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Queen's Bench Division 27 March 1991. © LGR

Nolan LJ. and Roch J.

MANCHESTER CITY COUNCIL [R] –v- KING

Local authority- Licensing- Street traders- Increase in licensing charges - Whether council acting “Ultra Vires” - Whether council bound to observe rules of natural justice- Scope of council's power to increase licence fees Local Government (Miscellaneous Provisions) Act 1982(c.30) Schedule 4, Para 9(1).

The Local Government (Miscellaneous Provisions) Act 1982 provides by Schedule 4, Paragraph 9:

- (1) A district council may charge such fees as they consider reasonable, for the grant or renewal of a Street trading licence or a street trading consent.

A council, having resolved that Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982 should apply to their district, resolved to increase fees for street trading licences by more than 1,000 per cent. Neither individual street traders nor their association were given an opportunity of making representations before the decision was made. The applicant, on behalf of the street traders' association, sought judicial review both of the decision to increase the licence fees and of a subsequent decision to reduce the level of the new fees by 20 per cent made by the council after hearing representatives of the street traders' association.

Held: (1) That the rules of natural justice did not apply to the determination of licence fees for street trading. Parliament having refrained from requiring the local authorities to hear representations from street traders on that matter; that consideration by a local authority of such fees was an administrative matter.

R. v Wear Valley District Council ex parte Binks [1985] 2 All E.R. 699 and *Mahon v. Air New Zealand Ltd* [1984] A.C. 808, distinguished

- (2) That schedule 4, paragraph 9(1) of the Local Government (Miscellaneous Provisions) Act 1982 did not empower a local authority to raise general revenue by way of street trading licences and consents; that in determining the level of fees under that paragraph a local authority might take into account the costs of operating the street trading scheme, including the costs of prosecuting unlicensed traders; that it was for the local

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authority to judge what was a reasonable fee for the purpose of recouping the cost of operating the street trading scheme; that both decisions were flawed because the council were seeking to set a commercial charge for street trading; and that accordingly the decision should be quashed.

APPLICATION for Judicial Review.

By notice of application dated 21 August 1990 the applicant, Donald King, representing the Manchester Street Traders' Association sought judicial review of resolutions made by Manchester City Council between 16 January and 27 February 1990, to vary fees for street traders' licences. The grounds of this application were, inter alia, that the decisions were out with section 9(1) of schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982 in that the proposed new rates for street trading licences exceeded what could be considered reasonable for the grant or renewal of a street trading licence; that no council properly directing themselves on the relevant law could have reached the decision complained of; and that the council failed to comply with the rules of natural justice in that they gave no opportunity to the street traders of Manchester or their association to be heard.

Schiemann J. granted leave out of time to move on this application on 6th December 1990.

Following representations to the council by the applicant's association, the council decided to reduce the fees by 20 per cent. By a further notice of application dated 14th January 1990 the applicant sought judicial review of that decision also on the grounds, inter alia, that no reasonable council properly directing itself on the relevant law could have reached the decision; that the council had acted contrary to the rules of natural justice in reaching their decision; that the council had acted ultra vires and in excess of their powers. Leave in the second application was granted by Schiemann J. on 24 January 1991. The court heard the applications together.

Paul STINCHCOMBE for the applicant.

Charles CROSS for the council.

ROCH J.

Until 31 March 1990, street trading in Manchester was subject to the relevant provisions of the Greater Manchester Act 1981. Section 130(1) of that Act provided that:

“With his application for the grant or renewal of a street trading licence... the applicant shall pay such reasonable fee to cover the expense of Manchester City Council in dealing with such

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applications as the council may by resolution prescribe; and different fees may be prescribed for applications of different kinds.”

The fee set for street trading licences for the year 1989 was £169 and for the year 1990 £196, albeit that that fee applied only to the first quarter of the year 1990. The fees for annual licences for street trading prior to 1989 had been these: 1989, £30; 1987, £32; 1988, £169;

From 1 April 1990 street trading in Manchester has been governed by Schedule.4, of the Local Government (Miscellaneous Provisions) Act 1982: section 3 of the 1982 Act enabled a district council to resolve that Schedule 4 of the Act should apply to their district on such day as might be specified in the resolution. The council passed such a resolution adopting a recommendation by the environmental health and consumer services committee to that effect made on 28 November 1989.

Paragraph 9(1) to schedule 4 of the Act of 1982 provides:

A district council may charge such fees as they consider reasonable for the grant or renewal of a street trading licence or a street trading consent”.

On the 7th March 1990 the Manchester City Council resolved that the fee for a street trading licence within the outer zone of the parking area in the centre of the city should be £1,000 per annum and that within the inner zone of the parking meter area the fee for a street, traders licence should be £2,000 per annum, except in the case of one road Market Street where the licence fee was to be £2,500 for the year. That decision is the subject matter of Mr King's first application for judicial review.

The steps by which those fees were fixed were these:

First, a report by the Director of environmental health and consumer protection and the city solicitor was prepared for the meeting of 16 January 1990 of the licensing and legal proceedings subcommittee, of the environmental health and consumer services committee. In this judgment I shall refer to the Manchester City Council as "the council", to the environmental health and consumer services committee as "the committee" and to the licensing and legal proceedings subcommittee of that committee' as "the subcommittee".

That report contained suggestions as to those streets which should be designated “prohibited”, that is to say, streets in which no street trading would be permitted, those streets to be designated as “consent streets”, (consent street means a street in which street trading is prohibited without the consent of the district council) and those streets to be designated “licensed streets” (a “licensed street” means a

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street in which street trading is prohibited without a licence granted by the district council). These definitions and the power to designate streets in this way are contained in paragraphs 1 and 2 of schedule 4, to the Act of 1982. The report informed the members of the subcommittee by paragraph 2, 14.

“Under the provisions of schedule 4 members must consider what fees are to be levied for licences to trade in various goods at different locations. Whilst the fee must be reasonable it need not be restricted to the recovery of the cost of administering street trading”.

The report went on in the next paragraph, (paragraph 2.15):

"Members may wish to consider the following proposals:

- (a) That within the outer zone of the parking meter area, including the market zone but excluding the inner Zone the fee be £1,000 per year.
- (b) That within the inner zone, the fee be £2,000 per year”.

With regard to street trading consents the report at paragraph 5.3 said:

"Members may wish to consider a fee of £300 as being appropriate”

The report contained no explanation as to how these sums had been chosen. The council has an "anti-poverty" policy and in the early part of the report it was stated that the anti-poverty implications were nil.

The subcommittee of 16 January 1990 adopted the suggested designation of streets and areas in the city contained in that report, revoked an earlier decision to use the Greater Manchester Act 1981 to control street trading within the city with effect from midnight on 31 March 1990, and resolved that approval be given to the proposed licence fees as detailed in paragraphs 2.15 and 5.2 of the report. The subcommittee also resolved that approval be given to the attachment of 12 conditions to a street trader's licence.

The matter came before that subcommittee a second time on 27th February 1990. At that meeting it was resolved that Market Street be designated a licence area; that the fee for a street trading licence for Market Street be increased to £2,500 for the year and that the wording of the tenth condition to be attached to a street trading licence relating to collection and disposal of refuse from Street trading sites be amended.

Both those meetings of the subcommittee were in private, it being resolved under section 100(A) (4) of the Local Government Act 1972 that the press and the public be excluded because of the likely disclosure of exempt information. Following the decisions taken on

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16 January 1990, notices appeared in local newspapers of the decision concerning the designation of streets, but no mention was made of the licence fees that the subcommittee were to invite the city council to adopt.

In these proceedings, Mr King, the applicant, acts as representative of the Manchester City Street Traders Association. I shall refer to that body in this judgment as "the association". A Mr Grimshaw is the secretary of that association. Following the council's approval of the scheme proposed by the committee for the control of street trading in Manchester, on 7 March 1990, Mr Grimshaw wrote to the council on behalf of the association and to Councillor Warren, the chairman of the committee. Meetings were held between representatives of the association and councillors and officers of the council between 7 March and 22 March 1990. On 22 March Councillor Warren wrote to the association:

"All fees are reviewed annually, but as a result of changes in the way Local Government is financed the city council has thoroughly reviewed all fees and these now more accurately reflect the costs of administration and enforcement of legislation.

You made two demands:

Firstly, that the level of licence fee for street trading within the city centre be reduced by 75 per cent; Secondly, that the facility should be available to pay such fee on weekly or monthly basis.

Unfortunately it is not possible to reduce the licence fee, and the payment of fees in weekly or monthly instalments would impose to great a burden on the administrative system.

However, it is possible to accept payment in four equal quarterly instalments as a transitional arrangement. This provision would only be available for the year commencing 1 April, 1990."

Mr Grimshaw's reply to that letter on the following day was to the effect that the association were deeply concerned that the result of such an increase in fees would be that: "The vast majority of our members will cease to trade or more than likely; will have to pass it on to our customers who are mostly of the lower income bracket."

At that time the solicitors of the association were not their present solicitors. The solicitors of that time advised the association that they had no means of challenging the council's decision relating to fees for street trading licences and the association accepted that advice.

In July 1990 the Manchester Private Hire Association, an association of owners and operators of taxi cabs, successfully challenged the council's decision relating to fees payable by taxi cab

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operators in Manchester. The solicitors of that association, Messrs Aubrey Isaacson and Co. The Manchester City Street Traders Association retained that firm of solicitors in July 1990 with the result that on 21 August 1990, application was made by Mr King for leave to move this court for judicial review of the decision of the council relating to fees for street traders' licences: The relief sought was a declaration that the decisions were invalid or ultra vires and an order of certiorari for the purposes of quashing the decisions. The application also sought an extension of the period within which the application could be made.

The application was considered by Schiemann J. at an oral hearing on 6 December 1990. When granting Mr King leave to move Schiemann J. indicated that it might be desirable if the street traders sought the opportunity to make representations relating to street trading licence fees to the council.

Following that indication by Schiemann J. the city council sent letters to all licensed street traders inviting them to attend a meeting of the subcommittee on 19 December for the purpose of making representations. The council also invited the Manchester City Street Traders Association to make representations to their Subcommittee through its' solicitor Mr Isaacson.

Prior to the meeting of the subcommittee on 19 December 1990, the members of the subcommittee were sent a report prepared by the city solicitor. That report began by stating that the purpose of the meeting was to reconsider fees for street trading licences for the year 1990 to 1991 in the light of representations made by the traders and to set the licence fees for street trading licences for the year 1991 to 1992. The recommendation was that the subcommittee set reasonable fees for street trading licences having regard to representations made by the street traders. The report recorded that leave to apply for judicial review had been granted by Schiemann J on 6th December on the basis that there was:

“(a) an arguable case; and (b) that the decision makers had not taken into account the effect such an increase in fees would have on the livelihoods of street traders”

The report further informed the members of the subcommittee- that representations had been invited from all licensed street traders concerning the level of licence fees for the current year and the next year, which would enable them to show what effect an increase in fees might have upon their livelihoods.

At the start of the subcommittee meeting and before the street traders and their solicitor were admitted to the meeting the members of the subcommittee were provided with the affidavits sworn by Mr

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Grimshaw, Mr King and Mr Isaacson in support of the application for judicial review and had the opportunity to read those affidavits. Mr Grimshaw, Mr King and Mr Isaacson were then invited into the meeting. Mr Grimshaw then addressed the meeting briefly and handed in a petition signed by some 8,000 persons in support of street trading.

Mr Isaacson, then addressed the subcommittee at greater length, submitting the accounts of six street traders who had produced trading accounts so that they might be disclosed to the subcommittee, making the point that those accounts showed that the increased fees would take up a large proportion of the net profits of those traders, and in the case of one trader the whole of the net profit. These accounts were said to be representative of the turnover and profit of street traders in Manchester.

Following those representations considerable discussion took place in the subcommittee in the absence of the representatives of the association. The committee then resolved to reduce the licence fees for street trading already, fixed for the year 1990 to 1991 by 20 per cent but to increase those fees by 11 per cent for the year 1991 to 1992, such increases being in line with other increases in other licence fees for that year. One councillor dissented, that councillor being in favour of the licence fee for street trading being reduced to £196 for the year 1990 to 1991, that is to say, to the figure that had been adopted under the Greater Manchester Act 1981.

The subcommittee's, decision was adopted by the council on 30 January 1991. However, prior to that time Mr King had applied for leave to move this court for judicial review of the decision of the subcommittee of 19 December 1990, that leave being granted by Schiemann J on 24 January 1991. This court gave the applicant leave to move in respect of the decision of the full council at the commencement of this hearing.

The benefit of street trading to the community is that street traders provide inexpensive goods for those with low incomes, that is to say, for "people to whom pennies mean a lot". In particular, street traders are a source of inexpensive food for those with low incomes.

It is the belief of street traders in Manchester that the increases in the fees for street trader's licences passed by the council are so large, (the new fee of £2,000 represents an increase of 1,083 per cent) that they must have been introduced, if not to put an end to street trading in the centre of Manchester then to effect a substantial reduction in the number of street traders in the centre of Manchester.

The council's counsel accepts that the use of exorbitant fees to implement such a policy would be ultra vires the authority's power given by paragraph 9 of schedule 4 of the Act of 1982. The council

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say that they adopted the Act of 1982 primarily to help combat unlawful street trading outside the city centre as the provisions of the Act of 1982 in this regard are more effective than those of the Act of 1981.

Although the report in which the new fees were first suggested contained no explanation of how those figures were derived, Mr Button, an assistant solicitor with the council has deposed that the proposed fees were fixed having regard to the fees charged for stalls within the various markets controlled by the council and also having regard to tenders which had been received by the markets department for a one-year licence to trade from one of four barrows to be owned by the council and stationed in Albert Square in the centre of the city. Mr Button exhibited to his affidavit a list of the weekly charges, made for stalls in various open and covered markets in the city of Manchester. Those charges range between £20 per week and £229 per week. Mr Button also exhibited a list of offers received for stall licences in Albert Square, those offers ranging between £400 and £6,500. Councillor Warren, the chairman of the subcommittee has deposed that the factors which influenced the subcommittee were: first, the charge for stalls in council-operated markets: second, the tenders received for the stalls in Albert Square, and third, the proximity of the street traders to the city centre which is the major shopping centre in the north west of England.

The council accepts that the street traders were not heard before the fees were fixed by them on 7 March 1990. The council point out that there is no requirement that they advertise the proposed fees or that they invite representations or consult street traders or their association in schedule 4 to the Act of 1982. That is in contrast to the position relating to the designation of streets and the recovery from licence holders of reasonable charges for the collection of refuse, the cleansing of streets and other services rendered by the authority to the licence holder in his capacity as licence holder, where the council is under a statutory obligation to give notice of the proposals, publish notice of the proposals in the local newspaper, to specify a reasonable period within which representations concerning their proposals may be made to them and to consider any representations which are made. The council submit that despite the absence of any statutory obligation to listen to representations as to the amounts of fees for street trader's licences, they did entertain representations from the association on 22 March 1990 as a result of which they introduced the concession relating to quarterly payment of fees.

The council say that the street traders and their association had no legitimate expectation that they would be consulted prior to the

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fixing of street trading licence fees because no promise had been made to them by the council that they would be consulted, nor was there any established practice of prior consultation. In any event, submit the council the street traders were heard and fully heard on 19 December 1990. Councillor Warren in his second affidavit has deposed that members of the subcommittee took full account of the affidavits of Mr Grimshaw and Mr King together with the representations made on behalf of the association by Mr Isaacson; and that regard was had to the effect that the fees charged for street trading licences might have upon the livelihoods of street traders. The council has no desire to drive street traders from the streets.

Councillor Warren refutes totally the allegation that the subcommittee on 19 December was motivated by bad faith or improper motive.

Mr Cross who appeared for the Council, said that the council had had regard to market forces in fixing the street traders' licence fees and that that was not unlawful. He went further and said that a local authority are under a fiduciary duty to their charge payers to maximise their income: The local authority can say that they have a right to fix fees and to take into account what the market will bear and that they will in doing that consider what the street traders can afford to pay. Mr Cross went on to say that there was an argument that a local authority would be in breach of their fiduciary duty to their charge-payers if they did not obtain by way of licence fees what the market will bear. The Local Authority discharge their duty if they ask themselves "What will the market bear?" In answering that question councillors, use their judgment and their knowledge of street trading conditions in their area. Mr Cross pointed to subparagraph 2 of paragraph. 9, of schedule 4, which provides:

"A council may determine different fees for different types of licence or consent and in particular, but without prejudice to the generality of this subparagraph, may determine fees differing according- (a) to the duration of a licence or consent; (b) to the street in which it authorises trading; and (c) to the descriptions of articles in which the holder is authorised to trade."

Mr Cross submitted that the provisions of that subparagraph indicated that the Council may and should take into account market factors.

In support of the council's contention that the fees they fixed were reasonable, affidavit evidence has been served to indicate that the number of street trading licences has increased from 42 in the year 1989 to 48 in the year 1990 to 1991. Of the 48 current street trading licences, 14 licence holders have paid the new fees in full and 31

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have undertaken to pay the new fees by instalments. All of those who have given that undertaking have paid two instalments but no more. The council sent out reminders to those persons in December of last year. In addition 29 further applications for street trading licences were received by the Council over and, above the 48 which had been issued. Those applications had been refused because the applicant or the application site or the nature of the goods were unsuitable. In addition over 100 further inquiries have been received by the markets department of the council. The council have also submitted affidavit evidence as to charges for street trading licences made by other comparable local authorities which shows that the fees that they have fixed are in the middle of the range of such fees. The Council accept that the four street trading licences in Albert Square were issued at fees of £ 100 each, those fees being paid by the markets department of the council, and that all four persons who took up those licences ceased to trade in Albert Square after some three or four months. Nevertheless the council say that they were entitled in the early months of 1990 to look at the sums which street traders had been prepared to offer for pitches in Albert Square as an indication of the state of the market for street traders' licences in the centre of Manchester

In her second affidavit Mrs Davenport, a principal environmental health officer with the council stated:

"Street trading licence fees¹ charged by Manchester City Council include amounts *to* reflect the cost to enforcement, administration and street cleansing."

Mr Button in his fourth affidavit stated that he had been informed that a certain proportion of the street trading licence fee is used by operational services as a payment towards street cleansing, which is general litter collection and street cleaning as opposed to specific refuse collection.

At first sight those passages in the council's affidavits suggest that there has been a breach of the terms of paragraph 9 of schedule 4. By subparagraph (8) of paragraph 9 the council may determine that charges under subparagraph (6) of paragraph 9, that is to say, such reasonable charges as the council may determine for the collection of refuse, the cleansing of streets and other services rendered by the council to the street trader in his capacity as a licence holder; should be included in the fee payable under paragraph for the street trading licence or street trading consent. Alternatively the council may recover such charges separately. By Subparagraphs (9), (10) and (12) of paragraph 9 of schedule 4 the council must give notice of the proposed charges; advertise such charges in a local newspaper and

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specify a reasonable period within which representations may be made, and consider such representations before determining such charges.

A further affidavit from Mrs Davenport was filed during the hearing explaining that it is a term of the street trader's licence that the street trader is responsible for the removal of waste and litter generated by his stall. Consequently, the affidavit goes on to say, the matters referred to in paragraph 18 of Mrs Davenport's second affidavit and in Mr Button's fourth affidavit are not charges made under paragraph (9) (6) of Schedule 4 to the Act of 1982. Therefore the council have not been in breach of their obligations under subparagraphs (9), (10) and (11) of paragraph 9. The services covered by "the certain proportion of the street trading licence fee used by operational services" was not a charge for services rendered to him by the council in his capacity as licence holder. I simply observe that whereas in respect of general street cleaning as opposed to specific refuse collection this explanation is readily understood, it is difficult to see how this explanation can apply to "the cost of enforcement" because the enforcement of the street trading scheme and the prevention of illegal street trading would appear on the face of it to be a service rendered by the council to the street trader in his capacity as a licence holder. Nevertheless, that was not an aspect of the case pursued by Mr Stinchcombe on behalf of the applicant.

Inquiry of Mr Cross revealed that no figures have ever existed to show what proportion of the Street trading licence fee represents the cost to the council of those matters referred to in paragraph 18 of Mrs Davenport's second affidavit.

On behalf of the applicant, Mr Stinchcombe submitted that the council's decision of 7 March 1990 was defective and should be quashed for several reasons. First, the increases in fees were unreasonable in the *Wednesbury* sense [*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 K.B. 223; 45 L.G.R. 635] that no reasonable local authority could have decided upon them on the information before the council's subcommittee in January and February of 1990. Second, the council by their subcommittee had failed to consider a material matter before fixing the new fees, namely, the probable impact of such substantial increases in the licence fees on existing and potential street traders.

Thirdly, there is a breach of the rules of natural justice in that no opportunity was afforded to existing holders of street trading licences of street trading licences to make representations to the subcommittee before the subcommittee reached their decisions. The rules of natural justice are to be applied because this is a case where the livelihood of persons will be affected

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by the acts or decision of the public authority. Here Mr Stinchcombe relied on two authorities *R. v Wear Valley District Council ex parte Binks* [1985] 2 All E.R. 699 and *Mahon v. Air New Zealand Ltd* [1984] A.C. 808

Mr Stinchcombe submitted that the council's decision of 31 January 1991 should be set aside because it also was unreasonable in the *Wednesbury* sense, being simply a decrease by 20 per cent of fees that had been fixed by decisions that were themselves flawed.

Further, the subcommittee on 19 December 1990 had received evidence from existing street traders which all pointed to the catastrophic effect on existing street traders' of the proposed increases. The reductions were not sufficient on the evidence presented to the subcommittee and, apparently, accepted by it.

Further, in so far as the level of fees determined by the subcommittee was based on factors other than the probable effect on existing street traders, the decisions were flawed because the street traders were not informed of those other factors and given an opportunity to make representations on them.

Mr Stinchcombe's principal submission was that the Council had misconstrued the statute in applying the test of "What will the market bear?" when determining the level of fees for street trading licences. The discretion given to the local authority by paragraph 9(1) of schedule 4 to the Act of 1982 is to charge such fees as they consider reasonable, but that must be such fees as will promote the policy and objects of the Act.

Mr Stinchcombe argues that it is not the purpose of the Act of 1982 to provide the local authority with a power to raise money irrespective of the impact of the level of fees charged upon street traders and street trading. Mr Stinchcombe meets Mr Cross's argument founded on subparagraph 2 of paragraph 9 by saying that, far from enabling the local authority to look simply at market forces, the purpose of subparagraph 2 is to ensure that street trading is not confined to a few prime streets and to those types of article which may produce high profits for street traders.

Subparagraph (2) enables the local authority to have a scheme or pattern of street trading within their district which provides a range of goods in a number of different places to meet the needs of those living within the local authority's area, and in particular of those with low incomes. Thus the local authority can ensure that each licensed street has one or more traders dealing in fruit and vegetables by adjusting the licence fees charged for street trading if necessary, so that street traders in fruit and vegetables pay lower fees than those dealing in goods which provide more lucrative rewards for the dealer.

I accept the submission of Mr Cross that this is not a case of

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breach of a legitimate expectation on the part of the street traders of Manchester that - they would be heard before the fees for street trading were fixed, because there was no promise to that effect by the council nor was there any practice of consultation with street traders before licence fees were set. Mr Stinchcombe for the applicant did not place reliance upon the doctrine of a legitimate expectation when making the submission that the decision should be set aside for procedural irregularity. Mr Stinchcombe relied upon a failure to observe the rules of natural justice.

In my judgment there is no question of the rules of natural justice having application in this case, despite the fact that the livelihoods of street traders were affected by fees for street trading licenses and consents, set by local authorities. Parliament in the Act of 1982 has required authorities to invite and to consider representations from street traders in two situations but has refrained from making such requirements part of the process of the determination of licence fees unless the licence fees include those matters set out in subparagraph (6) of paragraph 9 of Schedule 4.

The two cases relied upon by Mr Stinchcombe can both be distinguished from the present case. In *R v Wear Valley District Council, ex parte Binks, (supra)* the case concerned the revocation of an informal licence or permission given to a particular street trader, where the effect of the revocation was to deprive the street trader of her livelihood. There the court held that the council's failure to give the applicant prior notice, or an opportunity to be heard or any reasons for their decision amounted to a denial of natural justice and consequently the decision giving her notice, to quit would be quashed. The second case of *Mahon v Air New Zealand (supra)* concerned the making of an order that Air New Zealand should pay \$150,000 towards the costs of a Royal Commission investigating the cause and circumstances of an air disaster made by a judge of the High Court of New Zealand and who had been appointed by the governor-general as Royal Commissioner to investigate the air crash.

Both cases concerned the making of decisions which affected a single legal person and are to be contrasted with the administrative act of setting a licence fee which will apply generally to a class of persons. Further, in the first case the effect of the local authority's decision was to prevent the applicant from trading altogether.

If I am wrong in this matter, then in my judgment the council remedied any procedural defect in their decision of 7 March 1990 by the meeting of the subcommittee held on 19 December 1990. I do not accept the criticisms made on behalf of the applicant of the subcommittee's conduct at that meeting. I accept Mr Cross's

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submission that consideration by the subcommittee of a local authority of the proper level of licence fees for street trading is an administrative matter and does not require the subcommittee to follow procedures which would be appropriate to a hearing in a court of law. The evidence indicates that the street traders were given every opportunity to make any representations that they cared to make which they considered to be relevant to the fixing of the licence fees, and the members of the subcommittee listened to and took account of those submissions.

This case turns on the proper interpretation to be given to paragraph 9(1) of schedule 4 to the Act of 1982. The critical questions, in my opinion are:

1. Were the subcommittee given correct advice in the initial report by the officers of the council when they said "Whilst the fee must be reasonable, it need not be restricted to the recovery of the cost of administering street trading"?
2. When the council set the licence fees for street trading by asking themselves, "What would the market bear?" were the council applying the correct criterion?

The Greater Manchester Act 1981 section 130(1) required the Manchester Council to "prescribe fees which were reasonable to cover their expense in dealing with such applications." Clearly the wording of paragraph 9(1) of schedule 4 to the Act of 1982 reflects Parliament's intention that the local authority in determining reasonable fees for street trading licences are not to be restricted to fees which will cover their expense in dealing with such applications." But does the wording of paragraph 9 (1) enable a local authority to raise general revenue by way of fees for street trading licences and consents? **In my judgement it does not.**

First, it would be surprising if Parliament had intended to include a general revenue-raising provision in a schedule which deals solely with street trading. The purpose of that part of the Act is to establish a general scheme for street trading which local authorities may adopt, if they so desire: see section 3 of the Act. The fees which a district council may charge are "such fees as they consider reasonable for the grant or renewal of a street trading licence or a street trading consent." The fees charged, in my judgment, 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 costs 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

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cost of operating the scheme, the original decision 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.

That the provision is not a provision enabling a local authority to raise revenue for purposes other than street trading is confirmed by the fact that Parliament has not required the local authority to give prior notice of the fees they intend to charge or to invite representations concerning those fees or to take account of such representations unless the fees include charges referred to in subparagraph (6) of paragraph 9 of Schedule 4. Had Parliament intended paragraph 9(1) to be a general revenue-raising provision, or had Parliament intended that the district council should be able to charge "what the market would bear", then Parliament could have used terms similar to those of section 123 of the Local Government Act 1972, which deals with the disposal of land by local authorities where the local authority must seek a consideration that is the best that can reasonably be obtained.

Mr Cross's submission on the wording of paragraph 9(2) of schedule 4 does not persuade me that that indicates that Parliament intended the local authority to take account of market considerations when determining fees for street trading licences. I prefer the counter submission made upon this point by Mr Stinchcombe on behalf of the applicant.

What considerations do local authorities have to take into account when determining the level of fees under paragraph 9(1)? The local authority are no longer confined to the cost of issuing licences. They may take into account the costs which they will incur in operating the street trading scheme, including the prosecution of those who trade in the streets without licences. However, if they take into account those costs they may need to comply with the provisions of paragraph 9(8), (9), (10) and (11) as the prosecution of those who trade in streets without street trading licences or consents may be services rendered by the local authority to street traders in their capacity as licence holders within the meaning of paragraph 9(6).

The weighing and placing of a monetary value on the various facets of the street trading scheme and the judgment of what is a reasonable fee for the purpose of recouping in whole or in part the cost of operating the street trading scheme are matters for the members of the local authority.

My conclusion is that the initial decision was flawed because the council sought to set a commercial charge for a street trading licence rather than determining a reasonable fee to recover the whole or part

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of their costs in operating a street trading scheme. Further the council failed to have any regard for fees charged prior to 31 March 1990. Consequently, in my judgment, the council took into account an irrelevant consideration and failed to have regard to a relevant consideration when reaching the decision of 7 March 1990. The first flaw exists in the decision made on 31 January 1991. **Consequently I would quash both decisions and send the matter back for reconsideration in the light of the terms of the judgements given by this court.**

There remains the issue of the delay in bringing the first application for judicial review. That matter can be dealt with shortly. As my view is that the decision of 31 January of this year is flawed in the same way as the decision of 3 March last year and there can be no question of delay in bringing the application for judicial review of the council's second decision relating to street trading fees for the year 1990- 91, and as the decision, of the council of 31 January 1991 has had the effect of superseding or revoking the decision of 7 March 1990, the lateness of the application for judicial review of the earlier decision, even if unjustifiable, should not result in this court refusing the relief sought in respect of the later decision.

NOLAN L.J.

I agree that these applications should be granted. I agree in particular that the case turns on the meaning which should be given to paragraph 9(1) of schedule 4 to the Local Government ((Miscellaneous Provisions) Act 1982, which reads:

“A district council may charge such fees as they consider reasonable for the grant or renewal of a street trading licence or a street trading consent.”

The substance of the submissions put forward by Mr Cross on behalf of the council was that, in deciding what was a reasonable fee to charge, the council were entitled and indeed bound, to have regard to the fact that a street trading licence or consent is a valuable commodity. The evidence, he said, was that the council considered solely what was reasonable, having regard to what was a fair price to ask for a facility in respect of which there was a market. The council are under a fiduciary duty to maximise their income. The council own the highway, and should charge a proper amount for its use. He referred, by way of analogy, to section 123(2) of the Local Government Act 1972 which provides that, subject to specified exceptions: "...a council shall not dispose of land ...for a consideration not less than the best that can reasonably be obtained.”

The argument was most attractively put by Mr Cross, but I must say at once that in my judgment rests upon a fallacy. The fallacy

lies in believing that paragraph 9(1) authorises the council to use their licensing powers as an income-producing asset. Had this been the intention of Parliament the extent of the fund-raising powers conferred upon the Council would be enormous, since they have a monopoly over the granting of street trading licences in the Greater Manchester area. They have a similar monopoly in respect of the granting of other licences, including, for example, those for music and other entertainments and for sex establishments. In these cases also the Act of 1982 authorises them to charge reasonable fees for the grant or renewal of licences: see paragraph 7 of schedule 1 and paragraph 19 of Schedule 3. If the arguments of Mr Cross about the meaning of paragraph 9(1) and other similarly worded provisions are correct, then the Act of 1982 has provided the council and other licensing authorities with golden opportunities to augment their revenues.

In my judgement this was not the intention of Parliament. I accept the submission of Mr Stinchcombe that the powers conferred upon the councils by schedule 4 must be understood and exercised in accordance with the policy and objects of the Act. So far as schedule 4 is concerned, the policy and object of the Act is to control street trading. The power of the council to grant licences and consents is coupled with a duty to ensure that street trading is conducted and the highway is used in a manner which serves the public interest. The Act is not a fiscal measure. The purpose of paragraph 9(1) is to enable the council to charge a reasonable fee for the service which they render in granting or renewing licences and consents. Paragraph 9(2) enables the council to charge different fees to different traders, depending upon the type of goods which they sell and the place where they sell them with a view to ensuring so far as possible that the public are supplied with the right goods in the right place. But the level of fees overall must be related to the cost to the council of operating the street trading scheme. I fully agree in this respect with the views expressed by **Roch J.** Counsel were unable to refer us to any other case in which the point has arisen, but I note that the conclusion which we have reached appears to be in line with the approach adopted by the Divisional Court, albeit without argument to the contrary, in *R v Greater London Council ex parte the Rank Organisation Ltd*, *The Times*, 19 February 1982.

That ought to dispose of the matter but I would add for the sake of completeness that I see considerable force in the applicant's complaint that fees were, raised by something like 1,000 per cent without sufficient regard, to the ability of street traders to absorb the additional cost. I think that it may fairly be said that the

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council failed in this respect to take account of a material consideration when they arrived at their initial decision of 7 March 1990. The affidavits filed by the applicant indicate that for some traders at least the additional cost would be ruinous. But these affidavits, together with the oral representations made by and on behalf of the applicant and others, were taken into account by the licensing and legal proceedings subcommittee before it reached the decision which was approved by the council on 30 January 1991.

Moreover, it had become clear by then that, despite the hardship which the proposed increase in fees would have presented to the applicant and those similarly placed, it had produced no reduction in the number of traders applying for licences, but rather the reverse. Accordingly, I would not set aside the final decision of the council on the ground that material considerations had been left out of account, nor on the ground, which was also suggested by Mr Stinchcombe, that the decision was irrational. But, for the reasons given, I consider that both decisions were based on an incorrect interpretation of paragraph 9(1) and must therefore be quashed.

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