Claim No: HC-2017-001496

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
B E T W E E N:

JOLYON TOBY DENNIS MAUGHAM QC

Claimant

-and-

UBER LONDON LIMITED

Defendant

DEFENDANT'S SKELETON ARGUMENT
RESISTING PCO APPLICATION

References in square brackets are to [tab/page number] in the hearing bundle

INTRODUCTION AND SUMMARY

1. This Skeleton Argument sets out the basis on which the Defendant ("**ULL**") resists the Claimant's application for a Protective Costs Order ("**PCO**").

2. In summary, ULL submits that it would be clearly inappropriate for the Court to make a PCO for the following reasons:

   (1) There is no need for this claim to be brought in the public interest. That is because even if ULL's VAT position were an issue of "general public importance", which is not accepted, the statutory guardian of the public interest is HMRC, not the Claimant. If HMRC considered that ULL were liable to pay VAT on transport services provided by drivers, they could issue ULL with VAT assessments pursuant to their powers under the Value Added Tax Act 1994 ("**VAT Act**").

(2) Likewise, the proper judicial procedure for the resolution of any dispute concerning ULL's VAT liability is not a private law claim brought by the Claimant, but rather by statutory appeal to the specialist First-tier Tribunal (Tax Chamber) ("**FTT**"). If HMRC issued VAT assessments against ULL on the basis that it should have charged VAT on the transportation provided by drivers, ULL would then have the right to appeal such assessments in the FTT. That is the proper means, prescribed by Parliament, for the resolution of any such dispute.

(3) If as the Claimant asserts, it is "*inexplicable*" [**4/114/§20]**, and "*outrageous*" [**4/124]** that HMRC have not issued ULL with VAT assessments relating to the services provided by drivers, his remedy would be to bring Judicial Review proceedings against HMRC. He has not done so.

(4) The Claimant did seek to exercise another procedure against HMRC: after commencing this current High Court action, he made an input tax deduction claim against HMRC, under the VAT Regulations 1995 ("**the VAT Regulations"**). HMRC refused that claim, and the Claimant brought a statutory appeal to the FTT. However that appeal was subsequently dismissed by consent in July 2018 [**7/329]**, following the Court of Appeal's decision in the case of *Zipvit v HMRC* [2018] EWCA Civ 1515. Contrary to the Claimant's case, that failed appeal does not mean that the present proceedings are well founded, nor deserve the protection of a PCO.

(5) Further and importantly, the Claimant's High Court action is largely crowd-funded by the black cab taxi industry, who have a significant commercial interest in seeking to alter the competiveness of the services offered by ULL. In reality, there is thus a very real private interest being promoted through the vehicle of the Claimant's claim.

(6) Finally, and for the sake of completeness: (a) ULL strongly denies that the claim has any merit as a matter of VAT law; and (b) further, it is highly doubtful that the Claimant has any cause of action under the VAT Regulations 1995 (or otherwise) to demand a VAT invoice from ULL.

3. For these reasons, to grant a PCO would be contrary to the principles relating to PCO applications, as explained by the Court of Appeal in *R(Corner House Research) v*

Secretary of State for Trade and Industry [2005] 1 WLR 2600; and in subsequent decisions of the Court of Appeal, including *Eweida v British Airways Plc* [2009] EWCA Civ 1025.

FACTUAL BACKGROUND

ULL's VAT position

4. The background to the present dispute is set out in the two witness statements of Francois Chadwick, Global Head/Vice President of Tax and Accounting on behalf of ULL ("**Chadwick 1" [4/61-68]** and **"Chadwick 2**" [**4/218-222]**). The Court is respectfully invited to read those witness statements, the contents of which are not repeated here.

5. In very short summary, users of the Uber App (including the Claimant) agree contractual terms, including an express term stating that ULL does not provide transport services. ULL is a licensed private hire operator in London, which accepts private hire bookings and acts as an intermediary between the user and the third party driver who provides the transport: Chadwick 1 §5. Thus ULL is not liable to charge VAT to the users of the Uber App, on the transportation services provided by drivers.

6. The availability of a VAT invoice will thus depend on whether the driver, who provides the transportation services, is registered for VAT: Chadwick 1 §6. The driver, Mr Aurangzeb, who drove the Claimant on the journey in relation to which he seeks a VAT invoice in this action, was not registered for VAT: Chadwick 1 §9.

The Claimant's criticisms of HMRC

7. It is clear from the Claimant's three witness statements and the material exhibited thereto, that he disagrees with the analysis summarised above, and is dissatisfied with the way in which HMRC are addressing ULL's VAT position. The Claimant asserts that HMRC should have assessed ULL for VAT on what he considers to be the transportation services which (on his view) are supplied by ULL, and he has variously described HMRC's position as "*inexplicable*" "*outrageous*" and "*a genuine scandal*" [**4/122]**.

8. There is nothing to support any of these epithets, nor to support the Claimant's surprising assertion that "*HMRC is not taking any active interest in Uber's VAT affairs*": [**4/114/§20]**.

9. On the contrary, as explained in Chadwick 1 [**4/64/§§16-17]**, HMRC are well aware of ULL's tax arrangements. There has been regular dialogue with HMRC for several years regarding the taxation of the Uber group's activities in the UK, including that of ULL. That dialogue continues, as explained in Chadwick 2 [**4/220/§10]**.

10. Further, it is clear from evidence given to the Public Accounts Committee of the House of Commons by two of the Commissioners for HMRC, that HMRC are also aware of the employment and regulatory related litigation on which the Claimant seeks to rely so as to assert that ULL is liable for VAT: see Questions 88-92 in the Public Accounts Committee transcript at [**4/243-245].**

11. HMRC have not said that ULL has failed to comply with its VAT obligations and have not issued VAT assessments in line with what the Claimant asserts to be the correct legal position. At the risk of stating the obvious, however, it does not follow that HMRC's conduct is "*inexplicable*", or "*outrageous"* or a "*scandal*", nor that HMRC are ignoring ULL, in dereliction of their statutory duty.

12. Nor is there anything surprising or suspicious, as the Claimant now implies, about the fact that ULL have not acceded to the Claimant's recent demand that ULL disclose all of its communications with HMRC. Like all taxpayers, ULL has a statutory right to confidentiality in relation to its dealings with HMRC, under s.18 of the Commissioners for Revenue and Customs Act 2005 ("**CRCA 2005**"). The fact that the Claimant asserts (without foundation) that HMRC are failing to do their job properly does not disapply the protection of confidentiality that Parliament has granted ULL.

Procedural History of this claim and of the Claimant's failed appeal in the FTT

13. On 15 March 2017, the Claimant travelled in a licenced private hire vehicle, that service having been booked using the Uber app. The fare which he was charged was £6.34. Consistently with the position summarised at paragraphs 4 to 6 above, the Claimant was not charged VAT, nor was issued with a VAT invoice.

14. On 23 May 2017, the Claimant issued the present High Court claim, seeking a declaration that ULL should provide him with a VAT invoice for £1.06 in relation to the journey [**1/1-3].**

15. Three days later, on 26 May 2017, the Claimant applied for a PCO [**3/25-41]**, since he did not wish to be exposed to the costs risk of losing his claim. The application was eventually served on ULL a month later, on 21 June 2017 [**5/297**].

16. On 30 June 2017, the Claimant wrote to HMRC, asking them to exercise their discretion under Regulation 29 of the VAT Regulations to allow him to deduct £1.06 as input tax, despite his not having a valid VAT invoice.

17. On 14 August 2017, the present High Court claim was stayed by consent, in order for the Claimant to pursue his application for a PCO [**6/319]**. Reflecting the request that had previously been made by his solicitors at [**5/297]**, which was agreed to by ULL at [**5/298/§3**], the recital to the Order at [**6/319]** recorded that the parties had agreed to await the outcome of the PCO application before taking any substantive steps in the claim. It is therefore unfortunate for the Claimant's Skeleton now to assert (at paragraph 2) that "*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*". The reason no strike out application has been made, is because the Claimant himself (though his solicitors) had asked ULL to take no steps in the litigation until the PCO application had been determined.

18. Returning to the chronology: on 6 November 2017, HMRC rejected Mr Maugham's input tax claim: see HMRC's Statement of Case at [**4/154-162]**), as the documents he had provided did not demonstrate that VAT had been charged or was payable [**4/161/§37]**.

19. Later in November 2017, the Claimant issued a statutory appeal against HMRC's decision in the FTT, and sought ULL's agreement (which they gave) to stay the High Court claim, to enable him to pursue his FTT appeal: see the Order of 15 November 2017 at [**6/321**].

20. Before that appeal came on for a hearing, on 29 June 2018, the Court of Appeal handed down its judgment in the case of *Zipvit Limited v HMRC* [2018] EWCA Civ 1515. That judgment made clear (in short summary) that in the absence of a valid VAT invoice showing the tax that had been paid, a taxpayer is not entitled to a deduction/claim for the input tax which he asserts was chargeable in relation to the supply.

21. On 9 July 2018, a Consent Order was made in the FTT, dismissing the Claimant's appeal [**7/329].** Contrary to the Claimant's Skeleton Argument at §28, this was not because HMRC had agreed that "*there was no prospect of C having his claim for input tax deduction determined in the FTT*", but rather because (as the Claimant's solicitors earlier conceded at [**4/163]**) "*there is no reasonable prospect of the Appellant's case [in the FTT] succeeding, whether or not the supply at issue was made by Uber and whether or not VAT should have been charged on the supply*".

22. The FTT appeal having been dismissed, the Claimant then applied to lift the stay of his High Court claim and of his PCO application on 1 August 2018 [**3/42-43].** That application was supported by a witness statement signed by his solicitor, David Greene of Edwin Coe LLP [**4/143-150]**.

23. Inexplicably, the Claimant did not serve that application on ULL or its solicitors at the time, instead waiting over 2 months, until 10 October 2018 to serve it (two weeks before the hearing date, of which ULL had not been notified): see [**5/307**]. There has never been any - let alone any adequate - explanation for this.

24. Once ULL's solicitors were told of the application to lift the stay, they agreed to it, while pointing out the highly unsatisfactory way in which the matter had been conducted by the Claimant: see [**5/308].**

25. On 2 January 2019, the Claimant served his third witness statement in support of the PCO application [**4/169-180].** Much of this statement discusses other litigation involving the "Good Law Project" (of which the Claimant is the founder) which is entirely unrelated to the present claim. Other parts of the witness statement engage in further criticism of HMRC for "*not taking a greater interest in Uber's tax affairs*" (see paras 13(1) to (3)) at [**4/176].** In any event, it is entirely unclear from the Claimant's most recent Skeleton Argument (dated 25 January 2019) to what extent, if any, the matters discussed in this witness statement are actually relied on in support of the PCO application.

GUIDANCE ON PCO'S

26. The leading case giving guidance on when a PCO should be granted is *Corner House* (supra). Having reviewed the previous case law, Lord Phillips MR for the Court of Appeal stated as follows at §74:

> "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."

27. In *Eweida v British Airways*, the Court of Appeal held that it could not make a PCO, because even though the issue in that case was one of general importance[1], the case was not "public law litigation": per Lloyd Jones LJ at [38]: see also *Unison v Kelly* [2012] EWCA Civ 1148.

28. The Claimant's Skeleton Argument takes issue with this approach, relying on a series of judicial dicta to support his conclusion that it is open to the Court to make a PCO in his favour, even though he has not brought public law litigation, but rather a claim by way of Part 7 proceedings. However in ULL's submission, the Court does not need to resolve the question of whether it can depart from the decision in *Eweida* in a private law claim that has not been brought against a public authority. That is because on any view, the circumstances of this case point squarely against making a PCO.

SUBMISSIONS

***Corner House* factors (i) and (ii): the public interest**

29. It cannot be that every case involving application of the UK statutory tax code suffices to make that case one raising issues of "general public importance". In that context:

    (1) This case does not involve the Court being asked to determine the legality of "novel acts by the Executive": *Corner House* at [52]. Rather, ULL's liability to VAT is determined by the application of ordinary and well established principles of VAT law to the facts.

[1] *Eweida* concerned the appellant's discrimination claim against British Airways, arising from that company's refusal to allow her to wear a crucifix

(2) It is notable that the dominant group standing behind the Claimant is not drawn widely from the public at large, but rather from the far narrower black cab industry.

30. Thus ULL does not accept that the first *Corner House* condition is met.

31. However, it is the second *Corner House* condition which is of far greater relevance in this case. That is because it is clear that the public interest does not require that the issue of ULL's VAT liability be resolved in these proceedings. On the contrary, responsibility for ensuring that ULL complies with its VAT obligations under the VAT Act lies with HMRC, exercising their statutory responsibility for the collection and management of tax under s.5 of the CRCA 2005.

32. Put simply, it is to HMRC, not the Claimant, that Parliament has given these functions. And HMRC, rather than the Claimant, have therefore been given a wide range of powers and duties relating to those functions. As noted above, if HMRC consider that ULL were liable to pay VAT on the services provided by drivers, they can issue VAT assessments under the VAT Act.

33. ULL could then appeal such an assessment under s.83 VAT Act to the FTT. That would be the proper procedural route by which any dispute concerning ULL's liability to tax should be resolved: see *Autologic Holdings Plc v Inland Revenue Commissioners* [2006] 1 AC 118 at [12] per Lord Nicholls, who described the High Court proceedings in that case as an abuse of process, because it involved the resolution of a dispute that Parliament "*has assigned exclusively to a specialist tribunal*" (i.e. now the FTT).

34. The public interest thus requires that HMRC should be allowed to carry out their statutory functions; and that ULL (if a VAT assessment were raised) should be allowed to dispute that assessment in the manner prescribed by Parliament. The public interest does <u>not</u> require that the Claimant should be allowed to bring a civil action against ULL "*to shine a light*" (JM1 [**4/48/§19]**) on HMRC's discharge of its functions in the context of ULL's tax position.

35. The inappropriateness of allowing the Claimant to act as the self-appointed guardian of the public interest is obvious. One illustration of this can be seen in the basic error he makes at paragraphs 2 and 8 of his Skeleton Argument, where he asserts that "*D ought to be registered for VAT*" and that "*The public law issue – whether D must*

register for VAT – is of obvious general importance…". But the Defendant ULL is registered for VAT (under VAT no. GB 140 668 515). So the core issue of "obvious general importance" which the Claimant here identifies, is not in fact an issue at all.

36. Further, for the Court to permit ULL's VAT liability to be determined in this private law claim brought by the Claimant, would be contrary to the House of Lords' decision in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] A.C. 617. As Lord Wilberforce explained at 633B-E, it is generally contrary to the public interest to allow one taxpayer or group of taxpayers to challenge the Revenue's treatment of another:

> "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." (emphasis added)

37. Of course, if as the Claimant asserts, it were "*inexplicable*", and "*outrageous*" that HMRC have not issued ULL with VAT assessments relating to the services provided by drivers, then his remedy would be to bring Judicial Review proceedings against HMRC, as Lord Wilberforce went on to recognise[2]. The Claimant's Skeleton Argument at §30 asserts that "*since [ULL] has not disclosed the full correspondence it has had with HMRC, C has no practical ability to [claim judicial review]*". This is hopeless. The Claimant has seen fit to make numerous serious criticisms of HMRC's conduct, including in his most recent witness statement, which asserts that HMRC's position is "*almost self-evidently wrong; is contrary to what I know HMRC's practice to be; and is contrary to what I understand to be binding Court of Appeal authority*

[2] "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."

(as I discuss in the blog post)". ULL does not accept that any of the Claimant's criticisms against HMRC is well founded, but the point is that he clearly felt able to make them without having sight of any confidential communications between HMRC and ULL. If these allegations were well founded, the Claimant could bring a judicial review claim against HMRC: but he has not done so.

38. Finally and for the sake of completeness:

    (1) ULL does not accept that there is any merit in the Claimant's case concerning its VAT liability. On the contrary, ULL's case is that it is clearly not acting as the principal in the provision of transportation services and is not required to charge passengers VAT on such services. That case is consistent with its contractual arrangements.

    (2) Nor does ULL accept that the Claimant has any cause of action entitling him to a VAT invoice under the VAT Regulations 1995. So far as ULL is aware, there is no authority for the proposition that the recipient of a supply of services can bring a claim against the supplier under those Regulations to be given an invoice, particularly when Parliament has provided for HMRC to enforce the Regulations with penalties under s.69 VAT Act.

    (3) The Claimant's evidence also relies on press articles referring to concern expressed by MPs, including the chair of the public accounts committee, about HMRC's position. But that is a matter for HMRC, and Parliament (to whom they are accountable). It is not a reason for the Courts to grant a PCO to the Claimant to pursue his claim.

39. As to (2) above, the Claimant relies (Skeleton §2) on the fact that ULL has not applied to strike out his claim. As already noted above, that is a bad point. It is manifestly inconsistent with the agreement recorded in the recitals to the Court's Order of 14 August 2017, as follows: "… *UPON the Parties agreeing to await the outcome of the Claimant's application before taking substantive steps in the claim other than those necessary that relate to the application*".

***Corner House* factor (iii): the "private interest" issue**

40. It is a matter for the Court to assess whether the Claimant's interest in this case is devoid of any personal advantage to him. However, even assuming in his favour that

the Claimant is motivated solely by factors other than self-interest, that is manifestly not the position for those who have funded this action.

41. As at the date of JM1 (15 June 2017), the Claimant had raised £127,650 to fund this claim. On his own evidence "*well above 50%"* of that sum is from donations which "*originated with the black cab trade*": JM1 §22.

42. The Claimant's most recent statement accepts that "*a very substantial part of the monies that I was able to crowdfund came from the cab trade*", without giving further details of how much has been raised in this way.

43. Thus, far from being an action brought simply to protect the public interest, it is clear that this claim has been funded by drivers in an industry which competes directly with the services facilitated by the Uber App. Contrary to the Claimant's Skeleton Argument at §32, the benefit to the black cab industry is manifestly not "*incidental*".

44. Nor can it be said that the availability of funding from the black cab trade is somehow irrelevant, as the Claimant appears to suggest. On the contrary, it is a highly material matter be taken into account, as it would be in an application for a costs capping order in judicial review proceedings: see ss.89(1)(a) and (c) of the Criminal Justice and Courts Act 2015 ("**CJCA 2015**"):

> "(1) The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include:
>
> (a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;…
>
> (c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;"

***Corner House* factors (iv) and (v)**

45. As explained in *Corner House* at [52]:

> "…PCOs can be harnessed in cases of general public importance where it is in the public interest for the courts to review the legality of novel acts by the executive in a context <u>where it is unreasonable to expect that anyone would be willing to bear the financial risks inherent in a challenge</u>" (emphasis added).

See likewise [76(iii)]

46. In this case, there is no doubt that HMRC would, if it considered it appropriate to litigate, have the financial resources to do so. Thus this is very different from a case where unless the Claimant brings the claim, no one will do so.

47. Further and in any event, given the resources of those who have funded this claim so far, ULL does not accept that if a PCO were not made, the Claimant will probably discontinue the claim, and be acting reasonably in doing so:

    (1) There is clearly a real possibility that the £127,650 funding obtained by the Claimant, largely from black cab trade, could be increased significantly.

    (2) There is no reason why a considerable proportion of the existing fund should not be used to discharge an adverse costs order against the Claimant in the event that his claim fails, in accordance with the usual rule that costs follow the event. The suggestion that only £20,000 should be so used (Skeleton §38) is unexplained. It seems to proceed on the basis that the balance, being over £100,000, will be used to pay the Claimant's lawyers, including Leading and Junior Counsel, contrary to the approach in *Corner House* at [76]: "*The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest*".

    (3) Further, on his evidence in JM1 §§28-29, the Claimant has income of around £400,000 net of expenses, and very considerable capital assets. Yet his Skeleton and evidence appear to proceed on the basis that (despite the asserted importance of this case) he is prepared to fund <u>none</u> of it himself.

    (4) Finally, the Claimant's alternative application for a Costs Management Order (see further below) proceeds on the assumption that if a PCO is refused, this litigation will continue in any event. This is inconsistent with the conclusion that without a PCO, the claim will not be continued.

48. Finally, as the Court of Appeal said in *Corner House* at [74(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*" (and see likewise s.89(1)(d) CJCA 2015, which requires the Court to take into account "*whether legal representatives for the applicant for the order are acting free of charge*").

49. That is not the position in this case. As noted above, the Claimant has engaged and is choosing to pay Leading and Junior tax Counsel in the litigation who are not acting *pro bono*, but rather are apparently acting on the same rates as they would if acting for HMRC: JM1 §24. This is yet another factor pointing against the granting of a PCO.

Costs Management Order

50. Finally, ULL submits that the Court should not accede to the suggestion in the Claimant's Skeleton at ¶37 that (in the alternative to making a PCO) the Court should make a Costs Management Order under CPR 3.12(1)(e). Any such order should be made only if this litigation proceeds further, upon proper consideration of costs budgets filed in accordance with CPR 3.13 and Practice Direction 3E.

CONCLUSION

51. For these reasons, the Court is invited to refuse the Claimant's application for a PCO.

SAM GRODZINSKI QC

Blackstone Chambers

30 January 2019