LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1976; 'OPERATING'; UBER.

ADVICE

1. I am asked to advise my client, Brentwood Borough Council, as to the legal implications of one facet of Uber drivers undertaking work within Brentwood's administrative area.

2. In brief Uber holds a Private Hire Vehicle operator's licence issued by Transport for London (TfL), but not by Brentwood; the cars concerned are also licensed by TfL (and not Brentwood) and the drivers, too, are licensed by TfL and not Brentwood.

3. As I understand it, certain of those drivers regularly come to Brentwood in their TfL-licensed vehicles. The Uber app is (obviously) available to people physically within Brentwood, and if they open the app whilst they are in Brentwood they will (in all likelihood) see the 'vehicle' icons displayed on the map, indicating that vehicles are available in the area. If they make a booking (by entering a proposed destination and accepting the fare indicated) then a vehicle will come to their location and pick them up and take them to that destination.

4. The 'vehicle' icons displayed are the result of drivers indicating, via their Uber driver app, that they are available to take bookings.

5. The key question for this advice is whether that amounts to 'operating' within the meaning of the Local Government (Miscellaneous Provisions) Act 1976 (LGMPA). I have seen a legal opinion by Gerald Gouriet QC (a specialist in the field) dated 30 November 2018, provided to the Thurrock Taxi Drivers Association, which concludes that such activity in Thurrock (which is materially identical in terms of the issues raised) amounts to unlawful 'operating' in Thurrock. That, concludes the opinion, would be a breach of s.46(1)(d) of the LGMPA.

6. I have also seen two legal opinions by Richard Barraclough QC provided to my client which in essence agree with the advice given by Mr Gouriet QC. As I read Mr Barraclough QC's initial advice, the substantive analysis of the position (such as it is) appears at paragraphs 8-12 and

adopts Mr Gouriet's reasoning. The remainder (from paragraph 16) appears to be no more than extensive citation of legislative provisions and authorities.

7. Mr Barraclough QC also provides a second opinion dated February 2019 which reflects on the decision of the Divisional Court in Reading BC v Ali [2019] EWHC 200 (Admin), which concerned whether the Uber 'model' amounted to unlawful 'plying for hire'; and on a recent consultation paper on taxi licensing reform (and the 2014 Law Commission report). His advice is unchanged by any of those reflections.

8. I do not agree with their analysis of the position and see no unlawfulness in what Uber presently does in Brentwood.

The legal background

9. The legal background is summarised relatively comprehensively in Mr Gouriet QC's advice.

10. In order lawfully to run a private hire vehicle enterprise, there must be three licences in force, and all must be issued by the same authority: an operator's licence, a vehicle licence, and a driver's licence. For any lawful journey (save where subcontracting occurs, which is not relevant to this issue) all three licences must be in place and must all be issued by the same authority - see Dittah v Birmingham CC [1993] RTR 356.

11. Private hire vehicles may not 'ply for hire', which is the exclusive right of hackney carriages, to whom a different licensing regime is directed: this was the issue in Reading v Ali. Plying for hire is not specifically defined but there is a body of caselaw which culminates in the case of Cogley v Sherwood [1959] 2 QB 311, in which Salmon J, concurring with the leading judgment of Lord Parker CJ, said:

*"But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle."*

12. If the 'holy trinity' of licences from the same authority is in place, however, there is nothing unlawful in a private hire vehicle being sent by an operator licensed in District 'A' to pick someone up in District B, take them to their destination in District C, even where that journey does not pass through or even near to District A – see Adur v Fry [1997] RTR 257. As the author of Button on Taxis (Fourth Edition) puts it at 12.21:

*"It is clear that, provided the three licences required in relation to a private hire vehicle…have all been issued by the same authority, that is to say they 'match', then the private hire vehicle can undertake journeys anywhere in England and Wales. That is irrespective of the local authority area where the journey commences, areas through which the journey passes and, ultimately, the area where the journey ends*."

13. However, the 'operator' in such an example must have a licence from the local authority in which he physically 'operates'. He cannot do so from a neighbouring (or indeed any other) area. In East Staffs BC v Rendell (1995) Independent, 27 November QBD an operator licensed by Derbyshire Dales DC diverted his telephone to an office in the adjoining district, East Staffs, from where he answered calls and took bookings for private hire vehicles. His acquittal for operating in East Staffs without a licence issued by them was overturned on an appeal to the Divisional Court.

14. 'Operating' is defined by s.80 LGMPA as follows:

*"In this Part of this Act, unless the subject or context otherwise requires … "operate" means in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle"*

15. That form of words was said in Windsor & Maidenhead RBC v Khan [1994] RTR 87 and Adur v Fry (above) to be a 'restrictive' form of words, and in Brentwood DC v Gladen [2004] EWHC 2500 (Admin) to have a 'technical meaning'.

16. Khan concerned an operator licensed in Slough, with physical offices in Slough. However he advertised his private hire vehicle services (Top Cars) in two directories (Yellow Pages and Thompson's) which circulated in the neighbouring district of Windsor & Maidenhead. The allegation made was that he had 'made provision for the invitation or acceptance of bookings

for a private hire vehicle' in Windsor district, because the directories circulated there. The Divisional Court rejected this contention:

*I reject the submission. The considerations to which I have already referred make clear that, in its definition of the word 'operate', Parliament was not referring to places which invitations might reach, but to places where provision is made for the invitation of bookings. Put an advertisement in a local newspaper in one part of England and it may be read in almost any other part of the country. The defendant made provision for the invitation of bookings at his office in Slough. What he did by advertising in the directories circulating in the area where he conducted his business, and in adjacent areas, was to inform the public that he had made such provision. His provision was nevertheless made in Slough, not in Maidenhead, nor in any of the other areas in which those directories circulate. That conclusion is not, in my judgment, affected by the fact that the directories circulated in a much wider area, or that the defendant named towns other than Slough, such as Maidenhead, in his advertisement. If Mr Harrison's submissions were right, it would mean that the defendant was operating not just A576 KLT, which is named in this summons, but every one of his private hire vehicles 24 hours a day, seven days a week in Maidenhead, even on days when none of his vehicles ever went anywhere near Maidenhead. That would be nonsensical.*

17. It can thus be seen that advertising a private hire vehicle service is not 'making provision [etc]', and so not 'operating'. What matters is where provision is made, and in Khan it was in Slough, because that is where the office was. As Simon Brown LJ said in Rendell:

*"Essentially all that [Khan] decided was that by advertising a private hire vehicle business outside the permitted district no offence was committed. All that the advertisement does is to inform the public as to where provision has been made — in that case, at a single office which was properly licensed in Slough."*

18. In Murtagh v Bromsgrove DC [2001] LLR 514 the operator concerned (Rubery Rednal Cars) was licensed in Bromsgrove (and the office physically situated there). They placed dedicated telephones in supermarkets in Birmingham CC's area, from which potential customers could call their offices in Bromsgrove and request a vehicle. The alleged offences concerned bookings

made via those telephones, for which the trip was undertaken by Birmingham CC-licensed drivers in Birmingham CC-licensed vehicles. The Divisional Court upheld the convictions: provision had been made *in Bromsgrove* for the acceptance of bookings, and yet those bookings had been undertaken by Birmingham-licensed drivers and vehicles. Therefore the 'holy trinity' was not present.

19. What is more relevant in my view is that the placing of dedicated telephone lines in supermarkets outwith the Bromsgrove area, which were then used to call the office within Bromsgrove, did not seem to cause any difficulty with the suggestion that the firm was still 'operating' in Bromsgrove. No-one appeared to suggest that the placing of telephones in Birmingham meant that the firm was not operating in Bromsgrove (although as to whether it meant they were also operating in Birmingham did not need to be decided, and wasn't).

20. It is also clear (as Mr Gouriet QC sets out in his Opinion) that using a vehicle to fulfil bookings is not, itself, operating and is conceptually distinct from it – see Adur v Fry. In Britain v ABC Cabs (Camberley) Ltd [1981] RTR 395 the picking up of a passenger in Rushmoor was not 'operating' where the booking had been taken by the firm at its offices in Camberley, across the border:

*"I am satisfied that when the defendants' vehicle picked up the passenger at Farnborough Station, the only material act which the defendants did in the borough of Rushmoor controlled district, they were not 'making provision for the invitation or acceptance of bookings' at all, whether for a private hire vehicle or for any other vehicle. In my judgment to conclude otherwise would be to strain the language of the definition far beyond breaking point. If they were making provision for the invitation or acceptance of bookings anywhere, they were doing that, it would seem to me, in their office at Camberley, which is not a controlled district."*

Analysis

21. Despite the relative multitude of cases concerning the business and operating model of Uber, there is no direct authority on the point here at hand, which is whether what Uber does with its app amounts to operating within the district in which a passenger looks at the app and requests

a vehicle. It is an obvious first point (although it adds nothing to the analysis) to observe that if it does amount to operating, then Uber are operating in very many places where they do not have an operator's licence (and so too, I daresay, are a number of other private hire vehicle enterprises).

22. The operating model used by Uber is relatively familiar now. Mr Barraclough QC quotes extensively from the judgment in Uber BV v Aslam and Ors [2018] EWCA Civ 2748. In short the potential customer opens the app, and will usually see outline 'car' images on a background map. They are there because certain Uber drivers have switched on their driver app to denote their potential availability.

23. The outline car images do not identify the type of vehicle or the driver, but indicate a general position for each such vehicle. The potential customer then types in her desired destination. The app gives her an indication of the likely fare and she is given the option to confirm. If she does so, then the 'request' is sent by Uber's servers (located somewhere other than Brentwood – as I understand it, in London) to any nearby Uber drivers who have their own 'driver' app on, and they have a short period of time in which to accept the request and take the job. If one does so, the potential customer is then alerted to the fact that a specific driver (she does not know and cannot usually tell which of the 'car' images this referred to) is on his/her way. Only on picking up the passenger does the driver learn of the destination.

24. Clearly, at the heart of this issue is the undeniable fact that the way we book taxis today is very different to how we did it when the legislation was written. That observation was really at the centre of why the findings of the Chief Magistrate were upheld in Reading v Ali (albeit in the context of 'plying for hire'). In my view those findings have a very real bearing on the question at hand in respect of 'operating', not least because (as recorded at paragraph 30 of the decision) it was said by counsel for Reading in that case that the displaying of the outline 'car' image(s) on the app screen was a modern-day example of plying for hire (i.e. 'soliciting custom in the sense of inviting the public to use the vehicle without a prior contract' – para 25). That suggestion was rejected.

25. In particular at para. 34 Flaux LJ said:

*"It seems to me that depiction of the vehicle on the App does not involve any exhibition of that kind, but is for the assistance of the Uber customer using the App, who can see that there are vehicles in the vicinity of the type he or she wishes to hire. I agree with Mr Kolvin QC that the App is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years. If I ring a minicab firm and ask for a car to come to my house within five minutes and the operator says "I've got five cars round the corner from you. One of them will be with you in five minutes," there is nothing in that transaction which amounts to plying for hire. As a matter of principle, I do not consider that the position should be different because the use of internet technology avoids the need for the phone call."*

26. Plainly this is in respect of plying for hire. However, one should then consider whether the very same activity, carried out physically in Brentwood, amounts to '*in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle'* in Brentwood. There is no question but that it is in the course of business. However, making the app available to members of the public in Brentwood (or anywhere) – and the related activity of the driver turning on the driver app - is in my view no more than the modern-day equivalent of advertising on a billboard or in a directory that you have cars available in that area, and providing the phone number by which to book one. The 'making of provision' for the invitation or acceptance of bookings is not in Brentwood just because someone happens to take their mobile phone into Brentwood, open the app whilst there, and request a car.

27. This is, in my view, the answer to Mr Gouriet QC's reliance (at para. 19 of his Opinion) on the case of Rose v Welbeck [1962] 1 WLR 1010. That case – which is unusual on its facts – was cited to the court by Reading in Reading v Ali, and rejected as a basis for finding that the Uber app amounts to the sort of plying for hire that was found in that case. It was not sufficient to persuade either the Chief Magistrate, or indeed the Divisional Court, that the uber app amounted to plying for hire and for the same reasons I do not think it assists in showing that the Uber app amounts to 'operating' in Brentwood.

28. In particular I think it fatally undermines the points made by Mr Gouriet QC at paragraphs 31(a) and (c), and 32. That those points were not sufficient to show 'plying for hire' in Reading v Ali suggests in my view that they would be insufficient to show 'operating,' either.

29. Nor, in my view, is there anything in the suggestion sometimes made in this context that Uber drivers are 'encouraged' to go to (e.g.) Brentwood in order to be available to pick up passengers. I do not understand Uber's model to do that in any way and drivers retain complete autonomy as to where they go, and when. I agree with Mr Gouriet QC that the 'surge pricing' aspect of Uber's model is not determinative of the legal position in relation to operating.

30. It is undeniably true to say (as Mr Barraclough QC does at para. 9 of his first Opinion) that the app is designed so as to invite customers to make bookings, but in my clear view that is also true of the advert in the Thompson's Directory in Slough (Windsor v Khan). It simply does not follow that 'thus' Uber makes provision for the invitation and acceptance of bookings *in Brentwood*. It does not. Advertising a service is not 'operating'.

31. Nor do I think there is anything meaningful added by Mr Gouriet QC's paragraphs 27-29, about local licensing control. He may be right that the present legal environment means less local control of operators, but if he is right then the answer lies with Parliament. It does not bear on the proper interpretation of 'operating'.

32. Further, I note that this argument was essentially advanced by Mr Gouriet QC in the Uber/TfL licensing appeal. TfL's skeleton argument to the Magistrates' Court is publicly available online[1] and it is clear that TfL does not think there is anything in the point: see paragraphs 22-23 and Appendix 1. Nor did the Chief Magistrate[2] - see paragraphs 37-39 of her judgment. There was no challenge to this aspect in the subsequent appeal to the Court of Appeal. The fact that TfL, a major regulator of private hire vehicles, does not consider that there is anything in the point underlines my own view of the position.

33. Finally, it seems to me that, given that booking private hire vehicles using apps (whether Uber, or Lyft, or any other) is likely to be 'the future', and is certainly already highly prevalent, if the

[1] http://content.tfl.gov.uk/tfl-skeleton-argument.pdf
[2] http://content.tfl.gov.uk/uber-licensing-appeal-final-judgment.pdf

analysis of Mr Gouriet QC (and Mr Barraclough QC) is right, then there is unlawful operating all over the country all the time, right now. Further, the (presently lively) debate about cross-border hiring (see, for example, the Law Commission Report of 2014) would be essentially meaningless because any operator wishing to use an app would be required only to allow that app to be available to customers in the area in which it had its offices; or to have offices in every area in which it wishes its app to be usable. Neither is at all realistic in my view.

*Conclusion*

34. In my view Uber is not 'operating' (within the meaning of s.80) in Brentwood. It is operating from London (where it is licensed to do so by TfL). The fact that people in Brentwood can use its app to hire vehicles licensed by TfL, driven by drivers licensed by TfL, means that such journeys are lawful.

35. Just as the display of the 'car' outline on the app (or, specifically, the act by a driver of turning on his driver app such that the 'car outline' appears) is not plying for hire, nor is it, in my view, making provision *in Brentwood* for the invitation or acceptance of bookings. That provision is made in London, where the Uber office is and where, as I understand it, their servers (which do the actual accepting of bookings) are. The app lets people in Brentwood know that such provision has been made, and they can avail themselves of it.

36. Please do not hesitate to get in touch if anything is unclear, or if there are matters arising.

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8 March 2019

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