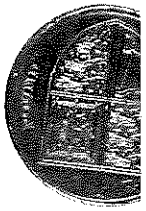

Hemming: outcome and implications

The judgment in *Hemming* will have far-reaching consequences for the funding of regulated entities, says **Jeremy Phillips**

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This first licensing update of the year focuses on what may prove to be the most important case in living memory for the funding of regulated entities: *Hemming*.

Broad remit

On 13 January 2015, the Supreme Court considered the case of *R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council*. While the case started as a simple challenge to Westminster City Council's (WCC) substantial fees for the consideration of applications for new sex entertainment venue licences, its implications have steadily broadened as it has progressed.

Not only could the ruling affect the fees for more than 600,000 licences in England and Wales, with counsel for the appellant, Philip Kolvin QC, arguing that fees regulations governing premises licences, personal licences and club premises certificates may be unlawful, but it is also now perceived as having broad implications for regulators generally, as evidenced by the more than 3,000 pages of pleadings and skeleton arguments put before the justices.

In the Supreme Court, the interveners were an extremely diverse body: the Architects Registration Board, the SRA, the BSB, the Care Quality Commission, the Farriers Registration Council, the Law Society, the Bar Council, the Local Government Association (LGA) and HM Treasury.

Following the appellants' successful appearances in the High Court and the Court of Appeal, the facts before the Supreme Court justices were summarised as follows: the respondents ran sex establishments, which were required to be licensed. Westminster was responsible for setting the fee for such licences to be granted or renewed. The fee was set at £28,531 in 2003 by WCC's major licensing applications committee, and at £29,102 in 2004 by its licensing sub-committee.

Subsequently, neither committee considered the fee (although the fee was reviewed annually by one of the appellant's officers), so that it remained the same until the year ending 31 January 2012.

The fee was calculated so as to cover the cost of: (i) enforcing the licensing regime against unlicensed operators and monitoring compliance by licensed operators; and, (ii) administering the application. Over 90 per cent of the fee was spent on (i).

The respondents brought a judicial review in 2011, claiming that WCC's setting of the fee was unlawful. They argued, *inter alia*, that since the Provision of Services Regulations 2009 had come into effect in 2009, implementing directive 2006/123/EC, the appellant was disentitled from including in the fee the cost of enforcing the licensing system against unlicensed operators.

Mr Justice Keith upheld the respondents' claim and ordered the appellant to make restitution of the difference between the payments it had received and the lawful fee. The Court of Appeal dismissed the appellant's appeal, except as to the amount that had to be repaid. The ruling was still said to have left Westminster with a £2m bill. The authority appealed to the Supreme Court.

Domestic powers

The principal arguments advanced by the appellant in the Supreme Court were as follows:

1. The approach adopted by the Court of Appeal, as with Keith J below, led to the reversal of the long-standing domestic powers to set fees within a licensing regime, as set out in *R v Westminster CC ex p Hutton* (1985) 83 LGR 516, in the absence of any evidence that this was the intended effect of the EU in enacting the directive, or of parliament in implementing it through the regulations.
2. The construction adopted by the Court of Appeal did not accord with the purposes of the directive, and indeed ran quite contrary to those purposes, because the construction adopted critically undermined the authorisation schemes in question. The result of the construction of the regulations and directive adopted by the Court of Appeal would be to make such licensing or regulatory regimes often "effectively impossible to run".

3. More specifically, regulation 18(4) of the Provision of Services Regulations 2009 should be construed as including costs of enforcement under a licensing scheme as part and parcel of the "costs of the procedures and formalities under the scheme".
4. Alternatively, the appellant maintained that the fee charged to successful applicants (£26,435) as opposed to the fee charged to all applicants (£2,662) should not properly be regarded as falling within regulation 18 at all.

Finally, in their original application, the appellants invited the Supreme Court to make a reference to the European Court of Justice (CJEU), on the grounds that the correct interpretation of the term 'authorisation procedures' was central to the determination of the question before the court.

The point was not acte clair. The issue had not previously been decided by the CJEU and neither party, following a request from the Court of Appeal, had been able to identify any judicial consideration of article 13(2) of the services directive in other member states. WCC also submitted that the scope of the term 'authorisation procedures' was likely to be of importance not only to regimes extending beyond the licensing regime in the UK, but also to member states more widely. Subsequently, however, a decision was made not to proceed with this request.

In reply, the respondents suggested that the issues remaining were far more straightforward: simply, was a licensing authority entitled to charge to lawful, licensed operators as part of their licence fee, the costs of prosecution of illegal, unlicensed operators?

Fleshing out

The outcome of the most recent stage of these proceedings is far from certain. While the original claimants were largely successful below, that was before the 'consequentialist issues', as they were termed in the Court of Appeal, had been fleshed out.

As Lord Justice Beatson observed at that stage (at paragraph 93): "The thrust of Miss Lieven's [who, with David Matthias QC, appeared for Westminster City Council in the Supreme Court] submission is that the judge's interpretation will mean that the funding for such activities is imperilled, but the post-hearing submissions did not include material on this."

Beatson LJ continued (at paragraph 97): "The submissions made about these other areas, while informative, are insufficiently detailed to enable anything more than an impression to be gained of how, if at all, the Services Directive and the 2009 regulations might apply to them and its impact on monitoring and enforcement. There was, for example, no evidence about what the position would be if the fees payable by practising solicitors could not be used to monitor and prosecute people who hold themselves out as solicitors."

Finally, at paragraph 98: "For these reasons, like the judge, I am not satisfied that the consequentialist arguments about the effect on other regulated areas advanced by the council in support of its construction have been made out.

"They do not, on the material before this court, justify a departure from the clear wording of the Services Directive and the 2009 regulations or show that the construction adopted by the judge is inimical to the purposes of the directive."

Before the Supreme Court, the position was very different, with detailed information being lodged by the interveners to demonstrate just what the consequences of the court's decision might be. For example, in preparation for the case, the LGA conducted a survey of local authorities on licence fee setting, looking at a range of fee regimes (including a number not ostensibly covered by the Services Directive). In the summer of 2014, the LGA advised councils to refrain from issuing refunds until the Supreme Court had decided the case.

It is likely that the court will take some time to consider that material in the light of the arguments recently canvassed before it. A detailed analysis of the decision will be given as soon as the judgment of the court is handed down.

Should the Supreme Court dismiss the appeal, then the government will no doubt give urgent consideration to legislation to remedy the potential mischiefs identified by the interveners, while at the same time recognising the need to observe the requirements of the directive. SJ

> **The implications of the case have steadily broadened as it progressed**