CLAIM No. CO/3767/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN

UNITED CABBIES GROUP (LONDON) LIMITED

Claimant

- AND -

WESTMINSTER MAGISTRATES' COURT

Defendant

- AND -

(1) TRANSPORT FOR LONDON
(2) LONDON TAXI DRIVERS' ASSOCIATION
(3) UBER LONDON LIMITED

Interested parties

COSTS SUBMISSIONS OF THIRD INTERESTED PARTY

Introduction

1. Uber applies for all or part of its costs from:

    a. UCG; and/or

    b. LTDA.

2. TFL has applied only for its costs of instructing counsel. Uber accepts that TFL's costs application should be determined first. Uber's application is therefore for costs in addition to any ordered in favour of TFL.

Principles

3. The following principles will be very familiar to the court.

    CPR 44.2 provides:
    (1) The court has discretion as to –
    (a) whether costs are payable by one party to another;

(b) the amount of those costs; and
(c) when they are to be paid.

(2) If the court decides to make an order about costs –
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order.

4. As stated by Ralph Gibson LJ in R v Intervention Board for Agricultural Produce ex p Fish Producers' Organisation Ltd [1993] 1 CMLR 707, 710 and Dyson J in R v Lord Chancellor ex p Child Poverty Action Group [1999] 1 WLR 347, 355F the starting point is the same in judicial review proceedings as in other types of cases.

5. In making its decision, the Court has regard to all the circumstances, including the conduct of all the parties. CPR 44.2 continues:

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
(a) the conduct of all the parties….

6. A non-exhaustive list of factors relevant to conduct is set out in CPR 44.2:

(5) The conduct of the parties includes –
(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended its case or a particular allegation or issue….

7. Clearly, this can refer to all kinds of conduct, including proper conduct by a party. Further, conduct does not need to amount to improper conduct or an abuse in order to be relevant for these purposes.

8. One particular aspect of conduct referred to above is the extent to which pre-action protocols have been followed. In the case of judicial review, this is reiterated by the Administrative Court Guide at para 5.2.3:

"It is very important to follow the Judicial Review Pre-action Protocol, if that is possible, before commencing a claim. There are two reasons for this. First of all, it may serve to resolve the issue without need of litigation or at least to narrow the issues in the litigation. Secondly, failure to follow the Protocol may result in costs sanctions being applied to the litigant who has not followed the Protocol."

9. A further duty on the Claimant is carefully to consider the case advanced by the other parties on receipt of their pleadings and evidence. As pointed out by Munby J in R (Bateman) v Legal Services Commission [2001] EWHC Admin 797 at [21]:

> *"An applicant who has been granted permission to apply for judicial review nonetheless remains under an obligation to consider with care just which arguments ought and which arguments ought not to be pursued at the substantive hearing. Matters contained in the defendant's acknowledgment of service or the defendant's evidence may demonstrate that points which were initially thought by the claimant to have merit in fact do not. This is why, despite the recent changes in procedure, the Administrative Court's standard form of permission order still contains the well known warning which, in its current form, reads as follows:*
> *"Where permission to apply has been granted, claimants and their legal advisers are reminded of their obligation to reconsider the merits of their application in the light of the defendant's evidence."*
> *The need for conscientious performance of this obligation has been pointed out on previous occasions: see for example Brooke J in R v Horsham District Council ex p Wenman [1995] 1 WLR 680 at p 701A referring to what Hodgson J had earlier said in R v Secretary of State for the Home Department ex p Brown (1984) The Times, 6 February. People must appreciate that failure in this regard may be visited with adverse costs orders."*

10. The Court also has a discretion to make partial costs orders. CPR 44.2 says:

> *"(6) The orders which the court may make under this rule include an order that a party must pay –*
> *(a) a proportion of another party's costs;*
> *(b) a stated amount in respect of another party's costs;*
> *(c) costs from or until a certain date only;*
> *(d) costs incurred before proceedings have begun;*
> *(e) costs relating to particular steps taken in the proceedings;*
> *(f) costs relating only to a distinct part of the proceedings…"*

11. In Bolton MBC v Secretary of State for the Environment (Practice Note) [1995] 1 WLR 1176, 1178, Lord Lloyd stated the general position in planning appeals where the Secretary of State's decision granting planning permission has been upheld:

> *(1) The Secretary of State, when successful in defending his decision, will normally be entitled to the whole of his costs. He should not be required to share his award of costs by apportionment, whether by agreement with other parties, or by further order of the court. In so far as the Court of Appeal in the Wychavon District Council case may have encouraged or sanctioned such a course, I would respectfully disagree.*
> *(2) The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.*
> *(3) A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords, by which time the issues should have*

crystallised, and the extent to which there are indeed separate interests should have been clarified.
(4) An award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests.

12. It should be noted that, immediately preceding that statement of principles, Lord Lloyd said:

> *"What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule."*

13. Further, there is not a precise analogy between a case where the Secretary of State appears to defend his/her own decision, with the developer coming along to support the decision and this case, where (i) the decision-maker did not appear, but (ii) the regulator was neutral before the Magistrates' Court, (iii) the regulator has not made positive submissions on the first ground of challenge before the court, (iv) the regulator is joined by a party whose conduct is directly criticised in the proceedings and (v) the entire operation of that party (also involving the livelihoods of over 40,000 drivers) is affected by the decision. In such a case, it cannot be said that the regulator and the licensee have identical interests.

14. In R (Smeaton) v The Secretary of State for Health [2002] EWHC 886 (Admin), Schering Healthcare was awarded its full costs in addition to costs being awarded to its regulator, the Secretary of State. At [34], Munby J found the following argument for Schering powerful:

> *"Secondly, he submits that Schering required separate representation. Schering and the Secretary of State are, he correctly says, on opposite sides both of the regulatory process and of the commercial relationship that govern the sale of prescription and pharmacy medicines such as Levonelle. He put the point rather tellingly when he commented that it would have been as unthinkable for Schering to have been represented by the Solicitor to the Department of Health as it would have been for the Secretary of State to have been represented by the albeit very distinguished firm, CMS Cameron McKenna, which in the event acted for Schering.*

15. In addition, one of the factors referred to in Bolton itself, at page 1179D, was the importance of the case to the developer.

16. Munby J also stated at [39]:

> *"The simple reality is that this case without the active participation of Schering would have been a 'Hamlet without the Prince'".*

While that is not a test for a further set of costs, it is at least a relevant factor.

17. Finally, at [40], Munby J focussed on the voluntary status of the claimant:

> *The reality, as it seems to me, is that once these proceedings had been begun Schering had no practical option but to seek to intervene — that is, to intervene in proceedings raised by a party which was not obliged to come to court at all, which is not a charitable organisation, which chose to make very serious allegations of criminality against a well-known pharmaceutical company, and which must have been well aware of the possible costs consequences of an unsuccessful application for judicial review.*

Submissions

18. *Costs against UCG.* Uber submits that it should have its costs against UCG less any proportion of its costs which are awarded against LTDA, for the following reasons.

19. First, UCG is an entirely voluntary party, being one of the associations representing black cab drivers in London. It is not a charitable organisation. It had no part in the proceedings before the Magistrates' Court. It is essentially a trade competitor of Uber.

20. It is apparently funding the proceedings through a company called United Trade Action Group Limited, whose web-site states:

> *United Trade Action Group Ltd 'UTAG' has been formed by Licensed Taxi Drivers to manage the legal process and action against Westminster Magistrates Court, Transport for London and Uber. We are in the process of raising funds to pay for these legal challenges to save the Licensed Taxi.*
> *MISSION*
> *To Judicially Review the decision of Westminster Magistrates to grant a license to Uber on the basis of conflict of interest and flawed reasoning. The hearing is scheduled for 13th and 14th February 2019, please see FAQs.*
> *To hold Transport for London to account under multiple causes of action including its failure to regulate the statutory regime.*
> *To hold Uber to account under multiple causes of action including economic torts and the interference of the trade's exclusive right to ply for hire.*[1]

21. The FAQs on its web-site indicate that it anticipates costs of £1.5m for the three actions, which it was seeking to raise through regular contributions from the trade as well as ATE insurance.

[1] It is right to say that the Licensed Taxi Drivers Association brought a private prosecution for plying for hire against an Uber driver, Mr Lalov. The prosecution was taken over and discontinued by the DPP because there was no case. This was confirmed by the High Court in dismissing an appeal by case stated against the acquittal of an Uber driver in Reading in Reading BC v Ali (second authorities bundle Tab 14).

22. UCG will have been well aware that in deciding to challenge a decision in a proceeding to which it was not even a party, and in which trade interests were already being protected by LTDA (which did not itself think it worthwhile to judicially review the decision), it risked having to pay the costs of the exercise.

23. Second, UCG failed to serve a pre-action protocol letter in this case. It plainly ought to have done. As to the bias claim, it would have brought forward the detailed and plain denial of knowledge by the Chief Magistrate ultimately contained in her 8.1.19 letter. As to the vires claim, it would have brought forth at an early stage the copious material showing that the Court was fully aware of the proper test, and that the whole appeal had been conducted on the basis of a common understanding of the test. As Charles Brasted for Uber pointed out in his evidence, the materials it produced comprehensively demonstrated that all were aware of the proper test at all times in the proceedings (Brasted 1, Tab 20 page 502 para 13).

24. Third, UCG clearly failed to give proper consideration to the case advanced by the interested parties, as enjoined by Walker J's order giving permission. It failed entirely to engage with the test for presumed bias, since it had literally no case on financial or proprietary interest. It failed properly to engage with the apparent bias test since it failed to grapple with the implications of the Chief Magistrates' repeated statements that she lacked knowledge. It also ignored the copious evidence submitted by the interested parties showing the basis on which the appeal had been conducted. Far from being irrelevant, this was a clearly material part of the factual matrix.

25. Fourth, UCG continued to submit evidence without permission during the course of the proceedings. These included allegations of links between Uber and the Judge and also criminal collusion between TFL and Uber. Uber clearly had to continue to participate to deal with this material. Even when it was ruled out by Laing J, UCG's reaction was to accuse her of bias and indicate that it intended to re-make its application for the material to be admitted at the hearing. In the event, of course, it did purport to rely on that material at the hearing.

26. Fifth, Uber had no real option but to participate in the claim. As pointed out above, its interests were not the same as TFL's interests either below or here. TFL was neutral below and critical of Uber in a number of respects. In this court, it did not file an

AOS, its detailed grounds made no positive case on bias and it did not file evidence in reply to LTDA. Uber obviously made a positive case and filed evidence on all grounds. Quite clearly, TFL, the statutory regulator, could not have been left to argue for Uber, a regulated entity, at the appeal. Moreover, as UCG continued to file evidence relating to alleged links between the Judge and Uber, the Judge and TFL and then criminal collusion between TFL and Uber, quite clearly Uber needed to stay in the case.

27. Sixth, so far as LTDA is concerned, TFL did not file evidence in reply to the grounds it advanced, while Uber did; the grounds involved a specific attack on the good faith of Uber, and TFL's position was not formally declared until receipt of its skeleton argument three days before the hearing herein. Uber's solicitors pointed out to LTDA that it had failed to refer to Uber's submissions and evidence below (Tab 26M page 657): Uber had to do so, and come to court to state its position.

28. Seventh, this is a first instance proceeding, which is relevant to Lord Lloyd's third principle.

29. Eighth, the case is of very great importance to Uber, which had to appear to protect its own interest and the interests of more than 40,000 drivers. It could not rely on a neutral regulator to act for it. The proceeding without Uber in it would have been Hamlet without the Prince.

30. In the circumstances, it is submitted that Uber should have its costs against UCG, to be assessed if not agreed.[2] The costs ordered against UCG might, however, be reduced to the degree that costs are ordered against LTDA.

31. If the Court is not minded to order full costs against UCG, it may in the alternative consider awarding Uber:

    a. its costs of responding to, and attending to argue, the bias claim, given that TFL did not respond positively on that issue;

    b. its costs of filing evidence in relation to the vires claim;

[2] While the hearing took less than a day, it had been listed for 1½ days at the instance of UCG. The extent of the paperwork generated during the litigation suggests that it will be fairer to both UCG and Uber for there to be an order for agreement or assessment.

c. its costs of responding to the applications for the submissions of the second, third and fourth witness statements of Darren Rogers.

32. Finally, in relation to UCG, it should be said that this is not a case where it is facing two full sets of costs, although for the reasons given above such an order would have been amply justified. Assuming, for the sake of argument, that the sum applied for by TFL represents only half of its costs, and that 15% of Uber's costs are awarded against LTDA, this would meant that UCG would be liable for only 1.35 sets of costs. This alone is some way from the situation contemplated in Bolton.

33. *Costs against LTDA.* LTDA, another trade competitor of Uber, was not a party below but was permitted to make brief written and oral submissions. Having not sought to judicially review the Judge's decision, it then elected five months later to piggy-back on UCG's claim, seeking to revive arguments which had been summarily dismissed below. It was specifically warned by Uber's solicitors that its intervention would require an evidential response, incurring costs **[CB/2/26.M]**, but it elected to pursue its case in this court. TFL did not file evidence in response to LTDA's case. Uber did so. It had no choice but to continue to defend its position in court.

34. LTDA might argue that the Court has not made a positive finding in Uber's favour on its case. However, that is because it elected to make its arguments contingent on the decision being quashed. Uber had to defend the case on the same contingent basis. There is no reason why it should bear the costs of doing so. The costs should be borne by LTDA if not UCG.

35. It is submitted that a reasonable proportion of Uber's costs which should be met by LTDA are 10 – 20% of its overall costs, to be assessed if not agreed.

Conclusion

36. In these proceedings, Uber was placed in jeopardy of having to re-fight the entire licensing appeal, this time with a direction from the High Court that its reliance on a right to operate across borders was a relevant factor in a fitness assessment. The case amounted to a challenge to Uber's entire operation, brought by its trade competitors, threating to undermine the livelihoods of over 40,000 drivers. This is clearly a case in

which more than one set of costs is appropriate, albeit that the orders sought would amount to far less than two full sets of costs against UCG.

37. The Court is therefore respectfully requested to make the costs orders sought above.

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25th February 2019

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