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Private Hire Operators, Vehicle Proprietors, Deregulation Act, Licence Fees post Hemming

Following on from the last Bulletin, this Edition takes a look at Private Hire Operators and Vehicle Proprietors. It also considers the passing of the Deregulation Act 2015 on Taxi and Licensing Act matters, and finally examines the Supreme Court decision in *Hemming*

Private Hire Operators

What is a private hire operator ("PHO")? The definition is reasonably straightforward, although there are a number of unanswered questions surrounding the "ancillary use" of vehicles[1]. S80 Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act") defines "operate" and "operator's licence" thus:

> ""operate" means in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle;
>
> "operator's licence" means a licence under section 55 of this Act;"

S46(1)(d) makes it clear that anyone acting as an operator must have an operators licence:

> "(d) 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;"

and a local authority cannot grant a licence (s55(1)):

> "unless they are satisfied that the applicant is a fit and proper person to hold an operator's licence."

So in simple terms, a private hire operator is the person who takes a booking for a private hire vehicle ("PHV"), and then dispatches a PHV driven by a licensed

[1] See *"Private Hire Vehicle Licensing - A note for guidance from the Department for Transport"* August 2011 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/3985/phv-licensing-guidance.pdf

private hire driver ("PHD") to fulfil that booking. All three licences (PHO, PHV and PHD) must have been granted by the same authority.[2]

But as with taxi drivers[3] the role goes far beyond simply taking bookings and despatching vehicles. In the course of making the booking and dispatching the vehicle and driver, the PHO will obtain significant amounts of personal information. For example, when a booking is made to an airport, and a return booking made for a week or fortnight later, it is reasonably apparent that a holiday is being taken. With a little further research (either by questioning the person making the booking, or following reports of conversations between the passengers and the driver) it will soon be apparent that the house is going to be empty for that period of time. In dishonest hands this information is extremely valuable. Likewise, where regular bookings are made, it is easy to ascertain when parents are leaving children alone in the house, and so on.

It is therefore vital that PHOs are as trustworthy and reliable as a driver, notwithstanding their slightly remote role.

How then does a local authority satisfy itself as to "fitness and propriety"? Once again, I think the term "safe and suitable" is a modern interpretation of "fit and proper"[4], but there are some difficulties placed in the path of the local authority.

Unlike hackney carriage and private hire drivers, the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2002 does not cover PHOs who are therefore not excluded from the workings of the Rehabilitation of Offenders Act 1974 ("1974 Act"). This means that convictions become "spent" in relation to a PHO. However, the ruling of the High Court in *Adamson v Waveney District Council*[5] means that local authorities can take spent convictions into account when determining suitability for a licence.

In addition, the fact that the role of the PHO is not an exempt occupation for the 1974 Act means that it is not possible to obtain an Enhanced DBS check. However, the applicant (or licensee on renewal) can be asked to obtain a Basic Disclosure from Disclosure Scotland. This can be combined with a statutory declaration as part of the application process requiring the applicant to list all previous convictions, together with other material information in a similar fashion to taxi drivers.

Although this is by no means a perfect system, it does give local authorities a reasonable basis for making an informed decision as to fitness and propriety of an applicant or existing PHO.

As with taxi drivers, it is not only permissible but eminently sensible to have a policy in relation to previous convictions and other matters for PHOs.

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[2] See *Dittah v Birmingham City Council, Choudhry v Birmingham City Council* [1993] RTR 356 QBD
[3] See James Button & Co Bulletin February 2015
[4] See James Button & Co Bulletin February 2015
[5] [1997] 2 All ER 898, QBD

To enable consistent and informed decisions to be made, it is useful to have a working test of fitness and propriety for PHOs and the one I would offer is this (which can be seen as a clear variation on the taxi driver test):

> "Would I be comfortable providing sensitive information such as holiday plans, movements of my family or other information to this person, and feel safe in the knowledge that such information will not be used or passed on for criminal or unacceptable purposes?"

It is also useful to note that s57(2)(c) of the 1976 Act allows the local authority to investigate and consider the fitness and propriety of limited companies, their secretaries and directors, and any convictions recorded against the company whilst an applicant was a secretary or director.

There is a further point to consider in relation to PHOs and that concerns the staff used on the telephones and radios. The licence is granted to the PHO on the basis of their fitness and propriety, but there is no overt mechanism to consider the suitability of those who work for the PHO. There is no reason why a condition cannot be imposed on a PHO licence requiring them to undertake checks on those they employ/use within their company to satisfy themselves that they are fit and proper people to undertake that task, and retain that information to demonstrate that compliance to the local authority. Any failure on the part of the PHO to either comply with this requirement or act upon information that they obtain (thereby allowing unsuitable staff to work in positions of trust) would then have serious implications on the continuing fitness and propriety of the PHO.

Vehicle Proprietors

Similar considerations apply to the vehicle proprietors, both Hackney carriage and private hire (referred to here generically as "taxis"). Although the vehicle proprietor may well not be driving a vehicle (and if they are they will be subject to their own fitness and propriety test to obtain a drivers licence), they clearly have an interest in the use of the vehicle.

As with drivers and operators, it is worth considering what a taxi actually does. Clearly they transport people from where they are to where they want to be in a convenient safe and comfortable manner, but again the impact of a licensed vehicle goes beyond that.

Taxis are seen everywhere across the United Kingdom, at all times of the day and night, in any location. As a result the presence of a taxi does not elicit any interest or curiosity. This can be contrasted with the unexpected presence of a van in the small hours of the morning.

As a consequence of this, taxis provide the ideal transportation system for any form of contraband, whether that is drugs, guns, illicit alcohol or tobacco, male or female prostitutes, or children who may be at risk of, or are being, abused.

In relation to both hackney carriages and private hire vehicles, the local authority has a discretion over granting the licence.

S37 of the Town Police Clauses Act 1847 ("the 1847 Act") gives that discretion in relation to hackney carriages, and the only grounds upon which that can be altered is where there is significant unmet demand for hackney carriage services within the district (or zone). This discretion is usually exercised in respect of the vehicle, both its size and specification and also its mechanical and suitability, but it is equally applicable in respect of the suitability of the proprietor.

Similar discretion exists in relation to private hire vehicles under section 48 of the 1976 Act. Although the legislation is considerably more detailed than that for Hackney carriages, it is clear that there is no prohibition on considering the suitability of the applicant, as the only grounds upon which the vehicle licence cannot be refused is for number limitation of private hire vehicles.

It seems obvious that the local authority would not wish to grant a vehicle licence (or a fleet of vehicle licences) to a drug dealer, gun-runner, pimp or child abuser and accordingly local authorities must make robust enquiries about the character of such applicants.

As with PHOs, this is not an exempt occupation for the purposes of the 1974 Act, but exactly the same process can be applied – Basic DBS, statutory declaration and consideration of spent convictions. This can then be used in the light of a similar policy in relation to suitability as the authority will already have for drivers and (hopefully) PHOs.

Deregulation Act

Taxis

The Deregulation Act 2015 introduces 3 changes to taxi legislation: the supposed requirement that drivers licenses should last for 3 years and operators licences for 5 years; and the freedom for a private hire operator to subcontract a booking across a council boundary. These will come into effect on 1 October 2015.

Duration of Licence

It is by no means clear that drivers' licences or operators' licences will have to be granted for the 3 or 5 years that the DFT maintained will be the case. There appears to be some confusion over the new wording which will amend the provisions of sections 53 and 55 of the Local Government (Miscellaneous Provisions) Act 1976.

The revised wording is as follows (new wording in red italics):

"53 Drivers' licences for hackney carriages and private hire vehicles

(1)(a) Every licence granted by a district council under the provisions of this Part of this Act to any person to drive a private hire vehicle shall remain in force for three years from the date of such licence or *for such lesser period, specified in the licence, as the district council think appropriate in the circumstances of the case.*

(b) Notwithstanding the provisions of the Public Health Act 1875 and the Town Police Clauses Act 1889, every licence granted by a district council under the provisions of the Act of 1847 to any person to drive a hackney carriage shall remain in force for three years from the date of such licence or *for such lesser period, specified in the licence, as the district council think appropriate in the circumstances of the case.*"

"**55 Licensing of operators of private hire vehicles**

(1) Subject to the provisions of this Part of this Act, a district council shall, on receipt of an application from any person for the grant to that person of a licence to operate private hire vehicles grant to that person an operator's licence:

Provided that a district council shall not grant a licence unless they are satisfied that the applicant is a fit and proper person to hold an operator's licence.

(2) Every licence granted under this section shall remain in force for five years or for such lesser period, specified in the licence, as the district council think appropriate in the circumstances of the case".

It can be seen that the local authority is still given a discretion as to how long a licence should last. This is in complete contrast to the perception that has existed that licences for a shorter duration would only be available in exceptional circumstances. However, the explanation given by the DFT when the proposals were first introduced in the Deregulation Bill does make the position clearer. In their letter dated 14th March 2014 they stated:

> "(iii) Making the standard duration for all taxi and PHV driver licences three years; and five years for all PHV operator licences. Shorter durations will only be granted on a case by case basis, where it is justifiable for a particular reason. This will reduce the financial and administrative burden of having to make more frequent licence renewals."

It seems that local authorities will still be able to grant licences for shorter periods. As to what would be "appropriate in the circumstances of the case" will have to be judged on a case to case basis. I think that a request for a one-year licence would be hard to resist. I can also see a good argument that where there are serious and justifiable concerns over a drivers conduct, again a short term licence might well be a sensible step. At present there is no indication that the DFT will issue any guidance, but that will have to be assessed if and when it is published, and of course any such guidance will only inform the local authority's decision, rather than compel it.

Subcontracting across Borders

The third change concerns cross-border subcontracting. This will bring to an end the prohibition which currently exists (and is arguably contained in *Shanks v North Tyneside Borough Council*[6]) on an operator licensed in one district subcontracting a booking to an operator licensed by another district.

There has been considerable opposition to this, not least by the Local Government Association ("LGA") on the grounds of public safety. There does not appear to be a particularly convincing argument, as the vehicle and driver that are being supplied under the subcontracted booking must themselves be licensed by the authority which licences the "new" operator.

The legislation (which is contained in section 11 of the Deregulation Act, and which will become sections 55A and 55 B of the 1976 Act) is unwieldy and arguably unnecessarily complex, but the principles seem relatively straightforward.

In simple terms, a PHO licensed under the 1976 Act can subcontract a booking to a licensed PHO in another district, in London or in Scotland[7]. This power overrides any contractual restriction on the subcontracting in the original contract between the hirer and the first PHO[8] .

Finally, the first PHO commits an offence if he knows that the second PHO is going to use an unlicensed vehicle or driver to fulfil the subcontracted booking[9].

It remains to be seen how this is going to work in practice. It will clearly allow much greater freedom of operation by private hire firms. There may be questions over the quality of the vehicle and driver provided by the subcontracted firm, but that would appear to be a matter of contract rather than public safety. If the initial contract with the first PHO was for a high-quality vehicle, or that was the expectation because that is the nature of the first PHO's business, and the supplied vehicle from the second PHO fell short of that agreed or anticipated standard, then that is a matter for the hirer to take up with the first PHO. From the public safety perspective, the vehicle and driver supplied must be licensed and therefore must be suitable (in the case of the vehicle) and fit and proper (in the case of the driver). As to whether this will really cause problems in the future, of either a safety or contractual nature, only time will tell.

[6] [2001] EWHC Admin 533, [2001] All ER (D) 344 (Jun), QBD
[7] S55A(1)
[8] S55A(2)
[9] S55B(3)

Licensing Act

The proposed changes to the Licensing Act under the provisions of the Deregulation Act were considered in Bulletin February 2014, and those that were examined there have not changed between the publication of the Bill and the passing of the Act[10]. However, the introduction of section 67 to allow the "Sale of alcohol: community events etc and ancillary business sales" was not in the Bill as originally laid before Parliament. At present there is no proposed commencement date for these provisions.

These proposals allow what is effectively a 36 month TEN to be given by certain community bodies (which will be prescribed by regulation) or specified types of business (again to be specified by regulation). The Community and Ancillary Sellers Notice ("CAN") will allow sales of alcohol between 7 AM and 11 PM in very limited circumstances.

The Government consulted on these proposals in November 2014 and made it clear that this is a potentially very restrictive freedom[11]. In particular it stated in relation to the types of activity where a CAN can be used:

> "The CAN is intended to benefit providers of bed and breakfast or other similar overnight accommodation who may wish to offer overnight guests a bottle of wine in their room or a drink with an evening meal, and community groups putting on small community events who wish to sell an alcoholic drink to those attending the event. The Government does not intend to extend the proposal to include florists and hairdressers or other business types at this stage."

The consultation concentrated primarily on the amount of alcohol that could be sold in certain circumstances, and we await the outcome of that consultation which will no doubt inform the regulations.

As with the community film shows, the prohibition on the community groups trading for profit may limit the use of this restriction. However until the regulations are published it is difficult to establish exactly what the parameters of this new authorisation will be.

[10] The clauses in the Bill do not correlate to the sections in the Act. Clause 38 (increase in number of TENs) is section 68; Clause 39 (abolition of renewal of personal licences) is section 69; Clause 40 (allowing sale of liquor confectionary to children) is section 70; Clause 41 (exemption for certain late night refreshment establishments) is section 71; Clause 42 (removal of requirement to report loss or theft of various documents to the police) is section 72; Clause 43 (community film shows) is section 76.

[11] https://www.gov.uk/government/consultations/community-and-ancillary-sellers-notice-consultation

Hemming

On 29th April the Supreme Court finally handed down its long-awaited judgment in the case of *Hemming.*[12]

The judgment is concise and the view of the 5 judges was unanimous, with judgment being given by Lord Mance.

In a nutshell, the Supreme Court upheld the position determined by both the High Court of the Court of Appeal that enforcement costs against unlicensed traders cannot be recovered via the licence fee where the particular licensing regime is covered by the Provision of Services Regulations 2009. They did not demur from the view that compliance costs i.e. the costs of ensuring that those who were licensed were complying with the requirements of that licence and the legislation, were a legitimate part of the cost to the authorisation process.

The court accepted that an application fee for a licence was covered by the Regulations, but that neither those regulations nor the underlying European Directive prevented a maintenance charge being levied for the licence. In an interesting development, the court stated that such a maintenance fee would have to be proportionate and comply with the overall requirements of the Directive. The court said this:[13]

> "But there is no reason why it [the maintenance fee] should not be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences."

In response to an argument put forward that the existence of a maintenance fee was itself part of the authorisation scheme and therefore contrary to the directive and the regulations, the court said this:[14]

> "19. The respondents' case is that, . . . the requirement to pay the further fee mentioned in sub-paras (ii) above is an aspect of the authorisation scheme within the meaning of the Directive. . . . I have no doubt that it is not. It is a mere provision that, if and when authorisation is successfully obtained, the actual grant or renewal of a licence will be subject to payment of a fee to cover enforcement costs. Once it is accepted (paras 15 to 17 above) that article 13(2) permits a licensing authority to levy on a successful applicant, in respect of the possession or retention of a licence, charges enabling the authority to recover the full cost of running and enforcing the scheme, it would be incongruous if an application could not refer to or include a requirement to pay such charges on the application being successful. The inclusion in the application of a requirement to pay a licence fee for the possession or retention of a licence, if the application is successful, does not turn that requirement into an authorisation procedure

[12] *R (app Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council* [2015] UKSC 25
[13] Para 17
[14] Para 19

> or formality or into a charge incurred from the application. It remains a licence fee incurred for the possession or retention of the licence."

In relation to the specific approach taken by Westminster whereby an application for a sex establishment licence had to be accompanied by both the application fee and maintenance fee, the Court concluded that this could be argued as being a means of dissuading someone from applying, and this element (and this element alone) is subject to a reference to the European Court of Justice.

So where does that leave licensing fees? If there is a general power to levy a reasonable fee (e.g. sex establishments, street trading), then it seems enforcement costs against non-licensees could be recovered via a maintenance fee, levied separately from the application fee, and after the licence has been granted.

Where the legislation is more restrictive, the overriding considerations will remain with the domestic legislation.

It will be interesting to see what the determination of the European Court is on this point, and equally interesting to see if the parties can expand the argument to cover the points already determined.

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