Trinity Term

[2017] UKSC 50

On appeal from: [2015] UKSC 25

JUDGMENT

R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) (Respondents) vWestminster City Council (Appellant)

before

Lord Neuberger, President

Lord Mance

Lord Clarke

Lord Reed

Lord Toulson

JUDGMENT GIVEN ON

19 July 2017

Heard on 11 May 2017

Appellant	Respondents
David Matthias QC	Philip Kolvin QC
Charles Streeten	Victoria Wakefield
	Tim Johnston
(Instructed by Westminster City Council Legal Services)	(Instructed by Gosschalks)

LORD MANCE: (with whom Lord Neuberger, Lord Clarke and Lord Reed agree)

1.
This is a sequel to the Supreme Court's previous judgment dated 29 April [2015] UKSC 25; [2015] AC 1600. It is written with the benefit of the Court of Justice's answer dated 16 November 2016 ((Case C-316/15) [2017] PTSR 325) to the question which that judgment referred to the Court of Justice. The appeal concerns fees which were charged to the respondents on applying to Westminster City Council for sex shop licences for the three years ended 31January 2011, 2012 and 2013 and which included the council's costs of enforcing the licensing scheme against unlicensed third parties running sex shops ("enforcement costs"). The respondents' applications all in the event succeeded, and I can call them "the licence holders".

2.
Under domestic law the basis for charging such fees was and is found in paragraph 19 of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 as amended by the Policing and Crime Act 2009, section 27(7), reading:

“An applicant for the grant, renewal, variation or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority.”

In respect of all years ending on 31 January up to 2010, Westminster City Council was entitled to determine a reasonable fee which included enforcement costs, and to require this to be paid on application for a sex shop licence, subject to refunding of the part relating to enforcement costs, if the application was not granted: see paras 6-7 of our previous judgment.

3.
The position however changed with the coming into force in the United Kingdom with effect from 28 December 2009 of the Provision of Services Regulations 2009 (SI 2009/2999), giving effect domestically to EU Directive 2006/123/EC. The courts below held that, after this change, the only legitimate charges which Westminster City Council could levy related to the administrative costs of processing the relevant applications and monitoring compliance with the terms of the licence by licence holders (which I can call “processing costs”): see Court of Appeal judgment dated 24 May 2013 [2013] EWCA Civ 591; [2013] PTSR 1377, para 130. The council was not entitled to levy the (considerably larger) parts of the actual charges which related to the costs of enforcing the scheme against non-licence holders.

4.
On that basis, the Court of Appeal ordered Westminster City Council to determine a reasonable fee excluding enforcement costs for each of the years ended 31 January 2011 and 2012, and to “determine afresh” a reasonable fee excluding enforcement costs for the year ended 31 January 2013. The distinction between “determining”, in the first two years, and “determining afresh”, in the third year, arose because the issues before Keith J [2012] EWHC 1260 (Admin); [2012] PTSR 1676 covered all years ending 31 January 2007 onwards, and he held by his judgment dated 16 May 2012 that the council’s Licensing Sub-Committee had failed to determine any yearly fee after 7 September 2004 (when it determined the fee for the year ended 31 January 2005 and no more) until 5 January 2012 (when it determined the fee for the year ended 31 January 2013). All that had happened in the intervening years was that the council’s officers had simply assumed that the same fee as set on 7 September 2004 continued to apply and had charged licence applicants accordingly.

5.
Pursuant to the Court of Appeal’s order, Westminster City Council made corresponding repayments totalling £1,189,466 to the licence holders on 28 June 2013, together, it appears, with a further £227,779.15 paid by mistake (since it related to licence holders not party to the present proceedings).

6.
In our previous judgment, we took a different view from the courts below about the effect of the change worked by the 2009 Regulations giving effect to the EU Directive. We drew a distinction between two types of licensing scheme, at para 18 as follows:

“Type A: Applications for licences are made on terms that the applicant must pay:

(i) on making the application, the costs of the authorisation procedures and formalities, and

(ii) on the application being successful, a further fee to cover the costs of the running and enforcement of the licensing scheme.

Type B: Applications for licences are made on terms that the applicant must pay:

(i) on making the application, the costs of the authorisation procedures and formalities,

(ii) at the same time, but on the basis that it is refundable if the application is unsuccessful, a further fee to cover the costs of the running and enforcement of the licensing scheme."

7.
We held that, both under domestic law (paragraph 19 of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982) and by reference to EU law (Directive 2006/123/EC, implemented domestically by the Provision of Services Regulations 2009), Westminster City Council was entitled to operate a scheme of type A in relation to the licensing of sex shops. We referred to the Court of Justice the question whether it was entitled to operate a scheme of type B. The Court of Justice has answered that question in the negative, on the basis that a requirement to pay a fee to cover the costs of running the licensing scheme and enforcing it against unlicensed operators, refundable if the application for a licence fails, constitutes an illegitimate charge in respect of the procedure for authorisation.

8.
In the above circumstances, and despite the Court of Justice's answer in respect of type B, Westminster City Council submits that it is entitled to be paid or repaid the sums which it repaid to sex shop licence holders on 28 June 2013, following the Court of Appeal's order. The licence holders, on the other hand, submit that they are entitled to retain the repayment made to them in full, because it was charged in a way for which there was no warrant. The submissions on each side were complicated by reference to principles of unjust enrichment under both domestic and European law, in the latter case including the Court of Justice judgment in Lady & Kid A/S v Skatteministeriet (Case C-398/09) [2012] All ER (EC) 410, although I note in parenthesis that it may be significant that this related to tax, rather than a fee for a service.

9.
In my view, the correct analysis is simpler than some of the submissions made would suggest. The scheme which the council operated was only defective in so far as it required payment up front at the time of the application. Its invalidity was limited. Contrary to the respondents' case, European law permits a fee to cover the costs of running and enforcing the licensing scheme becoming due upon the grant of a licence. There is no imperative under European law, as incorporated domestically by the 2009 Regulations, to treat the whole scheme as invalid, rather than to invalidate it to the extent of the inconsistency: see Edward and Lane onEuropean Union Law (2013), para 6.16. Even under purely domestic law principles, a test of substantial severability is appropriate, rather than a rigid insistence on textual severability: see eg Director of Public Prosecutions v Hutchinson[1990] 2 AC 783, 811D-G and 813E-G. Any remaining element of the scheme which can stand by itself is able to do so.

10.
Here, the council was entitled to set and to require payment of a fee including enforcement costs as well as processing costs applicable to all those who, like the licence holders, actually received licences and benefitted by the council's enforcement action. Although it was wrong to charge the element of this fee relating to enforcement costs conditionally at the time of any licence application, this element was under the scheme due unconditionally once a licence was granted. As we said in our previous

judgment (para 23): “When the application succeeds, the payment made becomes due unconditionally”.

11.
Even if this were not the right analysis, nothing in the course of events to date can have affected paragraph 19 of Schedule 3 to the 1982 Act, or the council’s right to determine a proper fee under it. Even if there might hypothetically be an exceptional case in which lapse of time and intervening circumstances might make it oppressive to set such a fee, there is no ground to put this case into that category.

12.
It follows that, in so far as the council has determined a reasonable fee, including enforcement costs, there is no answer to the council’s claim to be paid or repaid it now. Before Keith J, it was the licence holders’ case that, if the court concluded that a fee determined by the council (whether or not it could legitimately include enforcement costs) was unreasonable, the fee would have to be remitted to the council for re-determination of a reasonable fee. Before the Supreme Court, however, the parties have agreed that any such re-determination should be undertaken by a judge of the Administrative Court.

13.
The parties are however at odds as to whether there have been any relevant determinations in respect of the three years ending 31 January 2011, 2012 and 2013, which are now before the Supreme Court. As to this, the position is clear in respect of the third year, ended 31 January 2013. The parties are bound by Keith J’s finding that the council did on 5 January 2012 determine fees of £19,973.00 for a new sex shop licence and of £18,737.00 for renewal of a sex shop licence for the year from 1 February 2012 to 31 January 2013. Both these sums covered enforcement costs. Hence, when the Court of Appeal came to make its order in the light of its conclusion that the council could not on any basis recover enforcement costs from licence holders, it ordered the council to “determine afresh” the appropriate fees for the year ended 31 January 2013. This the council did by eliminating and repaying the enforcement costs. The position is now reversed, and the council is entitled to recover these enforcement costs, subject to corresponding reduction if and to the extent that the Administrative Court determines the enforcement costs determined to have been unreasonable.

14.
The position in respect of the two earlier years, ending 31 January 2011 and 2012 is slightly more complex. The council failed from 5 September 2004 until 5 January 2012 to determine annual fees for any of the years ended 31 January 2006 to 31 January 2012; and, when it was ordered to do so by Keith J and the Court of Appeal retrospectively in relation to the two years ended 31 January 2011 and 2012, it was ordered, and so did so, on the basis that enforcement costs should be excluded. In the light of the Supreme Court’s judgment, that order was incorrect, and the council could and should have been ordered to determine a fee in relation to those two years which included enforcement costs, just as it was in relation to the prior years before the EU law change on 28 December 2009.

15.
The council in response would, I understand, say that it did in effect determine a fee including enforcement costs, when, pursuant to the Court of Appeal’s order, it analysed the amounts which it had in fact charged for the years ended 31 January 2011 and 2012, determined the amount referable to enforcement costs included therein and approved a fee excluding that amount. It may also be able to suggest that fees for these years have been determined at some other point or points in time. Any such submission can be left for the Administrative Court to consider if it has any significance. For my

part, it is sufficient to say that, even if any such submission be rejected, the council must now clearly be put in the same position as it would have been, if the Court of Appeal had reached the same conclusion as the Supreme Court. In that event, the Court of Appeal would have ordered a determination of a fee for each year which included enforcement costs and it would not have ordered repayment of the element of enforcement costs as it did. As a matter of obvious justice, the Supreme Court must be able to restore the parties to the position they should have been in, by now ordering repayment by the licence holders of the enforcement costs, to the extent that they meet the criterion of reasonableness. The issue potentially remaining on this basis is the reasonableness of the sum identified as enforcement costs, and now to be repaid to the council. This issue should be remitted, as agreed, to the Administrative Court.

16.
Mr Kolvin QC for the licence holders submits that there are other matters which should also go back to the Administrative Court. The first two appear to go to the account prepared by the council in 2013 following the Court of Appeal's judgment, which account was not the subject of any challenge before the Supreme Court, other than by reference to the issue indicated in para 8 of this judgment. Whether that account has been properly prepared in these two respects can nevertheless be appropriately remitted to the Administrative Court.

17.
The first matter relates to a surplus of £116,520 shown, according to figures said to have been produced to Keith J, as arising from a difference between the total income from licences and the total cost of the licensing regime in the year ended 31 January 2005. The licence holders submit that it was a breach of the Court of Appeal's order not to bring any such surplus into account, since para 2 of that order refers to "the need to bring into account any previous surpluses or deficits" when determining a reasonable fee for the year ended 31 January 2011. It is not clear to me that this contemplates going back as far as a year ended 31 January 2005, since Keith J's order dated 17 July 2012 only refers to "the need to carry forward from year to year any previous surpluses or deficits from each of the said years" ending 31 January 2007 onwards, those being the only years which it appears were in issue before him. Any issues about the licence holders' right to raise this point as well as about its merits should be remitted to the Administrative Court.

18.
A second matter raised is that the council failed fully to account for some £80,611 of income received when calculating fees, and so accounting for profits, in respect of the years ended 31 January 2010 and 2011. Again, the admissibility and merits of this issue should be remitted to the Administrative Court.

19.
A third point was raised in oral submissions by Mr Kolvin. It related to interest which should, he submitted, be allowed on council surpluses in relation to sex shop licensing totalling £207,869 in respect of the years ended 31 January 2006 to 31 January 2010. The order made by Keith J contained a specific paragraph, number (7), dealing with interest on any excess repayable in respect of the years ending 31 January 2007 to 31 January 2010. The Administrative Court can no doubt consider what interest is due under that paragraph and whether it has been paid or accounted for. I do not at present see any basis for any further claim for interest on any earlier year or years, and the appeal to this court certainly did not involve any such claim. But it will be open to the Administrative Court to consider whether any such further claim falls within the scope of any of the issues which are open or orders which have been made in the present proceedings.

20.

Finally, Mr Kolvin emphasised that some of the licence holders party to these proceedings are no longer in existence or in business, and that any payment or repayment which has to be made by licence holders under this judgment must be according to the pro rata sums actually received by each licence holder. That is, I understand, common ground.

21.

Lord Toulson, who sadly died before this judgment was handed down, had indicated agreement both with its essential reasoning and with the conclusions reached in it.

22.

The parties should liaise with the Registrar with regard to an appropriate form of order to give effect to this and the court’s previous judgments, the detailed working out of which, together with the claim to recover the £227,779.15 allegedly paid by mistake as mentioned in para 5 above and the matters identified in paras 14 to 18 above, will be remitted to the Administrative Court. The parties will be at liberty to make submissions in writing on costs.