

Westminster City Council ordered to repay Soho Sex Shops

16.05.12

R (Hemming and Others) v Westminster City Council - Administrative Court - Keith J, 16th May 2012

In a seminal judgment, Mr. Justice Keith has ordered restitution of licence fees charged to sex shops by Westminster City Council.

A judicial review of Westminster's sex licensing fees was brought by 7 owners of 13 sex shops in Soho and Covent Garden.

The essence of their claim was that while a duly authorised licensing committee had determined the annual fee for sex shops under the Local Government (Miscellaneous Provisions) Act 1982 for 2005-2006 at £29,102 per annum, and it had failed to determine a fee for any year thereafter, until January 2012 when it determined that the renewal fee should be £18,737. The Council's case was that the fee determined for 2005-2006 had been a rolling annual fee. The Court disagreed. The fee determined had been for 2005-2006 only. Thereafter, there had been a failure to determine a fee as the Act required.

The claimants then claimed that the Council was precluded from making a profit from the sex licensing fee regime, and so there should be an account of the fee income and expenditure, with the claimants credited for any surplus. Although the Council contended that it was permitted to budget for a surplus, Keith J agreed with the claimants' case. The case therefore establishes the important principle that surpluses as well as deficits are to be carried forward.

Westminster City Council claimed that the vast majority of the fees collected were used to enforce the licensing regime against illegal third party operators, by way of prosecution and closure. The claimants stated that, while it was previously lawful to use (and calculate) licence fees in this way, it became unlawful upon the commencement of the Provision of Services Regulations 2009 on 28th December 2009. Thereafter, the only costs to be brought into account were those of the authorisation scheme itself.

The Council contested this interpretation but the claimants' interpretation was upheld by Keith J. He held that the procedures the costs of which could be recharged to licensees 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.”

Hence, Keith J held that the claimants were entitled to be credited with the enforcement costs in the licensing years 2010-2011, 2011-2012 and 2012-2013. Of course, it is not unlawful for a licensing authority to enforce the law, but the costs of doing so, in this instance, fell to be met from general funds rather than licensing fees.

The claimants finally claimed that, upon taking an account, they ought to have restitution of the surplus of fees paid over outgoings incurred. While this was contested by Westminster City Council, the Learned Judge ordered Westminster City Council to determine the fees for the years 2006-2007 through to 2012-2013 and to refund the excess of fees collected over the fees as determined.

The learned Judge refused the claimants’ claim for an account of fee income and lawful expenditure to be taken by the court itself, holding that it was for the licensing authority to determine the fee, but noted that the claimants were entitled to challenge the fee if Westminster determined it unlawfully.

In brief summary, the case established the important principles:

- (1) that where a Council profits from licence fees in that its expenditure is exceeded by its fee income, it must carry the surplus forward in determining the fee for future years;
- (2) that in authorisation schemes covered by the Provision of Services Regulations, enforcement costs may not be recharged to licensed operators.

Philip Kolvin QC, instructed by Gosschalks, acted for the claimants

Nathalie Lieven QC and Jacqueline Lean, acted for Westminster City Council.

Note: the precise form of relief remains to be determined.