# Insight 190

from Horwich Farrelly's Large & Complex Injury Group

# WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on two Supreme Court cases relating to:

- The jurisdiction of the court over claims in tort involving a defendant foreign company
- The classification of "workers" in the UK

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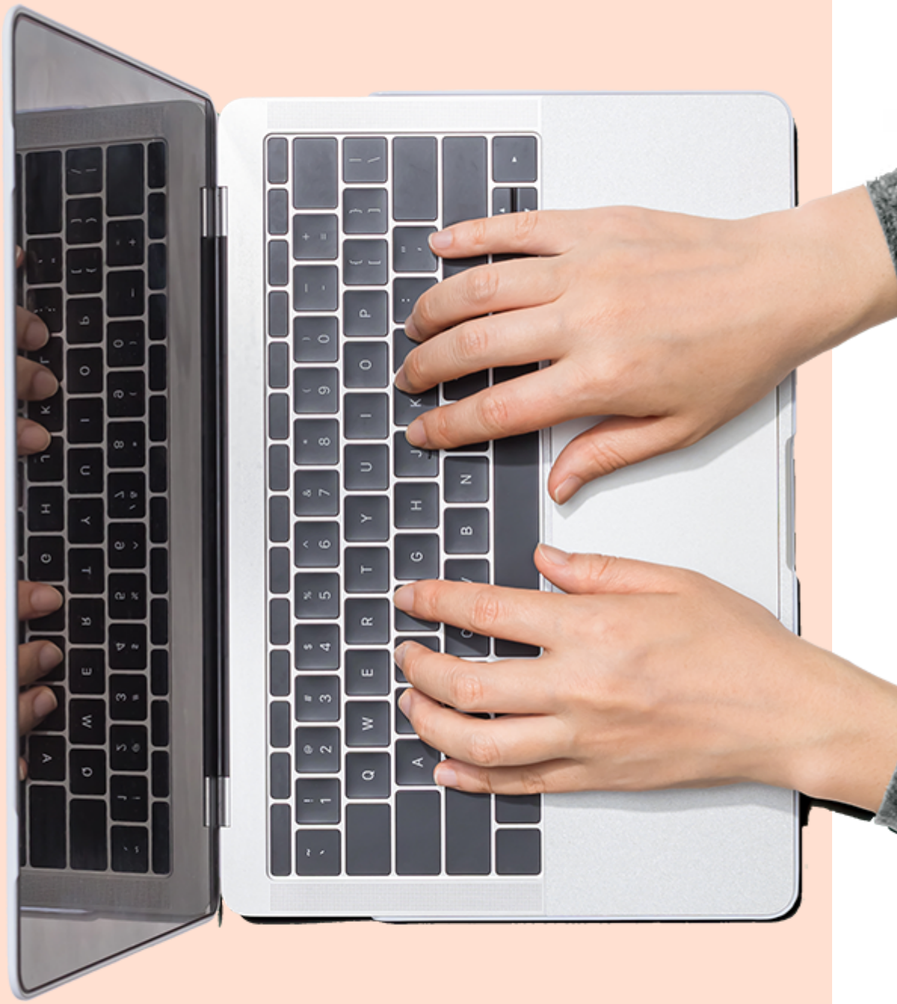


# Fuel for thought

## Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3

### Introduction

The UK Supreme Court has unanimously overturned both the Court of Appeal and the High Court in permitting a claim brought on behalf of over 40,000 individuals living in Rivers State, Nigeria against Royal Dutch Shell Plc and its Nigerian subsidiary, The Shell Petroleum Company of Nigeria Limited, for significant environmental and economic damage. The claims will now proceed to full trial in the High Court.

A similar issue was addressed in the Supreme Court decision of *Lungowe v Vedanta Resources plc [2019] UKSC 2*, which is very relevant to both the procedural and the substantive issues raised on this appeal. The case is the first to be heard by the court on the question of duties of care owed by UK domiciled parent companies for the actions of its foreign subsidiary since *Vedanta*.

### Facts

The claimants (approximately 40,000 members of the Ogale farming and fishing community and 2,335 individuals who live in the Bille Kingdom in Rivers State, Nigeria) allege that numerous oil spills have occurred from oil pipelines and associated infrastructure operated in the vicinity of the claimants' communities. These oil spills are said to have caused (and continue to cause) widespread environmental damage, including serious water and ground contamination, and have rendered natural water sources in the region unusable.

The claimants allege that the oil spills were caused by the negligence of the Nigerian subsidiary of Royal Dutch Shell Plc (RDS), the Shell Petroleum Development Company of Nigeria Limited (SPDC), which operated the pipelines and infrastructure on behalf of a joint

venture between it, the state-owned Nigerian National Petroleum Corporation, Total E&P Nigeria Ltd and Nigerian Agip Oil Company.

**Procedural position**

The claimants issued proceedings in England in 2016 against RDS on the basis that it owed them a common law duty of care, and at the same time they sought permission to serve the claim on SPDC out of the jurisdiction.

Permission was initially granted by the High Court, and then challenged by SPDC leading to a hearing before Mr Justice Fraser. Fraser J delivered judgment in January 2017 in which he held that whilst the court did have jurisdiction to hear the claims against RDS, no reasonably arguable case had been put forward by the claimants.

The claimants appealed and the court of appeal issued a majority judgment (Simon LJ and Chancellor Vos, with Sales LJ (as he then was) dissenting) upholding the High Court's decision in February 2018. Permission to appeal to the Supreme Court was given but only after the Supreme Court's hearing of *Vedanta*. The Supreme Court hearing took place in June 2020 and the reserved judgment was handed down on 12 February 2021.

This appeal raises two principal issues:

(i) whether the court of appeal materially erred in law; and

(ii) if so, whether the majority was wrong to decide that there was no real issue to be tried.

**Judgment**

The Supreme Court allowed the appeal. Lord Hamblen gave the lead judgment, with which Lord Hodge, Lady Black and Lord Briggs agreed. The issues were addressed as follows:

**Proportionality**

Although not one of the principal issues, the importance of proportionality in relation to the jurisdiction issues, as previously emphasised in *Vedanta* was reinforced. The court took the view that the analytical focus should be on the particulars of claim, or witness statement setting out the details of the claim, and whether, assuming the facts alleged are true, the cause of action asserted has a real prospect of success.

Referring to the filing of large quantities of evidential material, including between the High Court and CA proceedings, Lord Hambleton was not impressed with either party for choosing to:

***"swamp the court with evidence"***

Or the appellants, who chose:

***"not to update their pleadings to reflect the evidence"***

**Material error of law**

The court of appeal materially erred in law in that it "did conduct a mini-trial", which led it to the adoption of an inappropriate approach to the contested factual issues and to the documentary evidence. This was contrary to the guidance provided by the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1* and the Supreme Court in *Vedanta*. Instead of focusing on the pleaded case and whether that disclosed an arguable claim, the court was drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. Lord Hamblen was definitive that:

***"this is not the task at this interlocutory stage"***

and confirmed that the factual assertions made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable. Analysing this further:

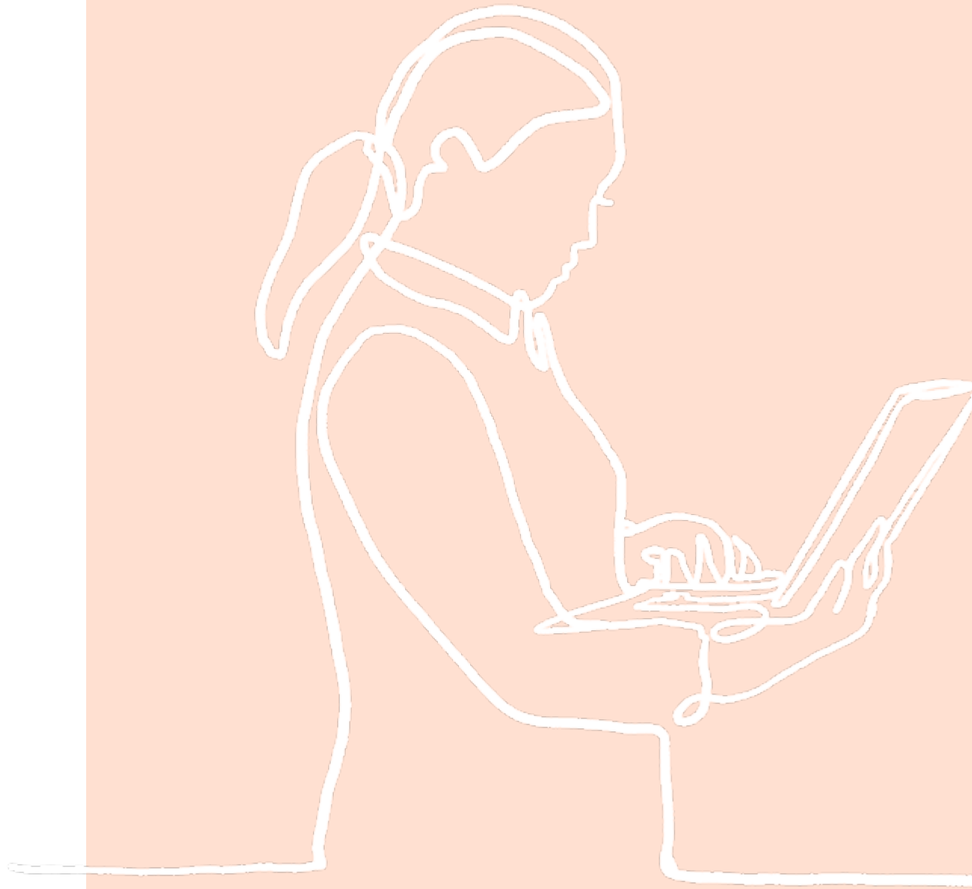
(i) making determinations in relation to contested factual evidence without the benefit of cross-examination was "*not appropriate on an interlocutory application*"; and

(ii) making assumptions that there was no prospect of further relevant evidence being uncovered during the disclosure process. This led to the Court of Appeal "*proceeding to a summary determination on the basis of the appellants having access only to two internal corporate documents*".

The appellants therefore established a material error of law in the approach of the court of appeal to the determination of the arguability of the claim at an interlocutory stage.

Lord Hamblen also considered, obiter, whether the CA had erred in its analysis of the principles of parent company liability and/or whether it had erred in focussing inappropriately on whether RDS had the requisite level of control over the actions of SPDC. The following observations are of particular note:

- The issuance of "group wide policies or standards" can in certain circumstances be sufficient to give rise to a duty of care. As Lord Briggs held in *Vedanta*: "[g]roup guidelines… may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then case harm to third parties".
- Whether the parent "controls" the subsidiary is not determinative of whether a duty of care arises. The key question is "the extent to which the parent did take over or share with the subsidiary the management of the relevant activity". It is therefore possible that the parent and subsidiary typically operate very separately but then on a specific project operate such that they share the management responsibilities. In that case a duty of care upon the parent may arise notwithstanding its typically separate status.
- Lord Hamblen found that the CA was wrong to approach the question of RDS's liability by reference to the threefold test (foreseeability; proximity; fair, just and reasonable) in *Caparo Industries plc v Dickman [1990] 2 AC 605*. He repeated the Lord Briggs doctrine in *Vedanta* that there was no distinct category of liability for common law negligence for a parent for the actions of its subsidiary.
- As regards RDS's corporate structure, Lord Hamblen adopted the conclusions of Sales LJ (the dissenting judge in the CA) where he pointed out that "it is of significance that the Shell group is organised along Business and Functional lines rather than simply according to corporate status".
- Lord Hamblen observed the "wide range of responsibilities" held by the CEO and the RDS



executive Committee which included, as stated in the Shell Control Framework (an internal Shell document) "the safe condition and environmentally responsible operation of Shell's facilities and assets". The question of how RDS's organisational structure works in practice was very much in dispute and one to which "proper disclosure is of obvious importance".

**Real issue to be tried**

Having full regard to the appellants' case and the respondents' written and oral submissions and evidence, Lord Hambleton held that the Appellants had established that there was a real issue to be tried as to whether RDS had "taken over the management or joint management of the relevant activity of SPDC" and whether RDS had "promulgated group-wide safety / environmental policies and taking active steps to ensure their implementation by SPDC".

It had not been shown that the asserted facts in the particulars of claim should be rejected as being demonstrably untrue or unsupportable and two RDS internal documents so far disclosed, established that there are real issues to be tried, in light of the guidance in *Vedanta*.

**Conclusion**

The appeal was allowed. The respondents were informed that if they intend to pursue the other challenges to jurisdiction which were not resolved

**Commentary:**

**The question of whether a parent company owes a duty of care to third parties affected by the actions of its subsidiary is one which is a pure question of fact, the analysis for which will differ in each case.**

**Except in the more speculative cases, a full trial with witness evidence and disclosure will be needed for the court to be in a position to evaluate whether in fact a duty of care exists. This has implications for multinationals who may not wish their corporate structures and operational mechanics to be aired in public.**

**Claimants may be encouraged as the judgment appears to close the door a little more on the potential jurisdictional arguments for corporates faced with such a claim.**

# A driving force for change?

## Uber BV and others (Appellants) v Aslam and others (Respondents)

### Introduction

This appeal concerns the employment status of private hire vehicle drivers who provide their services through the Uber smartphone application (the "Uber app"). The main question raised is whether an Uber driver is a "worker" for the purposes of employment legislation which gives "workers" rights to be paid at least the national minimum wage, to receive annual paid leave and to benefit from certain other protections. The Supreme Court also considers the related question of what time counts, if drivers are "workers", as working time for the purpose of the relevant rights.

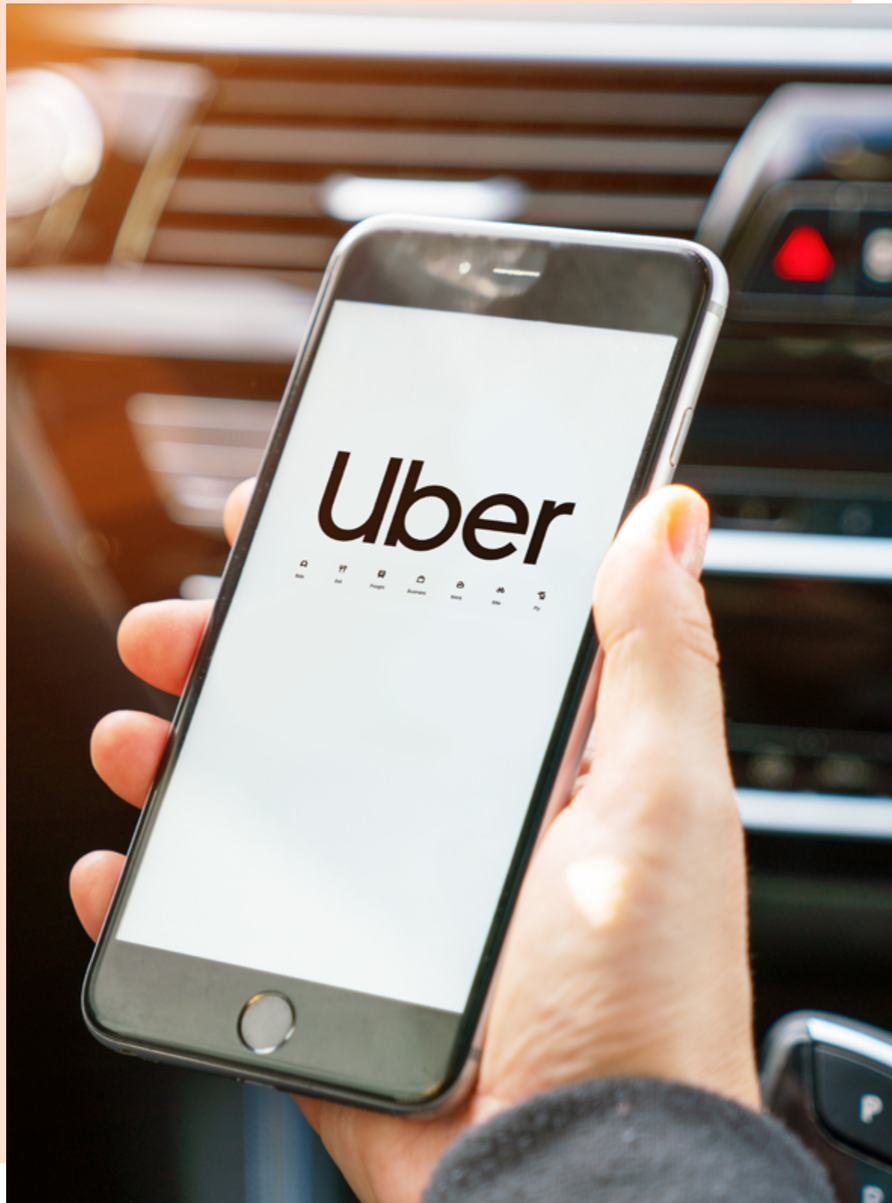
### Facts

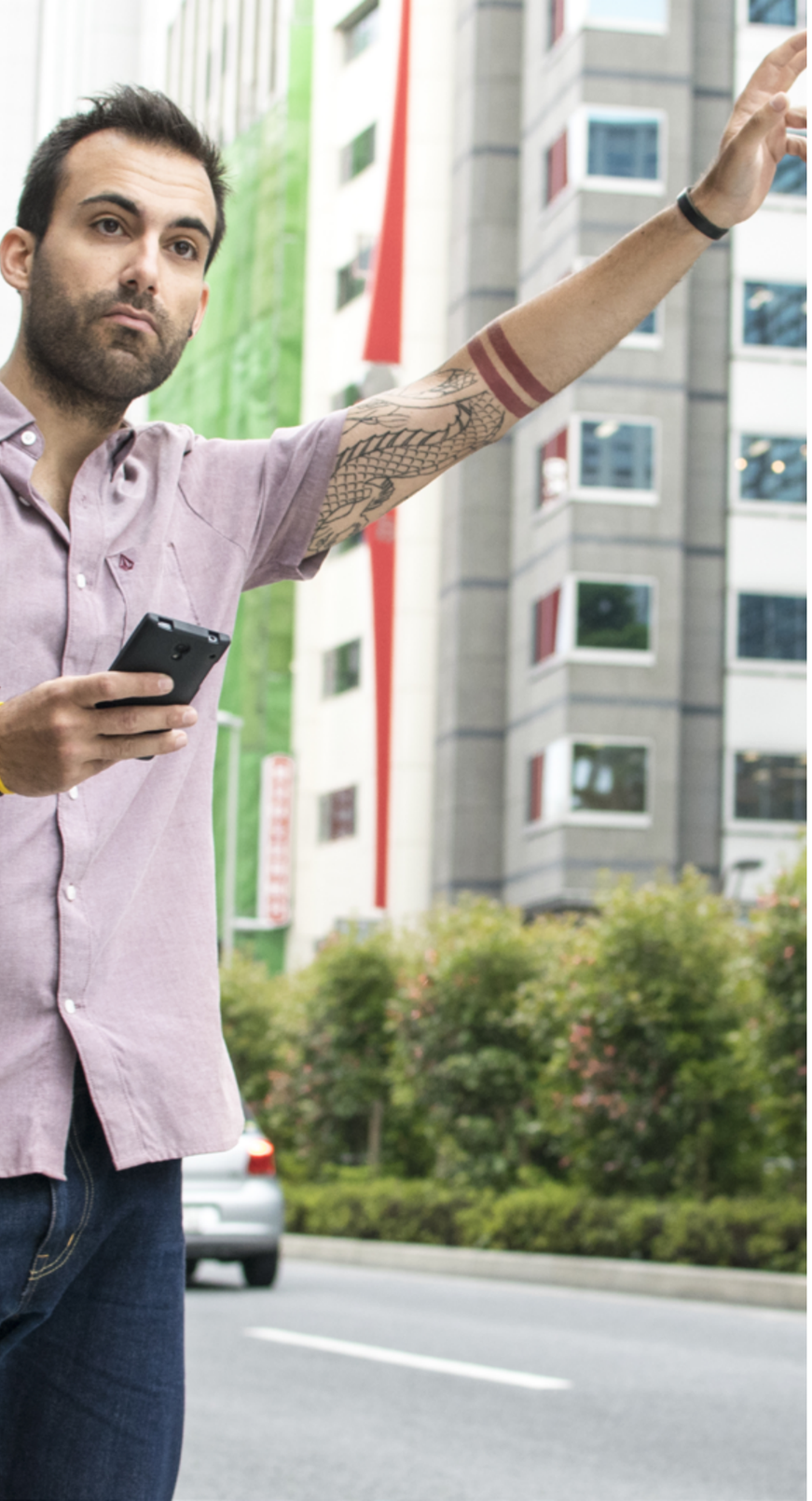
Uber BV is a Dutch company which owns the technology behind the Uber app. Uber London Ltd is a UK subsidiary licensed to operate private hire vehicles in London. The claimants, Mr Aslam and Mr Farrar, at the relevant times were licensed to drive private hire vehicles in London and did so using the Uber app. Their claim was brought in the employment tribunal as a test case to establish their employment status. At the time of the tribunal hearing in 2016, the number of Uber drivers operating in the UK was estimated to be around 40,000, of whom around 30,000 were operating in the London area.

### Background

The definition of a "worker" in section 230(3) of the Employment Rights Act 1996 and other relevant legislation includes anyone employed under a contract of employment but also extends to some individuals who are self-employed. In particular, the definition includes an individual who works under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

In 2016 the employment tribunal found that Mr Aslam and Mr Farrar satisfied this test and worked under worker's contracts for Uber London. The Employment Appeal Tribunal and the Court of Appeal (by a majority) dismissed Uber's appeals.





**Judgment**

The Supreme Court unanimously dismissed Uber's appeal. Lord Leggatt gave the sole judgment.

The original panel of seven Justices included Lord Reed (President), Lord Hodge (Deputy President), Lady Arden, Lord Kitchin (who later fell ill,) Lord Sales, Lord Hamblen and Lord Leggatt.  As it was uncertain Lord Kitchin would return to work, with the agreement of the parties, the panel was reconstituted as a panel of six Justices.

The issues were straightforward - is an Uber driver a "worker" and if so, when are the drivers "working" for Uber?

**Is an Uber driver a "worker"?**

Simply, yes.

Uber argued, relying on its standard written contracts between Uber BV and drivers and between the Uber companies and passengers, that the drivers are independent contractors who work under contracts made with customers and do not work for Uber.

In addition, they argued that:

- Uber BV acted solely as a technology provider with its subsidiary (Uber London in this case) acting as a booking agent for drivers who are approved by Uber London to use the Uber app.
- When a ride is booked through the Uber app, a contract is thereby made directly between the driver and the passenger whereby the driver agrees to provide transportation services to the passenger
- The fare is calculated by the Uber app and paid by the passenger to Uber BV, which deducts part (20% in these cases) and pays the balance to the driver.
- They are collecting payment on behalf of the driver and charging a "service fee" to the driver for the use of its technology and other services.
- Drivers are free to work when they want and as much or as little as they want.
- They were no different to other digital platforms which act as booking agents for hotels and other accommodation and with minicab drivers.

The Supreme Court disagreed, with Lord Leggatt stating:

***"There is a difficulty which, in my view, would be fatal for Uber's case even if the correct approach to deciding whether the claimants were working under workers' contracts with Uber London were simply to apply ordinary principles of the law of contract and agency. This difficulty stems from the fact that there is no written agreement between Uber London and drivers. In these circumstances the nature of their relationship has to be inferred from the parties' conduct, considered in its relevant factual and legal context."***

He went on to detail:

- There was no written contract between the drivers and Uber London. Therefore, the nature of their legal relationship had to be inferred from the parties' conduct.

- There was no factual basis for asserting that Uber London acted as an agent for drivers.
- The correct inference was that Uber London contracts with passengers and engages drivers to carry out bookings for it.
- In any event, it is wrong in principle to treat the written agreements as a starting point in deciding whether an individual is a "worker".

Referring back to The Supreme Court's previous decision in *Autoclenz Ltd v Belcher [2011] UKSC 41*, the correct approach is to consider the purpose of the relevant employment legislation, which is:

- To give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work;
- To preclude employers, frequently in a stronger bargaining position, from contracting out of these protections.

Lord Leggatt emphasised five aspects of the findings made by the employment tribunal which justified its conclusion that the claimants were working for and under contracts with Uber:

(1) Where a ride is booked through the Uber app, it is Uber that sets the fare and drivers are not permitted to charge more than the fare calculated by the Uber app. It is therefore Uber which dictates how much drivers are paid for the work they do.

(2) The contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them.

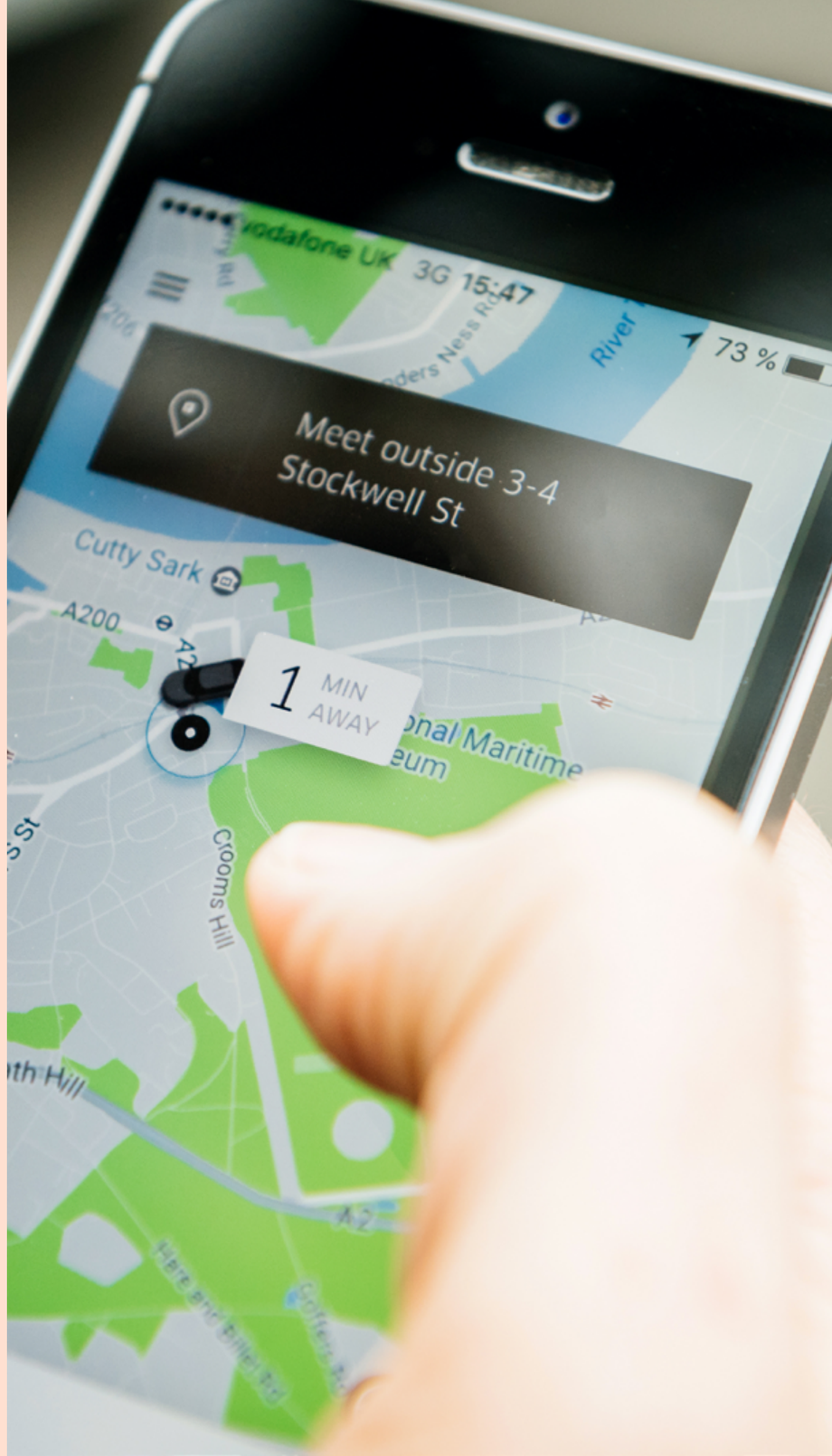
(3) Once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber.

The driver's rate of acceptance (and cancellation) of trip requests is monitored and imposing what amounts to a penalty if too many trip requests are declined or cancelled by automatically logging the driver off the Uber app for ten minutes, thereby preventing the driver from working until allowed to log back on.

(4) Uber exercises significant control over the way in which drivers deliver their services, including the ratings system on a scale of 1 to 5 after each trip.

Any driver who fails to maintain a required average rating will receive a series of warnings and, if their average rating does not improve, eventually have their relationship with Uber terminated.

(5) Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride.



These five factors led Lord Leggatt to conclude that the service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Drivers are in a position of subordination and dependency in relation to Uber such that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

He was unimpressed by the comparisons made by Uber with other digital platforms.

**When are the drivers "working" for Uber?**

Uber argued that this was limited to periods when they were actually driving passengers to their destinations. The drivers argued that it included any period when they were logged into the Uber app within the territory in which they were licensed to operate and were ready and willing to accept trips.

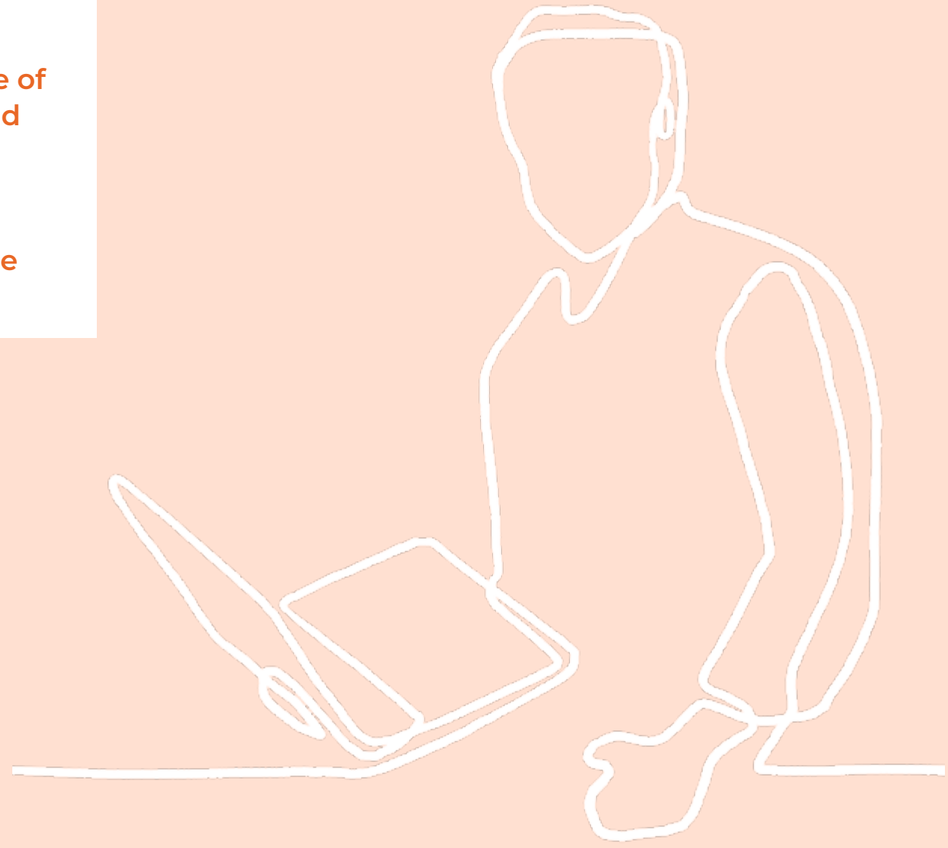
Not surprisingly, in light of the findings above, the Supreme Court held that the employment tribunal was entitled to find that the Uber drivers were working during any period when they were logged into the Uber app within the territory in which they were licensed to operate and ready and willing to accept trips.

**Commentary:**

**Whilst the case is vital confirmation for these Uber drivers that they are workers for the purposes of section 230(3) of the Employment Rights Act 1996, this judgment does not extend the duty of care owed by Uber to passengers.**

**The current position on vicarious liability remains – it would be based purely on the factual matrix.**

**In the unfortunate event that an Uber driver was to take advantage of their position as an Uber driver and commit a deliberate act, all the circumstances of the specific scenario would be taken into account and the current two-stage test applied.**



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