



Neutral Citation Number: Applied for

Appeal No. T/2010/81

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

On APPEAL from the DECISION of
Mary Kane, Deputy Traffic Commissioner for the
South Eastern and Metropolitan Traffic Area
Dated 21 October 2010

Before:

**Her Honour Judge J Beech, Judge of the Upper Tribunal
David Yeomans, Member of the Upper Tribunal
Leslie Milliken, Member of the Upper Tribunal**

Appellant:

**NATALIE HUNT trading as
WILD STRETCH LIMOUSINES**

Attendances:

For the Appellant: Murray Oliver, Solicitor of Oliver Legal

Heard at: Victory House, 30-34 Kingsway, London, WC2B 6EX

Date of hearing: 14 December 2010

Date of decision: 10 January 2011

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED and that the order of revocation shall take effect at 23.59 on 7 March 2011

SUBJECT MATTER:- Financial Standing; reliance on the bank statements of another business, the operator being one of the partner's.

CASES REFERRED TO:- Rai Transport Limited & Others (2004/373); 2 Travel Group plc (2005/7); J.J. Adam (Haulage) Ltd (1992 No. D 41).

REASONS FOR DECISION

[This decision has been redacted, in consultation with Her Hon. Judge Beech, to enable publication to take place after the removal of financial information]

1. This was an appeal from the decision of the Deputy Traffic Commissioner for the South Eastern & Metropolitan Traffic Area made on 21 October 2010 when she revoked the Appellant's Public Service Vehicle operator's licence under s.17(1) of the Public Passenger Vehicles Act 1981.
2. The factual background appears from the documents and the transcript of the public inquiry and is as follows:
 - (i) The Appellant is a sole trader who operates stretched limousines. On 7 April 2010, she was granted a standard international PSV operator's licence authorising 6 vehicles with a condition that no vehicle was to be used in respect of the licence without a "COIF". She also gave the following undertakings:
 1. A random audit of safety inspections will be conducted on a not less than 3 monthly basis when 2 vehicles will be checked by the transport manager. The findings will be recorded and made available to staff from VOSA or the Officer of the Traffic Commissioner on request.
 2. The operator will undertake a random audit of at least 5 drivers every 3 months to ensure the drivers are undertaking their walk round checks correctly. The findings will be recorded and made available to staff from VOSA or the Office of the Traffic Commissioner on request.
 3. All authorised vehicles will have a rolling road brake test every 3 months not including the MOT. The results will be recorded and records kept for at least 2 years.
 4. Maintenance systems, maintenance documentation and vehicle inspections will be audited by the CPT or equivalent every 3 months. Audit reports will be prepared and acted upon and retained for at least 2 years. A copy of the report will be forwarded to the Traffic Area Office within 14 days of its receipt together with the Operator's proposals for implementing its recommendations.
 5. All authorised vehicles will have a thorough and effective pre-MOT inspection. Records to be kept for at least 2 years.

6. All tachographs will be independently analysed and monthly reports will be prepared, acted upon and retained for at least 2 years.
 7. A training programme provided by CPT or equivalent and relating to a PSV inspection course will be implemented and fully completed by Ms Murphy and Mr Hunt within 3 months. Written details of sessions and attendees must be submitted to the Traffic Area Office within 10 days of the course. Thereafter the operator will ensure that all existing and new employees and drivers will receive annual training and records of all training sessions and attendees will be kept for at least 2 years.
 8. In order to satisfy the financial requirements, the operator will submit evidence of the necessary finance to the Traffic Area Office within 3 months and thereafter for a further 3 months for one year. (Our comment: £*** was required to be readily available to establish financial standing).
 9. Natalie Hunt and Simon Hunt will attend a new operator seminar within 3 months at the CPT or equivalent and provide the Traffic Area Office with evidence thereof.
- (ii) By a letter dated 12 May 2010, Murray Oliver of Oliver Legal, advised the Officer of the Traffic Commissioner (“OTC”) that the Appellant would be setting up a limited company to take over her present limousine business and that a new application for a licence would be made in due course. Mr Oliver confirmed that the Appellant had made arrangements to attend a PSV inspection course held by VOSA in Manchester at the next available date. Enquiries were being made regarding a new operator seminar. It was anticipated that a suitable course would be booked through the Freight Transport Association. Roller brake testing would be conducted by the nominated maintenance contractors and a maintenance contract would be forwarded shortly.
- (iii) On 1 July 2010, the OTC wrote to the Appellant noting that the the office had not received the first bank statements for the period 7 April to 31 May 2010. The Appellant was given until 8 July 2010 to comply with the undertaking. The letter also enquired about the status of the new application in the name of a limited company. No response to this letter was received.
- (iv) On 19 July 2010, the OTC wrote to the Appellant by post and by email requiring a response to the letter of 1 July 2010. In addition, the correspondence reminded Ms Hunt about undertakings (7) and (9) above in relation to training which was to be undertaken within 3 months of the grant of the licence. All information was to be provided to the OTC by 26 July 2010.
- (v) A response was received by email on 26 July 2010 informing the OTC that the Appellant had been advised by her accountant not

to transfer her business to a limited company and accordingly, a new application for a licence would not be made. In relation to training (undertaking 7), the Appellant advised that Mr Hunt and Ms Murphy had been scheduled to attend a course at the beginning of July 2010 but were unable to do so because of staff shortages and because July was the busiest time of the year. They were looking at the next available course in September 2010. In relation to a new operator licence course (undertaking 9), the Appellant asked for assistance in locating a suitable course. She advised that she would be sending a “pdf” of her bank statements “shortly”.

- (vi) On 26 July 2010, Mr Cook, the Public Inquiry Clerk, contacted the Appellant by email requesting receipt of the bank statements “ASAP” so that he could draft a submission to the Traffic Commissioner. As for a new operator seminar, he advised that the Appellant contact the CPT, the Freight Transport Association or the Road Haulage Association who all offered seminars for new operators. The Appellant replied that the CPT did not hold seminars for limousine operators but she would contact the other trade bodies.
- (vii) On 29 July 2010, Mr Cook emailed the Appellant enquiring about the steps that she had taken to comply with undertaking (4), the auditing of maintenance systems by the CPT on a three monthly basis. He also acknowledged receipt of a single bank statement covering the period 1 June to 28 July 2010. He requested sight of statements for the period 7 April to 31 May. He warned that the statements submitted “may not be accepted as meeting the required sum as it only shows £***going into the account yesterday”. No response to this email was received. A follow up letter was sent on 4 August 2010, requiring the outstanding information by 13 August 2010.
- (viii) By an email sent on 16 August 2010, the Appellant sent a number of bank statements and advised as follows:
 - 1. Undertaking (8): Some of the bank statements were for other businesses belonging to her: *** . There was always substantial funds in the International Limos account and consent has been obtained from Mr Murphy to use those funds as necessary. Written authorisation from Mr Murphy could be provided. The money shown on the original bank statements which supported the application for an operator’s licence had been transferred from the International Limos account. The overdraft facility on Wild Excursions (one of the Appellant’s trading names) was £***
 - 2. Undertaking (7): Mr Hunt and Ms Murphy were scheduled to attend a PSV Inspections Procedures and Standards seminar in September 2010.

3. Undertaking (9): The Appellant was awaiting correspondence from FTA and CPT in relation to a new PSV Limousine Operators course.
4. Undertaking (4): The Appellant was in the process of collating the information to send to the CPT “early next week” in order for them to undertake the audit.
5. The Appellant expressed her frustration that whilst she had spent a considerable amount of money “COIFing” her vehicles, there were still illegal operators who were being stopped by VOSA with no action being taken apart from prohibitions being issued for minor defects. She felt that it made a mockery of all that she was trying to do.

The bank statements that the Appellant provided were as follows:

1. ***
- (ix) By a letter dated 16 September 2010, the Appellant was called to a public inquiry so that the Deputy Traffic Commissioner could consider taking regulatory action in respect of her licence. Compliance with undertakings (4), (7) and (9) were to be considered along with financial standing.
 - (x) Prior to the public inquiry taking place on 21 October 2010, further bank statements were produced *** . Whilst there is no average calculation available for this account, it was accepted that the account was insufficient to establish financial standing. *** .
 - (xi) Also produced was a letter dated 20 October 2010 signed by Mr John Murphy on headed note paper of International Limo Sales, stating:

*“I refer to the .. licence held by Natalie Hunt, who is a business partner of myself in our company International Limo Sales. I am writing to you to inform you that I give authority to Natalie Hunt the use of such funds to the sum of £*** from our joint business account of which there is always these funds available. If you require any further information from me please do not hesitate to contact me”.*
 - (xii) In addition, a document headed “PSV Drivers Meeting” dated 29 September 2010 was submitted which purported to be the minutes of a meeting between David Ashby, the Appellant’s Transport Manager and six drivers. The meeting commenced at 18.30 and covered the topics of: PSV Drivers not Chauffeurs; tachographs – analogue and digital; manual records of driving hours; driver defect reporting and defect books; drivers hours and rest periods; driving licences; parking tickets and damage to vehicles; drivers grievances. This meeting did not comply with undertaking (7).

- (xiii) At the hearing of this appeal, the Appellant attended with her partner, Simon Hunt and David Ashby, Transport Manager and she was represented by Mr Oliver.
- (xiv) Mr Oliver commenced by stating that he was “quite disappointed” that the Appellant had been called to a public inquiry only six months after the grant of her licence. The Appellant was aware that licences were granted on trust but that some of the promises that she had made had been broken. Mr Oliver accepted that there was no information before the Deputy Traffic Commissioner to demonstrate compliance with undertakings (3) – (9). Upon that basis, financial standing became the focus for the hearing. Mr Oliver accepted that it was going to be difficult to “square the box” to show financial standing as the accounts relating to the Appellant’s limousine operation were insufficient when looked at in the conventional way i.e. by considering the average balance available over a three month period. There was also the difficulty that the Appellant had only printed off the first two weeks of every month in relation to the Wild Excursions accounts, although Mr Oliver was content to continue with his submissions as he considered that the remainder of the accounts would not make much difference. He submitted that an acceptable way of approaching financial standing could be adopted in this case, which involved adding up all of the deposits into the Wild Excursions accounts on a monthly basis without taking account of all the withdrawals and then taking that figure as demonstrating the financial standing of the business. If that were undertaken, the monthly totals were between £*** ***, which clearly demonstrated that there was sufficient funds to cover all of the Appellant’s liabilities, including maintenance. In addition, there was the guarantee provided by Mr Murphy’s letter and there was the possibility of a finance agreement in the name of the Appellant’s business. He accepted that his argument was a novel one and that if the Deputy Traffic Commissioner was against him, he did not feel confident that this Tribunal would agree with his approach.
- (xv) Upon the Deputy Traffic Commissioner indicating that Mr Oliver’s approach to the financial standing of the Appellant was not one that she could accept, Mr Oliver requested an adjournment. He submitted that there were in fact two financial agreements that the Appellant was negotiating with *** and they might be available within seven to ten days of the hearing and they would provide the Appellant with adequate financial standing. In addition, as one of her vehicles had yet to be COIF’d, the Appellant’s authorisation could be reduced to five vehicles, thus reducing the required financial standing to £***.
- (xvi) The Deputy Traffic Commissioner gave an oral decision. She had reminded herself of the Traffic Commissioner’s Practice Direction

on Financial Standing and “various Transport Tribunal rulings” upon what is required to demonstrate financial standing. Those authorities all refer to the word “balance”. She rejected Mr Oliver’s submission that she need only take account of deposits into the Appellant’s bank accounts without considering the withdrawals. A balance of £*** should be readily available at all times, whether it be by way of ring-fenced overdraft facilities or other similar facilities without call being made on the funds by the monthly costs of running a business. The Deputy Traffic Commissioner considered it a matter of concern that the Appellant had never met the criteria of financial standing since the licence was granted.

- (xvii) The Deputy Traffic Commissioner considered whether the sum of £*** *** vehicles was available and concluded that it was not. She rejected Mr Oliver’s submissions that she could take account of Mr Murphy’s letter confirming that the Appellant had his permission to use funds from their partnership account up to the figure of £***, having concluded that the letter did not have the same standing as a statutory declaration and, that International Limo Sales may, at any moment, require the available funds in the account for its own business activities. Therefore the funds in that account should be disregarded.
- (xviii) Having concluded that the Appellant could not satisfy the criteria for financial standing, whether for five vehicles or six, the Deputy Traffic Commissioner determined that she could not adjourn the public inquiry. If the Appellant’s finances had been adequate until shortly before the public inquiry, then she may have been able to take a different course, using “the Ways and Means Act” to conclude that matters had only recently worsened. Neither could it be said that the Appellant’s financial standing was only a little short of the requirement. The available funds in her business accounts amounted to an average of £***. The Deputy Traffic Commissioner was not satisfied that she could adjourn the public inquiry upon the basis of a possible lending arrangement with Close Asset Finance because it was not in place. In any event, the Deputy Traffic Commissioner did not feel able to accept any more promises from the Appellant in view of her failure to comply with her own undertakings. In the absence of financial standing, the Appellant’s licence must be revoked and this she did with immediate effect. The Deputy Traffic Commissioner highlighted the option of applying for a new licence whether in the name of a company or in the Appellant’s own name but if that were to take place, then all of the undertakings previously given would have to be fulfilled. The Deputy Traffic Commissioner indicated that she would be pleased if a new application were to be made which fulfilled all of the criteria, thus avoiding the need for a further public inquiry.

3. At the hearing of this appeal, the Appellant was again represented by Mr Oliver, who submitted a skeleton argument for which we were grateful. He first of all made an application under s.50(4) of the Act for the Tribunal to consider new evidence, namely, those parts of the Appellant's bank accounts that she had not printed off and supplied to the Deputy Traffic Commissioner prior to the public inquiry. We considered the documents and concluded that his application should be refused. The bank statements could and should have been produced at the public inquiry but were not; no application for a short adjournment was sought so that the remainder of the bank statements could be printed off; neither was there an application that the Deputy Traffic Commissioner adjourn her decision so as to allow the Appellant to produce the outstanding statements. Rather, the hearing proceeded upon the assumption that the missing statements would not have made much difference and having considered them ourselves, we are satisfied that the approach taken by both Mr Oliver and the Deputy Traffic Commissioner was the correct one. As it transpires, the statements do not in fact make any difference to the overall picture of the Appellant's financial standing.

4. Mr Oliver's first ground of appeal was that the Deputy Traffic Commissioner was wrong to refuse to take into account the financial standing of International Limo Sales or accept that the funds within the bank account of that business were not available to the Appellant if necessary. International Limo Sales, which buys and sells limousines in Holland, operated from the same premises as the Appellant's business and the two businesses were very much linked, not least by the Appellant being a partner in International Limo Sales. The finances of the businesses were intertwined, for example, if a fuel invoice in the name of Wild Excursions needed to be paid and funds were not available in the Appellant's bank accounts, then International Limo Sales would pay the invoice. The close relationship was evidenced by the letter from Mr Murphy confirming that the sum of £*** was available to the Appellant if necessary. No statutory declaration was obtained from Mr Murphy because it was considered unnecessary against the background of this letter and the provisions of s.7 of the Partnership Act 1890 which provides:

“Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.”

5. Mr Oliver submitted that the combined effect of s.7 of the Partnership Act 1890 and the letter from Mr Murphy was that they provided a mechanism by which the funds in the account of International Limo Sales were “available” as defined in JJ Adam (Haulage) Ltd (1992/41) para 33 and as applied in 2 Travel Group plc (2005/7). Mr Oliver also referred to the Transport Tribunal authority of Rai Transport (Midlands) Ltd & others (2004/373) in which it was held that a limited company

holding an operator's licence could not rely on the financial standing of another limited company, even if it falls within the same group of companies. Mr Oliver felt able to distinguish the Appellant's case from the facts of *Rai Transport* on the basis that in the Appellant's case, International Limos Sales was not a separate legal entity but a partnership in which the Appellant was a partner and that in those circumstances, a statutory declaration from Mr Murphy was unnecessary. In any event, if at some stage Mr Murphy were to withdraw his permission, that would amount to a change of circumstances which would require the Appellant to notify the Deputy Traffic Commissioner of the change.

6. Mr Oliver accepted that the only way that the Appellant's finances could satisfy the criteria of financial standing was if the finances of International Limo Sales were taken into account (subject to his second ground of appeal). Mr Oliver was taken through some of the bank statements by the Tribunal. *** . He accepted that the accounts were "a mess".
7. Mr Oliver's second ground of appeal was that the Deputy Traffic Commissioner should have adopted his "novel" approach to the Appellant's financial standing by only taking account of the monthly totals of the deposits placed into her accounts, without taking account of the withdrawals. He submitted that this was the appropriate approach in the circumstances of this case and that if it had been adopted, the Deputy Traffic Commissioner would have had no difficulty in finding that the Appellant did have appropriate financial standing without having to consider the finances of International Limo Sales.
8. We agree with Mr Oliver's description of the financial information provided to the Deputy Traffic Commissioner as being "a mess". We feel able to go further: it was inadequate and without detailed explanation of the information, it was complex. *** In the absence of crucial information explaining the relative position of the two businesses, the combined effect of s.7 of the Partnership Act 1890 and the letter of Mr Murphy was insufficient to provide sufficient financial standing to the Appellant, particularly in the absence of a financial declaration sworn by Mr Murphy, which we are satisfied was a minimum requirement. As the Deputy Traffic Commissioner determined, a successful business may have need to call upon its available funds at any time. Without the assurance in the form of a statutory declaration, the Deputy Traffic Commissioner could not be confident that £*** or alternatively, £*** would remain available for the Appellant's business.
9. In relation to the Mr Oliver's argument that in order to find the necessary financial standing, the Deputy Traffic Commissioner should have focused upon the monthly deposits into the Appellant's business accounts, without taking account of the withdrawals, the argument does not withstand close scrutiny and it ignores economic reality. A business may have deposits that exceed the statutory financial requirement for

financial standing but may nevertheless have every day business expenditure, without taking account of maintenance, that exceeds the deposits made. In those circumstances, there would be no funds left for maintenance at all.

10. Mr Oliver was made aware at the hearing of this appeal that it was likely to fail. We advised him to submit a new application for an operator's licence as soon as possible. The Tribunal wishes to encourage those limousine operators who are prepared to expend the capital to "COIF" their vehicles and to bring themselves into the licensing system but they must of course, comply with the conditions and undertakings attached to their licences. In the circumstances and in view of the financial links that there appears to be between the Appellant's business and that of International Limo Sales, we feel able to delay the coming into effect of the revocation of her licence until 23.59 on 7 March 2011. If it transpires that the Appellant's new application has not been determined at the end of that period, an application can be made to this Tribunal to grant a further extension of time before this order comes into force. However, if such an application is to be made, the Tribunal will have to be satisfied that all of the undertakings attached to the Appellant's current licence are being complied with.
11. We sympathise with the Appellant's frustration that whilst operator's such as herself are attempting to bring themselves into the licensing system, others are continuing to operate outside of the system, without expending the considerable capital required to "COIF" their vehicles which is a necessary step to ensure that the vehicles are roadworthy. It appears that some operator's are being allowed to continue to operate without any sanctions being imposed upon them. It may be small comfort to the Appellant, but the longer such unlawful operations remain outside the licensing system, the more difficult it will be for them to be granted licenses if and when they choose to apply for them. Each application should now be considered with great care to ensure that the applicants are not taking advantage of a phoenix operation and/or a corporate veil in order to shroud previous unlawful operation from the Traffic Commissioners.
12. As this decision concerns financial standing, it is not for general release.

**Her Honour Judge J Beech
10 January 2011**