

In the Westminster Magistrates' Court

Between:

UBER LONDON LIMITED

Appellant

- v -

TRANSPORT FOR LONDON

Defendant

WRITTEN SUBMISSIONS for Hearing 25 June 2018
(On behalf of the Licensed Taxi Drivers Association)

Introduction

1. These written submissions relate -
 - a. to ULL's proposal for cross-border hiring under the authority of a London PHV Operator's Licence ("the cross-border proposal"), as described by Helen Chapman in paragraphs 307-316 of her witness statement; and
 - b. to the continued operation by Uber in controlled districts where it has been refused a licence. (By agreement the evidence of this is limited to Uber's operations in York and Reading.)

2. In summary, the LTDA submits that -
 - a. the cross-border proposal is unlawful;
 - b. the unlawfulness of the cross-border proposal is a relevant consideration on this appeal;
 - c. by incentivising drivers on the Uber platform to work in areas in which Uber has been refused an operator's licence, Uber falls below the standards expected of a fit and proper person to hold such a licence;
 - d. by incentivising or otherwise encouraging Uber drivers to work in areas in which neither the drivers nor vehicles are licensed, Uber undermines local licensing control, with safety implications; and
 - e. if the Court is minded to allow ULL's appeal and renew ULL's licence, it should condition the licence so far as is necessary to meet the erosion of localism in the controlled districts that lie within Uber's "London Region" and in which ULL does not hold an operator's licence.

Cross border hiring

3. “Cross border hiring” is a portmanteau expression covering a miscellany of different activities, some of which are lawfully undertaken, others unlawfully. There is no case law to the general effect that cross-border hiring is *per se* lawful.
4. The main focus of the LTDA’s submissions is ULL’s proposed operation outside Greater London, in controlled districts in which it is not licensed. The governing statute is the Local Government (Miscellaneous Provisions) Act 1976 (“LGMPA 1976”).
5. The extent of ULL’s proposed operation – the so-called “London Region” – comprises Greater London (the area of TfL’s authority) and some 41 controlled districts in which ULL is not licensed to operate.
6. The licensing requirements of PHV drivers and their vehicles, and the exemptions therefrom, are different from those made of PHV operators. The over-simplification - “*cross-border hiring is lawful*” (ULL’s submission to this court at the last directions hearing) – suggests a failure to recognise that distinction.

PHV drivers and vehicles

7. The owner of a vehicle may not use it as a private hire vehicle in a controlled district (outside Greater London) unless the vehicle is licensed under section 48 LGMPA 1976: section **46(1)(a)**. Nor may the vehicle be driven otherwise than by someone licensed under section 51: section **46(1)(b)**. It is also an offence for the owner of a vehicle to employ as a driver someone who is not so licensed: **46(1)(c)**.
8. No offence under sections 46(1)(a), (b) or (c) is committed, however, if a driver’s licence and a vehicle licence issued by another council are in force: section 75(2). All three licences (operator’s, driver’s and vehicle) must be issued by the same authority: *Dittah v Birmingham City Council* [1993] RTR 356.
9. The so-called “right to roam” of PHV drivers and vehicles derives from section 75(2). The right is not unqualified: PHV drivers and vehicles may not solicit custom, and may only fulfil a booking accepted by an operator licensed by the same authority as licensed them: *Dittah*.

PHV operators

10. Section 80(1) LGMPA 1976 provides:

“operate” means in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle.
11. An operator may only make provision for the invitation or acceptance of PHV bookings in the controlled district in which he is licensed: LGMPA section **46(1)(d)**, applying section 80, subsections (1) & (2).

12. Section 75 of the LGMPA 1976 does not provide an exemption for operators (from section 46(1)(d)), equivalent to that which it provides for drivers and vehicles (from sections 46(a), (b) & (c)). Thus, whilst drivers and vehicles may lawfully undertake *journeys* “which ultimately have no connection with the area in which they are licensed” (per Latham LJ in *Shanks v North Tyneside BC* [2001] LLR 706), lawful *provision for the invitation or acceptance of bookings* is anchored to the controlled district in which the operator is licensed.
13. Whether or not provision has been made in breach of section 46(1)(d) is a question of fact. The following guidance emerges from the cases -
- “It is simply a question of asking, in common sense terms, whether there has been provision made in the controlled district for invitation or acceptance of bookings”: *Kingston Upon Hull City Council v Wilson* (1995) WL 1082181, per Buxton J.
 - “There could well be provision for invitation of bookings in one place and for acceptance in another”: *East Staffordshire BC v Rendell* (1995) WL 1084118, per Simon Brown LJ.
 - “As the authorities clearly show, the time [*query “main”?*] question is not where the act of accepting any particular booking or bookings take place, but where the provision is made”: *idem*
 - “The determining factor is not whether any individual booking was accepted, let alone where it was accepted, but whether the person accused has in the area in question made provision for the invitation or acceptance of bookings in general”: *Windsor and Maidenhead v Khan* [1994] RTR 87, per McCullough J.

Invitation of bookings

14. Uber customers make bookings using the Uber Rider App on a smartphone, licensed by Uber BV. When customers activate the Uber Rider App, they are immediately presented with a map of their local area, showing the position of each nearby Uber vehicle that is currently available for hire. Each vehicle is continuously advertising its availability for hire and inviting potential customers in the vicinity to commence the process of booking.
15. *Rose v Welbeck* [1962] 1 WLR 1010 was a decision on the prosecution of a driver for plying for hire: but the court’s analysis of the facts, and discussion of what amounted to an invitation to book, are relevant. There, a PHV vehicle was parked in a public street, bearing the inscription “Welbeck Motors, Minicabs” on both its sides, together with a telephone number. Winn J said: “At the very lowest, the evidence in the present case discloses behaviour and appearance on the part of this vehicle which amounts to an invitation:

‘Get in touch one way or another with my owner and see whether he is willing for you to take me as a vehicle which you are hiring.’”

Lord Parker CJ said: “The vehicle was saying:

‘Not only do I, if I may personify the vehicle, ‘recommend you to Welbeck Motors Ltd., where you can hire a minicab, but further I am one of those minicabs and I am for hire.’”

16. In terms of ‘invitation to book’ there is no meaningful distinction to be drawn between the invitation made by vehicles displayed on the Uber Rider App, and that made by the parked *Welbeck* vehicle: the former is merely a modern, internet-assisted manifestation of the latter.
17. Under Uber’s reconfiguration of cross-border work, the only vehicles and drivers that may work via the Uber platform in what Uber has defined as “the London Region” are those licensed by TfL. In addition to Greater London, “the London Region” includes some 41 other controlled provincial districts where ULL is not a licensed operator. Uber intends that TfL-licensed PHV drivers and vehicles will present themselves in those districts as available for hire, and it provides the means for them to do so. As mentioned below (e.g. in Reading and York) it actively encourages this.
18. By exhibiting (on the Rider App) their physical presence in those 41 districts, and their availability for immediate hire, the drivers and vehicles self-evidently invite bookings for their services. Provision for that invitation is made by ‘Uber’. Whether it is by ULL or UBL or UBV, or a combination of any or all of them, the provision will invariably be unlawful, either -
 - (a) under section 41(d), because provision will be made by an operator who is unlicensed in the area in which he makes it; or
 - (b) under section 41(e), because provision will be made for the invitation of bookings for PHV and driver not licensed by the same authority as the operator: *Dittah v Birmingham City Council*: [1993] RTR 356.

Relevance of unlawful model

19. The LTDA’s understanding is that *until ULL’s model was changed* – i.e. so that TfL licensed drivers no longer (or no longer appear to) accept PHV bookings – the model’s inherent incompatibility with section 2(1) of the Private Hire Vehicles (London) Act 1998 was, in TfL’s submission, a relevant consideration on this appeal: see TfL’s letter of 22 September 2017, and its written submissions to this Court in advance of the directions hearing on 19 December.
20. The inherent incompatibility of ULL’s new cross-border model with section 41(1)(d) of the LGMPA 1976 is no less relevant to this appeal than the previous model’s incompatibility with section 2(1) of the 1998 Act.
21. Parliament cannot be taken to have intended that a licence be granted to an operator for the purposes of an unlawful operation.

Not fit and proper

22. Uber’s unlawful cross-border activities have not been confined to areas (like Watford) where it has not applied for a licence, or areas (like North Tyneside) where it has applied for a licence and then withdrawn that application. It has incentivised and encouraged drivers on the Uber platform to work in areas where it has been *refused* a licence. This conduct continues to date.

23. The LTDA evidence bundle comprises:	[pages]
i. Minute: Reading refusal of Uber licence	[1-2]
ii. Report: Substantial numbers of Uber vehicles in Reading: 31/08/16	[3-5]
iii. Uber’s terms for drivers under ‘Reading Reward Zone’	[6]
iv. Map of ‘Reading Reward Zone’	[7]
v. ‘Reading Council News’ report of prosecution of Uber drivers who responded to “Reading Reward Zone” (Guilty pleas entered)	[8-9]
vi. Report to Reading Council. “Dramatic increase” in Uber drivers in Reading. October 2017	[10]
vii. Screen shots from Rider App, 16/5/2018. ‘Surge Pricing’ in Reading (i.e. higher earnings for drivers) promoted by Uber	[11]
viii. Uber instructions to its drivers re “how to make the most of” ...surge pricing	[12-15]
ix. Screen shots of Driver App (16 May 2018) showing how Leeds drivers are encouraged to go York, where there is surge pricing	[16-17]
x. Screen shots of Driver App (17 May 2018) showing same	[18]
xi. Screen shots of Driver App (27 April 2018) showing Leeds licensed Uber vehicle satisfying booking in York	[19]
xii. Receipt relating to booking as above, showing date and surge pricing x 3.7	[20]

Reading - conduct following refusal

24. Uber is unlicensed in Reading. By application dated 21 January 2016, Mr Elvidge applied on behalf of UBL to Reading Borough Council for a PHV operator’s licence. That application was heard by a sub-committee of the Council on 8 March 2016. It was refused on the basis that the sub-committee did not consider Mr Elvidge to be a fit and proper person to hold a licence by reason, *inter alia*, of his not being able to manage the operation within Reading’s standard conditions. [1-2] No appeal was brought against that refusal.

25. Notwithstanding the refusal, Uber began to operate in Reading. By the summer of 2016 more than 1,000 Uber journeys a day began in Reading [3-5]. Uber's dedicated "welcome" screen for users opening the Rider App at the Reading Festival 2016 is the screen shot shown at [4].
26. By October 2016, Uber had introduced a scheme (the "Reading Reward Zone" [8]) to incentivise out of area drivers to work in Reading. It guaranteed minimum hourly earnings for qualifying drivers who completed at least 80% of trips sent to them in the "zone" [9]. The number of Uber drivers working in Reading increased "dramatically" [10].

Reading: conduct following implementation (14/03/18) of new cross-border proposal

27. ULL initially included Reading in its so-called "London Region". TfL made specific complaint about this (see [HC-1/A/15/47-48]). ULL subsequently removed Reading from London (see Helen Chapman's statement at paragraphs 313-315). Uber now places Reading in its "South Coast Region", along with Southampton and Portsmouth.
28. Taking Reading from the "London Region" has not removed Uber vehicles from Reading. The TfL licensed vehicles that used to work there have simply been replaced by vehicles licensed by other authorities, including Slough and Windsor & Maidenhead. Because those local authority areas are in the "London Region", Uber drivers licensed in Slough and Windsor & Maidenhead can no longer take Uber bookings in the district that licensed them.
29. Uber has designated 'pick-up spots' in Reading where there is likely to be high demand for instant hires (the Railway Station for example [12]). Uber uses 'surge pricing' in Reading, as it does elsewhere, specifically to attract 'out-of-town' drivers to go to there in the hope of increased earnings.

Surge Pricing

30. 'Surge pricing' (also known as "dynamic pricing" [13]) is a feature of the Uber model. It applies a multiple to its standard rates for journeys that commence in certain areas [14-15]. These areas, and the applicable multiple, are broadcast to drivers via the Driver App. In the event of a surge, a "flash" icon-alert shows in the top right-hand corner of the map on the home page of the Driver App. When the icon is clicked, it shows the range of surge multiples. The areas and amounts of the most favourable surge can be found by scrolling/zooming. Surge areas are illustrated by a spectrum colour-change (light orange to dark red [15-16] - the closer to dark red, the higher the multiplier.)
31. Drivers who commence journeys in areas where surge pricing is in force receive a multiple of whatever fare they would otherwise have received. Surge pricing therefore provides a strong incentive for drivers to travel to areas where 'surge' is in operation, in the expectation of receiving enhanced rewards for their work.

York - conduct following refusal

32. York City Council refused to renew UBL's operating licence on 12 December 2017. UBL appealed. On 27 February the appeal was listed before the Chief Magistrate for a CMC in York. On 14 March 2018, UBL withdrew its appeal.
33. Uber vehicles and drivers continue to present themselves in York and invite customers to book their services by activating the Driver App supplied by Uber and exhibiting their location and availability for immediate hire on the Rider App. Uber encourages and incentivises them to do so.
34. Uber has placed York within its wide "Yorkshire Region" (which includes other local authority areas such as Leeds, Bradford and Kirklees). Uber uses surge pricing to encourage 'out of town' drivers, including those licenced by Leeds, Bradford and Kirklees, to come to York and activate the Driver App. This conduct continues to date [17-21].
35. The only discernible difference to Uber's operations in York, since the refusal to renew its licence there, is that York licensed drivers who were working on the Uber platform at the time of the hearing on 12 December 2017 are no longer eligible to do so: the entirety of Uber's provision in York is now made by 'out-of-town' vehicles and drivers licensed by other authorities.

Not fit and proper: conclusion

36. On one view, it could be said that Uber's conduct (deliberately targeting areas where they have been refused a licence) is insignificant by comparison with the catalogue of wrongdoing chronicled in the statement of Helen Chapman. An alternative perspective is that Uber's conduct is a flagrant defiance of the regulators who have refused to licence them.
37. On any view, it is difficult to reconcile Uber's conduct with its boast that, being now reformed, it "*does the right thing*", and has been taught "*the importance of partnership with the cities and towns in which we operate*", and its commitment to "*working with regulators to comply with the spirit and letter of the law*": Dara Khosrowshahi [EX1/B/106/620].

Erosion of localism: conditions

38. A number of licensing authorities made representations (on ULL's renewal application) about ULL's provision of vehicles and drivers in controlled districts in which neither the vehicles nor drivers are licensed. TfL raise the matter in the witness statement of Helen Chapman, in particular paragraphs 308-309. The Mayor of Watford's representation is already before this Court.

39. The Courts have said that “*the hallmark of the licensing regulatory regime is localism*”¹, and that “*that the authorities responsible for granting licences should have the authority to exercise full control*” over “*all vehicles and drivers being operated ... within its area.*”²
40. In *The Queen on the application of Delta Merseyside Limited and Uber Britannia Limited v Knowsley BC* [2018] EWHC 757, Kerr said –
- “*I refrain from expressing any view on the point, but I am fortified in my conclusion in this case by the consideration that, in principle, a condition on a licence could be imposed which, if otherwise lawful, would require a fit and proper person who is a licence holder to abide by whatever restrictions are contained within a condition that are considered reasonably necessary to meet any perceived erosion of localism in the governance of PHV licensing.*”
41. In the event that this Court is asked to allow ULL’s appeal subject to the imposition of conditions, it is invited to consider ULL’s reckless, if not wilful, undermining of local licensing control, its express intention of continuing so to do (in the London Region and elsewhere), its prevarication on this issue in correspondence with TfL, and whether in the circumstances a licence condition is likely to cause it to desist.

Conclusions

42. The initial Deloitte report, and TfL’s detailed reasons for refusing to renew ULL’s licence, focussed attention on the unlawfulness of the Uber model by reference only to the driver accepting bookings, where the law requires bookings to be accepted by a licensed operator. Understandably, perhaps, attention has been deflected from the equally important requirement that an operator may only make provision for the invitation or acceptance of bookings in the area of the authority that licensed him. It is that requirement, as much as any other, which endorses localism as “*the hallmark of the licensing regulatory regime*”. ULL’s recent cross-border proposal necessitates that consideration be now given to whether, as a matter of common sense, it entails provision being made for the invitation of PHV bookings in areas in which ULL is not licensed.
43. Although correction of the abuses of what may *lawfully* be done by way of cross-border hiring may, as has been said, require national legislative change, it is only necessary to enforce existing law to address the widespread concerns about Uber’s unique approach to cross-border hiring, and its unilateral creation of “Regions” that bear no relation to the statutory controlled districts.

¹ *Blue Line Taxis v Newcastle upon Tyne City Council* [2012] EWHC 2599 (Admin).

² *Shanks v North Tyneside Borough Council* [2001] EWHC 533 (Admin).

44. Uber’s cavalier response to being refused a licence also resonates in its February 2018 response on being asked by Helen Chapman to reconsider the wide reach of its “London Region”: see her witness statement, paragraphs 311-316. In particular, she says –

“... as the boundary proposed by ULL was much broader than Greater London licensing boundary for which TfL is responsible, TfL stated that it did not consider that the proposals addressed the concerns that TfL and other licensing authorities have raised about cross-border hiring. TfL requested that ULL consider TfL’s concerns and consider restricting the ULL geographical boundary to ensure it is consistent with the Greater London licensing boundary.

ULL sent a reply by email on 12 February [2018] stating that it would not be altering its geographical boundary further.”

45. Other than by the subsequent relocation of Reading to the South Coast, ULL’s “London Region” remains exactly as it was when concerns were first expressed about its size and scope.

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