

2018 EWHC 3664 (Admin)

IN THE HIGH COURT OF JUSTICE - LEEDS ADMINISTRATIVE COURT

Case No: CO/1325/2018

Courtroom No. 17

Leeds Combined Court Centre
The Courthouse
Leeds
LS1 3BG

2.36pm – 3.02pm

Wednesday, 5th December 2018

Before:
HIS HONOUR SAFFMAN
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

B E T W E E N:

R (REHMAN/WAKEFIELD & PH ASSOCIATION)

and

WAKEFIELD COUNCIL

MR G GOURIET QC & MR C STREETEN (Solicitor) (assisted by A2Z LICENSING) appeared on behalf of the Claimant

MS S CLOVER & MR B WILLIAMS (instructed by CITY SOLICITOR, WAKEFIELD COUNCIL) appeared on behalf of the Defendant

JUDGMENT

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HHJ SAFFMAN:

1. The claimant seeks to judicially review a decision made by Wakefield District Council on 24 January 2018. Permission to do so on one of the two grounds contained in the statement of facts in the grounds of claim was given by Males J on 26 July 2018.
2. On 24 January 2018 the Local authority decided to approve the fee to be charged from 1 February 2018 for a vehicle and operators' licence in respect of private hire vehicles and hackney carriages. The issue for determination today is whether that decision should be quashed on the basis that it was unlawful.
3. The claimant asserts that in setting this licence fee the Council took into account costs which the law does not permit it to take into account. The section upon which the claimant relies is Section 70 of the Local Government (Miscellaneous Provisions) Act 1976 which states, so far as it is relevant:

“(1) Subject to the provisions of subsection (2) of this section, a district council may charge such fees for the grant of vehicle and operators' licences as may be resolved by them from time to time and as may be sufficient in the aggregate to cover in whole or in part.

(a) the reasonable cost of the carrying out by or on behalf of the district council of inspections of hackney carriages and private hire vehicles for the purpose of determining whether any such licence should be granted or renewed;

(b) the reasonable cost of providing hackney carriage stands; and (c) any reasonable administrative or other costs in connection with the foregoing and with the control and supervision of hackney carriages and private hire vehicles”.

4. It does not appear to be in dispute that in setting the fee in respect of the licence the Local Authority took into account as *“costs in connection with the control and supervision of*

hackney carriages and private hire vehicles” the costs incurred by the Council in enforcing action against drivers for such things as speeding, smoking in the taxi, dressing inappropriately, parking badly, using mobile phones, carrying excess passengers, not permitting the carrying of an assistance dog, inappropriate dress and various uncivil and/or illegal conduct. For the purposes of this judgment, I shall call those “the Activities”.

5. The claimant argues that the expenses incurred in enforcement action in respect of the Activities is not permitted by Section 70 generally and section 70(1)(c) in particular since such expenses cannot be considered to be “*administrative or other costs in connection with the control or supervision of hackney carriages or private hire vehicles*”, rather they are costs incurred in connection with the control and supervision of drivers.
6. Since it is accepted that the expenses relating to enforcement action in respect of the Activities cannot be justified under section 70(1)(a) or (b) and that any right to factor those costs into the fees chargeable to operators can only be derived from section 70(1)(c), this case requires determination of what is encompassed by the phrase ‘*the control and supervision of hackney carriages and private hire vehicles*’ in section 70(1)(c) and whether it includes costs in respect of enforcement action relating to the Activities. The exercise to be undertaken therefore is one of construction of section 70(1)(c).
7. I was referred by Mr Gouriet QC, counsel for the claimant, to section 53 of the 1976 Act which deals with the licensing of drivers. It is as well I think to recite Section 53 insofar as it is relevant:

“(1)(a) Every licence granted by a district council under the provisions of this part of the Act to any person to drive a private hire vehicle shall remain in force for three years from the date of such licence or such lesser period as the district council may specify in such licence.

(2) Notwithstanding the provisions of the Act of 1847, a district council may demand and recover for the grant to any person of a licence to drive a hackney carriage, or a private hire vehicle, as the case may be, such a fee as they consider reasonable with a

view to recovering the cost of issue and administration and may remit the whole or part of the fee in respect of a private hire vehicle in any case in which they think it appropriate to do so”.

8. Mr Gouriet argues that the costs associated with enforcement action in respect of the Activities may, by virtue of Section 53, and he puts it no higher than that, be taken into account in setting a fee payable on the application for a licence to drive, a hackney carriage or private hire vehicle, but they do not fall within the remit of Section 70.
9. However, even if costs of enforcement of this nature are not recoverable under Section 53, Mr Gouriet argues that that does not make them recoverable under Section 70. He argues that there is no general principle of law which enables a Local Authority to recover by way of fees, its expenditure in connection with the grant and the administration of licences. In other words, he says that there is no general principle which entitles the Local Authority to administer a licensing scheme on the basis that it is self-funding. He asserts that insofar as a Local Authority is entitled to fix a fee that makes licencing self-funding, it is able to do so only as a result of the specific legislation entitling it to do so.
10. He argues that there are four categories governing the power of a Local Authority to charge a fee in respect of licences and that all four are essentially derived from statute. He offered the following examples for each category:
 - a. There is no legislation which permits a Local Authority to charge a fee for a licence to carry out street collections for charitable purposes and thus no fee can be charged for that type of activity, notwithstanding that the licensing regime may involve a Local Authority in expense.
 - b. On the other hand, some licenses, notably those for alcohol, entertainment and gambling, are capable of attracting a fee but the fee is fixed by regulation. Those fees may or may not cover the cost of administering the licensing regime in respect of those activities but whether it does so or not is irrelevant.

- c. The third category and the one which he argues applies in this case, is that sometimes statute enables the Local Authority to recoup specified expenditure. In that event, the fee can reflect only that specified expenditure and not any other expenditure such as, he would say, the expenditure in respect of enforcement in connection with the Activities.
 - d. There is a fourth category where statute gives a wide discretion to charge a reasonable fee. I am told that that is applicable to such activities as running a sex shop or street trading.
11. In the course of her submissions, Ms Clover, counsel for the defendant, referred me to a number of cases where the court has considered the principles involved in respect of the fixing of licence fees. It has to be said that in my judgment none of these cases permitted the conclusion that either, as a matter of principle, fees for licences could be set by Local Authorities at a rate that made the administration of the licencing scheme self-funding or that Mr Gouriet's 4 categories did not accurately reflect the licence fee regime and the restrictions on a Local Authority's power to fix its fees under that regime.
12. The first case to which she referred me was *R v Westminster City Council ex parte Hutton* [1985] 83 LGR 461. That case is indeed authority for the proposition that the cost involved in the grant or renewal of the licence for a sex shop should not fall on the Council taxpayers. That proposition was not disputed by Mr Gouriet who asserts that that is merely the manifestation of category d above.
13. She then referred me to *Kelly v Liverpool City Council* [2003] EWCA Civ 197. That case, like this case, concerned a hackney carriage licence and the effect of Section 70, but the issue in that case was not the question of whether the fee could be fixed on a basis which ensured that no costs fell on the Council tax payer. It was rather an issue relating to the power to charge a fee to re-inspect a vehicle which had previously failed an inspection. I observe that in any event, that case involved an analysis of Section 70(1)(a) of the 1976 Act whereas I am concerned with the interpretation of s70(1)(c). In any event, the analysis in that case concluded that the fee structure could not be a revenue raising measure and that

fees could only be charged which were sufficient to cover the costs of doing the three things referred to in Section 70(1). To that extent at least it sets restrictions on the Local Authority's power to fix the fee and to that extent supports Mr Gouriet's analysis.

14. Nor do I derive much assistance from the case of *R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council* [2015] UKSC 25 and [2017] UKSC 50, to which Ms Clover also referred me both at first instance and in the Supreme Court. As I understand that case, the issue was the construction of paragraph 19 of Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982. It is true that that case is authority for the proposition that licencing fees can be set on the basis which makes them self-funding. However, Mr Gouriet makes the valid point that the issue in that case related to the licensing of a sex establishment, which, as I have said, is subject to its own separate statutory regime.
15. If I was of the view that there was a general principle which entitled Local Authority licensing schemes to be self-funding then I accept that that may well assist in the construction of Section 70(1)(c). I am afraid, however, that I am not persuaded that there is such a general principle. As I have said, the cases to which I have been referred, albeit that they relate to an interpretation of an empowering statute, do not, in my judgment, support that conclusion.
16. I turn back to section 53. At this point I pause to record that Ms Clover invited me this morning to extend this hearing to encompass the construction of section 53 with a view to establishing whether or not the cost of enforcement in relation to the Activities could be taken into account in the fixing of fees for the driver's license in the event that it is not lawful for the Local Authority to factor those costs into the fee structure under s70. For the reasons I gave this morning, I did not consider it appropriate to embark upon that exercise, not least because there were no representatives of drivers in court, much less representatives primed and ready to argue issues as to the construction of Section 53 about which they would be directly affected.
17. I do however accept Ms Clover's point that the construction process in relation to Section 70 may be assisted by comparing the wording of Section 53 with that of Section 70. Mr

Gouriet did not suggest that regard should not be had to the existence of Section 53 and the fact that it provides a scheme for a fee to be charged for driver's licenses in respect of hackney carriages and private hire vehicles. Indeed, as I have said above, he himself referred me to it. However, I must recognise that, it does not follow that if Section 70 does not enable the fee to be fixed at a level that reflects enforcement action in respect of the Activities then Section 53 must. That must be so if I am right that there is no general principle that a licensing structure needs to be self-funding.

18. There may, and I put it no higher than this, be a hiatus whereby those costs have to be picked up by the general council tax payer. That might be the unintended consequence of the legislation or it might not be but, if it is, it is a matter for Parliament to rectify. Section 70 can only be construed in accordance with its terms where those terms are not ambiguous.
19. The comparison between the two sections is, suggests Ms Clover, instructive. Section 53 talks about recovering the cost of issue and administration. Ms Clover argues that this means the administration of the process of granting a licence and does not extend to administration after the grant of a licence. On the other hand, Section 70(1)(c) permits the Council to recover reasonable administrative and other costs in connection with the control and supervision of hackney carriages and private hire vehicles. She argues that must be something to do with the manner in which the vehicle is driven, that is, post issue of the licence. She argues that it must extend to post issue of licence matters since issues relating for example to the mechanical safety of a taxi are specifically covered by s70(1)(a).
20. She made it clear that it is the difference in wording between Section 53 and Section 70 that she relies on. In her Statement of Grounds of Response at paragraph 47, she argues that costs of enforcement in respect of the Activities fall under the definition of costs relating to control of supervision because the vehicles are being driven by regulated drivers.
21. First, let me say that I am not entirely convinced that mechanical issues are necessarily wholly covered by s70(1)(a). That subsection appears to relate to inspections for the purpose of determining whether a licence should be granted or renewed. It does not appear to me to have anything to say about mechanical issues relating to vehicles which might arise at other times, for example, between renewals. It is well known that if a taxi is repaired following

an accident the taxi driver is obliged to take the car to the Council for it to approve the condition of the car following those repairs. The process of approval of that mechanical issue will obviously involve the Council in some cost in the period between grant and renewal of the licence.

22. I have listened very carefully to Ms Clover's submissions and of course I have considered section 53 but I simply cannot accept that the costs of enforcement in relation to the Activities can sensibly be brought within the purview of the phrase '*the control and supervision of hackney carriages and private hire vehicles*'. It seems to me that these costs inevitably relate to the activities of drivers rather than vehicles.
23. If Section 53 provides a statutory basis for that to be factored into the fees payable by drivers then at least from the Council's point of view, well and good, but, if it does not, then, in my judgment, it does not form the basis for construing section 70(1)(c) to mean that they are recoverable under that subsection. That is all the more the case where there is no general principle of self-funding.
24. Really, I think I can put it no better than it was put by Males J when he gave permission. He says at paragraph 2 of his observations it is "*at least arguable (in my view, the argument is compelling) that many of the costs which the defendant attributes to the licensing of vehicles should properly be attributed to the licensing of drivers. This applies to all the items in paragraph 4 of the claimant's reply*". I say, in parenthesis as it were, that the items in paragraph 4 to which the learned judge refers are essentially the Activities. In the end, in my judgment, adopting the construction that Ms Clover champions would be to stretch the ordinary meaning of the language in that subsection beyond breaking point.
25. In my judgment it is clear that Section 70(1)(c) relates to the supervision and control of hackney carriages and private hire vehicles, not the supervision and control of drivers and enforcement steps in relation to the Activities in my view clearly relate to the activities of the driver, not the vehicle. That must be so even though it is the drivers that drive those vehicles.
26. It seems to me that it is not difficult to separate issues relating to the car from issues relating to the driver. An analogy may be helpful here although perhaps it is not a very elegant one.

If instead of the vehicle, we were talking about a gun and if instead of a driver we were talking about the controller of the gun and if we were to consider discharging the gun as the activity which needed to be policed, it would in my view be absurd to argue that if I were to shoot somebody that would be the action of the gun rather than the action of the controller of the gun.

27. I have had regard to the academic discussion in both *Button* and *Paterson*. The reference in *Button* is 4th Edition, Chapter 4, page 154. That seems to relate predominantly to Section 53 rather than Section 70, but insofar as it does relate to Section 70, the conclusion reached by the editor is perhaps informative. It is that '*It does not seem possible for a Local Authority to recover general compliance or enforcement costs for hackney carriages or private hire vehicles via the licence fees*'. If that is a general observation, then obviously it is equally applicable to Section 70 as it is to Section 53.
28. As to *Paterson*, I was referred to the 127th edition, paragraph 2.54 where it is said "*the difference in wording between Section 53(2) and Section 70 has led to the suggestion, that enforcement costs such as the prosecution of unlicensed drivers are not recoverable under Section 53(2), whereas they are in relation to the prosecution in relation to the unlicensed vehicles under Section 70. Opinion is far from unanimous, however, and until the matter is resolved by the High Court, it remains uncertain whether the recovery of enforcement costs as part of a drivers licence fee is or is not lawful*". With great respect to Mr Gouriet, who as I understand it is the editor of *Paterson*, that is not particularly helpful from where I am sitting.
29. However, for the reasons I have given, I am satisfied that it is appropriate to quash the fees decision fixing the fee because it incorporates expenses which in my view it ought not to have incorporated.
30. This leads me to the second limb of the challenge. It appears to be accepted that the Council have been incorporating the expenses involved in enforcement action relating to the Activities in their assessment of the level of fees payable by owners and operators for a number of years. The question arises as to what should be done about that if to have done so was unlawful?

31. The case of *R (on the application of Cummings) v Cardiff City Council* [2014] EWHC 2544 (Admin) is apposite in this context because it is authority for the proposition that there can be no cross-subsidy between different work streams.
32. Mr Gouriet paraphrases the effects of *Cummings* in paragraph 5 of his skeleton argument. He asserts that its effect is that, when determining hackney carriage and private hire vehicle licence fees, a Local Authority may take into account surpluses or deficits generated from fees levied in previous years in respect of meeting the reasonable costs of administration. But, the Authority may not make a profit from the license fees it charges; and must keep separate accounts for the surpluses and deficits arising under each of the licensing regimes. There must be no cross-subsidy between regimes and between licence types within a regime.
33. As I understand it, that was not a proposition with which Ms Clover took issue. She deals with it in paragraph 14 of her skeleton argument. The only qualification she appears to make is that there can be a broad-brush approach to analysing costs to avoid cross subsidy and it does not need to be done to a decimal point. The outcome is that if there has been cross-subsidisation then general principles would suggest that it needs to be corrected.
34. Ms Clover's position is that it is simply impossible now to make any appropriate adjustments, certainly going back to 2005, which is the date for which the claimants contend. I asked the parties to consider during the short adjournment how we deal with this issue if my construction of Section 70 favoured the claimant. I do not know if there has been any progress in that connection.

MR GOURIET: There certainly has not been any agreement and I have asked Mr Streeten for the simple reason he was a junior counsel in *Hemming*, and is much better able than I to help Your Lordship with the question of relief and I have asked him if he will take over.

JUDGE SAFFMAN: Right. Yes.

End of Judgment
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