Neutral Citation Number: [2013] EWCA Civ 591

Case No: C1/2012/1666

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Queen's Bench Division, Administrative Court
The Hon. Mr Justice Keith
[2012] EWHC 1260 (Admin); [2012] EWHC 1582 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2013

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE BLACK
and
LORD JUSTICE BEATSON

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Between:

The Queen on the application of	**Respondents**
(1) Timothy Martin Hemming (t/a Simply Pleasure Ltd)	
(2) James Alan Poulton	
(3) Harmony Ltd	
(4) Gatisle Ltd t/a Janus	
(5) Winart Publications Ltd	
(6) Darker Enterprises Ltd	
(7) Swish Publications Ltd	
- and -	
The Lord Mayor and Citizens of Westminster	**Appellant**

Philip Kolvin QC (instructed by **Gosschalks**) for the **Respondents**
Nathalie Lieven QC and Jacqueline Lean (instructed by **Westminster City Council**) for the **Appellant**

Hearing date: 14 January 2013
Further submissions: 22, 23, 30 January and 8 February 2013

Approved Judgment

Lord Justice Beatson :

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I. Overview:

1. The appellants are the Lord Mayor and Citizens of Westminster, in reality Westminster City Council (hereafter "the Council"). The Respondents are the licensees of eleven sex shops in Soho and two in Covent Garden and the West End. The principal issue in this appeal is whether regulations implementing a

European Directive mean that it is no longer lawful for the licence fees to reflect the Council's costs of enforcing the licensing system against unlicensed operators.

2. Section 2 of the Local Government (Miscellaneous Provisions) Act 1982 ("the 1982 Act") provides that the operators of sex establishments (a term including sex shops) in the areas of local authorities which have resolved that Schedule 3 of the Act is to apply to their area must have a licence. Paragraph 19 of Schedule 3 empowers local authorities to determine and charge a reasonable fee for the licence. Hitherto it has been possible for the licence fee to reflect the cost to a local authority of managing the licensing regime by enforcing it and prosecuting unlicensed operators as well as the cost of investigating and processing the individual application and monitoring compliance by licence-holders with the requirements of the licence. Indeed, it was the intention of the government at the time the 1982 Act was enacted that the fee for licences for sex establishments should cover the cost of the licensing operation and its enforcement.[1] The Council's fees reflected those costs.

3. The question is whether this is still possible after the implementation in the United Kingdom of Directive 2006/123/EC, Services in the Internal Market ("the Services Directive") with effect from 28 December 2009 by the Provision of Services Regulations 2009 SI 2009 No. 2999 ("the 2009 Regulations"). Article 13(2) of the Services Directive and Regulation 18(4) of the 2009 Regulations provide that charges for schemes requiring a person to obtain the authorisation of a competent body to have access to or to exercise a service activity must not exceed the cost of authorisation procedures and formalities. It is not in issue that the Respondents' activities are service activities or that the Council is a competent authority within the Directive and the Regulations.

4. In a judgment given on 16 May 2012 ("the first judgment"), Keith J held that the costs of enforcing the licensing system against unlicensed operators do not qualify as the costs of "authorisation procedures and formalities" and can no longer be reflected in the licence fee. He upheld a challenge by the Respondents to the £29,102 annual licence fee they had been charged since 1 February 2005. £26,435 of this reflected the costs of enforcing the licensing system. It included the costs of both quarterly compliance visits to licensed sex establishments and of operations to deal with and prosecute unlicensed operators. The declaration he granted in the light of his interpretation of the Services Directive and the 2009 Regulations stated that, when determining what is a reasonable fee for the grant or renewal of a licence to operate a sex establishment, the Council "has not, since 28 December 2009, been permitted to take into account the cost of investigating and prosecuting persons, firms or companies who operate sex establishments within [the Council's] area without a licence".

5. In that judgment and in a second judgment on 12 June 2012 Keith J also held that the Council had not validly determined a licence fee for any year after the year ending on 31 January 2006. He ordered it to do so and to make restitution of the difference between the payments it had received and the lawful fee set. In his

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[1] Statement of Home Office Minister of State during the Second Reading debate on the Bill: see HC Debs. 3 February 1982, col. 412.

second judgment Keith J also ordered the Council to pay indemnity costs and the enhanced rate of interest pursuant to CPR Part 36.14(3) because it had rejected an offer by the Respondents that was more advantageous to it than were the judgments.

6. The Council has not appealed against the finding that it had not validly determined a licence fee for the years in question. But it appeals against the judge's orders made on 12 and 26 June 2012 and the Consolidated Order dated 17 July 2012: (a) as to the interpretation of the Services Directive and the 2009 Regulations; (b) as to the basis on which restitution is to be made; and (c) in relation to costs and interest reflecting those judgments. The appeal on (c) concerns the operation of CPR Part 36.14(3) in cases where the party which has rejected a settlement offer is a public authority and the dispute is about a new and as yet untested legal regime.

7. On behalf of the Council, it was submitted that the judge's construction of the Services Directive and the 2009 Regulations would have very wide and serious implications for other regulatory authorisation regimes in this country. Those implications are said to be contrary to the purposes of the Directive because they critically undermine those regimes. Hitherto regulators and licensing authorities have been able to rely on the fees paid by those authorised in a given area to administer and enforce the regulated activity, and have done so. In the case of the sex establishments licensed by Westminster Council, over 90% of the fee is spent on enforcing the licensing regime against operators who are unlicensed and monitoring compliance by those with licences. This is a far higher proportion than in the case of other licensing regimes.

8. The adverse consequences would, it is said, be particularly felt by regulatory bodies with no independent source of income apart from the fees levied. There was, however, no material before us setting out and analysing the position in relation to the regulation of, for example, professional and business activities such as legal services to which the Council pointed. It appeared that there was also no material about them before the judge. In view of the way the argument about the adverse consequences developed, at the end of the hearing the court invited the parties to make written submissions on these matters. It received submissions on the scope of the Directive, and in particular the areas excluded from its scope by Article 2 (see [17] below), such as financial services and taxation, and on the regulatory and enforcement powers of the Bar Standards Board and the Solicitors' Regulatory Authority.

9. After the hearing the court invited submissions on two other matters. The first was whether, since it appeared that there was no European jurisprudence on Article 13(2) of the Services Directive before it, the court should refer the scope of the term "authorisation procedures" to the Court of Justice of the European Communities ("the CJEU"). For the reasons I give at [66], I do not consider it appropriate to do so. The second matter on which submissions were invited was whether there remained a difference between the parties on restitution, and, if so, to identify it.

10. As before the judge, the Council was represented by Miss Nathalie Lieven QC, leading Miss Jacqueline Lean, and the Respondents by Mr Philip Kolvin QC. I am grateful to counsel for their clear oral submissions, and for their written submissions, both before the hearing and in response to the court's requests.

11. I summarise my conclusions as follows:-

(1) Notwithstanding the undoubted force of Miss Lieven's submissions, for the reasons I give at [70] – [109] the judge's conclusion as to the impact of the Services Directive and the 2009 Regulations was correct.

(2) For the reasons I give at [110] – [137], the Council's appeal on the restitution question should be allowed in part. The Council is entitled to calculate the sum due by way of restitution in the following way:-

(a) Between the year ending 31 January 2007 and the year ending 31 January 2010 the amount of the reasonable fee may be calculated retrospectively by calculating the fee for each year, carrying forward any surplus or deficit from previous years.

(b) From the year commencing on 1 February 2010 it is not possible for the fee to reflect the element representing the costs of enforcing the licensing regime against unlicensed operators, and such part of the sums received thereafter as reflect that element was repayable "forthwith", and should be so treated.

(c) The other two elements of the fee, the administrative cost of investigating the background and suitability of applicants, and the cost of monitoring licence-holders' compliance with their terms can continue to be determined carrying forward any surplus or deficit as in (a) until these proceedings were issued in April 2011 and the amount repayable should be determined then.

(3) For the reasons I give at (at [139] – [144], I find no misdirection in the way the judge dealt with the issue of costs.

Accordingly, I would dismiss the appeal on the interpretation of the 2009 Regulations and costs, but allow it in part as to the basis on which restitution is to be made.

II. The legal framework:

(1) The Local Government (Miscellaneous Provisions) Act 1982

12. Paragraph 19 of Schedule 3 of the 1982 Act empowers the appropriate local authority to determine a reasonable fee for the grant, variation, renewal or transfer of a licence for a sex establishment. 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) (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.

13. It is clear that in the past a local authority was permitted to decide that a licensing system should be self-financing and reflect the costs of enforcement in the fees it charged: see, in the context of sex establishments *R v Westminster City Council, ex p. Hutton,* one of the cases tried and reported with *R v Birmingham City Council, ex p. Quietlynn Ltd* (1985) 83 LGR 516. In that case, it was accepted (at 517) that the fee could reflect not only the processing of applications but "inspecting premises after the grant of licences and for what might be called vigilant policing … in order to detect and prosecute those who operated sex establishments without licences". See also, albeit in the context of street trading licences, *R v Manchester CC, ex p. King* (1991) 89 LGR 696 at 710.

(2) Directive 2006/123/EC, Services in the Internal Market

14. The Services Directive seeks to facilitate the exercise of freedom of establishment and eliminate barriers to the development of service activities in the Internal Market. It deals *inter alia* with "the administrative procedures for granting authorisations, licences, approvals or concessions" (recital (39)) and the fees for those authorisations and licences.

15. Recital (42) provides that the rules relating to administrative procedures "should not aim at harmonising administrative procedures, but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings". Recital (43) refers to the intention to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures and disproportionate fees.

16. Recital (49) states that:

> "The fee which may be charged by points of single contact should be proportionate to the cost of the procedures and formalities with which they deal. This should not prevent Member States from entrusting the points of single contact with the collection of other administrative fees, such as the fee of supervisory bodies."

17. Article 2 of the Directive excludes a number of services from its scope. Financial services, including banking, credit, securities, insurance, pensions, investment funds and investment advice, services in the field of transport, healthcare services, and "the field of taxation" are among the areas excluded.

18. Article 5 requires Member States to "examine the procedures and formalities applicable to access to a service activity and to the exercise thereof". Article 6 requires Member States to ensure that it is possible for providers to complete all procedures and formalities needed for access to and exercise of the service activity through points of single contact.

19. By Article 4(6) procedures under which a provider is in effect required to take steps to obtain from a competent authority a formal decision "concerning access to a service activity or the exercise thereof" are termed "authorisation schemes". Article 9(1) provides access is not to be made subject to an authorisation scheme unless it does not discriminate against the provider in question and "the need for an authorisation scheme is justified by an overriding reason relating to the public interest".

20. Article 10 provides that authorisation schemes shall be based on criteria which preclude the competent bodies from exercising their power of assessment in an arbitrary manner. It also provides that the criteria shall *inter alia* be "justified by an overriding reason relating to the public interest", "proportionate to that public interest objective", and "made public in advance".

21. The critical provision in these proceedings is Article 13. Article 13(2) provides:

> "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."

Article 13(3) provides that authorisation procedures should provide applicants with a guarantee that, subject to extension if the complexity of the issue justifies it, their applications will be processed as quickly as possible and, in any event, "within a reasonable period which is fixed and made public in advance". By Article 13(4) if there is no response within the period set or extended "authorisation shall be deemed to have been granted".

22. The European Commission's Director-General for Internal Market and Services published a handbook on implementation of the Services Directive and the European Commission has published frequently asked questions ("FAQs") on it. Paragraph 6.1.8 of the former and one of the answers to the FAQs track the language of Article 13(2).

(3) The 2009 Services Regulations; SI 2009 No. 2999

23. In these proceedings the critical concepts and terms in the Regulations are "authorisation schemes" and "authorisation procedures". Those schemes and procedures relate to "service activities", and are administered by "competent authorities". The definition of "authorisation scheme" in Article 4(6) of the Directive has been implemented by Regulation 4. It provides that "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" is an "authorisation scheme".

24. Regulation 18, which contains the general requirements for authorisation schemes, reflects Article 13 of the Directive. By regulation 18(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."

25. The Department for Business, Innovation and Skills has published a number of guidance documents about the Services Directive and the 2009 Regulations directed to different sectors. The second edition of the *Guidance for Local Authorities* dated June 2009 stated:

> "Local authorities must set fees that are proportionate to the effective cost of the procedure dealt with. As costs vary from region to region, central advice on the level of fees will not be appropriate. Local authorities will need to bear in mind the threat of a legal challenge should a service provider feel that the levels of fee are being used as an economic deterrent or to raise funds for local authorities. Enforcement costs should not be assimilated with the application fee. *This is to forestall the possibility of an unsuccessful applicant seeking legal remedy due to part of his fee having been used to subsidise his successful competitors.*" (Page 17, emphasis added).

A separate box stated that "all charges must be proportionate to the effective cost of the procedure dealt with". Earlier in this guidance (at page 8) it is stated that "fees set must be proportionate to the effective cost of the procedure dealt with and must not be used as an economic deterrent".

26. Paragraph 86 of the Department's *Guidance for Business*, published in October 2009, stated:

> "Under Regulation 18, fees charged in relation to authorisations must be proportionate to the effective cost of the process e.g. to cover the actual cost of the application process. Fees should not be used as an economic deterrent to certain activities or to raise funds. As now, if you believe the fee to be disproportionate, you can contest it with the authority concerned."

27. The *Guidance for Departments and Competent Authorities on the Provision of Services Regulations 2009* published in January 2010 is the document to which the judge (first judgment [36] – [37]) referred. It *inter alia* stated:

> "Under regulation 18, fees charged in relation to authorisations must be proportionate to the effective cost of the process, i.e. must cover no more than the actual cost of the authorisation process. Fees should **not** be used as an economic deterrent to certain activities or to raise funds. If a service provider believes the fee to be disproportionate, they can contest it with the authority concerned. *Enforcement costs should not be assimilated with the application fee.*" (page 18, emphasis added).

A separate box also stated that the fee had to cover "no more than the actual cost of the authorisation process". The reason given for this was:

> "… to forestall the possibility of an unsuccessful applicant seeking legal remedy due to part of its fees having been used to subsidise successful competitors."

III. The factual background:

28. I primarily take the factual background from the judge's first judgment, but also refer to the evidence of Mr Ralph, the Council's Service Manager, Noise and Enforcement. Mr Ralph has been responsible for enforcement proceedings against unlicensed sex establishments since 2005. Licence fees within Westminster are generally determined by the Licensing Applications Sub-Committee of the Council's Major Licensing Applications Committee, though they can be determined by the Major Licensing Applications Committee itself: first judgment [13].

29. The number of licensed sex establishments in the City of Westminster fluctuated between 14 and 20 between 2003/04 and 2011/12. In 2003/04 there were 18: first judgment [15]. At that time the application fee for new and renewed sex establishment licences was £28,531. There were other significantly lower fees for applications for variations or transfers of licences: Mr Ralph's statement, paragraph 24.

30. The fees were set by the Major Licensing Applications Committee at a meeting on 10 July 2003: first judgment [14]. In September 2004, following a report by the Director of Legal and Administrative Services entitled *Licensing – Annual Review of Premises Fees & Charges 2004/5*. The fee for new and renewed licences was determined on the basis that in 2004/05 costs were projected to be slightly more than licence fee income. The fee was set by the Licensing Sub-Committee at £29,102 with effect from 1 October 2004: first judgment [3]. That fee was demanded of the claimants in every year thereafter until the year ending 31 January 2012.

31. For a number of years after 2004 neither the Licensing Sub-Committee nor the Major Licensing Applications Committee considered the fees for licences for sex establishments. The fees were reviewed each year by Mr Ralph. The income from licence fees and the costs of administering and enforcing the licensing system fluctuated over the years, but Mr Ralph's evidence was that broadly speaking "the income from fees" was "sufficient to fund the costs of ongoing enforcement, but no more". "Since Mr Ralph's annual review did not result in any recommendation for either an increase or a reduction in the fees, the level of the fees was never referred to either of the committees": first judgment [16]

32. The £29,102 licence fee payable on application was made up of two elements. I referred (at [4]) to the fact that £26,435 was for what Mr Ralph described (see first judgment, [32]) as "the management of the licensing regime". That element of the fee was refundable if the licence was not granted: first judgment [32]. The remaining £2,667 related to what Mr Ralph described as "the administration of the application". It was non-refundable: first judgment [32].

33. 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".

34. It appears from Mr Ralph's evidence (statement, paragraph 12) that he classified the cost of compliance monitoring against those with licences as part of the cost of the enforcement system rather than the cost of the administration of the application. Save in respect of the compliance monitoring that occurs after an application to renew a licence has been made, there would appear to be a conceptual overlap between this activity and managing the licensing regime by enforcing it against unlicensed operators. Both activities are undertaken by the Council's Licensed Premises Inspectors. The £26,435 therefore relates to monitoring and enforcement against both licensed and unlicensed operators. The terms of the declaration (see [4] above) show that the judge decided that only the part of that sum fees levied for enforcing the licensing regime against unauthorised operatives falls foul of the Services Directive and the 2009 Regulations.

35. There was evidence before the judge that for many years the determination of the licence fee for sex establishments took into account whether the income received from fees for such licences in the previous year was greater or smaller than the costs of administering and enforcing the system: first judgment [15(ii)], [18], and [19]. After 2004 when the level of fees was reviewed by Mr Ralph, the evidence was that, where the fee set resulted in a surplus or loss for the financial year, there would be an appropriate reduction or increase in the fee for the following financial year: first judgment [20(ii)]. It looked "as if the fee for the year ending 31 January 2006 had been calculated taking account a deficit from the previous year": see first judgment [28] and [30] above.

36. After the 2009 Regulations came into force on 28 December 2009 the claimants sought information about the process for setting the fee for sex establishments. On 27 May 2010, they made a request under the Freedom of Information Act 2000 ("a FOI request") asking the Council how the fee for that year had been determined and for a breakdown of costs: first judgment [48]. The Council's reply to that request was that the fee had been set by the Major Licensing Committee on 10 July 2003, and that while a full breakdown of its costs could not be provided, in 2009/10 £1,700 was charged to the Licensing Service, £800 to the City Solicitor, and £543,700 to Licensing Enforcement: see the email dated 24 June 2010 from Joyce Oduns, at the Council, to Clare Johnson, the claimants' solicitor.

37. Because the Council relied on a decision made in 2003, further FOI requests were made in respect of earlier years and the claimants developed what the judge described (first judgment [6]) as "a profound mistrust" of the Council's approach to the process. The Council accepted that its responses to the FOI requests were (see first judgment [48]) "not as informative as they should have been". It was only after the Council's response dated 2 February 2011 to the claimants' third FOI request that the judge considered the claimants could "realistically argue that the licence fee had not been determined by the Council for many years": first judgment [48].

38. In March 2011 the Respondents made a Part 36 offer to forgo the entirety of their historic claim in return for a redetermination of the fee for 2011/12 leaving out of account the costs of enforcement against unlicensed operators. The Council did not accept this offer.

39. The application for judicial review, issued on 28 April 2011, challenged the fee demanded for 2011/12 on the ground that the Council had not determined it by the due date, 1 February 2011. It also sought restitution of the fees paid in the previous 5 years, also on the ground that the Council had not determined the fees for those years, although in reality what the claimants sought was the difference between what they had paid and what would have been reasonable fees for those years: first judgment [3] – [5].

40. On 5 January 2012 the Council's Licensing Urgency Sub-Committee considered the level of the licence fees for sex establishments for 2012/13. The Sub-Committee approved recommendations from the Operational Director for Premises Management for the fee for a new sex establishment licence to be £19,973, and the fee for the renewal of such a licence to be £18,737, for the year from 1 February 2012. That represented a reduction of £9,129 and £10,365 respectively: first judgment [19]. The judge stated that these reductions were said to be necessary:

> "because 'the level of unlicensed establishments [had] significantly diminished and it [was] hoped that they will be reduced further during 2012', and there would therefore 'be a reduction in officer time and resources in relation to compliance and enforcement for sex establishments … in the next licence period'. This review was said to have been prompted by 'the anticipated decrease in compliance/enforcement costs during the next licence period', but you would not have to be unduly sceptical to suspect that the review, and the significant reduction in the level of the fees which flowed from it, was really triggered by the present claim." (first judgment [19]).

41. The Sub-Committee's report and Appendix 1 describe the fees as "licence application fees". Paragraph 2.3 of the report stated that the fees would be reviewed once the 2012/2013 budgets have been set to ensure "that the assumptions made within this report are correct". It also stated that any changes made to the fees structure following that review "will ensure that the Council can fully recover its actual costs in relation to the sex establishment licensing regime". The Appendix breaks down the Council's costs into "processing, administration and determination (licensing service)", environmental health consultation team, ongoing policy costs, and "compliance (licensing inspectorate) costs". The sums are, respectively, £1,640, £442, £173, and £17,718 for a new application. The last of these figures applied to both new and renewal applications. As previously, the fees for applications to vary or transfer a licence were to be very much lower.

IV. The judgments:

42. The judge held that in September 2004 the fee was fixed for the licensing year commencing on 1 February 2005 and ending on 31 January 2006, and that the Council had not determined a licence fee for any year thereafter: first judgment [22]. It was common ground, in the light of regulation 2(6)(e) of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 I have summarised at [12] above, that the reviews by Mr Ralph were no substitute for

determinations by the Council. The judge rejected the Council's submission that the fee had been fixed on an open-ended basis in 2004 so that the fee rolled over from one year to the next. There is no appeal against those decisions.

43. ***The 2009 Regulations****:* The judge held that the effect of the Regulations was that the Council was no longer entitled, when determining the reasonable licence fee for sex establishments, to include the cost of enforcing the licensing system against unlicensed operators in that fee: first judgment [44] and see the indication as to relief at [49(i)]. He did so because of the clarity of the provision in Article 13(2) of the Services Directive and regulation 18(4) of the 2009 Regulations. Paragraph [44] of the first judgment does not reflect the distinction he made at [39] and in the terms of his order between enforcement against unlicensed operators and enforcement against licensed operators.

44. The judge stated that, in this case, the critical question was whether the cost of "the procedures and formalities" under the authorisation scheme includes the cost of enforcing the licensing system by investigating and prosecuting those who operate without a licence or only the cost of administering the licensing system; that is costs of investigating the suitability of applicants and their compliance with the terms of their licences when they apply to renew them. He considered (first judgment [36]): (a) the language of regulation 18(4) "strongly suggests the latter", (b) "the combined effect of [regulations] 4 and 18(4) sensibly admits of no other construction if the language of the regulations is decisive", and (c) this was entirely consistent with the Departmental Guidance.

45. The judge rejected the Council's submission that it was not the Services Directive's purpose to restrict the substantive provisions of a licensing regime, including the charging of legitimate fees which included an element for the recoupment of expenditure, where those fees have been accepted as being rational, sensible and justifiable in accordance with domestic law. He did so because the language of the Services Directive implemented by Regulation 18(4) was "quite specific" and referred to the elimination of "disproportionate fees".

46. Paragraph [41] of the first judgment contains the core of the judge's reasoning. It stated:

> "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. The rationale for that has to have been that if it was otherwise, and if in consequence the fee was a sizeable sum, it might have the effect of dissuading people who might be thinking of setting up business from going into the market at all: the anticipated profit margin might just be too tight. Indeed, if the purpose of the Directive was to remove barriers to entry to the internal market, that purpose might be

> undermined if the Directive was regarded as permitting member states to allow the fee payable for entry into the market to be many times the cost of considering and processing applications for the relevant licence."

47. Both parties had made submissions about the undesirable consequences of adopting the construction for which the other contended. The Respondents maintained (see first judgment [42]) that in a part of the country with no sex establishments "it would be very odd if the effect of someone successfully applying for a licence for a sex establishment would be that the local authority would no longer have to use its general fund to get rid of unlicensed sex establishments, and that the lone licensee found himself saddled with all the costs of enforcement".

48. The Council's position was (see first judgment [43]) that, "if the claimants' construction of the 2009 Regulations is correct many regulatory authorities would simply not be able to recover their costs of enforcing the regulatory regime", and that, unlike the Council, some regulatory authorities "do not have an independent source of income and lack revenue-raising powers".

49. The judge stated (first judgment [43]) that neither party had persuaded him that the consequences of adopting the other's interpretation of the 2009 Regulations were so dire as to disturb or support the conclusion he had reached.

50. ***The position of surpluses and deficits:*** It was common ground in the light of *inter alia R v Manchester CC, ex p. King* (1991) 89 LGR 696 that the Council was not entitled to make a profit from the licensing regime: first judgment [24]. The judge held that it followed from this that, in determining the annual fee for a given year, the Council had to adjust what would otherwise be the appropriate fee to reflect any previous deficit or surplus: first judgment [27]. He also stated that this did not mean that it had "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". Additionally, "the adjustment [did] not have to be precise: a rough and ready calculation which is broadly correct will do".

51. As to how far back the Council had to go, the judge rejected the submissions on behalf of the Council that there were practical problems in going back into the past at all. He considered that, because (see [35] above) it appeared that the fee for the year ending 31 January 2006 was determined on the basis that in 2004/05 costs were projected to be slightly more than licence fee income, it was appropriate to go back to the year ending 31 January 2007: first judgment [28].

52. Because it was for the Council alone to determine what the fee should be, the judge stated (at [31]) it was not right to order the taking of an account. It would be open to the claimants to challenge any re-determination if the process used was flawed. He held that the Council "must repay the claimants the difference between the sum which was demanded [by the Council for 2011/12] and paid and the amount finally determined by the Council as a reasonable fee": first judgment [31] and see the indication given at [49(iv)].

53. The judge recognised (first judgment [45] - [47]) that the restitutionary claim was complicated by his conclusion on the effect of the 2009 Regulations and meant

that the claimants' restitutionary claim was far from academic. This was because, even on Mr Ralph's claim (see above at [31]) that the income from fees in previous years was sufficient to fund the costs of ongoing enforcement but no more, there would be a large surplus to be carried forward from the year ending 31 January 2011. This was because, in that year, the costs of enforcing the licensing system against unlicensed operators should have been excluded. He stated that, as a result, it would take many years of determining the fee at a nominal amount before the surplus would be eliminated: first judgment [46].

54. The second judgment finalised the declaration reflecting the decision that no fee had been fixed for any year since that ending on 31 January 2006. The judge ordered the Council to determine a reasonable fee for each year from the year ending 31 January 2007 to that ending 31 January 2013 (second judgment [1] – [4]), to do so having regard to (a) any surplus or deficits generated in previous years and, (b) in respect of the years ending 31 January 2011 and 2012, the declaration about the effect of the 2009 Regulations.

55. The judge also determined that, as his first judgment was more advantageous to the claimants than the Part 36 offer made by them in March 2011, they were entitled under CPR Part 36.14(3) to costs on the indemnity basis, and interest at 10% above base rate from on 18 April 2011, the date the offer expired.

V. The grounds of appeal:

56. The first ground is that the judge erred in his construction of the Services Directive and the 2009 Regulations. Miss Lieven submitted that his approach was too literal, and that he failed to give the provisions a purposive construction as required, in particular, in the case of EU provisions: see, e.g. *Litster v Forth Dry Dock Engineering Co Ltd* [1990] 1 AC 546. His failure to do so, she submitted, meant that he disregarded the fact that the Directive is concerned with removing barriers to entry to a market, and not preventing a licensing authority from requiring fees to cover the costs of enforcement activity hitherto accepted in national law and where the activity is ultimately to the benefit of those who hold licences. Her oral submissions focused more on the wider contention that not permitting such fees to reflect costs of enforcement against unlicensed operators inhibits entry to this market by those who wish to operate with a licence than on the fact that hitherto such fees have reflected these costs.

57. Miss Lieven's case is that enforcement is to the benefit of those with licences because it means they are protected from competition by unlicensed traders. She argued that it is contrary to the purpose of removing barriers to entry to make enforcement of a regulated activity so much more difficult. She contended that the absence of enforcement or much more limited enforcement would indeed inhibit entry by legitimate traders because of the competition they would face from unlicensed operators.

58. Regulation 18(4) of the 2009 Regulations requires fees to be "reasonable and proportionate to the cost of the procedures and formalities" under the licensing scheme and not to exceed those costs. Article 13(2) of the Services Directive is in similar terms save that it only refers to "the cost of the procedures in question".

While Miss Lieven accepted that construing these provisions as including the cost of enforcement is to some extent to give their words a strained meaning, she contended it is not an abuse of language to do so.

59. The Council's alternative argument is that the Directive and Regulations do not purport to affect the fees which may be charged to a person who has been granted a licence for the administration and maintenance of the regime that applicant has successfully applied to join. Such costs include the costs of enforcement.

60. On the basis upon which restitution is to be made, the Council contended that the judge erred in making an order under which the amount to be repaid was to be calculated on a cumulative year by year basis rather than on a rolling basis which enabled it to carry forward surpluses or deficits in any one year. Miss Lieven submitted that this was wrong in principle and inconsistent with the judge's acceptance that the Council was not required to account to the claimants for overpayments on a year-by-year basis.

61. The Council also submitted that it was unjust to apply CPR Part 36.14(3) in the circumstances of this case. Settling the dispute on the basis of the offer would, Miss Lieven maintained, affect not just the claimants, but all those who apply to the Council for licences. Had the Council accepted the offer, there was no way it could, in future years, have reverted to the interpretation of Article 13(2) and Regulation 18(4) which it considered to be correct. She submitted that it would be verging on the improper for the Council to accept an interpretation of the Services Directive and the 2009 Regulations when advanced by one applicant for a licence, but to take a different position on what is a matter of pure law in the case of other applicants and in future years. Since this was the first case on the 2009 Regulations, the width of the implications for the Council and its fiduciary duty to local taxpayers justified it not accepting the claimants' offer.

VI. Reference to the CJEC:

62. In response to the Court's request for submissions as to whether it should make a reference to the CJEC on the scope of the term "authorisation procedures" in Article 13(2), the Council submitted that this would be an appropriate case for the court to exercise its discretion to do so. It did so for three reasons. First, the correct interpretation of the term "authorisation procedures" is central to the court's determination of ground 1 of the appeal. Secondly, the point is not *acte clair*, and the issue has not previously been decided by the CJEC. Thirdly, neither party is aware of any judicial consideration of Article 13(2) of the Services Directive in other Member States.

63. The Respondents strongly resisted a reference. Mr Kolvin submitted that the Regulations are clear even without reference to the Directive, so that the matter is *acte clair*. If, however, they are not, he suggested the question that arises concerns the application of the Regulations rather than their interpretation. He also submitted that, while there is no CJEC jurisprudence precisely on Article 13(2) of the Directive, the trajectory of the wider European jurisprudence supports the Respondents' position.

64. Mr Kolvin referred to nine decisions of the ECJ and CJEC in a number of areas which he submitted show that costs going beyond those necessary to pay for the specific process appertaining to that provider are not permitted. Miss Lieven submitted those cases are concerned with the interpretation and application of specific Directives in different contexts and are distinguishable from the Services Directive. I deal with this material at [75] – [88].

65. Mr Kolvin also relied on a number of pragmatic considerations. First, neither party has ever requested a reference. At this stage, when the court has had more extensive argument on the point than was available to the judge below, and the arguments have been completed, the court should deliver its judgment in the light of the submissions made. He submitted that, now that all the costs in the appeal have effectively been incurred, there is little disadvantage in declining to make a reference. At worst, if a judgment of this court did not bring these proceedings to an end, it would mean that the Supreme Court would have to refer. He also stated that the Respondents are highly concerned by the delay that would be caused by a reference. It is over three years since the first of the FOI requests made by them, and the order made by the judge has been stayed pending this appeal. Mr Kolvin also relied on the fact that the Respondents' lawyers have been working under a conditional fee agreement with an insurance policy, which does not contemplate a reference to the CJEC.

66. In my judgment, in circumstances in which the issue of a reference to the CJEC only arose after the hearing and at the invitation of the Court, the Respondents' pragmatic reasons for resisting a reference are compelling. A court should hesitate before making a reference of its own motion where a party opposes this: see Nourse J in *Cambridge Petroleum v IRC* [1982] STC 325 at 332. While the way these proceedings have been financed does not appear to me to be a good reason tilting the matter against a reference, the certain delay from a reference and the fact that a judgment by this court does not preclude a reference if the matter goes further have led me to conclude that this court should not refer this matter to the CJEC.

VII. Analysis:

(1) The effect of the Services Directive and the 2009 Regulations

67. The judge is clearly correct in stating that the language of Regulation 18(4), particularly when read with the definition of "authorisation procedures" in Regulation 4, points strongly to a construction that only permits the costs of administering the application to be reflected in the fee. But the effect would be to forbid fees to reflect all or some of the enforcement costs which authorities have hitherto generally been allowed to reflect. Indeed, in some cases, authorities have been encouraged to set fees that reflect such costs. The result of the interpretation by the judge also sits uncomfortably with the history, in the United Kingdom, of self-regulation largely financed by those working in the regulated area.

68. An example of encouraging fees to reflect enforcement costs is the Regulatory Impact Assessment for the Licensing Act 2003 (Transitional Conversions Fees) Order 2005 SI 2005 No. 80 and the Licensing Act 2003 (Fees) Regulations 2005

SI 2005 No. 79. The Impact Statement states that "the objective of the Regulations and Order is to set the level of these fees, so far as possible, at a level that would achieve full recovery of the administrative, inspection and enforcement costs falling on licensing authorities' associated with their licensing under the 2003 Act" (paragraph 2(i)) and "the Government has consistently expressed the aim of ensuring that the costs of local authorities administration, inspection and enforcement associated with the new regime should not fall on the central or local taxpayer, but on those choosing to engage in licensable activities" (paragraph 2(ii)).

69. The amendments to the Licensing Act 2003 introduced by section 121 of the Police Reform and Social Responsibility Act 2011 ("the 2011 Act") provide another example. They make provision for those who licence the sale of alcohol, regulated entertainment and late-night refreshment to charge fees that will broadly relate to the licensing authority's costs, including monitoring and enforcement. For these reasons, I was initially considerably attracted by Miss Lieven's submissions. Notwithstanding my initial position and the force of Miss Lieven's submissions, I have been driven to the conclusion that, on this issue, Mr Kolvin's submissions are to be preferred

(A) Are the costs of enforcement, the costs of authorisation procedures and formalities?

70. The Council's primary case is that enforcement costs are "procedures and formalities under the scheme". What must be remembered is that Regulation 18(4) is concerned with charges which applicants may incur under an "***authorisation*** scheme" (my emphasis). The charges must be proportionate to and not exceed the cost of the procedures and formalities under the "authorisation scheme". An "authorisation scheme" is one which requires a service provider to obtain the authority of the competent authority to have access to or to exercise a service activity. It is difficult to see how even a strained interpretation enables the "cost of authorisation procedures and formalities" to include the cost of prosecuting unlicensed operatives who have not applied for authorisation.

71. I accept Mr Kolvin's submission that, as a matter of logic and language, it is not possible to regard the prosecution of those who are not licensed as an "authorisation procedure". Article 13(2) of the Services Directive does not include the word "formalities" but only the term "authorisation procedures in question". The use of the term "authorisation procedures", however, means the Council's position obtains no support from that difference. Moreover, the wording of Articles 13(3) and (4) suggest (albeit obliquely) that the "authorisation procedure" ends when a person gets authorisation because (see the summary at [21] above) they respectively provide for a fixed period for processing applications, after the end of which, absent a response authorisation is deemed to have been granted.

72. ***(i) <u>The need for a purposive construction of Article 13(2) and Regulation 18(4)</u>:*** It is clear that, in the case of legislation implementing EU law, there is a greater flexibility in applying a purposive construction: see, for example, Lord Oliver in *Pickstone v Freemans plc* [1989] 1 AC 66 at 126 and *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 at 576 – 577. Indeed, there is a duty to

construe such implementing legislation, so far as possible, to give effect to the objective of the European legislation the national legislation was designed to implement, and to do so by a more robust approach to the adoption of a strained construction than in cases where no question of Community law is involved. In *Russell v TransOcean International Resources Ltd* [2011] UKSC 57 at [22], Lord Hope DPSC stated that, because of this duty, the terms of the implementing legislation "are of secondary importance" to the terms of the Directive, although they are relevant as they set out the domestic rules that must be complied with in conformity with the obligations in the Directive, in that case the Working Time Directive 2003/88.

73. The Council's principal criticism of the judge is that he did not adopt the strongly purposive approach that is required for primary and secondary legislation implementing EU legislation. It is true that the judge's starting point in paragraph [36] of his first judgment was the language of Regulation 18(4). But in three crucial paragraphs, [39] – [41], the last of which I have set out at [46] the judge went on to consider the implications of the undisputed purpose of the Directive to remove barriers to entry to the internal market.

74. He referred to the express references to the elimination of disproportionate fees in Recital (43). He considered that the rationale for limiting the fee to the costs of the "authorisation procedures" was that if the fee was a sizeable sum, "it might have the effect of dissuading people who might be thinking of setting up business from going into the market at all" and the purpose of removing barriers to entry of the internal market "might be undermined if the Directive was regarded as permitting member states to allow the fee payable for entry into the market to be many times the cost of considering and processing applications for the relevant licence". I return to the question of whether the construction adopted by the judge is inimical to the purposes of the Services Directive at [99], after considering the guidance from European jurisprudence and the Council's "consequentialist" arguments.

75. ***(ii) <u>Guidance from ECJ and CJEU jurisprudence on fees and charges</u>:*** In the absence of consideration of Article 13(2) of the Services Directive by either the CJEC or courts in other Member States, it is useful to consider cases concerning other European Community provisions. Mr Kolvin relied on decisions about fees and charges in a number of contexts. These were: indirect taxation (Directive 69/335),[2] freedom of establishment (Article 43 of the Treaty),[3] free movement of goods (Articles 9 and 16 of the Treaty)[4] and freedom to supply telecommunications services (Directive 97/13).[5]

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2 Joined Cases C-71/91 and C-178/91 *Ponente Carni SpA and Cispadana Costruzioni SpA v Amministrazione Delle Finanze Dello Stato* [1993] ECR I-1915; Case C-188/95 *Fantask A/S v Industiministeriet* [1997] ECR I-6783; Case C-264/00 *Grunderzentrum-Betriebs-GmbH v Land Baden-Wuttenburg* [2002] 2 CMLR 46.

3 *Case C-400/08 Re Shopping Centres Licensing: European Commission v Spain* [2011] 2 CMLR 50

4 Case 46/76 *Bauhuis v Netherlands* [1977] ECR 5; Case 132/78 *Denkavit Loire SARL v France* [1979] ECR 1923; Case C-111/89 *Netherlands v P. Bakker Hillegon BV* [1990] ECR I-1735.

5 Joined Cases C-392/04 and C-422/04 *Germany GmbH and Arcor KG and Co v Germany* [2007] 1 CMLR 10,

76. It is important, as Miss Lieven submitted, to bear in mind the context of the Treaty provision, Directive or other instrument at issue in these cases, and the purposes of those instruments. But the overall case she puts on behalf of the Council is that, because the purpose of the Services Directive is to promote freedom of establishment and free movement, it follows that the authorities can charge applicants costs going beyond the costs of authorising them to provide such services. In the light of that submission, provided the court is sensitive to context, the decisions and the statements in the judgments in those cases are of assistance in ascertaining the general approach of the CJEU.

77. Miss Lieven submitted that the three cases on Directive 69/335 on indirect taxation are not of assistance in the present context. I accept that there is one significant difference between the two contexts. Directive 69/335 was expressly designed to harmonise the rules of indirect taxation across Member States. The Services Directive expressly (see Recital (42) summarised at [15] above) does not purport to harmonise either administrative procedures or fees.

78. The second distinguishing feature relied on by Miss Lieven cannot, however, be given the entire weight she accords to it. She submitted that it is not possible to read across the restrictive approach taken to Article 12(1)(e) of Directive 69/335 to the provisions relating to fees in the Services Directive because Article 12(1)(e) contained an exception from the general prohibition in Article 10 on Member States charging any taxes whereas the provisions in the Services Directive are not an exemption from a general prohibition on such charges.

79. It is true that the limitation in Article 13(2) of the Services Directive is not an exception from a general prohibition in another provision but results from the very definition of what is permitted; that is the use of the term "authorisation procedures" in defining what is permitted. But that does not justify giving a broad, let alone a strained, meaning to the term which has been used to impose the limit and in that way to widen the scope of what is permitted.[6] I nevertheless accept that the three cases on Directive 69/335 on indirect taxation and the decisions on whether fees for public health inspections of livestock for export taxes, which also concerned the scope of a provision derogating from a general prohibition, are not in themselves of direct assistance in the present context.

80. Two of the other cases relied on by Mr Kolvin are, however, of assistance in understanding the general approach of the CJEU and, in the past, the ECJ to restrictions on fees and provide some guidance in the present context. The first is Case C-400/08 *Re Shopping Centres Licensing: European Commission v Spain* [2011] 2 CMLR 50. The European Commission alleged that Spain had failed to fulfil its obligations under Article 43 because of a licensing scheme which provided for fees to be charged for processing applications for the establishment of shopping centres, which the Commission contended had a deterrent effect on

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6 There is some analogy with the fierce debates before the decision in *Photo Production Ltd v Securicor Transport Ltd.*[1980] AC 827 as to whether a clause qualifying a contractual obligation should be approached differently from one exempting a party from liability (see e.g. Coote, *Exception Clauses,* 1964) when the real question was the construction of the language used in the contract .

freedom of establishment and which, as they were unrelated to the cost of the procedure, were disproportionate. The fee was determined by reference to the size of the shopping centre. It was originally calculated by dividing the cost of processing applications for licences incurred in 1994 and 1995 by the number of square metres of the shopping centres concerned in those years. After that, the amount was updated in line with inflation.

81. The CJEU held (at paragraph [128]) that this method of calculation was designed to enable recovery of the actual processing costs. The court proceeded on the basis that a fee determined by a formula derived from the cost of the actual authorisation process in this way was justified.

82. The Commission's case before the Court was that the fee was not calculated by reference to the cost of the licence and was an unauthorised tax. It relied for this proposition on Joined Cases C-71/91 and C-178/91 *Ponente Carni SpA and Cispadana Costruzioni SpA v Amministrazione Delle Finanze Dello Stato* [1993] ECR I-1915, the earliest of the three cases on Directive 69/335 relied on by Mr Kolvin. In that context, the Court has held that a charge for a service at a level unconnected with the cost of that service or calculated on the basis of the running and capital costs of the department responsible for the service constituted an unauthorised tax.

83. Miss Lieven submitted that *European Commission v Spain* should be approached cautiously because no substantive consideration was given to the case law that had been referred to, either by Advocate-General Sharpston or the Court. She contended that both had focused on whether Spain had established that the means by which the fee was calculated was objectively related to the processing of the application, and that the case cannot be regarded as laying down any wider point of principle that Member States are restricted, in charging fees relating to a service, to only charging fees which relate directly to the cost of processing an application for that service.

84. In my judgment, the Advocate-General and the Court proceeded on the basis that, in order to justify the licence fee, it had to be shown that it was related to the cost of the actual authorisation process. It is true that the only case cited was *Ponente Carni,* but that was the first of a number of cases which considered whether fees could be related to the running and capital costs of the department responsible for effecting a transaction. It is of significance that, although *Ponente Carni* was concerned with a derogation from a general prohibition, the Advocate-General and the Court considered that the approach in it was of some relevance. It was for that reason that, while broadly accepting Miss Lieven's submission about the three cases on Directive 69/335, I stated only that they "are not in themselves" of direct assistance.

85. The second decision which is of assistance is that of the Grand Chamber of the CJEU in Joined Cases C-392/04 and C-422/04 *Germany GmbH and Arcor KG and Co v Germany* [2007] 1 CMLR 10. The decision concerned fees for telecommunications licences. Article 11 of Directive 97/13 permitted Member States to charge fees for telecommunications licences to cover "administrative

costs incurred in the issue, management, control and enforcement of the applicable individual licences".

86. The CJEU held that Article 11 precluded "the application for a fee for individual licences calculated by taking into account the regulatory body's general administrative costs linked to implementing those licences over a period of 30 years": [2007] 1 CMLR 305 at [70]. Earlier in its decision (at [34] and [35]) it stated that calculating the fee by reference to the regulatory body's general supervisory activities "goes beyond the work strictly generated by the implementation of individual licences, it follows that taking into account expenditure linked to this monitoring is contrary to Article 11(1) of Directive 97/13".

87. I reject Miss Lieven's submission that Article 11(1) was arguably more prescriptive of the costs that could be included in a licence fee than Article 13(2) of the Services Directive because it permitted the administrative costs incurred *inter alia* in "enforcement" of "the applicable individual licences". If anything, it is less prescriptive. Article 11(1), unlike Article 13(2) of the Services Directive empowers the fee to reflect "the administrative costs incurred" and not only "the costs of the authorisation procedures in question". The costs of a regulator's authorisation procedures are only a part of its administrative costs and, if the general administrative cost to a regulatory body of implementing the licensing regime do not qualify as part of its "administrative costs", it is difficult to see how the cost of enforcement can qualify as part of the "authorisation procedures".

88. The indication from *European Commission v Spain* and *Germany GmbH and Arcor KG and Co v Germany* is that the CJEU and before it the ECJ have tended to prevent Member States imposing costs on businesses that go beyond the costs of the authorisation, registration or inspection process. They have done so because such costs constitute illegitimate barriers to the exercise of fundamental freedoms or are inconsistent with principles of Community law. Although the judge did not have the benefit of extensive citation of European jurisprudence, his approach to the provisions of the Services Directive reflects that jurisprudence.

89. ***(iii) The "consequentialist" arguments:*** I turn to Miss Lieven's submission that the judge's construction will have serious and adverse implications for a number of regulatory regimes in this country which have hitherto relied on fees from persons authorised to provide services in a given area to administer and police the regulated activity against unlicensed operatives. It is said that, where the licensing authority is a local authority, this enabled it to decide that its local taxpayers would not bear all or part of the costs. Miss Lieven relied on the new sections 197A and 197B introduced into the Licensing Act 2003 by section 121 of the Police Reform and Social Responsibility Act 2011 to which I have referred. She submitted they show that Parliament and the Government have proceeded on the basis that licensing fees reflecting such costs are not prohibited by the Services Directive and the 2009 Regulations. The Regulatory Impact Assessment for the Licensing Act 2003 (Fees) Regulations to which I have referred (at [68]) provides another example.

90. Miss Lieven's examples of regulatory regimes covered by the Services Directive and the 2009 Regulations, where the regulator has no independent source of income, were the Bar Standards Board ("the BSB") and the Solicitors' Regulatory Authority ("the SRA"). She reiterated the Council's argument that adopting the judge's construction would mean that the regulatory regime would be critically undermined. Her submission was that, if such bodies could not recover the costs of enforcement from fees charged to authorised practitioners, there would be no realistic and reliable means of recovering such costs. While in some cases it would be possible to recover costs of enforcement action from unlicensed practitioners and operators, in many cases that would be unrealistic because of the financial position of the miscreants, or because they "disappear".

91. The Legal Services Act 2007 gave the BSB and the SRA regulatory and disciplinary functions which extend beyond practising barristers and solicitors. The BSB has power to undertake disciplinary proceedings against a person who has been called to the bar even if that person does not hold a practising certificate and is not practising. The SRA has similar powers for non-practising solicitors. It also has the power to regulate the conduct of non-legal employees of solicitors and regulated law firms.

92. As to the criminal law, it appears from *R v Rollins* [2010] UKSC 39, [2010] 1 WLR 1922, a prosecution by the Financial Services Authority, that statutory regulators have a general common law right to prosecute criminal offences subject to any particular restrictions in statute or their governing rules. Sections 14 and 17 of the Legal Services Act 2007 respectively make it a criminal offence for a person who is not entitled to do so to carry out a reserved legal activity, and to wilfully pretend to be entitled to carry out any such activity when not so entitled.

93. The SRA and its predecessor bodies have historically prosecuted non-solicitors who have held themselves out as solicitors and who have undertaken a reserved legal activity. The SRA has been empowered to prosecute criminal proceedings under a number of statutes, including the Solicitors Act 1974, the Administration of Justice Act 1985, the Access to Justice Act 1999, and the Legal Services Act 2007, and has published its prosecution policy. The thrust of Miss Lieven's submission is that the judge's interpretation will mean that the funding for such activities is imperilled, but the post-hearing submissions did not include material on this.

94. The Respondents relied on the variety of enforcement regimes for regulated activities. Some, such as prosecutions of those who impersonate barristers, and of barristers who carry out reserved legal activities when not authorised to do so, are undertaken by the State; that is the Crown Prosecution Service. The BSB generally deals with the disciplining of barristers who carry out reserved legal activities when not authorised to do so through its own disciplinary system. It does not undertake prosecutions, either of such barristers or those who impersonate barristers over whom it does not consider it has jurisdiction.

95. The Respondents also relied on the fact that, as the judge stated (first judgment [44]), many local authority services are funded from local authorities' general fund, whether the source of that fund is the council tax paid by local residents and

businesses or funding from central government rather than by members of the regulated trade or activity. Mr Kolvin referred to health and safety, environmental health, trading standards, and Sunday trading as examples of regimes where there are no authorisation procedures or fees, and where the cost of enforcement cannot be recovered from authorised persons. He also referred to payments which are not charges for an application for authorisation, but are charges for other services such as licensing advice, or charges reflecting administrative sanctions by way of fine. These too, he maintained, fall outside the scope of the Services Directive.

96. As to the fees and the late night levy under sections 121 and 125 – 139 of the Police Reform and Social Responsibility Act 2011, during the hearing Mr Kolvin suggested that the new sections 197A and 197B of the Licensing Act 2003 fell foul of the Services Directive to the extent that the charges are application fees. In his post-hearing submissions he stated that the late-night levy to be used for local measures to reduce crime and disorder is, under sections 125 – 139 of the 2011 Act treated by the Treasury as a tax rather than an application fee. He accepted that, because the Services Directive does not apply to taxation measures, the State is free to impose such levies.

97. The submissions made about these other areas, while informative, are insufficiently detailed to enable anything more than an impression to be gained of how, if at all, the Services Directive and the 2009 Regulations might apply to them and its impact on monitoring and enforcement. There was, for example, no evidence about what the position would be if the fees payable by practising solicitors could not be used to monitor and prosecute people who hold themselves out as solicitors. The material about the position of the BSB does not support the Council's case because the BSB does not prosecute those who impersonate barristers but relies on the CPS. Financial services and associated activities are excluded from the scope of the Services Directive. So is any requirement to pay which is characterised as a tax.

98. For these reasons, like the judge, I am not satisfied that the consequentialist arguments about the effect on other regulated areas advanced by the Council in support of its construction have been made out. They do not, on the material before this court, justify a departure from the clear wording of the Services Directive and the 2009 Regulations or show that the construction adopted by the judge is inimical to the purposes of the Directive.

99. ***(iv) Is the construction adopted by the judge inimical to the purposes of the Services Directive?*** I return to Miss Lieven's submission that the construction adopted by the judge is inimical to those purposes. The submission is put in two ways. The first and broader way is that not permitting the fee to reflect enforcement against unlicensed operators inhibits entry to this market by legitimate traders who would only wish to trade with a licence. Such traders would not wish to compete against unauthorised traders whose costs are lower because they have not paid the licence fee. I accept that there is an initial attraction in this argument. But its force depends on whether the effect would indeed be that there would be no or very little effective enforcement. This submission is, in reality, another version of the consequentialist arguments put on behalf of the Council which, for the reasons I have given, I have not accepted.

100. The second and narrower way the submission is put, primarily in Miss Lieven's skeleton argument, is that the Directive is not intended to prevent the collection of fees which domestic authorities had previously been allowed to collect where those fees benefitted licensees and prevented costs falling on taxpayers. The narrower submission gives rise to a particular difficulty. It appears to envisage a distinction between States whose domestic authorities had previously factored the cost of enforcement against unlicensed operatives into the fee, who could continue to do so, and States whose domestic authorities had not. States in the second category who had not factored these costs into their fees before the Services Directive would not be able to do so now. The difficulty is that, although the Services Directive does not (see [14] above) purport to harmonise administrative procedures or fees, a distinction based on past practice in different States appears inimical to the removal of barriers to entry to the internal market. For the reasons given by the European Court of Justice in Case 118/85 *Commission v Italy* 16 June 1987 at [11] it may undermine the unity and effectiveness of Community law.

101. ***(v) The distinction between enforcement against licensed operators and unlicensed operators:*** I have referred (see [33]) to the distinction the judge drew between the costs of enforcement against unlicensed operators and the costs of compliance monitoring and enforcement against licensed operators. The Council maintains that there is no such distinction in the language of either the Directive or the Regulations. It also contends that the distinction between the two types of enforcement drawn by the judge (first judgment, [35]) and in the terms of the declaration granted (see [4] above) is not reflected by the construction he adopted in paragraph [44] of his first judgment, which appears to suggest that the Council is precluded from recovering the costs of any enforcement activity through the licence fee.

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. The distinction, incidentally, is similar to the distinction that applies (see [94]) in respect of enforcement in the case of barristers and those who impersonate barristers.

(B) Does the fee charged to successful applicants fall outside Article 13(2) and Regulation 18(4)?

105. The alternative submission made on behalf of the Council is that the fee charged to successful applicants, as opposed to the fee charged to all applicants, should not be regarded as falling within Article 13(2) and Regulation 18(4) at all. The starting point of Miss Lieven's argument was that, since those provisions only deal with fees that may be levied on an individual on his **application** to obtain a licence and do not purport to prevent a licensing authority subsequently requiring payment of a further fee to an applicant who has successfully completed that application process as a requirement or condition of holding that licence. She submitted that it follows that those provisions do not affect the fees that may be charged to a successful applicant to administer and maintain the cost of the service regime he has successfully applied to join. She also maintained that such an analysis is consistent with a literal interpretation of the 2009 Regulations, established principles of licensing law and practice, and the purposes of the Directive. It was, she stated, also consistent with that part of the Departmental Guidance which stated that the reason enforcement costs should not be assimilated with the application fee was to forestall the possibility of an unsuccessful applicant seeking a legal remedy because part of his fee was used to subsidise his successful competitors.

106. Although I was initially attracted by this argument, I have concluded that it must be rejected. First, if the proportion of the £26,435 used for enforcement against unlicensed operators is to be treated differently from that used for monitoring licensed operators and the non-refundable £2,667 which relates to the administration of the application, the question is how it is authorised. Miss Lieven stated the *vires* for what would be a separate fee would have to be paragraph 19 of Schedule 3. Since that provision empowers local authorities to charge a reasonable fee for a licence for the operators of sex establishments, it would seem to fall within it. But the regime of the Services Directive and the 2009 Regulations applies not only to schemes requiring authorisation in order to have "access to" a service activity, but also to schemes that require authorisation "to exercise" that service activity. The relevant proportion of the £26,435 appears to be payable to enable, i.e. to authorise, an operator "to exercise" the activity.

107. Secondly, the argument that this element of the fee should be regarded as "a requirement or condition of holding" the licence, and thus governed by Regulations 21 and 22, which predominantly deal with discrimination and are silent as to charges or fees, faces and cannot overcome the difficulty that paragraph 19 of Schedule 3 contemplates a fee payable by an applicant for a licence or for its renewal. Moreover, Article 13(2) of the Directive controls

"charges which the applicants may incur from their application". Those include fees charged pursuant to paragraph 19 of Schedule 3 to the 1982 Act.

108. Thirdly, the Council has, in the past, in fact described and determined the fees as licence application fees, and they are payable on application. They continue to be so described in the Report of the Council's Licensing Urgency Sub-Committee to which I have referred at [40] – [41].

109. Fourthly, the Council is not assisted by the reference to "other administrative fees" in Recital (49) to the Services Directive (see [16] above) as part of this subsidiary argument. This is because it is necessary and important for the "other administrative fees" to be authorised and not themselves to fall within the Services Directive as fees for authorisation. Recital (49) simply makes it clear that, if those fees are authorised, they may be collected by points of single contact. It does affect the nature of fees that can be recovered under authorisation procedures. No sources of authority other than paragraph 19 of Schedule 3 was suggested and, for the reason I have given, the authority provided by paragraph 19 of Schedule 3 does not take this element of the fee out of the scope of the Services Directive and the 2009 Regulations.

(2) The basis upon which restitution is to be made

110. The Respondents claimed the difference between the sums they paid and whatever would have constituted reasonable fees for those years. What the judge described as a concession by the Respondents (see first judgment, [47]) in fact reflects the principle in the old *colore officii* cases and what was held to be an appropriate approach by the Judicial Committee of the Privy Council ("the Judicial Committee") in *Waikato Regional Airport Ltd v Attorney General (on behalf of the Director General of Agriculture and Forestry)* [2003] UKPC 50. That principle is that "money paid to a person in a public or quasi-public position to obtain the performance by him of a duty which he is bound to perform for nothing or for less than the sum demanded by him is recoverable to the extent that he is not entitled to it": *Woolwich Equitable Building Society v IRC* [1993] AC 70, at 164-5 *per* Lord Goff citing *inter alia Steele v Williams* (1866) LR 1 CP 363 and *South of Scotland Electricity Board v British Oxygen Co Ltd.* [1959] 1 WLR 587. It also has the practical attraction of entitling the person who overpaid in circumstances in which the public authority is able to levy the fee or part of it lawfully to recover only the excess. In this way it reflects the economic reality of what happened notwithstanding the public law flaw in the circumstances of the original payment.

111. There are thus two elements in ascertaining the sum to be repaid; the amount of the lawful reasonable fees, and the amount paid which was not due and which was unlawfully exacted. The question between the parties is as to the proper basis to proceed where sums have been unlawfully exacted for a number of years and the lawful reasonable fees have to be determined subsequently and retrospectively. Do they have to make calculations of the amount of the lawful fee and the sum that is to be repaid on a year by year basis, or can it be done on a rolling basis?

112. The judge's reasoning in his first judgment as to the first of these elements, how the lawful fees are to be retrospectively determined, is not altogether clear. He stated (first judgment [47]) that if the Council did not determine lawful fees for the relevant years the Respondents would be entitled to recover the whole of the sums paid. He ordered the Council to determine those fees, and held (see the summary at [50] above) that, in determining the fee for a given year, it had to have regard "to the need to carry forward from year to year any previous surpluses or deficits from each of the…years": Consolidated Order, paragraph (2). He had earlier (first judgment, [25]) described this as one of the two important principles which fell for decision. But he also stated that this did not mean that the licence fee for every year had to be adjusted to reflect those deficits or surpluses, and that a rough and ready calculation which is broadly correct, rather than a precise adjustment, would suffice. Also, although primarily relevant to the second of the two elements in the calculation, the amount paid which was not due, he rejected (see summary at [52] above) the Respondents' claim for an account.

113. In one sense some of the tension between requiring the fee for a given year to reflect a previous deficit or surplus, but not requiring the fee for every year to be adjusted was resolved in the second judgment. That (second judgment, [4]) ordered an annual determination, having regard to any surpluses or deficits in previous years and, in the period after the Services Directive and the 2009 Regulations had come into effect, the judge's decision about their effect on the determination of the fee. This is reflected in paragraphs (2), (3) and (4) of the Consolidated Order. They required the Council in determining the reasonable fee to have regard to the need "to carry forward from year to year any previous surpluses or deficits from each of" those years. The judge rejected the Council's contention that ordering an annual determination was not consistent with [27] of his first judgment, where he stated it did not have to adjust the fee each years so as "it all came out in the wash eventually". He did so (see first judgment, [45] – [47], summarised at [53] above) in part because, in the years after 2009/10 when the Services Directive came into effect, the surplus would be enormous and would take years to eliminate.

114. The tension, however, resurfaced in paragraphs (5) and (7) of the Order which deal with restitution and interest. They required the Council to:

> "(5) pay to the Claimants for each of the years to which paragraphs (2), (3) and (4) of this Order relates the difference between (a) the sums demanded by way of licence fees and paid by the Claimants and (b) the sums which the [Council] determines to be the fee for a licence to operate a sex establishment ("the excess") within six weeks from the date of such determination."

and

> "(7) …pay interest to the Claimants on the excess for each year from 1 February in the year in which the excess in question arose until the date of repayment of such excess under paragraph (5) at [specified rates]…"

Paragraph (7) was agreed by consent, it seems, in the light of the terms of paragraph (5). Read literally, the requirements that the Council repay the difference "for each of the years" and pay interest on the excess "for each year"

appear either to undercut or to be inconsistent with the requirement in paragraphs (2), (3) and (4) of the Order that account be taken of surpluses and deficits from previous years in determining the fee for each year.

115. The Council's position is that the appropriate way of achieving restitution should also take account of all surpluses and deficits in previous years. This is because, under the principles set out in *R v Westminster City Council, ex p. Hutton* (1985) 83 LGR 516, it was not required to determine a fee for each year, but entitled to fix the fee on a rolling basis. It maintained that paragraph (5) of the Order erred in not reflecting the principles established in *ex p. Hutton* because of the requirement that the Council repay "for each of the years". In its post-hearing note on this matter the Council accepted that it will have to undertake an accounting exercise for the relevant years. It proposes that it should do so by determining the appropriate fee for each year, carrying forward any surplus or deficit from previous years, and at the end of the process paying to the Respondents the difference.

116. Since the Respondents (see paragraph 52 of Mr Kolvin's further skeleton argument dated 23 January 2013) accept that the Council can carry forward any deficits to the next year in which there is a surplus, and set off such deficits against the later surplus, it might be thought that there is no difference of substance between the parties. However, there is.

117. The Respondents did not challenge the basic approach in *ex p. Hutton* but submitted it could not be applied retrospectively. Mr Kolvin accepted that, had the Council determined the fee at the time, it would have been possible to do so on a rolling basis, carrying forward surpluses and deficits. But, as the Council did not do so, he submitted that no lawful fee was determined in the relevant years, the demands for payment in each of those years were unlawful, and the payments made fell to be repaid "forthwith" under the principle in the *Woolwich* case. The successful submission of the building society was that upon paying in response to an unlawful demand from a public authority the payer acquired "forthwith" a *prima facie* right in restitution to the repayment of the money: [1993] AC 70, at 171 *per* Lord Goff.

118. Mr Kolvin's submissions made no distinction between the position before 28 December 2009 when the 2009 Regulations implementing the Services Directive came into force, and the position thereafter. He submitted that, in the circumstances of this case, it is no longer appropriate or lawful for the Council retrospectively to determine the fee in a manner that is in effect on a rolling basis from the year ending 31 January 2007. That, he maintained, would be an unwarranted departure from the rule laid down in the *Woolwich* case. The judge accepted (see [112] above) that if the Council did not determine lawful fees for the relevant years the Respondents would be entitled to recover the whole of the sums paid. It is basically that approach which Mr Kolvin has pressed on this court. He suggested that the Council's reason for resisting an annual determination is probably to avoid paying interest on the excess fees demanded for each of the years in which they made payments pursuant to unlawful demands.

119. Mr Kolvin also pointed to a number of practical difficulties with an approach for the retrospective determination of licence fees and restitution of the difference between the sums paid and the reasonable fee which carries forward surpluses and deficits. First, he relied on the fact that the number of licensees varies from year to year, and only an annual assessment of the overpayment enables the apportionment of any sum due by way of restitution to the licensees in any one year. Secondly, he contended that a single retrospective assessment would result in a very large surplus due to the Respondents, which (as the judge stated) would only be eliminated after many years of determining the fee at a nominal amount. Thirdly, he maintained that this would give a windfall to those holding licences for sex establishments at present and in the future, and would not give restitution to those who held such licences in some of the relevant years and paid sums not due, but no longer do so.

120. In relation to the submission based on the *Woolwich* case, it is important to remember that it concerned the payment in three instalments of a sum claimed as due in respect of a period of six months where no part of the sum paid was due or could be due because the regulations providing for the payment were *ultra vires.* Unlike the present case, in the *Woolwich* case there was no lawful way the payments could have been claimed. The question before us is whether a public law payee which could lawfully determine a fee and demand some payment and is ordered to do so will be regarded as unjustly enriched by the entire amount received before it has lawfully determined the fee.

121. The implication of Mr Kolvin's submissions based on the *Woolwich* case is that the answer to the question is "yes", although this appears to be inconsistent with his acceptance that, on the facts of this case, only the difference between the sums paid and the reasonable fees is recoverable. By contrast, *Waikato Regional Airport Ltd v Attorney General (on behalf of the Director General of Agriculture and Forestry)* [2003] UKPC 50, which was considered by the judge, appears to suggest that the answer is "no". Even before any new and lawful decision, the payee will only be regarded as unjustly enriched to the extent of the excess of what might have been lawfully demanded.

122. The *Waikato* case concerned charges for biosecurity inspections in airports which had been collected for nearly six years. They were held not to comply with a statutory requirement that such charges accord with the principle of equity specified in the relevant statute and were set aside. Wild J, whose order was restored by the Judicial Committee, set aside the first decision to levy the charges because ([2001] 2 NZLR 670 at [111]) it was not made on or under proper delegation from the Director-General and because the statutory principles were not addressed. He set aside the second decision to charge because (*ibid* at [94] – [95], [118], [124] – [131]), although the statutory principles were addressed, the Director-General had been influenced by irrelevant considerations and the resulting decision was illogical.

123. Wild J stated (see [2001] 2 NZLR 670 at [168] ff) that it followed from the *colore officii* cases that there should only be recovery of the excess over what would have been a fair and proportionate charge. He distinguished the *Woolwich* case (at [169] – [170] and [175]) *inter alia* because there was no lawful way the

payments in that case could have been claimed. He stated (at [177]) that "it would be unjust for [the airport] to succeed in a claim for full repayment". The Judicial Committee stated (at [84]) that they saw no ground for departing from the judge's decision to allow only what they described as "this partial recovery". They also stated (at [81]) that "the Court has the right and the duty, not to substitute its own view for that of the statutory decision-maker, but to indicate the proper basis on which a restitutionary remedy should be granted in respect of money unlawfully exacted".

124. What of the practical difficulties referred to by Mr Kolvin? There may be such difficulties in the present case, but they partly flow from the requirements of paragraphs (2), (3) and (4) of the Consolidated Order and the tension and possibly even inconsistency between them and the literal meaning of paragraphs (5) and (7). Even if the determination was not being done retrospectively, such difficulties would be present because they are a consequence of "rolling forward" pursuant to the principle in *ex p. Hutton.* In that case, Forbes J (1985) 83 LGR at 518 rejected the argument that similar anomalies resulting from differences in the identity of licence holders from year to year precluded even a contemporary "rolling basis". He did so on the ground that such comparisons are irrelevant in the context of local government finance because the statutory accounts of local authorities are structured on the basis that shortfalls in one year must be carried into next year's accounts. In any event, the sort of practical difficulties Mr Kolvin identified as a result of the variations in the number of licences and the identity of the licensees from year to year are not eliminated by what he proposed. For example, he accepted that deficits can be carried forward. But where a deficit in year 1 is carried forward to year 2, licensees in year 2 who did not hold a licence in year 1 will have to pay more, and licensees in year 1 will have underpaid.

125. Additionally, what the Respondents are now contending for is the equivalent of the account to which the judge stated they were not entitled. They have not sought to challenge that decision. Notwithstanding what the judge stated in his second judgment, I have concluded that their submissions are also inconsistent with his decision (first judgment [27]) that it was not incumbent on the Council "to adjust the licence fee ***every*** year to reflect any previous deficit or surplus, so long as it 'all comes out in the wash'.

126. What the Council must do is to determine the extent to which the Council was unjustly enriched at the expense of the claimants by the payments. What the court must do is to indicate the applicable principles. It should be recognised that any system of retrospective determination of the sums due will have an element of imprecision at the margin. This, in part, is because it is accepted as a matter of principle that it is for the decision-maker, here the Council, and not the court to fix the licence fee, and in part because it is recognised that deficits and surpluses can be carried forward and the accounting does not have to be on an annual basis. An element of imprecision also arises because of the practical difficulties which will arise (see [119] and [124]) whichever solution is adopted.

127. It may be that considerations such as these influenced Wild J at first instance in the *Waikato* case. He stated ([2001] 2 NZLR 670 at [179]) that there are particular policy concerns in allowing restitution from a public authority which

has authority to make a charge and to demand payment, but where that authority was not used, or was used in a way that was flawed in public law terms. It appears from both the *colore officii* cases and the *Waikato* case that no distinction has been made between the position where part but not all of the payment is due in any event and that where nothing is due until a valid public law decision is made. In the *Waikato* case, there was also no distinction made between the first decision to charge which, like that in the present case, was flawed by an improper delegation, and the second decision which was taken by the Director-General but it was flawed because irrelevant considerations were taken into account.

128. Wild J considered (at [177]) that "it would be unjust for [the airport] to succeed on a claim for full repayment". Neither he nor the Judicial Committee, which reinstated his order, expressly considered whether the mechanism for the partial restitution ordered was that it was assumed that the lawful amount had in fact been determined but that must be the position. It was therefore not the entire payment that was due back "forthwith" with the attendant consequences for interest, but only that to which the payee, the Director General, could not be entitled.

129. I am fortified in my conclusion by the illuminating and analytically powerful judgment of Henderson J in *Investment Trust Co (In Liquidation) v The Commissioners for HM Revenue and Customs* [2012] EWHC 458 (Ch). That case concerned a very different context; the recovery of VAT paid which was not due. Nevertheless, it is of some general assistance as to the underlying principles. One section of his judgment considered whether the Revenue's enrichment by the receipt of VAT that had been paid when not due was "at the expense of" claimants who had not made a direct payment of the unlawful VAT to HMRC. Henderson J concluded that it was at the expense of those claimants because of what he saw as the need to give due weight to the economic reality which explained and underpinned the structure of the VAT legislation. He stated (at [72]) that the requirement that the enrichment be "at the expense of" the claimant "can be satisfied by reference to the underlying commercial reality of a transaction". This is a similar principle to that which underlies the *colore officii* cases, to which I have referred.[7]

130. In the present case, before the Services Directive, the Council was entitled to operate a "licensee pays" system, and did operate one. Mr Ralph's evidence (see above at [32]) was that there were two elements in the fee; "the administration of the application", and "the management of the licensing system". In fact, as analysed by the judge, the fee 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

[7] See also *Westdeutsche Landesbank Girozentrale v Islington LBC; Kleinwort Benson Ltd v. Sandwell BC* [1994] 4 All ER 890 where Hobhouse J (whose decision was reversed on other grounds: [1996] AC 669) looked at payments by the banks and by the Councils made under swaps agreements together although the agreements were *ultra vires* and held the bank was only entitled to restitution of the net sum.

> ***Category (c)*:** the cost of enforcing the licensing regime against unlicensed operators.

The evidence was (see [34]) that the £26,435 classified as the cost of "the management of the licensing system" which was refundable if the licence was not granted included both (b) and (c). The remaining £2,667 fell within (a).

131. In assessing the extent to which the Council was enriched at the expense of the licence-payers, I have concluded that a distinction must be drawn between the period before 29 December 2009 when the 2009 Regulations came into force and the period since then. In respect of the first period, the Council was entitled to make charges reflecting all three elements. In respect of fees set after 29 December 2009, it was no longer entitled to reflect the costs of enforcement against unlicensed operators in the fee. The Council's fee year runs from 1 February to 31 January, so the first fees set after the 2009 Regulations came into force would be those set in early 2010 for the year ending 31 January 2010. It is only in respect of fees set for that and subsequent years, and only in respect of the part of the fee reflecting the costs of enforcement against unlicensed operators that the position is on all fours with that in the *Woolwich* case.

132. As far as the first period is concerned, the Council failed to determine the fee it was entitled to determine. Although it will now have to determine a lawful fee retrospectively, it is entitled to do this on the basis that it would have been entitled to do at the time. It is entitled to do so by applying the principles in *ex p. Hutton*. *Ex p Hutton* enabled the Council to fix fees reflecting all the three elements on a rolling basis without adjusting surpluses and deficits in each year.

133. This does not mean (as the judge considered: first judgment, [46]) that the Council is entitled to go on rolling the accrued surplus forward so that it would take many years of determining the fee at a nominal amount before the surplus would be extinguished. In my judgment, leaving aside the effect of the 2009 Regulations, once these proceedings were issued in April 2011, the claimants' claim and entitlement to restitution crystallised, the process would have had to come to an end, and the amount to be repaid determined. In doing this, the Council is, in my judgment, entitled to take into account that those who held licences in one or more of the relevant years but no longer do so may be entitled to part of this sum.

134. Once the 2009 Regulations came into force, the position changed. The Council was no longer entitled to include the third element in the fee, the category (c) costs of enforcement against unlicensed operators. Although the Council did not formally separate this element from the second element, the cost of monitoring compliance by licence-holders, the position of the two fundamentally differ because there was no lawful way the payments in category (c) could have been claimed. The Council was, however, entitled to continue to charge for the costs of processing the application itself (category (a)) and the costs of monitoring compliance by licence-holders (category (b)), and thus to continue to apply the *ex p. Hutton* principle to them.

135. The result is that the Council is, in my view, entitled to determine the fee in the way it proposed between the year ending 31 January 2007 and the year ending 31 January 2010. At that stage, the category (c) element could no longer be reflected in the fee, and such part of the sums received would be repayable "forthwith", and should be so treated. But the remaining two elements of the fee could continue to be determined in the way the Council proposed. It could continue to roll deficits and surpluses forward in respect of them (and the pre-January 2010 category (c) element of the fee) until April 2011 when these proceedings were issued. In respect of those elements, it is at that point that the calculation of the difference between the amount received in respect of these categories and the reasonable fees and thus the amount repayable should be determined.

136. In summary, I consider that the extent to which the enrichment is "at the expense of" the Respondents in these proceedings should be determined by taking account of the fact that would have been permissible for the Council to set fees on a rolling basis and until the year ending 31 January 2010 to do so by including all three elements of the fee. The position thereafter is complicated because of the change in the legal regime as a result of the 2009 Regulations but it can be addressed in the way I have stated in [134] – [135]. The artificialities involved in a retrospective determination do not have to be addressed by ignoring what the public authority involved could lawfully have done at the time, and taking the approach that most disadvantages it.

137. For these reasons, I consider that the accounting process does not have to be done "for each of the years", as required by paragraph (5) of the Consolidated Order but can be done in the way proposed by the Council until the year ending 31 January 2010, and thereafter in the way I have stated. It follows that to this extent I would allow the Council's appeal on this matter. There will have to be a consequential adjustment of the paragraph (7) of the order to reflect this.

138. Before leaving the question of restitution, I note that the judge considered (first judgment [10] – [12]) that the time limit for claims for judicial review in CPR Part 54.5 applied to the claim for restitution because he regarded its primary focus to be a challenge to the Council's failure to determine the licence fee for the relevant years, a public law act or decision. He relied in part on the decision of Plender J in *Jones v Powys Local Health Board* [2008] EWHC 2562 (Admin). As the judge extended time, it is not necessary to decide whether he was correct, but I do not consider that he was. The factor making the payee's enrichment unjust is rooted in public law, but the right to restitution and the obligation to make restitution are part of the private law of obligations. Just as there is no requirement that the time limit for judicial review applies to the tort of misfeasance in public office, so also it should not apply to claims seeking restitution against public bodies: see the discussion and the decisions cited in Williams, *Unjust Enrichment and Public Law* (2010) 49-52, and Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012), §21(4) and the commentary at 113.

(3) CPR Part 36.14(3)

139. In their Part 36 offer to the Council the Respondents offered to give up their claims that the fee had not been determined by a body with authority to do so for the years 2006 – 2011, that no proper account of fee income and expenditure had been taken in those years, and that surpluses had not been properly carried forward provided that the licence fee for 2011/12 was determined leaving out of account the cost of enforcement against unlicensed operators. The judgment below was clearly more advantageous to the Respondents than this offer.

140. CPR Part 36.14 makes provision for the costs consequences where a judgment is more advantageous to a party than the proposals in a Part 36 offer made by that person. In the case of such an offer by a claimant, CPR Part 36.14(3) provides "the court will, unless it considers it unjust to do so, order that the claimant is entitled to" interest at a rate not exceeding 10% above base rate for some or all of the period after the date the offer expired, his costs on the indemnity basis from that date, and interest at the enhanced basis on those costs. CPR Part 36.14(4) provides that in considering whether it would be unjust to make such an order, "the court will take into account all the circumstances of the case" including the terms of the offer, the stage in the proceedings when it was made, the information available to the parties at the time the offer was made, and the conduct of the parties with regard to giving or refusing to give information enabling the offer to be made or evaluated.

141. In the present case, the Respondents' offer was made before proceedings commenced and before significant costs had been incurred. The judge considered the factors in CPR Part 36.14(4), which the court is required to take into account in considering whether it would be unjust to make such an order. In paragraphs [5] – [6] of his second judgment, he found that they were all satisfied. His conclusion has not been challenged. The Council has also not challenged the judge's conclusion that none of those factors made it unjust for the normal consequences of Part 36 to be applied (second judgment, [6]), and that, in the light of the history of the events, this was a case meriting the award of a high rate of interest. It, however, considers that, for the reasons based on its position as a public authority faced with the interpretation of new and untested legislation that I have summarised at [61] above, it was unjust for the normal consequences of not beating an offer to be applied to it.

142. I do not consider that the judge erred in his approach. In *M v Croydon LBC* [2012] 1 WLR 2607, it was held that the principles governing costs where cases settle in the civil justice system applied to cases in the Administrative Court. Lord Neuberger MR stated (at [52]) that "at least on the face of it, the fact that a claim is a public law claim should make no difference. Such claims are subject to the CPR, and a successful claimant who has brought such a claim is just as much entitled to his costs as he would be if it had been a private law claim."

143. *M v Croydon LBC* was a case in which the public body defendant conceded all of the relief sought by the claimant and the Court was principally concerned with the correctness of the *Boxall* guidelines: see *R(Boxall) v Waltham Forest LBC* (2000) 4 CCCR 258. In *M's* case there had been a change in the law, or

rather in the understanding of the law, after the issue of proceedings as a result of the decision of the Supreme Court in *R(A) v Croydon LBC* [2009] 1 WLR 2557. The court considered the implication of the change. Lord Neuberger MR stated (at [56]) that, in a case where a public defendant assumed that the law was as had been decided in a Court of Appeal decision until the Supreme Court took a different view, the public law defendant had a real argument for saying it should not pay all the claimant's costs, but the claimant could nonetheless raise all the normal reasons for receiving them.

144. In the context of the impact, if any, on costs, the position of a yet untested new legal regime such as in these proceedings differs from the position where there is binding Court of Appeal authority, although not fundamentally so. It may be that in relation to the effect of the Services Directive and the 2009 Regulations it would have been difficult for the Council in these proceedings to have accepted the Respondents' offer without prejudice to other cases or its future exercise of discretion under the licensing regime for sex establishments. Some judges might have concluded that in a test case about a new legal regime an unsuccessful public law defendant who has rejected a Part 36 offer has a good argument for saying that it should not be subject to the Part 36.14(3) consequences. But, I do not consider that a judge is bound to do so. For these reasons, I find no misdirection in the way the judge dealt with the issue of costs. I would therefore dismiss the appeal on this ground too.

Lady Justice Black:

145. I agree.

The Master of the Rolls

146. I also agree.