

BIRMINGHAM CITY COUNCIL

**REPORT OF THE DIRECTOR OF REGULATION AND ENFORCEMENT
TO THE LICENSING AND PUBLIC PROTECTION COMMITTEE**

15 November 2023
ALL WARDS

REVIEW OF LICENSING SERVICE FEES AND CHARGES 2024/2025

1. Summary

- 1.1 The Corporate Charging Policy and Financial Regulations require that fees and charges levied by the Licensing and Public Protection Committee be reviewed on an annual basis to ensure the continued full recovery of costs.
- 1.2 It should be noted that some of the fees relating to areas which come within your Committee's remit are set nationally through statute, and these cannot be varied by your Committee.
- 1.3 The report covers the following Fees and Charges:
 - a) Hackney Carriage & Private Hire Licences.
 - b) Sex Establishments
 - c) Massage and Special treatment
 - d) Skin Piercing Registrations .
 - e) Licensing Act 2003
 - f) Gambling Act 2005

2. Recommendations

- 2.1 That, subject to any statutory advertisement process, the changes to the Licensing Service fees and charges be approved to take effect from 1st April 2024, including the new fee proposed for Classification of Films at Appendix 4b
- 2.2 That the Licensing Service fees and charges as detailed in Appendix 3b and 4a be noted.

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3. Background

- 3.1 The City Council's Corporate Charging Policy and Financial Regulations require that Chief Officers, at least annually, report to and seek approval from Committee on a review of all fees and charges levied for services provided. This report also takes account of the legal framework within which certain licence fees must be set.
- 3.2 The Licensing Service receives no corporate budget allocation and as such must meet any and all expenditure from within its own income. The level of income is entirely dependent upon the number of licences applied for, issued or renewed in a particular year.
- 3.3 In order to ensure the fees accurately reflect the true cost of administering and processing the licences the fee calculations are ordinarily based on the finalised accounts from the previous financial year as this is more reliable than trusting in projections and estimates and is accepted as best practice in fee calculations of this kind. At the time of writing the report, the accounts for 2022/23 were not yet finalised but have been used as the best available information.
- 3.4 Members will note a blanket percentage change has not been applied, but that each fee has been adjusted to take into account the changes in overhead costs, officer times and also the cost of physical items such as badges/plates.
- 3.5 The time taken to process and administer each licence type is verified each year to ensure the calculations are accurate. Costs for peripheral items such as vehicle plates, badges, semi-permanent door signs, meter testing etc. are added in after the time is calculated, as would any restitution of carry forward balances. This accounts for the variance in cost between the different types of vehicle licence.
- 3.7 The fees proposed in this report are calculated to recover the full cost of carrying out the service. This includes all administrative costs, any recharge of officers' time in appropriate cases when carrying out inspections of premises and other compliance duties (where applicable).
- 3.8 The fees proposed fulfil the main requirement of assuring that full costs are recovered from the income generated wherever possible.
- 3.9 The legal requirement for a Licensing Service to recover only "reasonable costs" takes precedence over the City Council's Corporate Charging Policy and the requirement to maximise income. Licence fees prescribed by statute also take precedence over the Corporate Charging Policy.
- 3.10 In setting the fees we have also taken account of the various precedents set by case law in the various area of licensing. A summary of these cases is provided at Appendix 5.

3.11 Every licensing authority is different and will set their own fees according to their own service delivery costs, and additional costs (such as legal and democratic services, IT, rent etc.) and incorporating any carry forward surplus or deficit they may have accrued.

4. The Proposed Fees:

4.1 Hackney Carriage and Private Hire: Drivers, Vehicles and Operators.

4.1.1 Whilst it must be acknowledged that the licensed taxi and private hire trade has been under significant pressure following the global pandemic, costs must be covered. Officers continue to try and operate in the most efficient manner with the resources available.

4.1.2 The majority of fees are proposed to increase, with just the large and very large operator fees set to reduce. This is as a result of a change to the manner in which these inspections are conducted which is more efficient, and therefore less time consuming which leads to a reduced fee.

4.1.3 Since the very large operator fee was introduced, there have been no applications for this type of licence, as there have been no new applications, nor any renewals due in that period.

4.1.4 It should be noted the operator licences only account for less than 5% of the officer time within the team, and the number of licences is very low (in fact no very large licences have been issued)

4.1.5 In real terms, the licence fee for a vehicle licence will effectively cost around 50 pence per day, with a driver licence approximately 25 pence per day.

4.2. Sex Establishments. Sex Shops, Sex Cinemas and Sexual Entertainment Venues (SEV's)

4.2.1 In setting fees for Sexual Entertainment Venues, Sex Shops and Sex Cinemas we have taken note of the relevant case law. Most notably the 'Hemming' case.

4.2.2 Members should note that sex establishment fees in Birmingham have been reviewed regularly by the Licensing and Public Protection Committee and that as it has not been necessary for officers to take enforcement action against an unlicensed sex establishment our fees have not included the cost of enforcement, other than the cost of achieving compliance amongst licensed businesses.

4.2.3 Schedule 3 to the 1982 Local Government (Miscellaneous Provisions) Act states that an applicant for the grant, renewal, variation or transfer of a sex establishment licence shall pay a **reasonable fee** determined by the appropriate authorities but does not expand on what would be considered to be reasonable. Case law relating to fee levels in various licensing cases has agreed a general principle that licensing fees should not be used as a method of creating revenue.

4.2.4 The relevant fees are listed at Appendix 2.

4.2.5 Members will note the fees are due to reduce for Sex Establishments. As detailed earlier within the report, fees are calculated on data from the previous years. The amount of officer time required to be spent on this kind of licence was significantly lower, predominantly due to the pandemic which affected this business area more than any other within our remit.

4.2.6 Much like some of the Private Hire Operator fees, which are due to be reduced – the sex establishments only account for 2% of the officer time. As a result, the reduction in income will be minimal.

4.3. Birmingham City Council Act 1990
Massage and Special Treatment (MST)

4.3.1 This local legislation requires a licence to be granted in order to carry out certain activities such as provision of massage, or other treatments such as radiant heat or light treatment. The fee relates solely to this Act and does not relate to any other regulation the business may be subject to - such as health and safety or legislation controlling the use of sunbeds etc.

4.3.2 The fees are listed at Appendix 2. Again, here are some increases and decreases owing to the amount of officer time spent on the different transactions.

4.3.3 The MST licences are little over 1% of the team's work.

4.4. Local Government (Miscellaneous Provisions) Act 1982
Skin Piercing (tattooists, piercers etc)

4.4.1 This legislation requires those wishing to carry out skin piercing activities to register with the Local Authority. This is a registration, not a licence or a permit. The fee relates solely to this registration and does not relate to any other regulation the business may be subject to - such as health and safety requirements.

4.4.2 The relevant fees are listed at Appendix 2

4.5 The Gambling Act 2005 –
Statutory Maximum Fees.

4.5.1 Some fees for the Gambling Act 2005 are determined by Licensing Authorities subject to Government prescribed *maximum limits*. These fees are listed at Appendix 3a.

4.5.2 The other fees listed in 3b were set by Government in 2007 and we are not aware of any proposals to increase them.

4.6. The Licensing Act 2003
Statutory Fees

4.6.1 The fees for this licensing regime are set nationally by the Government and are detailed at Appendix 4a we are not aware of any proposals to increase them, despite them having been set in 2005.

4.6.2 It is important to note, the majority of the work of the General Licensing Team is Licensing Act 2003 matters. The fees still do not accurately reflect the costs associated with this work. Officers continue to lobby for amendment to these fees at every opportunity.

4.6.3 Classification of Film Works

4.6.4 One of the functions under the Licensing Act 2003 is the classification of films not otherwise classified by the British Board of Film Classification. (Or following a request for local consideration of the rating).

4.6.5 This function requires officers to view the recordings and assess, in accordance with strict guidance, the appropriate classification for the work. This has previously not had any accompanying fee, but following networking discussions with colleagues in other authorities it has been identified that this is in fact a service for which the costs may be recovered.

4.6.6 A schedule of proposed fees is included at Appendix 4b.

4.7 Services for which no fee can be levied:
Charitable Street Collections, House to House Collections.

4.7.1 House to House Collections are regulated by the House to House Collections Act 1939 and the House to House Collection Regulations 1947. The object of the Act is to provide for the regulation of house to house collections for charitable purposes. The legislation does not allow the Local Authority to charge a fee for processing these licences.

- 4.7.2 Likewise, charitable street collections are regulated by The Police, Factories etc. (Miscellaneous Provisions) Act 1916. The Act requires collectors to obtain a permit from the Licensing Authority. The legislation does not allow the Local Authority to charge a fee for processing these permits.
- 4.7.3 With no budget allocation from the General Fund for this service, the cost of administering these charitable collection applications adds to the deficit accrued by the service.

5. Consultation

- 5.1 Under Section 70(2) of the Local Government (Miscellaneous Provisions) Act 1976 (LGMPA 76), a Local Authority is required to advertise changes to fees in respect of hackney carriage and private hire vehicles and private hire operators by placing an advert in a local newspaper for 28 days before it can apply the new fees and it must consider any objections. Although it must consider them it does not have to vary the proposal as a result of them.
- 5.2 Should any objections be received within that time, they must be considered by your Committee, thereby potentially delaying the date of implementation for the revised fees for the Licensing Service as set out in this report.
- 5.3 There is no requirement upon the Local Authority to advertise or consult on any alteration to driver fees. Those fees must simply be related to the recoverable costs (LGMPA 76 s53(2)).

6. Implications for Resources

- 6.1 The proposed fees are calculated to ensure the services continue to be managed within the approved cash limits and in line with the financial regulations relating to these services.
- 6.2 The fees and charges proposed within this report are calculated based on historic income and expenditure for 2022/23 (in line with previous practice) and include the direct costs of the delivery of services and a proportion of indirect central business support costs e.g., Human Resources, Legal, IT, Finance, Procurement and Democratic costs.
- 6.3 It should be noted that fees and charges are recalculated annually and that they may increase or decrease depending on the cost of delivering the service in the previous year and any carry forward balances.

- 6.4 Further to the right to object as detailed in 5.1 above, there are three possible ways in which the fees could be challenged:
- Judicial review of the Council decision based on the decision being Ultra Vires or considered to be unreasonable or irrational (known as Wednesbury Principles).
 - Through the District Auditor – if a Birmingham resident objects to the Local Authority accounts on the grounds that an item is contrary to law or
 - If the Council proposes to set an unlawful fee. This must be reported to and considered by the Monitoring Officer.
- 7.5 The proposed fees have been calculated having regard to the accounts of the previous financial year in accordance with best practice advice and with regard to significant case law. There is no statutory method in which to calculate the fees.
- 7.6 Any decision to deviate from the proposed fees would need to be reconciled with the potential impact this would have on covering the cost of delivering the service.
- 7.7 Any decision to set fees otherwise than in accordance with the proposals within this report without appropriate justification is likely to increase the risk of challenge.

8. Future Financial Plan

- 8.1 In 2022/23 and 2023/24 significant progress was made towards replacing the licensing software system (SOPRA) and sourcing an online application system for licences. This project has been much slower than anticipated but is still progressing. Back office functionality is implemented, with online applications scheduled to be completed before the end of the 2023/24.
- 8.2 Although fees are calculated using historic accounts, it is important to also have regard to the future. The costs of replacing the licensing system have yet to be fully realised, although it is hoped a new system will lead to more opportunities for efficiency and flexibility for the service.

9. Implications for Policy Priorities

- 9.1 The recommendations are in accordance with Financial Regulations and budget requirements.
- 9.2 The legal requirement for a Licensing Service to recover only “reasonable costs” takes precedence over the City Council’s Corporate Charging Policy and the requirement to maximise income. Licence fees prescribed by statute also take precedence over the Corporate Charging Policy.

10. Public Sector Equality Duty

- 10.1 The fees that are proposed in this report will relate to all licence holders and applicants for licences regardless of their protected characteristics. The fees are calculated on the cost of delivering the service or are prescribed by regulation, and consequently an Equalities Assessment has not been undertaken.

DIRECTOR OF REGULATION AND ENFORCEMENT

Background Papers:

Birmingham City Council – Corporate Charging Policy

Hackney Carriage and Private Hire

Licence type		Current fee	Proposed fee	difference
Hackney Carriage				
	Driver Grant (3yr)	£207	£277	£70
	Driver Renewal (3yr)	£164	£225	£61
	Vehicle Grant	£123	£159	£36
	Vehicle Renewal	£94	£142	£48
Private Hire				
	Driver Grant (3yr)	£199	£277	£78
	Driver Renewal (3yr)	£156	£225	£69
	Vehicle Grant	£127	£196	£69
	Vehicle Renewal	£113	£179	£66
	Small Operator Grant (1 yr)	£284	£501	£217
	Small Operator Renewal (1 yr)	£241	£449	£208
	Small Operator Grant (5 yr)	£979	£1,329	£350
	Small Operator Renewal (5 yr)	£935	£1,277	£342
	Operator Grant (1yr)	£805	£1,122	£317
	Operator Renewal (1 yr)	£762	£1,070	£308
	Operator Grant (5 yr)	£3,584	£4,435	£851
	Operator Renewal (5 yr)	£3,541	£4,383	£842
	Large Operator Grant (1yr)	£4,246	£5,815	£1,569
	Large Operator Renewal (1 yr)	£4,208	£5,763	£1,555
	Large Operator Grant (5 yr)	£20,420	£27,900	£7,480
	Large Operator Renewal (5 yr)	£20,382	£27,849	£7,467
	Very Large Operator Grant (1yr)	£8,289	£7,747	-£542
	Very Large Operator Renewal (1 yr)	£8,251	£7,696	-£555
	Very Large Operator Grant (5 yr)	£40,637	£37,563	-£3,074
	Very Large Operator Renewal (5 yr)	£40,599	£37,494	-£3,105
	Amend Operator details	£72	£75	£3
Miscellaneous:				
Vehicle	Replacement of Lost/Stolen Vehicle Identity Plate/Door Plates	£29	£35	£6
Driver	Replacement of Lost/Stolen Badge	£29	£35	£6
Driver	Change of Name/Address	£29	£35	£6
All	Replacement/Copy Paper Licence	£29	£35	£6
Vehicle	Change of Registration (VRM)	£87	£104	£17
Vehicle	Transfer of Vehicle Licence	£87	£104	£17
Driver	Hackney Carriage Knowledge Test Folder	£29	£50	£21
Driver	Hackney Carriage Knowledge Test	£100	£150	£50
Driver	Hackney Carriage Written/Verbal Test	£50	£75	£25
Driver	Private Hire Verbal Test	£50	£75	£25

Appendix 2

Sex Establishments, MST and Skin Piercers

Application Type		Application fee	licence fee	Current fee (total)	Proposed fee	Variance (£)
Sex Shop/Cinema	Grant	4433	125	£4,558	£1,987	-2571
	Renewal	2492	125	£2,617	£1,896	-721
	Variation	1887	107	£1,994	£1,692	-302
	Transfer	1442	107	£1,549	£1,669	120
Sexual Entertainment Venue	Grant	4611	178	£4,789	£2,168	-2621
	Renewal	2519	160	£2,679	£1,975	-704
	Variation	2448	178	£2,626	£1,726	-900
	Transfer	1433	178	£1,611	£1,658	47
Massage and Special Treatment						
- 1 level of treatment	Grant			£190	£170	-20
renewal	Renewal			£160	£136	-24
- 2+ levels of treatment	Grant			£222	£182	-40
renewal	Renewal			£204	£148	-56
Transfer of Ownership				£89	£136	47
Application for additional treatments				£80	£68	-12
Skin Piercers	Registration			£41	£136	95

Appendix 3A

GAMBLING ACT 2005

Premises Type	New Licence	1st Annual Fee	Annual Fee	Variation	Transfer	Re-instatement	Provisional Statement	Licence Application (Provisional)	Copy Licence	Change Notification
Casinos (statutory maximum)			(£3,000)	(£2,000)	(£1,350)	(£1,350)	N/A	N/A	(£25)	(£50)
Current fee	£2,118	£324	£424	£1,695	£707	£707	£2,042	£1,245	£25	£50
proposed fee	£2,444	£375	£491	£1,964	£819	£819	£2,365	£1,442	£25	£50
Bingo Clubs (stat. max.)	(£3,500)		(£1,000)	(£1,750)	(£1,200)	(£1,200)	(£3,500)	(£1,200)	(£25)	(£50)
Current fee	£2,118	£324	£424	£1,483	£707	£707	£2,118	£1,017	£21	£42
proposed fee	£2,454	£375	£491	£1,718	£819	£819	£2,454	£1,178	£25	£50
Adult Gaming Centre (stat. max.)	(£2,000)		(£1,000)	(£1,000)	(£1,200)	(£1,200)	(£2,000)	(£1,200)	(£25)	(£50)
Current fee	£2,000	£249	£344	£848	£394	£394	£1,695	£674	£25	£50
proposed fee	£2,000	£288	£398	£982	£456	£456	£2,000	£781	£25	£50
Race Tracks stat. max.)	(£2,500)		(£1,000)	(£1,250)	(£950)	(£950)	(£2,500)	(£950)	(£25)	(£50)
Current fee	£2,500	£324	£424	£1,060	£805	£805	£2,119	£805	£25	£50
proposed fee	£2,500	£375	£491	£1,228	£933	£933	£2,455	£933	£25	£50
Family Entertainment Centres (stat. max.)	(£2,000)		(£750)	(£1,000)	(£950)	(£950)	(£2,000)	(£950)	(£25)	(£50)
Current fee	£2,000	£249	£323	£1,000	£370	£370	£2,000	£950	£25	£50
proposed fee	£2,000	£288	£374	£1,000	£429	£429	£2,000	£950	£25	£50
Betting Premises (stat. max.)	(£3,000)		(£600)	(£1,500)	(£1,200)	(£1,200)	(£3,000)	(£1,200)	(£25)	(£50)
Current fee	£3,000	£249	£344	£1,272	£394	£394	£2,573	£674	£25	£25
proposed fee	£3,000	£288	£398	£1,474	£456	£456	£2,981	£781	£25	£50
Temporary Use Notice (stat. max.)	(£500)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	(£25)	N/A
Current fee	£275								£25	
Proposed fee	£319								£25	

Appendix 3B

GAMBLING ACT 2005 – PRESCRIBED FEES

These fees were set nationally by Government in 2007 and may not be changed. There are no proposals from Government to revise these fees.

Alcohol Licensed Premises

Notification of up to 2 machines	£50
Permit for 3 or more machines (transitional)	£100
New Permit for 3 or more machines	£150
Variation	£100
Transfer of permit	£25
New name to be substituted	£25
Copy permit	£15
1 st Annual fee (3 or more machines)	£50
Annual fee (3 or more machines)	£50

Club Gaming and Machine Permits

Renewal and Transitional	£100
New	£200
Renewal after 10 years	£200
Variation	£100
Copy permit	£15
1 st Annual fee	£50
Annual fee	£50

Unlicensed Family Entertainment Centres

Transitional	£100
New	£300
Renewal after 10 years	£300
New name to be substituted	£25
Copy permit	£15

Lotteries

New	£40
Annual Fee	£20

LICENSING ACT 2003 - PRESCRIBED FEES

These fees were set nationally by Government in 2005 and can only be changed by national legislation.

Application Fee

Rateable Value	Premises Value	Published
		21 January 2005
A	No rateable value up to £4,300	£100
B	£4,301 to £33,000	£190
C	£33,001 to £87,000	£315
D	£87,001 to £125,000	£450
E	£125,001 and above	£635
D primarily alcohol	2 x multiplier	£900
E primarily alcohol	3 x multiplier	£1,905

Annual Charge

Rateable Value	Premises Value	Published
		21 January 2005
A	No rateable value up to £4,300	£70
B	£4,301 to £33,000	£180
C	£33,001 to £87,000	£295
D	£87,001 to £125,000	£320
E	£125,001 and above	£350
D primarily alcohol	2 x multiplier	£640
E primarily alcohol	3 x multiplier	£1,050

Other Fees

Personal Licence (grant)	£37
Temporary Event Notice (TEN)	£21
Theft/loss of premises licence/club certificate, summary, personal licence or TEN	£10.50
Provisional Statement	£315
Change of name, address, club rules	£10.50
Personal Licence Change of details.	£10.50

Variation of DPS	£23
Transfer of premises licence	£23
Interim Authority Notice	£23
Right of Freeholder notification	£21
Minor Variation	£89
Variation to include alternative condition (no DPS)	£23

APPENDIX 4b

Licensing Act 2003- Classification of Film

First film (any length)	£180
Additional Film (30 mins+)	£120
Additional Film (under 30 mins)	£70

*additional film refers to circumstances where films are submitted in groups – such as for a film festival – not in a particular time period such as within the same year.

Summary of Relevant Case Law

R (on the application of Carl Cummings and others) v The County Council of the City of Cardiff [2014] EWHC 2544 (Admin)

The Claimants challenged successfully the lawfulness of the taxi and private hire fees set by Cardiff City Council, resulting in the refund of some £1.2 million to the taxi trade in respect of overpaid fees. This case was a Judicial Review of a Cardiff City Council decision. The court found that the Council had not been properly accounting and keeping record of any surplus or deficit dating back to 01 May 2009, and that the fees that had been set over the subsequent years had therefore been set without taking into account any such surplus or deficit. These surpluses and deficits can only be accounted for and taken into account within the specific regime that they cover (either hackney carriage or private hire), and surpluses from one regime cannot be used to offset deficits in the other regime. In other words, Councils are required to keep separate accounts for both the hackney carriage regime and the private hire regime, and must ensure that one is not supporting the other financially. Councils ought to separate out the five streams of taxi licensing (comprising vehicles, drivers and operators) when collecting their licence fees, to ensure no cross-subsidy within these streams. Moreover, Councils must not use the licensing fees as an income generating scheme.

R (on the application of Abdul Rehman on behalf of the Wakefield District Hackney Carriage and Private Hire Association) v Wakefield District Council and the Local Government Association (intervener) [2019] EWCA Civ 2166

This case, known as Rehman v Wakefield Council, was a Court of Appeal matter which clarified the law on taxi and private hire enforcement costs. Wakefield Council had imposed the cost of enforcement activity in relation to drivers onto the vehicle licence fees. Wakefield's Taxi and Private Hire Association challenged this, on the basis that Wakefield's calculations were unlawful because it was a form of cross-subsidising fees. The case clarified the correct procedure that councils must apply when setting taxi and private hire fees – namely that costs associated with monitoring and enforcing driver conduct must be factored into to driver licensing fees under s53 LG(MP)A 1976, and not vehicle licence fees under s70 (as had been the practice in Wakefield). The case therefore reaffirmed the principle that cross-subsidisation of taxi and private hire fees is not permitted in law.

R v Manchester City Council ex parte King (89 LGR 696 [1991]; The Times, 3 April 1991)

This was a street trading case that established that local authorities may only charge reasonable fees for licences and cover the Council's costs in the administration of those application types and issue costs - but not use them to raise revenue. The Council had set licence fees at a commercial rate, considering that the calculation of a 'reasonable fee' was a matter for their own discretion. But the court held that the fees must be related to the street trading scheme, and the costs of operating that scheme. The Council could therefore charge such fees as it reasonably considered would cover the total cost of operating the street trading scheme (or such lesser part of the cost of operating the street trading scheme as they considered reasonable). NB – this does not mean that any surplus revenue makes the fee structure invalid. The original position will remain valid provided that it can be said that the Council reasonably considered such fees would be required to meet the total cost of operating the scheme, even if the fees levied turn out to exceed the cost of operating the scheme.

R v Westminster City Council ex parte Hutton (1985) 83 LGR 516

This case was tried and reported with R v Birmingham City Council, Ex p Quietlynn Ltd (1985) 83 LGR 461, 517 and confirmed the principle that licensing fees may lawfully include amounts calculated to cover the cost to the licensing authority of regulation and enforcement. Hutton challenged the fee set for applying for a licence to operate a sex shop, on the basis that the administrative costs on which the fee was based included a sum representing the supposed shortfall in fee income against administrative costs in the previous year. The court held that the fee could reflect not only the processing of applications, but also 'inspecting premises after the grant of licences and for what might be called vigilant policing ... in order to detect and prosecute those who operated sex establishments without licences'. The Council was free to fix fees reflecting those necessary elements on a rolling basis, without adjusting surpluses and deficits in each year. This was on the basis that the statutory accounts of local authorities are structured such that shortfalls in one year must be carried into the next year's accounts. The court accepted Westminster's contention that when a charge is based on an annual budget, which must be concerned with situations which themselves will not be verifiable until after the end of the year in question, the only sensible way to fix the level of the charge is to take one year with another.

R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council [2015] - 29th April 2015; [2015] UKSC 25, [2015] BLGR 753, [2015] PTSR 643, [2015] WLR(D) 193, [2015] AC 1600, [2015] 3 CMLR 9, [2015] LLR 564, [2015] 2 WLR 1271, UKSC 2013/0146

The Hemming case was a Supreme Court decision which overturned a Court of Appeal decision which had in turn upheld the decision of the lower court. Many commentators feel that the Supreme Court decision "restored common sense to the question of what licensing and other regulatory fees can lawfully include". The

Supreme Court affirmed the principle in *ex p. Hutton* – namely that licensing fees may lawfully include amounts calculated to cover the cost to the licensing authority of regulation and enforcement.

Hemming's argument was that the approach approved 30 years before in *ex p. Hutton* was no longer lawful due to the effect of an EU Directive which had been implemented into domestic law under Regulations. Hemmings asserted that the Directive and Regulations precluded Westminster from including costs of enforcement activities against unlicensed operators in determining the licence fees payable by licensed operators; he felt that these costs should be covered by revenue from Council Tax and business rates. The huge importance of the case, not only to all other Council licensing departments but also to other (entirely unrelated) regulatory bodies, was such that when the case came before the Supreme Court there were nine Interveners before the Court - including the Architects Regulation Board, the Solicitors Regulation Authority, the Bar Standards Board, the Local Government Association and HM Treasury.

The decision was that the Directive and Regulations were solely concerned with ensuring that the costs charged for authorisation procedures (ie the clerical and administrative aspects of authorisation) were reasonable and proportionate to the actual costs of those procedures; they in no sense precluded licensing authorities from also including the costs of regulatory and enforcement activities in the total licence fees payable by licensed operators. The court saw no reason why the fee 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." Likewise, with regard to other areas of licensable activity (where licensing authorities are empowered by domestic legislation to recover the costs of enforcement activity through licence fees) and regulated activity (e.g. practising as an architect, barrister or solicitor) - the decision of the Supreme Court has made clear that the Directive and Regulations do not preclude licensing authorities, or other regulatory bodies, from continuing to recoup their enforcement costs through fees charged to licensed operators or certified practitioners.

There is a related point - the Supreme Court said that one aspect should be referred to the European Court of Justice, namely Westminster's chosen method of exercising its right to recover the costs of enforcement. Westminster charged all applicants for sex establishment licences a fee that included both a sum to cover the cost of administering the application and a sum representing a contribution towards Westminster's costs of enforcement. The latter sum was refunded to unsuccessful applicants, whilst the former sum was not.

The Supreme Court asked the ECJ to determine whether that particular method of charging, which effectively deprives unsuccessful applicants of the use of the latter sum whilst their application is being considered, fell foul of the Directive (as opposed to an alternative method of charging only the successful applicants with the contribution towards the costs of enforcement).

In its judgment the ECJ concluded that the Directive must be interpreted as precluding a requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of authorisation, part of which corresponds to the costs relating to the management and enforcement of the authorisation scheme concerned, even if that part is refundable if that application is refused. The citation of this ECJ decision is: Hemming (Judgment) [2016] EUECJ C-316/15 (16 November 2016): [2017] 3 WLR 317, [2017] LLR 189, [2016] WLR(D) 608, [2017] PTSR 325, ECLI:EU:C:2016:879, [2018] AC 650, [2017] CEC 920, EU:C:2016:879, [2016] EUECJ C-316/15