

MICHAEL DEMIDECKI & CO

Solicitors

M R Demidecki - Demidowicz MSc, Solicitor
J D Luckhurst BSc (Hons), Barrister (non-practising)
and Solicitor advocate

Taxi House
11 Woodfield Road
London W9 2BA
Tel: 020 7266 3607
Fax: 020 7266 4050

Our Ref L269026/L/LTDA

johnl@ltda.co.uk

Your Ref

FAO: Ms Helen Chapman

Transport for London - London Taxi and Private Hire Office
Palestra
197 Blackfriars Road
London
SE1 8NJ

23 March 2017

Dear Sirs

Uber London Limited - renewal of London PHV Operator's Licence

Introduction

1. We write on behalf of our client, the Licensed Taxi Drivers Association ("the LTDA"). The LTDA is a co-operative community benefit society whose membership comprises around 10,500 "black cab" drivers (so, drivers licensed by TfL under s.6 of the Metropolitan Carriage Act 1869 to be in charge of hackney carriages plying for hire within London).
2. On 31 May 2012, TfL granted a London PHV operator's licence to Uber London Limited ("ULL"). This licence will expire on 31 May 2017. We anticipate that TfL will shortly be considering an application by ULL to renew that licence. We are instructed by the LTDA to make representations in opposition to that application.
3. TfL should refuse to renew ULL's operator's licence, because –
 - (1) The Uber model requires that Uber drivers unlawfully ply for hire.
 - (2) Insofar as Uber purports to comply with PHV legislation, its operation is a sham. It masquerades as an operator under the cloak of an operator's licence; which it obtained for that purpose, and which it uses as a shield for the unlicensed and unlawful activities of its drivers.
 - (3) The consequence is that 30,000 PHVs on the Uber model regularly stand and ply for hire within London (and beyond) under the pretence that they are being operated in accordance with the PHV legislation. This seriously undermines the prevailing two-tier licensing system (hackney carriages: private hire vehicles), and causes unacceptable public nuisance and risks to public safety.

4. By virtue of the foregoing, ULL is not a fit and proper person to hold a London PHV operator's licence.

Background

5. Uber includes the US company Uber Technologies Inc., and (relevant here) its corporate off-shoots, Uber B.V. (domiciled in the Netherlands) ("UBV"), and ULL.
6. Uber describes itself as a technology company which connects drivers with passengers. It operates globally from a common internet-based platform. It licences smartphone applications, the "Driver App" and the "Customer App". Drivers are "on-boarded" onto the platform, and then log on to the Driver App, so that, if they elect to go online, their location and availability for immediate hire is shown on the Customer App by vehicle icons on a map. Passengers can use the App to request one of several classes of vehicle, seeing before doing so where and approximately how many minutes' drive away the nearest vehicles in each class are. Fares are charged at the conclusion of journeys by Uber as agent for the relevant drivers, with Uber taking a commission.
7. Uber's activities in London have become a matter of significant concern, not just to the LTDA and its members, but also to the wider public. Among the more serious concerns are:
 - a. there is minimal vetting by ULL of drivers before they are on-boarded, and minimal control of them thereafter;
 - b. drivers are given perfunctory training;
 - c. the 'plying for hire' Uber model results in severe congestion in and around London, because drivers congregate near places where they are most likely to be hailed;
 - d. because supply significantly exceeds demand, drivers need to work long hours to maintain their income (and, in some cases, to earn a living wage), to the point where safety issues arise;
 - e. as a 'technology platform' that does not employ its drivers, Uber avoids vicarious liability and responsibility for the activities of its drivers; and
 - f. a body of evidence points to its being extremely difficult for passengers to complain effectively to Uber (i.e. get a meaningful response).
8. It has recently been disclosed that Uber actively engages in obstructing regulators from making an accurate appraisal of its operation – either the fundamentals of it (the "nuts and bolts"), or its lawfulness. It would appear that this obstruction is not confined to the USA (where the disclosure originated), but is a *modus operandi* across the entire Uber estate.

The Uber model is a plying for hire model

9. Uber, on its own case¹, is an agent for drivers who use its platform to obtain trade. It expressly disclaims that it controls or directs those drivers², and does not accept any contractual liability for transport services provided under the platform³.
10. Uber asserts (and we accept) that each driver on its platform has complete autonomy over when he logs on to the platform and goes online⁴, where he is when he does so⁵, how long he remains logged on and online for⁶, whether he is parked or moving when not hired, and whether or not he accepts any request allocated to him to undertake a journey⁷.
11. Uber, via the Customer App, solicits requests for the immediate provision⁸ of a vehicle with a driver. When requests are made they are allocated by Uber's servers to the driver nearest to the passenger⁹ (or in certain "geo-fenced" areas, to the driver at the head of a virtual queue¹⁰). The driver has 10 seconds to accept the request¹¹. If he declines or does not respond within 10 seconds, Uber's servers will send the booking to the next nearest driver¹².
12. Uber thus has no control over which driver receives (or ultimately accepts) which request.
13. The only way a driver can provide services via the platform is for him to be:
 - (1) in a vehicle;

¹ Uber UK terms and conditions, 23 August 2016 ("the Terms"): Part 1, clause 3 and Part 2, clause 4. <https://www.uber.com/en-GB/legal/terms/gb/>

² Both its "Partner Terms" of 1 July 2013 (clause 2.2.1) and its "Services Agreement" of October 2015 provide as such. Clause 2.4 of the latter provides: "*Uber and its Affiliates ... do not and shall not be deemed to direct or control Customer or its Drivers generally or in their performance under this Agreement specifically including in connection with the operation of Customer's business, the provision of Transportation Services, the acts or omissions of Drivers, or the operation and maintenance of any Vehicles.*" (Note that in the vast majority of cases, "Customer" and "Driver" within the Partner Terms are one and the same individual).

³ See "Uber in its own words" appended hereto.

⁴ Statement of Joanna Mary Ricardo Bertram, 7 July 2016 in *Aslam v. Uber BV* ("ET Statement"), paragraphs 11-12 and 58-59. <http://www.uphd.org/wp-content/uploads/2016/11/Jo-Bertram-witness-statement.pdf>

⁵ *Ibid.*, paragraph 58.

⁶ *Ibid.*, paragraph 59.

⁷ *Ibid.*, paragraphs 45, 60-61, 180.

⁸ Although Uber last year introduced a "scheduled ride" facility, this is simply a time-delayed immediate booking request. There is no contractual obligation upon Uber (or anyone) to satisfy a scheduled ride in the way there would be for a true pre-booking.

⁹ Statement of Joanna Mary Ricardo Bertram dated 24 April 2015 in *Transport for London v. Uber London Limited* [2015] EWHC 2918 (Admin) ("*TfL v. ULL*") ("*Taximeter Statement*"), paragraph 31.

¹⁰ Such as Heathrow Airport: <http://uberdriverlondon.co.uk/uber-airport-pickups-london-drivers-side/>

¹¹ ET Statement, paragraph 62. Formerly 15 seconds: Taximeter Statement, paragraph 31.

¹² ET statement, paragraph 62 and Taximeter Statement, paragraph 31. Presumably when the vehicle is in a queuing system, it goes to the next vehicle in the queue.

- (2) immediately available for work;
 - (3) logged on to the Driver App and online; and
 - (4) either:
 - (a) nearest such person to the requested pick-up location of a passenger; or
 - (b) in a geo-fenced area at the head of a virtual queue.
14. There is a striking similarity between these requirements and what hackney carriages have to do obtain trade. This is because:
- (1) Both Uber vehicles and hackney carriages must be available for immediate hire, and be physically near people who wish to be immediately carried in a vehicle.
 - (2) Both exhibit their availability for immediate hire: hackney carriages by standing in rank or plying for hire in the street with their 'Taxi' roof signs illuminated; Uber vehicles by standing in a (virtual) rank or plying for hire in the street with their availability and presence exhibited on the Customer App.
 - (3) Both are hailed by the public: hackney carriages by being approached at the head of the rank or hailed whilst plying; Uber vehicles by requested via the Customer App as either at the head of a virtual queue or being the nearest vehicle to the customer.
15. Hackney carriages either stand or ply for hire¹³. We submit that Uber vehicles do the same.
16. The drivers of Uber vehicles (and *not* any Uber entity) contract with passengers¹⁴. Uber has repeatedly asserted¹⁵ that its role is confined to connecting drivers with passengers, and that it does not provide transportation services and plays no role in the contract that arises between drivers and passengers.
17. In effect, Uber's role is to act as tout for the drivers of vehicles on its platform. So:
- (1) When drivers are logged on to the Driver App and online, they authorise Uber to indicate their locations and immediate availability for hire.
 - (2) Uber does this by showing on the Customer App, in real time, the approximate location of available drivers with vehicles¹⁶, with an estimate of how many minutes' drive away the nearest vehicle in any particular "product" line is.

¹³ It is their defining characteristic: ss. 4 and 7 Metropolitan Public Carriage Act 1869.

¹⁴ The Terms, Part 1 clause 3.

¹⁵ See "Uber in its own words".

¹⁶ ET Statement, paragraph 48.

18. There is no conceptual difference between, on the one hand, soliciting custom by touting in the street (say, by standing outside a theatre asking departing patrons if they require a minicab) and, on the other hand, by using technology to the same effect. In either case, the tout indicates to the public that vehicles are in the vicinity and are immediately available for hire. Touting is a manner of plying for hire: *Cavill v. Amos*¹⁷.
19. In *Sales v. Lake*¹⁸, Trevethin L.C.J. said:

... a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers.
20. Here, there is a soliciting or waiting to secure passengers by the driver without any previous contact with those passengers. The driver (as principal) solicits or waits by authorising Uber (as his agent) to show the location and immediate availability of his vehicle on the Customer App. The driver has in his possession a vehicle for which he is soliciting or waiting to obtain passengers. The driver has complete freedom over when, where and for how long he does this, and whether or not to accept requests for him to provide (as principal) a journey. This is a plying for hire model.

ULL's reliance on its London PHV operator's licence is a sham

21. Uber relied upon TfL's grant of a London PHV operator's licence to ULL to launch in London, and on-board London PHVs onto its platform.
22. In fact and in law, vehicles on the Uber platform are plying for hire. ULL knowingly uses its operator's licence to give a veneer of legality to what is in truth an unlawful operation. That is not a proper usage of that licence: renewal should be refused for that reason alone.
23. Furthermore, TfL has discretion to refuse (or to refuse to renew) a London PHV operator's licence where the applicant does not intend to use it in accordance with the legislative scheme. Uber's expressed intention is to continue to operate as a peer-to-peer intermediary where it, as agent, connects drivers with members of the public who wish to hire a vehicle, so that those drivers can contract directly with them. Insofar as Uber acts as an operator (making provision for the invitation or acceptance of bookings) the provision it makes is unlawful and an improper use of an operator's licence.

¹⁷ (1899) 16 T.L.R. 156, *per* Channell J. "In ordinary cases, in order that there should be a plying for hire, the carriage itself should be exhibited. It is, however, possible that a man might ply for hire with a carriage without exhibiting it, by going about touting for customers".

¹⁸ [1922] 1 K.B. 553

The Uber platform requires drivers to act in contravention of the Private Hire Vehicles (London) Act 1998

24. S.2(1) of the Private Hire Vehicles (London) Act 1998 provides:
- No person shall in London make provision for the invitation or acceptance of, or accept, private hire bookings unless he is the holder of a private hire vehicle operator's licence for London (in this Act referred to as a "London PHV operator's licence").*
25. PHV drivers on-boarded onto the Uber platform, when in London:
- (1) make provision for the invitation of bookings for their PHVs, through the agency of UBV, by being logged onto the Driver App and online;
 - (2) make provision for the acceptance of bookings for their PHVs in the same manner;
 - (3) accept private hire bookings by touching the relevant screen of the Rider App.
26. When a passenger presses the request bar on the Customer App, the next human intervention is when a driver uses the Driver App to accept that request following its allocation to him. The driver, and no-one else, accepts (as principal) the booking, having (as principal) made provision for the invitation and acceptance of the same.
27. S.2(1) of the 1998 Act is drafted to ensure that the allocation of bookings for London PHVs is directed and controlled by a London PHV operator (the statutory equivalent of the "job-master" found in the case-law¹⁹).
28. The operator is the lynchpin of the private hire licensing regime²⁰. The existence of an operator who directs and controls licensed PHVs driven by licensed PHV drivers whose services are pre-booked²¹ is what distinguishes private hire vehicles from hackney carriages, which alone are permitted to stand and ply for hire in public. The regime is a two-tier regime.
29. In an attempt to escape the consequences of the two-tier regime, Uber has engaged in wordplay and sophistry to give the false impression that ULL (rather than the drivers) is making provision for the invitation and acceptance of, and accepting, private hire bookings.

¹⁹ Vehicles that are being directed by a "job-master", where the job-master selects which vehicle would satisfy which job, do not ply for hire: *Allen v. Tunbridge* (1871) L.R. 6 C.P. 461 at 485, *per* Montague Smith J.; *Armstrong v. Ogle*, [1926] 2 K.B. 438 *per* Hewart L.C.J.; and *Cogley v. Sherwood* [1959] 2 Q.B. 311 *per* Parker L.C.J. (at 326) and Salmon J. (at 331).

²⁰ Law Commission Consultation Paper on "Reforming the law of taxi and private hire services" (CP No 203), paragraph 2.15 http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp203_taxi-and-private-hire-services.pdf, as cited by Hickinbottom J. in *Blue Line Taxis (Newcastle) Limited v. The Council of the City of Newcastle upon Tyne* [2012] EWHC 2599 (Admin), at [7].

²¹ S.4(1) of the 1998 Act. "Bookings" are not defined in the Act. The OED definition of "booking" is "the action of arranging in advance or reserving freight transport, accommodation, a seat, a ticket to travel etc.; the issuing of a ticket, reservation, etc. Also: an instance of this".

30. Initially, Uber’s terms applicable in London (i.e. the Terms) stated that the driver “has sole and complete discretion to accept or reject each request for transportation service”
31. In 2014, on TfL’s suggestion²², the Terms were amended. They now provide “Uber UK accepts PHV Bookings acting as disclosed agent for the Transportation Provider (as principal)”²³.
32. Only the Terms were changed: the platform remained unaffected. If a fork is renamed a spade, it is still a fork²⁴. The reality of Uber’s model was as set out in the Terms prior to their amendment.
33. In Uber’s 2015 evidence²⁵ in *TfL v. ULL*, it was said that ULL “accepted” booking requests before they were allotted to the nearest driver. So:
30. ... The customer then clicks “request” to make their booking. ULL accepts the booking and Uber’s servers locate the nearest available vehicle of the type requested by the customer. The servers do this by reviewing all the GPS coordinates of the relevant vehicle type using signals sent from the drivers’ smartphones to the servers.
31. Uber’s servers will then send the accepted booking on to the smartphone of the driver of the vehicle closest to the customer. That driver has 15 seconds to agree to take the booking. If a driver declines or does not respond within 15 seconds, the servers will send the booking to the smartphone of the next nearest vehicle to the customer. When a driver takes on a booking, he is sent all the relevant booking details...
34. That evidence was not accurate. This is because:
- (1) The servers in question were in the United States²⁶.
 - (2) The Driver App and the Customer App communicated directly to those servers²⁷.
 - (3) ULL’s operating centre was in London, kept office hours, and the platform operated independently of it²⁸.

²² TfL memo, “Uber - Operating Model Investigation” (“the TfL Memo”), paragraph 28.
https://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/TfL%20Uber%20legal%20advice_0.pdf

²³ The Terms, Part 1 clause 3.

²⁴ *Street v. Mountford* [1985] A.C. 809.

²⁵ Taximeter Statement.

²⁶ Judgment of Ouseley J. in *TfL v. ULL* at [12].

²⁷ *Ibid.* and see also judgment of Sean F. Dunphy J. in *City of Toronto v. Uber Canada Inc., Uber B.V. and Raiser Operations B.V* 2015 ONSC 3572 (“*City of Toronto*”) at [1]-[2] and [80]-[88]

²⁸ See ULL’s letter to Westminster Council received on 29 January 2013, as excerpted in “Uber in its own words”.

- (4) ULL is not the contracting party and, until a driver accepts a request, the identity of the contracting party is not known.
- (5) Not all booking requests were ultimately accepted²⁹.
35. Uber substantively changed its position³⁰ in its 2016 evidence in *Aslam v. Uber* where, in common with *TfL v. ULL*, its evidence was given by Ms. Bertram³¹. She said:
45. *ULL is responsible for accepting the booking made by a Passenger, as holder of the operating licence. However, at the point that a request is made by a Passenger, there is no obligation to provide a vehicle. As I explain below, the booking is accepted by ULL as the relevant private hire vehicle operator and allocated to the Driver. A booking is not accepted by ULL until a Driver has confirmed that they are available and willing to take it. Confirmation and acceptance then takes place by ULL almost simultaneously. A Driver is entirely free to make themselves available to provide the transportation services or not, which is described in further detail below. As such, the Operator Licence has no impact upon the freedom a Driver has when using the platform...*
53. *Once a request is made, and ULL has confirmed a Driver is available to accept the booking, ULL accepts the booking on behalf of that Driver...*
60. *ULL will receive a booking request from a Passenger. ULL will then make this request visible on the Driver's smartphone, together with the first name and rating of the passenger. It is then the Driver's decision whether or not to confirm their availability and willingness to take the trip. If they do chose to take the trip, they will touch to confirm to ULL that they are available and willing to take the trip. Having done so, ULL will accept and confirm the booking to the passenger on behalf of the Driver, and almost simultaneously and instantaneously allocate the trip to the Driver.*
36. The previous assertion, that ULL accepted bookings prior to referral to any driver, was abandoned without explanation.
37. We do not know whether the new formulation (that acceptance takes place after driver confirmation and is “almost simultaneously” communicated to the

²⁹ See this exercise conducted in Sheffield as to what happens if a vehicle is shown on the screen, requested, and the booking is not accepted, in circumstances where there are no other vehicles present: <http://acnedriver.blogspot.co.uk/2016/05/uber-do-not-actually-accept-bookings.html>

³⁰ Uber may be thought to have something of a track-record of changing its stated position to address the problems they face in any given litigation.

³¹ In each case by a statement verified with a statement of truth.

driver) was simply a mere change of words, or whether any genuine alterations to the operation itself were put into place.

38. Even if the change were genuine, however, it would make no difference to the illegality of which we complain. Where a principal (the driver) undertakes an act signifying acceptance which is communicated to the other party via an agent (whether that be ULL, UBV, UBI or some or all or none of them), it is the principal who accepts, not the agent who he merely appoints to communicate his acceptance. Furthermore, as the person waiting for a booking request and primed to accept it, the driver (as principal) is a person who has made provision for the invitation and acceptance of bookings.
39. It follows that by making use of the Driver App in London, PHV drivers do so as operators in breach of s.2(1) of the 1998 Act.
40. Furthermore, by accepting booking vehicles in their vehicles, PHV drivers also breach s.4(1) of the 1998 Act, which prohibits the acceptance of a private hire booking other than at an operating centre.

Drivers cannot derive authority from ULL's PHV operator's licence

41. A licensed principal's unlicensed agents can derive authority from their principal's licence when under the control and direction of the principal: see *Williamson v. Norris*³²; *Mellor v. Lydiate*³³; *Anderton v. Rogers*³⁴.
42. So, where a licence is held by a company, it can only act by its human agents (telephone operators and the like), who will not be licensed. The agents do not commit offences so long as they act under the control and direction of the company.
43. By contrast, a principal cannot derive authority from a licence held by an agent where that agent is a mere nominee who is not controlling and directing the licensable activity: *Dunning v. Owen*³⁵ and *Mellor v. Lydiate*³⁶. The drivers cannot derive authority from ULL when - on all of Uber's formulations - ULL is a mere conduit for the drivers' entirely autonomous activities, conducted on their own accounts.

The Uber model gives rise to unacceptable nuisance and risks to public safety

44. The above breaches are in no sense 'technical'. The primary purpose of the statutory regime is the protection of the public. It requires the licensing, and

³² [1899] 1 Q.B. 7

³³ [1914] 3 K.B. 1141 at 1153.

³⁴ [1981] Crim L.R. 404

³⁵ [1907] 2 K.B. 237

³⁶ [1914] 3 K.B. 1141

therefore regulatory control, of operator, driver and vehicle. The Uber model (under which the driver is the real operator, but is only licensed as a driver; and the so-called 'licensed operator' is no such thing - it does not accept bookings or otherwise exercise the expected functions of an operator) undermines the *raison d'être* for the three-division licensing regime for PHVs. The consequences are matter of genuine concern and are becoming increasingly widespread. We suggest they are the inevitable result of a regulator turning a blind eye to breaches of the law.

45. The licensed operator is the lynchpin of the private hire system³⁷, who by definition accepts bookings for vehicles, and therefore dispatches and controls the drivers of those vehicles. The Act countenances the operator as the contracting party³⁸, and it is the operator who bears responsibility for matters of public importance such as record-keeping, dealing with complaints and lost property³⁹.
46. In reality, this lynchpin is missing from the Uber system. Uber (including ULL) disclaims all responsibility for and control over drivers. It is an operator in name only.
47. Uber now has over 30,000 active drivers on its platform in London⁴⁰, with a reported⁴¹ ambition to increase this to 42,000. These drivers are claimed to be operated by an 'operator' that in reality has no right to direct, control or discipline⁴² them. Drivers are not interviewed⁴³ and such training as Uber provides by way of videos and in document form appears to be confined to explaining how the App works and providing "guidance on how to maximise the amount of money Drivers could make using the Platform"⁴⁴.
48. These tens of thousands of drivers then:
 - (1) have complete freedom as to when and where they work;
 - (2) under a plying for hire model where to get trade they need to be near custom, in the crowded and congested 607 square miles of London;

³⁷ See note 20 above.

³⁸ See s.5(1) of the 1998 Act.

³⁹ See the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000 (as amended).

⁴⁰ ET Statement, paragraph 33.

⁴¹ <https://www.theguardian.com/technology/2016/apr/27/how-uber-conquered-london>

⁴² ET Statement, paragraph 158.

⁴³ ET Statement, paragraph 73. They are on-boarded if they can provide the necessary documentation (licence, insurance etc.).

⁴⁴ ET Statement, paragraphs 74-77. Until April 2016, Uber's UK website was encouraging drivers to "turn your car into a money machine" by working 65 hour weeks:

<http://www.telegraph.co.uk/news/2016/04/30/fears-overexcessive-and-unsafe-65-hour-weeks-for-uber-cabdrivers/>

- (3) and unless demand increases with supply, for longer and longer hours⁴⁵ to maintain their income (and often working for less reward than the statutory minimum wage⁴⁶);
 - (4) where they receive requests for their services via a smartphone, with a time limit to respond whatever their position in traffic;
 - (5) where destinations are provided by smartphone, with significant reliance on SatNav directions being provided by that device.
49. Unsurprisingly, all this gives rise to unacceptable nuisance and risks to public safety. There are frequent reports in the news and social media⁴⁷ of London PHVs (which one might safely assume - because of the sheer numbers - include many on the Uber platform) driving the wrong way down one-way streets⁴⁸, performing dangerous manoeuvres, taking circuitous routes⁴⁹, clustering near hackney carriage stands⁵⁰ and in other areas of high public resort, and, most troubling of all, being involved in serious road traffic accidents.
50. This is the predictable result of the undermining of the two-tier system in this manner. The right to stand and ply for hire in the challenging environment of London is - entirely appropriately - meant to be confined to those who had passed the rigorous requirements of the Knowledge, and whose vehicles (unlike PHVs) comply with the Conditions of Fitness, and thus are easily identifiable has hackney carriages (and therefore are easily regulated), have tight turning circles (so they can safely perform U-turns) and are disability-friendly and wheelchair accessible.
51. Uber's repudiation of any role as a transportation provider has further adverse consequences for public safety.
- (1) Because Uber has no contractual liability to its passengers:

⁴⁵ In an interview with Evan Davies broadcast on BBC's *Newsnight* 2 June 2016, Jo Bertram was highly reluctant to give details of what - if any steps - it would take to drivers who were working weeks of 70-80 hours of more. A transcript of the interview is appended to this letter.

⁴⁶ Part of the subject-matter of *Alsam v. TfL*. Whilst of course it is not for *TfL* to deal with employment law issues, poor pay leading to drivers working very long hours to meet liabilities is a matter with which it should be concerned.

⁴⁷ As reported here: <https://www.thesun.co.uk/news/1372792/uber-crashes-and-prangs-of-low-cost-cabbies-in-london/>

⁴⁸ And steps: <http://www.standard.co.uk/news/london/bizarre-moment-confused-driver-ploughs-down-steps-in-central-london-a3464836.html>

⁴⁹ See for example: <http://www.itv.com/news/london/2016-03-29/uber-passenger-taken-on-102-ride-around-london-for-what-should-have-been-a-four-mile-trip/> and <https://www.thesun.co.uk/news/2964940/uber-passenger-taken-from-brixton-to-croydon-via-bristol-after-putting-in-wrong-destination-and-falling-asleep-costing-440/>

⁵⁰ St Pancras International being a particularly notorious example: See for example: http://www.hamhigh.co.uk/news/politics/call_for_terror_law_to_be_used_to_solve_camden_traffic_problem_caused_by_uber_drivers_1_4200473

- (a) passengers who suffer wrongs at the hands of their drivers that not covered by vehicle insurance (such as assaults⁵¹, thefts, discriminatory behaviour⁵² and poor performance of journeys) are confined to seeking redress against the drivers (who may have no assets to meet a claim);
 - (b) passengers who suffer wrongs at the hands of their drivers that would be covered by vehicle insurance where the driver has in fact no insurance are confined to seeking redress via the Motor Insurer's Bureau or against the drivers;
 - (c) Uber has no incentive to vet, train and manage drivers (even if it had the power to do so).
- (2) Because Uber does not employ drivers:
- (a) it cannot discipline them;
 - (b) it has no obligation under the Health and Safety at Work Act 1974 to control them in such a way as to ensure, so far as is reasonably practicable, that persons not in its employment who may be affected thereby are not thereby exposed to risks to their health or safety.
- (3) Because Uber asserts that it does not provide a transportation service and does not control or direct drivers:
- (a) it avoids vicarious liability in tort arising out of activities of its drivers;
 - (b) it seeks to maximise its revenue without regard to the health and safety consequences this gives rise to (in terms of long working hours⁵³, the risk to the public that causes, and innovations such as "uberPOOL", where passengers sharing vehicles are risk at each from other⁵⁴);

⁵¹ See for example: <http://www.standard.co.uk/news/crime/uber-driver-who-called-woman-a-black-c-and-punched-her-in-the-face-walks-free-a3372241.html>, <https://www.thesun.co.uk/news/3104428/uber-driver-assault-woman-threw-keys-daughter/>, <http://www.independent.co.uk/news/uk/uber-drivers-accused-of-32-rapes-and-sex-attacks-on-london-passengers-a7037926.html>

⁵² See for example <http://www.standard.co.uk/news/london/woman-claims-uber-driver-called-her-a-slut-and-kicked-her-out-of-cab-after-going-the-wrong-way-a3314471.html> and <http://attitude.co.uk/gay-clubbers-claim-homophobic-uber-driver-threw-them-out-for-kissing/>

⁵³ See for example <http://www.standard.co.uk/news/transport/my-uber-driver-fell-asleep-and-crashed-they-need-to-stop-working-stupid-hours-10293791.html>

⁵⁴ See for example <http://www.dailymail.co.uk/news/article-3639558/Female-passenger-attacked-two-men-did-not-realise-share-ride-using-UberPool-car-service.html> and <http://www.standard.co.uk/news/transport/uber-to-ban-strangers-from-flirting-with-each-other-in-pool-cars-a3416376.html>

- (c) it avoids the duties placed on the providers of such services under the Equality Act 2010⁵⁵;
- (d) it has been enormously difficult for passengers to take up complaints with Uber, and Uber is ultimately toothless in respect thereof.

52. Uber's launch in London has been one of the main causes⁵⁶ of the explosion in the number of PHVs licensed by TfL⁵⁷, which, as TfL accepts⁵⁸, has contributed to traffic congestion, illegal parking and pollution. On TfL's own estimation⁵⁹, the number of PHVs circulating within the central London Congestion Charge zone has increased by over 50% between 2014 and 2016, with multiple sources⁶⁰ reporting that journey times have significantly increased since early 2015. The plying for hire model means that ULL exercises virtually no control⁶¹ over how many PHVs on its platform are on the streets of London looking for trade.

ULL is not fit and proper to hold a PHV operator's licence

53. Uber is well-known for aggressively entering new markets with a willingness to take "disruption" to new heights⁶². In a 2013 interview with the Wall Street Journal in 2013⁶³, Uber's chief executive, Travis Kalanick was quoted as follows:

When I suggest to Mr. Kalanick that Uber, in the fine startup tradition, was using the "don't ask for permission, beg for forgiveness" approach, he interrupts the question halfway through. "We don't have to beg for forgiveness because we are legal," he says. "But there's been so much

⁵⁵ Although Uber launched an uberWAV option in May 2016, only a tiny proportion of the vehicles on the platform are wheelchair accessible: between 55 to possibly "over 100" out of 30,000:

<http://www.bbc.co.uk/news/technology-36256581>

⁵⁶ See for example the report of Professor David Begg for "Greener Journeys", pp.10-11:

<http://www.greenerjourneys.com/wp-content/uploads/2016/06/Prof-David-Begg-The-Impact-of-Congestion-on-Bus-Passengers-Digital-FINAL.pdf>

⁵⁷The number of London PHVs has increased from 53,960 for the year 2010/11 to 87,107 for the week ending 19 March 2007, an increase of 61%: <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/licensing-information>. In the same period the number of licensed drivers has nearly doubled.

⁵⁸ <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/licensing-information>.

⁵⁹ *Ibid.*

⁶⁰ See note 56, <https://www.ft.com/content/40774fc6-76b5-11e6-bf48-b372cdb1043a>, <http://www.standard.co.uk/business/jim-armitage-london-s-uberbusy-roads-are-costing-business-dear-a3416516.html> and <https://www.theguardian.com/uk-news/2016/jan/13/rise-in-london-minicab-numbers-increase-journey-times-by-10>

⁶¹ It can "geo-fence" particular areas so that drivers cannot virtually rank there:

<https://www.theguardian.com/technology/2016/may/11/uber-drivers-villages-heathrow-huge-distress>

⁶² <https://www.theguardian.com/technology/2014/nov/18/uber-worst-company-silicon-valley>

⁶³ http://www.andykessler.com/andy_kessler/2013/01/wsj-weekend-interview-uber-ceo-travis-kalanick-the-transportation-trustbuster.html

corruption and so much cronyism in the taxi industry and so much regulatory capture that if you ask for permission upfront for something that's already legal, you'll never get it. There's no upside to them."

54. The article described how Uber would seek to overcome regulatory hurdles by encouraging its customers to place pressure on regulators in email and social media campaigns (as has happened on several occasions in London). It concluded:

What has Mr. Kalanick learned so far from his Uber experience? "The regulatory systems in place disincentive innovation. It's intense to fight the red tape." His advice for others: "Stand by your principles and be comfortable with confrontation. So few people are, so when the people with the red tape come, it becomes a negotiation"

55. TfL's statutory duty⁶⁴ is to exercise its regulatory functions in a way that is transparent, accountable, proportionate and consistent. It must apply the law. If this causes an operator issues, then unless and until Parliament change the system that the problem is for the operator and the regulator⁶⁵.
56. As we have explained, the London PHV regime applying is incompatible with the Uber model. At first Uber appears to have ignored the issue (in line with the approach described by Mr Kalanick above). The Terms said, bluntly and - we suggest - candidly, that the person doing the accepting was the driver⁶⁶.
57. When questions were raised about the legality of the Uber model here, there arose in 2014, the unusual (if not unprecedented) situation in which, by way of response, TfL as regulator suggested to Uber that it amend the Terms. We have concerns as to the motives of TfL in so doing. We have already made the point that a mere relabeling of a product does not change the nature of the product.
58. Uber has since sought to mislead regulators and the courts as to the reality of how the model operates.
59. We have already set out the inexplicably conflicting accounts of ULL's role that were given in evidence by the same witness in *TfL v. ULL* and then in *Aslam v. Uber*⁶⁷.
60. Both accounts further conflicted with Uber's 2015 evidence in the *City of Toronto* case. In that jurisdiction it suited Uber's purposes for drivers (and not the local Uber off-shoot) to be accepting bookings. In other words, there, it suited Uber to tell the truth about its system.

⁶⁴ S.21 of the Legislative and Regulatory Reform Act 2006.

⁶⁵ *Blue Line Taxis (Newcastle) Limited v. The Council of the City of Newcastle upon Tyne*, at [12].

⁶⁶ See paragraph 30 above.

⁶⁷ See paragraphs 33 and 35 above.

61. Uber's evidence⁶⁸ described in detail how the US servers of its global system automatically connected passengers with drivers without intervention from any local Uber company. Drivers had sole and complete discretion whether or not to receive requests, and neither Uber Canada Inc. "nor any other Uber company" responded to passenger requests, or dispatched vehicles. The only persons who did so respond were drivers, who were not employees or agents of any Uber company. Uber "simply provides a telecommunications platform that facilitates those responses".
62. The clear, unambiguous and internally logical account given in Canada is to be contrasted with the carefully drafted and conflicting formulations deployed in this jurisdiction. As we have explained, London's regulatory system is ill-suited for the Uber model. Rather than confront the problem, Uber has attempted to side-step it by lawyers' drafting.
63. In the employment proceedings, it suited Uber to play down ULL's role even though, as a licensed operator, it should be the lynchpin of its London operation: the job-master directing and controlling how bookings are satisfied. Ms. Bertram had to be prevailed upon to accept that ULL was running a PHV operation in London⁶⁹. The truth, we submit, is that it is not running such an operation (a truth which suited Uber in the employment proceedings, and hence Ms. Bertram's reluctance there).
64. The Tribunal's findings - "fictions, twisted language and even brand new terminology"⁷⁰ and the "grimly loyal evidence of Ms. Bertram"⁷¹ - are no surprise when a business resolves to aggressively implement its product on a global scale, regardless of the local regime in which it finds itself, and on a "disruptive" basis where it seeks to avoid obligations (be they relating to employment rights, competition, taxation or otherwise) with which its competitors have long had to comply.
65. Uber is not an organisation where employees are free to act with candour. The most recent of a wealth of examples is that of Susan J. Fowler, an engineer employed by Uber, who detailed a history of discrimination and sexual harassment that was brushed under the carpet by the very department tasked to deal with such issues⁷². Uber has "an unrestrained work culture"⁷³. Its own documentation says its employees must possess competencies including "fierceness", "execution" and "super pumpedness"⁷⁴. Its ethos has been

⁶⁸ Given by affidavit of Mr Ian Black sworn on 21 January 2015 and excerpted in the appendix "Uber in its own words".

⁶⁹ Paragraph 98, note 56 of the Tribunal's reasons.

⁷⁰ Paragraph 87.

⁷¹ *Ibid.*

⁷² <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>

⁷³ <https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html>

⁷⁴ <http://uk.businessinsider.com/uber-employee-competencies-fierceness-and-super-pumpedness-2014-11?r=US&IR=T>

repeatedly described (including by itself) along the lines of “Take no prisoners, win at any cost”⁷⁵. In this context the resignation this week of Jeff Jones as President of Uber, and his reasons for so doing⁷⁶, must surely ring alarm bells with any regulator, and will be of particular concern to TfL as licensing authority.

66. Despite Mr Kalanick’s new-found appetite for apologising, this is the context in which Uber’s statements to TfL need to be considered. There can be little if any doubt that the staff of Uber (and ULL in particular) are under enormous pressure to tell the tribunal of the moment what is in Uber’s interests for that tribunal to hear, rather than to act with openness and candour.
67. In this vein the LTDA is shocked, but perhaps not entirely surprised, by the recent disclosures of Uber’s deployment of the VTOS programme and “Greyball” tool⁷⁷, software designed to frustrate regulators using the Customer App to investigate regulatory compliances (or breaches) by Uber. “Greyballing” included carrying out investigations into the regulatory officers and staff”. Uber accepted that it operated these programmes and practices. It took six days of international condemnation before it resolved to terminate its activities.
68. It is of course a criminal offence to obstruct and mislead TfL’s officers acting in the course of their duties under the 1998 Act⁷⁸.
69. We are anxious to know what usage Uber has made of the VTOS programme, Greyball tool, masking and cloaking software, background checks into staff, and other underhand practices in its dealings with TfL. Axiomatically, this must be investigated as a matter of urgency, and in any event before the renewal of ULL’s operator’s licence is considered.
70. Uber has demonstrated on numerous occasions that it is willing to operate a corporate culture where the one and only goal is to implement the model regardless of the regulatory landscape. This not just the matter of employees submitting to pressures to give “grimly loyal” evidence, but extends to the sanctioning of the use of cloaking software, and investigations into the personal details of the employees and even of regulators. That Uber appear not to have thought it wrong to do so, should be a matter of the greatest concern to TfL

⁷⁵ <https://www.theguardian.com/technology/2017/mar/07/uber-work-culture-travis-kalanick-susan-fowler-controversy> A frequent refrain in Uber’s job advertisements is “We play to win”. A 2013 job description for a Public Policy pro” stated “This is not a job for the risk-averse or compulsive people-pleasers. We play to win”.

⁷⁶ <http://www.reuters.com/article/us-uber-jeffjones-idUSKBN16Q0X3> (a copy is appended to this letter).

⁷⁷ <https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html>

⁷⁸ S.27 thereof.

Requested steps

71. We request on behalf of the LTDA that:
- a. these written representations are placed before the appropriate decision-makers in relation to ULL's anticipated application to renew its London PHV operator's licence;
 - b. the LTDA is permitted to attend, call evidence and make representations at a hearing before the said decision-makers, convened to determine whether or not to renew ULL's licence.
72. We submit that ULL's licence should be refused.
73. We submit that it is imperative that TfL provide explicit and detailed reasons for whatever decision it makes. If there are matters that are genuinely "commercially confidential" (the claim is too-frequently made by parties to litigation in order to defeat transparency) then those and those alone should be scheduled in a confidential annexe.
74. We also request that TfL immediately and urgently investigate what use of the VTOS programme and the Greyball tool, or any similar masking programmes, software tools, devices or practices, Uber have employed in London. In particular, this investigation should review all information provided by ULL to TfL about Uber's booking process, and the results of all tests of and earlier investigations into Uber's booking process. The findings of this investigation should be published. In view of the seriousness and potential criminality of the matter it is appropriate that the interviews conducted in the course of this investigation are carried out under caution.
75. If there are any points in this letter which we can clarify or particularise further, please do not hesitate to contact us and will endeavour to provide such clarification and particularity with all due expedition.

Yours faithfully,



MICHAEL DEMIDECKI & CO