

RE: UBER BRITANNIA LIMITED

UNLICENSED PROVISION FOR THE INVITATION OF PHV BOOKINGS

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1976

THURROCK TAXI DRIVERS ASSOCIATION

OPINION

Introduction

1. I have been asked by the Thurrock Taxi Driver’s Association to give my opinion as to whether the activities of Uber and its drivers in Thurrock are lawful.
2. The background to that request is a very familiar one: Uber do not hold a PHV operator’s licence in Thurrock; but large numbers of Uber vehicles showing TfL badges (therefore, also not licenced in Thurrock) are fulfilling PHV bookings there.
3. The central question is whether Uber and/or the TfL drivers are making provision in Thurrock for the invitation of PHV bookings. It is an offence for a person to operate (that is, make provision for the invitation of bookings) in a controlled district in which he is not a licensed PHV operator: LGMPA section 46(1)(d).
4. It is of the utmost importance not to confuse ‘making provision for the invitation of bookings’ with ‘using a private hire vehicle’. It is trite law that, provided an operator makes provision for the invitation and acceptance of bookings from within the controlled district that licensed him, he can use drivers and vehicles licensed by the same authority for journeys that may start and end anywhere in the Country, or in the well-known words of Latham LJ, journeys “which ultimately have no connection with the area in which they [the vehicles and drivers] are licensed.”
5. What an operator is *not* entitled to do – and Latham LJ said so in strong language – is to make provision for the invitation or acceptance of bookings in a different controlled district from the one in which he is licensed. Making provision, etc., is a question of fact, to be determined looking at all the circumstances. For the reasons given below, and in particular the citations in paragraph 17, I have no hesitation in advising that it is highly likely (and may prove, on the facts, incontrovertibly to be so) that Uber are acting as unlicensed operators in Thurrock, contrary to section 46(1)(d) of the LGMPA 1976 – *because they are making provision in Thurrock for the invitation of PHV bookings. Not because the drivers and vehicles are fulfilling bookings remotely from the area of the licensing authority that licensed them.*

6. The following checklist may assist in keeping the different issues ('operating a vehicle' and 'using a vehicle to fulfil bookings') separate from one another:
 - a. 'Operate' is defined by the LGMPA 1976 as making provision for the invitation or acceptance of PHV bookings.
 - b. 'Operate' is not the same thing as using a vehicle to fulfil a booking: *Adur v Fry* [2001] LLR 706.
 - c. An operator may only operate in the area in which he is licensed.
 - d. It is well settled that an operator whose *provision* for the invitation and acceptance of bookings is made within the area in which he is licensed may *use vehicles and drivers* licensed in the same area as he (preserving the 'trinity of licences') to fulfil PHV bookings starting/finishing in places that have no connection with the area in which they or he are licensed: *Shanks v North Tyneside BC* [2001] LLR 706)
 - e. Provision for the invitation of bookings and the acceptance of bookings may be made in different places.
 - f. An operator who makes provision for the invitation of bookings in an area in which he is not licensed commits an offence. It does not save him:
 - i. That the 'trinity of licences' is preserved; or
 - ii. That he accepts the booking from within the area that licensed him.
7. A common mistake is to assume that because the 'trinity of licences' has been preserved in a given booking, then it automatically follows no offence can have been committed. The error is to fail to ask where the invitation of that booking took place, and whether any provision for that invitation was made outside the licensed area of the operator.

The statutory provisions & case law

8. The statutory provisions applying to PHV drivers and vehicles are materially different from the provisions applicable to PHV operators.

Vehicles

9. The owner of a vehicle may not use it as a private hire vehicle in a controlled district unless the vehicle is licensed under section 48 LGMPA 1976: section **46(1)(a)**.

Drivers

10. A private hire vehicle may not be driven in a controlled district 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)**).
11. No offence under sections 46(1)(a), (b) or (c) is committed, however, if a driver's licence and a vehicle licence issued in a different controlled district are in force: section **75(2)**.

12. The so-called “right to roam” of PHV drivers and vehicles derives from section 75(2). It means that licensed 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).
13. 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 v Birmingham City Council* [1993] RTR 356. Thus all three licences (operator’s, driver’s and vehicle) must be issued by the same authority.

Operators

14. 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.
15. 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).
16. Section 75 of the LGMPA 1976 does not provide an exemption for operators (i.e. from section 46(1)(d)), equivalent to that which it provides for drivers and vehicles (i.e. 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”, lawful *provision for the invitation or acceptance of bookings* may only be made in the controlled district in which the operator is licensed: *Shanks*.
17. 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 [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

18. Uber customers make bookings using the Uber Rider App on a smartphone. The App is 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.
19. *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: [my emphasis]

'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 ... 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.'"

20. 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.
21. By exhibiting (on the Rider App) their physical presence in Thurrock, and their availability for immediate hire, Uber drivers and vehicles self-evidently invite bookings for their services. Provision for that invitation is made by 'Uber'; and it is made in Thurrock, where Uber are unlicensed.

Uber's 'Regions'

22. On 14 February 2018 Uber announced its unilateral decision to divide the UK into nine 'regions', each of which spans several different licensing districts, with their own standards and local licensing requirements.
23. UBL has told drivers on the Uber platform that if they hold a vehicle/driver's licence from any licensing authority within one of Uber's so-called regions, they will have exclusive rights to work as Uber drivers anywhere within that region. Uber has placed Thurrock within its all-encompassing 'London Region' (which includes some 41 other local authority areas, each with its own local licensing standards and requirements).

Surge Pricing

24. An important consideration, though it is not determinative of my assessment of the legal position, will be whether Uber uses ‘surge pricing’ to encourage TfL Uber drivers to come to Thurrock and activate the Driver App there. As indicated above, the activation of the Driver App and the vehicle’s exhibition on the ‘Rider App’ are self-evidently an invitation to book a PHV.
25. ‘Surge pricing’ (also known as ‘dynamic pricing’) is a feature of the Uber model. It applies a multiple to its standard rates for journeys that commence in certain areas. These areas, and the applicable multiple, are broadcast to drivers via the Driver App. 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.
26. I have been shown screen shots of Uber’s use of surge pricing to encourage drivers elsewhere in the Country to work remotely from the area which licensed them. There is no reason to believe (though I would like it confirmed) that ‘surge pricing’ doesn’t play its part in Thurrock too.

Local Licensing Control

27. Uber’s conduct is in no way a ‘technical breach’ of the statutory provisions. It goes to the heart of the licensing regime and its purposes. 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 ability to exercise full control*” over “*all vehicles and drivers being operated ... within their area.*”²
28. The undermining of local licensing control is of nationwide concern. In its representation to TfL, on the opposed renewal of Uber’s London licence, the Mayoress of Watford wrote:

“Uber’s method of operation seems inconsistent with the principles of a locally determined licensing regime that allows for each authority area to decide what is best in the interests of public safety for residents and visitors...”
29. I understand there to be every bit as great concern in Thurrock about the lack of local licensing control over Uber drivers as there is in Watford – indeed as there is in licensing authorities throughout the Country.

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).

Conclusions

30. The licensing requirements of PHV drivers and their vehicles, and the exemptions therefrom, are different from those made of PHV operators. The gross oversimplification – “*cross-border hiring is lawful*” – is a misreading of the relevant case law (*Shanks* and *Adur*) and suggests a failure to recognise that distinction. There is no “loophole” in the law that allows Uber to operate (as defined by section 80(1) LGMPA) a private hire vehicle in an area in which neither Uber, the vehicle nor the driver are licensed.
31. Uber is not a licensed operator in Thurrock.
 - a. Uber supplies Uber drivers (who are not licensed in Thurrock) with the means (smartphone and App) by which the drivers advertise their presence in Thurrock, and their availability for immediate hire there.
 - b. In addition, it is possible (if not probable) that Uber actively encourages and incentivises Uber drivers by ‘surge pricing’ to advertise their presence in Thurrock.
 - c. Uber drivers, so supplied with the means, and so incentivised, come to Thurrock and invite potential passengers to make bookings with Uber, via the Uber App.
32. For the reasons given in paragraph 21 above, I think that activating the driver’s App amounts to an invitation to book an Uber PHV. There can be no other sensible conclusion than that Uber provides drivers on the Uber platform with the Driver’s App expressly for that purpose.
33. I have no doubt that the provision of TfL Uber drivers with the Driver’s APP in order that the drivers go to Thurrock (where neither the drivers nor Uber are licensed), and activate the App there, is making unlawful provision for the invitation of PHV bookings, contrary to section 46(1)(c) of the LGMPA 1976.

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