Simply Pleasure: Licence Fees
R (Hemming) v Westminster City Council[1]

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Although Timothy Hemming trades as the more memorable Simply Pleasure Limited, it is by his own name that this important case will come to be known. He and six other operators ran a total of 13 shops in Westminster, together accounting for the great majority of the adult sex shop trade in the borough. While in the greater scheme of things the numbers of licensed premises is small, the principles they established with their case in the Administrative Court affect most licensed establishments, and in particular those where it is up to the authority to determine the fee. Although part of the case is subject to further appeal to the Court of Appeal, important elements have not been appealed, and need to be read, learned and inwardly digested by all licensing authorities. In this article, I shall first explain those parts of the judgment which have not been appealed and then describe those parts which have.

The fees for sex shops, and of course sexual entertainment venues and sex cinemas too, are governed by Schedule 3, paragraph 19 of the Local Government (Miscellaneous Provisions) Act 1982. This requires the applicant for a grant, renewal, variation or transfer of a sex establishment licence "to pay a reasonable fee determined by the appropriate authority."

From this, it is axiomatic that the obligation to pay a fee at all only arises once it has been determined by the appropriate authority. This requires an act of determination by some person or body within the council with authority to make the determination. While in an annual licensing regime, the authority may determine the fee anew each year, it is not bound to do so. It might for example determine the fees for the next three years. But determination there must be, otherwise the demand of the fee which follows is unlawful. By the time of the hearing of this case, those propositions were not in dispute.

In this case, Westminster City Council had delegated the job of setting fees to the Licensing Applications Sub-Committee. In 2004, the Sub-Committee determined the application fee for 2005 at £29,102. This is by some stretch the largest licensing fee in the country, of which more later.

Following that, it was the Claimants' case that no delegated body within Westminster determined the fee again until January 2012. Westminster pleaded that the fees had been subject to an annual review by officers. However, it ultimately accepted that, while provision may have been made for such annual reviews in its financial regulations, these did not amount to determinations for the purposes of the legislation. Its case rested on the proposition that the 2004 determination had been open-ended and was therefore designed to govern future fees until such fees were re-determined. The Claimants pointed to the language of the resolution in 2004 which made it clear that the Sub-Committee had only been purporting to determine the fees for a single year. The Court, in the guise of Mr. Justice Keith, agreed. In the result, therefore,

[1] [2012] EWHC 1260 (Admin) and [2012] EWHC 1582 (Admin).

Westminster had not determined the fees for any of the years from 2006 to 2011 inclusive. The next part of the debate concerned the consequences of that.

Were the Claimants entitled to challenge fees going all the way back to 2006? Or were they confined to challenging the fees only for 2011? Westminster pointed to the proposition, contained in rule 54.5 of the Civil Procedure Rules that judicial review challenges have to be brought promptly and in any event within 3 months of the decision to be challenged. To that, the Claimants had a two-pronged attack. The first was the common law principle that where a tax or other sum has been paid as a result of an unlawful demand, there is an immediate common law right to restitution, not dependent on public law rules at all. The principle was clearly laid out in important tax cases, including British Steel Plc v Customs and Excise Commissioners (No.1) [1997] 2 All ER 366. The second was the Court's discretion to extend time for judicial review proceedings under section 31 of the Senior Courts Act 1981. In this case, the Learned Judge decided that time should be extended. Given that the Claimants could have brought their action separately as a claim in restitution, this is not surprising and has not been the subject of appeal.

The next question, though, is what principles should govern the calculation of fees? It so happened that the leading case on calculation also involved the determination by the same Council of sex licensing fees, R v Westminster City Council ex parte Hutton (1985) 83 LGR 461. There, it was held that in the determination of fees, previous years' deficits may be brought into account so as to balance income and expenditure. Furthermore, it was held that it was lawful for the licensing authority to bring into account its enforcement costs.

In Hemming, the Claimants had for some time being seeking to ascertain what the state of account was through Freedom of Information requests, as a result of which they believed that Westminster had been making profits at their expense. While Westminster accepted that its response to the requests had been inadequate, they denied that the account was substantially in surplus. That was not decided by this case, but is to be the subject of a new determination process to be undertaken by the Council.

What was, however, decided was whether surpluses as well as deficits are to be carried forward. The logic of Hutton is that they should. If the Council is entitled to bring forward deficits, why should it not give credits for surpluses? Mr. Justice Keith agreed. He stated: "If a local authority were to be treated as acting lawfully if it failed to carry forward a surplus from one year to the next, the making of profits would become legitimized." He did not go so far as to require pin-point precision year on year, stating: "…it does not have to adjust the licence fee every year to reflect any previous deficit or surplus, so long as it 'all comes out in the wash' eventually. And the adjustment does not have to be precise: a rough and ready calculation which is broadly correct will do."

The upshot of that was that Westminster was ordered to determine the fees for each of the years 2006-2011 and to repay the Claimants the balance between the fees determined and those collected. None of that was subject to an appeal.

However, the Claimants had further strings to their bow, which concerned the effect on licence fees of the implementation through the Provision of Services Regulations 2009 of Directive 2006/123/EC on Services in the Internal Market, commonly known as the Services Directive. The Directive applies to most authorisation schemes dealing with the provision of services, with exceptions including gambling and taxis. Article 13.2 of the Directive concerns fees and states "… 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." This was transposed by similar language into regulation 18(4) of the Regulations, which came into effect on 28th December 2009, and therefore governed Westminster's sex licensing fees from 2010.

As mentioned above, Westminster's annual fees were £29,102. The overwhelming preponderance of that was alleged to be for the costs of the pursuit of illegal operators who were not licensed at all, but were working wholly outside the system. The Claimants' case was that, while this may have been permitted by Hutton, it ceased to be permitted when the Regulations became law. The Council's case was that the Directive and Regulations should not be construed as prohibiting that which has been permitted in domestic law for a long time. The Court decided that the construction of the provisions was clear, and that Westminster was not entitled to charge licensees the costs of investigating and prosecuting unlicensed operators. In determining its fees for 2010 and 2011, Westminster was to apply this principle. The Court also quashed the fee for 2012 which had been determined at £19,973 and £18,737 for applications and renewals respectively, on the same basis.

Westminster have appealed against this element of the judgment, which will require the Court of Appeal to decide whether the proper construction of the provisions is that advanced by the Claimants and accepted by Mr. Justice Keith or not. This case is likely to be heard in early 2013.

For the sake of completeness, it is necessary to mention two other elements of the case which were appealed. First, Mr. Justice Keith ordered that the redetermination of the fee should take place on an annual basis for each of the years 2006 to 2012. Westminster argued for a single retrospective recalculation, and have carried that argument to the Court of Appeal. Second, prior to the commencement of the claim, the Claimants had made a without prejudice offer pursuant to Part 36 of the Civil Procedure Rules to forego all of their past entitlements if Westminster would re-determine the fee for 2011 without bringing into account the costs of enforcement against illegal operators. Their offer was refused but the Claimants proceeded to obtain a judgment which represented a significant improvement on that position. Accordingly, the Learned Judge awarded the Claimants interest at 10% over base rate on the repayments due from Westminster, which is a sanction contemplated by Part 36. Westminster intends to argue that the rules should not be taken to apply to cases in which important public law principles are at stake.

The lessons for licensing authorities from Hemming are at least two-fold. First, as they are given increasingly wide powers over the determination of fees, they must exercise those powers in a transparent and rigorous manner. Second, they must ensure that basic public finance accounting principles are followed so that, if challenged, they are able to justify their fees and demonstrate that the fees system has not been

used to make profits. The extent of their ability to bring into account third party enforcement costs, assuming they incur any, is a matter which will be considered by the Court of Appeal in the coming months, and will no doubt be revisited in this journal.