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BINDMANS LLP

APPENDIX I

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BINDMANS LLP



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Dear Ms Comstive

Proposed claim for judicial review by Allied Vehicles Ltd

We act for the proposed claimant in this matter, Allied Vehicles Limited of 230 Balmore Road, Glasgow, G22 6LJ, which also trades as 'Cab Direct'. Our client manufactures the Peugeot E7 taxi.

On 26 November 2009, the Licensing Committee ('the Committee') of Blackburn with Darwen Borough Council ('the Council') met to review recommendations it had decided to make on 1 October 2009 for the approval of the E7 for use as a hackney carriage locally. It decided to do so in response to a drivers' petition opposing the E7.

The outcome of the 26 November 2009 meeting was, in effect, to reverse the earlier decision and withdraw the existing recommendations. The meeting is reported in this way in the taxi press:

"...about 50 Hackney drivers came to the town hall on Thursday night to protest against the new vehicles, known as Eurocabs..."

After a long debate, the committee recommended the Peugeots were not granted licenses. The final decision will be made by Tory executive member Alan Cottam.

Committee chair Sajid Ali said: 'We voted to stick with the black cabs. It's what the drivers wanted.' Labour committee member Jim Smith added: 'It was chaos at the meeting!'

See further: <http://taxi-driver.co.uk/phpBB2/viewtopic.php?t=12952>

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We have considered this report and accounts given to our client alongside the documents that were before the Committee. We have advised that its decision is unlawful and amenable to challenge by way of a judicial review claim, that there are ongoing unlawful failures on the Council's part to discharge legal duties to which it is subject and that our client is entitled to seek damages for those that relate to breach of EU law in line with the principles in *Francovich v. Italian Republic* [1991] ECR I-5357 and *Brasserie du Pêcheur / Factortame (No. 4)* [1996] QB 404.

This letter is written in accordance with the Judicial Review Pre Action Protocol and April 2009 Practice Direction on Pre Action Conduct with which you will be familiar. It is intended to give the Council an opportunity to reconsider its position expeditiously and, having done so, to agree to reinstate the recommendations and promptly determine the question of whether the E7 should be licensed in a lawful manner. We see no reason why that cannot happen before Christmas.

If the Council is unwilling to do so then, in line with the protocol, it should set out its response to each of the grounds of the proposed claim and provide the information and documents requested below. Either way, we require a full response no later than 18 December 2009. Absent one, we are instructed to file a judicial review claim on our clients' behalf immediately thereafter.

Our client trusts such a claim will not be necessary; the legal position is very clear. Once the Licensing Committee's members have been properly advised by you, we are confident a lawful decision will be made; as foreshadowed by that of 1 October 2009.

The details of the legal advisers, if any, dealing with this; their reference details; address for reply and service of court documents

Our details are given on the letterhead above. This matter is being dealt with by John Halford, a Partner in the Public Law and Human Rights Department under reference "JHL". Please advise us whether you will be using external legal advisors and, if so, of their identity.

The details of the matter being challenged

These are:

1. the ongoing unlawful breach of Article 28 EC by the maintenance of a licensing policy which amounts to an unlawful import restriction;
2. the ongoing unlawful breach of the Disability Discrimination Act 1995 ('the DDA') by failing to have due regard to the statutory imperatives listed in section 49A; and
3. the decision of 26 November 2009 which breaches section 21E DDA along with public law standards of rationality and fairness.

Factual background

The Council's hackney carriage licensing policy is based on the London Public Carriage Office's Conditions of Fitness. They prescribe that hackney carriages must have a turning circle (with the steering at full lock) which is tighter than that of the E7 taxi. This requirement dates back to the days of horse drawn Hackney carriages. Besides London, it is remains part of the hackney cab licensing policies in a tiny number of authorities in the UK. Most authorities, including large cities and towns such as Birmingham, Edinburgh, Glasgow and now Liverpool have abandoned it and now license the E7. No issues as to safety have arisen as a result. On the contrary, many drivers prefer the E7 as do many passengers. The taxi is especially popular with wheelchair users because it has a larger internal floor area, allowing virtually all models of wheelchair to be turned and safely secured and more room for other passengers.

The E7's base is manufactured in France and imported into the UK by our client. It then further adapts the vehicle for specialist use as a hackney cab and sells or leases it to drivers in authorities that license it. In those that do not, there is a near monopoly enjoyed by our client's UK based competitor, London Taxis International.

Turning to Blackburn, in March 2009 the Council's Executive Member, Mr Cottam, reviewed its licensing policy and decided to maintain it. His reasons for doing so are obscure and we seek information about them below.

On 17 September 2009, the Council's officers (entirely appropriately) advised the Licensing Committee that this decision had to be revisited in the light of a judicial review ruling in the test case *R (on the application of (1) Alma Lunt (2) Allied Vehicles Ltd) v Liverpool City Council (Defendant) and Equalities & Human Rights Commission (Intervener)* [2009] EWHC 2356 (Admin) ("*Lunt*").

On 1 October, the Committee decided to make the recommendations mentioned above, most significantly that the Council should:

"... amend existing policy in line with findings of High Court ruling at Liverpool Council [sic], which would allow alternative purpose built vehicles (Peugeot E7)."

For reasons that are also obscure, several weeks passed without a decision being made on these recommendations.

It appears, however, that a group of drivers banded together to protest about this decision and the Licensing Committee decided to reconvene to hear more of what they had to say. This led directly to the 26 November 2009 decision. It was not the course recommended by officers. They simply proposed that the objections be noted and that the petition be included with the material to be considered by Mr Cottam when he came to make his decision.

It is worth noting that the officers' report for the 26 November 2009 meeting offers no justification for the effects of maintaining the current licensing policy in terms of Article 30 EC or the DDA. Nor does it record there having been any impact assessment of those effects upon disabled persons for DDA purposes. The report makes no mention of consultation with our client or with disabled people locally either (indeed there was none).

In relation to this last point, we draw your attention to the Council's emphatic commitment to undertake proper equality impact assessments when making policy decisions such as these. Its current Disability Equalities Policy states at pages 15-16:

"At the Blackburn with Darwen Council we need to understand whether our services are meeting everyone's needs and that people who need our services have access to them. To help us to do this we carry out an Equality Impact Assessment..

The Borough Council has been carrying out Equality Impact Assessments on a number of policies and services since 2004. Assessments will be carried out on new policies and services, as they are developed and over time on all other existing policies and services."

Our client was not informed by the Council about the 26 November 2009 meeting in advance or afterwards. It learned of the decision through the press report quoted above.

Legal framework

Hackney cab licensing powers

Under Part II of the Local Government (Miscellaneous Provisions) Act 1976 each vehicle operating as a hackney carriage outside London must be licensed as such by the responsible local authority. Subsections 47(1) and (2) provide as follows:

"Licensing of hackney carriages

(1) A district council may attach to the grant of a licence of a hackney carriage under the Act of 1847 such conditions as the district council may consider reasonably necessary.

(2) Without prejudice to the generality of the foregoing subsection, a district council may require any hackney carriage licensed by them under the Act of 1847 to be of such design or appearance or bear such distinguishing marks as shall clearly identify it as a hackney carriage."

The "Act of 1847" is the Town and Police Clauses Act of that year which defines "hackney carriage" in this way at section 38:

"Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the prescribed distance, having thereon any numbered plate required by

this or the special Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise the term "hackney carriage" shall be sufficient to describe any such carriage: provided always, that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law to be placed on such stage coaches, shall be deemed to be a hackney carriage within the meaning of this Act."

to which section 37 of the 1847 Act adds:

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

These discretionary powers which local authorities have to grant or refuse licenses and to impose conditions must be exercised subject to the constraints of EU law, domestic statute and public law principles

EU law

Taking these in turn, where a measure hinders intra-Community trade, it is unlawful under Article 28 EC unless it can be cogently justified by reference to the conditions set out in Article 30 EC or the mandatory requirements referred to in the case law of the European Court of Justice on free movement of goods (see Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837 at para. 5; Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* ("Cassis de Dijon") [1979] ECR 649, at para. 8).

The burden of proving that the measure in question serves an objectively justifiable goal and is proportionate falls on the Member State (in this case the Council).

The DDA

As to domestic statutory constraints, the DDA (as amended by the 2005 Act) provides as follows:

"21B Discrimination by public authorities

(1) it is unlawful for a public authority to discriminate against a disabled person in carrying out its functions..."

It continues:

"(2) For the purposes of section 21B(1), a public authority also discriminates against a disabled person if—

(a) It fails to comply with a duty imposed on it by section 21E in circumstances in which the effect of that failure is to make it—

(i) impossible or unreasonably difficult for the disabled person to receive any benefit that is or may be conferred, or

(ii) unreasonably adverse for the disabled person to experience being subjected to any detriment to which a person is or may be subjected,

by the carrying-out of a function by the authority; and

(b) it cannot show that its failure to comply with that duty is justified under subsection (3), (5) or (7)(c)...

21E Duties for purposes of section 21D(2) to make adjustments]

(1) Subsection (2) applies where a public authority has a practice, policy or procedure which makes it—

(a) impossible or unreasonably difficult for disabled persons to receive any benefit that is or may be conferred, or

(b) unreasonably adverse for disabled persons to experience being subjected to any detriment to which a person is or may be subjected,

by the carrying-out of a function by the authority.

(2) It is the duty of the authority to take such steps as it is reasonable, in all the circumstances of the case, for the authority to have to take in order to change that practice, policy or procedure so that it no longer has that effect."

It follows that, when exercising their discretion on licensing matters, local authorities will act unlawfully by failing to discharge the section 21E reasonable adjustments duty where it arises. In *Lunt*, the trial judge, Blake J, laid down a six step test to be applied to determine whether this duty should be discharged by making the adjustment sought:

- "1. Did the [authority] have a practice policy or procedure?
2. Did that practice policy or procedure make it impossible or unreasonably difficult for disabled persons to receive any benefit that is, or may be, conferred by the [authority]?
3. If so, is it under a duty to take such steps as is reasonable in all the circumstances of the case for it to change that practice policy and procedure so it no longer has that effect?
4. Has the [authority] failed to comply with its duty to take such steps?

5. If so, is the effect of that failure such as to make it unreasonably difficult for [a disabled person] to access such benefit?

6. If so, can the [authority] show that its failure to comply is justified in that either

a). it reasonably holds an opinion that the non-compliance is necessary in order not to endanger the health or safety of any other person; or

b). its failure is justified as a proportionate means of achieving another legitimate aim?"

Referring to Sedley LJ in *Roads v Central Trains* [2004] EWCA Civ 1541, the judge confirmed that the duty to make reasonable adjustments to the taxi licensing policy was:

"not...a minimal duty, but seeks broadly to put the disabled person as far as reasonably practicable in a similar position to the ambulant user of a taxi".

Considerations to which regard must be given when exercising discretionary licensing powers include those that Parliament has made relevant by statute, including those listed under Section 49A DDA. That provides:-

"49A General duty

Every public authority shall in carrying out its functions have due regard to:-

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons that is related to their disabilities;

(c) the need to promote equality of opportunity between disabled persons and other persons;

(d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;

(e) the need to promote positive attitudes towards disabled persons; and

(f) the need to encourage participation by disabled persons in public life."

We refer to these listed needs as the 'statutory imperatives' below.

Public law standards

Licensing authorities must act rationally and fairly (a requirement that is especially important as they are quasi judicial bodies). Fairness requires that a person or body that may be deprived of a benefit they enjoy as a result of an administrative decision should have (at a minimum) the opportunity to make representations which are taken conscientiously into account by the decision maker before the decision is made. It also requires the decision maker to inform them of the 'case against' their retention of the benefit so that those representations can be informed and meaningful.

The issues in this case

The interplay between these legal provisions was directly in issue in the *Lunt* case. This was brought by Mrs Lunt (a wheelchair user who, like many others, cannot travel safely in a vehicle that does meet the London Conditions of Fitness because her wheelchair cannot be turned and secured) and by Allied. We acted for both claimants. The Equalities and Human Rights Commission intervened to make submissions of law and to explain its policy position on the application of the section 21E reasonable adjustments duty to questions of hackney cab licensing (which is that a reasonable adjustment by way of licensing the E7 is required at law).

The claimants firstly argued that the Liverpool's decision refusing to license the E7 was unlawful because the licensing policy was contrary to Article 28 EC as a restriction on the free movement of goods. There was, they argued, no justification under Article 30 for that restriction as there was no evidence that the turning circle materially promoted public safety.

Blake J agreed. He directed the Council to give weight to the emails Allied had collected from other authorities:

"indicating that no safety concerns arose regarding the E7 either as regards sliding doors, turning circle or anything else"

and the "cogent" Edinburgh report (para. 51).

He added that he had:

"great difficulty in seeing how descent from a commercial vehicle designed to carry people which has a sliding door can be said to represent a safety issue given the scale of the use of such vehicles in London and elsewhere as private hire vehicles precisely for that purpose" (para. 81(ii)).

He found that that the fact that the E7 is used as a public hire taxi extensively in the UK without reported incident "is a compelling source of relevant evidence that would have to be addressed", that it was

"particularly notable that no concerns have been reported in Liverpool itself resulting from the dropping off of passengers by E7 vehicles licensed in neighbouring authorities"

and that "the practice and experience of other authorities over a reasonable period of time cannot be ignored" (paras. 81(iii), (iv)).

He also noted that while the turning circle may be:

"useful for the avoidance of three point turns in narrow streets where someone seeks to specifically hail a passing taxi... where a particular assessment has been made as to the safety consideration of this issue, as it has in the Edinburgh study, the Liverpool Council would have to consider whether it has a cogent basis for disagreeing with such evidence and why".

Secondly, the claimants argued that, despite the existence of an impact assessment, Liverpool had failed to discharge its statutory duty under section 49A DDA to have due regard to the need to promote equality of opportunity for disabled persons and to encourage their participation in public life.

Blake J agreed that this was also correct: the Council had failed to appreciate the impact of maintaining the current licensing policy not only on users of larger wheelchairs such as Mrs Lunt, but also on those that could be turned and secured with difficulty. The evidence (which was not confined to circumstances in Liverpool) established there are

"serious difficulties for a class of wheelchair users" and "of that class there are some, like Mrs Lunt, who could not access the safe and secure position at all" (para. 60).

Thirdly, the claimants argued that Liverpool had failed to comply with its duty under section 21E(2) DDA to take reasonable steps to ensure that its taxi licensing policy did not make it impossible or unreasonably difficult for disabled people to receive the benefit intended to be conferred (access to hackney cabs). Applying the six step test, Blake J again agreed (paras. 60 and 81(v)).

Blake J also found that the decision was based on a material error of fact as to the safety and accessibility of current fleet vehicles. He ordered that the decision be reconsidered and awarded costs.

Liverpool reconsidered, ironically on the same day as Blackburn with Darwen Borough Council's own Licensing Committee met. However, Liverpool's Licensing Committee licensed the E7 by a unanimous resolution. Two days earlier, Norwich City Council's Regulatory Committee made an identical decision. It had originally been challenged alongside Liverpool, but the proceedings were settled when it agreed to reconsider on acceptable terms.

The legal position following *Lunt* is straightforward. In each licensing authority that continues to base its policy on the Conditions of Fitness, there is a restriction on imports and disability discrimination in the form

of a failure to make a reasonable adjustment. Both call for justification (by the authority itself) and absent that justification, or proportionality, there will be an ongoing, unlawful failure to comply with Article 28 EC and section 21E of the DDA.

An authority contemplating maintaining a licensing policy based on the Conditions of Fitness must ask itself:

1. Is a refusal to license the E7 taxi justified by cogent evidence demonstrating a legitimate public safety concern, and strictly limited to what is necessary to achieve the legitimate aim of protecting public health?; and
2. does the evidence on safety similarly justify - on the same basis - a failure to make a "reasonable adjustment" to the taxi licensing policy by approving the E7, in order to avoid continuing unlawful discrimination contrary to sections 21B-21E DDA?

Where there is no evidence before the authority that would enable it to answer both questions positively, the only legal option is to approve the E7 immediately. Matters such as the convenience of the turning circle and drivers' views or financial interests are legally irrelevant and to take account of them is irrational because, as a matter of law, they can never justify a restriction on the free movement of goods, or disability discrimination.

It is not lawful for authorities to deliberately seek to, or by default, evade EU law. Similarly, authorities are subject to an ongoing duty to discharge section 49A DDA. They must do so by having meaningful due regard to each of the listed statutory imperatives and, where adverse impact is identified, considering how it might be mitigated: see *R (Eisai) v National Institute for Clinical Excellence & Others* [2007] EWHC (Admin) 1941 at [92].

Authorities cannot, then, simply await a licensing application or request to amend their policies before they grapple with the consequences of *Lunt*.

When an authority has, like the Council here, committed itself to undertaking impact assessments when discharging its section 49A duty, its failure to do so will amount to a free standing legal error: see *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC Admin 2026 at [27].

Returning to the events of 26 November 2009, plainly the Council's Licensing Committee erred in law and there are ongoing failures to comply with Article 28 EC and the DDA.

First, the Licensing Committee's decision was based wholly on a factor of no legal relevance, "what the drivers wanted", according to the Chair.

Second, the Committee did not focus on what was relevant, whether there was any evidence demonstrating a legitimate public safety concern that could amount to a justification for Article 30 EC and section 21E DDA purposes. Had it done so it could only have concluded (as did Liverpool and Norwich that same week) that there was none. Having done that the only lawful course was to recommend immediate licensing of the E7, a recommendation Mr Cottam should have acted on immediately.

Third, the Committee ought to have had before it an assessment to enable it to discharge its section 49A duties, it did not.

Fourth, disabled people ought to have been consulted locally to inform that assessment. They were not. If the report is accurate, disabled people's interests were treated either as an irrelevance or possibly even with contempt. That is unacceptable.

Fifth, our client ought to have been given notice of the meeting and the opportunity to make representations about being potentially deprived of the benefit of the recommendations of 1 October 2009, it was not.

The details of the action that you, the proposed defendant, are being asked to take

Undertake to:

1. reconvene the Licensing Committee urgently to reconsider its position;
2. provide proper advice in line with the points made above;
3. arrange to canvass the views of disabled people; and
4. arrange for Mr Cottam to promptly determine the question of whether the E7 should be licensed in a lawful manner.

The details of any interested parties

Disabled people unable to safely use current fleet vehicles are interested parties to this claim in our view. We intend to publicise the fact of the proposed claim in the press and through:

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so that those who may wish to participate may do so.

Details of any information sought and documents that are requested as relevant and necessary

You are asked to address the following questions requests using the enumeration below. Where you are unable or unwilling to do so, please say so in terms and give full reasons.

Please:

1. provide Mr Cottam's reasons for the 27 March 2009 decision along with any contemporaneous record of those reasons and copies of documents taken into account by him in reaching it;
2. explain why no action was taken to implement the recommendations made on 1 October 2009;
3. provide the Licensing Committee's reasons for its 1 October and 26 November 2009 decisions along with any contemporaneous record of those reasons and copies of documents taken into account by them;
4. explain why there was no consultation with Allied or disabled people and their representatives before making the decision of 1 October 2009;
5. explain why there was no disability equality impact assessment prepared to inform the 27 March, 1 October and 26 November 2009 decisions; and
6. provide any record made of the proceedings of the 26 November 2009 meeting (whether electronic, or officers' manuscript notes transcribed if they are not easily legible).

Reply date / concluding remarks

Please acknowledge receipt of this letter by return. We look forward to hearing from you substantively by close on 18 December 2009.

Yours faithfully

BINDMANS LLP