December 2015

Taxi Changes, Taxi Licence Fees, Case Report and Book Review

Taxi Changes

2 months have now passed since the alterations were made to taxi law. Readers will recall the changes (see *Bulletin* April 2015 for details): 3 or 5-year licences being the norm for drivers and operators respectively[1]; cross border sub-contracting being permitted[2].

To date there do not appear to be enormous problems resulting from these changes, however, there does remain uncertainty over the powers of Councils to issue licences for shorter periods. There was a suggestion that the DfT were going to publish some Guidance on the changes, but to date none has been forthcoming.

The legislation is reasonably vague: it allows a local authority to issue a licence for either 3 years for a driver, or 5 years for an operator or "*for such lesser period, specified in the licence, as the district council think appropriate in the circumstances of the case".*

What does this mean? It clearly gives the Council a discretion. The next question is: in what circumstances should they exercise that discretion?

If an applicant wants a licence for a shorter period, it must be possible for the authority to grant one. I think it is acceptable to have a limited range of shorter licences, e.g. 1-year and 3-year driver's licences, 1-year, 3-year and 5-year operator's licences. The reasons why the applicant wants a shorter period are immaterial.

From the authority's perspective, there may be reasons to grant a shorter term licence. In relation to drivers, doing so to enable future renewals to coincide with triennial DBS checks would make sense. Likewise, where an authority has yet to set a licence fee for a 3 or 5-year licence, shorter term ones could be granted, although this should be resolved from April next year.

[1] S53(1) in relation to private hire and hackney carriage drivers' licences; s55(2) in relation to private hire operators licences.
[2] Ss55A & 55B in relation to sub-contracting over a local authority border.

In the April *Bulletin* I stated that "I can also see a good argument that where there are serious and justifiable concerns over a drivers' conduct, again a short term licence might well be a sensible step." I have now reconsidered this, and do not think this is the correct approach. This goes back to the question of fitness and propriety of drivers discussed in the January 2015 *Bulletin*. If a driver is safe and suitable, he or she should be granted a licence for up to 3 years. If they are not safe and suitable, then they should not be granted a licence. The idea of a "probationary" period where a potentially unsafe person is allowed to prove themselves seems wrong. What would happen if they abused or injured passengers during that period, and it came to light that the Council had reservations? It does not seem a sensible approach.

The further question concerns the fees that authorities are levying for the extended licences. Generally, licence fees cannot be used as a revenue raising tool and should only cover the costs of the licensing regime (see *R (on the application of Hemming) and others v The Lord Mayor and Citizens of Westminster*[3] in the High Court, Court of Appeal and Supreme Court). In relation to taxi licence fees levied under ss53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976, there are further restrictions on what can be recovered via the licence fees (see following article).

As a result of this it is quite apparent that a 3-year licence fee cannot simply be triple the 1-year fee, or a 5-year one five-fold the cost of an annual licence. Whilst there can be some increase over the basic annual fee, it must be carefully calculated to fall within the limitations imposed by ss53 and 70.

Taxi Licence Fees

Taxi licence fees are levied under the Local Government (Miscellaneous Provisions) Act 1976, s53(2) in respect of drivers licences and s70 in respect of vehicle and operator's licences. Both of those sections are very prescriptive in relation to what expenditure can be recovered.

S53(2) states:

> "(2) Notwithstanding the provisions of the Act of 1847, a district council may demand and recover for the grant to any person of a licence to drive a hackney carriage, or a private hire vehicle, as the case may be, such a fee as they consider reasonable with a view to recovering the costs of issue and administration and may remit the whole or part of the fee in respect of a private hire vehicle in any case in which they think it appropriate to do so.

[3] [2012] EWHC 1260 (Admin); [2012] P.T.S.R. 1676; [2013] EWCA Civ 591 and [2015] UKSC 25

and s70 states:

> "(1) Subject to the provisions of subsection (2) of this section, a district council may charge such fees for the grant of vehicle and operators' licences as may be resolved by them from time to time and as may be sufficient in the aggregate to cover in whole or in part—
>
> (a) the reasonable cost of the carrying out by or on behalf of the district council of inspections of hackney carriages and private hire vehicles for the purpose of determining whether any such licence should be granted or renewed;
>
> (b) the reasonable cost of providing hackney carriage stands; and
>
> (c) any reasonable administrative or other costs in connection with the foregoing and with the control and supervision of hackney carriages and private hire vehicles."

One question that has come up in relation to taxi fees is whether it is possible to recover enforcement or compliance costs. The distinction between enforcement and compliance is important as was made clear in the *Hemming* judgments[4]. Compliance is ensuring that those who have licences comply with the requirements of those licences, whilst enforcement is action against those who do not have licences. *Hemming* concerned different legislation (schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982) relating to a very different activity (sex establishment licensing), but it is clear that the principles can be applied to other licensing regimes.

In *Hemming* the view was that compliance costs could be recovered by the licence fee, but enforcement costs could not, although under the provisions of the specific legislation the Supreme Court took the view that an additional maintenance fee could be levied to cover enforcement costs.

Taxi licensing differs from sex establishment licensing in a number of ways. Firstly, it is not covered by the European Union Services Directive, and secondly the fee levying powers are considerably more restrictive than the ability for a local authority to simply levy "a reasonable fee" for sex establishment licence.

Where then does this leave the question of compliance and enforcement costs in relation to taxi licensing?

It must be stated at this point that the law is not entirely clear. As can be seen, s53 specifically excludes the cost of enforcement and s 70(1)(c) only allows the costs of "the control and supervision of hackney carriages and private hire vehicles". Accordingly, on the face of it, the fee levying provisions of the 1976 Act do not allow recovery of enforcement costs other than in relation to vehicles. Has *Hemming* altered that apparently clear position?

As explained above, in *Hemming* the Court of Appeal was prepared to accept that the overall costs of "authorisation procedures" could also include the costs of

[4] *R (on the application of Hemming) and others v The Lord Mayor and Citizens of Westminster* [2012] EWHC 1260 (Admin); [2012] P.T.S.R. 1676; [2013] EWCA Civ 591 and [2015] UKSC 25

enforcement against existing licensed operators. This has become known as "compliance" and must be contrasted with "enforcement" which is action against unlicensed operators (see paragraphs 101 to 104 of the Court of Appeal judgment).

Does this mean that compliance costs for drivers and operators can be factored into the licence fee? This is by no means certain, and seems unlikely. The reasons for this are that the *Hemming* case concerns different legislation (see above) and was primarily concerned with the application of the European Union Services Directive as applied by the Provision of Services Regulations 2009 SI 2009/2999. In that case the relevant legislation was Article 13 of the Directive which 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 which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures."

The arguments against the application of the *Hemming* approach to taxi licensing are that the legislation is different, and much more prescriptive for taxi licensing as opposed to sex establishment licensing. In addition, taxi licensing is not subject to the provisions of the European Union Services Directive.

It is therefore difficult to sustain the argument that the reference in *Hemming* to "authorisation procedures" means the same as "the costs of issue and administration" (s53) or "administrative or other costs" (s70).

Accordingly, in my opinion, it does not seem possible for a local authority to recover general compliance or enforcement costs for taxi licensing via the licence fees, other than in relation to licensed hackney carriage and licensed private hire vehicles which are licensed by that authority. However, until this matter is addressed by the senior courts, the alternative argument exists.

Burden of Proof in Taxi Licensing Decisions

It is well accepted that a local authority cannot grant taxi licences unless they are satisfied that the applicant is safe and suitable to hold them[5]. It is also well accepted that on application for a new licence the burden of proof lies with the applicant to demonstrate that they are safe and suitable[6]. Does this proposition hold good once the licence has been granted?

This was the question raised in the High Court in *Kaivanpor v Sussex Central Justices DC*[7]. Unfortunately, as yet there is no transcript of the judgment available but a reasonably detailed digest has been published. The court determined that once a

[5] See *Bulletins* February and April 2015 for full details
[6] See *R v Maidstone Crown Court, ex parte Olson* [1992] COD 496 at 498
[7] 28 October 2015 (unreported)

licence has been granted, if the local authority wished to take action against that licence, at that point the burden of proof switches and it is for the authority to demonstrate that the licensee is no longer safe and suitable to continue to hold the licence, rather than the licensee being required to demonstrate that he or she still is.

At first glance this may seem peculiar, and does apparently fly in the face the earlier High Court decision in *Canterbury City Council v Ali*[8]. However, it does follow the earlier Court of Appeal decision in *Muck It Ltd v Secretary of State for Transport*[9]. That case concerned goods vehicle licences, but may have a wider application in relation to licences generally. Clearly, the Administrative Court felt that it did so in *Kaivanpor.* They appear to have been particularly influenced by the fact that the *Canterbury* decision was made on the basis of representations from only one party, and have taken the view that they are bound by the Court of Appeal's decision in *Muck It.*

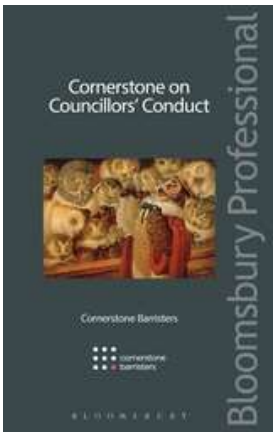
The legislative requirements are quite different - *Muck It* concerned the provisions of Goods Vehicles (Licensing of Operators) Act 1995 rather than the Local Government (Miscellaneous Provisions) Act 1976. Goods vehicle licensing is also covered by an EU directive[10]. However the proposition does seem reasonable. A person unknown to the authority (a new applicant) must demonstrate their safety and suitability in order to be granted a licence.

Once that licence has been granted however, it would appear to be unreasonable for them to have to do continue to demonstrate their safety and suitability in relation to any potential challenge to the continued existence of that licence. The local authority (as licensing authority) would have to have evidence to show that they no longer comply, and it does appear to follow as a logical conclusion that it must then be for the authority to show that such evidence is sufficient to demonstrate that they are no longer safe and suitable. It would appear perverse if the burden still remained with the licensee who, when faced with a complaint or allegation, was then required to demonstrate that notwithstanding that, he or she remained an acceptable licensee.

This decision has generated some discussion, and it remains to be seen what the consequences will be. This may become clearer if and when a full judgment is available. In the meantime however, there is a clear indication from the High Court that this is the approach to be taken, which is backed by the earlier Court of Appeal decision. It would be a brave lower tribunal which ignored both of these precedents.

[8] [2013] EWHC 2360 (Admin), [2014] L.L.R. 1
[9] [2005] EWCA Civ 1124, [2006] R.T.R. 9
[10] Directive 96/26/EC

Book Review



Cornerstone on Councillors' Conduct

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Councillors are vital to local government; without them the system as we understand it could not work. However, their role is often misunderstood and there are a number of myths and half-truths surrounding their position. The introduction of the Localism Act 2011 allied to the abolition of the Standards Board in England has in many cases made the position less clear that it was before. In addition, the rules and approach in Wales are different.

This important book cuts through the fog of confusion to provide clear and concise answers to both the obvious and obscure questions that arise in relation to local authority members.

Philip Kolvin has called upon his Cornerstone Chambers colleagues and together they have provided a book which is not only extremely useful from a professional standpoint, but it is also eminently readable.

It is littered throughout with short case studies of 2 types: hypothetical questions which are then answered; and brief reports of investigations into councillors' conduct from around the country. Those are amplified by Appendix E which contains digests of key cases.

As was mentioned earlier, the differences in Wales are important and these are covered in a separate chapter allied to a unique Appendix which encapsulates all the material required for Welsh authorities.

This is not just a handy reference book to Councillors conduct: it is an indispensable guide and should be the first port of call when questions arise. It is potentially even more useful than that. It would be good practice for every councillor to read it when they are first elected. That suggestion would also benefit a great many local government officers.

Without a clear understanding of all parties of the role, responsibilities and restrictions placed upon councillors, local authorities place themselves in a difficult position. They may not make the best use of their councillors and may also find themselves in judicial jeopardy. This book goes a long way to assiting local authorities to get these matter right.

This book is highly recommended.

Christmas and New Year

I would like to take this opportunity to wish everybody a very happy Christmas and a joyous and peaceful New Year. The office will be closed from 5 PM on Wednesday 23rd December until Monday 4th January.

James Button

22nd December 2015

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