New Supreme Court ruling in licensing case of Hemmings

On April 29th 2015 the Supreme Court delivered judgment in *R (on the application of Hemmings (t/a Simply Pleasure Ltd) and others) v Westminster City Council [2015] UKSC 25*, in what was a significant case for regulators and the regulated of licensing or other similar regulatory regimes.

The full UKSC judgment and press summary are available here.

Lord Mance gave judgment on the appeal by Westminster City Council, as the licensing authority, against a decision of the Court of Appeal in favour of the respondents, who are licensees of sex shops in Westminster.

The case concerned the situation of an applicant who applied for the grant or renewal of a sex establishment licence for any year and who had to pay a fee made up of two parts. One part was payable regarding the administration of the application and was non-refundable and another part (which was considerably larger – £29,435 in 2011/12) for the management of the licensing regime and was refundable if the application was refused.

The central issue for the court was whether it was legitimate under domestic and or European Union Law for Westminster City Council to charge the fee for the management of the regime. One of the arguments run by the Respondent (Hemmings) was that following the introduction of the Provision of Services regulations 2009 (SI 2009/2999 to give effect to Directive 2006/123/EC), Westminster City Council were no longer entitled to include within their fee the cost of running and enforcing the licencing regime.

The Supreme Court disagreed. Paragraph 17 of the judgment reads, “Nothing in article 13(2) precludes a licensing Authority from charging a fee for the possession or retention of a licence and making this licence conditional upon payment of such a

fee". The judgment went on to say that any such fee would need to be proportionate but that there was no reason why it should not be set at a level enabling the authorities to recover from licenced operators the full costs of running and enforcing the licensing scheme including the costs of enforcement of proceedings against those operating sex establishments without licences.

The court went on to consider two schemes used by licensing Authorities concerning with the way in which the fees were required. Scheme A, required the applicant on making the application to pay the costs of authorisation procedures and formalities and on the application being successful, a further fee to cover the costs of running and enforcing the licensing regime. Scheme B, required the applicant on making the application to pay the costs of the authorisation procedures and formalities and at the same time pay a further fee (which is returnable if the application is unsuccessful) to cover the costs of the running and enforcement of the licensing regime.

The court ruled that Scheme A was within the law but in respect of Scheme B it ruled that the answers to questions raised were not clear. One of these questions was whether this scheme and in particular the element of having to pay the fee for the enforcement and running of the regime even if subsequently unsuccessful in the application and even though this was returnable, amounted to a charge by Westminster council on the licensee. The Court directed that Westminster should continue only with Scheme A whilst it referred the issue relating to scheme B to the Court of Justice in Luxemborg.

Commentary provided by Stuart Jessop of Six Pump Court Chambers