IN THE HIGH COURT OF JUSTICE **Claim No: HC-2017-001496**

BUSINESS AND PROPERTY LIST

BUSINESS LIST

BETWEEN:

JOLYON MAUGHAM QC

Claimant

-and-

UBER LONDON LIMITED

Defendant

CLAIMANT'S SUPPLEMENTARY SKELETON

Introduction

1. This is the Claimant's ("C") Supplementary Skeleton Argument in response to the Defendant's Skeleton Argument dated 30 January 2019.

Legal Framework

2. There is no doubt that the Court has jurisdiction to make a PCO. S. 51 of the Senior Courts Act 1981 provides that, subject to any other enactment and to rules of court, costs are in the discretion of the Court. There is no enactment or rule of court that would prevent the making of a PCO in this case. CPR r 44.2(1) maintains the Court's discretion in relation to costs. CPR r 3.1(2)(m) provides in unqualified terms that the Court may "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

3. That the Court's discretion extends to the making of a PCO was recognised in *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347. Dyson J. recognised that

a PCO may be appropriate in "public interest challenges", which he characterised as challenge which "raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case". Pausing there, the fact that persons other than the applicant may have a private interest in the outcome is neither here nor there.

4. In *R v Hammersmith and Fulham London Borough Council, Ex p Council for the Protection of Rural England London Branch* [2000] Env LR 544, Richards J observed:

> "... I accept, that in exercising discretion with regard to costs ... I should seek to give effect to the overriding objective and should have particular regard to the need, so far as practicable, to ensure that the parties are on an equal footing and that the case is dealt with in a way which is proportionate to the financial position of each party. Those aspects of the overriding objective seem to me to be embedded in any event in the principles laid down in *Ex p Child Poverty Action Group* [1999] 1 WLR 347."

5. In *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 W.L.R. 2600; [2005] EWCA Civ 192 the Court of Appeal gave guidance as to the circumstances in which a PCO should be made. The Court of Appeal did not purport to be formulating rules but guidelines and governing principles: see paragraphs 70 – 74. The governing principles were set out as follows:

> "74 We would therefore restate the governing principles in these terms.
> (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
> (i) the issues raised are of general public importance;
> (ii) the public interest requires that those issues should be resolved;
> (iii) the applicant has no private interest in the outcome of the case;
> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

6. In *Eweida v British Airways Plc* [2010] C.P. Rep 6; [2009] EWCA Civ 1025, Lloyd LJ held that "a PCO cannot be made in private litigation" (paragraph 38). That case concerned a discrimination claim brought by an employee against her employer: a case of private litigation on any analysis. Even in the context of employment disputes, *Eweida* has been doubted: see Richards LJ in *Unison v Kelly* [2012] EWCA Civ 1148; [2012] I.R.L.R. 951 at paragraph 21 and Master MacLeod in *Dring v Cape Distribution* [2017] EWHC 2103 at paragraph 78.

7. As noted above, the *Corner House* principles are not to be applied inflexibly: see *Morgan & Anor v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107; [2009] C.P. Rep. 26 at paragraphs 36 – 40 where the Court of Appeal concluded that flexibility extends to the requirement that the litigant not have a private interest in the outcome of proceedings.

8. In the specific context of tax litigation, in *Drummond v HMRC* [2016] UKUT 369; [2016] B.V.C. 535, the Upper Tribunal observed:

> "10 …Although private interest is a factor to be taken into consideration, it is not a bar to a PCO (see *Morgan & Anor v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107* at [37] — [39]). The question of private interest must be viewed in the context of the general public importance of the issue (see the comments of Walker LJ in *R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749, [2009] 1 WLR 1436* at [23] and the passage from *Wilkinson v Kitzinger* [2006] EHWC 835 (Fam), [2006] 2 FCR 537, [2006] 2 FLR 397 (Fam) quoted therein). **All tax appeals will have an element of private interest. If the test is applied inflexibly then no case where a person's tax liability was in issue would ever satisfy this criterion.** I understood HMRC to agree with this approach to the private interest criterion but to contend that this appeal is pursued solely for Mr Drummond's private interest and any public interest does not begin to displace Mr Drummond's private interest. Mr Drummond contends that his private interest is outweighed by the general public importance of the issue and public interest." (emphasis added)

Factual Background

9. C, a leading tax barrister, brings this claim for a declaration and order requiring the Defendant ("ULL") to provide C with a VAT receipt in relation to a trip booked with ULL for business purposes (see [46, JMI §§ 9 – 10; and 112, JMII §§ 11 – 12]). A VAT receipt is needed to enable C to claim input tax deduction (a fundamental aspect of the VAT

regime: see Article 168 of the Principle VAT Directive). The underlying issue is whether, of a taxi booked through the Uber app, the taxi service is supplied for VAT purposes by ULL (in which case ULL would be obliged to charge VAT) or by the individual driver (whose earnings are likely to be below the VAT registration threshold of £85,000 per annum such that he is not obliged to charge VAT).

10. The claim is brought in association with the Good Law Project ("GLP"), of which C is the founder and director, and which is dedicated to litigating cases of significant public importance, with some success (see [45, JM1, §§ 5 – 8; 173, JMIII, § 8].

11. The sum at stake is trivial for C (56 pence) and C has no other private interest in the proceedings [114, JMII, §§ 21 – 22; 175, JMIII §§ 10 – 12]). However, the principle at stake is not. The question whether ULL is liable for VAT for journeys booked through ULL's platform has significant implications for the public interest in raising revenue as well as the fair administration of VAT (see [47 – 48, JM1, §§14 – 20; 113, JMII, §§ 18 - 20].

12. There is an extremely clear public interest at stake in the resolution of this case. HMRC is not taking any action, in circumstances where there is real reason (in particular because of the recent cases, in particular *Uber BV v Aslam* [2018] EWCA Civ 2748; Case C-434/15 *Asociación Profesional Elite Taxi v. Uber Systems Spain SL* [2018] Q.B. 854) to believe that the relevant relationships (and therefore the relevant supplies) have been mischaracterised, and where there is an incomplete explanation from HMRC of its position, and no right to disclosure of the full train of correspondence.

<u>The merits</u>

13. C considers that the underlying merits of the claim are strong. The issue ultimately turns on whether ULL is properly characterised as the supplier of services for the purposes of the VAT Act or whether ULL acts only as the agent of the driver. ULL's agency analysis has been rejected in analogous contexts (see paragraph 12 above). The critical point as to merits for the purpose of this application is that the court must treat the application as, at the very least, having a real prospect of success, there being no application for summary judgment before this court.

14. The Defendant seeks to dispute the merits in paragraph 38 of its skeleton. These assertions are misconceived:

a. Paragraph 38(1) simply ignores the employment cases or the ECJ cases on whether it is in fact supplying a transportation service.
b. Paragraph 38(2) ignores the clear language of reg.13(1) of the VAT Regulations: "shall provide such persons … with a VAT invoice". How else, other than by seeking an order of the Court, is the provision supposed to be enforceable? There is no basis for suggesting that HMRC could order an invoice to be issued (the imposition of a penalty is a different matter and is subject to a reasonable excuse defence in s.69(8)). And since possession of a VAT invoice is a formal requirement for any trader seeking to deduct input VAT in relation to a taxable supply, and since a trader's right to deduct VAT in relation to a taxable supply to him for business purposes is a fundamental aspect of EU VAT law (see paragraph 27 below), the EU law principle of effectiveness requires that a trader whose supplier incorrectly refuses to provide a VAT invoice on a supply that is in fact a taxable supply must be able to obtain a court order requiring the supplier to do so.
c. Paragraph 39(3) ignores the point that section 18 of the Commissioners of Revenue and Customs Act precludes HMRC from disclosing taxpayer information to Parliament, and that HMRC have refused to discuss the position of any particular taxpayer.

<u>No other forum</u>

15. There is no other forum in which this issue can be timeously resolved. C made an input deduction claim against HMRC under the VAT Regulations 1995. Following several months in which it did not clarify its position, by a letter dated 6 November 2017 HMRC refused to exercise its discretion to accept that claim without a VAT receipt issued by ULL. These proceedings were stayed by order of 10 November 2017 "to enable C to seek a determination as to whether that constituted an appealable decision" [321]. In light of the decision of the Court of Appeal in *Zipvit Limited v HMRC* [2018] EWCA Civ 1515 it became clear that the question of the correct tax status of the supply, the issue this claim

raises, had become irrelevant to the appeal, which would have no prospect of success. The appeal was therefore dismissed by consent and C applied to lift the stay (see the witness statement of David Greene at [143 – 149].

16. The GLP has been able to raise some money towards funding this litigation through crowdfunding (see [49, JM1, §§ 22 – 24). C raised some £107,650 (before costs) from 3,400 separate donations and the GLP received a donation of £20,000 by an organisation connected with the black cab trade. C has been candid that many donors will be connected with the black cab trade; C has been equally open about the fact that he does not bring this litigation in order to benefit that trade. C has also been open about his own resources (see [51, JM1, § 28]).

17. There is an enormous disparity in resources between C and ULL. C has estimated that ULL's costs could reach £500,000 – 1 million at first instance alone (see [51, JM1, § 27; 177 JMIII, § 15); ULL has not challenged that estimate.

18. C has been clear that without costs protection, he cannot continue this litigation (see [52, JM1, § 30; 177, JMIII, §§ 16 -18; 21). C identified another litigant with fewer personal resources (see [112, JM2, §§ 13 – 15) but no purpose would be served by substituting a different C, for the same issue is likely to arise.

Submissions

Overall

19. The present claim is plainly a public interest claim within the meanings identified in *ex parte Child Poverty Action Group* and *Corner House.* The claim is brought for no other reason than that it raises a general issue of public importance.

The *Corner House* principles – overarching discretion

20. Turning to the *Corner House* framework, C does not argue that *every* case that relates to the application of the tax code is one of general public interest. But he has given cogent reasons as to why this litigation is in the public interest, having regard to the issue of

principle to be resolved, the amounts at stake, and public concern as to fair administration of the tax system.

The public interest

21. Second, the public interest requires the issues in this claim to be resolved. These proceedings are the only actually available means by which the issue will be resolved in the near future (and there is an ongoing loss to public revenue while it remains unresolved). If ULL made a taxable supply, C is entitled to a VAT invoice. There is no means by which he can compel production of such an invoice, other than through these proceedings.

22. HMRC has not taken action and its responses to questions from the Select Committee suggest it has little appetite for litigating the issue at stake in this claim: see [243 - 245]. Judicial review of the actions of HMRC would not necessarily address the issue of principle at all: the focus of such a challenge would be on the reasonableness (in *Wednesbury* terms) of HMRC's decisions whether to act or not. In any event, given that section 18 of the Commissioners of Revenue and Customs Act imposes strict obligations of confidentiality on HMRC with regards to the disclosure of information, and neither HMRC nor ULL has provided any information as to the liaison said to have taken place between them, and ULL continues to refuse to disclose the relevant documentation despite having been asked to, such litigation is not a practical possibility. Accordingly, the suggestion that the proper course is for the Claimant to drop this litigation and seek judicial review of HMRC is utterly hopeless.

23. The fact that ULL could bring an appeal against a decision by HMRC to issue a VAT assessment does not mean there is no public interest in these proceedings, in circumstances where HMRC have not issued such an assessment or given any indication that they are likely to do so.

24. In any event, the *Corner House* principles do not require that a claim in which costs protection is sought be the only possible litigation by which an issue of public importance could be resolved. The question is not whether the issue could hypothetically be resolved in other proceedings but whether it is in public interest that it be resolved.

25. ULL refers to the decision of the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] A.C. 617. That case concerned an attempt by the NFSSB to challenge a special arrangement agreed between the Inland Revenue and casual workers in Fleet Street who had been responsible for tax evasion, part of which arrangement was an agreement by the Inland Revenue not to investigate tax lost in previous years. The NFSSB argued that the approach taken was inconsistent with that take by the Inland Revenue in other cases of tax evasion.

26. At issue before the House of Lords was the question whether the NFSSB had a sufficient interest to have standing to pursue the claim in judicial review (so not precisely the same question as posed here, although it may give insight into the underlying legal policy). Drawing a contrast between ratepayers and those paying income tax, Lord Wilberforce said at p633B – F):

> "The structure of the legislation relating to income tax, on the other hand, makes clear that no corresponding right is intended to be conferred upon taxpayers. Not only is there no express or implied provision in the legislation upon which such a right could be claimed, but to allow it would be subversive of the whole system, which involves that the commissioners' duties are to the Crown, and that matters relating to income tax are between the commissioners and the taxpayer concerned. No other person is given any right to make proposals about the tax payable by any individual: he cannot even inquire as to such tax. The total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system. **As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over-assessed: indeed, there is a strong public interest that he should not. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest**.
>
> **That a case can never arise in which the acts or abstentions of the revenue can be brought before the court I am certainly not prepared to assert, nor that, in a case of sufficient gravity, the court might not be able to hold that another taxpayer or other taxpayers could challenge them.** Whether this situation has been reached or not must depend upon an examination, upon evidence, of what breach of

duty or illegality is alleged. Upon this, and relating it to the position of the complainant, the court has to make its decision. I find it necessary to state the circumstances in some detail." (emphasis added)

27. The principle which the Defendant seeks to establish proves too much, in that it suggests that the Claimant should not even be able to bring this claim at all. Yet no strike out application has been made on that basis (or any other basis). There can be no doubt that C has a genuine claim to input tax deduction (which is a fundamental EU law right under Article 168 of the Principal VAT Directive in order to ensure that a trader does not bear the burden of VAT – see *Case 268/83 Rompelman*), which cannot be resolved in any other way (and the Defendant makes no suggestion as to how he could otherwise litigate his claim).

28. The Defendant has seen fit not to make reference to the (critical) second passage highlighted above. In fact even in the context of taxpayers seeking to challenge decisions by HMRC in relation to other taxpayers by way of judicial review, none of their Lordships excluded the possibility that a claimant would be found to have standing in an appropriate case.

29. Indeed, Lord Diplock said (p644E – G):

"**It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.** The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; **they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.**" (emphasis added)

30. In *R v HM Treasury ex parte Smedley* [1985] 2 W.L.R. 576; [1985] Q.B. 657, the Court of Appeal considered that an individual taxpayer had standing to bring a challenge to a draft Order in Council requiring payments being made to the EEC. Slade LJ said:

> "The speeches of their Lordships in *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 well illustrate that there has been what Lord Roskill described at p. 656G-H as a "change in legal policy," which has in recent years greatly relaxed the rules as to locus standi. Lord Diplock referred at p. 640C to a "virtual abandonment" of the former restrictive rules as to the locus standi of persons seeking prerogative orders against authorities exercising governmental powers. If the court had taken the view that Mr. Smedley's application was of a frivolous nature, the wide discretion given it by *R.S.C., Ord. 53* would have enabled it to dispose of it appropriately. There has, however, been no suggestion that it is of this nature. It raises a serious question as to the powers of Her Majesty in Council to make an Order in Council in the form of the draft now before Parliament. The making of any such Order would be likely to be followed automatically by the expenditure by the government of substantial sums from the Consolidated Fund in reliance on *section 2 of the European Communities Act 1972*. **I do not feel much doubt that Mr. Smedley, if only in his capacity as a taxpayer, has sufficient locus standi to raise this question by way of an application for judicial review**; on the present state of the authorities, I cannot think that any such right of challenge belongs to the Attorney-General alone." (emphasis added)

31. The general approach to standing has relaxed since the decision in the *NFSSB* case. In *R v Secretary of State for Foreign and Commonwealth Affairs* [1995] 1 W.L.R. 386, Rose LJ said:

> "It is to be observed, in passing, that there are dicta since *Ex parte National Federation of Self-Employed and Small Businesses Ltd*. which are in favour of according standing to a single taxpayer in an appropriate case: see *Reg. v. Her Majesty's Treasury, Ex parte Smedley* [1985] Q.B. 657, *per* Slade L.J., at 670B, and *per* John Donaldson M.R., at p. 667F. There is, submitted Mr. Richards, "a certain tension" between what Lloyd L.J. said in *Reg. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg* [1994] Q.B. 552, 562 and what Sir John Donaldson M.R. said in *Reg. v. Monopolies and Mergers Commission, Ex parte Argyll Group Plc.* [1986] 1 W.L.R. 763, 774A. The rules of standing should not, submitted Mr. Richards, be allowed to evolve further so as to embrace the applicants.
>
> For my part, I accept that standing (albeit decided in the exercise of the court's discretion, as Sir John Donaldson M.R. said) goes to

> jurisdiction, as Woolf L.J. said. But I find nothing in *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 to deny standing to these applicants. **The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years**. It is also clear from *Ex parte National Federation of Self-Employed and Small Businesses Ltd*. that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case: see *per* Lord Wilberforce, at p. 630D, Lord Fraser, at p. 645D and Lord Scarman, at p. 653F.
> Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Wade's words in Administrative Law, 7th ed. (1994), p. 712: "the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved."
>
> Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasised [1982] A.C. 617; the importance of the issue raised, as in *Ex parte Child Poverty Action Group* [1990] 2 Q.B. 540; the likely absence of any other responsible challenger, as in *Ex parte Child Poverty Action Group and Ex parte Greenpeace Ltd. (No. 2)* [1994] 4 All E.R. 329; the nature of the breach of duty against which relief is sought (see *per* Lord Wilberforce, at p. 630D, in *Ex parte National Federation of Self-Employed and Small Businesses Ltd.*); and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid: see *Ex parte Child Poverty Action Group* [1990] 2 Q.B. 540, 546H. All, in my judgment, point, in the present case, to the conclusion that the applicants here do have a sufficient interest in the matter to which the application relates within section 31(3) of the Supreme Court Act 1981 and Ord. 53, r. 3(7) .
>
> It seems pertinent to add this, that if the *Divisional Court in Ex parte Rees-Mogg* [1994] Q.B. 552, eight years after *Ex parte Argyll Group Plc.* [1986] 1 W.L.R. 763, was able to accept that the applicant in that case had standing in the light of his "sincere concerns for constitutional issues," a fortiori, it seems to me that the present applicants, with the national and international expertise and interest in promoting and protecting aid to underdeveloped nations, should have standing in the present application." (emphasis added)

32. That the position has relaxed in the specific context of challenges to decisions concerning taxpayers is also clear from *R (on the application of UK Uncut Legal Action Ltd) v Commissioner's of Her Majesty's Revenue and Custom*: see paragraph 9 of the decision on permission [2012] EWHC 2017 (Admin) and paragraph 41 of the substantive judgment [2013] EWHC 1283 (Admin). In the present case, there is no question of

standing. C has no other remedy by which to obtain a VAT receipt and the public interest goes well beyond that relied upon in the NFSSB case.

C has no private interest in the outcome

33. Third, C has no private interest in the outcome of the claim. The sum at stake is trivial for C. C would not be bringing this claim but for the public interest considerations that it raises, which plainly outweigh the 59 pence stake he has in the outcome. The focus of the *Corner House* principles address is whether the applicant has a private interest; the fact that there exist other people who have a private interest in the outcome is irrelevant. It will be true of almost all public interest litigation that *somebody* has a private interest in the outcome: if litigation had no effect on anybody, it is difficult to see how there could be a public interest worth pursuing in the first place. Even if the applicant himself had a private interest (which is not so here), that would still not be determinative against allowing the application for a PCO. At most it would only be one factor among many, and it is submitted that the other factors in favour of a PCO in this case are sufficiently compelling to justify the application being granted.

34. In any event, the funding C has raised is plainly insufficient to enable him to continue with these proceedings having regard to the costs risk he would face.

C's resources

35. Fourth, C has been very open about the resources available in connection with this litigation. But while C has been able to raise some money towards the costs of the litigation, and has a substantial income compared to the average person, his resources are dwarfed by ULL and are not such as would enable C to proceed with this litigation given the money ULL is likely to be willing to spend to defend it. It is fair and just to impose an order to enable an important point to be determined where it may otherwise go unresolved. C has explained why he is unlikely to be able to raise more money (179, JM III, paragraph 21), the limit on what GLP can contribute (178, JM III, paragraph 18) and the fact that his own legal costs are proposed on the basis of work being undertaken for substantially reduced rates. C has proposed a fair level of cap in all the circumstances. But even if the

court disagreed with the level of cap proposed by C, that cannot constitute a reason for refusing a cap generally. The question whether a cap should be imposed and the appropriate level of such a cap are separate questions.

C cannot continue with this litigation without a costs cap

36. Fifth, it is clear that C will not be able to continue with this litigation without costs protection. It would plainly not be reasonable to expect C to continue to pursue a claim of this nature if exposed to the likely costs liability, which is not fixed, and which may rise.

CMO

37. So far as the alternative reference to a CMO is concerned, what is important is the substance of the costs protection rather than the form it takes. A PCO is plainly the appropriate order in this case; but if costs protection that sufficiently limits C's exposure to ULL's costs by other means that possibility should also be noted.

Conclusion

38. For the reasons given above, and those stated in the Claimant's earlier Skeleton Argument dated 25 January 2019, the court is urged to allow this application.

2 February, 2019

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