

Classification: Public

Key Decision: No

Gravesham Borough Council

Report to: Licensing Committee

Date: 17 September 2013

Reporting officer: Assistant Director (Communities)

Subject: Implications of the R (Hemming and Others) v Westminster City Council judgement in the High Court relating to Sexual Entertainment Venues and Sex Establishments licensing

Purpose and summary of report:

To apprise Licensing Committee of the Hemming Judgement in respect to the setting of licence fees for sexual entertainment venues and sex establishments and the implications for Gravesham Borough Council.

Recommendations:

- (1) Members to note the content of the report.
- (2) Licensing Committee delegate powers and duties in relation to the licensing of sexual entertainment venues and sex establishments to the Assistant Director (Communities) with the limitation that:
 - any application lodged will be submitted to the Committee for decision where it appears to the Assistant Director (Communities) appropriate for the applicant to have the opportunity of presenting his case orally. Any case where the Assistant Director (Communities) has concluded that a licence or permit should be refused, or revoked, shall be submitted to the Committee for decision. All powers of prosecution and Court litigation are reserved to the Assistant Director (Governance and Law).
- (3) Delegation from the Licensing Committee to the Assistant Director (Communities) as at recommendation (1) above, to include future fee setting under the Act, with such fee-setting to be carried out in conjunction with the Assistant Director (Finance).

1. Background

- 1.1 On 20 December 1982 Gravesham Borough Council adopted powers available under Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 to regulate sex establishments.
- 1.2 This enabled the council to license and regulate sex shops and sex cinemas and was delegated to be a function of Regulatory Board.

- 1.3 On 5 October 2010, Council adopted the amendment to Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, as introduced by the Policing and Crime Act 2009, so as to allow the licensing of 'sexual entertainment venues' in addition to the existing categories of sex establishment.
- 1.4 At that same meeting Council delegated all categories of sex establishments licensing to the Licensing Committee and the Constitution was updated accordingly.
- 1.5 On 17 November 2010, Licensing Committee approved a statement of licensing policy in respect of sex establishments and sexual entertainment venues.
- 1.6 On 9 March 2011, the Licensing Committee endorsed the steps taken by officers in working up a scale of fees for the licensing of sex establishments and sexual entertainment venues. These fees, of £2,510 for an application and £1,320 for renewal/transfer/variation were subsequently published.
- 1.7 Since the initial fee setting process, these fees have been reviewed each year in accordance with corporate procedures and have remained at the same level.

2. The Hemming Judgement

- 2.1 Hemming and others operating in Westminster recently challenged the level of sex establishment fees as set by Westminster City Council. In 2011/12 Westminster were charging an annual fee of £29,102.00 and had been doing so since 2005.
- 2.2 The case hinged very much upon the requirement for proportionate fees as laid out in The Provision of Services Regulations 2009. Regulation 18(4) of the Regulations 2009 clearly states that 'any charges provided for by a competent authority which applicants must incur under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities'.
- 2.3 The challenge was strongly contested by both sides and was eventually heard in the High Court in March 2012 by Mr Justice Keith and an approved judgement published, with Hemming's claim succeeding and Westminster being ordered to recalculate their fees and to refund any overpayments since the coming into force of the Provision of Services Regulations 2009.
- 2.4 During the course of the hearing Westminster tried, unsuccessfully, to support the position that the licence fee should include monies to enforce against operators who should have a licence but are unlicensed. Indeed, when questioned, the council admitted that the cost of administering an application was only £2,667 out of the £29,102 sum charged.
- 2.5 The other aspect of the Hemming judgement was that a local authority must review and determine fees on an annual basis with all necessary authorisations and delegations in place to do so.

3. Implications of Hemming for GBC

- 3.1 The Hemming Judgement led us to closely re-examine in general terms our fees for sex establishments, and also for the other licensing regimes caught by The Provision of Services Regulations 2009.

- 3.2 In calculating an appropriate fee for sex establishments we used a 'toolkit' approach recommended by LACORS that we were already familiar with having used it to set our licence fees under the Gambling Act 2005. The methodology is to break down the licence application or renewal process into all of its component steps -right from opening the envelope containing the incoming application form, logging it onto the system, making necessary background checks and site visits, liaising with partners and stakeholders, through to determining the application by panel hearing and dealing with any appeals. Some of these steps are taken for all incoming applications and are charged 100%, whilst other steps are taken in only a percentage of applications and for these the cost is pro-rata-ed accordingly. In this way the 'average' cost of an application or renewal was generated.
- 3.3 In setting our fee we did not include any element to contribute to enforcement against unlicensed premises as our understanding was that this was not an appropriate consideration in setting a licence fee.
- 3.4 In respect of sex establishments licensing, current benchmarking with other Kent local authorities and within our CIPFA family group shows our licence fees to be relatively low. See benchmarking table of fees at Appendix 2.
- 3.5 We are confident that all fees are set so as to only cover cost of administering the licensing schemes, do not seek to cover the cost of enforcing against unlicensed premises, and are therefore entirely defensible.
- 3.6 With regard to the annual review and determination of proportionate fees, it is recommended that for practicality, and for the avoidance of doubt, that this is delegated to the Assistant Director (Communities) as part of a general delegation for sex establishments and sexual entertainment venues licensing.

4. BACKGROUND PAPERS

4.1 R (Hemming and Others) v Westminster City Council (2012) EWHC 1260

Anyone wishing to inspect background papers should, in the first place, be directed to Committee & Electoral Services who will make the necessary arrangements.

IMPLICATIONS

APPENDIX 1

Legal	The making of this report has been driven by the recent Hemming vs Westminster City Council judgment in the High Court and its interpretation of the Provision of Services Regulations 2009 in relation to fee setting.		
Finance and Value for Money	<p>There is a clear financial implication to this report in that we must be able to demonstrate that our licence fees only cover the cost of procedures and formalities of the licensing scheme –and do not seek to make profit or to deter potential applicants by setting excessive fees.</p> <p>We will be mindful to apply the Hemming Judgment to fee setting all licensing regimes caught by Provision of Services Regulations 2009. This will include fees to be set under the Scrap metal Dealers Act 2013.</p>		
Risk Assessment	Our level of licence fee was set by a rigorous and detailed process in keeping with a LACORS model and benchmarks relatively low against Kent/CIPFA group authorities.		
Equality Impact Assessment	Screening for Equality Impacts		
	Question	Answer	Explanation
	a. Does the decision being made or recommended through this paper have potential to cause adverse impact or discriminate against different groups in the community?	No	
	b. Does the decision being made or recommended through this paper make a positive contribution to promoting equality?	No	
	c. What steps are you taking to mitigate, reduce, avoid or minimise the impacts identified above?		
<i>In submitting this report, the Chief Officer doing so is confirming that they have given due regard to the equality impacts of the decision being considered, as noted in the table above</i>			

Corporate Business Plan	Links to the strategic priority of managing the council's business responsibly and in particular to area of focus 18 Working to ensure council services provide value for money and are delivered efficiently.
Crime and Disorder	The licensing regimes caught by the Provision of Services Regulations 2009 and the Hemming judgement include those where tackling crime and disorder is a licensing objective.