Neutral Citation Number: [2012] EWHC 1260 (Admin)

Case No: CO/3928/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2012

Before:

MR JUSTICE KEITH

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Between:

(1) Timothy Martin Hemming (trading as Simply Pleasure Ltd)
(2) James Alan Poulton (trading as Soho Original Book)
(3) Harmony Limited
(4) Gatisle Limited (trading as Janus)
(5) Winart Publications Limited
(6) Darker Enterprises Limited
(7) Swish Publications Limited — **Claimants**

- and –

Westminster City Council — **Defendant**

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Mr Philip Kolvin QC (instructed by **Gosschalks**) for the **Claimants**
Miss Nathalie Lieven QC and Miss Jacqueline Lean (instructed by **Head of Legal and Democratic Services, Westminster City Council**) for the **Defendant**

Hearing dates: 9 and 12 March 2012
Further written representations: 13, 14 and 15 March 2012

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Approved Judgment

Mr Justice Keith:

Introduction

1. When people of my generation hear the word Soho, they tend to think of seedy clubs and illicit sex. But the sex industry is now highly regulated. Shops which cater for the sex market have to be licensed, and those in Soho are regularly inspected to ensure that they are being properly run. In the past, the costs of enforcing the licensing system have often been reflected in the licence fee, but a recent change in the law to implement a European directive is said to have made that unlawful. That is one of the issues which this case raises. It has been brought by a number of licensees of sex shops in Soho and other parts of London within the City of Westminster.

The nature of the claim

2. The regime governing the regulation of sex establishments (including sex shops) is contained in Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 ("the 1982 Act"). Local authorities have to decide whether to apply the Schedule to their area, and Westminster City Council ("the Council") decided to do so. The effect of para. 6 of the Schedule is that if someone wants to operate a sex establishment in an area to which the Schedule has been applied, they must be licensed to do so by the relevant local authority. Para. 9 provides that such licences remain in force for one year unless a shorter period is specified in the licence. The Council's practice has been to grant such licences for 12 months, renewable on 1 February of each year. The claimants are all long-standing licensees of sex shops in Westminster, though one surrendered their licence last year. They operate 13 sex shops in all, 11 of which are in Soho, and the other 2 in Covent Garden and the West End.

3. The charging of a fee for the licence is provided for by para. 19 of the Schedule, which provides:

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

The annual licence fee for sex establishments in Westminster did not change for a number of years. It was determined at £29,102.00 in September 2004 for the year from 1 February 2005 to 31 January 2006, and that was the fee which the Council demanded of the claimants for every year thereafter up to and including the year from 1 February 2011 to 31 January 2012 ("2011/12"). This claim for judicial review challenges the fee demanded for 2011/12. The basis of the claim is that the fee was never determined for that year, even though an annual fee of £29,102.00 was demanded of, and paid by, the claimants for each of the sex establishments they operated. The claimants' case is that a reasonable fee should now be determined for 2011/12, and one of the orders they seek is a mandatory order requiring the Council to determine that fee.

4. But what amounts to a reasonable fee? The claimants' case is that the fee to be determined by the Council should reflect two important considerations. I have already mentioned one, namely that the fee should no longer reflect the costs of

enforcing the licensing system. The other is based on the undoubted fact that the Council is not entitled to make a profit out of the fees it charges. So the claimants say that the fee to be determined by the Council for 2011/12 should reflect the extent to which the fees which the Council demanded over the previous years exceeded the costs of administering and enforcing the licensing system. Any surplus which the Council should have taken into account should now be passed on to the current licence holders in the fee which should now be set for 2011/12.

5. The claimants' claim form includes an additional claim. It is a restitutionary claim on the basis that the Council did not determine the appropriate licence fee for the five previous years as well, i.e. the years ending on 31 January 2007, 31 January 2008, 31 January 2009, 31 January 2010 and 31 January 2011. The demands for licence fees for those five years were therefore as unlawful as the demand for the fee for 2011/12 because the level of the fees had not been determined, and the claimants are therefore entitled to the return of the sums they paid. The claimants accept that they should not be able to recover the whole of the sums they paid for those years. They claim the difference between the sums they paid and whatever would have constituted reasonable fees for those years.

6. A feature of both claims is that the claimants have a profound mistrust of the Council's preparedness to determine a reasonable fee for 2011/12, or to identify what would have been reasonable fees for the previous five years. They want what their counsel, Mr Philip Kolvin QC, called "independent scrutiny" of the process. The type of outside involvement which the claimants have in mind is the taking of an account in which a master would be able to scrutinize the expenditure which the Council has claimed it incurred over the years in connection with the licensing system. The idea is that once such an account has been taken, the Council can then determine the fees for the years in which the appropriate licence fee was not determined on a transparent basis.

Delay and limitation

7. As I have said, the claim for judicial review relates to the licence fee for 2011/12. Since the claimants' case is that no fee was determined for that year, as it should have been by 1 February 2011 at the latest, they had until 30 April 2011 to issue their claim for judicial review, bearing in mind the three months time limit in rule 54.5(1)(b) of the Civil Procedure Rules. In fact, the claim was filed on 28 April 2011, and the claim was therefore in time, it not being suggested by the Council that the requirement in rule 54.5(1)(a) for the claim to be filed promptly was not complied with. Of course, the practical effect of ordering the Council to determine the appropriate licence fee for 2011/12 by reference to any surpluses it made over the preceding years may have serious repercussions for the Council's budget. That is a factor to be taken into account in deciding what relief, if any, should be granted, but the fact that the claim for judicial review was filed in time cannot be doubted.

8. Different considerations apply to the restitutionary claim relating to the earlier five years. This claim is a common law claim in unjust enrichment, and the time limit for such a claim is generally considered to be six years: see Goff & Jones, "*The Law of Unjust Enrichment*", 8th ed. (2011), para. 33-08. Since it is common ground that a fee was determined for the year ending 31 January 2006, the first year which the claimants claim that a fee was not determined for was the year ending 31 January

2007. The claimants' case is that the fee for that year should have been determined by 31 January 2006, and the failure to determine it by then was less than six years before the claim was filed on 28 April 2011.

9. But there is still a problem with the restitutionary claim. The legal principle on which the claim is based is well established. Where money has been paid as a result of an unlawful demand for its payment, the person or body who paid it is entitled under the common law to have it repaid. The principle was established in ***Woolwich Equitable Building Society v Inland Revenue Commissioners*** [1993] AC 70 and has been applied in a number of cases since then including ***British Steel Plc v Customs and Excise Commissioners (No.1)*** [1997] 2 All ER 366. The demand for payment was held to be unlawful in ***Woolwich*** because the legislation which provided for the demand had been *ultra vires*, and in ***British Steel*** because the legislation which provided for the demand had been misapplied, but there is no reason why the principle should not also apply where, as here, it is alleged that the demand for the payment of a licence fee was unlawful because the amount of the licence fee had not even been determined.

10. The problem with the restitutionary claim is this. A claimant wishing to invoke the ***Woolwich*** principle in the context of an unlawful demand for payment made by a public authority needs to establish the unlawfulness of the demand. That would normally be done by a claim for judicial review. But the claimant must proceed quickly in view of the tight time limit to bring such a claim. Can you avoid that by bringing the claim in private law proceedings, for example by a Part 7 claim? There are comments in both ***Woolwich*** (by Lord Slynn at p. 200F) and in ***British Steel*** (in particular in the judgment of Millett LJ (as he then was)) suggesting that you can, but they were made before 2004 when rule 54.3 of the Civil Procedure Rules was amended to permit a claim for judicial review to include a claim for restitution. Has that change made a difference? Plender J thought so in ***Jones v Powys Local Health Board*** [2008] EWHC 2562 (Admin). In that case, the claimant had issued a private law claim, but the claim was struck out as an abuse of the court's process as the "primary focus" of the proceedings had been a challenge to public law decisions, and proceeding by way of a private law action deprived the defendants of the protection afforded by the requirement for claimants in claims for judicial review to obtain the permission of the court for the claim to proceed. I agree with Plender J's view at [28] that it is necessary to consider whether the claim is in substance "asserting an entitlement to a subsisting right in private law, which 'may incidentally involve the examination of a public law issue' or whether the 'primary focus' or 'dominant issue' is to challenge a public law act or decision". Mr Kolvin did not suggest that Plender J's approach should not be followed.

11. At first blush, no question of there being any abuse of the court's process arises in the present case because the restitutionary claim was brought as a claim for judicial review. Moreover, permission for the restitutionary claim to proceed was given by Sales J, who said that the claim in the claim form for restitution "could equally have been brought in CPR Part 7 proceedings subject to the relevant limitation period for a restitutionary claim, so it is appropriate for the claim to be allowed to proceed in relation to earlier years also". Sales J was saying, I think, that because of the claim for judicial review of the demand for the fee for 2011/12, the relief sought in the restitutionary claim in respect of the five previous years could as a matter of

convenience also be pursued in the claimant's claim for judicial review without separate proceedings having to be issued under Part 7 of the Civil Procedure Rules. However, I do not think that Sales J thought it appropriate at that stage to consider whether Part 7 proceedings would have amounted to an abuse of process, or whether treating the restitutionary claim as a claim for judicial review meant that the restitutionary claim was out of time.

12. The important point here is that the claimants cannot have it both ways. If the restitutionary claim is treated as a Part 7 claim (having been permitted to proceed in the claim for judicial review as a matter of convenience), the question of what its primary focus is has to be addressed. I have no doubt that the primary focus of the restitutionary claim is to challenge the equivalent of "a public law … decision", i.e. the Council's failure to determine a licence fee for the relevant years. Accordingly, if the restitutionary claim is to proceed, it must be treated as a claim for judicial review (because Part 7 proceedings would have amounted to an abuse of the court's process). On that basis, the question of the claimants' failure to bring the claim within the time limit for claims of judicial review has to be addressed. Plainly the claim was not brought within the time limit, since the claim was brought long after the three months had elapsed since 31 January 2010 when the fee for the latest of the years prior to 2011/12 should have been determined. The question which then arises is whether the claimants' time for bringing the claim should be extended. Should it be necessary, I shall return to that issue later when I come to the restitutionary claim.

The determination of the fee over the years

13. Licensing applications within Westminster are the responsibility of the Major Licensing Applications Committee. One of its sub-committees is the Licensing Applications Sub-Committee, whose terms of reference include the determination of licence fees. However, licence fees can also be determined by the Major Licensing Applications Committee itself, since its terms of reference include those functions included in the terms of reference of the Licensing Applications Sub-Committee.

14. At a meeting on 10 July 2003, the Major Licensing Applications Committee approved the fees for various licences, including licences for sex establishments, with effect from 1 August 2003. The document which identifies what the fee for licences for sex establishments was is no longer available, but it is common ground that the fee was determined at £28,531.00, since that was the fee when the level of fees was considered the following year. The part of the minutes of the meeting of 10 July 2003 in which the committee's approval of the fees is recorded is headed "Licensing – *Annual* Review of Charges 2003/04" (emphasis supplied). On the face of it, therefore, the fees being approved were the fees to be charged for licences for the forthcoming licensing year (because the level of the fees was to be reviewed annually), and since licences for sex establishments were granted from 1 February in each year, it looks as if the fee of £28,531.00 was intended to be the fee for the year from 1 February 2004 to 31 January 2005 only.

15. At its meeting on 7 September 2004, the Licensing Applications Sub-Committee (which by then had come to be known as the Licensing Sub-Committee) approved the fees for various licences, including licences for sex establishments, with effect from 1 October 2004. The fee for licences for sex establishments was determined at £29,102.00. In determining that fee as well as the others, the Licensing Sub-

Committee was adopting the recommendations contained in a report by the Director of Legal and Administrative Services. In respect of licences for sex establishments, the recommendation was for the fee for the 18 sex establishments licensed by the Council to be increased by 2%. Three points emerge from the report which are relevant to this case:

(i) The title of the report is "Licensing – *Annual* Review of Premises Fees & Charges 2004/05" (emphasis supplied). The report referred to the estimated additional income which the fees would generate "in a full year", and said that in determining the fees, the Council's estimates for 2004/05 were "included", i.e. taken into account. Indeed, the part of the minutes of the meeting of 7 September 2004 in which the Licensing Sub-Committee's approval of the fees is recorded is given the same heading as the report. On the face of it, therefore, the fees being approved by the Licensing Sub-Committee were the fees to be charged for licences for the forthcoming licensing year only. When the report came to deal with licences for sex establishments in particular, it noted that the annual renewal date for such licences was 1 February in each year, and continued "next *annual* review 1 February 2005" (emphasis supplied). It added that "the costs of licensing" had increased during the previous year and would continue to do so "in the year ahead". All of this suggests that the licence fee of £29,102.00 for sex establishments was to be the fee for the year from 1 February 2005 to 31 January 2006 only.

(ii) The reasons for recommending a 2% increase in the fee for sex establishments was expressed in the report as follows:

> "The City Council's expenditure was under-recovered by fee income in 2003/04; however, this is a result of the granting of licence refunds relating to income received in previous financial years. In 2004/05, costs are projected to be slightly more than licence fee income. Given this situation, it is proposed to increase fees for sex establishments by 2% … "

This passage shows that the Council thought it appropriate to consider each year whether the income received from licence fees for sex establishments exceeded the costs of administering and enforcing the system. If it did, the surplus would be passed on to licence holders. If it did not, it would be necessary for the fee to be increased.

(iii) The report also said:

> "The fee for a sex establishment licence is designed to recover all of the City Council's costs relating to the licensing of sex shops including enforcement action against unlicensed sex shops."

This passage speaks for itself. It shows that the licence fee for sex establishments reflected the costs of taking enforcement action against sex establishments which were not licensed.

16. The Council accepts that for a number of years thereafter neither the Major Licensing Applications Committee nor the Licensing Sub-Committee considered again the fees for licences for sex establishments. The Council says that that was because the fees were reviewed each year by Mr Andrew Ralph, who was the member of management responsible for enforcement proceedings against unlicensed sex establishments. Mr Ralph acknowledges that the income from licence fees and the costs of administering and enforcing the licensing system fluctuated over the years, but he says 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.

17. What was the status of these reviews? The Council's Financial Regulations required "senior managers" of the Council "to undertak[e] regular reviews of fees and charges" (para. E.2), and to ensure that that was done "annually" (para. E.4). But the Council expressly disavows any suggestion that Mr Ralph's annual review of the level of the licence fees for sex establishments – which supposedly resulted in no recommendation for a change being made to either committee – amounted to the determination of the fees for any years for which fees had not been determined by either of the committees. His reviews, in other words, were not a substitute for the functions of either of the committees to determine the licence fee for themselves. That concession, I imagine, was made because reg. 2(6)(e) of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 provides that the fee for the sort of licence which cannot be granted by an officer of a local authority (such as a licence for a sex establishment) cannot be determined by such an officer. It has to be determined by the local authority itself.

18. In any event, the claimants are sceptical about Mr Ralph's reviews. Requests for information about how the licence fees for sex establishments had been determined for these years were not answered sufficiently, and it was not until after the issue of the current claim that the Council admitted that the level of the fees had not been referred to either of the committees. That led the claimants to suspect that the level of the fees had not been addressed at all in those years. The issue had simply been overlooked. However, a few days before the hearing, some documents were disclosed which showed that the level of the licence fees for sex establishments had been considered sporadically over the years by the Council's officers. For example, a report for the Licensing Sub-Committee was prepared in April 2006 by the Director of Legal and Administrative Services recommending that the fees be reduced by 5% to bring income more in line with expenditure, though that report remained in draft and was not presented to the Sub-Committee, and in April 2007 the Council's Cabinet decided that the fees should not be changed "for 2007/08" bearing in mind the surpluses and deficits forecast for the next few years. It looks, therefore, as if the level of licence fees for sex establishments had occasionally been looked at, though whether they were reviewed *every* year *by Mr Ralph* is doubtful, because if they had been, it is likely that at least some documents would have been generated by his reviews, and none have been disclosed. What can unquestionably be said is that the last time before the issue of the current claim that either of the committees considered the level of the licence fees for sex establishments was when the Licensing Sub-Committee considered them on 7 September 2004.

19. It was only following the issue of the current claim on 28 April 2011 that the level of the licence fees for sex establishments was considered again at committee level. It was considered by the Licensing Urgency Sub-Committee. There is no evidence about why the fees were considered by that committee, but on 5 January 2012 it approved recommendations from the Operational Director for Premises Management for the fee for a new sex establishment licence to be £19,973.00, and the fee for the renewal of such a licence to be £18,737.00, for the year from 1 February 2012. That represented a reduction of £9,129.00 and £10,365.00 respectively. 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.

20. Two points emerge from the report which contained the recommendations which are relevant to this case:

(i) The report said that the licence fees for sex establishments had "last" been "reviewed" in 2004. At first blush, that suggests that the level of the fees had not been reviewed even by the Council's officers in the intervening years, but it may be that what the report meant was that the level of the fees had not been considered by either of the committees since 2004.

(ii) The report concluded as follows:

> "If the proposed fee structure results in a surplus or loss for the financial year there will be an appropriate reduction or increase in fees as the case may be for the following financial year."

This is another example of the Council recognising that it was not entitled to make a profit out of the fees it charged. The Council was acknowledging that the fees would be further reduced for the year from 1 February 2013 in the event of a surplus as a result of income from licence fees exceeding the expenditure incurred in administering and enforcing the system. Significantly, though, no surplus or deficit for the previous year (or years) had been carried forward when the fee for the year from 1 February 2012 was calculated.

21. In the light of all this, did the Council determine a licence fee for sex establishments for 2011/12 (or indeed for any year after the year ending 31 January 2006)? Miss Nathalie Lieven QC for the Council says that it did. Para. 19 of Schedule 3 to the 1982 Act does not require local authorities to determine the licence fee for sex establishments annually. Nor is there any requirement to do so in the Council's Standing Orders. There was therefore nothing to prevent the Council from determining the licence fee for sex establishments indefinitely, so that the licence fee rolled over from one year to the next. With all that I agree, but is that what the Council actually did? Miss Lieven contends that it did. As we have seen, on 7 September 2004, the Licensing-Sub Committee approved the fees for various

licences, including licences for sex establishments, with effect from 1 October 2004. She points out that there was no time limit on how long the fees would remain at the levels which were being determined then, and she argued that if it had been intended for the fees to be limited to the next licensing year, the Sub-Committee's resolution approving the fees would have said so. It would not have been open-ended.

22. I cannot go along with this argument at all. For the reasons given in para. 15(i) above, it is inconsistent with the report whose recommendations the Sub-Committee approved, as well as the approach of the Major Licensing Applications Committee the previous year set out in para. 14 above. Indeed, a licence fee which automatically rolls over from year to year without consideration being given at committee level each year to whether it should remain the same was inconsistent with the Council's view – expressed in the report for the meeting of the Licensing Sub-Committee on 7 September 2004 (see para. 15(ii) above) – that each year the Council should consider whether the income received from licence fees exceeded or was less than the costs of administering and enforcing the system, and should adjust the level of the fee for the next year accordingly. The fact of the matter was that no licence fee was determined for sex establishments in 2011/12, or indeed for any of the years since the year ending 31 January 2006.

The claim relating to the demand for the licence fee for 2011/12

23. As I have already said, the claim for judicial review focuses on the licence fee for sex establishments for 2011/12. Does the failure of the Council to determine the licence fee for that year mean that it must do so now? The only argument advanced by the Council for resisting an order requiring the Council to do that is that instead of issuing these proceedings, the claimants should have exercised their rights under the Audit Commission Act 1998 ("the 1998 Act"). Miss Lieven was uncharacteristically imprecise when it came to what it is said the claimants should have done, but I think she was saying that they should have exercised their rights under section 15 of the 1998 Act to inspect the Council's accounts, and to object to those accounts under section 16 of the 1998 Act. However, the argument was not developed, maybe because the accounts would not have cast any light on whether the licence fees demanded over the years had in truth been determined by a relevant committee of the Council, or maybe because the 1998 Act did not afford the claimants with the remedy which they need, which is an order for the licence fee for 2011/12 to be determined.

24. It follows that the Council must now determine the fee for 2011/12. It is not disputed that its determination of the fee will have to be informed by the need to ensure that it does not make a profit out of the fee which it charges. That is no more than the law dictates. The power of a local authority to charge a reasonable fee for the grant, for example, of a street trading licence was said in *R v Manchester City Council ex p. King* (1991) 89 LGR 696 to preclude the raising of revenue for purposes other than street trading. As Roch J (as he then was) said at pp. 709-710:

> "The fees charged … must be related to the street trading scheme operated by the district council and the costs of operating that scheme. The district council may charge such fees as they reasonably consider will cover the total cost of operating the street trading scheme or such lesser part of the cost of operating the street trading scheme as they consider

> reasonable. One consequence of the wording used is that, if the fees levied in the event exceed the cost of operating the scheme, the original position will remain valid provided that it can be said that the district council reasonably considered such fees would be required to meet the total cost of operating the scheme."

25. There are two important issues of principle which affect how the Council may determine the licence fee for 2011/12. First, is the Council obliged to adjust what would otherwise have been an appropriate fee for 2011/12 to reflect any previous surplus or deficit? Secondly, can the costs of enforcing the licensing system be reflected in the licence fee? It is necessary to deal with each of these issues in turn.

26. *Carrying forward surpluses or deficits*. The first of these issues arose in *R v Westminster City Council ex p. Hutton*, which was one of a number of cases tried together and reported collectively as *R v Birmingham City Council ex p. Quietlynn Ltd and ors.* (1985) 83 LGR 461. *Hutton* related to the licence fee for a sex establishment in Westminster. The administrative costs on which the fee was based in the year in question included a sum representing the supposed shortfall in fee income against administrative costs in the previous year. The question was whether the fee was lawful. Forbes J held that it was. At pp. 518-519, he said:

> "I accept entirely that to carry forward a deficit from one year to another may result in anomalies when considering the effect of that process on applicants for grants or renewal of what are annual licences. The persons who, in the year in which the deficit is brought in, seek the grant or renewal of licences may well not be the same people who sought the grant or renewal in the previous year. Those in the previous year may have been fortunate to be undercharged. There is no certainty that, by bringing the deficit into the next year's accounts and therefore recouping from the next year's applicants, the authority will be exacting the money from those who morally ought to pay. But to my mind such a comparison is itself irrelevant in the context of local authority finance. The statutory accounts of local authorities are structured on the basis that shortfalls in one year must be carried into the next year's accounts. The identity of the ratepayers who contribute to the General Rate Fund is changing all the time. If an authority, as a matter of policy, which is itself not challenged on the ground of immateriality, decides that the cost of a service from year to year shall not fall on the ratepayers, that decision would benefit ratepayers of different identities and may disadvantage or advantage from year to year different persons who benefit from the service. I accept [Westminster's counsel's] contention that when a charge is based on an annual budget, which must be concerned with situations which themselves will not be verifiable until after the end of the year in question, the only sensible way to fix the level of the charge is to take one year with another."

It does not *necessarily* follow that just because a local authority acts lawfully in carrying forward a deficit from one year to the next, it acts unlawfully when it declines to carry forward a surplus. But if the justification for carrying forward a deficit from one year to the next is because it is not known in the current year what the expenditure on administering and enforcing the system will be, that reasoning should apply to a surplus just as much. If a local authority were to be treated as acting lawfully if it failed to carry forward a surplus from one year to the next, the making of profits would become legitimized.

27. It follows that the Council has to determine the annual licence fee for sex establishments by adjusting what would otherwise have been the appropriate fee to reflect any previous deficit *or surplus*. That is an uncontroversial requirement bearing in mind that that has been the Council's policy for many years as reflected in the report for the meeting of the Licensing Sub-Committee on 7 September 2004 (see para. 15(ii) above), and in the report for the meeting of the Licensing Urgency Sub-Committee of 5 January 2012 (see para. 20(ii) above). However, it does not have to adjust the licence fee *every* year to reflect any previous deficit or surplus, so long as it "all comes out in the wash" eventually. And the adjustment does not have to be precise: a rough and ready calculation which is broadly correct will do.

28. But in determining the licence fee for 2011/12, how far back has the Council got to go? Only to the previous licensing year? Or all the way back to the year ending 31 January 2007? Or even further back than that? There is no basis for going further back than the year ending 31 January 2007 because it looks as if the fee for the previous year had been calculated taking into account a deficit from the previous year: after all, the report on which the fee for that year had been based had referred to the increase in "the costs of licensing" in the previous year. At the same time, I see no basis for not going back to the year ending 31 January 2007. Any surplus or deficit from the previous year would have had to have been carried forward, and even if the Council had decided to keep the fee at the same level for that year, any surplus or deficit from that year and the previous year would again have had to have been carried forward.

29. The very idea of going back into the past to determine the level of the licence fee for 2011/12 is strongly opposed by the Council. A number of grounds are advanced. The practical problems in undertaking the exercise of going back so many years to identify whether there was a surplus or a deficit in each year, and if so, how much, would be not inconsiderable. Apart from anything else, documents may have gone missing or have been destroyed, and officers who could have contributed to the exercise may have left the Council's employment. Moreover, the Council fixed its overall budget over the years for what is now called "premises management" based on the fees which licensees would be charged, and a component of that income were the fees for licences for sex establishments. For years, no-one objected to those fees. Had the licensees done then what the group of them who are the claimants in these proceedings are doing now, the Council might have reassessed its own thinking on the licensing of sex establishments. In other words, the claimants' "acquiescence" (to use Miss Lieven's language) in the licence fees resulted in the Council not reconsidering its approach to sex establishments in its area. These points were made in argument, not on the basis of any evidence, but they fed into another point, which is that if the Council is required to determine licence fees for sex establishments for

2011/12 on the basis of surpluses and deficits going back to the year ending 31 January 2007, that would be tantamount to a challenge to the fees which the Council says were determined in the intervening years. The failure of the claimants to act until they challenged the fee for 2011/12 should result in them being refused any relief for the Council's failure to determine a fee for that year, since that would require the Council to go back over the years and that would, to use the language of section 31(6) of the Senior Courts Act 1981, be "detrimental to good administration".

30. I think that there is a good deal of over-egging the pudding here. If Mr Ralph's view that over the years "the income from fees" was "sufficient to fund the costs of ongoing enforcement, but no more" is correct, there will be no surplus or deficit to be carried forward. In the light of Mr Ralph's own assessment of the position, the spectre of the Council having been lulled into a false sense of security about its approach to sex establishments licensing smacks of sabre-rattling. In any event, the claimants were entitled to assume that the fees demanded of them by the Council had been determined by the Council, and in the light of the Council's own policy that they had been determined by taking previous surpluses or deficits into account. Nor do I think that the administration of the Council's affairs will be detrimentally affected by the exercise which the Council must undertake. The income from fees in the relevant years will be known, so the only area on which some work will have to be done is the collation of the Council's expenditure on administering and enforcing the system over the years. But much of that work would have had to have been done for the Council's own internal accounting procedures, and I do not think that the exercise which the Council is being required to undertake can be said to be particularly onerous. If for one reason or another precise figures on some items of expenditure are now unavailable, it will be permissible for suitable estimates to be made.

31. Having said that, I do not believe that it would be right to order the taking of an account. Mr Kolvin's critique of the Council's inadequate attempts to explain its expenditure over the years on administering and enforcing the system was compelling, and I can see how the claimants' scepticism of the Council's willingness to determine properly the fee for 2011/12 has arisen. But it is unnecessary for me to increase the length of this judgment by going through Mr Kolvin's criticisms of the Council, because the undeniable fact remains that it is for the Council, and the Council alone, to determine what the fee should be. Forbes J regarded that as "axiomatic" in ***Hutton*** at p. 518, and I agree. The sort of "independent scrutiny" of the process which the claimants want is inconsistent with that. If there is reason to suppose that the licence fee for 2011/12 which the Council determines pursuant to this judgment has been arrived at by a process which is flawed, it will be open to the claimants to challenge that determination. Having said that, since the claimants paid the licence fee for 2011/12 which the Council demanded, the Council must repay the claimants the difference between the sum which was demanded and paid and the amount finally determined by the Council as a reasonable fee.

32. *The effect of the new regulations*. I turn to whether the domestic implementation of a recent European directive no longer permits the costs of enforcing the licensing system to be reflected in the licence fee. That is the issue in the case which has wider ramifications than the narrow interests of the parties to the litigation, and I therefore approach the issue with a keen sense of its importance, though first it is necessary to identify the various elements which made up the licence fee which was determined at

£29,102.00 in September 2004, and was demanded for every year thereafter, up to but excluding the year from 1 February 2012. These elements were the aggregate of the sum of £2,667.00 which represented what Mr Ralph described as "the administration of the application", and the sum of £26,435.00 for what Mr Ralph called "the management of the licensing regime". In addition, it should be noted that the whole of the £29,102.00 was payable when an application for a sex establishment licence was made, but if the application was refused, the element which represented "the management of the licensing regime", i.e. the £26,435.00, was refunded. Only the element which represented "the administration of the application", i.e. the £2,667.00, was non-returnable. Since the element which represented "the management of the licensing regime" was so much larger than the element which represented "the administration of the application", the legality of the Council to fund the cost of enforcing the licensing system from licensees rather than from its general fund becomes important.

33. There is no doubt that before 2009 the Council was permitted to reflect the costs of enforcing the licensing system in the fees which it charged. As Roch J said in ***King*** at p. 710, albeit in the context of licences for street traders:

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

Similarly, in ***Hutton***, Forbes J noted at p. 517 that it was not disputed that the Council could calculate the licence fee for sex establishments, "not only [by reference to the cost of] processing licensing applications, but also [by reference to the cost of] inspecting premises after the grant of licences and … [the] vigilant policing of establishments within the city in order to detect and prosecute those who operated sex establishments without licences." In other words, it was not disputed that the Council's Licensing Inspectorate could be self-financing.

34. The new regulations are the Provision of Services Regulations 2009 (SI 2999 of 2009) ("the 2009 Regulations"). They came into force on 28 December 2009, and they therefore applied for the first time to the licence fee for the year beginning 1 February 2010. They have applied to all subsequent licence fees, and will apply to future ones until such time as they may be repealed. The relevant regulation is reg. 18(4) which provides:

> "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."

The expression "authorisation scheme" is defined in reg. 4 as meaning

> "… 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".

The expression "service activity" is not defined in the 2009 Regulations, but reg. 2(1) defines "service" as meaning "any self-employed economic activity normally provided for remuneration". And the expression "competent authority" is defined in reg. 3(1) as meaning "a body or authority having supervisory or regulatory functions in the United Kingdom in relation to service activities (and includes in particular a professional body, professional association or other professional organisation, that regulates access to, or the exercise of, a service activity)."

35. The sex establishments operated by the claimants provide a service of the kind to which the 2009 Regulations apply, and the Council has supervisory and regulatory functions relating to the services which the claimants provide. Since the claimants are required to obtain the Council's authorisation to provide those services, it follows that the licence fees which they incur are charges of the kind to which reg. 18(4) applies. The issue, therefore, is whether the licence fees which the Council charges are (a) reasonable and proportionate to "the cost of the procedures and formalities under the scheme" and (b) do not exceed "the cost of those procedures and formalities". The critical question is what "the costs of the procedures and formalities under the scheme" include. Do they include what Mr Ralph described as "the management of the licensing regime", i.e. the costs of *enforcing* the licensing system, which I have taken to be the costs of investigating and prosecuting those who operate sex establishments without a licence? Or are they limited to what Mr Ralph described as "the administration of the application", i.e. the costs of *administering* the licensing system, which I have taken to be the costs associated with the grant, renewal and revocation of licences, which include (a) the administrative costs involved and (b) the 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 their renewal?

36. The language of reg. 18(4) strongly suggests the latter. The relevant costs are the costs of the procedures and formalities under the *authorisation* scheme, and those costs are, on the face of it, 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. The combined effect of regs. 4 and 18(4) sensibly admits of no other construction if the language of the regulations is decisive. That is entirely consistent with the advice given by the Department for Business, Innovation and Skills. In its Guidance for Departments and Competent Authorities on the 2009 Regulations which was published in January 2010, the Department said at p. 18:

> "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.*" (Italicised emphasis supplied)

And in case there was any doubt about the guidance being given, it added in a separate box that the fee had to cover "no more than the actual cost of the authorisation process".

37. Having said that, the reason the guidance gave for why "[e]nforcement costs should not be assimilated with the application fee" was as follows:

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

If that was the only rationale for not reflecting enforcement costs in the licence fee, the Council can justifiably say that it took that into account: after all, unsuccessful applicants have the element which represents "the management of the licensing regime" returned to them. But that presupposes that what the guidance says is the rationale for not reflecting enforcement costs in the licence fee is the only rationale for it. For the reasons given in para. 41 below, it is not.

38. The Council's case is that the language of these regulations is not determinative. The 2009 Regulations represent the domestic implementation of Directive 2006/123/EC on Services in the Internal Market ("the Directive"). Since member states are required to take all appropriate measures to achieve the objectives of such a directive, domestic courts of those states have to interpret those of their domestic laws which seek to implement such directives in the light of their language and purpose, so as to achieve, so far as is possible, their objective. When that exercise is undertaken, a very different picture is said to emerge. The purpose of the Directive was to create a free and competitive market for services within the European Union. It was no part of the purpose of the Directive to restrict the substantive provisions of a licensing regime, including the charging of legitimate fees, where those fees have been accepted as being rational, sensible and justifiable in accordance with domestic law.

39. The claimants do not dispute that the Directive's purpose is to remove barriers to entry to the Internal Market. After all, recital (5) of the Directive reads:

> "It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of these two fundamental freedoms of the Treaty."

Nor does the Directive prohibit member states from operating licensing systems which place restrictions on entry into the market. Indeed, the phrase "authorisation scheme" in the 2009 Regulations comes from the Directive itself, and relates to those schemes which require those who wish to enter the market in a particular area of activity to obtain approval before doing so. What the Directive said about such schemes is contained in a variety of recitals, but recital (39) requires them to cover, amongst other things, "the administrative procedures for granting authorisations, licences, approvals or concessions", and a number of other recitals state what those "administrative procedures" should involve. Thus, recital (43) talks of eliminating "the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex or burdensome procedures, the duplication of procedures, the 'red tape' involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is

given, the limited duration of validity of authorisations granted and disproportionate fees and penalties".

40. The reference to the elimination of "disproportionate fees" is important. What it means is that any fee which is charged for an authorisation, licence, approval or concession must be "proportionate to the cost of the procedures and formalities with which they deal". That is what recital (49) says, albeit in the context of fees which may be charged by points of single contact, i.e. a single point at which applicants for an authorisation, licence, approval or concession can complete all the required formalities and procedures. But the fact that the fee to be charged should be "proportionate to the cost of the procedures and formalities with which they deal", irrespective of whether the fee relates to a single point of contact, is apparent from Art. 13.2 of the Directive, which provides that

> "… 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."

So what are the "authorisation procedures" whose cost the fee may not exceed? The answer is to be found in Art. 4(6), which defines an authorisation scheme as meaning

> "… any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof".

41. Against that background, I return to the Council's key point, which is that the Directive did not purport to limit the fees which could be charged for a licence under a legitimate licensing regime, when those fees included an element for the recoupment of expenditure which domestic law did not prohibit. I do not agree. When it came to the fee for a licence, Art. 13.2 of the Directive, which reg. 18(4) of the 2009 Regulations implemented domestically, was quite specific. 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.

42. Both the claimants and the Council point to what they say are the unfortunate consequences of the other's approach being adopted. Take a part of the country in which there are no licensees of sex establishments. The local authority would still have to incur the cost of investigating and prosecuting those who operated sex establishments without a licence if it wanted its area to be free of unlicensed sex establishments. The cost of that would have to come out of its general fund. The claimants say that 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.

43. On the other hand, the Council says that if the claimants' construction of the 2009 Regulations is correct, many regulatory bodies would simply not be able to recover their costs of enforcing the regulatory regime. Unlike local authorities who have a general fund to call on, there will be some regulatory bodies who do not have an independent source of income and lack revenue-raising powers. So unless they can include the costs of enforcement in the fees they charge successful applicants, they may not have the funds to police their regulatory regime effectively. Against that, it is said that recital (49) appears to permit "supervisory bodies" to charge fees which are not "proportionate to the cost of the procedures and formalities with which they deal", but that is by no means clear. Ultimately, though, neither the claimants nor the Council have persuaded me that the consequences of adopting the other's interpretation of the 2009 Regulations are so dire as to disturb or support the conclusion I have reached.

44. Finally, I acknowledge that the claimants are the beneficiaries of the Council's enforcement of the licensing system. Effective enforcement means that they do not have to worry for long about unlicensed competitors. Since they get much of the benefit of that enforcement, should they not have to pay for at least some of it? I see the force of that, but it does not necessarily follow that those who benefit from a service provided by a local authority should have to pay for it. Many services are funded from the local authority's general fund, whether the source of that fund is the council tax paid by local residents or businesses or funding from central government, especially when the community as a whole benefits from that service. The fact that the Council has preferred over the years to use the licence fee to charge the operators of sex establishments for enforcing the system does not affect the proper interpretation of the 2009 Regulations. For all these reasons, therefore, I have concluded that since the year beginning 1 February 2010, the Council has not been permitted, when determining the reasonable licence fee for sex establishments, to reflect in the fee which it determines the costs of enforcing the system.

The claim relating to the demand for the licence fees for the previous five years

45. The claimants' restitutionary claim relating to the demands for the licence fees for the five years before 2011/12 is complicated by what I have found to be the effect of the new regulations. But for that, the fact that the determination of the licence fee for 2011/12 requires the Council to take into account surpluses or deficits from previous years would have made the claimants' restitutionary claim relating to the demands for the licence fees for the previous five years academic. If Mr Ralph's claim that "the income from fees" in those years was "sufficient to fund the costs of ongoing enforcement, but no more" turned out to be correct, any sums which might have been

due under the claimants' restitutionary claim would have been absorbed in the fee which the Council would have been determining for 2011/12. And even if Mr Ralph's claim turned out to be incorrect, and there would still have been a surplus to be carried forward even if the fee for 2011/12 was determined at a nominal amount, there would have been nothing to prevent that surplus being reflected in the fee for the year beginning 1 February 2013 and in later years. I appreciate that this would have meant that those who operated sex establishments in 2011/12, and will be doing so in the future, but who did not do so in the previous five years, could well have received an unexpected windfall. But as Forbes J explained in ***Hutton***, that would not have been a relevant factor when it comes to local authority demands.

46. However, matters are very different now that I have found that the determination of the licence fee for 2011/12 must be limited to the costs of administering the licensing system. Even if Mr Ralph's claim that "the income from fees" in previous years "was sufficient to fund the costs of ongoing enforcement, but no more" turns out to be correct, there will still be a large surplus from the year ending 31 January 2011 to be carried forward, since in that year the costs of enforcing the licensing system should have been excluded. Not only that. There will still be a surplus from 2011/12 to be carried forward to the year ending 31 January 2013 even if the fee for 2011/12 is determined in a nominal amount. And since the fee for the year ending 31 January 2013 took into account the costs of enforcing the licensing system when they should have been excluded, there will be a large surplus to be carried forward to the year ending 31 January 2014. Indeed, the size of the surplus means that it will take very many years of determining the fee at a nominal amount before the surplus would have been extinguished. All the more so if Mr Ralph's claim turns out to be incorrect.

47. All this means that the claimants' restitutionary claim is far from academic. Indeed, it has to succeed because on the findings I have made, the Council demanded what purported to be lawful fees, and were paid them, for the five relevant years when the demands were unlawful because the Council had not determined what the licence fees for those years should be. The claimants' claim for the restitution of the fees paid must therefore succeed subject to two things. First, I have already said that the claimants accept that they should not be able to recover the whole of the sums they paid for those years. They are only claiming the difference between the sums they paid and whatever would have constituted reasonable fees for those years. That concession recognises what the Privy Council in *Waikato Regional Airport Ltd v A.-G.* [2003] UKPC 50 held to be an appropriate approach. But only the Council can determine what those fees should be, and if an account is not ordered, Mr Kolvin accepts that the Council must determine them. If they are not determined, the claimants will be entitled to recover the whole of the sums they paid for those years. Secondly, since the restitutionary claim has to be treated as a claim for judicial review, the question whether the claimants' time for bringing the claim should be extended is a live one.

48. I have no doubt that it should be extended. The claimants were entitled to assume that the annual licence fee which the Council demanded of them had been determined by the Council, and that it had been determined in accordance with the law. Putting it another way, they had absolutely no reason to suppose otherwise. Following the coming into force of the 2009 Regulations on 28 December 2009, the claimants decided to request the Council for information about how the licence fee was

calculated. They made their first request under the Freedom of Information Act 2000 on 27 May 2010, and the Council accepts that its responses to that and subsequent requests were not as informative as they should have been. Such information as their solicitors got was provided piecemeal, and in my opinion it was not until 2 February 2011 when the Council responded to the third request for information that the claimants' solicitors had the material on which they could realistically argue that the licence fee had not been determined by the Council for many years. It is significant that that date was less than three months before the claimants' claim was filed.

Conclusion

49. For these reasons, the claimants' claim succeeds, and the relief I have in mind at present is to

(i) declare that, when determining under para. 19 of Schedule 3 to the 1982 Act, 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,

(ii) to order the Council to determine, within three months of the handing down of the final judgment in this case, a reasonable fee for the years ending 31 January 2007, 31 January 2008, 31 January 2009, 31 January 2010, 31 January 2011 and 31 January 2012 for the grant or renewal of a licence to operate a sex establishment, having regard to (a) the declaration in (i), and (b) the need to carry forward from year to year any previous surpluses or deficits from the year ending 31 January 2007,

(iii) to order the Council to determine afresh, within three months from the handing down of the final judgment in this case, a reasonable fee for the year ending 31 January 2013 for the grant or renewal of a licence to operate a sex establishment, having regard to (a) the declaration in (i), and (b) the need to carry forward any previous surplus or deficit from the year ending 31 January 2012, and

(iv) to order the Council to pay to the claimants for each of the years to which (ii) and (iii) relate 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, within six weeks from the date of such determination.

Save for an award of interest on the sums to be paid to the claimants, my present thinking is that the claimants are not entitled to any other relief, though of course if the fee determined for any of these years or any future year is determined otherwise than in accordance with this judgment, it would be open to the claimants (or any other licensed operator of sex establishments in the relevant year) to challenge those determinations.

50. At the conclusion of the hearing, I asked Mr Kolvin to submit a revised draft of the relief the claimants were seeking. His draft prompted further representations, but

since the relief to be granted depended on what my conclusions were on the many different issues which the claim raised, and since those conclusions were by definition unknown to the parties, I would be more comfortable if the parties had the opportunity to consider the appropriate relief in the light of my findings. A further hearing is unnecessary, and the parties' written representations will do. Unless the parties agree on the form which the relief should take in the light of this judgment, the claimants have 14 days after the date of the handing down of this judgment to submit such written representations to my clerk, with the Council having 7 days thereafter to submit written representations in response. I will consider what orders to make for costs and whether permission to appeal (if sought) should be granted when the final judgment in this case is handed down. The parties' time for filing an appellant's notice will begin from then.