



Neutral Citation Number: [2022] EWCA Civ 1026

Case No: CA-2021-003449

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT (LORD JUSTICE MALES & MR JUSTICE FRASER)**  
**[2021] EWHC 3290 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/07/2022

**Before :**

**LORD JUSTICE BEAN**  
**LORD JUSTICE SINGH**  
and  
**LORD JUSTICE PHILLIPS**

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**Between :**

**THE QUEEN ON THE APPLICATION OF UNITED  
TRADE ACTION GROUP LIMITED**

**Appellant**

**- and -**

**(1) TRANSPORT FOR LONDON  
(2) TRANSOPCO UK LIMITED**

**Respondents**

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**David Matthias QC and Charles Streeten (instructed by Chiltern Law) for the Appellant**  
**Maya Lester QC and Tim Johnston (instructed by Transport for London Legal) for the**  
**First Respondent**

**Philip Kolvin QC and Ronnie Dennis (instructed by EMW Law LLP) for the Second**  
**Respondent**

Hearing dates : 6-7 July 2022  
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**Approved Judgment**

**Lord Justice Bean :**

1. Transopco UK Ltd, better known by its trading name of FREE NOW, is a licensed operator of private hire vehicles (“PHVs”) which can be booked by prospective passengers using a smartphone app. In this litigation United Trade Action Group Ltd (“UTAG”), a trade association for drivers of taxis (“black cabs”) challenges the lawfulness of the decision of Transport for London (“TfL”) to grant Transopco a London PHV operator’s licence. It may seem extraordinary that the underlying question of law is one of the interpretation of a statute enacted in 1869, before the invention of the telephone or the motorcar, let alone the internet or the smartphone app. Yet that is the issue before us.
2. David Matthias QC for UTAG cited to us a passage in the election manifesto of the present Mayor of London, Sadiq Khan, in 2016:-

*“An iconic taxi service*

As the world’s greatest city it is absolutely right that we have, and continue to have, the best and most qualified cabbies in the world. London’s black taxi drivers are highly trained and properly checked to a high safety standard, driving wheelchair accessible vehicles, with the incredible geographical recall and sense of direction that only those with The Knowledge have. With people like this at the wheel, it’s understandable that the London black cab is an icon known around the world and a source of pride for Londoners.

I will ensure that the markets for licensed taxi drivers and for private hire drivers are fair – with special privileges built in, as they always have been, for those who become a licensed London taxi driver.”

3. Few would quarrel with the proposition that the London black cab is an icon known around the world. But black cabs face increasing competition from app-based PHVs, and their numbers have decreased significantly in the last few years.
4. Both black cabs and PHVs are regulated in London by TfL but under wholly different statutory regimes. PHVs were unregulated in the capital until the passing of the Private Hire Vehicles (London) Act 1998. Black cabs have a far longer established statutory regime. The legal term for a black cab is a hackney carriage: in 1715 the term used was hackney coaches. Section 3 of an Act with the short title of the Hackney Coaches Etc Act 1715 provided that no person “shall presume to stand, ply, or drive for hire with any coach whatsoever” within the cities of London and Westminster or their suburbs, except such persons who were licensed by Commissioners appointed under an earlier statute. After some intervening statutes which I need not set out, the Metropolitan Public Carriage Act 1869 prohibited plying for hire in London except by licensed drivers of licensed hackney carriages. “Hackney carriage” was defined by section 4 of the Act as “any carriage for conveyance of passengers which plies for hire within the limits of this Act” with the exception of stage carriages (the precursors of buses). Section 7 provided:-

“If any unlicensed hackney ... carriage plies for hire, the owner of such carriage shall be liable for a penalty not exceeding £5 for every day which such unlicensed carriage plies...”

5. Until the year 2000 it was the Metropolitan Police Commissioner’s Public Carriage Office which licensed hackney carriages and their drivers. Since that time it has been Transport for London. Section 8(1)-(2) of the 1869 Act, as amended, now reads:-

“(1) Transport for London shall have the function of licensing persons to be drivers of hackney carriages

(2) No hackney carriage shall ply for hire within the limits of this Act unless under the charge of a driver having a licence under this section from Transport for London.”
6. The phrase “plying for hire” in the 1869 Act is not defined. I shall come later to the case law on its interpretation.
7. It is the Appellant’s case that the driver of any London private hire vehicle (“PHV”) providing services via the electronic platform of the Second Respondent, Transopco UK Ltd. commits an offence under s 7 of the 1869 Act. If that is correct, the offence is committed by tens of thousands of drivers of PHVs in London every day, via the FREE NOW platform and also other similar platforms such as those operated by Uber London Limited, Ola and Bolt.
8. On 9 August 2020 TfL granted a London PHV operator’s licence to FREE NOW. UTAG sought judicial review of that decision on two grounds. One was that (as suggested by Lord Leggatt JSC in *Uber BV v Aslam* [2021] ICR 657) the 1998 Act required the passenger’s contract to be with the operator rather than with the driver. On 6 December 2021 the Divisional Court (Males LJ and Fraser J) allowed the judicial review claim to the extent of upholding UTAG’s argument on the operator issue and granting a declaration accordingly. Their decision is reported at [2022] 1 WLR 2043. FREE NOW have changed their *modus operandi* to comply with the law as so declared and have not appealed against the finding.
9. The other ground for judicial review – the “plying for hire issue” - was that FREE NOW’s platform enables and encourages PHV drivers unlawfully to ply for hire; and that as a result Transopco is not a “fit and proper person” to hold a London PHV operator’s licence. The Divisional Court rejected this argument, holding that it was bound to follow its previous decision in *Reading BC v Ali* [2019] 1 WLR 2635 which it regarded as indistinguishable, but granted UTAG permission to appeal. On this appeal UTAG argues that in both *Reading BC v Ali* and the present case the Divisional Court erred in holding that London PHV drivers working from the FREE NOW app were not plying for hire. TfL and Transopco say that both Divisional Court decisions were correct.

#### *The 1998 Act*

10. The regulatory framework for PHVs in London is in the 1998 Act. The framework for most of the rest of England and Wales is in the Local Government (Miscellaneous Provisions) Act 1976 (“the 1976 Act”).

11. The effect of the 1998 Act is that private hire journeys may only be provided by: (i) a licensed London PHV operator (s. 3); (ii) in a licensed London PHV (s. 6); (iii) driven by a licensed London PHV driver (s. 12). Each of those entities must hold a licence from TfL, a requirement often described as the “triple lock”.
12. Section 1(1) of the 1998 Act defines an operator as:

“a person who makes provision for the invitation or acceptance of, or who accepts, private hire bookings”
13. The 1998 Act draws a distinction between the licensing frameworks for PHVs and hackney carriages (s. 1(1):

“private hire vehicle” means a vehicle constructed or adapted to seat fewer than nine passengers which is made available with a driver for hire for the purpose of carrying passengers, other than a licensed taxi or a public service vehicle”
14. A vehicle is being used as a PHV if it is in use in connection with a hiring for the purpose of carrying one or more passengers, or is “immediately available to an operator to carry out a private hire booking”. (s 1(2)). The role of accepting a booking falls to the operator (s 1(3)). It is a criminal offence to “make provision for the invitation or acceptance of, or accept, private hire bookings” without an operator’s licence (s 2(1)).
15. Section 3(3) of the 1998 Act states that TfL shall grant an operator’s licence where it is satisfied that the applicant is a “fit and proper person” to hold a London PHV operator’s licence and any such further requirements as TfL may prescribe are met.
16. UTAG says that FREE NOW is not a fit and proper person to hold a London PHV operator’s licence because its mode of operation involves the commission of a criminal offence by its drivers (plying for hire). Indeed Mr Matthias put his case very high: his argument was that whenever a driver logs on to the FREE NOW app and leaves home he is from that moment committing the offence of plying for hire.

*Cogley v Sherwood*

17. Prior to the era of the smartphone app the leading case on plying for hire was *Cogley v Sherwood* [1959] 2 QB 311, the decision of an exceptionally strong Divisional Court consisting of Lord Parker CJ, Donovan J and Salmon J (the Lord Chief Justice and two future Lords of Appeal in Ordinary).
18. Two individuals were prosecuted for plying for hire at what is now Heathrow airport. Their vehicles were parked at the airport but there was nothing about the vehicles’ appearance, the place where they were parked, or the behaviour of the drivers which suggested that they were for hire. Bookings could only be made via the car hire desk, inside the terminal, which advertised their services.
19. The Court heard detailed argument on the authorities. Lord Parker CJ observed [323] – [324]:

“The court has been referred to a number of cases from 1869 down to the present day dealing with hackney carriages and stage

carriages. Those decisions are not easy to reconcile, and like the justices, with whom I have great sympathy, I have been unable to extract from them a comprehensive and authoritative definition of “plying for hire”. One reason, of course, is that these cases all come before the court on case stated, and the question whether a particular vehicle is plying for hire, being largely one of degree and therefore of fact, has to be approached by considering whether there was evidence to support the justices’ finding.”

20. The first key conclusion in *Cogley v Sherwood* is that, in order to ply for hire, a vehicle must be exhibited: Lord Parker said at [326], “I think it is of the essence of plying for hire that the carriage should be exhibited.” He reached that conclusion following a review of a number of earlier cases – particularly those concerning charabancs and stage carriages – some of which had suggested that it might be possible for a vehicle to ply for hire without being on view. The Lord Chief Justice rejected that suggestion.

21. Donovan J reached the same conclusions, both as to the outcome of the case and as to the requirement that a vehicle be exhibited [329]:

“I am fortified in suggesting a test of exhibition by several considerations. The first is that *there is no decided case where a hackney carriage was held to be plying for hire where it was not exhibited so as to be visible to would-be customers*.... Second, in section 7, the words are “If any unlicensed... carriage plies for hire,” thus indicating that one is to look and see what the vehicle itself is doing, albeit under human agency. I find it very difficult to say that a vehicle which is not exhibited in some way is a vehicle plying for hire.” [emphasis added]

22. Salmon J, also concurring, said at 331:

"But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle."

23. Lord Parker’s second requirement was that the vehicle must be soliciting business from prospective customers: the essence of the offence turns on the specific invitation to the public by the driver of a particular vehicle to be conveyed in it. This was a question of fact and degree: would a customer seeing the vehicle understand that he or she was being offered services for hire by that vehicle directly? Lord Parker held that this was not the case in *Cogley*:

“Here I think it is clear that the cars in question were not exhibited in this sense of the word. As I have said, the only cars that were on view were at one terminal and to the ordinary member of the public they did not appear to be for hire; they appeared merely to be ordinary private cars with private chauffeurs”

24. Donovan J took the same approach. The two vehicles were standing near the terminal but:

“there is certainly no evidence that at either standing there was any notice that the cars, or any of them, were for hire.”... “I do not find it possible to say that a hackney carriage not on view to the public is, when not so on view, plying for hire, particularly when at the same time there is no indication in or around it that it ever does such work.”

25. In *Rose v Welbeck Motors* [1962] 1 WLR 1010 the defendant's unlicensed minicab, a distinctive red Renault Dauphine with the inscription "Welbeck Motors, Minicabs" on its sides and a telephone number and radio aerial on the roof, was parked in a stand in Walthamstow where buses turned round. When a bus wanted to turn around, the driver of the car pulled out of the stand and parked about ten yards away. A licensed taxi driver called the police. When the police arrived and told the driver he was not allowed to be there to ply for hire, he disagreed with them saying he had been there 50 minutes and his control had told him he was allowed to be there. The Divisional Court reversed a finding by justices that there had been no case to answer. Lord Parker CJ said:

“That the vehicle in the present case was on exhibition in the sense that it was on view to the public is undoubted. The real question, as it seems to me, is whether a prima facie case was made out that the vehicle in question was impliedly inviting the public to use it. Whether in any case such a prima facie case is made out must, of course, depend upon the exact circumstances, and I certainly do not intend anything I say in this judgment to apply to any facts other than those here. What are the facts here? One starts with the fact that this vehicle was of a distinctive appearance, regarding its colour, its inscriptions, its equipment in the form of radio communication, and its type. Secondly — and this is equally important — it was standing with the driver at the steering wheel for some fifty minutes in a public place on public view and at a place where buses turned round: in other words, at a place where many members of the public would be getting off the buses and where many members of the public would forgather to board the buses. Moreover, when requested to leave, the driver drove away only to return immediately almost to the same place.”

He expressed the test as being that the vehicle “should while on view expressly or impliedly solicit custom, in the sense of inviting the public to use it.”

### *Reading BC v Ali*

26. Half a century after *Cogley v Sherwood* the case law on plying for hire entered the digital age. In *Reading BC v Ali* [2019] 1 WLR 2635 a PHV driver who had been lawfully parked while waiting for a booking via his smartphone app was prosecuted for plying for hire. Although the statute applicable in Reading was s 45 of the Town Police Clauses Act 1847 and the driver was using the Uber app rather than that of FREE NOW, it is common ground that for present purposes the case is indistinguishable from the

one before us. The Chief Magistrate, SDJ Arbuthnot, had acquitted the driver but stated a case for this court to answer the following questions:

“(1) As a matter of law did the display of the respondent's vehicle as the outline of a car on the smartphone Apps of potential passengers constitute an invitation to book the respondent's vehicle?

(2) As a matter of law did the display of the respondent's vehicle as the outline of a car on the smartphone Apps of potential passengers constitute an invitation to book an Uber vehicle in the vicinity, even if it were not the respondent's?

(3) If the answer to questions (1) or (2) is yes:

(a) Did the Chief Magistrate err in law in holding it to be relevant to whether the respondent was plying for hire, that his vehicle had no distinctive markings, was not at a stand and was not available on the street to pick up passengers in the traditional way? and/or

(b) Did the Chief Magistrate err in law in holding it to be a relevant consideration that the whole of the transaction between the passenger and the driver, and the passenger and the licensed operator, was conducted via a smartphone App, where the booking process starts, is recorded and the fare estimated?

(4) On the facts agreed and found by her, did she err in law in finding that the prosecution had not proved that the respondent was plying for hire?”

This court answered (1) No, (2) No (3) not applicable (4) No.

27. Since the Appellants argue, as they have to do, that *Reading BC v Ali* was wrongly decided, I should set out the relevant paragraphs of the judgment of Flaux LJ (with whom Holgate J agreed) in full, excluding discussion of the “operator” issue on which UTAG have succeeded in the present case:

“33. In my judgment, there was no unlawful plying for hire in this case for a number of reasons. First, the mere depiction of the respondent's vehicle on the Uber App, without either the vehicle or the driver being specifically identified or the customer using the App being able to select that vehicle, is insufficient to establish exhibition of the vehicle in the sense in which that phrase is used by Lord Parker CJ in formulating the two stage test for plying for hire in *Cogley v Sherwood* and *Rose v Welbeck*. That requires not just exhibition of the vehicle but its exhibition expressly or implicitly soliciting custom, inviting members of the public to hire the vehicle.

34. It seems to me that depiction of the vehicle on the App does not involve any exhibition of that kind, but is for the assistance of the Uber customer using the App, who can see that there are vehicles in the vicinity of the type he or she wishes to hire. I agree with Mr Kolvin QC that the App is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years. If I ring a minicab firm and ask for a car to come to my house within five minutes and the operator says "I've got five cars round the corner from you. One of them will be with you in five minutes," there is nothing in that transaction which amounts to plying for hire. As a matter of principle, I do not consider that the position should be different because the use of internet technology avoids the need for the phone call.

35. Second, it does not seem to me that the position is different because, as between Uber and the driver, the latter is a principal and Uber is an agent. Whether this agency analysis is correct has not been finally decided. However, like the Chief Magistrate and contrary to Mr Holland's submissions, I do not consider that it has any bearing on the issue in this case.....

.....

37. Whatever the correct contractual analysis, in my judgment it has no impact on the question we have to decide. On any view, there is a pre-booking by the customer, which is recorded by Uber as PHV operator, before the specific vehicle which will perform the job is identified. This is all in accordance with the transaction being PHV business, not unlawful plying for hire. There was no soliciting by the respondent without some prior booking, as he only proceeded to the pick-up point after the customer had confirmed the booking and the respondent as driver had accepted the job. Whenever any contract was concluded, I have little doubt that this was not plying for hire, because on the facts found in this case, the customer could not use the respondent's car without making a prior booking through the App. As with the charabanc in *Sales v Lake*, the customer would make a booking to be picked up at a pre-arranged point. On the evidence in this case, all the Uber App did was to facilitate that booking.

38. This leads on to the third reason why this was not plying for hire, which is the character of the waiting. The respondent was waiting in his vehicle until a customer confirmed a booking on the Uber App and he accepted that booking. There was no question of his soliciting custom during the period of waiting. His vehicle did not advertise itself as available for hire nor did he do anything which would have suggested to the public that he was available for hire. Indeed, as the Chief Magistrate found, if a member of the public had approached the vehicle and sought a

ride, the respondent would have refused to take such a passenger off the street without a prior booking through the Uber App.

39. The waiting here was of a completely different character to that in *Rose v Welbeck*. Unlike in that case, the respondent was not waiting to solicit custom from passing members of the public, but he was waiting for a private hire booking via the Uber App. Putting the example given by Lord Parker CJ in *Cogley v Sherwood* of what would not be plying for hire into the context of the Uber App, if approached in the street, the respondent would have been saying: 'You cannot have my vehicle, but if you register for the Uber App and make a booking on it, you will be able to get a vehicle, not necessarily mine.'

28. This may be summarised as follows:

- i) Depiction of available vehicles in the form used by the App is not "exhibition". The App simply uses modern technology as a substitute for the operator of a traditional minicab firm, who tell customers on the phone that (eg) we have 5 minicabs in your area and could get you one in 5 minutes.
- ii) The driver using the App is not soliciting custom during the period of waiting; there is nothing on the vehicle advertising that it is for hire and the driver will not allow passengers simply to hail the vehicle and step into it.

#### *The Appellants' submissions*

29. At the heart of the Appellant's submissions is an attempt to challenge the law set out in *Cogley v Sherwood*, in particular the requirement for a vehicle to be "exhibited" in the sense of being physically visible to the public. Mr Matthias relied heavily on *Sales v. Lake* [1922] 1 K.B. 553, a stage carriage case in which Lord Trevethin C.J., expressed the two conditions for a vehicle being found to ply for hire as follows:

"...a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers."

30. Mr Matthias notes that there is no mention of the need for "exhibition" of the vehicle. The skeleton argument submitted by him and Mr Streeten relies also on other cases where the physical visibility of the vehicle was thought not to be essential:

- a) In *Cavill v. Amos* (1900) 64 J.P. 309, Channell J. said that: "In ordinary cases, in order that there should be a plying for hire the carriage itself should be exhibited. It is, however, possible that a man might ply for hire with a carriage without exhibiting it, by going round touting for customers".

- b) *Griffin v Grey Coaches* (1928) 45 TLR 109 concerned stage carriages for which there were extensive advertisements at an office in Brighton. The times of departure of charabancs were advertised, and it was stated that tickets could be purchased at the office up to 10 minutes before the advertised time, but not afterwards. At the time of the purchase of tickets from the office there was no charabanc in the garage, one not arriving to take passengers until 20 minutes later. Lord Hewart C.J., finding that there had been a plying for hire, said of the facts in the case [at 111]: “What is the real difference, apart from mere accidental difference, between that state of affairs and the state of affairs which exists where the driver of the coach, by gesture and words, invites the members of the public to board, and travel upon, a vehicle which they can see? It may be, as has been said, that the particular coach was not appropriated to the particular journey. It was waiting to be appropriated; it was in a proper and convenient place for that purpose.” It is clear from this that the vehicle itself did not need to be visible to the customer to be plying for hire.
- c) In *Gilbert v McKay* [1946] 1 All ER 458, Lord Goddard C.J. held that: “It is quite possible that there can be a plying for hire where [the vehicle] is not exhibited, but where it is being exhibited is a most important fact”, and went on: “There may be cases in which, although the cars were standing in some yard and not actually seen by the public, it might be possible to find that there was a hiring”.

31. The skeleton argument continues:

“Notwithstanding the aforementioned authorities, Lord Parker C.J. proceeded to opine in *Cogley v Sherwood* at 326 that “it is of the essence of plying for hire that a carriage should be exhibited”. There is thus an apparent conflict in the authorities on this point.”

32. Having attempted to cast doubt on *Cogley v Sherwood*, the Appellants move on to *Reading BC v Ali*, which they contend was wrongly decided for several reasons.

- a) First, the Court in *Reading BC v Ali* failed to recognise that *Cogley v Sherwood* did not provide an exhaustive definition of the term “plying for hire”. Nor did the Court properly recognise the effect of the previous decisions, in particular *Sales v Lake*. The Court in *Cogley v Sherwood* did not purport to depart from *Sales v Lake* and its decision should be read as being consistent with that decision. To the extent that there is any conflict between the decisions in *Sales v Lake* and *Cogley v Sherwood*, it is the definition in the former that is to be preferred; it better encapsulates the purpose of the legislation. The narrow approach taken by the court in *Reading BC v Ali* ignores, for example, the fact that touting has always been a form of plying for hire (see, for example, *Cavill v. Amos*).
- b) Second, the Court in *Reading BC v Ali* failed to identify the mischief targeted by the use of the phrase ‘plying for hire’ in the 1869 Act. The

purpose of the legislation is to stop vehicles, other than licensed hackney carriages, from trying to get customers in a public place, by driving around or waiting in a likely place. So called ‘ride hailing’ apps (as they are commonly known) fundamentally conflict with that statutory purpose. They encourage drivers to drive around waiting for an electronic ‘hail’, resulting in significantly increased numbers of vehicles driving the streets looking for passengers. Those vehicles do not meet the stringent regulatory standards demanded of hackney carriages. They make U-turns to reach passengers who have electronically ‘hailed’ them. Their drivers do not have the intimate knowledge of London’s streets required to pass The Knowledge. They are not required to be wheelchair accessible etc.

- c) Third, the Court in *Reading BC v Ali* wrongly regarded the contractual analysis as irrelevant (see para. 37). As *Sales v Lake* makes clear, an essential element of the test for determining whether or not a vehicle is plying for hire is that there is solicitation before any contract for hire is made.
- d) Finally, vehicles working from the Free Now App are “exhibited”, giving that word its natural and ordinary meaning, and indeed using it in the sense it was used in *Cogley v Sherwood*. The very purpose of showing or exhibiting vehicles on the App is to solicit custom. A customer seeking a vehicle will decide which app to use based, at least in part, on whether or not cars are exhibited nearby that will respond to the ‘hail’. The effect of this is to encourage drivers to drive to and cruise the streets in popular and busy areas in search of a fare.

#### *The Respondents’ submissions*

- 33. Mr Kolvin, for Transopco, pointed out that there is no allegation in this case that the triple lock was not in place, nor that the drivers using the FREE NOW app or their vehicles were breaching their respective licences; nor that the vehicles could be mistaken for black cabs. Transopco is a licensed PHV operator, using licensed PHVs and licensed PHV drivers to fulfil bookings. Drivers do not carry passengers unless they have booked through the app. Therefore, drivers are behaving lawfully under the statutory regime for London PHVs. There is no contention otherwise.
- 34. Accordingly, UTAG’s case has to be that perfectly lawful conduct under private hire legislation is simultaneously criminal conduct under hackney carriage legislation. He submits that UTAG has, in the absence of any of the usual indicators of plying for hire, advanced its case on two main footings: that drivers drive towards areas of demand in the hope of bookings (solicitation) and that an anonymised outline of vehicles is shown on the app (exhibition).
- 35. As to the first, Mr Kolvin observes that no legislation or case law requires drivers to dematerialise between bookings. There are no “super sheds” for their accommodation while awaiting bookings. They have the same right to use the highway as any other driver, and are limited by the same restrictions such as not being able to park in violation of parking control. If their day starts or a journey ends in an unpopulated spot, nothing

compels them to remain there while drivers nearer the centre of demand are allocated to passengers.

36. As to the second, formerly, a passenger might have telephoned a private hire operator and stated: "I am outside the cinema. Do you have any cars nearby to pick me up?" The operator might have replied "Yes, we have one at the end of the High Street just 5 minutes away." With developing technology, this information can now be conveyed to the customer quickly and graphically by showing anonymised symbols depicting the location of vehicles. Indeed, it would be no different from the app stating in text format: "your nearest vehicle is 5 minutes away". That it is shown graphically rather than textually does not convert the communication of information leading to a lawful private hire booking into an unlawful plying for hire.
37. The Appellant's contention is that telling the customer through the use of technology approximately how long it is likely to take for a vehicle to arrive converts the lawful activity of awaiting a private hire booking into the unlawful activity of plying for hire. This offends common sense. The lead-in time may be shorter, which benefits the consumer, but it remains a pre-booking process. It certainly does not amount, factually or legally, to plying for hire, which is doing that which only hackney carriages are permitted to do, i.e. soliciting or waiting to admit a member of the public without pre-booking.
38. Further, even if there were room for an argument that virtual exhibition could be akin to touting, this would not carry the Appellants to their destination, since it overlooks the important points that: a) any "exhibition" in this case is anonymous; b) the customer cannot walk up and step into the vehicle; c) the vehicle "exhibited" cannot be specifically booked; d) the vehicle "exhibited" may not even be available, if the driver chooses not to carry out the booking; and e) any booking is a lawful booking of a licensed PHV with a licensed PHV driver through a licensed PHV operator. There is, in short, no attempt to induce the customer to walk up to the vehicle and hire it without a pre-booking.
39. We asked whether FREE NOW drivers have the choice of whether to accept the prospective ride once the app informs them of the passenger's destination. Mr Kolvin told us that they do, although that had not been the case until about two years ago.
40. Ms Lester QC, for TfL supported the submissions made by Mr Kolvin. She emphasised that the sequence of events for a FREE NOW booking is as follows:
  - (1) Passenger opens app and sees a display of (say) 5 vehicles in the area;
  - (2) Passenger click "order ride now". At this stage Transopco, as operator, has accepted the booking pursuant to s 2 of the 1998 Act;
  - (3) Transopco send the job to drivers in the area to see whether one of them would like to take it.
  - (4) If a driver does accept the job, then and only then are the vehicle and driver identified to the passenger.

41. In answer to a question from Singh LJ, Ms Lester agreed that if at stage (1) the app identified the vehicle to the passenger and enabled him or her to book direct with the driver, or to step into the vehicle without any prior booking, that would be plying for hire.

### *Discussion*

42. The Appellants argue that as a matter of ordinary language a vehicle plies for hire if it “drives around or parks in a public place waiting for someone to hire it.” That cannot possibly be enough. Such a test would criminalise almost the entire PHV industry, except perhaps one-person operators working from home; and would mean that the careful provision made by Parliament for regulation of PHVs in London (under the 1998 Act) was contradicted by a phrase in the 1869 statute dealing with hackney carriages. The Appellants have to go further and show that the tests of exhibition and solicitation laid down in 1959 in *Cogley v Sherwood* are made out.
43. I agree with what Lord Parker CJ said in *Cogley* about the previous authorities. None of them is binding on this court; and, with respect to Mr Matthias, I do not think it is a useful exercise to consider what various judges said (often *obiter*) about charabancs or stage carriages in the previous cases which were comprehensively reviewed in *Cogley*. And while I admire his tenacity in arguing that *Sales v Lake* is somehow to be preferred to *Cogley*, that submission is valiant to the point of desperation. Firstly, *Sales v Lake* was a 1922 case about a stage carriage, not a hackney carriage. Secondly, it is a very rare example of a reported decision of Lord Trevethin CJ, who cannot be said to be an authority of equal standing to Lord Parker CJ, nor anywhere near it. Thirdly, it was one of the cases carefully reviewed by the Divisional Court in *Cogley* and found not to offer useful guidance.
44. Lord Parker’s conclusion that “there is no decided case where a hackney carriage was held to be plying for hire where it was not exhibited so as to be visible to would-be customers” is in my view correct. The two-stage test of exhibition of the vehicle and solicitation of passengers is clear and intelligible and has stood the test of time. If it is still necessary for *Cogley v Sherwood* to be approved in this court, I would approve it.
45. I agree with the Divisional Court in *Reading BC v Ali* that plying for hire requires a vehicle to be not just exhibited or on view but, while exhibited, to be soliciting custom in the sense of inviting members of the public to hire it without a prior contract. I do not consider that drivers of PHVs using the FREE NOW app can be said to be plying for hire. Neither the “exhibition” nor the “solicitation” element of the test is satisfied.
46. As to the element of exhibiting the vehicle, I do not consider that the depiction of the vehicle and others as rectangular blobs on the passenger/s smartphone screen amounts to exhibiting. The passenger is not being given any details that would identify a vehicle and no means of finding it or contacting it directly. The individual vehicles depicted on the screen are neither “visible” nor “on view” in any real sense. I agree with Mr Matthias that the case would be the same if, instead of being shown a map of the area with a number of blobs representing cars, the customer was simply told by an on-screen message “there are five cars currently available within five minutes of where you are waiting”. But that would not be exhibition either. Like Flaux LJ in the *Reading* case, I accept that the case is no different from that of the traditional minicab firm which takes phone calls from prospective customers and where the operator tells them “we have

five cars within five minutes of you”. All that the FREE NOW app does is to speed up that process.

47. The Appellants’ case is similarly unpersuasive on the issue of solicitation. I cannot accept Mr Matthias’ submission that a PHV or its driver solicits business simply by driving towards (or remaining in) an area of high demand. This would lead to the startling conclusion that the PHV industry has involved inherent criminality for many years, well before the introduction of ride-hailing apps. Moreover, as Mr Kolvin rightly pointed out, PHV drivers cannot dematerialise or disappear between one ride and the next.
48. Once mere presence in an area is rejected as a form of solicitation there is nothing else the FREE NOW driver is doing which amounts to the solicitation of any prospective passenger to take a ride in the car without having previously booked through the operator. There is nothing on the vehicle to indicate that it is a FREE NOW PHV. FREE NOW drivers do not queue at taxi ranks (that being the exclusive privilege of black cab drivers); nor do they solicit passers by to step into the vehicle and reach an agreement on the spot. Since FREE NOW drivers in London do not exhibit a contact telephone number on the vehicle we do not have to consider whether that might make a difference.
49. In my view *Reading BC v Ali* was correctly decided. For these reasons and those given by Singh LJ, with which I entirely agree, I would dismiss UTAG’s appeal against the substantive decision of the Divisional Court on the plying for hire issue

#### *Costs*

50. UTAG also seek permission to appeal against the decision of the Divisional Court to make no order for costs. Mr Matthias argues that having succeeded (albeit only on one of two issues) in establishing that Free Now was operating in an illegal manner UTAG should have been awarded either all their costs or a substantial proportion of them.
51. In refusing permission to appeal on the issue of costs the Divisional Court noted that there had been two issues under judicial review, (1) the operator issue and (2) the plying for hire issue. UTAG succeeded on the first issue, which overlapped completely with the part 8 claim where all parties (including Uber London Ltd and the App Drivers and Couriers Union, neither of which was a party in the judicial review) had agreed to bear their own costs. It lost on the second issue. In those circumstances the court took the view that these issues “cancelled each other out” and that it was appropriate to make no order for the costs of the judicial review. Like Singh LJ, I consider that this was an unappealable exercise of discretion and discloses no error of principle. I would refuse permission to appeal on the issue of costs.

#### **Lord Justice Singh**

52. I agree that this appeal should be dismissed for the reasons given by Lord Justice Bean. I add a few words of my own because the issue of principle in this case has not previously been considered by this Court. It seems to me that the essential principle was summarised in *Cogley v Sherwood* [1959] 2 QB 311, at 331, by Salmon J:

“But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle

and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle.”

53. As Mr Kolvin pointed out before us, it was always possible, even in 1869, for a person to hire a private vehicle (to use modern terminology) which would not be plying for hire. At that time, there were carriages with horses and drivers available for hire from a “jobmaster”. There were stables where such carriages and horses were kept. But the essential difference between such a hire and plying for hire by a hackney carriage was that a pre-booking had to be made. The coming of the motor car did not change this conceptual distinction, as the facts of *Cogley* themselves illustrate. The facts of *Cogley* also illustrate the point that it has for a long time been possible to go to an office (there a desk at the airport terminal) and make a booking physically for the hire of a vehicle. The subsequent widespread availability of telephones in the 20th century made it unnecessary to make a booking physically. Towards the end of the 20th century the mobile phone meant that a person could make a telephone booking even from the street. In the 21st century the advent of the smartphone has meant that, instead of having to make a telephone call, a person can use an app and almost instantaneously book a private hire vehicle.
54. Crucially, however, although these technological developments have reduced the amount of time needed to book a hire vehicle, they have not, in my opinion, obliterated the conceptual distinction between the need for such a booking and plying for hire, where there is no need for a prior booking. As Salmon J said in *Cogley*, a member of the public can simply step into the vehicle and the driver will be expected to take them to their destination. If, in the circumstances of the present case, a member of the public stepped into a vehicle, the driver would not simply drive them to their destination. They would point out that they had not been booked on the relevant app and would (no doubt politely) ask the member of the public to leave their vehicle. In the circumstances of this case, therefore, I agree with Bean LJ that there was no plying for hire.
55. I turn briefly to the issue of costs. I agree with Bean LJ that permission to appeal against the costs order should be refused. I would accept the distinction which was suggested by Mr Kolvin, between a claim for judicial review where there is a single decision which is challenged on more than one ground; and a case in which there are in substance two entirely different issues to be determined. In the former case, although costs decisions are always within the discretion of the court, it would not be surprising if the court decided that, if the resulting decision has been held to be unlawful, it does not matter that not all of the grounds of challenge have succeeded. In such a case the court might well award at least part of the costs to the claimant and, depending on the circumstances, might even award the whole of the costs even though the claimant has not succeeded on every point. That situation, however, is to be contrasted with the present, where there were two entirely separate issues which the Divisional Court had to decide. As Bean LJ has pointed out, the outcome on those two issues was different. The claimant succeeded on one; the defendant succeeded on the other. The court was therefore entitled, in the exercise of its discretion, to take the view that the outcomes had in effect cancelled each other out and that there should be no order as to costs.

### **Lord Justice Phillips**

56. I agree with both judgments.