
Report of the Head of Elections, Licensing and Registration**Report to Licensing Committee****Date:** 7th July 2015**Subject:** Hemming v Westminster Outcome

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Summary of main issues

1. For many years Westminster City Council has charged £29,000 per year for a sex establishment licence, £27,000 of which was for prosecuting unlicensed operators and was refundable if the application failed.
2. An operator instructed a barrister to challenge the fee in the Courts with a view that the fee would be reduced to consist of just the application fee. This, if successful, would have a wide ranging impact on the setting of fees by licensing authorities.
3. This case has been through the High Court, Court of Appeal and the Supreme Court and has now been referred to European Court of Justice. This report provides an update on the case and the impact these cases will have on regulatory regimes.

Recommendations

4. That Licensing Committee notes the contents of this report.

1 Purpose of this report

- 1.1 To present to Licensing Committee an update on the 'Hemmings case'.

2 Background information

- 2.1 For many years Westminster City Council has charged £29,000 per year for a sex establishment licence, £27,000 of which was for prosecuting unlicensed operators and was refundable if the application failed.
- 2.2 An operator, Simply Pleasure, instructed a barrister to challenge the fee in the Courts with a view that the fee would be reduced to consist of just the application fee. This, if successful, would have a wide ranging impact on the setting of fees by licensing authorities.

3 Main issues

- 3.1 Sex establishments are licensed under the Local Government (Miscellaneous Provisions) Act 1982. One of the purposes of the Act was to confer more power on the licensing authority to control the number of sex establishments in a particular locality. Under the Act the authority may determine a maximum number of establishments in a particular area, and may refuse to grant more than that number.
- 3.2 The Act provides that a person wishing to operate a sex establishment must apply for a licence, and a licence may be granted for a period of up to one year (when an application for renewal may be made). The Act provides that "an applicant for the grant, variation, renewal or transfer of a licence ... shall pay a reasonable fee determined by the appropriate authority".
- 3.3 An annual fee for a sex establishment licence in Westminster was £29,102 set by the Licensing Sub-Committee in September 2004. That fee was much greater than the fee charged under other licensing regimes as it included an element designed to recover the cost of enforcement action relating to unlicensed activity.
- 3.4 Before 2009, there was no doubt that the law permitted a licensing authority to calculate a fee in this way. As the High Court held in a case concerning licences for street traders:

"[Local authorities] may take into account the costs which they will incur in operating the street trading scheme, *including the prosecution of those who trade in the streets without licences.*" (Emphasis supplied).

- 3.5 Indeed, the fees charged by Westminster were the subject of a legal challenge in 1985. In that case the Court noted that it was not disputed that the sex establishment licensing regime could be self-financing. In fact it has been regarded as a basic principle of most licensing regimes for many years that the "polluter pays" principle should apply and that the regime should be self-funding. As set out below, that principle has, in the case of the Licensing Act 2003, been formally enacted by the current government, in the Police Reform and Social Responsibility Act 2011.

The legal challenge

- 3.6 In April 2011 Mr Timothy Hemming, trading as Simply Pleasure Ltd, and six other holders of sex establishment licences, began proceedings for a judicial review of the licence fee demanded by Westminster for the licensing year 2010/11. The claim followed a number of requests made under the Freedom of Information Act for financial data relating to expenditure incurred by the Council, and for information about how the fee charged for the years 05/06 onwards had been decided upon.
- 3.7 The basis of the claim was that no fee had ever been determined for 2010/11, even though an annual fee of £29,102.00 was demanded of, and paid by, the claimants for each of the sex establishments they operated. The claimants' case was that a reasonable fee should now be determined for 2011/12, and they sought an order requiring the Council to do so.
- 3.8 But it was the claimants' case that the fee to be determined by the Council should reflect two considerations. The first and most important related to the effect of the Provision of Services Regulations 2009. On 28 December 2009, The Provision of Services Regulations 2009 came into force. These Regulations implement the European Services Directive 2006/123/EC.
- 3.9 The purposes of the Services Directive are set out in its Recitals, and in general terms are to create a free market for services within the EU, and to promote a competitive market. Article 4 of the Services Directive sets out the following definition:
- “authorisation scheme” means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;”*
- 3.10 Article 13 deals with authorisation procedures and states;
- Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges with the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in questions and shall not exceed the costs of the procedures.”*
- 3.11 In the 2009 Regulations these provisions have been transposed as follows. Regulation 4 provides
- “authorisation scheme” means any arrangement which in effect requires the provider or recipient of a service to obtain the authorisation of, or to notify, a competent authority in order to have access to, or to exercise, a service activity;”*
- 3.12 Part 3 of the Regulations deals with authorisations, and regulation 14 sets out general conditions that must be met in respect of the establishment of such

schemes. Regulation 15 sets out requirements for conditions that can be attached for the granting of authorisations. Regulation 15(2) states:

- (1) *An authorisation scheme provided for by a competent authority must be based on criteria which preclude the competent authority from exercising its power of assessment in an arbitrary manner.*
- (2) *The criteria must be—*
 - (a) *non-discriminatory,*
 - (b) *justified by an overriding reason relating to the public interest,*
 - (c) *proportionate to that public interest objective,*
 - (d) *clear and unambiguous,*
 - (e) *objective,*
 - (f) *made public in advance, and*
 - (g) *transparent and accessible.*

3.13 Regulation 18 provides:

18.— Authorisation schemes: general requirements

- (1) *Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must—*
 - (a) *be clear,*
 - (b) *be made public in advance, and*
 - (c) *secure that applications for authorisation are dealt with objectively and impartially.*
- (2) *Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must not—*
 - (a) *be dissuasive, or*
 - (b) *unduly complicate or delay the provision of the service.*
- (3) *Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must be easily accessible.*
- (4) *Any charges provided for by a competent authority which applicants may incur under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities.*

3.14 The claimants' first and main point was therefore that since the coming into force of the 2009 Regulations, the fee should no longer reflect the costs of enforcement against unlicensed operators, since such costs were not part of the costs of the "procedures and formalities" under the "authorisation scheme."

3.15 Their second point was that because (as is undisputed) the Council is not entitled to make a profit out of the fees it charges, the fee to be determined by the Council for 2011/12 should reflect the extent to which the fees which the Council demanded over the previous years exceeded the costs of administering and enforcing the licensing system. Any surplus which the Council should have taken into account

should, it was argued, now be passed on to the current licence holders in the fee which should now be set for 2011/12.

- 3.16 The claimants, in addition, made a restitutionary claim on the basis that the Council had not determined the appropriate licence fee for the five previous years. The demands for licence fees for those five years were therefore said to be unlawful and the claimants sought the return of the sums they paid. It was accepted that they should not be able to recover the whole of the sums they paid for those years. The claim was for the difference between the sums they paid and whatever would have constituted reasonable fees for those years.
- 3.17 When commencing proceedings, the claimants offered to settle the claim on the basis that they would abandon their claims relating to previous years if the Council determined a licence fee for 2011/12 leaving out of account the cost of enforcement against unlicensed operators. That offer was not accepted.
- 3.18 The Council's response to the claims was (very briefly summarised) that the fee had been lawfully set on an ongoing basis by the Licensing Sub-Committee in 2004, and that officers had, as required by Financial Regulations, reviewed the fee on an annual basis since then, and had not submitted a report recommending the fee be varied because, broadly speaking, income from fees had continued to match expenditure.
- 3.19 In relation to the claim that fees could no longer reflect the cost of enforcement action against unlicensed establishments, the Council's position was that when the regulations relied upon by the claimants were interpreted, as they should be, to give effect to the European Directive which they sought to implement, it could be seen that they did not prohibit the recovery of enforcement costs as permitted by long established domestic legislation. This issue is discussed in more detail below.

The High Court judgment

- 3.20 The claim was heard in the High Court before Keith J over two days in March 2012, with judgment following in June.
- 3.21 The Judgment handed down on 16th May 2012, Keith J concluded that:
 - a. The Council had not determined a licence fee for any year after the year ending 31 March 2006; and
 - b. Since the coming into force of the 2009 Regulations, the Appellant had not been permitted, when determining the reasonable licence fee for sex establishments, to reflect in the fee which it determines the cost of enforcing the licensing system
- 3.22 In relation to the first point, the Judge accepted that the Council was entitled lawfully to determine a licence fee which rolled over from year to year, and that it was not necessary as a matter of law for there to be a separate decision each year. However, he held that that is not what the Council had done.

- 3.23 Because of the terms of the report considered by the Licensing Sub-Committee in September 2004, which referred to an “annual” review of licensing fees, the costs to be incurred “in the year ahead”, and “the next annual review” in February 2005, he held that the Sub-Committee had decided on a fee only for the one year period 05/06. That meant no fee had been lawfully set for subsequent years.
- 3.24 On the second point, the Judge said:
“Whatever domestic law had permitted in the past, there had in the future to be, not only a proportionate relationship between the fee which was charged and the cost of the “authorisation procedures”, but the fee could not exceed the costs of those procedures. Those procedures are the steps which an applicant for a licence has to take if he wishes to be granted a licence or to have his licence renewed. And when you talk about the cost of those procedures, you are talking about the administrative costs involved, and the costs of vetting the applicants (in the case of applications for a licence) and the costs of investigating their compliance with the terms of their licence (in the case of applications for the renewal of a licence). There is simply no room for the costs of the “authorisation procedures” to include costs which are significantly in excess of those costs”.
- 3.25 A second judgment handed down on 12th June 2012 Keith J determined the question of relief and consequences of the Respondents’ pre-action settlement offer.
- 3.26 The formal Order made by the Court on 17th June 2012:
- (i) declared that when determining under paragraph 19 of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 what is a reasonable fee for the grant or renewal of a licence to operate a sex establishment, the Council had not, since December 2009, been permitted to take into account the cost of investigating and prosecuting persons, firms or companies who operate sex establishments within Westminster without a licence;
 - (ii) ordered the Council to determine a reasonable fee for the years ending 31 January 2007 through to 31 January 2010 for the renewal or grant of a licence to operate a sex establishment, having regard to the need to carry forward from year to year any previous surpluses or deficits;
 - (iii) ordered the Council to determine a reasonable fee for the years ending 31 January 2011, 31 January 2012 and 31 January 2013 for the renewal or grant of a licence to operate a sex establishment, having regard to (1) the need to carry forward from year to year any previous surpluses or deficits and (2) the declaration at (i) above; and
 - (iv) ordered the Council to pay to the claimants for each of the years referred to above the difference between (a) the sums demanded by way of licence fees and paid by the claimants and (b) the sums which the Appellant determined to be a reasonable fee to operate a sex establishment, such monies to be paid within six weeks of the date of determination;

- 3.27 The Order also made provision for the payment of interest and costs, pursuant to the learned Judge's decision on the consequences arising from the pre-action offer. The claimants were awarded their costs. Because the Council did not accept the pre-action offer, the claimants were awarded costs on an indemnity basis from the date of the offer.

The Court of Appeal judgment

- 3.28 The Court of Appeal gave the Council permission to appeal to the High Court judgment on three grounds.
- 3.29 The first ground was that the Court had erred in concluding that on a proper construction of the Services Directive and the Services Regulations the Council has not been permitted, since December 2009, to include in the licence fee any costs of investigating and prosecuting persons, firms or companies who operate sex establishments within Westminster without a licence.
- 3.30 The second ground related to the costs award – Westminster should not be penalised for not accepting an offer that would not have resolved the issue between the parties, or for resisting a claim when it was clearly in the wider public interest that the point should be determined.
- 3.31 The third ground related to the restitutionary relief ordered by Keith J.
- 3.32 The Appeal was heard by the Master of the Rolls, Lady Justice Black and Lord Justice Beatson on 14th January 2013. The Court of Appeal dismissed the appeal on 2 grounds but upheld the second ground of appeal concerning the restitutionary relief ordered by Keith J. Permission to appeal to the Supreme Court was refused by Order dated 24th May 2013.
- 3.33 By Order dated 24th May 2013, the Court of Appeal varied that High Court Order in part to reflect the Council's successful appeal on the form of restitutionary relief, and ordered that the Council pay 90% of the claimants' costs of the appeal, and that the claimants pay 10% of the Council's costs of the appeal.

The Supreme Court judgment

- 3.34 Westminster applied to the Supreme Court to appeal this decision on the first two grounds. It was joined in this endeavour by The Architects Registration Board, The Solicitors Regulation Authority, The Bar Standards Board, The Farriers Registration Council, The Law Society, The Bar Council, The Local Government Association and Her Majesty's Treasury, as it was recognised that the decision made in the Court of Appeal would have wide ranging impact on other professional regulators who charge for the service of licensing or registration.
- 3.35 On 13 January 2015, the appeal was heard before Lord Neuberger, Lord Mance, Lord Clarke, Lord Reed and Lord Toulson. The question for the Supreme Court was whether the appellant's scheme of charging fees for licensing sex shops in Soho is permitted by the Services Directive.

- 3.36 The judgement was that Westminster City Council's appeal should succeed in that a scheme of a two part fee, part that relates to the processing of an application and part of enforcement of the licensing regime, would be consistent with regulation 18 of the Provisions of Services Regulations and article 13(2) of the EU Services Directive.
- 3.37 The question whether requiring both fees be paid before the application is processed, but that the second part could be refunded if the application is not successful, should be referred to the European Court of Justice.

Implications

- 3.38 Hemming is a case of significant importance. This is the first time that Directive 2006/123/EC on Services in the Internal Market ("the Services Directive"), has been considered by the UK courts, and the point in issue is a hugely important one for local authorities and for other regulatory bodies.
- 3.39 The approach taken by the Court of Appeal leads to the reversal of the very long standing domestic powers to set fees within a licensing regime, It also casts doubt on the compatibility of provisions of primary legislation post-dating the implementation date of the Directive which places a duty on licensing authorities to seek to ensure that licence fees are set so as to equate as closely as possible to the costs of discharging specific functions and a reasonable share of the authority's general licensing costs, including enforcement. In fact, the Court of Appeal itself acknowledged that the result of the interpretation by Keith J *"sits uncomfortably with the history, in the United Kingdom, of self-regulation largely financed by those working in the regulated area."*
- 3.40 Moreover, there is no evidence that this outcome was the intended effect of the EU in enacting the Directive, or of Parliament in implementing it through the Regulations. It is completely inconsistent with the later enactment of section 121 of the Police Reform and Social Responsibility Act 2011, intended to provide for "full cost recovery" under the Licensing Act 2003. This section (which is not yet in force) provides for the insertion of new sections 197A and 197B into the Licensing Act 2003 which sections expressly require a licensing authority to seek to ensure the income generated from the licence fees equates as closely as possible to its costs, including general licensing costs. There is a clear and inescapable tension between the full cost recovery requirement of these statutory provisions and the conclusions of the Court of Appeal.
- 3.41 For Westminster, the case had immediate financial consequences. The consequences are not limited to the sex establishment regime. The Licensing Act 2003, and the street trading regime (including tables and chairs on the highway) are "in scope" for the purposes of the Services Directive, as are special treatment premises.
- 3.42 But the outcome also obviously impacts on all other licensing authorities, and a wide range of regulatory bodies. For some bodies, who have no alternative means of raising funds other than a licence fee, the effect of the judgments may be to critically undermine the regime and make it impossible to run.

- 3.43 There are also implications for central government – in particular the Home Office, which must decide on what effect the outcome of this action has on its plans to consult on draft Regulations providing for full cost recovery under the 2003 Act, as mentioned above. The Home Office is understood to have been watching the case with interest, but has not sought to intervene, or even comment, so far.
- 3.44 It is extremely good news that the Supreme Court has ruled that it is legal for licensing authorities to recover the costs of enforcement activity against both licensed and unlicensed operators through licence fees. This is the definitive ruling on the point.
- 3.45 However, there are outstanding risks associated with the Hemming case, if the European Court of Justice were to rule that it is unlawful for licensing authorities to charge all relevant costs in a single fee, rather than two fees. In this scenario, it is likely that councils would be subject to claims for restitution from a range of claimants, as has already been the case following the earlier Hemming hearings and, as we have seen, following legal cases relating to fees imposed by councils in other areas.

4 Corporate Considerations

4.1 Consultation and Engagement

- 4.1.1 There are no concerns relating consultation and engagement relating to this advisory report.

4.2 Equality and Diversity / Cohesion and Integration

- 4.2.1 There is no impact on equality and diversity, cohesion and integration and the contents of this advisory report.

4.3 Council Policies and Best Council Plan

- 4.3.1 The licensing regime contributes to the following Best Council Plan 2015-20 outcomes:

- Improve the quality of life for our residents, particularly for those who are vulnerable or in poverty;
- Make it easier for people to do business with us.

- 4.3.2 The licensing regime contributes to our best council objective:

- Ensuring high quality public services – improving quality, efficiency and involving people in shaping their city.

- 4.3.3 The licensing regime is linked to the Best Council Plan objective:

- Supporting communities and tackling poverty.

4.4 Resources and Value for Money

- 4.4.1 With regard to licensing fees, the outcome of these cases will impact on previous fees set and the setting and approval of fees in future

4.5 Legal Implications, Access to Information and Call In

- 4.5.1 The council will need to consider these judgements in the setting of future fees and any implications for previous fees set..

4.6 Risk Management

- 4.6.1 There is a risk to the council of a refund of part of some fees to existing operators, however this risk is considered small due to the amount involved.

5 Conclusions

- 5.1 After nearly three years of litigation there is now a definitive answer to the question on whether the fees for regulatory services, which fall within the scope of the EU Services Directive, can include a cost for the enforcement of the licensing regime. The question still outstanding is the way these fees can be charged.

6 Recommendations

- 6.1 That Licensing Committee notes the contents of this report.

7 Background documents¹

- 7.1 There are no unpublished background documents that relate to this matter.

¹ The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.