



19 July 2017

PRESS SUMMARY

R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) (Respondents) v Westminster City Council (Appellant) [2017] UKSC 50
On appeal from: [2015] UKSC 25

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Reed, Lord Toulson

BACKGROUND TO THE APPEAL

This appeal follows the Supreme Court’s previous judgment dated 29 April 2015, and concerns fees charged to the respondents when they applied to Westminster City Council (“the Council”) for sex shop licences for the three years ending 31 January 2011, 2012 and 2013. These fees included the Council’s cost of enforcing the licensing scheme against unlicensed third parties running sex shops (“enforcement costs”) [1].

The courts below held that, following the coming into force in December 2009 of the Provision of Services Regulation 2009 (SI 2009/2999) (“the Regulation”), giving effect domestically to EU Directive 2006/123/EC, the only charges which the Council could legitimately levy related to the administrative costs of processing the relevant applications and monitoring compliance with the licence terms by licence holders. The Council was not entitled to levy enforcement costs [3].

On that basis, the Court of Appeal ordered the Council to determine a reasonable fee excluding enforcement costs for the two years ending 31 January 2011 and 2012, and to “determine afresh” a reasonable fee excluding enforcement costs for the year ending 31 January 2013 [4]. Pursuant to that order, the Council made repayments totalling £1,189,466 to the licence holders on 28 June 2013, together with a further £227,779.15, apparently paid by mistake [5].

In its previous judgment, the Supreme Court, departing from the view taken by the lower courts, drew a distinction between two types of scheme. Under Type A, applications for licences are made on terms that the applicant must, upon their application being granted, pay a fee to cover the cost of administering and enforcing the licensing regime. Under Type B, which represents the scheme actually adopted by the Council, applications for licences are made on terms that the applicant must, at the time of making the application, pay a fee, refundable in the event that the application fails, to cover the cost of administering and enforcing the licensing regime [6]. The Supreme Court held that Type A schemes are permissible both under domestic and EU law, and referred to the European Court of Justice the question whether the Council was entitled to operate a Type B scheme. On 16 November 2016, the Court of Justice answered that question in the negative [7].

The Council now submits that it is entitled to be paid or repaid the sums it repaid to licence holders on 28 June 2013. The licence holders in turn contend 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 [8].

JUDGMENT

In a unanimous judgment given by Lord Mance, the Supreme Court holds that in so far as the Council has determined a reasonable fee, including enforcement costs, it is entitled to be paid or repaid it now

by the licence holders (according to the pro rata sums actually received by each licence holder). The issue of the reasonableness of the sum identified as enforcement costs is to be remitted, as agreed, to the Administrative Court, together with the claim to recover the £227,779.15 allegedly paid by mistake.

REASONS FOR THE JUDGMENT

Although reference was made on each side to principles of unjust enrichment, the correct analysis is a simpler one. The Council's scheme was only defective in so far as it required payment up front at the time of the application: EU law permits a fee covering enforcement costs becoming due upon the grant of a licence. As a matter of both EU and domestic law, there is no imperative to treat the whole scheme as invalid, rather than to invalidate it to the extent of the inconsistency [9-10]. In relation to the three years before the Supreme Court:

- a. Year ending 31 January 2013: The Council gave effect to the Court of Appeal's order to "determine afresh" the appropriate fees for this year by eliminating and repaying the enforcement costs. In light of the Supreme Court's judgment, the Council is now entitled to recover these enforcement costs, subject to a corresponding reduction if and to the extent that the Administrative Court considers the enforcement costs determined to have been unreasonable [13].
- b. Years ending 31 January 2011 and 2012: The Council failed to determine annual fees for the years ending 31 January 2006 to 2012. Pursuant to the order of the lower courts, the Council did so retrospectively in respect of the two years ending January 2011 and 2012, and on the basis that enforcement costs should be excluded. That order was incorrect: the Council could and should have been ordered to determine a fee for those two years which included enforcement costs [14]. The Council must now be put in the same position it would have been in had the Court of Appeal reached the same conclusion as the Supreme Court [15].

In addition, the admissibility and merits of the following issues can be appropriately remitted to the Administrative Court:

- a. Whether it was in breach of the Court of Appeal's order not to bring an apparent surplus of £116,520 into account. This surplus is said to arise from a difference between the total income from licences and the total cost of the licensing regime for the year ending 31 January 2005 [16-17].
- b. Whether 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 ending 31 January 2010 and 2011 [16; 18].
- c. Whether a further claim by the licence holders for interest should be allowed on Council surpluses in relation to sex shop licensing totalling £207,869 in respect of the years ending 31 January 2006 to 31 January 2010 [19].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>