

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
05/11/2008

Before:

MR CHRISTOPHER SYMONS Q.C.

Between:

THE QUEEN (on the application of
NEWCASTLE CITY COUNCIL)

Claimant

- and -

(1) BERWICK-UPON-TWEED BOROUGH
COUNCIL

Defendant

GEORGE RICHARDSON

For and on behalf of BERWICK BOROUGH
TAXI ASSOCIATION

Interested
Party (1)

IAN GORDON SHANKS, PAUL THOMAS

SHANKS AND JANE BELL

Interested
Party (2)

T/A BLUE LINE TAXIS

MR JOHN MCGUINNESS QC & ALEXANDRA WARD
(instructed by Newcastle-upon-Tyne Legal Department) for the Claimant

MR CHARLES HOLLAND
(instructed by James Button & Co agents for W.E. Henry Borough Solicitor for Berwick-upon-Tweed Borough Council) for the Defendant

MR PETER MADDOX
(instructed by The National Private Hire Association) for the First Interested Party

JONATHAN RODGER by written representations only
(instructed by Nicholson and Morgan) for the Second Interested Party

Hearing dates: 15th, 16th, 17th September and 5th November 2008

HTML VERSION OF JUDGMENT

MR. CHRISTOPHER SYMONS Q.C.:

Introduction

1. Hackney Carriages have been subject to a licensing regime since 1847. In that year it was clearly considered desirable to have some system of control over the carriages and to promote public safety. That licensing regime covered hackney carriages standing or plying for hire but it did not cover hiring in other ways, such as pre-booking, which was not at that time regulated. It was only in 1976 that a licensing scheme for pre-booked vehicles came into being.
2. It is the current practice for hackney carriages to be used by private hire operators to fulfil pre-booked contracts albeit that the hackney carriage in question is only licensed to stand or ply for hire in another area. There is a dispute, which I shall need to deal with, as to whether it is lawful for a hackney carriage to be booked, and to carry out that booking, in a district remote from where it is licensed. There is no dispute that a hackney carriage can be booked within its license area to fulfil a hire outside the area.
3. Newcastle upon Tyne has a population within the city of some 276,000 people. The wider conurbation of Tyne and Wear has a total population of over 1 million people. Newcastle City Council (Newcastle) licences hackney carriage proprietors and drivers and private hire vehicles, private hire operators and private hire drivers. It has licensed some 780 hackney carriage proprietors and some 1196 drivers. Those numbers are separate from its licensing of private hire drivers. It also limits the number of hackney carriage licences it issues, as it is entitled to do under section 16 of the Transport Act 1985 because it is satisfied that there is no significant unmet demand for the services of hackney carriages within the city.
4. Berwick-upon-Tweed Borough Council (Berwick) also issues hackney carriage licences to proprietors and drivers. Although the population of Berwick-upon-Tweed is only some 26,000 people the number of hackney carriage proprietors licensed by Berwick, as at August 2008, was 672. This number is to be compared with only 46 licensed in April 2006 and 148 licensed as at April 2007. Of the 616 proprietors licensed as at July 2008 some 247 have their registered home address in Newcastle upon Tyne, 196 in North Tyneside, 24 in Darlington and 21 in Gateshead. Newcastle, North Tyneside and Gateshead are approximately 55 miles distant from Berwick upon Tweed and Darlington is approximately 90 miles distant. There is now about 1 hackney carriage licensed by Berwick for every 42 residents of Berwick. Mr. Wilson of Berwick informed the Court that 74 of the 672 licensed hackney carriages were likely to be primarily used within the Borough. This evidence was based either on the fact that the proprietors lived within the borough or because they were otherwise known to Mr. Wilson. Mr. Wilson accepted that the majority of vehicles never stand or ply for hire in Berwick despite being licensed to do so^[1].
5. The reason for this substantial number of licensed proprietors in Berwick-upon-Tweed is because Berwick take the view that it is not open to them to refuse to issue licences to hackney carriage proprietors unless either the vehicle or the proprietor are unfit. Thus the fact that a proprietor may live remotely from Berwick and has no intention of plying for hire in Berwick is not considered to be a valid reason for rejecting the application.
6. This case comes before this Court on the application of Newcastle which is troubled by the influx of hackney carriages licensed in Berwick which are being used by private hire operators in Newcastle upon Tyne to fulfil their pre-booked hire contracts. Newcastle, not being the licensing authority, has no enforcement powers over these vehicles and in addition these vehicles are not subject to the same conditions as those licensed by Newcastle. Whether the conditions imposed by Berwick are better or worse they are different.

7. One of the reasons why Berwick have received numerous applications for licences from outside their area is undoubtedly the fact that the cost of the licence in Berwick- upon-Tweed is less than in many other areas including Newcastle upon Tyne. There may be other reasons as well relating to the conditions and bye laws imposed relating to the vehicles themselves. There is a danger, as was mooted in front of me, of Berwick becoming a national issuer of hackney carriage licences. Newcastle, by their application to this Court, sought a declaration that it was unlawful for Berwick to grant a hackney carriage licence to a proprietor where it was not satisfied that the vehicle, if licensed, would ply for hire in the area of Berwick together with certain other relief. However it seems to me that the issue before the Court is whether or not Berwick are right in their submission that they have no discretion, save as to fitness, but instead are obliged to keep granting licences for hackney carriages regardless of the intentions of, and geographic location of, the proprietors of those vehicles. The answer to this issue depends on the proper interpretation of section 37 of the Town Police Clauses Act 1847.
8. Before turning to the legislation I should say a word about the other parties before me. Mr. George Richardson, the First Interested party, appeared on behalf of the Berwick Borough Taxi Association and was represented by Mr. Maddox. The position of Mr. Richardson was largely aligned with Newcastle however he raised the different although, at least indirectly, related point, to which I have already alluded, namely whether a hackney carriage once licensed was entitled to accept pre-booked contracts for hire when those hirings were contracted outside the area in which the hackney carriage was licensed. That issue largely turns on an interpretation of section 46(1)(e) of the Local Government (Miscellaneous Provisions) Act 1976.
9. In addition I received written representations from the Second Interested Party, Ian Gordon Shanks, Paul Thomas Shanks and Jane Bell trading as Blue Line Taxis ("Blue Line") who are long established and substantial operators of private hire vehicles and hackney carriages. They are the largest cab firm in the north east of England. They operate approximately 400 vehicles comprising private hire vehicles licensed by North Tyneside Borough Council, hackney carriages licensed by North Tyneside Borough Council and some 70 hackney carriages licensed by Berwick. Approximately half of their Berwick licensed drivers live in Newcastle. Blue Line adopted the contentions of Berwick and put in their own evidence, position statement and skeleton argument all of which I have taken into account in reaching my conclusions.

The Legislation

The Act of 1847

10. Section 37 of the Town Police Clauses Act 1847 ("the 1847 Act") provides:

"The commissioners may from time to time licence to ply for hire within the prescribed distance, or if no distance is prescribed, within 5 miles from the General Post Office of the city, town, or place to which the special Act refers, (which in that case shall be deemed the prescribed distance,) ... hackney coaches, or carriages of any kind or description adapted to the carriage of persons..."

11. The prescribed distance is now a reference to the area of the district council, or unitary, metropolitan district, Welsh county or county borough, unless the council in question has hackney carriage zones, in which case it will be the area of the zone in question^[2]. The references to the commissioners are now construed as references to the relevant local authority^[3]. It was thus decided by Parliament, from the outset of the licensing of hackney carriages, that licensing should be dealt with locally rather than nationally. The right to ply for hire is limited, by the licence, to the immediate locality and no right to ply for hire is given for any wider area.

12. Under section 40 of the 1847 Act before a licence is granted the proprietor of the hackney carriage, or one of them, is obliged to fill in and sign a "requisition" in which they state "the name and surname and place of abode of the person applying for such licence" and also provide similar details in respect of any other proprietor or "person concerned in the keeping, employing or letting to hire of such carriage". By this means the authority granting the licence will immediately discover whether the applicant lives in the area without seeking any further information at all. As I shall come to, the authority has the power to ask for information under section 57 of the Local Government (Miscellaneous Provisions) Act 1976 (the 1976 Act).
13. By section 41 of the 1847 Act the licence once granted will specify the name and place of abode of the proprietor. The licence will then be entered into a book prepared for that purpose which is open for inspection (section 42) and it will also record any offences committed. The proprietor's licence will be in force for one year only (section 43). If the proprietor changes his or her place of abode he or she is obliged to notify the authority and the change is then noted on the licence (section 44). If the proprietor of the hackney carriage permits it to be used without a licence he or she will commit an offence (section 45). There is also an obligation on the *driver* of a hackney carriage to obtain a licence from the authority (section 46) and it is an offence for a driver to drive without such a licence (section 47).
14. A driver of a hackney carriage is not obliged to carry anyone beyond the prescribed distance or outside the designated area although it is an offence to refuse to take passengers within the prescribed distance (section 53).
15. The authority has power to make byelaws under section 68 of the 1847 Act for regulating- the conduct of the proprietors and drivers of hackney carriages; the manner for displaying the number of the cab; the number of persons who may be carried; the stands where the carriages can wait; the distance within the prescribed distance the carriages are obliged to take passengers; the rates or fares charged^[4] and return of property left behind.

The Act of 1976

16. The 1976 Act was adoptive, that is it only applies in those parts of the country where the Act has been adopted. However most authorities have adopted the Act including Berwick and Newcastle.
17. Under section 47 of the 1976 Act the authority may attach to a hackney carriage licence such conditions as the authority thinks fit. It can require the hackney carriages to be of a particular design or appearance or bear particular distinguishing marks. Section 50 of the 1976 Act requires the proprietors of hackney carriages to present their vehicle for inspection and testing "at such place within the area of the council^[5] as they may by notice reasonably require" and the authority can require inspection and testing up to 3 times in any 12 month period. Section 50 also provides for proprietors of hackney carriages to state in writing the address of every place where the hackney carriage is kept when not in use and are obliged, if the authority requires, to permit inspection and testing of the hackney carriage at that place. There is also a requirement to report accidents causing damage to a hackney carriage which may affect the safety, performance or appearance of the vehicle.
18. As referred to above, section 57 of the 1976 Act gives the authority power to require an applicant for a licence to –

"...submit to them such information as they may reasonably consider necessary to enable them to determine whether the licence should be granted and whether conditions should be attached to any such licence".

Section 59 provides that the authority shall not grant a licence to drive a hackney carriage unless the applicant is a fit and proper person. Section 60 gives the authority power to suspend or revoke or refuse to renew a licence if the hackney carriage is unfit, if an offence has been committed or if there has been non-compliance with the legislation or for "any other reasonable cause". Section 61 contains similar provisions in relation to a hackney carriage driver's licence.

19. Section 67 of the 1976 Act makes it an offence for a hackney carriage to be used in the district under a contract for hire except at a rate of fares or charges fixed by the authority. Section 68 gives a power to an authorised officer of the authority (or any constable) at all reasonable times to inspect and test the hackney carriage effectively giving a right for reasonable spot testing.

Transport Act 1985

20. Finally in relation to the legislation affecting hackney carriages there is an important provision in section 16 of the Transport Act 1985 which provides that:

"the grant of a hackney carriage licence may be refused for the purposes of limiting the number of hackney carriages in respect of which licences are granted, if, but only if, the person authorised to grant licences is satisfied that there is no significant demand for the services of hackney carriages (within the area to which the licence would apply) which is unmet."

21. Newcastle use section 16 to limit the number of hackney carriage licences granted but Berwick do not.

The Proper Interpretation of section 37 of the 1847 Act

22. In my judgment the major purpose behind the 1847 Act, and indeed the 1976 Act, is the safety of the public by which I include both the travelling public as passengers and other road users. Thus the scheme of the legislation is directed towards having safe vehicles, fit and proper drivers and appropriate conditions of hire. To ensure this safety a form of enforcement is provided for with a system of penalties for non-compliance. Registers of proprietors and drivers are kept together with offences committed which are available for public inspection. Byelaws and conditions apply locally to the licensed hackney carriages and it was apparent from the evidence before me that different councils will impose different conditions¹⁶¹ and have different byelaws no doubt prompted by legitimate differences of opinion but also dependent on the area concerned. It may be, for example, that an authority covering a large conurbation will have different concerns, and require different conditions, to one covering a more rural area.
23. If hackney carriages are working remote from their licensing authority a number of, at the least potentially, undesirable consequences follow. The licensing authority will not easily keep their licensed fleet under observation. It will be carrying out its enforcement powers from a distance. The licensing authority where the hackney carriage has chosen to operate will have no enforcement powers over the vehicle although it is being used in its area. Further, unlike its own licensed vehicles, the hackney carriage from remote areas will not be subject to the same conditions and byelaws as the local vehicles. It is no surprise that the legislation provides for testing and testing centres to be within the licensing authority's area.
24. The fact that Berwick now has a large, but remote, fleet of hackney carriages has had the effect of persuading Berwick that they need to have testing stations over a wide area well removed from Berwick-on-Tweed. Mr. Holland, who appeared before me for Berwick, told me that due to the large number of licences being issued Berwick has a financial surplus which they use in part to pay to have a vehicle on the road in the Tyneside area to keep an eye on their hackney carriages.

25. It seems to me that it must be desirable for an authority issuing licences to hackney carriage to be able to restrict the issuing of those licences to proprietors and drivers which are intending to ply for hire in that authority's area. Similarly it must be desirable to be able to refuse to issue licences to proprietors and drivers who do not intend to ply for hire, to a material extent, in the area of the licence grantor.
26. However Mr. Holland submitted that it is not open to Berwick to refuse a licence to anyone who was a fit and proper person and assuming that the vehicle concerned was fit. He argued that refusing a licence because a person never intended to use the licence to ply for hire in Berwick-upon-Tweed, or intended to use the vehicle for fulfilling hire commitments in Newcastle upon Tyne, would be exercising the discretion that exists in an unlawful manner. In support of those submissions Mr. Holland argued that the Act did not refer to "intentions" and did not make any requirement in relation to where the vehicle or the proprietor was based. He further submitted that there was no power to refuse a licence which was going to be used in a perfectly lawful manner. Assuming, for this submission, it was lawful for a hackney carriage to fulfil a pre-booked hire made and to be undertaken outside the prescribed area then it was not open to Berwick to refuse the licence and thereby stop that lawful activity. In any event a licence holder had no obligation to "use" the licence obtained and therefore to inquire into what use was to be made of it was irrational.
27. This line of argument was supported by Blue Line Taxis who provided in paragraph 42 of their skeleton a number of examples of other licences granted to the public making the point that there was no obligation to use for example a driving licence, television licence, shot gun licence etc.
28. Further Mr. Holland argued that the two regimes, that relating to hackney carriages and that relating to private hire vehicles, were separate and distinct. What Newcastle were expecting Berwick to do when considering a grant of a hackney carriage licence was to have regard to an extraneous and irrelevant matter namely a different licensing regime to further the aims of that regime.
29. Section 37 of the 1847 Act gives the authority concerned a discretion as to whether to grant a licence or not. Hence the use of the word "may". The exercise of that discretion falls to be considered against the background of the legislation and in my judgment should be used "to promote the policy and objects of the Act"¹⁷¹. The licence permits the vehicle to ply for hire in the prescribed area. The authority, if it wishes, can restrict the number of licences it issues based on demand within the area¹⁸¹. The local authority can issue it its own conditions and make its own byelaws. It can make provision for its own inspections of the hackney carriages. Thus the licensing regime is local in character. In addition it can be seen that most of the provisions have public safety much in mind. The local imposition of conditions and byelaws, local testing and enforcement, together with the other statutory provisions I have referred to all seem to me to point clearly to the conclusion that it was the intention behind the licensing system that it should operate in such a way that the authority licensing hackney carriages is the authority for the area in which those vehicles are generally used. Further the 1847 Act provides for licences to be granted for hackney carriages to ply for hire within the prescribed distance (i.e. within the area of the licensing authority).
30. Having regard to the policy and objects of the Act in my judgment Berwick in exercising its discretion under section 37 of the 1847 Act should take into account where the hackney carriage will be used. The byelaws and conditions which apply to Berwick's licensed hackney carriages are largely there to promote safety and to ensure that the vehicles are easily identifiable. They are made and imposed to protect the public and in particular the public in the Berwick-upon-Tweed area. If the hackney carriages are used in areas remote from Berwick-upon-Tweed enforcement will be very difficult and impracticable. On one view what happens to hackney carriages owned, kept and used outside the Borough are really not Berwick's concern but the concern of the area where they are operating.

31. It seems to me that the question to be asked is not whether a hackney carriage proprietor once a licence is granted would be acting lawfully but rather whether in exercising their discretion a licensing authority can use its discretion to ensure that it maintains control over those vehicles it has licensed. In my judgment a local authority, properly directing itself, is entitled, and indeed obliged, to have regard to whether the applicant intends to use the licence to operate a hackney carriage in that authority's area and also to have regard to whether in fact the applicant intends to use that hackney carriage predominantly, or entirely, remotely from the authority's area. This should result in each local authority licensing those hackney carriages that will be operating in their own area and should reduce the number of hackney carriages which operate remotely from the area where they are licensed.
32. Approaching the matter in that way there is in fact no need to have regard to the private hire regime in the exercise of the discretion. But in my judgment the two regimes relating to hackney carriages and private hire vehicles are to be considered as closely related and complementary and it would not be unlawful to have regard to both regimes when issuing licences in either one. The fact that hackney carriages are expressly excluded from the private hire scheme does not seem to me to alter the position.
33. Further I do not think that consideration of other types of licences, issued for a different purpose, under different legislation are of assistance here. In most cases no discretion is given to the issuer and where a discretion does exist it is in very different circumstances to those pertaining here.
34. I am anxious not to direct how Berwick, or any other local authority, should exercise their discretion which must be a matter for their own judgment taking into account the need to have available safe and suitable hackney carriages and having proper regard to the safety of the public. However it would seem to me to be difficult for any local authority to justify exercising their discretion by granting a hackney carriage licence to an applicant when the authority knows that the applicant has no intention of using that licence to ply for hire in its area. This is particularly so when the local authority also knows that the intention is to use the hackney carriage in an area remote from that authority's area. I say that because it seems to me it is very difficult to exercise proper control over hackney carriages which are never, or rarely, used in the prescribed area. It is also undesirable for authorities to be faced with a proliferation of hackney carriages licensed outside the area in which they are being used and therefore not subject to the same conditions and byelaws as apply to those vehicles licensed in the area.
35. I have had placed before me in evidence a considerable amount of detail of where the hackney carriages licensed by Berwick are in use. This is without using the powers that exists under section 57 of the 1976 Act to require information. Thus it seems to me it will not be an unduly difficult task to discover whether an applicant for a licence has the intention of plying for hire within Berwick's area. However that must be a matter for Berwick. It may be they will wish to seek certain information to assist them using section 57. I consider that it would be perfectly proper to seek such information to ensure that Berwick's hackney carriages are intended to be used in their area and thus any enforcement powers can be exercised locally. It is to be noted that section 57 (3) makes it an offence to knowingly or recklessly make a false statement. This is quite apart from the fact that an applicant who does not act honestly towards the issuer of a licence may well not be a fit and proper person and may well have his or her licence revoked or not renewed. I do not believe there is any reason to believe that applicants will not continue to provide information, whether through filling out an application form or more specifically under section 57, in an honest and straightforward manner.
36. It may well be that up to now local authorities have not sought information as to the intentions of licence applicants. This may be because until recently it has not been an issue. It may be that following this judgment it will no longer be an issue. However the fact that it has not generally

been done up to now is no reason in my view why such information cannot be sought in the future.

37. Newcastle sought relief against Berwick in the form of an order requiring them to cease issuing licences to those who do not intend to ply for hire within their area; an order compelling Berwick to exercise its powers under section 57 to enable Berwick to ascertain the intentions of applicants with regard to where they are going to operate and finally a declaration that Berwick may not lawfully grant a licence unless they are satisfied the applicant will ply for hire in their area.
38. It must be a matter for Berwick to exercise its own discretion in this matter taking into account the terms of this judgment. While I cannot at the moment conceive of it being rational to grant a licence to those who intend to operate their hackney carriages remotely from Berwick-on-Tweed I am not prepared to say that it is bound to be unlawful. I certainly do not think it is essential that Berwick use section 57 of the 1976 Act. It is quite apparent that Mr. Wilson and his staff have, as one would expect, a fairly good idea of what is going on in their area and it may be they will not need to use that power. For example if Berwick were to make it known they were no longer going to issue hackney carriage licences to those intending to operate in some other district it may well be that the number of applications will reduce dramatically with little need for any action. That may be wishful thinking but as I have said that is a matter for Berwick and its officers.
39. It is clear that there has been a good deal of communication between the various local authorities and no doubt that will continue. Sensible cooperation between for example Berwick, Newcastle and the immediately adjacent councils may well assist in ensuring that licences are sought where they are intended to be used. There will be proprietors who wish to use their vehicles in a number of different authorities' areas^[9] and in that case no doubt there will be flexibility in the exercising of the discretion. Matters such as where the proprietor is based and where most of the business comes from will be material matters to consider.
40. In conclusion in my judgment Berwick has a discretion under section 37 of the 1847 Act to refuse to issue licences to those who have no intention of exercising their right to ply for hire in Berwick and/or to those who intend to use the vehicle predominantly in an area remote from Berwick. Whether or not Berwick can be said to have "a policy" to grant licences for use remote from their area, I can see little purpose in making a declaration as to the matter.

The meaning and effect of section 46(1) of the 1976 Act

41. The regime for private hire vehicles is different to the regime for hackney carriages. To operate a private hire vehicle three licences are required. There need to be in force an operator's licence^[10], a private hire vehicle licence and a driver's licence. All the licences are required to be granted by the same licensing authority.^[11] It is the general practice for operators not only to fulfil their pre-booked hirings by using private hire vehicles but also by using hackney carriages even though the hackney carriage in question may be licensed in a different area. It is for this reason that the Berwick hackney carriages, though not permitted to ply for hire outside their prescribed area, are arguably able to be used to fulfil pre-booked hire contracts in Newcastle. However if, as argued before me, that is not permissible this will provide another possible solution to the problem of what to do about hackney carriages seeking licences remotely from where they intend to operate. This solution would stop operators using hackney carriages not licensed in their area to fulfil pre-booked hirings made in their area. Hence this part of the case is at least indirectly linked to the first part.
42. The practice of using hackney carriages licensed remotely to fulfil pre-booked hirings has apparently become very prevalent since the decision of this court in the case of *Brentwood Borough Council v. Gladen* [2004] EWHC 2500 [2005] R.T.R. 12. It seems to me that my decision on the discretion available under section 37 of the 1847 Act may well make the practice much

less prevalent because hackney carriage owners will be licensed in the area they do business rather than remote from it. Nonetheless since I heard argument on this point I shall attempt to deal with it.

43. Section 46 of the 1976 Act provides:

"(1) Except as authorised by this Part of this Act -

(a) no person being the proprietor of any vehicle, not being a hackney carriage [or London cab] in respect of which a vehicle licence is in force, shall use or permit the same to be used in a controlled district as a private hire vehicle without having for such a vehicle a current licence under section 48 of this Act;

(b) no person shall in a controlled district act as a driver of any private hire vehicle without having a current licence under section 51 of this Act;

(c) no person being the proprietor of a private hire vehicle licensed under this Part of this Act shall employ as the driver thereof for the purpose of any hiring any person who does not have a current licence under the said section 51;

(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;

(e) no person licensed under the said section 55 shall in a controlled district operate any vehicle as a private hire vehicle -

(i) if for the vehicle a current licence under the said section 48 is not in force; or

(ii) if the driver does not have a current licence under the said section 51.

(2) If any person knowingly contravenes the provisions of this section, he shall be guilty of an offence."

44. The words "private hire vehicle" are defined in section 80:

"private hire vehicle" means a motor vehicle constructed or adapted to seat [fewer than 9 passengers] other than a hackney carriage or public service vehicle [or London cab][or tramcar], which is provided for hire with the services of a driver for the purposes of carrying passengers."

45. Thus in sub paragraph (a) the words "not being a hackney carriage" are included albeit that the definition of "private hire vehicle" excludes a hackney carriage. The words "not being a hackney carriage" do not appear in sub-paragraphs (d) and (e). It seems to me that the most likely explanation for that may be that in sub-paragraph (a) the draughtsman is talking about a vehicle itself whereas in sub-paragraphs (d) and (e) the words are referring to the use that is made of the vehicle hence the words "operate as a private hire vehicle". Thus in paragraph (d) you cannot operate any vehicle (with no saving for hackney carriages) as a private hire vehicle without the requisite licence. Similarly in paragraph (e) no vehicle (again no saving for hackney carriages) may operate as a private hire vehicle unless licensed as set out. If that is right, as Mr. Maddox representing Mr. Richardson and the Berwick Borough Taxi Association submits, then Newcastle could prosecute operators licensed under section 55 of the 1976 Act where those operators use vehicles other than appropriately licensed private hire vehicles to fulfil pre-booked hirings.

46. Thus Mr. Maddox submits that not all pre-booked journeys would be impermissible. A Berwick hackney carriage would be able to undertake a pre-booked hiring where the booking was made with the hackney carriage proprietor/driver rather than through an operator licensed under section 55 of the 1976 Act and where the booking was taken in that hackney carriage's own licensed area. However where a private hire operator is used then use of a hackney carriage breaches section 46(1)(e). The definition of "operate" in section 80(1) of the 1976 Act provides:

"operate" means in the course of a business to make provision for the invitation or acceptance of bookings for a private hire vehicle" .

A private hire vehicle does not include a hackney carriage. Thus it is argued that the operator may not operate through the use of hackney carriages.

47. It is clearly envisaged by section 67 of the 1976 Act that hackney carriages are able to accept pre-booked hirings either through the driver or some other person other than the driver. But there is no provision made for hackney carriages to have operators as there is for private hire vehicles by section 55.

48. There are a number of decisions of this Court which throw light on this issue and I must refer to some of them. In *Britain v. ABC Cabs (Camberley) Ltd* [1981] RTR 395 the Court had to consider the meaning and effect of section 46(1)(a) of the 1976 Act on a case stated from the Magistrates Court. A hackney carriage had been booked, in the district where it was licensed, to pick up a fare in another district and prosecutors alleged that at the time and place the fare was picked up the hackney carriage had no relevant private hire licence and no operator's licence in force since it was not licensed in the area where the pick up occurred. The defendant argued that the licence for the hackney carriage which was in force, albeit in another district, was all that was required and therefore no offence was made out. The prosecutors relied on the definition of licence in section 80 of the 1976 Act and argued that the hackney carriage in question did not have the relevant licence issued by the district where the fare was picked up. The Court relied on the definition of "private hire vehicle" in section 80(1) which expressly excludes a hackney carriage and decided the case in favour of the defendant. Webster J. said

"...I conclude without hesitation that being a hackney carriage licensed to ply for hire in that district, and not being in breach of that licence at that time and place, it was, for the purpose of section 46(1)(a), to be treated as a hackney carriage in respect of which a vehicle licence was in force, so that no offence under that section would have been made out."

49. The *ratio* of that case was followed in another case in this Court *Kingston Upon Hull City Council v. Andrew Wilson* CO 1249-95; 29th June 1995. It follows, at least so far as this Court is concerned, that it is lawful for a hackney carriage to pick up a fare in another district provided that the booking contract is made in the district where the hackney carriage is licensed. If the booking contract is made outside that area then it may fall foul of not having an operator's licence under the private hire regime in the 1976 Act (see section 55).

50. However in the *Wilson* case the Court went on to consider section 46(1)(b) and contrary, or apparently contrary, to the reasoning in the *ABC Cabs* case, held that a hackney carriage driver could not rely on his hackney carriage licence to avoid an offence under section 46(1)(b). It was argued by Wilson that his vehicle was not a private hire vehicle for the purposes of section 46(1)(b) as it was a "hackney carriage" and thus fell outside the definition of "private hire vehicle" in section 80 (see paragraph 38 above). However the Court rejected that argument and Buxton J, (as he then was) said:

"That amounts to saying that once the vehicle is licensed anywhere as a hackney carriage, that precludes the application, in respect of that vehicle, of any part of Section 46 of this act anywhere else in this country. Thus, if Mr. Wilson had driven his vehicle in other respects not in conformity with Section 46 in Truro or Newcastle Upon Tyne, the fact that it had been licensed in Beverley as a hackney carriage would preclude the application, by any local authority, of section 46(2)..."

...for my part, I cannot accept that this Act intends it to be the case that in every case where a hackney carriage vehicle exists it follows thereafter that the vehicle so licensed cannot be susceptible to the rules applying to private hire vehicles...

...it cannot, in my view, be the case that simply to licence a vehicle as a hackney carriage thereby makes that vehicle a hackney carriage for all time, even if it is functioning as a private hire vehicle. In my judgment, therefore, it is not enough that a hackney carriage licence exists to establish that this vehicle was a hackney carriage as that term is used in the definition of a "private hire vehicle" in section 80 of the 1976 Act."

51. In *Benson v. Boyce* [1997] RTR 226 this Court again considered section 46(1)(b) and considered the *Wilson* decision. Reference was made to the fact that the Court in *Wilson* did not appear to have been referred to the cases of *Hawkins v. Edwards* [1901] 2 KB 169 and *Yates v. Gates* [1970] RTR 135 which dealt with section 38 of the Town Police Clauses Act 1847. That section was construed as defining a hackney carriage by reference to its characteristic use, and not as meaning that a vehicle ceases to be a hackney carriage at the times when it is not in fact used for standing or plying for hire. Hence, in submissions to me, those cases were described as having the effect that "once a hackney carriage always a hackney carriage". In *Benson* Mance J. (as he then was) having referred to previous remarks to the effect that the provisions of the Act are "not easy to construe"¹²¹ said that he did not:

"...feel it necessary to go further into the extent to which the exclusions relating to hackney carriages in sections 46(1)(a) and 80(1) can apply to vehicles, if there are such, operated as private hire vehicles in one controlled area but as hackney carriages in another ..."

52. However in *Benson* the Court saw no difficulty with the decision in *Wilson* under section 46(1)(b) and 80(1) "in a case where there is nothing more than a hackney carriage licence." I confess I have found it difficult to reconcile the various dicta in these cases.
53. To return to *Brentwood Borough Council v. Gladen* the facts were that the defendant was telephoned, and cabs were booked, and those bookings were fulfilled by providing licensed hackney carriages with licensed hackney carriage drivers. Gladen was accused of knowingly operating the vehicles as private hire vehicles in a controlled district without a current operator's licence under section 55 of the 1976 Act contrary to section 46(1)(d) and (2). The district judge held that section 46(1)(d) had no application where a licensed hackney carriage was used for private hire and the defendant was acquitted. The appeal to the High Court was dismissed on the basis that it was not necessary for a hackney carriage, driven by a licensed hackney carriage driver, to be subject also to the requirements of an operator's licence under section 55 of the 1976 Act, when the hackney carriage was being used as a private hire vehicle. The decision of the Court placed particular reliance on the words of the definition of "private hire vehicle" which expressly excludes a hackney carriage.

54. In giving judgment Collins J. said:

"But by 1976 it is apparent that such means of getting taxis was common place (ie pre-booking them) and Parliament must be taken to have appreciated that. The whole

purpose behind the 1976 Act, as I understand it, was to bring within the licensing control those who were operating private hire; it being recognised that hackney carriages already had the controls under the 1847 Act. It was regarded as not being in the interests of the public that there should be the possibility of a separate provision of private hire vehicles which was outside any licensing scheme."

55. I was provided with the judgment of District Judge Andrew Shaw sitting in the Magistrates Court in the case of *Wrexham County Borough Council v. Debbie Whalley and Jonathan Higgins* decided earlier this year. The learned District Judge distinguished *Gladden* on the basis that in *Gladden* the private hire took place in the area where the hackney carriage was licensed whereas in *Whalley* the hire took place outside the district where the hackney carriage was licensed. The owner was thus convicted under section 46(1)(e). I confess that on my reading of *Gladden* the critical issue was whether the vehicle used for private hire had a hackney carriage licence not whether the licence was issued in the particular area where the hire took place. I understand that case is coming to this Court on appeal when the issue as to the correct interpretation of sections 46(1)(d) and (e) will have to be considered.
56. The Court is therefore in the position that both the Claimant and the Defendant (supported by Blue Line Taxis, the Second Interested party) are agreed that Newcastle has no power to prosecute those private hire operators licensed under section 55 of the 1976 Act who use hackney carriages to fulfil pre-booked hirings provided the hackney carriage and the driver are properly licensed. The authority of this Court in *Gladden* in my judgment supports that view. On the opposite side appears to me to be the decision in *Wilson* and the decision of the District Judge in *Whalley* which will shortly be coming to this Court. I am told by Mr. Richardson, through, Mr. Maddox that this matter is of national significance.
57. While, as may be apparent from my remarks in paragraph 45 above, I have considerable sympathy with the argument persuasively put by Mr. Maddox, I am not prepared to do other than follow *Gladden* which is a decision of this Court which I am certainly not prepared to say is obviously wrong. Mr. Maddox sought to persuade me that since that case involved section 46(1)(d) the submission now advanced on behalf of Mr. Richardson was not fully argued. However it is clear from the judgment in that case that the Court considered section 46(1)(d) and (e) and expressed its conclusions and I do not think it is possible to distinguish it.
58. So it follows that I am not prepared to hold that Newcastle can prosecute those using hackney carriages to fulfil pre-booked hirings in Newcastle Upon Tyne albeit that their hackney carriage licence is obtained from a local authority remote from Newcastle.

Conclusions

59. Following the handing down of my judgment in draft I heard Counsel on the appropriate form of relief that I should grant. In my judgment the appropriate relief, and the relief that I therefore grant, is by declaration as follows:
- (i) In the proper exercise of its statutory discretion under section 37 of the Town Police Clauses Act 1847 a licensing authority is obliged to have regard (a) to whether the applicant intends that the hackney carriage if licensed will be used to ply for hire within the area of that authority, and (b) whether the applicant intends that the hackney carriage will be used (either entirely or predominantly) for private hire remotely from the area of that authority.
 - (ii) A licensing authority may in the proper exercise of its discretion under the said section 37 refuse to grant a licence in respect of a hackney carriage that is not intended to be

used to ply for hire within its area and/or is intended to be used (either entirely or predominantly) for private hire remotely from the area of that authority.

(iii) In determining whether to grant a licence under the said section 37 a licensing authority may require an applicant to submit information pursuant to section 57 Local Government (Miscellaneous Provisions) Act 1976 in order to ascertain the intended usage of the vehicle.

60. Berwick will pay half of Newcastle's costs of the action to be assessed if not agreed.

Note 1 Wilson No 1 paragraph 11 [\[Back\]](#)

Note 2 Pursuant to the Public Health Act 1875, the Local Government Acts of 1894, 1933 and 1974 and the Transport Act 1985. [\[Back\]](#)

Note 3 *ibid* [\[Back\]](#)

Note 4 The 1976 Act also makes provision for the authority to fix fares "within the district" under section 65. [\[Back\]](#)

Note 5 I was provided with a list of test stations used by Berwick by Mr Wilson. Of the 22 stations 6 are in the Borough of Berwick-upon-Tweed others being in Newcastle (2), Alnwick (2) and others as far afield as Birmingham. It was not clear to me how the spirit of section 50 was being adhered with stations outside the district although Mr Wilson was of the opinion that provided the testing station was a Vehicle and Operator Services agency (VOSA) whether it was within or outside the Borough was irrelevant (Wilson No 1 paragraph 22) [\[Back\]](#)

Note 6 Examples were whether 3 rows of seats were permissible and whether tinted glass was permissible. There were also colour requirements in some areas. [\[Back\]](#)

Note 7 *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 [\[Back\]](#)

Note 8 Section 16 of the 1985 Transport Act [\[Back\]](#)

Note 9 Although they will only be able to ply for hire in the area where the licence is granted. [\[Back\]](#)

Note 10 Such a licence is not required for a hackney carriage. [\[Back\]](#)

Note 11 *Dittah v. Birmingham City Council, Choudry v. Birmingham City Council* [1993] RTR 356 [\[Back\]](#)

Note 12 At p. 229B [\[Back\]](#)