Licensing Fees - An Update

On 24th May the Court of Appeal handed down its long-awaited decision in the case of *R (on the application of Hemming) and others v The Lord Mayor and Citizens of Westminster*[1] and for most material purposes of every licensee and local authority apart from Westminster City Council, upheld the High Court judgment.

The case concerned fees levied by Westminster City Council ("the Council") for sex establishment licences under the provisions of the Local Government (Miscellaneous Provisions) Act 1982 ("the 1982 Act"). Sex establishment licensing is governed by Schedule 3 to the Act which is adoptive (and there was no issue over adoption in this case). Once adopted, the local authority may grant a sex establishment licence to premises for one of three types of activity: a sex cinema; a sex shop; or a sexual entertainment venue[2].

Under para 19:

> "An applicant for the grant, variation, renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority."

For many years Westminster City Council had levied high licence fees for sex establishment licensing on the basis that in addition to their administration costs, they also had significant enforcement costs against not only licensed sex establishments, but also unlicensed sex establishments. This principle was upheld by the courts in *R v Westminster City Council, ex p. Hutton*[3].

The legality of the means by which those fees were set, the level of the fees and the impact of the European Union Services Directive were challenged by a group of sex establishment licensees by means of judicial review [4]. In the High Court, the judge (Keith J) found in favour of the applicants. He determined that the Council had not set a lawful fee since 2006, although it had been levying one. In addition, he concluded that the effect of the introduction of the European Union Services Directive[5] ("the Services Directive") from 28th December 2009 by the Provision of Services Regulations 2009[6] ("the 2009 Regulations") meant that from 2010, the Council could not assimilate (and thereby recover) enforcement costs

[1] [2013] EWCA Civ 591.
[2] See paras 2, 2A, 3, 4 and 27A for definitions.
[3] Tried and reported with *R v Birmingham City Council, ex p. Quietlynn Ltd* (1985) 83 LGR 516
[4] *R. (on the application of Hemming (t/a Simply Pleasure Ltd)) v Westminster City Council* [2012] EWHC 1260 (Admin); [2012] P.T.S.R. 1676.
[5] Directive 2006/123/EC, Services in the Internal Market.
[6] SI 2999/2009.

with the licence fee. There were subsequent hearings to determine the quantity and method of restitution.

The Council accepted that no lawful fee had been set since 2006, but appealed the other findings to the Court of Appeal.

Enforcement Costs and the European Union Services Directive

It was well established by the courts and accepted by all parties that prior to the Services Directive it was lawful to levy licence fees for sex establishments which were intended to recover all the costs of the licensing regime including enforcement against licensees and unlicensed traders[7].

The High Court had found that the provisions of the Services Directive introduced into English law by the 2009 Regulations prohibited the recovery of enforcement costs as part of the licence fee.

This formed a significant part of the High Court decision[8], and was a fundamental element of the appeal. Between 2004 and 2012, £26,435 (or 91%) of the total fee of £29,102 charged by the Council was described as being for "the management of the licensing regime", with only £2667 (or 9%) being for "the administration of the application".[9] It can be seen that with the potential to lose over 90% of its sex establishment licensing revenue, the High Court ruling had a huge impact on the Council's licensing and enforcement budget.

As has already been mentioned, the Court of Appeal confirmed the decision of the High Court. The Council tried to argue that the smaller fee was the application fee (because it was not refundable even if the application failed) and that the higher fee, which was only payable by successful applicants, was therefore outside the scope of the Services Directive and 2009 Regulations and could still be lawfully administered. This was rejected on the grounds that it was within the scope, and even if it had not been, there was no power within the 1982 Act to levy any fee other than an application fee.[10]

There was however a scrap of comfort for the Council as the Court of Appeal allowed a distinction to be drawn between enforcement costs against unlicensed operators, and the costs of compliance monitoring and enforcement against licensed operators. This had been identified in the High Court[11] and was confirmed by the Court of Appeal. Beatson MR, giving the judgment of the Court stated as follows[12]:

---

[7] See *R v Westminster City Council, ex p. Hutton* (1985) 83 LGR 516, *R v Manchester CC, ex p. King* (1991) 89 LGR 696, paragraph 33 of the High Court judgment and paragraph 13 of the Court of Appeal decision.
[8] Paragraphs 32 to 44 of the High Court judgment.
[9] See paragraph 32 of the High Court judgment.
[10] See paragraphs 105 to 109 of the Court of Appeal judgment.
[11] See paragraph 35 the High Court judgment.
[12] At paragraphs 102 to 104.

"102. It is clear that the judge intended to distinguish between the costs of monitoring compliance and enforcement in respect of licensed operators, and the costs of enforcement against unlicensed operators. It was only the latter which he held fell outside Article 13(2) and Regulation 18(4). Unsurprisingly, since neither the Directive nor the Regulations refer to the costs of enforcement at all, the distinction between these two types of enforcement does not reflect their express terms. But for the reasons in the next paragraph, I agree with the judge that the cost of compliance monitoring and enforcement against an applicant who is given a licence can fall within the costs of the "authorisation procedures".

103. It is clear and undisputed that costs incurred in investigating the suitability of an applicant for a licence can be reflected in the fee. In the case of an application to renew a licence, I consider that the costs of monitoring the applicant's continued suitability can include the costs of monitoring compliance with the terms of their licences in the past. Once the Council knows what those costs are in broad terms, as it does by reference to what has happened in the past, it is, in my judgment, entitled to include them in the calculation for the next year's licence. There may be a formulaic element to this calculation. But the example of *European Commission v Spain* (as to which see [81] – [85]) is a strong indication that using a formula that proceeds on the basis of the cost of the actual authorisation process is justified.

104. For these reasons, I reject the contention that it is not lawful to draw a distinction between the two types of enforcement."

In terms of the split of the licence fee between application and enforcement, the Court of Appeal concluded that the two-way split (91%:9%) was incorrect and that the licence fee in its entirety

"was made up of three elements:-

> *Category (a)*: the administrative cost of investigating the background and suitability of applicants for licences;
> *Category (b)*: the cost of monitoring the compliance of those with licences with their terms; and
> *Category (c)*: the cost of enforcing the licensing regime against unlicensed operators."[13]

and accordingly, after the introduction of the Services Directive and the 2009 Regulations, the Council could continue to recover the costs in categories (a) and (b), but could no longer recover the costs in category (c). In relation to the first two categories the principle established in *ex parte Hutton*[14] would continue to apply and accordingly all costs of applications, and monitoring compliance and enforcement against licensees, could continue to be recovered as part of the licence fee.

[13] At paragraph 130 of the Court of Appeal judgment.
[14] *R v Westminster City Council, ex p. Hutton* (1985) 83 LGR 516

Repayment

Having established that no lawful fee had been set since 2006 and since 2009 enforcement costs had been unlawfully levied, the question of repayment had to be addressed.

There was considerable disagreement over how this should be approached, and the Court considered this.[15] The conclusion was that the Council could determine a lawful fee retrospectively, rolling forwards surpluses and deficits. In doing so it would have to take account of the change in the law from December 2009 which would be reflected in the first licence fee set after that date. The Council's fee year ran from 1st February to 31st January (which seems unusual, as most local authorities run their fee year to accord with the municipal year of 1st April to 31st March) so the fee to be levied from 1st February, 2010 would have to reflect the new provisions.

The court made it clear that the enforcement costs unlawfully levied after 31st January, 2010 must be repaid forthwith, but in relation to the allowable costs (elements (a) and (b) identified above) the continued rolling of deficits and surpluses would be lawful[16].

Power and mechanism to set a fee

In respect of the mechanism to set a fee, the Council maintained that the fee was reviewed annually by an officer[17] but maintained that this did not amount to setting a fee. Keith J put it like this (at paragraph 17):

> "His reviews, in other words, were not a substitute for the functions of either of the committees to determine the licence fee for themselves. That concession, I imagine, was made because reg. 2(6)(e) of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 provides that the fee for the sort of licence which cannot be granted by an officer of a local authority (such as a licence for a sex establishment) cannot be determined by such an officer. It has to be determined by the local authority itself."

That assertion that a licence fee for sex establishment licence cannot be set, nor can a licence itself be granted, by an officer, but has to be set or granted by the Council itself is restated by Beatson MR in the Court of Appeal judgment (at paragraph 12) in the following terms:

> "Some licences, including those for sex establishments, cannot be granted by a Council officer but have to be granted by the Council itself. By regulation 2(6)(e) of the Local Authorities (Functions and Responsibilities)

[15] See paragraphs 110 et seq of the Court of Appeal judgment.
[16] See paragraph 135 of the Court of Appeal judgment.
[17] See paragraph 13 et seq of the High Court judgment.

(England) Regulations 2000 SI 2000 No 2853 the fee for the types of licence which cannot be granted by an officer of a local authority must also be determined by the local authority itself and cannot be determined by one of its officers."

It is difficult to see where this view has come from, and there must be questions over its accuracy.

By virtue of regulation 2(1) and Schedule 1 Part B para 15 to the Local Authorities (Functions and Responsibilities) (England) Regulations 2000[18] ("the 2000 Regulations"), the power to licence sex shops and sex cinemas (and all related functions under Schedule 3 to the 1982 Act) are functions which cannot be the responsibility of an authority's executive. Accordingly the starting point is that these are Council functions, and in the absence of any delegation, the decision would need to be made by full council. However, under section 101 of the Local Government Act 1972 ("the 1972 Act") the Council can delegate any of its functions to a committee, a sub-committee or an officer.

Regulation 2(7) of the 2000 Regulations does contain limitations on the use of section 101, and prevents delegation by the Council in respect of functions which are specified, but those functions do not include regulation 2(6)(d) and (e) which cover deciding whether to charge for (in this case) a licence and the amount of the charge for the licence.

There is no prohibition contained in the regulations on delegating the grant of a sex establishment licence or setting the fee for sex establishment licence to a committee, sub-committee or officer under section 101 of the 1972 Act, and it is difficult to see why both the High Court and Court of Appeal came to the conclusion that they did.

For readers in Wales, it should be noted that identical provisions exist in paragraph 3 and Schedule 1 Part B para 13 to the Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007/399.

Although in relation to the specific facts of the Westminster case, this did not become a significant issue (as the Court accepted that the Council could set a fee retrospectively) it is clearly a significant point for local authorities generally in relation to all licence fee setting. It is rare for a local authority to delegate the setting of a licensing fee to an officer, but it is regularly delegated to a committee of the Council, rather than being set by the Council itself.

In relation to the grant (or renewal etc) of a licence, again this is regularly delegated to officers in the absence of factors that conflict with Council policy, and to committees and subcommittees of the Council where policy questions arise.

[18] SI 2000/2853

It should be noted that if the Council are considering refusing to grant, renew or transfer a sex establishment licence, they must give the applicant or licensee the opportunity to appear before a committee or sub-committee[19], but this specifically refers to a committee or sub-committee, not full Council.

It remains to be seen what future cases make of this element of this decision, but it deserves to be treated with caution.

The immediate impact of this decision

Clearly this judgment will have a significant impact in relation to sex establishment licensing. Every local authority that has adopted the provisions of Schedule 3 to the 1982 Act will have to reassess its licence fees in the light of this judgment. Those that do not will be susceptible to challenge either by means of judicial review (which although expensive, does have the advantage of addressing the issue before the fee is levied) or by means of a challenge via the District Auditor (which is relatively cheap but of necessity, retrospective).[20]

However, the impact is far wider than that. The Services Directive applies to all local authority licensing regimes except taxi licensing (hackney carriage and private hire), gambling and cinema licensing. This means that for every licensing regime covered by the Services Directive a similar reassessment of licensing fees must be undertaken.

In addition, local authorities must make arrangements to repay enforcement costs that were unlawfully levied from December 2009.

This is clearly a significant exercise which will take a lot of time and effort, but it is difficult to see how this approach can be avoided.

In relation to future fee setting and licence granting, there are questions over the accuracy of the Court of Appeal decision. To require all sex establishment licences to be granted by the Council (rather than under delegated powers) would be a significant burden. As it is impossible to establish why the court came to the conclusion that only the Council itself could grant a sex establishment licence, it is also impossible to establish how far the court might think that principle may extend to other licences. As argued above, neither the English nor Welsh Functions and Responsibilities Regulations appear to require this, and it remains to be seen what approach will be taken by local authorities.

[19] Para 10(19) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982
[20] For consideration of these approaches see James Button and Co. Bulletin August 2012.

The wider impact of this decision

It seems obvious that this decision only applies to licensing regimes covered by the Services Directive, but there are certainly arguments that it should apply more widely.

If the principle established in *King* and *Hutton* that licensees should pay the whole cost of the licensing regime does not apply to areas covered by the services directive, why should that principle applies to any other licences? Is it fair to expect casino operators, bookmakers, hackney carriage and private hire vehicle proprietors and cinema operators to pay enforcement costs?

From the local authority perspective, the answer is simple. Where the existing law allows such fees to be levied, and enforcement costs to be recovered, they can continue to set fees on that basis.

What is the impact where there are limitations on the expenditure that can be recovered via the licence fee? If the law does not allow enforcement costs to be recovered (e.g. hackney carriage and private hire drivers and private hire operators) does this judgment have a bearing?

The answer would appear to be yes. In relation to taxi drivers licences and private hire operators licences, sections 53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976 limit the licence fees to recovering the costs of "issue and administration" (section 53(2)) and "administrative or other costs" (section 70(1)) of the licence. There has been a long debate over the meaning of these words and it has generally been accepted that they do not cover the cost of enforcement. However Beatson MR stated:[21]

> "The judge took the costs of the administration of the application to include the administrative costs of investigating the background and suitability of applicants for licences as well as their compliance with the terms of their licences when they apply for renewal: first judgment, [35]. He also stated (first judgment, [36]) that they were the costs "involved in the process by which those who are to be, or are no longer to be, licensees under the scheme, are determined".

And he then concluded:[22]

> "I agree with the judge that the cost of compliance monitoring and enforcement against an applicant who is given a licence can fall within the costs of the "authorisation procedures"

It can therefore be seen that there is an argument that monitoring compliance with the terms of a drivers or operators licence and action for non-compliance[23] is

[21] at paragraph 33 of the Court of Appeal judgment.
[22] at paragraph 102 of the Court of Appeal judgment
[23] Hackney carriage and private hire licensing is unusual in that breach of conditions is not an offence (except non-compliance with record keeping conditions imposed on a private hire operators licence under s56(2) Local Government (Miscellaneous Provisions) Act 1976) and accordingly enforcement will be by means of action against the licence by the Council, rather than prosecution.

administration and therefore recoverable via the licence fee. Whether this approach would be accepted by the courts remains to be seen. Clearly this judgment is not binding in relation to taxi licensing as it is different domestic legislation and not caught by the Services Directive, but it must be seen as persuasive.

The future impact of this decision

How will local authorities fund enforcement against non-licensed traders? The simple answer is that such funding must be found from general council funds, but practically, that will prove difficult.

Council budgets are continually being reduced, with cuts on top of cuts the norm, so there is unlikely to be any slack to pay for enforcement. However, it is essential that councils do enforce against the unlicensed traders, because otherwise there will be no reason to obtain a licence. Licensees will be controlled but rogue operators will not: this cannot be an acceptable approach.

It remains to be seen whether the Government will address this issue. Whilst the Services Directive and 2009 Regulations must remain, it would be open to the Government to allow local taxation to fund enforcement. This could be a national scheme, or adoptive, and a precedent already exists with the Late Night Levy under the Police Reform and Social Responsibility Act 2011, which the Court of Appeal accepted is a tax, and therefore not caught by the Services Directive.[24]

Whether any Government would consider such an approach, and whether local authorities would be prepared to tax their local traders are two big questions that remain to be answered.

Conclusion

The position in relation to licence fees for sex establishment licensing and other licences covered by the Services Directive now seems clear, and all local authorities must ensure compliance with this judgment. It is equally clear that the arguments over licence fees not caught by the Services Directive will continue.

James Button
4th June 2013

For further information or to book a Licensing Fees course (see next page) please contact James Button on 01629 735566 or james@jamesbutton.co.uk

[24] See *R (on the application of Hemming) and others v The Lord Mayor and Citizens of Westminster* [2013] EWCA Civ 591 paragraph 96

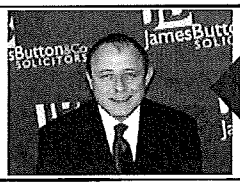
JamesButton&Co SOLICITORS

Licensing Fees
Setting, Justifying, Levying

Updated to examine Hemming v Westminster Court of Appeal

A One Day Course

Facilitated by: **James Button** BA., Solicitor, MCIArb, MIoL.- Principal



Confident that the licence fees that you set and levy are lawful, and that you can resist any challenge?
Understand the Westminster Court of Appeal judgment and its impact?

This course enables consideration of:

* **your licence fees**
* **the legality of those fees**
* **the political dimension to fee setting**
* **the consequences of getting the fees wrong**

Key personnel who would benefit from this course:

* **Chair (and other members) of the Licensing Committees**
* **Portfolio Holder for Licensing**
* **Portfolio Holder for Finance**
* **Licensing Officer**
* **Head of Service for the Relevant Department**
* **Finance Officer**
* **Legal adviser**
* **DSO**

Session 1 – Licensing Fees – The Legal Position

* *What fees can be charged?*
* *How do you determine the fees?*
* *What can and cannot be taken into account?*

Session 2 – Legal Position contd.

* *Impact of the EU Services Directive*
* *R (App Hemming) v Westminster - what does it mean?*

Session 3 – Practical Exercises

* *How will you set fees?*
* *How will you find the correct information?*
* *How will you justify them?*

Session 4 – Worked Example of Fee Setting

* *How one authority set its fees*
* *How long it took*
* *How they have used the process since*

"Jim Button tackles the difficult subject of setting licensing fees and presents the information in a readily understandable format for both experienced professionals and beginners alike. The course represents excellent value for money and avoids the Council making what could be costly errors"
Nigel J Marston, Licensing Manager, South Somerset District Council.

t : 01629 735566 e : secretary@jamesbutton.co.uk w : www.jamesbutton.co.uk