In the matter of
Section 46(1)(d) of the Local Government (Miscellaneous Provisions) Act 1976

And in the matter of York City Council

ADVICE NOTE

---

1. Section 46(1)(d) of the Local Government (Miscellaneous Provisions) Act 1976 provides:

   'Except as authorised by this Part of this Act – no person shall in a controlled district operate any vehicle as a private hire vehicle without having a current licence under section 55 of this Act'.

2. A question has arisen in York as to whether the business model of Uber is in breach of this sub-section. This has been brought into focus by an Opinion provided to the York Private Hire Association by Gerald Gouriet QC (16th November, 2018).

3. The Editors of *Paterson's Licensing Acts 2019* provide a detailed footnote to this sub-section (see 2.467 / p 1181):

   'It is suggested that PHV operators who knowingly send drivers in their fleet expressly to work in areas where they are not licensed will be in breach of this subsection if they are found as a question of fact to be making provision in those areas for the invitation of bookings: see the definition of 'operate' in s 80(1). The detailed circumstances of each case will be relevant. Whether or not the display of a waiting PHV on a potential passenger's Smartphone is an invitation to book that vehicle has yet to be determined by the courts. The operator may in any event be vulnerable to having his operator's licence revoked or refused renewal under s 62(1)(d) of the 1976 Act on the ground that he undermines local licensing control.'

4. This footnote along with the Gerald Gouriet QC Opinion to the York Private Hire Association (16th November, 2018) seem to me to represent, in part, the anxieties and challenges raised by the advent of new technologies on established systems.

5. The recent case of *Reading Borough Council v Ali* [2019] EWHC 200 (Admin) is of assistance. This case is an appeal by way of case stated from the decision of the Chief Magistrate to acquit Mr Ali of two charges of plying for hire contrary to s 45 of the Town Police Clauses Act 1847. The respondent is an Uber driver, he, his vehicle and Uber are licensed by Transport for London ("TfL") to conduct private hire business pursuant to the "triple lock" licensing-regime under the Private Hire Vehicles (London) Act 1998. On the nights in question, some 60 Uber vehicles were in Reading. In the early hours of 21st January, 2017, Mr Ali was parked in Kings Road in the center of Reading waiting for a passenger to make a booking for his vehicle via the Uber smartphone App. Two of the appellant's Licensing Enforcement Officers who were registered as Uber passengers saw the outline of his vehicle on their App, approached the vehicle and interviewed Mr Ali. He said he was waiting for a booking through the Uber App. A

similar series of events occurred just after midnight the following night when the same Officers interviewed Mr Ali again.

6. Similarly, the Gouriet Opinion summaries the circumstances in York as follows:

> '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 on the vicinity to commence the process of booking' [14].

7. The question that arises for Mr Gouriet and the York Private Hire Association, is whether this business model is lawful. Gouriet opines that: 'I am strongly of the opinion that Uber and Uber drivers are acting as unlicensed operators, contrary to section 46(1)(d) of the LGMP 1976' [3]. And again at [27]: 'I have no doubt at all that Uber, together with Uber drivers, are making unlawful provision in York for the invitation of PHV booking contrary to section 46(1)(d) of the LGMPA 1976'.

8. The High Court in the *Reading* case gave consideration to the Uber business model and concluded:

> 33. In my judgment, there was no unlawful plying for hire in this case for a number of reasons. First, the mere depiction of the respondent's vehicle on the Uber App, without either the vehicle or the driver being specifically identified or the customer using the App being able to select that vehicle, is insufficient to establish exhibition of the vehicle in the sense in which that phrase is used by Lord Parker CJ in formulating the two stage test for plying for hire in *Cogley v Sherwood* and *Rose v Welbeck*. That requires not just exhibition of the vehicle but its exhibition expressly or implicitly soliciting custom, inviting members of the public to hire the vehicle.
>
> 34. 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.

9. At para 16 of the Gouriet opinion it is said that '[i]n terms of 'invitation to book' there is no meaningful distinction drawn between the invitation made by vehicles displayed on the Uber Rider App, and that made by the parked [*Rose* v] *Welbeck* vehicle: the former is merely a modern, internet-assisted manifestation of the latter'. This analysis is expressly rejected by Lord Justice Flaux and the very opposite position taken, that the use of 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* [34].

10. In *Reading* the court further drills down into the character of waiting – that is the vehicles being physically present in an area that is not in the area the controlled district of which the operator, vehicle and driver are licensed – and the Uber App. In so doing the court further distinguishes the Uber business model from the *Rose v Welbeck* scenario:

> 38. This leads on to the third reason why this was not plying for hire, which is the character of the waiting. The respondent was waiting in his vehicle until a customer confirmed a booking on the Uber App and he accepted that booking. There was no question of his soliciting custom during the period of waiting. His vehicle did not advertise itself as available for hire nor did he do anything which would have suggested to the public that he was available for hire. Indeed, as the Chief Magistrate found, if a member of the public had approached the vehicle and sought a ride, the respondent would have refused to take such a passenger off the street without a prior booking through the Uber App.
>
> 39. The waiting here was of a completely different character to that in *Rose v Welbeck*. Unlike in that case, the respondent was not waiting to solicit custom from passing members of the public, but he was waiting for a private hire booking via the Uber App. Putting the example given by Lord Parker CJ in *Cogley v Sherwood* of what would not be plying for hire into the context of the Uber App, if approached in the street, the respondent would have been saying: 'You cannot have my vehicle, but if you register for the Uber App and make a booking on it, you will be able to get a vehicle, not necessarily mine.'

11. In effect the Uber business model represents no more than an efficient, speedy and convenient modern manifestation of the private hire regime under the 1976 Act. In *Dittah v Birmingham City Council* [1993] RTR 356 it was held that 'an accurate statement of the law' (363) was provided by the Department of Transport letter (dated 25 June, 1993) which read: 'In our view applying section 80(2) to sections **46(1)(d)** and (e) has the effect that an operator requires a licence from the area in which he intends to operate and may only operate in that area vehicles and drivers licensed by the same district. This has the practical effect that an operator licensed in area A may only use vehicle and drivers licensed in area A but these vehicles and drivers will be able to go anywhere in the course of hiring' (363) (Emphasis added). Further in *Shanks v North Tynside Borough Council* [2001] EWHC (Admin) Lord Justice Latham came to the firm conclusion that *Dittah* was correctly decided [22].

12. In *Shanks* it was held that '[t]he meaning of "operator" in section 80 when taken in conjunction with section 75(2) provides for considerable flexibility. The operator can use the vehicles within his organisation for journeys both inside and outside the area of the local authority in which he is licensed **and, indeed, can use such vehicle and drivers for journeys which have no ultimate connection with the area in which they are licensed.** There is, it seems to me, therefore, no reason to believe that the construction, which I consider to be the right construction of the Act, renders the operation of private hire vehicles in any way so restrictive as to justify the conclusion that the construction that I have reached must be wrong.' [26]. (Emphasis added).

13. That the drivers and vehicles may be in areas (such as Reading or York) which have no ultimate connection with the area in which they – and the operator – are licensed. This is

both lawful and an accepted part of the *considerable flexibility* of the private hire regime.[1] The key factor for enforcement purposes (and compliance with section 46) is that the vehicle licence, the driver licence and the operators licence are issued by the same local authority how-so-ever the vehicles and drivers may rightly roam.

14. At para 12.99 *Button on Taxis* (4th Edn) opines that '[t]he simplest way to establish whether or not an offence has been committed is to inquire whether all three licences have been issued by the same authority? If the answer to that is 'Yes', and the 'happy family of licences' is present, then there is no restriction on the geographical area in which the journey can take place.' These established principles seem to have informed the approach of the High Court in the *Reading* case [2]:

> The respondent is an Uber driver, He, his vehicle and Uber are licensed by Transport for London to conduct private hire business pursuant to the "triple lock" system under the Private Hire Vehicles (London) Act 1998. Uber had been refused an operating licence by the appellant. However, if Uber, their vehicles and drivers were conducting a private hire business, they could lawfully operate in Reading with their private hire vehicle ("PHV") licences from Transport for London ("TfL"). What drivers were not permitted to do was ply for hire, which only licensed hackney carriages are permitted to do.

15. It seems to me that the key question informing the *Reading* case and also the Gouriet opinion is whether or not the Uber business model is lawful, in other words is it a genuine private hire operation? In *Reading* the court accepts that the Uber business model is indeed a modern variant of the traditional private hire regime ([33] & [34] above).

16. In *Reading* the court went on to further consider whether the Uber business model in the context of pre-booking (an established feature of the private hire model), here again the court was satisfied that the Uber model was in accord with the principles of private hire:

> 37. Whatever the correct contractual analysis, in my judgment it has no impact on the question we have to decide. On any view, there is a pre-booking by the customer, which is recorded by Uber as PHV operator, before the specific vehicle which will perform the job is identified. This is all in accordance with the transaction being PHV business, not unlawful plying for hire. There was no soliciting by the respondent without some prior booking, as he only proceeded to the pick-up point after the customer had confirmed the booking and the respondent as driver had accepted the job. Whenever any contract was concluded, I have little doubt that this was not plying for hire, because on the facts found in this case, the customer could not use the respondent's car without making a prior booking through the App. As with the charabanc in *Sales v Lake*, the customer would make a booking to be picked up at a pre-arranged point. On the evidence in this case, all the Uber App did was to facilitate that booking.

17. This reflects existing established principles: In *Britain v ABC Cabs (Camberly) Ltd* [1981] RTR 395 the court was asked to determine whether the collection of a passenger within a controlled district (Rushmoor) in pursuance of a contract of hire made outside of the control district (Surrey Heath) 'was operating" for the purposes of the 1976 Act (403 – 404): 'I am satisfied that when the defendants' vehicle picked up the passenger at

[1] It seems to me that this 'considerable flexibility' (*Shanks*) is further reflected in the recognition that there are no restrictions upon where a private hire operator may advertise (see *Windsor & Maidenhead Royal Borough Council v Khan* [1994] RTR 87). To my knowledge there has been no consideration given to the Uber app (and similar applications) as being a form of advertisement.

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. In my judgment therefore no offence was made out under section 46(1)(d) and the justices rightly dismissed that information.'

18. The case of *Milton Keynes Council v Skyline Taxi and Private Hire Ltd* [2017] EWHC 2794 applies *Britain* and also endorses the practice whereby the traditional methods of business practice are replaced by automated computerised systems. In *Milton Keynes* 'the definition of the word 'operate' focuses on the arrangements in pursuant to which the a private hire vehicle is provided and not with the provision of the vehicle itself … the word 'operate' is not to be equated with, or taken as including, the providing of the vehicle, but refers to the antecedent arrangements.' (per Dyson J in *Bromsgrove v Powers* (1998) cited in *Milton Keynes* [8]). Those *antecedent arrangements* being the triple lock.

19. Thus, in *Milton Keynes* Hinkinbottom LJ states [10] that:

> 'However, because of the limited definition of "operate" [[8], above], he only commits an offence if, in the course of business and in a controlled district, he makes provision for the invitation or acceptance of bookings for a private hire vehicle in circumstances in which the vehicle and/or the driver do not have the required licence(s). That too is firmly established by the cases to which I have referred (see, eg, *Britain* at page 403). Therefore for these purposes, it is irrelevant (eg) where the customer might be picked up, or where the contract for hire might have been made, or where the particular booking might in fact have been accepted.'

20. In light of *Reading*, *Milton Keynes* and the established principles to which these cases adhere and apply, the assertion by Gouriet [at para [17]] that '[b]y exhibiting (on the Rider App) their physical presence in York, 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 York, where Uber are unlicensed' is, in my opinion, untenable and *self-evidently* wrong.

21. It seems to me that the Gouriet opinion is flawed in that it advances an analysis of the App-based Uber business model that has now been rejected by the High Court in the *Reading* case and secondly, fails to apply the established legal principles in respect of the specific legal definition of 'operate' within the 1976 regime.

Leo Charalambides
Francis Taylor Building
5th March, 2019