In the Southern Derbyshire Magistrates' Court

ALBATROSS CARS LIMITED
CHAD CARS LIMITED

Appellants

-v-

DERBY CITY COUNCIL

Respondent

JUDGMENT

Before District Judge Strongman sitting at Derby on 13th October 2014. Judgement reserved to 23rd October 2014 in Birmingham and a copy of the draft supplied to the parties in advance.

1. These are the conjoined appeals brought by way of complaint by Albatross Cars Limited and Chad Cars Limited pursuant to section 55(4) of the Local Government (Miscellaneous Provisions) Act 1976 they being aggrieved by conditions attached to the grant of their respective private hire operator's licences by Derby City Council.

2. Mr Rodger has been instructed for both Appellants and Mr Skinner appears for the Respondent. Both counsel have furnished me with detailed and helpful skeleton arguments together with the authorities on which they rely. I have heard no live evidence but I have witness statements from Mr Mansha for Albatross Cars, Mr Matkin for Chadd Cars and from Ms Jackson and Mr Day for the Respondent.

3. This appeal arises out of the decision taken by Derby Council to adopt recommendations for amendments to its standard conditions. This followed a decision of the Administrative Court in ***Stockton-On-Tees Borough Council v Fidler*** [2011] RTR 282 which confirmed that licensed hackney carriages fall outside the scope of the regulation of private hire vehicles. The Respondent was concerned about the use of hackney carriages unregulated by this council by private hire operators in the city. Accordingly, following an extensive consultation process during the summer of 2013, on 29th August 2013 the Taxi Licensing and Appeals Committee of the Respondent Council resolved to adopt the recommended revised standard conditions for private hire operator's licences granted or renewed after that date by adding five new conditions and amending the existing condition 10.

4. The grounds of appeal set out in the notice dated 19th February 2014 assert that the new conditions 34 to 38 in the licence "are unlawful or alternatively unworkable and are therefore unnecessary and unreasonable". Mr Rodger has added some flesh to the grounds in his skeleton argument but the lawfulness of the conditions and workability remain the planks of the appeal. Mr Skinner was anxious to remind me that whilst Mr Rodger sought to stray from the arguments of "unlawful" and "unworkable" by suggesting that the conditions were otherwise unnecessary or unreasonable, the evidence of the Respondent that it was reasonably necessary to include such amendments to address perceived difficulties has not been challenged. Accordingly, the scope of this appeal is restricted firstly to an examination of whether the Respondent could lawfully include these conditions and, secondly, if so, whether the terms of the conditions are unworkable and therefore unreasonable.

5. At the start of the hearing it was possible for the parties to come to terms with regard to all conditions save condition 37 by a memorandum of understanding as to the interpretation of those conditions and their application to the Appellants. Accordingly, I am asked to adjudicate only on condition 37.

6. Condition 37 addresses two matters. Firstly, it applies condition 11 (operator's obligation to keep certain records about each booking) to circumstances where the operator allocates an out-of-town hackney carriage to fulfil a customer's booking. The actual wording of the condition is wider and less clear as to the class of vehicle to which it applies, but out-of-town hackney carriages are the intended target. Secondly, the condition requires that in the event that the operator allocates an out-of-town hackney carriage the operator must "secure that a record is maintained that confirms that the hirer has been informed of the supply of a vehicle to undertake the booking which is [an out-of-town hackney carriage] and whether this has been accepted".

7. There was some considerable discussion during the hearing as to the precise nature of the obligation that the second part of this condition imposed on the operator. On the face of it, the obligation to inform the customer and obtain consent only applies once the allocation of a vehicle has been made and is an out-of town hackney carriage. The written evidence before me sets out the booking process. Cars are allocated based on their nearness to the fare and whose turn it is, so that at the point of booking it is not known which car will be allocated to the job. It is not clear whether implied consent from the customer is sufficient and whether the inclusion of a warning in the operator's standard terms and conditions on an Internet booking or via a mobile telephone app is sufficient.

8. Mr Skinner declined to be drawn on the proper interpretation of this condition. He argued it was for each Appellant to take such steps as it thought appropriate to give effect to the condition. He said that to spell out precisely what was required would mean the condition may need to be different for each operator and may not keep up with developments in technology and methods by which customers booked taxis.

9. I deal first with the issue of whether the condition is lawful. Mr Rodger does not take issue with the first part of the condition. Until such time as a vehicle is allocated to the job, it is not possible for the Appellants to know whether it is a transaction for a private hire vehicle which would clearly be regulated by the 1976 Act or alternatively for a hackney carriage which would not. There was some discussion about whether the transaction would be regulated until such time as a hackney carriage was allocated or became regulated only once a private hire vehicle is allocated. As the operator will need to keep the condition 11 records against the possibility that a private hire vehicle is allocated, the point is largely academic.

10. Mr Rodger does take issue with the second part. He argues that if the booking results in a hackney carriage being allocated, that is not a licensable activity. He argues that to impose by the back door a condition that purports to regulate the use of hackney carriages in such circumstances, goes outside the Respondent's powers under section 55(3) because it relates not to the operation of private hire vehicles but to hackney carriages.

11. He cites the *Fidler* case to say that a hackney carriage is always a hackney carriage, whether operating in its own licensing district or not, and is therefore excluded from the scope of the 1976 Act. He draws the analogy with liquor licensing that whilst it may be a proper policy for the council to seek to reduce obesity, it would not be proper to make it a condition of a licence to sell alcohol that the licensee should not sell crisps. Whilst superficially attractive as an analogy, it is in fact unhelpful because there are recognised licensing objectives set out in the guidance published pursuant to section 182 of the Licensing Act 2003 which does not appear in the 1976 Act. Whilst it may be right to say that the Respondent would be acting outside the law to impose conditions wholly unconnected with operating private hire vehicles, it seems to me that section 55(3) gives the council a fairly wide discretion to impose conditions regulating private hire operators.

12. Mr Sninner responds by asserting that being a criminal case, *Fidler* does not address the issue of lawfulness of conditions. The case on the point, he argues, is ***Regina (Shanks and others (trading as Blue Line Taxis)) v Northumberland County Council*** [2012] EWHC 1539. In that case, Northumberland County Council was concerned by the high number of hackney carriages licensed for use in its county per head of population. It appeared that Blue Line Taxis, who operated in North Tyneside, were making inappropriate use of Northumberland hackney carriages as part of their private hire business. Pursuant to section 37 of the Town Police Clauses Act 1847 Northumberland Council had power to grant to the proprietor of a hackney carriage a licence to use the vehicle to ply for hire within its local area and in doing so it could, pursuant to section 47 of the 1976 Act, attach to the grant of a hackney carriage proprietor's licence such conditions as it considers "reasonably necessary". Section 46 of the Act permits a local authority to grant to a person a licence to drive a hackney carriage, but there is no power to attach conditions to the grant of a hackney carriage driver's licence. There is no equivalent of an operator's licence for hackney carriages. Accordingly, Northumberland Council purported to impose a condition on the owners to keep records of the use of the taxi, including use for pre-booked journeys, akin to those an operator would be expected to keep for a private hire business. The wording of the power to impose conditions is essentially the same in both section 47 (hackney carriage proprietor's licences) and section 55 (private hire operator's licences).

13. Mr Rodger also appeared in the *Shanks* case. His essential submission in that case was based upon the twin propositions that the licensing regimes for hackney carriages and private hire vehicles are separate and that the use of a hackney carriage for private hire is an unlicensed activity. Accordingly, he submitted that the effect of the policy adopted by Northumberland Council was unlawfully to confine the use for private hire of a hackney carriage for which it

grants a licence to someone also licensed by Northumberland to operate private hire vehicles under section 55 of the 1976 Act.

14. The Respondent in *Shanks* used the same argument as Mr Skinner, namely, that *Fidler* is a criminal case and does not address the issue of the approach of a licensing authority when imposing conditions on a licence. In his judgment at paragraph 64 of *Shanks*, Mr Justice Foskett said:

> "In my judgment, therefore, to the extent that the very wide words of section 47 have to be construed to meet modern day conditions, then they should be so construed. However, I am not at all convinced that it involves that kind of approach: the words of the statute are wide and emphatically so. That being so, that is the end of the matter subject, of course, to any condition imposed being "reasonably necessary". At all events, I do not, for my part, see any basis upon which it could properly be argued that the proposed arrangements for self monitoring are unlawful. In those circumstances, I do not consider that the proposed arrangement is *ultra vires* the statutory powers."

15. The circumstances in Shanks are virtually identical to the present appeal, albeit I am dealing with a private hire licence. I consider *Shanks* to be binding authority. Mr Rodger sought to distinguish *Shanks* for the present appeal, but I can see no proper basis for so doing. Accordingly, I am satisfied that it is properly within the council's power to impose condition 37.

16. I turn next to the issue of whether it is unworkable. The council has adduced unchallenged evidence that members of the public have complained that having booked a "taxi" through a local firm an out-of-town taxi has turned up with the consequence that the driver is unfamiliar with Derby streets so the journey is less direct and costs more than it should. It does seem to me reasonable to expect that if a customer telephones a Derby taxi firm that a Derby taxi will be dispatched.

17. Read strictly, condition 37 bites only should a hackney carriage be allocated to the customer. It requires the customer to be informed of that fact and to record the customer's acceptance. At the point of making the booking, usually the operator will not know whether a private hire or hackney carriage will be allocated. Potentially, the operator will be required to contact the customer once a hackney carriage is allocated to obtain the customer's consent. If the operator uses the precise form of words set out in the condition it is likely the customer will have no idea what the operator is talking about. As observed above, it is not clear from the condition as drafted whether some form of standard conditions to an app or recorded message on the telephone would suffice, and whether a customer is required to give express informed consent on every occasion a hackney carriage is dispatched or whether implied consent is sufficient.

18. Mr Skinner's submission is that the operator must put in place such process as it thinks fit to satisfy the condition and that those steps will be examined to see whether they were adequate to meet the condition when the licence comes up for renewal. He argues that the other 70 or so private hire operators in the city are complying with the new conditions, so there is no reason why these two should not also.

19. It seems to me that conditions ought to be sufficiently clear that an operator can readily see whether it is complying or not. The condition as presently drafted, if interpreted strictly, would in my view be unworkable for the Appellant companies.

20. I have not been addressed as to the proper approach the court should take to these appeals save Mr Skinner's submission that I should give due weight to and be slow to overturn conditions which were deemed reasonably necessary by democratically elected council officials, which was adopted in ***Darlington***

Borough Council v Kaye [2004] EWHC 2834 and ***R (Reading Taxi Drivers' Association) v Reading Borough Council*** [2004] EWHC 765. It seems to me I ought to approach this case as I would an appeal under the Licensing Act 2003 following the principles in ***Regina (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court*** [2011] EWCA Civ 31, namely, that I should consider the evidence and arguments before me, reach a decision on the basis of that evidence and then consider whether in the light of that the decision of the Respondent was wrong, even if it was not wrong at the time.

21. Accordingly, whilst satisfied that it is appropriate to put in place some process such that a customer is alerted, if it be the case, that an out-of-town hackney carriage may be dispatched in response to the booking, in my view the condition ought to set out with more clarity that which is expected of the operator and impose the obligation in such a way as to be workable. To that extent, I find the Respondent was wrong to seek to impose condition 37 in the terms it did.

22. Rewording the condition is primarily a matter for the Respondent. I invited the Appellants to submit in advance of the hearing alternative versions of the conditions they argue would be acceptable. They declined to do so. However, a form of words along the following lines would seem to me to be satisfactory:

"For the avoidance of doubt, Condition 11 of these conditions also applies where the operator allocates a booking to a hackney carriage. Where a hackney carriage licensed otherwise than by Derby City Council may be allocated by the operator, the operator shall inform the customer of that fact, whether by a pre-recorded announcement during a telephone call, by written terms visible when booking on an Internet site or signing up to an app, or by any other method likely to bring the information to the attention of the customer at the time of booking or prior to making a booking."

23. The fact the customer continues with a booking having been informed at the time or previously that an out-of-town hackney carriage may be dispatched, should be taken as implied acceptance by the customer. A requirement for an operator to record the positive assent of a customer, as seems to be required by the original condition, is in my judgment both unworkable and unnecessary.

24. Accordingly, I allow the appeal with regard to condition 37 to the extent set out above.

25. Having circulated the draft judgement to the parties, I understand the Appellants are content with my proposed wording in paragraph 22 above and the Respondent has made no comment on it. In those circumstances I direct that condition 37 be amended as indicated.

26. As to costs, the parties have elected to make written submissions. I direct that any costs application together with a costs schedule and written submissions be filed (by sending to my email address) and served by 3 November, and the response be filed and served by 13 November. I shall fix 18 November as the notional hearing date when I shall consider any costs application.