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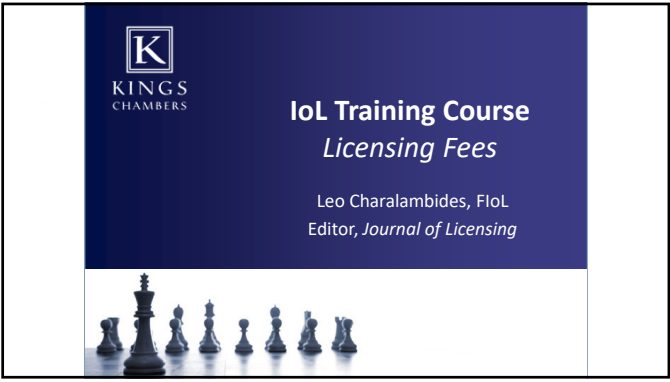
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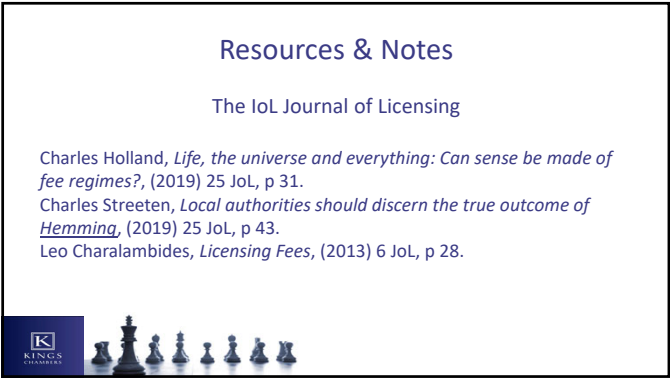
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Part 1

Some general principles of Licensing fees



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- In *R (Rehman) v Wakefield Council* [2018] EWHC 3664 (Admin), it was suggested, with judicial concurrence [10-11] that four categories of fee regime existed:
  - Where no fee can be charged (e.g. for street collections under the Police, Factories, & c. (Miscellaneous Provisions) Act 1916).
  - Where only fixed fees can be charged (e.g. under the Licensing Act 2003, as prescribed in the Licensing Act 2003 (Fees) Regulations 2005, and under the Gambling Act 2005).
  - Where the regime only permits specified expenditure to be recouped (as the claimants suggested was the case for fees for private hire driver's licenses under s 53 of the Local Government (Miscellaneous Provisions) Act 1976).
  - Where the regime gives the regulator a wide discretion to charge a reasonable fee (as the claimants said was the case for sex licensing and street trading).



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A starting point?

- A clear understanding of the policy and objects of the regime in question is required.
  - It follows that the relevant considerations for vetting an applicant for a street trading licence will be different to those required for a sex establishment (see *R v Manchester City Council ex parte King* (1991) 89 LGR 696; also *R (on the application of Davis & Atkin) v Crawley Borough Council* [2001] EWHC 854 (Admin)).
  - Particular attention needs to be had to those statutory provisions where a power is given to the local authority for the determination of an authorisation fee and other administrative fees.



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Identifying the purpose for which the statutory powers were conferred?

- Lord Nicholls of Birkenhead summarised the approach in *R. v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd* [2001] 2 AC 349, 396:  
*"No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose: "the policy and objects of the Act" in the oft-quoted words of Lord Reid in Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030. *The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context, and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation."*



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Generally speaking, licensing fees cannot raise general revenue

- *R v Manchester City Council, ex p King* (1991) 89 LGR 696, a challenge was brought to the council's decision to increase its street trading licence fees from £169 to £1,500-2,500 p.a. The relevant statute provided (Local Government (Miscellaneous Provisions) Act 1982, Schedule 4, paragraph 9) that a council "may charge such fees as they consider reasonable for the grant or renewal of a street trading licence or street trading consent".



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- The council argued that its fiduciary duty to "maximise" its revenue empowered it to set fees at a level it considered to be a market rate. In rejecting this argument, the Divisional Court held that it was unlikely that Parliament intended general revenue purposes to be served by the implementation of a street trading licence provision, and in the absence of any express statutory authorisation, the fees had to relate to the budgeted costs of operating the scheme, rather than being set at whatever level the market would bear.



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- Roch J. said at pp 709-710:  
*"The fees charged ... must be related to the street trading scheme operated by the district council and the costs of operating that scheme. The district council may charge such fees as they reasonably consider will 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 consider reasonable. One consequence of the wording used is that, if the fees levied in the event exceed the cost of operating the scheme, the original position will remain valid provided that it can be said that the district council reasonably considered such fees would be required to meet the total cost of operating the scheme."*



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- Surplus** must be carried forwards - Accounting for Surplus?  
– *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591
  - The court determined surpluses as well as deficits are to be carried forward. The licensing authority is not entitled to make a profit. The court did not require pin-point precision year on year.
  - The council does not have to adjust the licence fee every year to reflect any previous deficit or surplus, so long as it 'all comes out in the wash' eventually. And the adjustment does not have to be precise: a rough and ready calculation which is broadly correct will do.



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- But what about **deficit**?
  - R v Westminster City Council, ex parte Hutton* (1985) 83 L.G.R. 461
    - In this case it was held that where the fee income generated in one year fails to meet the costs of administering the licensing system, it is open to the local authority to make a proportionate increase in the licence fee for the following year so as to recoup the cost of the shortfall (Hutton at p 518).
    - This longstanding principle was confirmed in *Hemming* [2012] EWHC 1260 (Admin), albeit that case concerned licence fees in the context of sex shops and the application of the European Services Directive.



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- Different fee levels for different types of application.
  - *R v Greater London Council, ex parte Rank Organisation* [1982] LS Gaz R 643.
- A licensing authority is entitled to set either the same or different fee levels for different types of applications: i.e. grant, renewal, variation, alteration or transfer.



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*R v Greater London Council, ex parte Rank Organisation* [1982] LS Gaz R 643.

The extent and scope of fee recovery is a matter of local policy.



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Bench Marking / Local Comparisons



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EU Services Directive

Provision of Services Regulations 2009

Hemming: Does the EUSD / PSR09 apply?

*R (Gaskin) v Richmond-upon-Thames*  
[2018] HLR 47 (anticipated costs)



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Part 2

Fees in context: licensing regimes



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Street Trading

Local Government (Miscellaneous) Provisions Act 1982,  
Schedule 4, para 9

A comprehensive fees and charges regime ?



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Busking

London Local Authorities Act 2000

Part V, s 36 (3)

An applicant for a licence shall pay such fee determined by the council as may be sufficient to cover in whole or in part the reasonable administrative or other costs incurred in connection with their function under this Part of the Act



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Sex Establishments

Local Government (Misc Provisions) Act 1982,  
Schedule 3, para 19

An application for the grant, [variation,] renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority.



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Special Treatment Licence

London Local Authorities Act 1991

S 7(4) An applicant for the grant, renewal, transfer or variation of a licence shall pay a reasonable fee determined by the council.



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Scrap Metal Dealers Act 2013

Schedule 1, para 6

- 6(1) An application must be accompanied by a fee set by the authority.
- 6(2) In setting a fee under this paragraph, the authority must have regard to any guidance issued from time to time by the Secretary of State with the approval of the Treasury.



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Zoo Licensing Act 1981

SS 15 & 16 Fees and Charges regime



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HMO's

Part 2, Housing Act 2004, s 63

*R (Gaskin) v Richmond-upon-Thames*  
[2018] HLR 47



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Part 3

Taxis and PHV's



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Taxi & PHV's

- The taxi licensing regime is a “two tier” system, involving two types of distinct vehicles, hackney carriages and private hire regimes. In the hackney carriage tier drivers and vehicle proprietors are licensed; in the private hire tier, the licensed entities are drivers, vehicle proprietors and operators. There are therefore five categories of licence.
- The fee setting powers within the Local Government (Misc Provisions) Act 1976 do not distinguish between these five categories. Rather there is a split between (a) drivers and (b) vehicle proprietors and private hire vehicle operators.



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The Provisions

- The power to charge a **fee for a driver's licence** (both HC and PHV) is found in section 53(2) of the Local Government (Misc Provisions) Act 1976, which provides that:
- (2) *Notwithstanding the provisions of the Act of 1847, a district council may demand and recover for the grant to any person of a licence to drive a hackney carriage, or a private hire vehicle, as the case may be, such a fee as they consider reasonable with a view to **recovering the costs of issue and administration** and may remit the whole or part of the fee in respect of a private hire vehicle in any case in which they think it appropriate to do so.*



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### Taxi & PHV's



- The power to levy a fee for vehicle and operator's is contained within s.70:

(1) Subject to the provisions of subsection (2) of this section, a district council may charge such **fees for the grant of vehicle and operators' licences** as may be resolved by them from time to time and as may be sufficient in the aggregate to cover in whole or in part—

(a) the reasonable cost of the carrying out by or on behalf of the district council of inspections of hackney carriages and private hire vehicles for the purpose of determining whether any such licence should be granted or renewed;

(b) the reasonable cost of providing hackney carriage stands; and

(c) any reasonable administrative or other costs in connection with the foregoing and with the control and supervision of hackney carriages and private hire vehicles.



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### Taxi & PHV's

- Two different Legislative phrases:

(1) the cost of issue and administration

(2) administrative or other costs ....control and supervision



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*R (on the application of Cummings) v Cardiff City Council* [2014] EWHC 2544 (Admin)

- The Claimants were all involved in the taxi trade and held licences issued by Cardiff City Council covering each of the five types of licence.
- Claim challenged the lawfulness of the setting of hackney carriage and private hire licence fees by Cardiff. Following a decision of the authority on 3 June 2013 to inflate considerably the fees for hackney carriages (as of 1 July 2013).
- Cardiff initially resisted the claim but later conceded and by an order dated 18 June 2014 Mr Justice Hickinbottom granted the claim for judicial review in the following terms.



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Cummings

• Declarations that:

– (1) A local authority when determining hackney carriage and private hire licence fees under ss.53 and 70 of the LG(MP) Act 1976 must take into account any surplus or deficit generated from fees levied in previous years in respect of meeting the reasonable costs of administering the licence fees as provided by ss.53 and 70.

– (2) A local authority must keep separate accounts for and ensure when determining hackney carriage and PHV licence fees under ss.53 and 70 of the LG(MP) Act 1976 that any surplus or deficit accrued under each of the hackney carriage and private hire licensing regimes are only accounted for and taken into account within the regime under which they have accrued and a surplus from one licensing regime shall not be used to subsidise a deficit in another.

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What does this mean?

• Must separate out the five streams (PHV / HCV/drivers x 2 and operators)

• Until the case of *Cummings* this local authority (as with many others) did not separate out the five work streams.

• What about **enforcement**? (see below)

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• Judicial approval for the concession in *Cummings* can now be found in the May 2018 decision of *R (LPHCA Ltd t/a Licensed Private Car Hire Association) v Transport for London* [2018] EWHC 1274 (Admin). This concerned a challenge to increases in the fees charged by TfL for London PHV operator’s licences, one of the claimant’s grounds being that the increases constituted a cross-subsidy from London PHV operators to the hackney carriage regime and PHV drivers and vehicle proprietors.

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All speakers views are their own and not necessarily the views of the IoL

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### The *Wakefield* challenge

- In terms of the fees decision – 2 grounds of challenge
  - That the level of fees failed to have regard to and / or account for any surplus of deficit generated in previous years; and
  - There was unlawful cross-subsidy in the form of charging driver enforcement costs to vehicle enforcement



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- D pleaded that Local Authorities would welcome such guidance given the lack of clarity created by the differently worded ss (53 and 70) of the LGMPA 1976.
- Permissions stage (July '18) – licence fees only (Males J)
- 1. I think it highly likely that the defendant is entitled to recover costs attributable to the licensing of drivers through the fees charged under its licensing scheme. If there is an issue about this, a decision of the court would bring useful clarity.



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### The Decision

- HHJ Saffman - determined that matters associated with control and supervision of drivers (such as overcharging and smoking) could not be assigned to vehicle licence costs under the term 'control and supervision [of vehicles]'. He also considered that it would not necessarily follow that such costs would be properly incorporated into driver's licence fees under s.53(2) either, although he was not conclusive on that point.



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- He rejected Wakefield’s suggestion that the regime ought to be self-financing on a full costs recovery basis, and suggested that no such general principle was in operation. If enforcement costs relating to drivers do not properly come under the ambit of ss 53(2) or 70 then it followed that they were not recoverable through the fees structure at all, but he made no final ruling other than in relation to section 70 which certainly cannot be used to justify the driver enforcement element of cost. The Court rejected the contention that such a general principle of full cost recovery for the licensing scheme could be derived from Hemming and other preceding case law.



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### On to the Court of Appeal

- Permission granted on paper
- Ground (1) – The Learned Judge incorrectly restricted himself to determining the meaning of s70 only of the 1976 Act, when the question to be determined was whether driver enforcement costs were recoverable at all, and if so, whether under s 53(2), or s70; and
- Ground (2) – The Learned Judge incorrectly concluded that there was no general principle that the taxi licensing fee regime should be self-financing.



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- The real reason behind the challenge...
- A search for clarity
- S 53? An inevitable second JR
- Otherwise stuck with Saffman’s decision
- LGA intervention (written submissions only)



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- Master of the Rolls, King LJ and Lavender J
- The hearing discussed
- Judgment – begins with an overview of the regime; background facts and the judicial review proceedings



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- 24 “We agree with HHJ Saffman that the cost of monitoring and enforcing driver conduct cannot be taken into account in fixing the vehicle licence fee under section 70. We consider that the wording of section 70 in the context of the structure of the 1976 Act leads clearly to that conclusion, irrespective of the proper interpretation of section 53. We also consider, however, that such cost can be included in the driver’s licence fee under section 53. It is regrettable that no one representing drivers appeared before HHJ Saffman or before us to argue that point, which is plainly relevant to the scope of section 70.”



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- Court discussed the structure of the Act
- 39 “What is apparent from those provisions of Part II, read where appropriate with the 1847 Act, is that each of the three types of licence – vehicle, operator and driver - has a comprehensive and self-contained statutory regime, which addresses grant, terms, suspension, revocation and fee. There is no cross-referencing in relation to any of those matters. The notion that the fee for one type of licence can reflect the costs involved in another, far from being implicit in Part II of the 1976 Act, is entirely contrary to its structure.”



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- 40 “...The fact that, in the case of each type of licence, the district council can attach such conditions as they consider reasonably necessary indicates that Parliament envisaged that there would be additional requirements to be observed as conditions of the licence after its grant. Plainly, in all those cases the district council would need to monitor compliance with the various requirements and conditions on the basis of which the licence was granted and was to be permitted to subsist until it came to an end or was suspended or revoked. That would inevitably involve, in the case of each category of licence, expense on the part of the district council beyond the cost of the original grant of the licence.”



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- Paragraphs 41-5 considered s.70
- Move to s.53(2)
- 46 “In any event, we consider that the costs of enforcing the behaviour of licensed drivers can be recovered through the driver’s licence fee under section 53(2). The relevant words in that provision are “the costs of issue and administration”. The costs of “administration” must be something other than, and in addition to, the costs of “issue”. There is no difficulty in interpreting “administration” in its statutory context as extending to administration of the licence after it has been issued. It naturally includes the costs of suspension and revocation, which are events expressly mentioned in Part II of the 1976 Act. Suspension and revocation rest on non-compliance with the requirements and conditions for continuing to hold the licence. As we have said, it would therefore have been obvious to Parliament, when enacting the 1976 Act, that costs would be incurred by the district council in monitoring compliance with such requirements and conditions.”



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- 47 “Furthermore, there would appear to be no obvious reason why, as is plain, the costs of monitoring and enforcing the conditions and requirements for vehicle and operators’ licences are recoverable under section 70, but those for monitoring and enforcing the conditions and requirements for drivers’ licences are not recoverable under section 53. As we have said, in the case of all three categories of licence there are conditions of the grant which will have to be satisfied so long as the licence subsists; there will be reasonable additional conditions which the district council will wish to attach to the licence itself; and there are changed circumstances since the grant of the licence which Part II expressly states can result in suspension or revocation. In that connection, it is notable that, when section 46 of the 1847 Act was amended by the 1980 Act so as to permit the charging of “such fees as the commissioners may determine to be paid” for the grant of a hackney carriage driver’s licence, Parliament did not consider it necessary to amend section 53(2) of the 1976 Act”



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- 48 “For those reasons, both on the literal wording of section 53(2) and, if and so far as necessary, applying a purposive interpretation, we consider that the costs of monitoring and enforcing the behaviour of licensed drivers can be recovered through the fee under section 53(2).”



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- Some clarity
- Review licence fees accordingly
- Potential claims for restitution still a real possibility
- Time recording methodology etc



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Part 4

Some final thoughts

*Should LA 2003 fees be locally set?*



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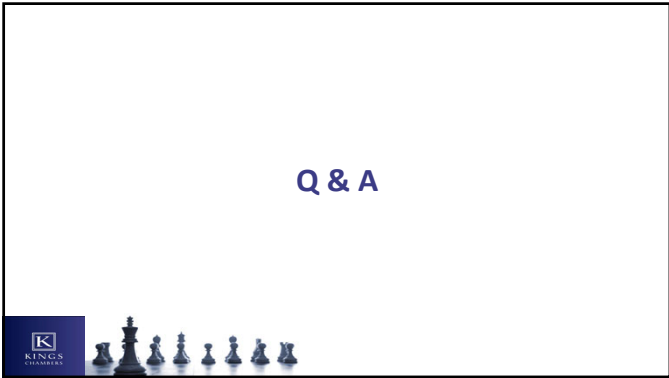
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