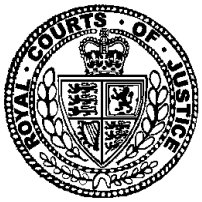

Neutral Citation Number: [2017] EWHC 2794 (Admin)

Case No CO/3499/2017

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

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham

Date: 10/11//17

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE GILBART

- -

Between :

MILTON KEYNES COUNCIL

Appellant

- and -

(1) SKYLINE TAXIS AND PRIVATE HIRE LIMITED
(2) GAVIN SOKHI

Respondents

- -
- -

Sarah Clover (instructed by **Milton Keynes Council Legal Services Division)**
for the **Appellant**
Kevin Leigh (instructed by **Woodfines**) for the **First Respondent**
Daniel Oscroft (instructed by **Woodfines**) for the **Second Respondent**

Hearing date: 26 October 2017

- -

Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. This is an appeal by way of case stated against the decision of 25 May 2017 of District Judge (Magistrates' Court) Malcolm Dodds, in which he dismissed, as there being no case to answer, summonses brought by Milton Keynes Council ("the Council") against the Respondents, Skyline Taxis and Private Hire Limited ("Skyline") and its director ("Mr Sokhi"), for offences under section 46(1)(e)(i) and (ii) of the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act"), namely that, on 4 April 2016, being the holder of a private hire vehicle operators' licence, they operated a vehicle as a private hire vehicle for which a licence issued under section 46 of the 1976 Act was not in force, and the driver of which was not licensed under section 51 of the 1976 Act.

2. Before us, as before the District Judge, Miss Sarah Clover of Counsel appeared for the Appellant, Kevin Leigh of Counsel for the First Respondent Skyline, and Daniel Oscroft of Counsel for the Second Respondent Mr Sokhi. We thank them all for their contribution.

The Legal Background

3. In this judgment, statutory references are to the 1976 Act, unless otherwise appears.

4. For the purposes of this appeal, there are two types of car available for hire to transport passengers, namely hackney carriages (or "taxis") and private hire vehicles (or "minicabs"), to which different rules apply. This appeal only concerns the latter; and it only concerns the provisions which apply to out-of-London private hire vehicle operations. Different provisions apply to minicabs in London.

5. One of the main differences between the two categories of hire vehicle is that only taxis can ply for hire on the streets. Private hire vehicles can only be hired to transport passengers on a pre-booked basis through an operator licensed by the relevant local authority. Indeed, by virtue of Part 2 of the 1976 Act a vehicle may not work as a private hire vehicle in a controlled district unless there are in existence three licences.

    i) An operator's licence issued under section 55. Section 55 provides that a local authority shall, on receipt of an application for the grant of a licence to operate private hire vehicles, grant to that person a licence unless it is satisfied that that person is not a fit and proper person and, if the applicant is an individual, he has not been disqualified from driving. The local authority may attach such conditions to the licence as it considers reasonably necessary (section 55(3)).

    ii) A vehicle licence issued under section 48, which sets out matters about which the local authority must be satisfied before issuing such a licence, such as the suitability, safety and comfort of the vehicle.

    iii) A driver's licence issued under section 51, which again sets out matters about which the local authority must be satisfied, such as the fitness of the person to hold such a licence.

6. The underlying purpose of this regulatory regime is "… to provide protection to members of the public who wish to be conveyed as passengers in a motor car provided by a private hire organisation with a driver" (St Albans District Council v Taylor [1991] RTR 400 at page 403A-B per Russell LJ). It is well-established that, to enable coherent regulation and enforcement, in respect of any hiring, all three licences must be issued by the same local authority (Dittah v Birmingham City Council [1993] RTR 356), something which has been called "the trinity of requirements".

7. Again as part of the regulatory and enforcement scheme, section 56 requires the holder of any section 55 operator's licence to keep such records as the local authority "may, by condition attached to the grant of the licence, prescribe and shall enter therein, before the commencement of each journey, such particulars of every booking of a private hire vehicle invited or accepted by him, whether by accepting the same from the hirer or by undertaking it at the request of another operator, as the [local authority] may prescribe" (section 56(2)); as well as particulars of any private hire vehicle he operates (section 56(3)). The licensing authority therefore controls the level and nature of the record keeping of any operator. An operator is required to produce such records on request to any authorised officer of the local authority. A breach of the requirements of section 56 is a criminal offence (section 56(5)).

8. "Operate", for the purposes of section 55, has been considered by this court in a series of cases, including Britain v ABC Cabs [1981] RTR 395, Windsor and Maidenhead Royal Borough Council v Khan [1994] RTR 87, Adur District Council v Fry [1997] RTR 257 and Bromsgrove District Council v Powers (Unreported) (16 July 1998). These firmly establish that, in this context, "operate" does not have its common meaning. Rather, it is a term of art defined strictly by section 80(1) as meaning "in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle". Therefore, as Dyson J said in Powers:

> "… [T]he definition of the word 'operate' focuses on the arrangements pursuant to which a private hire vehicle is provided and not the provision of the vehicle itself…. [T]he word 'operate' is not to be equated with, or taken as including, the providing of the vehicle, but refers to the antecedent arrangements."

9. Section 46(1)(e) provides:

> "[N]o 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 section 48 is not in force; or (ii) if the driver does not have a current licence under section 51";

and, if any anyone knowingly contravenes that provision, he is guilty of an offence.

10. However, because of the limited definition of "operate", he only commits an offence if, in the course of business and in a controlled district, he makes provision for the invitation or acceptance of bookings for a private hire vehicle in circumstances in which the vehicle and/or the driver do not have the required licence(s). That too is firmly established by the cases to which I have referred (see, e.g., Britain at page 403).

Therefore, for these purposes, it is irrelevant (e.g.) where the customer might be picked up, or where the contract for hire might have been made, or where any particular booking might in fact have been accepted. So, in giving the judgment of the Divisional Court in Khan, McCullough J said (at page 92):

> "The determining factor is not whether any individual booking was accepted, let alone where it was accepted, but whether the person accused has in the area in question made provision for the invitation or acceptance of bookings in general".

11. *Who* accepts the booking is, however, important; because, by section 56(1), for the purposes of Part 2 of the 1976 Act, every contract for the hire of a private hire vehicle is deemed to be made with the operator who accepts the booking for that vehicle whether or not he himself provides the vehicle.

12. Under the provisions as originally enacted, therefore, it did not matter if the booked journey passed through an area other than the controlled area in which the operator had an operator's licence, or even if the pick-up was outside that area. Nevertheless, the operation was to a substantial degree geographically restricted. Over and above the trinity of requirements, if the operator who had accepted a booking did not have a driver/vehicle licensed by the same authority to do the job, although he could get another operator within the same area to provide a vehicle, he was proscribed from transferring or sub-contracting the job out to a firm outside the controlled area even if that firm used a driver and vehicle licensed in that same, other area (Powers).

13. However, as from 1 October 2015, section 11 of the Deregulation Act 2015 inserted new sections 55A and 55B into the 1976 Act, which, for the first time, allowed sub-contracting by operators, in the following terms (so far as relevant to this appeal):

> "**55A Sub-contracting by operators**
>
> (1) A person licensed under section 55 who has in a controlled district accepted a booking for a private hire vehicle may arrange for another person to provide a vehicle to carry out the booking if—
>
> (a) the other person is licensed under section 55 in respect of the same controlled district and the sub-contracted booking is accepted in that district;
>
> (b) the other person is licensed under section 55 in respect of another controlled district and the sub-contracted booking is accepted in that district;…
>
> (2) …
>
> (3) Where a person licensed under section 55 in respect of a controlled district is also licensed under that section in respect of another controlled district, subsection (1) (so far as relating to paragraph (b) of that subsection) and section 55B(1) and (2) apply as if each licence were held by a separate person.

> **55B Sub-contracting by operators: criminal liability**
>
> (1) In this section—
>
> 'the first operator' means a person licensed under section 55 who has in a controlled district accepted a booking for a private hire vehicle and then made arrangements for another person to provide a vehicle to carry out the booking in accordance with section 55A(1);
>
> 'the second operator' means the person with whom the first operator made the arrangements (and, accordingly, the person who accepted the sub-contracted booking).
>
> (2) The first operator is not to be treated for the purposes of section 46(1)(e) as operating a private hire vehicle by virtue of having invited or accepted the booking."

In this judgment, I will use the terms "first operator" and "second operator" in the same way.

14. In relation to this appeal, with regard to these new provisions, three matters are worthy of particular note.

    i) Although they use the term "sub-contracting" and "sub-contracted booking", for these provisions to be effective in respect of a particular booking, no legal contract is required between the first and second operators: the first operator merely has to "arrange" for the second operator to provide a vehicle to carry out the booking. The effect of such an arrangement is sometimes said to "transfer" the booking to the second operator, although the statutory provisions themselves do not use that term.

    ii) Section 55A(3) is a deeming provision. Where an operator has an operator's licence in more than one controlled area, he can use a driver and vehicle in a controlled area other than the area in which he accepts the booking. However, by section 55A(3), where he does so, the licence in each of those areas is treated as being held by a different legal person. I shall return to that provision.

    iii) Where a booking is the subject of a section 55A arrangement, section 56 enables the local authorities involved to require records of the booking to be kept by both the first and the second operator.

The Facts

15. Skyline operate a taxi and minicab service in and around Milton Keynes and Northampton. Operating as "Skyline Taxis incorporating Ace Cabs" ("Skyline MK"), they have a section 55 private hire vehicle operator's licence from the Council, the Appellant licensing authority. Operating as "Skyline SNC", they also have such a licence from South Northamptonshire District Council ("SNDC").

16. Skyline uses a computer system called iCabbi, under which, instead of being directed to an operator, a regular customer who telephones them to make a minicab booking is

directed to an automated system by which, using sophisticated voice recognition, the booking can be made without the customer having to engage with a human operator at all.

17. Simon Platts regularly uses the train from Central Milton Keynes Station; and regularly uses a Skyline minicab to get from his home in Middleton to that station. On 3 April 2015, he telephoned Skyline on a Milton Keynes number. As a regular customer, he spoke to the automated system, and made a booking for a minicab to pick him up the following morning at 6.50am, and take him from his home to the station. The car did not arrive on time; and he rang Skyline shortly after 6.50am to tell them so. A minicab, registration mark MA60 WGK and driven by a Muhammad Sabeel, arrived at 7.17am. Mr Platts was understandably annoyed, and he complained to the Council.

18. The investigation into that complaint revealed that, although Mr Sabeel and his vehicle were licensed by SNDC, they were not licensed by the Council. The Council consequently prosecuted Skyline and Mr Sokhi under section 46(1)(e)(i) and (ii) for operating a vehicle as a private hire vehicle for which a section 48 vehicle licence issued by the Council was not in force, driven by a driver who was not licensed by the Council under section 51. The defence to those charges was that, under section 55A, Skyline MK had made an arrangement for Skyline SNC to carry out the booking; and Skyline SNC, Mr Sabeel and his vehicle were all licensed by SNDC. Thus, it was contended, the trinity of requirements were met.

19. Those charges came before District Judge Dodds at Milton Keynes Magistrates' Court sitting at High Wycombe on 25 May 2017. The judge found that there was no case to answer, because the Council as prosecutor had failed to show to the criminal standard of proof that the booking had not been "sub-contracted" or "transferred" to Skyline SNC under section 55A. Skyline SNC had a section 55 operator's licence from SNDC; and so the operation, the vehicle and the driver each had the relevant licence issued by the same authority. Thus, he found there was no case to answer, and dismissed the charges. He refused an application for an order for costs against the Council, but rather made an order that the costs of Skyline and Mr Sokhi be paid out of central funds.

The Questions Posed

20. The Council appealed by way of case stated, the District Judge posing the following questions for determination by this court:

    Question 1: Did I err in law in ruling at the conclusion of the evidence called by the prosecution that there was no case to answer?

    Question 2: Was I entitled to find on the evidence that the Respondents having accepted a booking for a private hire vehicle had made arrangements for another person to provide a vehicle to carry out the booking in accordance with section 55A(1)…?

21. In response, albeit without lodging a formal Respondent's Notice, the Respondents not only opposed the Council's grounds of appeal, but themselves sought to appeal the District Judge's refusal of their application for costs against the Council. The District Judge has posed the following further two questions in respect of that:

Question 3: In circumstances where the Appellant brings the prosecution as a 'test' case does the word 'unnecessary' in section 19(1) of the Prosecution of Offences Act 1985 mean that a court can award a party its costs if it finds that no such 'test' case was necessary and in particular if the prosecution was dismissed on the basis that there was no case to answer then was it unnecessary?

Question 4: Should the conduct of the Appellant prior to the bringing the prosecution form part of the basis on deciding whether or not there has been an 'unnecessary or improper' act or omission by the Appellant?

The iCabbi System

22. The District Judge was unpersuaded that the evidence adduced by the Council did not exclude as a real possibility that the minicab booking was transferred from Skyline MK to Skyline SNC, because, as a result of the iCabbi system as evidenced by records derived from it, the booking was or might have been "offered" by Skyline MK and "accepted" by Skyline SNC, in which event the trinity of requirements in the 1976 Act scheme were all met. This requires some more particular consideration of the iCabbi system.

23. So far as relevant to this appeal, how the system works appears to be largely uncontroversial. It is set out in two statements that were before the District Judge, one of Mr Sokhi dated 15 May 2017 and one of a Gavin Walsh also dated May 2017 (the precise date being illegible). Mr Walsh is a director and the chief executive officer of Coolnagour Limited, which trades as iCabbi.

24. The evidence is that the iCabbi system is intended to be a comprehensive, integrated, post-Deregulation Act, web- and cloud-based despatch software, which includes a despatch system designed to "manage all aspects of the booking process", using new technology such as Interactive Voice Response ("IVR"), the internet and apps; as well as a system to record the details of the journey undertaken, which, in addition to providing useful management information, is seen as useful as assisting in dealing with incidents that might form the basis of a complaint by driver or customer. There is no evidence as to the location of the servers which are used to process and store the relevant data: but it seems to be common ground that they are probably somewhere exotic, and certainly not in Milton Keynes or South Northamptonshire.

25. In respect of the despatch system, however a booking is made (personally, by telephone and IVR, through a telephone operator, by the internet or by app), the details including the booking time, and pick-up and delivery addresses, are recorded on the iCabbi system as raw data. A driver/vehicle is not immediately assigned to the job. That assignment is made, by the computer and without any further human intervention, approximately 5-10 minutes before the pick-up time. Drivers/vehicles that are eligible and available are then identified by the computer system. First, those who are licensed by the same local authority that licensed the operator which accepted the booking are identified. If there is none, the drivers/vehicles from adjacent controlled areas where Skyline have an operator's licence are identified. That all appears to be common ground. It is the Respondent's case that, if such a driver/vehicle within a reasonable distance of the pick-up point can be identified, the computer system actions a series of steps – sequentially, but over a very short space of time measured in milliseconds – namely (i) the job is offered by the operator which accepted the original booking, (ii)

the job is accepted by the Skyline operation in the other area; and (iii) the driver/vehicle is despatched. Again, each of those steps is performed by the computer without any further human intervention.

26. It is the Respondent's evidence that all the relevant details of the original booking, the transfer and despatch are recorded on the iCabbi computer system as raw data; but can be retrieved in the form of various reports which the computer is or can be programmed to produce. One such report is described by Mr Walsh, namely a full Booking Transfer Report. This sets out in tabular form the booking reference number, the operator's telephone number on which the booking was made, the customer's name, the pick-up time, the pick-up address, the destination address, and any "action" taken (e.g. "transfer offered" and "transfer accepted") with timings. It is said that this report is designed to "assist local authorities and show the life cycle of any booking that was transferred".

27. In this case, Mr Platts telephoned the Skyline MK number on 3 April 2015, and made an automated booking for 6.50am the following day. His booking was given a unique booking number which assists in the identification and reporting of stored data relevant to that booking. Mr Platts' evidence was that he telephoned Skyline MK at about 6.53am on the morning he was expecting the car. At the hearing before the District Judge, a short form report was produced from the iCabbi computer system which showed that job transferred from Skyline MK to Skyline SNC at 7.05am on 4 April 2015 ("the Short Report"). A full Booking Transfer Report was produced by the Respondents at the hearing which showed the transfer was offered by Skyline MK at 7.05.41, and accepted by Skyline SNC subsequently although also timed the same second, at 7.05.41 ("the Full Report"). As I have indicated, the minicab arrived at the pick-up point (Mr Platts' home) at 7.17am.

The Substantive Appeal: The Issue

28. As a result of section 55A(3), for the purposes of section 55A(1)(b), the separate operator's licences held by Skyline in respect of the area covered by the Council and that covered by SNDC have to be treated as being held by separate persons. Skyline MK initially accepted Mr Platts' booking. Skyline SNC, Mr Sabeel and the vehicle he used are all licensed by SNDC. The essential issue before the District Judge therefore focused on whether, treating them as distinct persons for these purposes, Skyline MK arranged via the iCabbi system for Skyline SNC to provide a vehicle to carry out that booking in accordance with section 55.

29. Before us, Miss Clover conceded that, where there is a charge under section 46(1) and the defendant produces some evidence to show that it arranged for another person to provide a vehicle to carry out the booking, then the burden of proof lies on the prosecution to show that there was no such arrangement. That is how the matter proceeded before the District Judge, and was, by the end of the hearing, common ground before us.

30. Given that the burden of proof fell upon the Council as prosecutor, but this was an application to dismiss, the District Judge was therefore required to consider whether, on the evidence it had adduced taken at its highest, the Council could satisfy him to the criminal standard that the booking had not been transferred to Skyline SNC. If the District Judge concluded on that evidence that there a real possibility that the booking

had been transferred from Skyline MK to Skyline SNC, he was entitled to dismiss the charges.

31. In evidence, the District Judge had the Short Report. The Full Report was produced by the Respondents, late and overtly to assist the court especially if Mr Walsh gave evidence (which, in the event, he did not). The Council objected to the Full Report being admitted; and, as I understand it, the District Judge did not formally admit it.

32. However, in his judgment, the District Judge said this (at paragraph 6):

> "I am satisfied that should a customer make a booking with one firm licensed by one local authority which is transferred to another [firm] licensed by another local authority and something untoward occurs (e.g. the customer is assaulted by the [minicab] driver) the iCabbi system provides reports which show transfer and provided the relevant details so that any untoward incident can be properly investigated by the relevant local authority.
>
> I therefore find that when Mr Platts booked his taxi the iCabbi cloud system discovered that there was no driver available from the Skyline MK operator the system automatically transferred the booking to the Skyline SN[C] operator so that a driver and vehicle licensed by SN[DC] could be dispatched to fulfil that booking.
>
> I also find that a proper record of this transfer in [the Short Report] was created by the iCabbi system which was made available to [the] Council and which met any concerns about record keeping and the need to properly investigate any untoward incident involving the customer and the private hire driver and/or private hire vehicle and making it clear which local authority was responsible for licensing the operator, driver and vehicle and investigating any untoward incident. In my judgment this satisfies the important public safety requirements which underpin the need to keep proper records.
>
> I also find that the layout of [the Short Report] does not inevitably show that Mr Sabeel was booked by Skyline MK and then the booking transferred and that everything happened in the wrong and unlawful order. [The Short Report] can equally be construed as showing that the system identified Mr Sabeel as the best available driver, transferred the booking from Skyline MK to Skyline SN[C] and the assigned Mr Sabeel. The [Full Report] makes this latter construction much more likely and better illustrates the correct sequential arrangements for and accepting of transferred booking.
>
> I therefore found that no reasonable court could convict on the prosecution evidence and found no case to answer and the offences were dismissed. If I was wrong about finding no case I would then have dismissed the cases because I have more than

> reasonable doubts that the cloud system breaches any laws. There was no evidence in my judgment that the transfer did not lawfully happen and sufficient evidence that it did. I was particularly reassured by the format of [the Full Report] which if not available at the time these offences were investigated in my judgment now clearly showed that the cloud based system complied with the law."

33. Before us, as her primary ground, Miss Clover contended that it was not open to the District Judge to conclude that the Council as prosecutor had not excluded a real possibility that the booking had been transferred from Skyline MK to Skyline SNC. In particular, she submitted the following.

    i) Section 55A requires an arrangement that involves, not only an offer of a particular booking by the operator who initially accepted it, but also some positive engagement by the operator taking over the particular booking including some positive acceptance of that booking by him.

    ii) There was no evidence that Skyline SNC engaged with this booking at all; and, particularly, no evidence that it accepted the booking. The District Judge was wrong to take into account the Full Report, the admission of which was opposed by the Council as hearsay without the proper notice, and which was not in fact admitted. In any event, the Full Report was produced long after the event. The Short Report too was not contemporaneous; and, in any event, provided insufficient evidence of a positive acceptance of the booking by Skyline SNC.

    iii) Even if, contrary to Miss Clover's primary submissions, "acceptance" of a booking by a second operator could be by electronic means, the District Judge erred in failing to give consideration – or any meaning – to the statutory phrase "accepted *in that district*". This phrase is unambiguous: it requires the acceptance to be made, positively and physically, in the district in which the second operator holds his licence. Here, even on the assumption that Skyline SNC accepted the booking through the iCabbi cloud-based system, there is no evidence as to where the relevant computer servers are; but it cannot be sensibly suggested that they are in South Northamptonshire.

The Substantive Appeal: Discussion

34. It will be helpful, first, to clear the decks by dealing with the procedural errors which Miss Clover contends the District Judge made.

35. First, she submits that he was wrong to consider the Full Report, which was late-served, not accepted by the Council and not formally admitted. However, as is clear from the extract from his judgment which I have quoted (see paragraph 32 above), the District Judge concluded, without reference to the Full Report, that the Short Report (which was, it is accepted, properly before him) could properly be construed as showing that the iCabbi system identified Mr Sabeel as the best available driver, transferred the booking from Skyline MK to Skyline SNC, and the assigned the job to Mr Sabeel, in that order. On the evidence before him, he was clearly entitled to conclude that the prosecution could not disprove that. The Full Report certainly does not suggest otherwise. Indeed, in my view, he referred to the Full Report only as giving further

comfort that his conclusion based on the Short Report alone was correct. In any event, although I understand why the District Judge refused to admit the Full Report – understandably, as it was produced very late and the Council had had no time to consider or respond to it – I do not see any basis for that report otherwise not being admitted. It simply produces data already on the iCabbi computer system. The Council, having now had an opportunity to respond to it, have produced no evidence to suggest that it not an accurate record of the data on the system, or that those data do not accurately reflect what happened or have been changed in some way.

36. There is nothing in the point made by Miss Clover that even the Short Report was "not contemporaneous", because it was not requested or printed out until well after the events. The evidence is found in the data held by the iCabbi system, there was no evidence that that data could be manipulated or altered after it had been input, and some form of report had to be prepared in comprehensible form and printed so that the court could see the data held. The submission failed to heed the difference between data held in a computer system, and the regurgitation of those data in a comprehensible form.

37. Second, Miss Clover criticised the District Judge for taking into account two irrelevant matters, namely (i) that the iCabbi system has been in operation for a number of years apparently without complaint, and (ii) the assumption that the iCabbi system was designed to be legally compliant, including to satisfy the requirements of section 55A. The judge referred to both of these matters in paragraph 20 of his judgment, where he set out the reasons why he considered the iCabbi system "does comply with the law". However, the crucial parts of that paragraph concern the true construction of section 55A, which I deal with below. He did not suggest that the two matters to which he referred could affect that matter of construction. Those matters might, of course, have given the District Judge some comfort that that construction was correct.

38. I now turn to the substantive ground. The starting point must be section 55A.

39. The same legal entity, Skyline, holds section 55 operator's licences from the Council and SNDC, in respect of the distinct controlled areas of Milton Keynes and South Northamptonshire respectively. However, as I have described (see paragraphs 13 and 14(ii) above), as a result of section 55A(3), Skyline MK and Skyline SNC have to be treated as separate persons for the purposes of section 55A(1).

40. When Mr Platts made his booking over the telephone, Skyline MK "accepted" it. Miss Clover submits that Skyline MK did not arrange for another person [i.e. Skyline SNC] to carry out the booking, because Skyline SNC did not know of or consent to the transfer of the booking, but played a merely passive role: the transfer was the unilateral act of Skyline MK. Insofar as Skyline MK offered the booking at all, it was accepted, not by Skyline SNC, but by Mr Sabeel, who was contacted direct via the iCabbi computer system to see whether he would take the job; and he duly agreed to do so. Miss Clover submitted that, for there to be an arrangement that satisfies section 55A, the second operator has to take a positive decision to accept the booking, which in practice means that, in respect of the particular booking, there has to be some positive intervention on the part of the second operator. For this to happen, the second operator has to have a separate and distinct "controlling mind" from the first operator. There was no separate controlling mind here; and, in any event, Skyline SNC did not accept (or, indeed, play any part in) Mr Platts' booking. The requirements of section 55A were therefore not satisfied.

41. However, I am unpersuaded by that submission.

42. The concept of the same legal personality having an arrangement with itself requires some mental flexibility; but section 55A(3) requires this matter to be approached on the hypothetical basis that Skyline's operator's licences from the Council and SNDC are held by separate persons. However, that does not mean that the real world has to be ignored altogether. In that world, Skyline MK and Skyline SNC share the same, unitary iCabbi computer system, which organises the business, and holds the data, of each. No doubt that makes good commercial sense. There was and is nothing in the statutory scheme to prevent it.

43. It was open to Skyline MK and Skyline SNC to enter into an arrangement in which the latter agreed to carry out any booking that had been earlier accepted by Skyline MK, if, at the relevant time, Skyline MK itself did not have a driver/vehicle eligible and available for the job – indeed, that fulfils the obvious purpose of section 55A, which is to allow the "sub-contracting" or "transfer" of such jobs in that way – and it was open to them to manage that arrangement through their common computer system. It was the evidence that that is what happened here. There can be no sensible suggestion that Skyline SNC did not agree to such an arrangement. There is no question here of Skyline MK unilaterally imposing anything on Skyline SNC.

44. With respect to Miss Clover, and given the evidence, I found her submission that, insofar as Skyline MK offered the booking at all, it was accepted, not by Skyline SNC, but by Mr Sabeel, to be simplistic. The evidence was that the iCabbi system (which, insofar as section 55A required Skyline MK and Skyline SNC to be treated as separate persons, was the common computer system of each), having implemented the arrangement between the two to "transfer" the booking from the former to the latter, then, as the computer system of Skyline SNC, offered the job to Mr Sabeel, who accepted it. The District Judge was entitled to accept that evidence. He was certainly entitled to conclude that the prosecution could not prove that that was not the case.

45. Miss Clover's further submission that the District Judge failed to have regard to the need for the second operator to "provide a vehicle to carry out the booking" is defeated by a similar response: the iCabbi system incorporated a scheme whereby Skyline MK arranged for Skyline SNC to provide a vehicle to carry out the booking.

46. I do not accept the proposition that, under section 55A, the first and second operators have to have separate controlling minds. The provisions clearly contemplate a single operator having multiple operator's licences in different areas; and there is nothing in the legislative scheme to suggest the operation in each area has to have a separate and distinct controlling mind.

47. Nor do I accept the proposition that, an overarching arrangement having been set up to be implemented through a computer rather than individuals on telephones, the second operator has to take a distinct positive decision to accept each and every particular booking. Again, such a restriction seems not only out of kilter with modern life (as powerfully submitted by Mr Leigh), but entirely unwarranted by the wording used in the statutory provisions.

48. Miss Clover further submits, however, that the precondition in section 55A(1)(b) that "the sub-contracted booking is accepted *in that district*" (i.e. in the district in which the

second operator is licensed under section 55) can only be given substance if the second operator accepts the booking, actively and physically, *in its own district*. It seems that the acceptance in this case took place somewhere in a computer server serving the cloud-based iCabbi system, probably abroad and certainly not in South Northamptonshire. The District Judge failed to make any finding as to where the subcontracted booking was accepted: if he had brought his mind to bear on that question, she submits that he could only have concluded that his interpretation and application of section 55A(1) was wrong. He simply failed to give any meaning to the statutory words: "… accepted in that district".

49. However, I do not consider that that submission is made good either.

50. Miss Clover contended that the words "the sub-contracted booking is accepted in that district" in section 55A(1)(b) meant – indeed, unambiguously meant – that the booking had to be accepted at a base of the second operator which had physically to be within the controlled area where that operator had an operator's licence. However, that construction would be at least curious; because, as I have explained, an operator's licence authorises the holder to "operate" in a particular area, i.e. to make provision for the invitation or acceptance of bookings for a private hire vehicle. It is only an offence under section 46 if he operates in that sense. It is irrelevant where any particular booking might in fact initially have been accepted. It would be strange – and inconsistent with the principles of the regime as a whole – if where a booking was accepted under a section 55A arrangement mattered in the crucial way in which Miss Clover's construction suggests.

51. However, it is my firm conclusion that that construction is not correct. In my view, as Mr Leigh submitted, section 55A(1)(b) is focused, not upon place of acceptance, but the district in which the sub-contracted booking is accepted *as a booking*. To maintain the trinity of requirements, as section 55A does, it is vital that the second operator accepts the booking as one made in the district in which he has an operator's licence. It is in that manner that the integrity of the scheme is maintained.

52. Therefore, whilst I accept that the wording of section 55A(1)(b) could have been clearer, when seen in the context of the regulatory regime as a whole, in my view it requires that the second operator "is licensed under section 55 in respect of another controlled district and the sub-contracted booking is accepted *as a booking subject to the licence* in that district…". That construction is consistent with the principles underlying the regime; and is, in my view, clearly the construction to be preferred.

53. I have considered the true construction of that section on its own words, seen in the context of the regulatory regime as a whole. However, I should say that I see the force in Mr Leigh's submission that Parliament could not have intended to enact legislation, designed to make the regulation of minicabs better fitted to modern times, that requires "manual" systems and ignores the commercial use of computerised systems to the extent suggested by Miss Clover's contention. That gives me further comfort that the construction I prefer is, indeed, true.

54. Insofar as Miss Clover suggested that the construction undermines the underlying purpose of the scheme, namely to provide protection to the public who use minicabs, I disagree. It maintains the trinity of requirements which, whilst regulation and enforcement is in the hands of local authorities, remains a fundamental plank of the

scheme. Section 55A inherently allows the "transfer" of a booking outside the controlled area where the initial, first operator operates; but the requirements for both the first and the second operator to maintain records ensures that any authority can ascertain, relatively quickly, which operator, driver and vehicle is involved in any minicab booking. There is no evidence that Mr Platts' complaint to the Council about the lateness of his minicab was not properly received and dealt with; and no evidence that SNDC has any issues with Skyline's operating licence in its area.

55. In this case, on the basis of the evidence it had adduced taken at its highest, the District Judge concluded that the Council as prosecutor had failed to disprove that, through the iCabbi computer system, Skyline SNC had accepted Mr Platts' booking under its arrangement with Skyline MK. It did not matter where the acceptance took place: Skyline SNC clearly accepted it as a booking that fell under its SNDC operator's licence. Thus, the trinity of requirements were satisfied; and Mr Platts' booking, having been accepted by Skyline MK, was properly subject to an arrangement under section 55A whereby Skyline SNC provided a vehicle to carry it out.

The Substantive Appeal: Conclusion

56. For those reasons, I would dismiss the substantive appeal.

57. I would answer the specific questions posed by the District Judge as follows:

Question 1: No: you did not err in law in ruling at the conclusion of the evidence called by the prosecution that there was no case to answer.

Question 2: Yes: you were entitled to find on the evidence that Skyline MK, having accepted a booking for a private hire vehicle, had made arrangements for Skyline SNC to provide a vehicle to carry out the booking in accordance with section 55A(1).

The Costs Appeal

58. The District Judge refused the Respondents' application for an order for costs against the Council as prosecutor under section 19 of the Prosecution of Offences Act 1985, rather making an order that the Respondents' costs be paid out of central funds. The Respondents now seek to appeal against that refusal.

59. Section 19 of the 1985 Act provides:

> "The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs."

60. The relevant regulations are the Costs in Criminal Cases (General) Regulations 1986 (SI 1986 No 1335) ("the 1986 Regulations"), which came into effect on 1 October 1986. Regulation 3(1) provides (so far as relevant):

> "… [W]here at any time during criminal proceedings [the court] is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him by the other party."

61. In responding to the application for costs against the Council under these provisions, the District Judge said succinctly, in the last paragraph of section 6 of the case stated, that:

> "I made an order that the Respondent's costs be paid from central funds and refused to make an order of costs under section 19(1) of the [1985 Act] against the Appellant since I found that the Appellant had not acted unreasonably in bringing the prosecution."

62. Mr Leigh and Mr Oscroft for the Respondents submit that the District Judge was wrong not to make an order under section 19 of the 1985 Act, because the prosecution of the Respondents was caused by the Council's initial failure to clarify what, if any, aspect of the Respondents' computer systems and procedures were in breach of the 1976 Act as amended by the Deregulation Act 2015. The Council was the relevant regulatory body. The Respondents sought approval of their proposed iCabbi system from the Council, prior to October 2015; but, it is said, the Council refused to engage, simply advising the Respondents to seek legal advice. After the investigation into the circumstances of Mr Platts' case, the Council considered reviewing the Respondents' operator's licence; but admitted that they simply did not know whether the Respondents' operating model was in breach of the 1976 Act as amended. The prosecution was thus brought to test the Council's enforcement officer's view of the law. This "test case" was wholly unnecessary.

63. It is said that the District Judge failed to take this conduct of the Council as regulator into account, when considering the application for costs. That was an error of law. Had he properly considered the issue of costs, he would have been driven to conclude that the Council's failure properly to act as regulator was an unnecessary act or omission, as a result of which the entire costs of the case before the magistrates' court (over £30,000) have been expended. It is submitted that this court should not only conclude that the District Judge acted in error, but should itself proceed to make an order under section 19 against the Council in respect of all the costs of the proceedings below.

64. I considered the application of section 19 in R v Evans and Others [2015] EWHC 263 (QB); [2015] 1 WLR 3595. I need not set out passages from that judgment again, here, *in extenso*. However, the following propositions can be drawn from that (and earlier) cases, relevant to this appeal:

    i) Conduct is "improper" if it fails to conform to prevailing standards of behaviour.

    ii) In this context, the word "improper" cannot be construed in isolation, but only as part of the phrase into which it fits, i.e. "unnecessary or improper act of omission". The courts have resiled from adopting discrete and isolated

definitions of each of the adjectives, preferring a broader consideration of the relevant phrase. Thus, Nolan LJ in Director of Public Prosecutions v Denning (1992) 94 Cr App R 272 did not seek to define "improper"; but held that that word was coloured the meaning of "unnecessary" so that the phrase covered acts and omissions that would not have occurred had the matter been properly conducted by the relevant party. Similarly, whilst, on its own, "unnecessary" (which appears largely to have escaped judicial consideration and comment) has the import of something which could have been avoided, it too has to be read in the light of its juxtaposition with "improper".

iii) What amounts to "unnecessary or improper" conduct is necessarily fact-sensitive. Where an order is sought against a public prosecutor, the court will take into account the fact that public prosecutors have a particular and unique role in criminal litigation – they have a particularly wide discretion in who they prosecute, and how – and so different factors apply to mould the standards of behaviour expected of them. Therefore, although each case will depend upon its own facts, cases in which a section 19 application against a public prosecutor will be appropriate will be very rare, and generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. The court will be slow to find that such an error has occurred. Generally, a decision to prosecute or similar prosecutorial decision will only be an unnecessary or improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision.

iv) The section 19 procedure is essentially summary; and so a detailed investigation into (e.g.) the decision-making process of the prosecution will generally be inappropriate.

65. Mr Leigh does not suggest that the prosecution here was improper. However, he submits that the prosecution was unnecessary, because it has failed and the Council as regulator could have taken a different course and avoided it.

66. However, as I have indicated, "unnecessary" has to be read with "improper". Even if it could be said that not all local authorities with the responsibilities of a regulator under Part 2 of the 1976 Act would have prosecuted in these circumstances – and that the Council might have proceeded in a way that at least reduced the level of costs incurred by the Respondents – that, in itself, does not entitle the Respondents to a costs order under section 19. The District Judge considered that this prosecution was not unreasonably brought. Whilst I accept that his reasons were short, it seems to me that they were sufficient. In my judgment he was entitled to conclude that the manner in which the Council dealt with this matter was not outside the broad discretion it has a prosecuting authority. The Council firmly denied that their conduct was in any way wrong – and nothing I say should be taken as suggesting otherwise – but, even taking the Respondents' case on costs at its highest, I consider that this case falls very far short of anything that could properly fall within the category of "unnecessary or improper acts or omissions" as that term is used in section 19 of the 1985 Act.

67. Therefore, I would answer the remaining questions as follows:

Question 3: Effectively, two separate questions are posed. I would respond to them as follows.

Yes: where a prosecuting authority brings an unnecessary test case, then the court can (i.e. has the power to) make an order that the prosecutor pays the costs of the relevant defendant(s); but only where the acts or omissions of the prosecutor are "unnecessary or improper" as that phrase is used in section 19 of the 1985 Act. The Council's conduct in this case fell far short of that very high threshold.

No: if a prosecution is dismissed on the basis of no case to answer, that, in itself, does not mean that the prosecutor had engaged in an act or omission that was "unnecessary or improper" for the purposes of section 19. Each case will depend on its own facts. In this case, the Council's conduct fell far short of the very high section 19 threshold.

Question 4: Yes: the conduct of the Council prior to bringing proceedings was a material factor in the assessment of whether its conduct was "unnecessary or improper" for the purposes of section 19. However, in this case, on any view, the Council's conduct in this case fell far short of the very high section 19 threshold.

68. I would dismiss the Respondent's cross-appeal in respect of costs.

Mr Justice Gilbart :

69. For the reasons set out by my Lord, I agree that both the appeal and cross-appeal should be dismissed.

70. I would wish only to emphasise one point. It is very hard to see how the public interest has been disadvantaged by the arrangement made, or by its operation. The car sent to pick up Mr Platts was a lawfully licensed driver in a vehicle licensed for private hire, and full records were kept as data within the computer system. The fact that the transfer was made and received by a computerised system rather than by a clerk or operator, did not alter the scope of the protection afforded by the SNDC "trinity" in the slightest respect. As was very clear from the documents before the court, all the relevant data about the carriage of Mr Platts were as available to Milton Keynes Council as they were to SNDC.