

**NEWCASTLE-UNDER-LYME BOROUGH COUNCIL**

**REPORT TO LICENSING COMMITTEE**

**Date: 3<sup>rd</sup> JULY 2013**

**1. LICENSING FEES**

**Submitted by:** Paul Washington, Principal Solicitor

**Portfolio:** Safer Communities, Culture and Leisure

**Wards affected:** All

**Purpose of the Report**

To update the Committee upon the recent decision concerning fees levied for sex establishment licences.

**Recommendation:**

**That the report be received.**

**Reasons**

The outcome of the case will impact upon decisions made and income received.

**1. Background**

1.1 On 24<sup>th</sup> May 2013 the Court of Appeal handed down its long awaited decision in the case of R. & Others v. The Lord Mayor and Citizens of Westminster and for most material purposes of every licensee and local authority apart from Westminster City Council upheld the High Court judgment.

1.2 The case concerned fees levied by Westminster City Council ('the City Council') for sex establishment licences under the provisions of the Local Government (Miscellaneous Provisions) Act 1982 ('the 1982 Act'). Sex establishment licensing is governed by Schedule 3 to the Act which is adoptive and, once adopted, the local authority may grant a sex establishment licence to premises for one of three types of activity: a sex cinema, a sex shop or a sexual entertainment venue.

1.3 Under paragraph 19:

"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."

For many years the City Council had levied high licence fees for sex establishment licensing on the basis that in addition to their administration costs, they also had significant enforcement costs against not only licensed sex establishments, but also unlicensed sex establishments. This principle was upheld by the courts in R. v. Westminster City Council, ex parte Hutton.

- 1.4 The legality of the means by which those fees were set, the level of the fees and the impact of the European Union Services Directive were challenged by a group of sex establishment licensees by means of judicial review. In the High Court, the Judge (Keith J.) found in favour of the applicants. He determined that the City Council had not set a lawful fee since 2006, although it had been levying one. In addition, he concluded that the effect of the introduction of the European Union Services Directive ('the Services Directive') from 28<sup>th</sup> December 2009 by the Provision of Services Regulations 2009 ('the 2009 Regulations') meant that from 2010, the Council could not assimilate (and thereby recover) enforcement costs with the licence fee.

The City Council accepted that no lawful fee had been set since 2006, but appealed the other findings to the Court of Appeal.

## 2. Issues

- 2.1 It was well established by the courts and accepted by all parties that prior to the Services Directive it was lawful to levy licence fees for sex establishments which were intended to recover all the costs of the licensing regime including enforcement against licensees and unlicensed traders.
- 2.2 The High Court had found that the provisions of the Services Directive introduced into English law by the 2009 Regulations prohibited the recovery of enforcement costs as part of the licence fee.
- 2.3 This formed a significant part of the High Court decision and was a fundamental element of the appeal. Between 2004 and 2012, £26,435 (or 91%) of the total fee of £29,102 charged by the City Council was described as being for 'the management of the licensing regime', with only £2667 (or 9%) being for 'the administration of the application'. It can be seen that with the potential to lose over 90% of its sex establishment licensing revenue, the High Court ruling had a huge impact on the City Council's licensing and enforcement budget.
- 2.4 The Court of Appeal confirmed the decision of the High Court. The City Council tried to argue that the smaller fee was the application fee (because it was not refundable even if the application failed) and that the higher fee, which was only payable by successful applicants, was therefore outside the scope of the Services Directive and 2009 Regulations and could still be lawfully administered. This was rejected on the grounds that it was within the scope, and even if it had not been, there was no power within the 1982 Act to levy any fee other than an application fee and the cost of monitoring the compliance of **licensed** sex establishments.
- 2.5 In terms of the split of the licence fee between application and enforcement, the Court of appeal concluded that the two way split (91%:9%) was incorrect and that licence fee in its entirety 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

Category (c): the cost of enforcing the licensing regime against unlicensed operators"

and accordingly, after the introduction of the Services Directive and the 2009 Regulations, the Council could continue to recover the costs in categories (a) and (b), but could no longer recover the costs in category (c).

## 2.6 Repayment

Having established that no lawful fee had been set since 2006 and since 2009 enforcement costs had been unlawfully levied, the question of repayment had to be addressed. The Court made it clear that the enforcement costs unlawfully levied after 31<sup>st</sup> January 2010 must be repaid forthwith, but in relation to the allowable costs (elements (a) and (b) identified above, the continued rolling forwards (from year to year) of deficits and surpluses would be lawful.

## 2.7 Power and mechanism to set a fee

In respect of the mechanism to set a fee, the City Council maintained that the fee was reviewed annually by an officer, but maintained that this did not amount to setting a fee. An assertion that a licence fee for a sex establishment licence cannot be set by an officer, but has to be set by the council was dealt with by the Court of Appeal where it was said that “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 be determined by the local authority itself and cannot be determined by one of its officers.”

## 2.8 The immediate impact of this decision

Clearly, this judgment will have a significant impact in relation to sex establishment licensing. Every local authority that has adopted the provisions of Schedule 3 to the 1982 Act will have to reassess its licence fees in the light of this judgment. Those that do not will be susceptible to challenge either by means of judicial review (which although expensive, does have the advantage of addressing the issue before the fee is levied), or by means of a challenge via the District Auditor (which is relatively cheap but, of necessity, retrospective.

However, the impact is far wider than that. The Services Directive applies to all local authority licensing regimes except taxi licensing (hackney carriage and private hire), gambling and cinema licensing. This means that for every licensing regime covered by the Services Directive, a similar reassessment of licensing fees must be undertaken.

In addition, local authorities must make arrangements to repay enforcement costs that were unlawfully levied from December 2009. This is clearly a significant exercise which will take a lot of time and effort, but it is difficult to see how this approach can be avoided.

## 2.9 The future impact of this decision

The question now arises as to how local authorities will fund enforcement against non-licensed traders. The simple answer is that such funding should be found from general Council funds, but practically, that will prove difficult.

Council budgets are continually being reduced, with cuts on top of cuts the norm, so there is unlikely to be any slack to pay for enforcement. However, it is essential that councils do enforce against the unlicensed traders, because otherwise there will be no reason to obtain a licence. Licensees will be controlled but rogue operators will not which cannot be an acceptable approach.

It remains to be seen whether the Government will address this issue. Whilst the Services Directive and 2009 Regulations must remain, it would be open to the Government to allow local taxation to fund enforcement. This could be a national scheme, or adoptive, and a precedent already exists with the Late Night Levy under the Police Reform and Social Responsibility Act 2011, which the Court of Appeal accepted is a tax, and therefore not caught by the Services Directive.

Whether any Government would consider such an approach, and whether local authorities would be prepared to tax their local traders are two big questions that remain to be answered.

3. **Options Considered**

No options need to be considered at this time.

4. **Proposal**

That the report be received.

5. **Outcomes Linked to Sustainable Community Strategy and Corporate Priorities**

Creating a Cleaner, Safer and Sustainable Borough  
Creating a Borough of Opportunity

6. **Major Risks**

None

7. **Financial Implications**

Potential for loss of income

8. **Crime and Disorder**

There are no Crime and Disorder Issues

9. **Human Rights, Legal and Statutory Implications**

There are no human rights issues. The Services Directive and Regulations referred to in the report need to be applied as appropriate.

9. **Background Papers**

The case of R & Others –v- The Lord Mayor and Citizens of Westminster  
The local Government (Miscellaneous Provisions) Act 1982  
The European Services Directive 2006  
The Provision of Services Regulations 2009