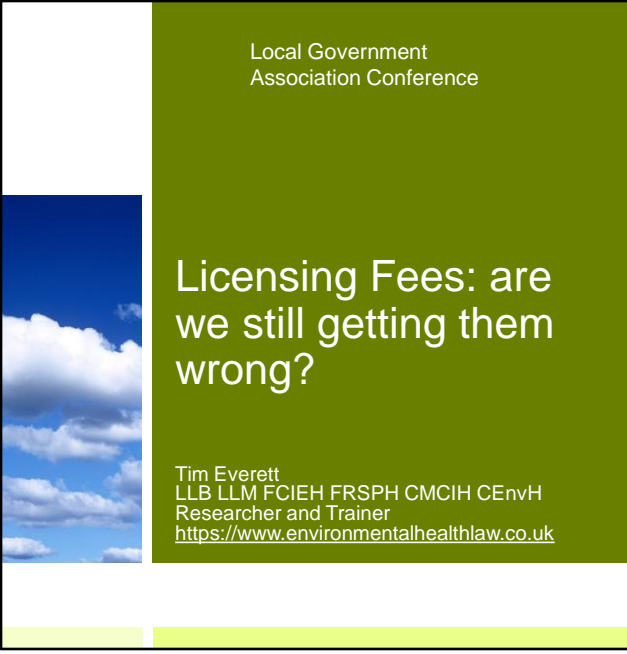


Local Government  
Association Conference



## Licensing Fees: are we still getting them wrong?

Tim Everett  
LLB LLM FCIEH FRSPH CMCIH CEnvH  
Researcher and Trainer  
<https://www.environmentalhealthlaw.co.uk>



## Outline

- The big question and why it is important
- What costs take 1
- Three legal categories and the law before *Hemming*
- *Hemming* revisited
- What costs take 2
- Process - when to charge and recording decisions
- Summary
- Questions
- Slides, asterisks, the commitment - any queries to [help@environmentalhealthlaw.co.uk](mailto:help@environmentalhealthlaw.co.uk)

## The big question

- To what extent (if any) should taxpayers subsidise the regulation of commercial activities now and in the future?
- Why?
  - Regeneration and economic activity
  - Business start ups
  - Promoting business compliance
  - Protecting public safety
  - Volatility of fee income
  - *The price is right\**

\*Audit Commission Value For Money study on charging

## Why important?

- Licences, permits, consents, registrations etc. are a core regulatory function
  - Some big earners and lots of small ones
- Continuing pressure on the general fund
- Councils still falling into four traps
  - Inadvertent subsidies – not charging true costs
  - Cross-subsidies between different licences
  - Overcharging
  - Deterrence
  - The same Council may do be doing all four!

## What costs take 1

- Four potential elements
  - The cost of administering the licence process for grant/renewal etc.
  - The cost of inspections and enforcement of licensed operations
  - The cost of inspections and enforcement of unlicensed ones
  - Special costs allowed by the relevant statute
    - E.g. Taxi stands (vehicle fees)\*

\*Section 70(1) of the Local Government (Miscellaneous Provisions) Act 1976.

## What costs to include?

- **Direct staffing costs**
  - Salaries and expenses, training/holidays/sickness
  - Salary overheads (pension, NI)
- **Indirect staffing costs**
  - Admin, management
  - Support such as legal, HR
  - External costs such as Vets, other experts
- **Support costs**
  - Disposables
  - Premises. Rental, heating, lighting, facilities management etc.
  - IT hardware and software. Other equipment

## Three legal approaches

- The Government sets the fees nationally by regulations
  - S55 and S93 Licensing Act 2003\*
- LA set - the legislation specifies the things which can be covered
  - S63 Housing Act 2004\*\*
  - S70 Local Government (MP) Act 1976\*\*\*
- LA set - the legislation allows a reasonable fee to be charged
  - S53 Local Government (MP) Act 1976\*\*\*\*
  - Schedule 3 Para 19 LG(MP) Act 1982\*\*\*\*\*

\*Section 121 of the Police Reform and Social Responsibility Act 2011 introduced powers to allow local fee setting. These have not been brought into force.

\*\*HMO Licences

\*\*\*Vehicle and Operators Licences

\*\*\*\*Drivers Licences

\*\*\*\*\*Sex shops etc.

## The law before *Hemming*\*

- No deliberately budgeting for profits – set to cover expected costs\*\*
- Casual surplus of income could arise – pinpoint accuracy not expected, but need to be reasonable
- Deficits (and surpluses) actually incurred should be taken into account next year\*\*\*
- Fees could cover enforcement activities including against unlicensed operations
- No cross-subsidies between different licence types – e.g. vehicle and drivers' licences\*\*\*\*
- Fee setting could be challenged by Judicial Review

\*Three important cases – R v Birmingham City Council ex parte Quietlynn Ltd [1985], R v Westminster City Council ex parte Hutton [1985] and R v Manchester City Council ex parte King [1991]

\*\*R (on application of Atfield) v Barnet LBC 2013 (Councils have no power to tax except under a clear Parliamentary fiscal measure)

\*\*\* and also see R (on the application of Carl Cummings and others) v Cardiff CC [2014] EHC 2544 (Admin.)

\*\*\*\*Blue Line Taxis (Newcastle) Ltd v Newcastle Upon Tyne City Council [2012] EWHC 2599 (Admin), [2013] RTR 8, and Cummings as above – confirmed in R (on the application of Rehman) v Wakefield MBC and LGA [2019] EWCA Civ 2166.



## *Hemming* revisited

- Round 1 - High Court\*
  - Could not include unlicensed enforcement
  - Process flawed - Committee needs to review and set fees each year, taking into account deficits and surpluses from the preceding year
  - Restitution can go back 6 years for costs arising out of unlawful decisions
  - The basis of the fee setting changed in 12/2009
- Round 2 - Court of Appeal\*\*
  - Agreed with HC but changed restitution calculation in respect of the earlier years

\**Hemming* (t/a Simply Pleasure Ltd) v Westminster City Council [2012] EWHC 1260 (Admin); \*\* [2013] EWCA Civ 591

## *Hemming* revisited

- Round 3 – Supreme Court\*
  - Good news! Enforcement costs against unlicensed operators can be included
  - Bad news 1! SC only sure of this if a separate fee for holding, maintaining, and enforcing the licence is charged after grant
  - Bad news 2! SC referred including this element up front and then refunding to unsuccessful applicants to ECJ
  - Bad news 3! Does the particular legislation allow split charges?

\*[2015] UKSC 25

## *Hemming* revisited

- Round 4 - opinion of Advocate-General\*
  - No charge upfront permissible for enforcement or scheme costs
  - Critical of WCC as still unable to justify figures
  - Queried whether enforcement against unlicensed operators feasible
  - Suggested that all such licences should be for open term, not limited to 1 year

\*A-G Wathelet 28/7/2016 C-316/15

## *Hemming* revisited

- Round 5 – ECJ Judgement\*
  - Confirmed that only costs of processing the application to grant or renew can be charged upfront.
  - Charges must be reasonable and proportionate to the costs of authorisation and must not exceed those costs.
  - Agreed with A-G over term of licences, but not binding part of decision.
- Round 6 – Back to the Supreme Court\*\*
  - Applied ECJ judgment on upfront costs – WCC approach unlawful. Scheme costs to be billed after grant.\*\*\*
  - Can include enforcement against unlicensed operators.
  - Detailed costs back to High Court – Round 7!

\*C-316/15 16/11/2016

\*\*R (on the application of Hemming t/a Simply Pleasure Ltd and others) v Westminster City Council [2017] UKSC 50

\*\*\*Local Government (Miscellaneous Provisions) Act 1982 does not specify when charges can be made.

## What costs take 2

- Four potential elements
- Part 1
  - The cost of administering the licence process\*
- Part 2
  - The cost of inspections and enforcement of licensed operations
  - The cost of inspections and enforcement of unlicensed operations
  - Special costs such as taxi stands
- Otherwise law is same as before

\*Key question – will the Supreme Court’s decision still be binding on the lower courts if all vestiges of the Services Directive are removed from UK legislation? The current wording of Clause 7 of the Retained EU Law (Revocation and Reform) Bill suggests UK case law (e.g. Hemming) will continue to apply unless reversed by the Supreme Court or other higher appeal court.

## When can you charge?

- On application
  - Licensing Act 2003, LGMP82
- After grant?
  - LGMP76 S51 PH Drivers– no mention of upfront, S53 wording suggests afterwards
  - LGMP76 S70 Vehicles and Operators – unclear.
  - Non-payment not usually a ground for refusal

## Four possible strategies

- Grant but don't issue until second payment received
- Attach condition to licence etc. where allowable requiring payment\*
- Suspend the licence if fee not paid\*\*
- Seek payment afterwards and sue for debt if not paid
- Depends on wording of particular legislation – risks of challenge will vary
- NB Even if legislation says you can demand everything up front, you can't!\*\*\*

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\*The courts have endorsed this approach

\*\* You need explicit authority for this, such as in Section 55A of the Licensing Act 2003.

\*\*\*E.g., Section 63 of the Housing Act 2004 and R (on the application of Gaskin) v Richmond-upon Thames LBC [2018] EWHC 1996 (Admin), ditto [2018] HLR 47.

## Process!

- What costs can you include?
- What costs do you want to include?
- Have you got a true record of your actual costs??
- Who has the responsibility for setting which fees?
- Have they been reported to the right Committee etc.?
- Have the decisions been properly recorded?



## Recording and publishing decisions

- Since 2000 (2001 in Wales\*) Executive decisions by Councillors have to be recorded and published
- All functions Executive unless in Never Executive/Local Choice lists – see Schedules\*\*
- Since 2012 in England, delegated Executive decisions made by officers also covered\*\*\*
- Since 2014 in England similar rule applied to all licensing decisions by officers, also things which affect the individual\*\*\*\*
- Failure may make decision invalid\*\*\*\*\*

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\*The Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 SI 2001/2290

\*\*See Schedules 1 and 2 SI 2000/2853

\*\*\*The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 SI 2012/2089, in force from 10/9/2012

\*\*\*\*Openness of Local Government Bodies Regulations 2014 SI 2014/2095

\*\*\*\*\**Shasha v Westminster CC* 2016, R (on the application of *Newey*) v *South Hams District Council* 2018, R (on the application of *Spedding*) v *Wiltshire County Council* 2022.

NB Some licences are Executive functions e.g., HMOs; some are never Executive e.g., Taxis, alcohol, street trading, sex shops, animal welfare etc.; and some are Local Choice items e.g., Environmental Permitting (so check Constitution).

## Summary

- There are some things you are now not be able to charge for upfront whatever the original Act says
- You need to be clear about the true costs of the activities that can still be covered
- If you are going to charge less than you could, be clear why you are doing so
- You need to get the process right, as you can be challenged and you may have to go back for up to 6 years – the right calculation approved by the right body and you have the records to show this!

Questions?  
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## Bonus Slide 1

### Porky Pint Ltd v Stockton-on-Tees BC\*

- Background

- Landlord broke Covid-19 rules 4 times during lockdown 2.
- On last occasion Prohibition Notice served
- He then readvertised opening during lockdown 3 and opened
- He refused to handover CCTV footage
- He was obstructive and believed that the pandemic was a lie and the restrictions were a breach of his human rights.
- Stockton revoked his licence under the 2003 Act.
- He appealed, but Magistrates Court dismissed the appeal\*\*.
- He appealed to the High Court

\*[2023] EWHC 128 (Admin)

\*\* The District Judge followed the procedure laid down in R (Hope and Glory Public House Ltd) v Westminster City Magistrates [2011] EWCA Civ 31.

## Bonus Slide 2

### Porky Pint Ltd v Stockton-on-Tees BC

- High Court

- Three questions of law

- (a) Was the District Judge right to take account of public health in terms of public safety and preventing crime?

- (b) Were they right to take into account behaviour that had not resulted in a criminal prosecution?

- (c) Were they right to take into account the refusal to hand over the CCTV footage?

- On (a) yes – both the Committee and the DJ had clearly considered the issues in terms of the relevant objectives

- On (b) yes - while the DJ should have considered whether the appellants could rely on HRA arguments as “reasonable excuse” the High Court was clear that they could not

- On (c) yes - as drafted the appellants had clearly breached their licence condition with respect to CCTV.