Neutral Citation Number: [2012] EWHC 1582 (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: 12 June 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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Further written representations: 29 May and 6 and 11 June 2012

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Approved Judgment

Mr Justice Keith:

1. I handed down my judgment in this case on 16 May, but I invited further representations on the form of the relief which should be granted. This judgment takes those representations into account.

2. It is common ground that the declaration which I was proposing in para. 49(i) of my earlier judgment is appropriate. Some additional words were suggested by Mr Kolvin, but I do not think they are necessary. Subject to two points, there is no disagreement between the parties about the order which I was proposing to make in para. 49(ii). The two points relate to whether the relevant years should be sub-divided to distinguish between those years when the 2009 Regulations are relevant and those years when they are not, and to whether the Council's time for setting a reasonable fee for the years to which my proposed order related should be six months from the date when this judgment is handed down rather than the three months I originally had in mind. I go along with what the Council suggests on the first of these points. Sub-dividing the relevant years in the way in which the Council suggests makes things neat and tidy. On the other hand, the documents and information which the Council needs to calculate the expenditure on administering and enforcing the licensing system over the years are all held "in-house", and I remain of the view that the task which the Council has to perform is not particularly onerous. Even taking into account what the Council describes as the "incremental" effect of the proposed order, three months should be ample time for the Council to set the fees for the relevant years.

3. I was not aware that a new claim had been lodged by the claimants relating to the fee for the year ending 31 January 2013, but the parties acknowledge that the order proposed in para. 49(iii) of my earlier judgment is appropriate in the light of my conclusions on how the fee should be determined. The time for the Council to set this fee should remain at three months from the handing down of this judgment.

4. The Council objects to the order proposed in para. 49(iv) of my earlier judgment on the basis of what I said in para. 27 of my earlier judgment, namely that the Council 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. However, that does not take into account para. 46 of my earlier judgment: in the light of the enormous surplus to be carried forward to the year ending 31 January 2014, it will take very many years of determining the fee at a nominal amount before the surplus would have become extinguished. All the more so 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 incorrect. The order which I proposed in para. 49(iv) of my earlier judgment is the appropriate order to make.

5. I turn to the question of costs, and to the interest payable on the sums payable pursuant to the order proposed in para. 49(iv) of my earlier judgment. The Council does not suggest that it should not be ordered to pay the claimants' costs of the claim, to be the subject of detailed assessment if not agreed. What divides the parties is whether some of the claimants' costs should be assessed on the standard or the indemnity basis, whether interest is payable on those costs, and if so at what rate. That arises because the claimants made a Part 36 offer on 21 March 2011, which expired on 18 April 2011 (10 days before the claim was issued on 28 April 2011), and

my earlier judgment was, to use the language of rule 36.14(1)(b) of the Civil Procedure Rules, "at least as advantageous to the claimant[s] as the proposals contained in [their] Part 36 offer". In those circumstances, the court is required by rule 36.14(3), unless the court considers it unjust to do so, (i) to award the claimants interest on the sums to which the order proposed in para. 49(iv) of my earlier judgment relates at a rate not exceeding 10% above base rate from 18 April 2011, (ii) to award the claimants their costs from that date on an indemnity basis, and (iii) to award the claimants interest on those costs at a rate not exceeding 10% above base rate. In considering whether it is unjust to make any of those orders, the court is required to take into account all the circumstances of the case, including the four factors specified in rule 36.14(4).

6. The Council has not suggested that any of the factors specifically referred to in rule 36.14(4) would make it unjust for the normal consequences of the judgment being at least as advantageous as the proposals contained in the Part 36 offer to follow. Its case is that the Part 36 offer required the Council to accept that the effect of the 2009 Regulations was to prohibit them from reflecting the cost of investigating and prosecuting those who operate sex establishments without a licence in the fee for a sex establishment licence. That was too important a principle for the Council to concede bearing in mind that it could apply to any licensing system anywhere in the country in which unlicensed traders operate and against whom steps have to be taken to close down their operations and to prosecute them as appropriate.

7. I cannot accept this argument. The Part 36 regime is intended to encourage defendants to accept appropriate offers of settlement. The Council's acceptance of the offer would not have required them to accept any principle at all. It only required them to agree a fee with the claimants for a licence for 2011/12 to be calculated without reference to the cost of taking enforcement action against unlicensed traders. That would not have created any precedent because it could have been treated as the Council's willingness, on this occasion, to compromise a particular claim without prejudice to the stance it might adopt in other cases. It is therefore not unjust for the consequences provided for by rule 36.14(3) to follow. Accordingly, the Council must pay interest on the sums payable under the order proposed in para. 49(iv) of my earlier judgment at the judgment rate from the dates when the claimants paid the sums demanded of them by the Council at the rate of 10% above base rate from 18 April 2011. In addition, it must pay the claimants' costs of the action, to be the subject of detailed assessment if not agreed, on the standard basis in respect of their costs incurred up to 18 April 2011, and on the indemnity basis in respect of their costs incurred thereafter, with interest thereon at the rate of 10% over base rate from 18 April 2011. Rule 36.14(3) is silent as to when the interest payable on the costs should be payable from. The claimants have said that the interest should be payable from 18 April 2011. The Council has not responded to that, but if interest is to be awarded on costs, it should only be payable, at first blush, from when the claimants put their solicitors in funds (because that was when they were deprived of the use of their money), and it should reflect the interest which would have been paid on those sums while it remained in the claimants' solicitors' client account. The parties have not addressed any of that, and I give the parties 14 days from the handing down of this judgment to file such written representations on the topic as they wish.

8. The claimants ask for a payment of £50,000.00 on account of their costs. Since one of the factors to be taken into account is any intention on the part of the Council to appeal, it is premature for me to address the issue now, because I do not know whether the Council proposes to appeal. The written representations only say that an appeal is likely. I shall therefore return to the issue of a payment on account of costs if, following the handing down of this judgment, the Council applies for permission to appeal.

9. It will not be necessary for the parties to attend court when this judgment is handed down. If the Council wishes to apply for permission to appeal, it should notify my clerk of that within seven days of the handing down of this judgment, and I will decide whether permission to appeal should be granted on the basis of such written representations as are made. However, it will still be necessary for any appellant's notice to be filed within 21 days of the handing down of this judgment.