rateable value up to £18,000."

Potential applicants were directed to the www.mygov.scot website for further information on how to apply.

[14] On 24 March, the UK Government issued its guidance to local authorities on the English grant schemes. Paragraph 12 of that guidance specified that the grants in England would be "per property". In particular, eligible RHL businesses would receive a grant per property of £10,000 for all properties with a rateable value of up to £15,000 and a grant of £25,000 per property for properties in the £15,000 to £51,000 range. Guidance to businesses subsequently issued by the UK Government on 1 April stated:

"Eligible businesses can get one grant per property.

You cannot claim both the retail, hospitality and leisure grant and the small business grant on the same property."

[15] On 15 April, the Scottish Government published a "factsheet" containing details of an expansion of the scope of both of its grant schemes. The factsheet stated:

"In addition to the 100% grant on the first property, ratepayers will also be eligible for a 75% grant on each subsequent property that meets the criteria for each grant."

A further update to the www.mygov.scot website on 17 April explained that whilst the £10,000 grant had been extended to all properties in the RHL sector with rateable values of less than £18,000, that extension would only apply where the cumulative rateable value of all properties operated by the business was in the range £35,001 to £51,000. With effect from 8 June, that upper cumulative limit was increased from £51,000 to £500,000.

[16] The combined effect of these various announcements was that with effect from 8 June 2020, the petitioner was entitled to receive grants in respect of all six of his shops, subject to a restriction by 25% of the amount due in respect of five of them. This resulted in his aggregate grant entitlement being £107,500. Had the petitioner's shops been situated in England, he would have received a full 100% grant for all six properties. This would have resulted in an aggregate entitlement of £135,000.

[17] In a joint letter to the Convenor of the Economy, Energy and Fair Work Committee dated 25 April 2020, the Cabinet Secretary for the Economy, Fair Work and Culture and the Cabinet Secretary for Finance provided a full appraisal of the business support measures in Scotland. That letter explained that all Barnett consequentials received in respect of UK Government business support measures (amounting to around £2.253 billion) had been passed on to Scottish businesses. The letter stated *inter alia*:

“With regards to the policy of awarding the Small Business Grant at 75% for second or subsequent eligible properties, we have chosen to go beyond the UK Government for the vast majority of the economy.

In England, we believe that very few properties beyond the RHL sectors will actually receive any grant for multiple properties due to restrictions in the design of the Small Business Rates Relief compared to the more generous Small Business Bonus Scheme in Scotland. We estimate that around 5,500 properties in the broader economy will benefit from a £7,500 grant in Scotland but would receive nothing in England. Meanwhile, around 3,500 RHL properties would receive £7,500 in Scotland compared with £10,000 in England. These figures demonstrate that, on balance, more properties will gain more in Scotland.

Whilst we do provide slightly less grant support to the RHL sectors with multiple properties through the grant schemes than in England, properties in the RHL sectors will also benefit from 100% rates relief in 2020-21. This is a substantial saving for many businesses, on top of the potential wage savings through the UK Government's furlough scheme. In sharp contrast, there are many businesses outside the RHL sectors who are not getting any rates relief or grant funding. The Scottish Government has sought to ensure as much fairness at a time when businesses in many sectors, across the country, are grappling with the impact of Covid-19.

The 75% grant figure for second or subsequent eligible properties was chosen as a fairer means of allocating funding and ensuring there are resources to provide broader support for the economy. We also believe it more accurately reflects the realities of operating multiple properties for the majority of businesses. For example, a 75% grant will reflect the greater efficiency and lower overhead and operating costs for a business operating across multiple sites.”

The letter recognised the desire of many businesses to have consistency across the UK, but noted also the need for distinctive approaches in Scotland where evidence pointed to that being necessary.

[18] Before leaving the question of the rationale for the 75% limit on grants for second and subsequent properties, it should be noted that in the answers to the petition the respondents aver that Scotland has a significantly higher proportion of low value rateable properties than England. In submissions, and under reference to an Affidavit from a representative of the Scottish Government Local Government and Analytical Services Division, Mr Storrie, it was explained by Senior Counsel for the respondents that the expression “higher proportion” was intended to signify a higher percentage relative to population. In addition, it is averred that Scotland has a similarly higher percentage of hospitality properties than England. The combined effect of this is that an exact replication of the English grant scheme in Scotland would cost more in Scotland than the aggregate amount of the Barnett consequentials generated by the equivalent scheme in England. Exact replication of the two English grant schemes in Scotland would be respectively 8.45% and 50% more expensive.

Submissions

Petitioner

[19] Senior Counsel for the petitioner submitted that a claim to a legitimate expectation could arise from a promise which was “clear, unambiguous and devoid of relevant qualification” (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, per Lord Hoffman at page 488H; *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Limited* [1990] 1 WLR 1545, per Bingham LJ at page 1569; *R (Save Britain’s Heritage) v Secretary of State for Communities and Local Government* [2019] 1 WLR 929). The statements made by the Cabinet Secretaries in the Scottish Parliament on 18 March 2020 constituted a clear, unequivocal and unconditional promise to “mirror” or “replicate” the English grant schemes which had been announced on 17 March by the Chancellor. That gave rise to a legitimate expectation on the part of the petitioner that a full £25,000 grant would be made available per property on all qualifying properties. Senior Counsel also pointed to the use by the Cabinet Secretary for Economy, Fair Work and Culture on more than one occasion of the expression: “a £25,000 grant for hospitality and leisure **properties** with a rateable value between £18,000 and £51,000” (emphasis added) and noted that similar language had been used by the Cabinet Secretary for Rural Economy and Tourism. Senior Counsel submitted that, in context, the only possible construction of what was said was that the respondents had promised that a full £25,000 grant per qualifying property would be made available. Although detrimental reliance was not essential, it was a relevant consideration (*Bancoult*, pp 488-9). From 18 March, the petitioner had relied upon that promise in his dealings with suppliers, and in taking important decisions about the funding of his shops going forward. He had a legitimate expectation that the promise would be honoured. The website post of 24 March and the factsheet of 15 April each constituted a

departure from and frustration of that expectation. In the circumstances, that departure represented an abuse of power by the respondents (*R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115; *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213; *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755).

[20] It was further submitted that I should treat the explanations now given by the respondents for choosing to adopt a different policy to that which had been implemented in England with caution and as *ex post facto* rationalisation (*R (Ermakov) v Westminster City Council* [1996] 2 All ER 302; *R (Nash) v Chelsea College of Art and Design* [2001] EWHC Admin 538 at paragraphs 34 and 35).

[21] Apart from the submission that I should treat reasons given *ex post facto* with some caution, the issue of rationality did not feature prominently in the oral submissions for the petitioner as a “stand alone” ground for review. To some extent, it was relied upon as a facet of the case based on legitimate expectation to suggest that where there was a departure from a previously declared policy giving rise to a legitimate expectation, reasons should be given.

[22] As a separate ground of review, rationality is relied upon at paragraph 14 of the petition under reference to the well-known dictum of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Read short, the petitioner avers that the policy decision of the Scottish Ministers to restrict the amount of grant payable for second and subsequent properties by 25% is so outrageous in its defiance of logic as to be unlawful. It is averred that it is illogical – at least without giving reasons – to place businesses in Scotland at a disadvantage when compared to equivalent businesses in England whilst maintaining that the English support schemes are being “mirrored”. It is said that having

linked the grant schemes to the non-domestic rates system, it is irrational further to sub-categorise eligible properties in a manner unrelated to liability for non-domestic rates.

Respondent

[23] Senior Counsel for the respondents began by noting that, within the legal and constitutional framework created by the Scotland Act 1998, the Barnett formula was the accepted method of allocating funds to Scotland in relation to devolved matters. There was, however, no presumption that the approach taken by the Scottish Government to spending the monies so allocated would be precisely the same as that taken in England. It was the responsibility of the Scottish Government to formulate policies in devolved areas which were suitable for Scotland. That was an inevitable consequence of devolution. The premise of the petitioner's submission was that the Scottish Government was merely administering a UK scheme. That was incorrect. There was no requirement on the Scottish Government to justify or give reasons for adopting a different policy to that which may have been adopted in England. The rationality of Scottish Government decisions should not be judged simply by comparison to the position in England. Both nations are entitled, rationally, to arrive at different policy decisions.

[24] Whilst accepting that I could scrutinise the statements made by the Cabinet Secretaries in the Scottish Parliament on 18 March – even where those had been made in response to parliamentary questions – Senior Counsel submitted that the language used did not create a clear, unambiguous and unqualified representation in the terms contended for by the petitioner. The statements had to be taken in their full context (*R (Association of British Civilian Detainees: Far East Region) v Secretary of State for Defence* [2003] QB 1397). At their highest, the statements by the Cabinet Secretaries could give rise only to a legitimate

expectation that all consequentials arising from the policies announced by the Chancellor on 17 March would be passed on in Scotland as rates relief and business support. That was exactly what had happened. The detail of the English grant schemes was not known until the UK Government published its guidance on 24 March. That was the first point at which there was any indication that grants in the RHL sector in England would be per property rather than per business. The indications on 18 March that the English schemes would be “mirrored” or “replicated” had to be read in that context and in light of what the Chancellor had said on 17 March. In the absence of a promise in the terms contended for by the petitioner which was clear, unambiguous and devoid of qualification, the submission for the petitioner insofar as based upon legitimate expectation could not succeed (*Bancoult* at para [60] per Lord Hoffman).

[25] Even if that was wrong, the particular policy under consideration was one which lay within the “macro-political field”. The decision challenged in the present case was not an administrative decision but the exercise of an executive function. Policy decisions about the detailed allocation of the Barnett consequentials for business support within Scotland were political ones with which the courts should be slow to interfere other than, perhaps, on grounds of *Wednesbury* irrationality (*Begbie*, page 273 D-E; *Bancoult*, paragraph [60], and *cf Coughlan* and *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237). This was not a situation where the respondents required to give reasons at all for the particular policy adopted or for any change to that policy (*R v Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] 1 WLR 242). This factor was relevant both to the issue of whether or not there had been an “abuse of power” as well as to the issue of rationality. In any event, the respondents had given reasons for this policy which were neither *ex post facto* nor irrational.

Analysis and decision

Legitimate expectation

[26] In relation to the aspect of the petitioner's case based upon legitimate expectation, it was common ground that the relevant questions were:

- a. Did the respondents create a legitimate expectation in the terms contended for by the petitioner by making a promise which was clear, unambiguous and devoid of any relevant qualification?
- b. If so did the respondents frustrate that expectation? and
- c. If so, was the frustration of the legitimate expectation so unfair that to take a new and different course amounted to an abuse of power?

The particular expectation for which the petitioner contends is that he would receive a grant of £25,000 per property for each of his six shops.

[27] The undertakings given by the Cabinet Secretaries on 18 March to "mirror" or "replicate" the package of measures announced by the Chancellor on 17 March 2020 could not legitimately have formed the basis for such an expectation. On 17 March, the Chancellor spoke of providing businesses in the RHL sector with "an additional cash grant of up to £25,000 per business". The first point to note is that "an additional cash grant" is framed in the singular and is said to be "per business". An ambiguity as to whether the grant was to be per business or per premises could arguably be said to arise from the Chancellor's reference in the immediately preceding paragraph to "businesses...with a rateable value of less than £51,000". In particular, the concept of rateable value is one which is usually understood to apply to properties or premises rather than to the wider collection of assets and goodwill that make up a "business". At best for the petitioner, however, the

Chancellor's statement was ambiguous on the issue of whether the proposed grant support being described by him was intended to be per business or per property. Having regard to the way in which the grant schemes ultimately developed in Scotland, it is also worth noting that the use by the Chancellor of the qualifying words "up to" clearly signified that whilst individual grants would be capped at £25,000, they would not necessarily be paid at that maximum level. The words "up to" were relevant words of qualification.

[28] The petitioner also founds upon other sections of the statements of the Cabinet Secretary for Economy, Fair Work and Culture and the Cabinet Secretary for Rural Economy and Tourism on 18 March. The former spoke of providing "a £25,000 grant for hospitality, leisure and retail **properties** with a rateable value between £18,000 and £51,000" (emphasis added). The latter described "the £25,000 grant for hospitality, leisure and retail properties with a rateable value of between £18,000 and £51,000". These expressions, viewed in isolation, might create an impression or understanding that grants were to be paid per property and that multiple grants would be available for businesses with multiple properties. On the other hand, the particular context in which those statements were made was of an undertaking to "mirror" or "replicate" the package of English measures. As I have already noted, the policy announced by the Chancellor on 17 March, though arguably ambiguous, was expressed as being a grant "per business". None of the Cabinet Secretaries who spoke on 18 March expressly addressed the question of whether grants would be per business or per property. In the context of the Chancellor's announcement on 17 March, the consistent and repeated use by the Cabinet Secretary for Economy, Fair Work and Culture and the Cabinet Secretary for Rural Economy and Tourism of the singular definite and indefinite articles ("the £25,000 grant" and "a £25,000 grant") might also be said to be consistent with a single grant per business. The language used by the Cabinet Secretary for

Finance indicated that £25,000 grants were available “for businesses” in the RHL sector. She also made clear that details of eligibility would be put online “so that businesses can identify quickly and easily whether they are eligible”. In their full context, the statements by the Cabinet Secretaries on 18 March were not a clear, unambiguous and unconditional promise to pay multiple grants to small businesses and RHL sector businesses operating from multiple properties. On 19 March, the post on the official MyGov website clarified the position, stating: “You can only apply for one grant – even if you own multiple properties”. Prior to that clarification, however, it was not clear from what was said on 18 March whether the grant support was to be made available per business or per property.

[29] As matters later developed, the respondents did ultimately make grant support available on a per property basis for all of the petitioner’s shops, but at a restricted level on second or subsequent properties. That extension of eligibility happened in two stages on 15 April and 9 June. Prior to 15 April, however, the respondents did not state sufficiently clearly and unequivocally that *any* grant would be paid in respect of second and subsequent properties such as to create a legitimate expectation to that effect upon which the petitioner was entitled to rely.

[30] Since the petitioner cannot point to a sufficiently clear, unambiguous and unconditional promise in the terms for which he contends, the part of his argument which is based upon the principle of legitimate expectation must fail. For that reason, it is not necessary for me to consider in any detail the two further questions related to frustration of expectation and abuse of power. On the latter of those questions, however, I saw significant force in the respondents’ submission that the policy for allocation of Barnett consequentials fell, in the particular circumstances of this case, within what is referred to in the case law as the “macro-political field” where a change of policy would not readily be seen as an abuse of

power. I would also have regarded it as material that on 19 March the respondents stated on an official and publicly accessible website that applicants could apply for only one grant even if they owned multiple properties. That same message was repeated on a different official website on 24 March. Even if – contrary to the conclusion that I have reached – the respondents did clearly announce a policy on 18 March in the terms contended for by the petitioner, that policy was very swiftly revoked. That would also have been a relevant factor in considering whether any such revocation was unfair and an abuse of power. Given the conclusion that I have reached on the first of the three questions bearing upon the legitimate expectation argument, however, it is not necessary for me to express a concluded view on these other issues.

Rationality

[31] To the extent that rationality featured as a facet of the petitioner's case based on legitimate expectation – in the submission that a departure from a previously declared policy giving rise to a legitimate expectation should be accompanied by reasons – I need say nothing further. For the reasons already noted, I have concluded that the petitioner did not have such a legitimate expectation.

[32] To the extent that rationality was relied upon as a “stand alone” ground of review, Senior Counsel for the petitioner conceded that there was no duty on the respondents, as a devolved administration, to give reasons for the way that it decided to distribute the Barnett consequentials. For the reasons which were forcefully put by Senior Counsel for the respondents about the constitutional and legal consequences of devolution, that concession seemed to me to be properly made. Turning to the averments in the petition, the mere fact of there being a difference between England and Scotland in their respective approaches to

the distribution of grant support for businesses does not mean that either approach is irrational, nor does it follow from the fact that eligibility for a grant is linked to non-domestic rates valuations that an identical approach should be taken in both jurisdictions. The reasons given in the joint letter from the Cabinet Secretaries of 25 April for restricting grants on second and subsequent properties by 25% are not obviously illogical. They are political reasons based upon a clear desire by the respondents to achieve an equitable distribution of a finite amount of money – the Barnett consequentials – to businesses within Scotland affected by the COVID-19 closures. I did not understand the petitioner to suggest that Mr Storrie was wrong in his statement that Scotland has, as a matter of fact, a greater percentage than England of low-rated non-domestic properties per head of population. In these circumstances, I am not satisfied that the petitioner has shown that the decision of the respondents to limit the amount of grant payable in respect of second or subsequent properties of RHL businesses can be said to be irrational in the sense described by Lord Diplock.

[33] In these circumstances, I shall sustain the respondents' first and second pleas-in-law, repel the petitioner's pleas-in-law and refuse the petition. I shall reserve all questions as to expenses.