

LGA briefing on the implication of Hemming v Westminster City Council on locally set licence fees

10th July 2013

This briefing aims to provide councils with a summary of the recent Hemming v Westminster City Council case and the implications for councils more widely.

The case impacts on the type of costs that councils can recover through locally set licence fees and the processes councils have in place to ensure fee setting is transparent and open to scrutiny. We recommend that legal services and licensing departments use this brief to discuss the impact of the case for their council.

The LGA is interested in hearing directly from members that have concerns about the implications of the Hemming v Westminster case for their council, particularly in relation to cost recovery or where any outstanding legal issues have not been resolved by this paper. Please do contact gwyneth.rogers@local.gov.uk or ian.leete@local.gov.uk to ensure we can act effectively on your behalf.

Summary of Hemming v Westminster City Council

Timothy Hemming, owner of Simply Pleasures Ltd, led a case on behalf of various sex shops contesting the level of licence fees for sex shops charged by Westminster City Council on the basis they could not be considered reasonable.

The original court ruling was given in May 2012, but this was subject to appeal and it is the Court of Appeal judgment made on 24th May 2013 that has now been established as the leading law on what costs can be taken into account when setting local licence fees.

The key issue addressed was whether the fees set by Westminster City Council complied with the requirements of the European Services Directive 2009 and the interpretation of Article 13(2) of the Directive. The Services Directive aims to make it easier for service providers to set up or offer their services anywhere within Europe and introduced a range of requirements on those issuing licences to the service and retail sector, including the provision of online applications and payments. The Services Directive also makes it clear that licence fees covered by the Directive can only be used to recover costs and should not be used to make a profit or deter service providers from entering a market.

In essence, the Hemming case questioned the lawfulness of Westminster's licence fees for sex establishments as 'charges' under the Directive and whether these were 'reasonable and proportionate to the cost of the authorisation procedures...' and did 'not exceed the cost of the procedure'.

The court ruling

While the Services Directive may be clear that any charges for licences covered by the Directive must be reasonable and not exceed the costs associated with the authorisation procedures, there is no more detail on what costs can or not be included when calculating a fee.

The original hearing also considered whether Westminster City Council had made a valid determination of the licence fee for any year after the year ending on 31 January 2006, which was the last occasion that the fees were considered by the Licensing sub-committee. The judgement, accepted by the Court of Appeal, found that the annual reviews conducted by an officer of Westminster City Council 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.

In the Hemming V Westminster case, the Court of Appeal specifically considered whether the cost of investigating and prosecuting those who operate without a licence can be recovered through the licence fee paid by those operating within the system. Ultimately, was it lawful to set licence fees which reflected the council's costs of enforcing the system against *unlicensed* operators, as well as those which were licensed?

Unfortunately for Westminster, the Court of Appeal upheld the earlier decision of the Administrative Court from May 2012. It ruled that the fees set must be not exceed the costs of administering the process. As such, the council was no longer able to include the cost of enforcement against unlicensed sex establishment operators when setting the licence fee.

This confirmed the change of approach from what was the accepted position prior to the Regulations coming into force in 2010. Then, the setting of a fee for sex establishment licences was regulated by the Local Government (Misc. Provisions) Act 1982. A 'reasonable' fee under that Act was accepted as including enforcement costs so that the system was, in effect, self- financing.

Whilst the council had sought to argue that there should be no distinction between the enforcement of licensed and unlicensed operators, particularly as licensed businesses ultimately benefit from action to tackle rogue traders and ensuring there is a level playing field in place for responsible businesses, the Judge did not agree.

He commented at paragraph 70 as follows:

"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".

However, the Judgment makes it clear that the costs of compliance monitoring and enforcement against an applicant who has been given a license can fall within the costs of the council's authorisation procedures. Further, costs associated with monitoring the continued suitability of operators during license renewals (and, potentially, reviews) may also be included as part of the compliance process given that they relate to the terms of their licenses previously granted.

It should be noted that it is not yet clear whether this will be tested in further litigation, possibly with a reference to Europe for a definitive ruling on the meaning of the Directive.

What does this mean for councils?

The LGA recommends that all councils review the costs covered by locally set licence fees in light of this judgment and ensure that they no longer reflect costs of addressing unlicensed business activity. It is clear that not being able to recover costs associated with addressing unlicensed sex establishments will have significant long term financial repercussions for Westminster City Council, however, we do recognise that the financial impact for councils more widely will vary depending on the local economy, the licensed activity and the approach taken to local fee setting in the past.

The LGA also recommends that councils take the opportunity to ensure that all locally set licence fees are based on an up to date cost recovery approach, which is established and regularly reviewed in a transparent manner that can be understood by both businesses and residents. The LGA will be publishing guidance on what can be included in locally set licence fees during the Summer 2013.

Further information

Original court ruling for Hemming V Westminster
<http://www.bailii.org/ew/cases/EWHC/Admin/2012/1260.html>

Court of Appeal ruling for Hemming V Westminster – 24th May 2013
<http://cornerstonebarristers.com/wp-content/uploads/2013/05/Hemming-APPROVED-Judgement.pdf>

EU Services Directive
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:en:pdf>

BIS guidance on the EU Services Directive
<https://www.gov.uk/eu-services-directive>