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

SKELETON ARGUMENT FOR THE CLAIMANT

For a hearing to be listed between 5 and 7 February 2018

References in the form W/S JM I, W/S JM II and W/S JM III are to the first, second, and third witness statements of Jolyon Maugham QC

References in the form W/S FCI and W/S FCII are to the first and second witness statements of Francois Chadwick

References to the tabbed application bundle are in the form: [tab number/page number]

1. This is the skeleton argument on behalf of the Claimant ("**C**") in respect of the hearing of his application **[3/25]** for a protective costs order ("**PCO**") to be made in favour of C in respect of his claim for a declaration and an order requiring the Defendant ("**D**") to provide C with a VAT invoice **[1/1]**.

2. D's business is providing vehicle hire services. C's case is that D makes taxable supplies of private vehicle hire; that its drivers are in effect D's agents; that D ought to be registered for VAT; and that D ought therefore to provide C with a VAT invoice. D maintains that it acts only as an intermediary between a third party transport provider (the individual driver) and the person using that provider. D's position has been

rejected in analogous legal contexts by the Court of Appeal (see *Uber BV v Aslam* [2018] EWCA Civ 2748, on appeal from the Employment Appeal Tribunal [2017] 11 WLUK 238; [2018] R.T.R. 14) (and by the European Court of Justice (Case C-434/15 *Asociación Profesional Elite Taxi v. Uber Systems Spain SL* [2018] Q.B. 854). For the purposes of this application, the Court must proceed on the basis that the claim is at the very least arguable: aside from the merits on its face, there has been no application for it to be struck out.

3. The sum at issue in the immediate case – at most £1.06 (see W/S JM I §21 **[4/49]** – is so trivial that C cannot be said to have any private interest in the outcome of the proposed proceedings. Nor, as explained in C's evidence, does C's purpose in bringing this action have anything to do with advancing the interests of the black cab trade (see W/S JM III §10 – 12 **[4/175]**). The issue of tax policy principle is one of great public importance, not only because of the substantial amount of VAT that would be payable but to maintain public trust and confidence in the fair administration of VAT. It is for that reason that those acting for C are acting on the basis that they will be paid significantly less than commercial rates (see W/S JM I §20 **[4/49]**, W/S JM 2§27 **[4/118]**).

The power to make a protective costs order

4. The jurisdiction to make costs orders is a wide one. Section 51 of the Senior Courts Act 1981 provides:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
> (a) the civil division of the Court of Appeal;
> (b) the High Court;
> …
> shall be in the discretion of the court.
> …
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

5. There can be no doubt that the court has jurisdiction to make a PCO.

6. The starting point is that costs follow the event: *McDonald v Horn* [1995] ICR 685, 694D-E per Hoffmann LJ; CPR 44.2(2)(a).

7. In *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347, there was no dispute that the Court had the power to make anticipatory costs orders; there was no dispute that it would not normally do so and that the usual rule was that costs follow the event. However, Dyson J recognised that there may be exceptions to the usual rule:

> "It is not disputed that, if these applications were made in private law actions, I would be bound to dismiss them. The main question of principle that arises in this application is whether different considerations of public policy apply in cases which can aptly be characterised as "public interest challenges". I shall explain later in my judgment what I understand to be meant by "public interest challenges.
> …
> I should start by explaining what I understand to be meant by a public interest challenge. The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own. The central submission advanced on behalf of the applicants is that, because of those essential characteristics, the court should be more willing to make no order as to costs against an unsuccessful applicant in public interest challenge cases than in other cases. It is submitted that public interest challenges are not "ordinary litigation" between adverse parties of the kind that Hoffmann L.J. was contemplating in *McDonald v. Horn* [1995] I.C.R. 685." (emphasis added)

8. Pausing there, the present case meets the essential characteristics of a public interest challenge identified by Dyson J. The public law issue – whether D must register for VAT – is of obvious general importance; and C has no private interest in the outcome of the case, the VAT claimable for his journey being minimal. The fact that the procedure by which this claim is brought is under Part 7 of the CPR rather than a claim for judicial review does not change that characterisation.

9. 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 laid down the following principles:

> "(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."

10. While those principles were laid down in the context of a claim for judicial review, there is no reason why they should not also apply in an appropriate case where a public interest challenge has to be brought by way of a claim under Part 7.

11. In *Eweida v British Airways Plc* [2010] C.P.Rep. 6; [2009] EWCA Civ 1025, Lloyd LJ said at paragraph 38:

> "38 In my judgment, the court cannot make a PCO in this case. This is not public law litigation, but a private claim by a single employee against her employer. A PCO cannot be made in private litigation. I do not regard *Wilkinson v Kitzinger* as a true exception to this principle, even though the President considered the *Corner House* conditions. It was close to public law litigation, and could have been brought by way of judicial review but for a particular statutory provision. Moreover, the President's order was not made as a PCO, but as a CCO: see paragraph [28] above. The particular issue in the present appeal may not be usual, but the nature of the claim is commonplace. The issue

> may be of general importance, but the claim is a private claim, for the benefit of the employee."

12. At paragraphs 22 and 23 of his judgment, Lloyd LJ referred to *Corner House:*

> "23 In Corner House the Court of Appeal drew a distinction between private law cases, governed by these principles, and public law litigation, where a more flexible approach was legitimate. At paragraph 24 the court said:
>
> > "The present appeal is concerned not with the incidence of costs in private law civil or family litigation or with statutory (or other) appeals, but with the incidence of costs in a judicial review application at first instance. Over the last 20 years there has been a growing feeling in some quarters, both in this country and in common law countries abroad which have adopted the "costs follow the event" regime, that access to justice is sometimes unjustly impeded if there is slavish adherence to the normal private law costs regime described by Buckley LJ in *Wallersteiner v Moir (No 2)* and by Hoffmann LJ in *McDonald v Horn* ."
>
> 24 Having reviewed a number of cases, in this jurisdiction and abroad, the court said at paragraph 69: "We are satisfied that there are features of public law litigation which distinguish it from private law civil and family litigation." They went on to set out the principles as I have quoted them at paragraph 74 of their judgment, and to give guidance as to the procedure and the form of order that might be appropriate, before dealing with the facts of the particular case. They made a PCO under which the claimant was to be at no risk as to the respondent's costs."

13. *Eweida* is not authority for the proposition that the Court has no power to make a PCO in a case such as the present.

14. First, it is important to note that Lloyd LJ characterises the claim as a "private claim by a single employee against her employer" and "a private claim, for the benefit of the employee…". The sentence "a PCO cannot be made in private litigation" has to be read in that context. The key point in the Court's reasoning in *Eweida* was not the nature of the procedure by which the claim was brought but with the fact that it was a claim brought for the Claimant's private interest. Hence it would not have made a PCO in any event: paragraphs 38 – 39.

15. Second, Lloyd LJ does not define what is meant by "private litigation"; and similarly left the dichotomy between "private law cases" and "public law litigation" undefined.

Having regard to the discussions in *Child Poverty Action Group* and *Corner House* there is no reason why that dichotomy should be defined by reference to the procedure by which a claim is brought rather than the substance of the issue to be determined. Just as the private/public law distinction should not be rigidly applied where the question of procedural exclusivity arises so too it should not be rigidly applied in this context.

16. Third, those categories are not necessarily exhaustive. There are cases which do not neatly fall into either category: see e.g. *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam); and the observation of Master Macleod in *Dring v Cape Distribution* quoted below. The Court should not be astute to maintain a rigid conceptual distinction that does not correspond to the underlying substance of different cases.

17. Fourth, the Court should be slow to conclude that it has fettered the broad discretion conferred by s. 51 of the Senior Courts Act. There is nothing in the statutory language to suggest that the Court does not have jurisdiction under s. 51 of the Senior Courts Act to make a protective costs order where it is in the public interest to do so in an action brought under Part 7 of the CPR. Lloyd LJ's remarks also have to be seen in the context of a claim in which he made it clear that a PCO would not have been made in any event because the private interest was too significant.

18. That *Eweida* is not authority for the proposition that a PCO cannot be made in the context of private litigation is also clear from subsequent judicial observations.

19. In *Unison v Kelly* [2012] EWCA Civ 1148 [2012] I.R.L.R. 951, Richards LJ doubted that *Eweida* was authoritative that the Court did not have discretion to make an order analogous to a PCO in private litigation:

> "21 I agree. It seems to me that one way in which the application was put was as an application for a PCO. But for the decision in Eweida that a PCO cannot be made in private litigation, I would have been minded to make a PCO in this case**. <u>It may be that notwithstanding Eweida the wide discretion of the court in matters relating to costs would admit of the possibility of a freestanding order analogous to a PCO, even in private litigation.</u>** But it is not necessary for us to go that far." (emphasis added)

20. In *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012 [2015] 1 W.L.R. 62, the claimant sought a protective costs order in the context of a private law action for nuisance. The Court of Appeal refused to allow an appeal against the refusal to make that order. The Court of Appeal was referred to *Eweida* but, importantly, did not refuse to make a protective costs order on the basis that such orders are not in principle possible in the context of a private law action for nuisance.

21. In *Dring v Cape Distribution Ltd* [2017] EWHC 2103, Master Macleod said the following in relation to *Eweida*:

> "78 I do not need to decide the question whether this court could alternatively make a Protective Costs Order of the sort referred to in *Corner House* and *Eweida* and other case or as to whether if that were the case the instant application would be seen as 'private' litigation or being *sui generis* and of a quasi-public nature. **My observation is that in *Eweida* the court, albeit stating that such orders were not available in private litigation, was in subsequent paragraphs of judgment prepared to consider that there might not be an absolute bar**, if a given case fell within the scope of the criteria in *Corner House* , but that on the facts of *Eweida* the extent of the private interests at stake was said to be too great. **Para 21 of the judgment of Richards LJ in *Unison v Kelly*, which must surely be very persuasive even if not part of the ratio of the decision, lends support to that possibility**. I need not express a view beyond this, but were I to address my mind to the strict question whether (assuming a PCO could be available in a private case and assuming the criteria in *Corner House* would then be applied), I would on the material before me in evidence have concluded that the Corner House criteria were met." (emphasis added)

22. In *Drummond v HMRC* [2017] 1 W.L.R. 2185; [2016] UKUT 221, the Upper Tribunal held that it had the same power to make PCOs as the High Court (paragraphs 30 – 31; 36 – 38) and that *Eweida* was not authority to the contrary.

23. In a subsequent decision in respect of the same case, in *Drummond v HMRC* [2016] UKUT 369; [2016] B.V.C. 535, the Upper Tribunal observed:

> "10 In relation to the criterion that the applicant must not have any private interest in the outcome of the appeal, Mr Drummond adopts the comments in [30] of the set aside decision. 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)

24. For the avoidance of doubt, the issue raised in this application is not that of a costs capping order under CPR 3.19. CPR 3.19 applies where an order is sought to minimise the risk that costs will be disproportionately incurred (CPR 3.19(5)(b) and (c)). The existence of CPR 3.19(5) is not therefore a reason either to deny that there is a power to make a PCO or to take a different approach to the making of a PCO than would be taken in a claim for judicial review.

The making of a protective costs order on the facts of this case

25. Each of the *Corner House* criteria will be addressed in turn.

26. First, the issues raised are of obvious public importance. The public has an interest in ensuring that tax properly payable is properly collected, particularly where the sums involved are large. Not only is that important from the point of view of revenue collection but also from the point of view of ensuring fairness and transparency in administering the shared burden of taxation. It is also important from the point of view of fair competition. It is no answer to rely, as D seeks to do, on the mere fact that HMRC exists to suggest that the public has no further legitimate interest. Despite being invited to do so by C's solicitors, Edwin Coe LLP **[5/316]**, D has disclosed no evidence of any correspondence with HMRC to show the nature of the dialogue referred to at FC I § 17 **[4/64]** and FC II §9 **[4/220]** or any steps taken by HMRC towards investigating or addressing the issue raised in these proceedings. The evidence of HMRC to the Public Accounts Committee on 6 November 2017 does nothing to diminish the public importance of a determination of the issue in this case. The existence of HMRC does not

pre-empt or preclude a member of the public from seeking a declaration such as that sought in the present proceedings, where the issue of law to be determined arises out of a relevant transaction between that member of the public and D.

27. Second, the public interest requires that the issues be resolved. These proceedings are the most appropriate way to resolve them.

28. There is no evidence that HMRC has itself taken steps to resolve the issue; and in any event it is ripe for judicial determination. D refused to provide C with a VAT invoice. C requested HMRC to exercise its discretion to allow him to claim for a deduction of input tax on the basis of 'other evidence'. After several months, HMRC gave no indication that it would do so and indicated in correspondence of 1 September 2017 that it was not minded to do so. On 9 November 2017, HMRC wrote indicating that it had decided not to permit C to hold "other evidence" in place of a VAT receipt in support of his claim to deduct input tax. This claim was stayed to enable an appeal to be brought against that decision, it being thought in light of the relevant authorities at the time that such an appeal could be brought. However, in light of the decision of the Court of Appeal in *Zipvit Limited v HMRC* [2018] EWCA Civ 1515, which was handed down on 29 June 2018, C and HMRC agreed that there was no prospect of C having his claim for input tax determined in the FTT, for reasons explained in the witness statement of David Greene dated 31 July 2018, and the appeal was withdrawn.

29. In the absence of an appeal, this is not a case in which the reasoning in *Autologic Holdings Plc v Inland Revenue Commissioners* [2006] 1 AC 118 applies.

30. D has asserted the possibility that the proper remedy is for C to claim judicial review of HMRC's failure to issue VAT assessments against D. However since D has not disclosed the full correspondence it has had with HMRC, C has no practical ability to do so. Even if such correspondence was belatedly disclosed, it would not render inappropriate these proceedings, nor this application. In any event, such a claim is highly unlikely to result in the Administrative Court resolving the issue at the heart of these proceedings. It would merely invite HMRC to revisit the lawfulness of its decision.

31. Furthermore, what is at issue is D's failure to fulfil its obligation to provide C with a VAT invoice. It is D as the party responsible who should have to defend that action; not

HMRC. The whole point of compelling suppliers to provide a VAT invoice under regulation 13 of the VAT regulations 1995 is to provide a straightforward mechanism for a customer to deduct input VAT without leaving a customer to the discretion of HMRC or imposing the burden of discretion on HMRC.

32. Third, C has no private interest in the claim to speak of. The sum at issue is obviously trivial. Nor does the fact that a proportion of those who have donated to assist C in bringing this claim may have a private interest in the claim mean that C has such an interest. In any event, whether a private interest is sufficient to render a PCO inappropriate is a matter of fact and degree. Here, there can be no doubt that C seeks to bring this claim in the public interest and any private benefit to anyone else is incidental. It would be absurd and unjust for the Court to deny costs protection to C on the basis of the hypothetical possibility that others who would have a private interest in the outcome could bring a claim themselves (i) in the absence of any evidence that they would do so and indeed in the absence of any suggestion that such litigation would make any commercial sense given the speculative and uncertain nature of that private interest vis-à-vis the all too certain costs of commercial litigation; (ii) having regard to the fact that arguments in the public interest should not go unheard in case and until a commercial interest with deep enough pockets comes along with a sufficiently large and certain overlapping private interest to justify the costs of commercial litigation; and (iii) the absence of any suggestion as to what cause of action anyone with such an interest might have.

33. Fourth, C has been candid as to the resources at his disposal. They pale in comparison to those available to D. JM/1 §23 **[4/50]** notes that Uber's value is generally thought to be around $70 billion and that figure has not been challenged. Nor has the suggestion at JM/1 §23 that Uber's costs could reach £1,000,000 at first instance been challenged in D's evidence.

34. Fifth, if a PCO is not made then for the reasons set out in JM/1 §22 – 26 and JM/3 §16 – 21 **[4/49-5150]**, C will not be able to continue as a litigant. While C has identified an alternative possible litigant with less in the way of personal resources, it would be artificial to refuse costs protection on the grounds that other person could bring the claim and seek costs protection. There is a clear need for meaningful costs protection to

enable this claim to continue. C has been open about the possibilities, and limitations, of crowd-funding and the fact that some limited resource may be available from crowd-funding is not a reason to decline to make a PCO: see e.g. *R (Hawking & ors) v Secretary of State for Health and Social Care and the National Health Service Commissioning Board* [2018] EWHC 989 (Admin).

35. In exercising this discretion it is submitted that the observations of Lord Justice Jackson in his Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs are relevant. In particular, his Lordship considered that access to justice required proportionate adverse costs for litigants; that the system of protective costs orders current in 2009 was expensive to operate and uncertain in its outcome, and that if Qualified One Way Costs Shifting was not to be introduced, the Aarhus rules limiting adverse costs to a modest sum should be extended to judicial review claims generally. The same considerations apply to public interest litigation conducted in private law.

36. In the circumstances, it would be fair and just to make a PCO in C's favour. The Court is also entitled to have regard to the fact that those acting for C are doing so on reduced rates.

37. Alternatively, it is submitted that this case is an appropriate one for a Costs Management Order under CPR 3.12(1)(e); although this will not solve the significant problem of the costs incurred by the time of any CCMC, as the court has no power to budget incurred costs: *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 [2017] C.P. Rep. 35 at [46] – [47]. Nor will it solve the problem of the litigation being able to proceed, unless the CMO sets a budget that offers effectively the same protection as a PCO (see JM III §20).

Conclusion

38. For the reasons given above, there plainly is jurisdiction for the court to make a PCO in this case, the *Corner House* criteria are plainly met, and the court is therefore invited to make a PCO limiting the Claimant's exposure to adverse costs in the event of losing the claim to £20,000, alternatively imposing costs budgeting.

25 January 2019

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