

CO/1932/2004

Neutral Citation Number [2004] EWHC 2500 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 28 October 2004

B E F O R E:

MR JUSTICE COLLINS

MR JUSTICE SILBER

BRENTWOOD BOROUGH COUNCIL

(CLAIMANT)

-v-

ANDREW ERNEST GLADEN

(DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR JAMES FINDLAY (instructed by Sharpe Pritchard) appeared on behalf of the
CLAIMANT

MR PETER MADDOX (instructed by Kearns & Co) appeared on behalf of the
DEFENDANT

J U D G M E N T

1. MR JUSTICE COLLINS: This is an appeal by way of case stated by District Judge Gray, sitting at Grays in Essex. He had before him five informations laid by the deputy town clerk of Brentwood Borough Council against Mr Gladen (the respondent), each in identical terms relating to different dates. It is therefore only necessary to read one of them, which was that he:

"On 16 December 2002 did knowingly operate a Ford Mondeo as a private hire vehicle within the area of Brentwood Borough Council being a controlled District under [Part II of the Local Government \(Miscellaneous Provisions\) Act 1976](#) without having a current Operators Licence under section 55 of that Act."

The district judge acquitted the respondent of all five charges, and it is against that acquittal that the prosecutor now appeals.

2. There was no issue as to the facts. Essentially, on the various dates an employee of the Council telephoned the relevant telephone number in Brentwood, asking for "848 cars", that being part of the telephone number in question, and a taxi was duly sent, picked the individual up and took him or her to the place where he or she wished to go. Having made those findings, in paragraph 5 of the case the district judge continues:

"(vi) Brentwood Borough Council adopted [Part II of the Local Government \(Miscellaneous Provisions\) Act 1976](#) on 6 November 1985 and the area of Brentwood Borough Council has from that date been a controlled area for the purposes of Part II of the Act.

(vii) The vehicles referred to in paragraphs 1 to 5 above whether driven by Mr Gladen or others did so as a result of the telephone bookings referred to in those paragraphs.

(viii) Those vehicles attended in accordance with the requests made and those requests were received by the defendant responding as '848 cars'.

(ix) On each case referred to in paragraphs 1 to 5 both the vehicle and the driver concerned were properly licensed as hackney carriages and hackney carriage drivers respectively."

3. The argument was that, although they were licensed as hackney carriages and although the drivers were equally licensed as hackney carriage drivers, there was a requirement under the legislation that there should be an operator's licence under the relevant provisions of [Part II of the Local Government \(Miscellaneous Provisions\) Act 1976](#) because they were, by virtue of section 46(1)(d) of the 1976 Act, to be regarded as requiring an operator's licence under that Act, to enable the particular operations to be carried out lawfully.
4. As Mr Findlay submitted then and now, the need for such controls is to ensure that there are proper records kept of calls received and of the dispatching of the vehicles, and therefore, if there are any complaints, then it can be easily seen when a booking was made and when the vehicle was dispatched so as to ensure that the operation was being carried out properly and in the interests of the public, and people were not likely

to be subject to unnecessary and possibly even dangerous delays in being picked up from wherever they wished to be picked up.

5. It is first necessary to have a look at the legislation, part of which is to be found in the provisions of [the Town Police Clauses Act 1847](#), which deals with hackney carriages, and part in [Part II of the Local Government \(Miscellaneous Provisions\) Act 1976](#), which introduced a licensing scheme for private hire vehicles, but also has additional provisions relating to hackney carriages.
6. [Section 37 of the 1847 Act](#) requires that a hackney carriage should be licensed, and section 38 defines what are to be deemed to be hackney carriages, which essentially are:

"Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance."

7. That is just the commencement of the relevant section. Essentially, the idea behind a hackney carriage was and is that it is a vehicle that can be flagged down in the street: it plies for hire or can be found standing at a stand or perhaps outside an office, where anyone can go and require to be taken to a place within the district in question or outside if agreement is reached on the amount to be paid.
8. In addition, under section 46 of the 1847 Act there was a requirement that the drivers also should be licensed, and thus one has a licence, which attaches to the vehicle and a licence which attaches to the driver; both must be held.
9. Finally, so far as drivers are concerned, and indeed generally, section 68 of the 1847 Act enables byelaws to be made for, among other things, regulating the conduct of the proprietors and drivers of hackney carriages, plying within the prescribed distance in their several employments, and so on.
10. The 1976 Act, Part II, deals with the licensing of vehicles being used for the purposes of private hire. That imposes a requirement that the vehicle and the driver be licensed, much as in the case of hackney carriages, but, in addition, it requires that the operator should be licensed. The purpose behind that is, as Mr Findlay submits, to enable a check to be kept to ensure that the operation is being carried out properly and the public are getting a proper service and the matter is being dealt with in terms of safety in an appropriate manner. But the operator's licence is an additional licence, which was not required for the purposes of the 1847 Act for hackney carriage operators. That, perhaps, is not altogether surprising since the concept behind a hackney carriage would not easily, on the face of it, include the situation where one rings up a central office and a hackney carriage, or a taxi which has a hackney carriage licence, is dispatched to pick someone up. But by 1976 it is apparent that such means of getting taxis was common place and Parliament must be taken to have appreciated that. The whole purpose behind the 1976 Act, as I understand it, was to bring within 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 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.

11. Part II of the 1976 Act is careful throughout to distinguish what is required for those who have hackney carriage licences and for those who simply deal in private hire. But it is also clearly recognised that hackney carriages can be used for the purposes of private hire. So much is clear from [section 67 of the 1976 Act](#), which has the side note, "Hackney carriages used for private hire" and provides by subsection (1):

"No hackney carriage shall be used in the district under a contract or purported contract for private hire except at a rate of fares or charges not greater than that fixed by the byelaws or table mentioned in section 66 of the Act, and, when any such hackney carriage is so used, the fare or charge shall be calculated from the point in the district at which the hirer commences his journey."

12. Subsection (2) creates an offence for the knowing contravention of that provision. In subsection (3) it is provided:

"In subsection (1) of this section 'contract' means-

(a) a contract made otherwise than while the relevant hackney carriage is plying for hire in the district or waiting at a place in the district which, when the contract is made, is a stand for hackney carriages appointed by the district council under section 3 of this Act; and

(b) a contract made, otherwise than with or through the driver of the relevant hackney carriage, while it is so plying or waiting."

That section clearly recognises the possibility that hackney carriages can be obtained otherwise than through being flagged down in the street or approached when standing on a stand.

13. Going back, I should perhaps start with section 46 which is the section under which these prosecutions were brought. That 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."

14. Section 48 provides for the licensing of the vehicle. Subsection (b) prohibits a person from driving without a driver's licence, and that is a licence, which is provided under section 51 of the 1976 Act. Subsection (c) prevents a proprietor of a private hire vehicle, licensed under the Act, from employing a driver who has not got a licence. Then we come to (d) and (e) which read:

"(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."

So (d) and (e) are clearly complementary in the sense that (d) prevents a person from operating a vehicle as a private hire vehicle without an operator's licence, and (e) prevents a person, even if he does have an operator's licence, from operating a vehicle which is not itself licensed as a private hire vehicle, or using any driver who is not licensed as the driver of a private hire vehicle.

15. It is important to note that Parliament, in section 80 of the Act, has defined certain terms for the purposes of Part II. It is headed, as all interpretation sections are, "In this Part of this Act, unless the subject or context otherwise requires". The relevant terms for our purposes are "operate", which is defined as meaning "in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle"; "operator's licence", which means a licence under section 55 of the Act and "private hire vehicle", which means:

" ... a motor vehicle constructed or adapted to seat [fewer than nine passengers], other than a hackney carriage or public service vehicle [or a London cab] [or tram car], which is provided for hire with the services of a driver for the purpose of carrying passengers."

16. Now, it is, in my view, quite clear that the drafting of section 46 is with the technical meanings in mind. It is true that one could say that, in certain respects, there could have been omissions of various words if one simply went to the definition section, but that would make the wording of the section itself less than clear. It is important, therefore, to note that licensing of operators is dealt with in section 55 and that a licence under section 55 of the Act must be a licence which enables what is there set out to be done.

17. Section 55(1) provides:

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

So it is a licence to operate private hire vehicles.

18. Section 56 which is headed, "Operators of private hire vehicles", by subsection (2), for example, provides:

"Every person to whom a licence in force under section 55 of this Act has been granted by a district council shall keep a record in such form as the council may, by condition attached to the grant of the licence, prescribe ...

(3) Every person to whom a licence in force under section 55 of this Act has been granted by a district council shall keep such records as the council may, by condition attached to the grant of the licence [et cetera]."

19. It is clear from those provisions that it is only a person who is operating private hire vehicles who needs to be granted such a licence, and more importantly, he is the only person in respect of whom conditions under section 56 can be imposed.
20. Looking at various other provisions in Part II, one sees that the distinction between what is required for a hackney carriage and what is required for a private hire vehicle are specifically kept apart. I am not going to refer to the relevant sections in detail, but one sees this throughout sections 58 to 66 and 68 and 69 -- section 67 I have already referred to.
21. It seems to me quite clear that the word "operate" in section 46(1)(b) has the technical meaning which is set out in section 80(1). Mr Findlay submits that it should have a wider meaning because the words "operate as a private hire vehicle" are unnecessary since "operate" itself is defined as meaning "in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle". But as it seems to me, there is no reason why the draftsman, for the avoidance of any doubt, should not have included the words "as a private hire vehicle" within that subsection.
22. Furthermore, in [Benson v Boyce](#) [1997] RTR 226, a case which concerned section 46(1)(b), not (d), of the Act, this court did consider generally the framework of section 46(1). Mance J (as he then was) at page 231 of the report at letter F says this:

"Looking at the other subsections of section 46, the first applies to a proprietor of a vehicle who uses or permits it to be used in a controlled district as a private hire vehicle without having a licence for it as such under section 48. The phrase 'as a private hire vehicle' appears, I accept, to indicate that a proprietor who used or permitted use in a controlled district without a licence under section 48, for purposes other than hiring falling within the Act, would not be committing an offence. Assuming that to be so, it does not appear to throw real light on the proper interpretation of paragraph (d) of subsection (1), dealing in different terms with the different questions of driving [pausing there, I think that should be (b) rather than (d), in context. That is a misprint in the Road Traffic Reports]. In the context of legislation designed to control the use of private hire vehicles, which (as the present case illustrates) may include vehicles of some bulk, the intention may still have been to restrict driving in controlled districts to licensed drivers in all the circumstances. When one turns to paragraph (c) of subsection (1), the words 'for the purpose of any hiring' are plainly directed at the specific purposes of the proprietor's employment of a driver. Again, the wording is in contrast with paragraph (b) of subsection (1), where it would have been easy to express a similar restriction, if it had been intended. Paragraphs (d) and (e) of subsection (1) deal with persons operating vehicles as private hire vehicles. Under section 80(1) 'operate' is defined as meaning 'in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle'. It does not seem to me either surprising, or significant in relation to the issue before us, that the offences introduced in respect of operators are, by the phrase 'as a private hire vehicle' related to the operation of the private hire vehicle as such."

23. That may explain why the draftsman thought it right to include those words in both (d) and (e), although they might be said otherwise to have been included within the word "operate". He put the matter, as it seems to me, beyond any doubt. Furthermore, what Mance J there said is an indication that, in his view, the word "operate" had the technical meaning as set out in section 80(1). The importance of that is that Mr Findlay has submitted that "operate" should be given a wider meaning, and that, effectively, it should mean little more than "makes use of" in the sense of provides a private hire vehicle for carrying out any business which any individual wants to be carried out by means of such a vehicle. It also gives little scope to the limitation to the licence being a licence under section 55 because no licence under section 55 is required to operate a hackney carriage. That is plain from the wording in section 80(1) of the definition of private hire vehicle because a hackney carriage is specifically excluded from that definition.
24. It is also to be noted that the same wording, that is to say "operate any vehicle as a private hire vehicle" occurs in section 46(1)(e), and Mr Findlay accepts, as indeed is obvious, that it would be absurd to suggest that a person who operates for the purpose of private hire and provides duly licensed hackney carriages and hackney carriage drivers should be committing an offence if those hackney carriage drivers and vehicles do not also have a private hire vehicle and driver's licence. But that would clearly result if the construction which Mr Findlay seeks to place upon the words "operate any vehicle as a private hire vehicle" were to prevail. Mr Findlay seeks to get out of that difficulty by submitting that the words at the outset of section 46(1), "except as authorised by this part of this Act", will through section 67 (because he accepts that there is no other specific authorisation) enable sense to prevail and to indicate that section 46(1)(e) is not being contravened.
25. The difficulty with that is that section 67 does not provide an authorisation for anything. It simply provides that it is unlawful to charge more if you use a hackney carriage for a private hire than would be permissible were it being used as a hackney carriage. It does not provide for the authorisation of anything. It simply recognises that it is not unlawful to use hackney carriages as private hire vehicles.
26. Accordingly, although I would not follow the district judge in his suggestion that 46(1)(d) must be read subject to 46(1)(e), the construction of the same words used in each points to the impossibility of the construction being sought to be applied by Mr Findlay.
27. In fairness to Mr Findlay, this construction is one which has appealed to others. It appealed to Judge Allardice, sitting in the Crown Court at Worcester in June 1991. However, his decision perhaps has even less weight than it might otherwise have had because it is apparent that the argument before him was misconceived. One sees that looking at page 16 of the transcript with which we have been provided, where at letter F he says this:

"The argument put forward by Mr Salmon and for which to a very large extent he relies on the Liverpool case [that was another Crown Court case], is that section 67 is a permissive section which allows all vehicles licensed as hackney carriages to be used also for private hire. It is a clear submission which, if it were successful, would seem to me (and I intend no pun) to drive a coach and horses through the Act."

If that was the argument that was being used to suggest that 46(1)(d) did not require an operator's licence where a hackney carriage was used as a private hire vehicle, then, for my part, I can well understand why it was given short shrift. It does not appear from the argument, or from the decision, that the learned judge was referred to the matter in the detail which should have been provided.

28. The other source which Mr Findlay relies on is a book entitled *Taxis -- Licensing Law and Practice* by Mr James Button. In that, he discusses the question of hackney carriages used as private hire vehicles. At paragraph 13.60 he says this:

"A question which often arises concerns the use of hackney carriages as private hire vehicles. This can occur in one of two ways. First, the hackney carriage can be used effectively as a private hire vehicle because a booking is made with a person, either by telephone or in person, and a vehicle, which is a hackney carriage, is dispatched to fulfil the booking. Secondly, a private hire operator can operate a vehicle as a private hire vehicle, but the vehicle is licensed as a hackney carriage."

29. He then sets out the relevant provisions of section 46, and then at 13.64 he says this:

"It appears that the effect of [the 1976 Act], s.46(1)(d) is to require an operator's licence for a person who operates 'any vehicle as a private hire vehicle', the effect being to bring within the provisions of that subsection any vehicle that maybe operated for the purposes of a private hire vehicle, irrespective of whether or not the vehicle itself is actually a private hire vehicle. This obviously therefore includes hackney carriages which are pre-booked, as a pre-booked hackney carriage falls within the definition of operate within [the 1976 Act], s.80."

30. With the greatest respect to Mr Button, I am afraid I cannot agree with what he there says. It seems to me apparent that section 80 excludes hackney carriages from section 46(1)(d). I say that because, without going in detail over ground that I have already covered, "operate" relates to business in relation to bookings for a private hire vehicle. An "operator's licence" means a licence under section 55, and a "private hire vehicle" is defined as meaning a vehicle other than a hackney carriage. Thus, that, coupled with the provisions of section 55 and 56 which I have already read, seem to me to make it apparent that Parliament has recognised that different regimes apply to hackney carriages and to private hire vehicles, and that it is not necessary for a licensed hackney carriage, driven by a licensed hackney carriage driver, to be subject also to the requirements of an operator's licence; otherwise the limitations on the wording which Parliament has clearly set out would not be given their true meaning.
31. It is true that, if one looks at it at face value without considering the technical meaning, the words "operate any vehicle as a private hire vehicle" could lead to the belief that hackney carriages were included because a hackney carriage is obviously a vehicle. But, as it seems to me, that is quite impossible having regard to the meanings which Parliament has attached to the various words and to which I have already referred.
32. Mr Findlay submits that the result of that will leave a gap, in the sense that the public's protection, which is provided for by the need for an operator's licence in relation to private hire vehicles, is removed when one is dealing with hackney carriages. There

are of course many instances where hackney carriages will operate in much the same way as private hire vehicles, in that members of the public will ring up and ask for a cab, and they do not, on the whole one suspects, really mind what sort of cab they get, provided it is properly licensed and they know that the driver is properly controlled.

33. It was suggested in the course of argument that conditions might be imposed under the 1847 Act, and indeed the 1976 Act, which supplements it to some extent. There were observations made by Maurice Kay J in a case which was cited to us, [R v Doncaster Metropolitan Borough Council ex parte Heath](#) (unreported), decided on 16 October 2000. That case is not directly in point, but it is to be noted that the submission made then to Maurice Kay J was that the schemes relating to hackney carriages and private hire vehicles were two distinct schemes, and that the issues in that case had arisen because the Council had fallen into the trap of seeking to apply private hire statutory provisions to a hackney carriage situation. Although Maurice Kay J did not specifically have to deal with that point, it is plain from the tenor of his judgment that he was entirely sympathetic to it and essentially agreed with it. But what he did say in paragraph 21 of his judgment was that the Council might be able to require persons in the position of the applicant in that case, who was licensed under the 1847 Act, to provide information in advance about who would act as a substitute driver in a case of need, and further requiring him or anyone else driving the vehicle to keep a contemporaneous record of who drove which vehicle on what day. No doubt, this is very sensible, but we have been referred to the relevant provisions of the two Acts and the only conditions which can be attached in relation to hackney carriages appears to be those arising under [section 47 of the 1976 Act](#), which enables conditions to be attached to the grant of a licence of a hackney carriage but not a driver's licence. So far as the driver is concerned, byelaws under section 68 of the Act can be imposed, and as far as I can see there is no reason in principle why, if there is a problem in any particular district, the Local Council should not decide to try to impose byelaws which require a driver to provide the information which they regard as desirable in the interests of the public and to keep records which equally are considered desirable. If any Council which has a problem is able to persuade the Department that some such conditions are needed, then no doubt they could be imposed. But that is as far as it can go.
34. I have reached the clear view that the district judge in this case was correct and that section 46(1)(d) is not breached where a licensed hackney carriage and a licensed hackney carriage driver is provided for the relevant conveyance of a passenger, albeit it is provided through an operator. In those circumstances, an operator's licence under section 55 of the Act is not appropriate, since that section does not cover hackney carriages.
35. The district judge posed this question for the opinion of the High Court:
- "Whether it is necessary to hold a licence under [section 55 of the Local Government \(Miscellaneous Provisions\) Act 1976](#), in an area where that Act is in force, to operate a hackney carriage duly licensed as such under [the Town Police Clauses Act 1847](#) as a private hire vehicle."
36. **The answer to that question is: no. Accordingly, I would dismiss this appeal.**
37. **MR JUSTICE SILBER: I agree that this appeal must be dismissed.**

38. MR MADDOX: My Lords, in those circumstances I would seek an order that the respondent's costs of the appeal should be paid.
39. MR JUSTICE COLLINS: You cannot resist that, can you?
40. MR FINDLAY: My Lord, I am going to try and shift the burden. My Lord, what I would propose to your Lordships is that, instead of costs being awarded against this particular District Council, they are awarded out of central funds and a defendant's costs order be made.
41. MR JUSTICE COLLINS: I think that is what we would normally do. As far as your clients are concerned, they do not mind who pays it as long as they are paid.
42. MR MADDOX: My Lord, I think that must be right.
43. MR JUSTICE SILBER: That would be the normal order that we would make because it was the court which reached the decision, although you persuaded it to do so, or rather you were not able to persuade it not to do so, but it is the decision of the court, and normally then central funds would be appropriate.
44. MR FINDLAY: My Lord, I am grateful. My Lord, also in this case, although your Lordships have reached a very clear conclusion, your Lordship will be aware from what I have (inaudible) it is a matter of considerable concern to –
45. MR JUSTICE COLLINS: It is only surprising that it has not been expressly decided in the -- whatever it is -- 28 years that this has been in force. We have now decided it, rightly or wrongly.