

Licence to thrill

The renewal of a lap dancing club's licence is just one of the cases to reach the senior courts, writes **Jeremy Phillips**



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Following my previous analysis of the argument in the Supreme Court (SJ 159/5), I should, of course, start with that court's landmark decision in *R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) (Respondents) v Westminster City Council (Appellant)* [2015] UKSC 25. In the courts below, Mr Hemming and his supporters had succeeded on virtually every front. However, as I indicated in my previous analysis, the outcome of the most recent stage of these proceedings was far from certain. And so it proved to be.

Giving the unanimous judgment of the court, Lord Justice Mance arrived at a contrary conclusion to the Court of Appeal, holding that a European directive did not 'preclude a licensing authority from charging a fee for the possession or retention of a licence, and making this licence conditional upon payment of such fee'. In his judgment, there was no reason why fees 'should not be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences.'

As a consequence of that view, the court had no doubts that a scheme which provided for a fee being payable at the time of application to cover the costs of processing the application, followed by a fee payable if the application was successful (to include the costs of enforcement of the sex establishment regime), was lawful. As to the legality of a scheme that required full payment to be made on the application, with a refund to unsuccessful applicants, the court was more doubtful and referred that discrete issue to the European court.

Procedural regulations

Other licensing cases that have reached the senior courts include a brace of hearings where the issue was the extent to which licensing authorities needed to comply with the procedural regulations underpinning legislation. In the first, *R (D&D Bar Services Ltd) v Romford Magistrates' Court and the London Borough of Redbridge* [2014] EWHC 213

(Admin), the authority accepted that it had failed to include within its statutory notice the grounds upon which the premises licence was being reviewed.

A secondary challenge (to the apparent amusement of those resisting the application), raising equality issues, complained that three lines directing the public to the council's website were printed smaller than the prescribed 16-point font.

The challenge failed, the court holding that it could never have been parliament's intention that 'minor errors' on a notice or advertisement for a licensing review should make any subsequent consideration of a licence void. While there had to be substantial compliance, the district judge had been right to follow the principle that the court should consider what consequences might have flowed from any breach. A permission to appeal, subsequently granted by the Court of Appeal subject to conditions as to costs, was not pursued.

In an associated case, *R (on the application of Yasar Akin (t/a Efe's Snooker Club)) (Claimant) v Stratford Magistrates' Court (Defendant) and Hackney London Borough Council (Interested Party)* [2014] EWHC 4633 (Admin), a similar challenge arose. Again, the court applied the approach in *R v Secretary of State for the Home Department ex p. Jeyanthan* [2000] 1 WLR 354 and said that tribunals should apply their minds to the following three questions:

1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement, and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance?
2. Is the non-compliance capable of being waived, and, if so, has it, or can it and should it, be waived in this particular case?
3. If it is not capable of being waived or is not waived, then what is the consequence of the non-compliance?

Dismissing the challenge, the court also held that there was no evidence that the licensee had suffered any prejudice as a result of the failure.



New, wider powers gave councils virtually free rein in refusing the renewal of some licences

Summary review

Another case of significance (where an application to the Court of Appeal for permission is pending) is *R (Sharonjeet Lalli) v Metropolitan Police Commissioner and Newham Borough Council* [2015] EWHC 14 (Admin). In *Lalli*, the police applied for the summary review of a premises licence on the basis of a superintendent's certificate that the premises were 'associated with serious crime or serious disorder or both'.

The certificate was issued on the basis of a single incident where a customer was ejected with some force from the pub by the licensee's husband, with kicks being exchanged in the process. Outside the pub, the unruly customer was then assaulted by another, causing him to be rendered unconscious. Criminal charges were brought against both the husband and the customer assailant. Critically, it was accepted by the police that this was a 'one-off' event and that there had been no serious crime or disorder in the premises in recent years.

At an *ex parte* hearing, the licensing authority suspended the licence as an interim step. The suspension was extended at a subsequent *inter partes* hearing. At the necessary review hearing, the licence was revoked. The issues before the High Court were:

- What was meant by the requirement that premises were 'associated with serious crime or serious disorder'? Did a single incident where excessive force was used to evict a member of the public mean that the premises could be so 'associated'?
- Could a reasonable police officer have arrived at such a conclusion in the circumstances?
- Before the council proceeded to decide whether to take 'interim steps', should it have decided whether the certificate was ostensibly valid?

Noting that the Home Office guidance on summary reviews, which dealt with such issues, was seriously flawed, the High Court held nonetheless that an association between the premises and serious violence had arisen on the basis of the single incident.

By way of a postscript, on the appeal, heard some nine months later and long after the High Court challenge, the magistrates' court overturned the council's decision to revoke and determined that the imposition of a condition (among others) preventing the licensee's husband from managing the premises would suffice.

Licence renewal

There have been a number of challenges in the High Court to decisions concerning what are

euphemistically known as 'sexual entertainment venues' (SEV), a new category of sex establishment established by schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, through the Policing and Crime Act 2009, to deal with the proliferation of so-called 'lap dancing' clubs. The new, wider powers gave councils virtually free rein in refusing the renewal of such licences.

In the widely followed case of *R (Alistair Thompson and Spearmint Rhino Ventures (UK) Limited) v Oxford City Council* [2014] EWCA Civ 94, the Court of Appeal confirmed that even though premises might have previously relocated to a location which was more acceptable to a licensing authority, which had then approved its licence, that authority might then proceed to decline renewal the following year without it being necessary for an objector to demonstrate that something had changed since the decision granting the licence.

However (differing with the court below), the decision-maker did have to have due regard to the fact that a licence was previously granted. Further, if there was no relevant change of circumstances, the decision-maker had to give its reasons for departing from the earlier decision.

In the present case, it was sufficient that the decision had made it clear that evidence concerning the operation of the premises over the preceding 12 months and other changed circumstances had led to a different overall conclusion. As regards a potential change of circumstances, the ability to take into account forthcoming developments could not be open-ended. The court suggested that a council might not rely, for example, on a development plan that contemplated development, say, some five years in the future.

Formal constitution

Finally, in *R (on the application of Bridgerow Limited) v Cheshire West and Chester Borough Council* [2014] EWHC 1187 (Admin), the High Court quashed the decision of the licensing authority regarding an SEV. In that case, Mr Justice Stuart-Smith held that where a council had published a formal constitution and a decision was subsequently taken in a way that did not comply, that decision had been taken by a group of people who had no power to take it and was therefore unlawful.

That concludes this brief review of recent licensing cases. As ever, I will be pleased to address any queries raised with me by SJ readers. SJ