

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

Appeal No. T/2015/78

ON APPEAL from the DECISION of Traffic Commissioner Sarah Bell,
TRAFFIC COMMISSIONER for the West of England Traffic Area.

Dated 9 November 2015

Before:	Mr M R Hemingway	Judge of the Upper Tribunal
	Mr A Guest	Member of the Upper Tribunal
	Mr J Robinson	Member of the Upper Tribunal

Appellant: Black Velvet Travel Ltd; Western Greyhound Ltd;
Michael John Bishop

Attendances:

For the Appellant: Mr Michael John Bishop in person

For the Respondent: No attendance

Heard at: Field House, London

Date of Hearing: 8 April 2016

Date of Decision: 24 June 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

Subject matter:

Good Repute
Traffic Commissioners Powers

Cases referred to:

Leslie John Ings (Appeal 2005/457).

Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought against the decision of the Traffic Commissioner for the West of England made on 9 November 2015. The decision, insofar as it related to Western Greyhound Ltd, Black Velvet Travel Ltd and Michael John Bishop was in these terms:

“Decision

Black Velvet Travel Ltd. PH1075733

1. Pursuant to adverse findings under Section 17(3)(a), (aa)(b), (c) and (e) of the Public Passenger Vehicles Act 1981, Black Velvet Travel Ltd no longer satisfies the requirements of Section 14 ZA(2)(b) and (c) of the 1981 Act to be of good repute and appropriate financial standing. Accordingly, the Licence is revoked pursuant to Section 17(1)(a) of the 1981 Act with immediate effect.

2. Pursuant to Section 28 of the Transport Act 1985, Black Velvet Travel Ltd. and Mr Michael John Bishop are disqualified for an indeterminate period from holding or obtaining an Operator’s Licence or being involved in management, administration or control of the transport operations of an entity that holds or obtains such a Licence in Great Britain with immediate effect.

3. ...

Western Greyhound Ltd PH0006741

4. Pursuant to adverse findings under Section 17(3)(a), (aa), (b), (c) and (e) of the Public Passenger Vehicles Act 1981 Western Greyhound Ltd no longer satisfies the requirements of Section 14 ZA(2)(b) and (c) of the 1981 Act to be of good repute and appropriate financial standing. Accordingly, the Licence is revoked pursuant to Section 17(1)(a) of the 1981 Act with immediate effect.

5. Pursuant to Section 28 of the Transport Act 1985, Western Greyhound Ltd and Mr Michael John Bishop are disqualified for an indeterminate period from holding or obtaining an Operator’s Licence or being involved in management, administration or control of the

transport operations of an entity that holds or obtains such a License in Great Britain with immediate effect.

The background

2. Black Velvet Travel Ltd (BVTL) was a company which was involved in the business of transporting members of the public for commercial gain. It had a Public Service Vehicle Operator's Licence and had been licensed from 19 December 2007 enabling it to operate six vehicles but there were some subsequent variations including one in March 2011 which increased the number of vehicles to sixteen. It is important to note, in the context of this appeal, that for the bulk of its previous history neither Michael John Bishop nor a person named Adam Smith (though apparently sometimes known as Paul Jones) had had any involvement in its ownership or its business operations. It is fair to say, in broad terms, that the company had not had any particular difficulties with respect to compliance issues until around September of 2013. However, certain concerns were raised during that and subsequent months which are referred to in more detail below. It appears that, over time, the then sole Director and sole Transport Manager of the company came to realise that substantial capital investment would be required to meet the difficulties caused by what was an ageing fleet of vehicles. This led to his decision to sell and on 1 August 2014, Adam Smith was appointed as a Director, that being closely followed by the appointment, on 13 August 2014, of Michael John Bishop also as a Director. However, on 2 September 2014 Adam Smith resigned, leaving Michael John Bishop as the sole **[Director.]** On the same day he resigned, Adam Smith was sentenced to a period of 16 months imprisonment suspended for two years. More detail regarding the offences that led to that sentence appear below. After the change of ownership there were further compliance difficulties and, in particular, an incident which occurred on 12 December 2014 when a BVTL owned vehicle lost both offside road wheels whilst in service.

3. Turning to Western Greyhound Ltd (WGL), that was a company conducting business in the same sort of field as BVTL. It too had had a lengthy business history which had largely free of compliance related concerns. It too had a Public Service Vehicle Operator's Licence and it had been licensed since as long ago as 7 January 1998. It was previously owned by persons entirely unconnected with Michael John Bishop. However, prior to his involvement it had experienced difficulty in 2013 when the company's property was subject to repeat arson

attacks as a consequence of which 38 vehicles were lost. Nevertheless, in September 2013, it had been the subject of a full maintenance investigation by the DVSA and had been found to be satisfactory. There were, though, compliance difficulties after that including a failure to operate local service bus routes and some vehicle maintenance issues. On 9 December 2014 the company was sold to Michael John Bishop who became its sole Director. The company subsequently received seven advisory notices and two prohibitions.

4. In light of all of the above, the Traffic Commissioner decided to call a Public Inquiry. It was intended that this would be an all encompassing process and both operators, the former and proposed transport managers and the former and current Directors were called to it. That, of course, included Michael John Bishop and Adam Smith. As it turned out though, neither of them attended. Mr Bishop had indicated in advance that he would not do so because he was not, he said, able to afford legal representation. He had promised to send a witness statement instead but he failed to do so.

5. Its having been adjourned on one occasion, the Public Inquiry went ahead on 10 September 2015, there being a number of attendees who had been involved with BVTL and WGL prior to the involvement of Michael John Bishop.

The Traffic Commissioner's Decision

6. The relevant part of the actual decision is, of course, set out above. However, we have also quoted extensively from the written reasons supplied because, in our view, those reasons set out, in commendable detail, the factual background as well as the Traffic Commissioner's reasoning. The Traffic Commissioner said this;

“CONSIDERATION AND FINDINGS.

Preliminary.

14. I found the DVSA examiners to be measured throughout in their opinions, which were supported by the evidence. I remind myself of the importance of setting out my approach at the outset. In relation to both Operators, there are 2 specific periods of operation; the period which before the involvement of Mr Bishop and Mr Smith/ Jones and the period after their involvement. Accordingly my approach to this part of the decision process is to address each of those categories.

BVTL to 31 July 2014

15. On 23 September 2013 DVSA conducted a maintenance investigation which was marked as “unsatisfactory”. On 2 October 2013 Mr Stockley met with the Vehicle Examiner at the local Goods Vehicle Testing Station and on 4 October 2013 sent detailed written representations and assurances with regard to future compliance. At the conclusion the Vehicle Examiner determined that a follow-up in 6 months’ time would be appropriate. On 25 October 2013 BVTL received an “S” marked Prohibition at the roadside. The Prohibition was for loose wheel nuts and flooring in poor condition which was likely to cause injury. The DVSA follow-up investigation arising from this history took place on 4 March 2014. At the fleet inspection 3 vehicles were checked with 1 delayed Prohibition being issued. The outcome was marked as ‘unsatisfactory’ because the Operator had a poor annual test first time pass history. Whilst issues arising at the previous investigation had been resolved, standards needed to be raised with the defect reporting and defect rectification details. On 31 March 2014 Mr Stockley sent a detailed written response to the Vehicle Examiner. In relation to the loose wheel nuts Mr Stockley was unable to assist because there was nothing to suggest an issue at the previous PMI and the wheels had not been removed. The Vehicle Examiner accepted that this was an anomaly.

16. The Vehicle Examiner described Mr Stockley as always helpful and cooperative. It was noted that between the September 2013 and March 2014 investigations BVTL had (a) instructed an auto-electrician to provide an extra layer of compliance management to do running repairs; and (b) it had sacked the previous tyre company and replaced it with one of national repute with monthly checks. More detail as to the challenges faced and the steps taken to improve compliance are set out in Mr Stockley’s comprehensive written statement dated 12 March 2015.

17. It is clear from the evidence before me that despite the issues found by DVSA, Mr Stockley has a positive approach to compliance. He always provided comprehensive responses to DVSA and had clearly engaged in looking for the root causes of the failings. It was as a result of this that Mr Stockley identified an appropriate level of compliance was not going to be achieved with the aging fleet and that substantial capital investment was required. Regrettably a full review of the business available in the local area, the level of competition and the margins prevented this level of investment. This was compounded by the significant loss in revenue due to flooding in the winter months at the end of 2013 and the start of 2014. He made the difficult decision to sell the business after many years in the industry. It was his intention at that time to perhaps continue with a smaller fleet of say 5 vehicles at some point but subsequent events precluded that. On 31 July 2014 Mr Stockley resigned as Director and Transport Manager and on 4 August 2014 he notified those changes to the Central Licensing Office in Leeds. This is well within the 28 days statutory timescale to notify such changes.

18. Whilst compliance was below par in September 2013 and March 2014 there had been some improvements and an effective root and branch review was conducted by Mr Stockley. He did not shy away from these difficult decisions; before the maintenance investigation in 2013 BVTL had a good history. Before selling the business Mr Stockley undertook his own due diligence enquiries into the purchaser, including checks to ensure the necessary resources were in place for financial standing. Taking into account the positive and negative features, I am satisfied that it is not necessary for me to take action in relation to Mr Stockley as a Director or Transport Manager. However, should Mr Stockley seek to return to the industry he will need to undertake some refresher training as there have been advances in the information available, such as the revised Senior Traffic Commissioner's Statutory Guidance and Statutory Directions since his resignation in July 2014. Accordingly, Mr Stockley does not feature in paragraphs 1 and 2 above and I have reached the decision set out in paragraph 3 above.

WGL to 9 December 2014

19. In 2013 WGL was the subject of repeat arson attacks in which 38 vehicles were a total loss. WGL kept my Office informed with regular updates as to the impact and also the great assistance it was receiving from other local Operators to meet its obligations for example in relation to local services. It was a shocking event for the business and had an on-going impact for a considerable period of time. Mr and Mrs Howarth had been directors since 1997. Mr Orbell was a director for 14 years but retired in early 2013. However, he returned as a Director in October 2013 to help WGL through the challenging period. The Transport Managers [sic] throughout the relevant period were Mr Mark Howarth and Mr David Tarrant. In September 2013 WGL was the subject of a full maintenance investigation by DVSA and it is significant to note that the outcome of that investigation was satisfactory.

20. Between 8 and 23 September 2014 DVSA conducted a local services bus monitoring exercise and over the course of 7 days monitored 7 registrations. Before consideration of 'reasonable excuse' there was 43% non-compliance including 8 failed to operate. Two challenges were subsequently made by the Operator in relation to the failed to operate and 1 was accepted. At the conclusion of his Report dated 24 November 2014, the Examiner states: *"Overall, the operator rarely appears to contest the compliance findings but mainly reports the reasons why the vehicle was late or did not operate. A number of non compliance issues have been responded to by the operator stating that there were no vehicles or no drivers available to operate the service. Some of the lat journeys are caused by the vehicle starting its journey late and two routes appear not to have operated despite the registered particulars indicating that the routes should have been serviced until the end of September"*.

21. In light of those representations, the Examiner decided to conduct a maintenance investigation and this took place on 2 November 2014. The outcome was marked as “unsatisfactory” because the Operator had an unsatisfactory Prohibition history and the driver defect reporting and preventative maintenance systems were not sufficiently robust. This manifested itself in 12 prohibitions issued at the fleet inspection: 10 Immediate, 2 Delayed and 2 of which were ‘S’ marked, indicating a significant failure in the maintenance systems. The Examiner did note that the Operator had an 87% pass rate at annual test in the period since the previous investigation in 2013.

22. Mr Howarth, as Managing Director and Transport Manager, sent in a detailed written response. The Vehicle Examiner states in his Report “*The response outlined difficulties experienced by the Operator and acknowledges urgent action is needed*”.

23. In that comprehensive letter dated 28 November 2014, Mr Howarth states “*You will be aware that we have been ‘to hell and back’ having had 2 arson attacks, losing 38 buses in total, plus the difficulties of continuing to operate through the extensive floods earlier in the year which caused mayhem on the electrical systems of the buses we have. There has been a mass exodus of staff due to the various issues of competition and we are working very hard to get back to the high standards that we have had for a long time. You will also remember that you visited several times earlier in the year and we were fully compliant....To conclude, I respectfully feel that I am able to reasonably demonstrate that appropriate steps are already being taken immediately, to return to the high standards that we have always had. The whole company has experienced incredible difficulties, not of its own making which has placed it where it is, but we will leave no stone unturned to deal with these issues which we take tremendously seriously.*”

24. On 8 December 2014, an asset sale of part of the WGL business was completed with a Go-Ahead subsidiary. On 9 December 2014 WGL was sold to Mr Bishop. Mr and Mrs Howarth have now retired from the industry and are on a long sojourn abroad to pursue other interests. Mr Howarth has recently received a Confederation of Passenger Transport Honorary Membership in recognition of his 49 years service to the industry and the work he undertook for CPT for many of those years.

25. It is fair to say that until 2013 WGL was not on the compliance radar for its previous 15 years of trading. I accept that the close sequence of catastrophic events described by Mr Howarth presented a challenge individually as well as cumulatively. Mr Howarth and Mr Orbell do not seek to condone the non compliance but have put matters in context between them before and during the hearing. In relation to Mr Orbell I am satisfied that as a director

he did exercise independent judgement, skill and care and ensured an appropriate level of diligence after he returned to the company to help it with the challenges in 2013 and 2014. It is not appropriate or proportionate for me to take action in relation to Mr Orbell in such circumstances. In relation to Mrs Howarth I am told that she suffered an illness and complications during the relevant period. Whilst she attended Board Meetings held at her home she was not able to take an active role during the relevant period. I refer to the helpful analysis of Board working and the collective responsibility of directors in 2012/025 First Class Freight Ltd and 2010/071 Eurofast. On the facts of this case, I am satisfied it is appropriate and proportionate to take no action in relation to Mrs Howarth. In relation to Mr Howarth on balance I do not take any action at this time either as a Director or Transport Manager. All matters are left to lie on the file. They may be revisited in the unlikely event that he should seek to return to the industry in the future. Accordingly, I have reached the decisions set out in paragraphs 6 above.

26. Mr Tarrant has lodged a statement which on the face of it suggest that he was a Transport Manager in name only. This was less definitive after the evidence of Mr Orbell. If true it has very serious consequences for his good repute and professional competence in light of the Upper Tribunal Decision in 2011/036 LWB Limited. It follows that I do need to hear from Mr Tarrant in person to fully explore exactly what he actually meant. At the same time I must consider the best use of limited tribunal resources and I do not gain the impression that Mr Tarrant intends to seek a further nomination any time soon. However I do direct that if Mr Tarrant applies to be nominated as a transport manager on an operator's licence anywhere in Great Britain then the application must be referred to a Traffic commissioner or Deputy and his statements lodged to this enquiry should be made available for the purposes of that referral.

BVTL and WGL under Mr Bishop and Mr Smith/ Jones

27. Save for a period of approximately 1 month Mr Bishop has been the sole registered director of BVTL and WGT. In such circumstances there is a clear and consistent case law from the Upper Tribunal that I am entitled to treat the conduct of the Sole Director effectively as the conduct of the Limited Company and repute is determined accordingly. Such an approach has received approval from the appellate tribunal on a number of occasions, as recently as 2013/008 Vision Travel International Limited and T2013/61 Alan Michael Knight.

28. On 1 August 2014 Mr Smith was appointed as a Director of BVTL. On 13 August Mr Bishop became a Director and the following day a TM1 form was sent to the Central Licensing Unit in Leeds nominating him as the Transport Manager. On 2 September 2014 Mr Smith resigned as a Director and on or about the same day he was sentenced at Kingston

upon Thames Crown Court after pleading guilty to spending 3 counterfeit £20 notes knowing they were not genuine and 2 counts of possessing fake notes. The total money involved was £9,600. Mr Smith was sentenced to a 16-month prison sentence suspended for 2 years and ordered to undertake 150 hours unpaid work. The sentencing Judge is reported as saying *“If I were to send you to prison then a number of people at Black Velvet would have their employment put in jeopardy”*.

29. In relation to an incident on 12 December 2014, a BVTL driver (Mr John Riley) was prosecuted. At the Public Inquiry the police confirmed that the driver pleaded guilty to using a vehicle in a dangerous condition (for which he received 3 points on his driver’s licence and a fine). Further a summons was issued against BVTL for the same offence and for using a vehicle without an MOT (a Most Serious Infringement if found guilty). The case was not progressed because he was told that the company had stopped trading. The incident circumstances were that there was a road traffic accident involving a vehicle being operated by BVTL, whereby the vehicle lost both off side axle 2 road wheels when in service on the M3. One of the wheels struck an HGV. The evidence before me provides sufficient evidence there was a serious lack of judgment by both the Operator and its driver. One passenger gave a statement to the police. The minibus set off at 19.00 and there was a high pitched squeaking sound – constant while the vehicle was in motion and increasing under acceleration. They boarded the bus at 23.00 and the same situation arose up until the wheel loss at 23.55. On 22 December 2014 a DVSA Examiner inspected the vehicle and in his opinion the examination indicates that the road wheels had been coming loose for ‘some period of time’ before becoming detached. Further checks of the system found that the said vehicle had been out of MOT since 11 November 2014. The Vehicle Examiner produced a helpful timeline at the Inquiry, which confirmed he attended the notified BVTL premises in Eastleigh but was told by another business that BVTL had ‘suddenly vacated the premises in October/November 2014. Enquiries were made of Xelabus which revealed that the BVTL vehicles were sent to Cornwall.

30. On 8 December 2014 DVSA were notified by Eastleigh Borough Council of a number of complaints about the reliability of the BVTL local services. Between 11 December 2014 and 6 January 2015 DVSA’s monitoring exercise over 5 days found that of 48 observation there was a non compliance rate of 39% plus 15 journey [sic] displayed an incorrect destination board. BVTL was invited in writing to respond to the report (sent by tracked delivery and signed for on 21 January 2015 by ‘BVT’) but DVSA did not receive a response. On 11 January 2015 a number of registrations were cancelled (pursuant to a request dated 14 November 2014). It was BVTL’s responsibility to make sure all services ran in a timely manner until the cancellation date but failed to do so.

31. On 9 December 2014 Mr Bishop became the sole Director and shareholder of WGL. He had appeared on the scene in late November and was known to advisors of the WGL Directors. Mr Orbell set out in private the diligence undertaken before he, and the other shareholders, agreed to sell to Mr Bishop. In a supplemental Public Enquiry statement dated 17 March 2015, the Vehicle Examiner confirmed that since 2 November 2014 another 2 Immediate prohibitions and 8 advisory notices have been issued. Upon questioning by me he confirmed that since Mr Bishop took over the 2 prohibitions and 7 advisory notices had been issues [sic]. On 22 January 2015 the prohibition was for a brake fluid leak and on 7 March 2015 the prohibition was for a fuel leak. There had only been 4 clear encounters. At the hearing DVSA records confirmed that the vehicle involved in the BVTL wheel loss transferred to WGL and took 4 attempts to pass an MOT. On 31 March 2015 WGL went into administration. No proof of financial standing was received prior to this date. It should have been lodged by no later than 16 March 2015 as per the Call In letter dated 19 February. Likewise no evidence of financial standing was received from BVTL by the same date. BVTL was placed in compulsory liquidation on 15 June 2015 as a result of a winding up petition on behalf of HMRC. WGL remains in administration at the date of this decision.

32. The serious incident on 12 December 2014, using a vehicle with no MOT, the high failure rate in relation to running local services, the failure to respond to the DVSA bus monitoring report, the prohibitions and advisory notices issued to WGL after 9 December 2015 and the focus on WGL to the detriment of an orderly wind down of BVTL operations, without explanation or context from Mr Bishop, are such that when I pose the question suggested by the Transport Tribunal in *Priority Freight Ltd and Paul Williams 2009/225* are these Operators that I can trust to ensure future compliance, my conclusion is: No. Whilst there is some background correspondence in the hearing papers from correspondence sent to Leeds it does not even begin to address the serious issues. Mr Bishop could have attended the hearing without legal representation (as Mr Stockley and Mr Orbell did). Whilst less helpful, Mr Bishop could have sent a witness statement as he suggested he would in his e mail to my office on 4 September 2015, but he chose not to do so.

33. I have therefore proceeded to apply the question posed in *2002/217 Bryan Haulage*, namely: are these Operators that should be put out of business? By reference to the significant serious shortcomings identified above posing a significant risk to road safety, passenger confidence and fair competition since 1 August 2014 for BVTL and 9 December 2014 for WGL the answer is in the affirmative. Whilst Mr Bishop's history in operator licensing is short and it is his first Public Inquiry, he is deemed to be fully aware of the requirements (as per *2012/030 MGM Haulage and Recycling Limited*) and as a transport manager CPC holder should have done far better. It follows that good repute is lost and the Operator's Licence must be revoked.

34. I am required to consider the question of whether revocation is disproportionate in the circumstances of this case. In my judgment the answer is 'no'. In 2012/2015 First Class Freight the Upper Tribunal stated that "*Traffic Commissioner's [sic] play a central role in the enforcement of the regulatory regime for both types of vehicles. That regime is intended to ensure, amongst other things, that heavy good and public service vehicles are properly maintained and safely operated by operators who comply with the operator's licensing system and compete fairly with other hauliers*' [sic] (my emphasis). The failings are sufficiently significant that revocation is appropriate and proportionate. It follows that I have reached the Decision set out in paragraphs 1 and 4 above. The Licences must also be revoked as neither Operator satisfies the financial standing requirements.

35. In 2009/011 Katherine Oliver and JW Swan & Partners the then Transport Tribunal indicated a general principle that at the time the disqualification order is made that the operator cannot be trusted to comply with the regulatory regime and that the objectives of the system, the protection of the public and fairness to other operators, requires that the operator be disqualified.

36. When issues arose, in relation to meeting post purchase obligations, Mr Stockley arranged to see Mr Smith/ Jones but was left dealing with Mr Bishop. Mr Orbell arranged a meeting with Mr Bishop on 16 December 2014 but was met by Mr Smith/ Jones, who introduced himself as the General Manager and set out the plans for the business; In December 2014 Mr Smith/ Jones held himself out as a director to Southampton City Council in relation to an application to change the bank account into which payments were made to BVTL. When dealing with the December 2014 wheel loss the Officer gave evidence that in a telephone conversation with Mr Smith/ Jones in February 2015, Mr Smith/ Jones said that he was the owner of both BVTL and WGL. All the evidence now before me indicates that BVTL and WGL has been at the very least a joint enterprise by Mr Bishop and Mr Smith/ Jones regardless of who the named director was.

37. 'Fronting' was helpfully defined in the case of 2012/071 Silvertree, where the Upper Tribunal stated: '*.. 'fronting' occurs when appearances suggest that a vehicle, (or fleet), is being operated by the holder of an operator's licence when the reality is that it is being operated by an entity, (i.e. an individual, partnership or company), which does not hold an operator's licence and the manner in which the vehicle is being operated requires, if the operation is to be lawful, that the real operator holds an operator's licence.* I am entitled to know whom I am regulating. It is of the utmost importance that those who are directing a business so as to be the controlling mind are properly registered as directors at Companies House and CLO. I have not made formal findings of shadow directorship or similar because

Mr Smith/ Jones was not called in and I did not hear from Mr Bishop nor did he send a statement. However it is a matter of fact that Mr Smith/ Jones has been convicted of a serious offence of dishonesty which will not be spent for many years. Whilst it does not mean a mandatory bar to operator licensing under Schedule 3 it is a conviction that will be subject to scrutiny by a Traffic Commissioner if Mr Smith/ Jones sought to be involved in operator licensing. Further it was only by pure chance that a fatality or serious injury did not occur as a result of the wheel loss on 12 December 2014. Accordingly, I have reached the decision as set out in paragraphs 2 and 5 above.

38. By disqualifying Mr Bishop for an indeterminate period it is open to him at any time to seek the cancellation of the direction at anytime. However he is likely to need to be in a position to address the matters raised in this case and as appropriate provide assurance as to the involvement of Mr Smith/ Jones, if any.”

7. From the above it will be noticed that WGL has remained in administration and that BVTL was placed in compulsory liquidation in June of 2015. Michael John Bishop, having received the decision, first of all wrote to the Traffic Commissioner Office seeking some clarification as to the decision and, in particular, whether “being involved in management, administration or control of transport operations”, wording used in the decision in respect of him, meant that he was prohibited from performing what he described as “middle management or supervisory duties”. The response sent to him by the Traffic Commissioner’s Office was to the effect that he was so prohibited. He then sent a Notice of Appeal to the Upper Tribunal.

The Proper Approach on Appeal to the Upper Tribunal

8. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from a Traffic Commissioner are governed by Schedule 4 to the Transport Act 1985 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters whether of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against conviction from a Magistrate’s Court, where the case effectively begins all over again and is simply reheard. Instead, an appeal hearing before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner. In this context we have taken full account of the valuable guidance to be found in a passage from paragraphs 30-40 of the judgment of the Court of Appeal in *Bradley Fold Travel Ltd. and Peter Wright v Secretary of State for Transport* [2012] EWCA Civ 695. We also note that the appellant bears the burden of showing that the decision under appeal is wrong and that, in order to succeed, he must show that “the process of

reasoning and the application of the relevant law require the tribunal to adopt a different view”. Put another way, it might be said that in order to succeed an appellant has to demonstrate to the Upper Tribunal that a decision of the Traffic Commissioner was “plainly wrong”.

The Proceedings before the Upper Tribunal in this Appeal

9. Mr Bishop drafted the grounds of appeal himself. In summary, his written contentions were to the effect that with respect to BVTL he had sought to surrender his licence and had acted properly in doing so; that with respect to WGL the Traffic Commissioner had wrongly held against him adverse compliance issues which had been raised before he became the owner and sole Director; that he should not have been debarred from being a Transport Manager because he had not been called to a “Transport Manager’s Public Inquiry”; that points made in a letter he had sent to the Traffic Commissioner’s Office of 6 February 2015 had been ignored; that he had not sent in a written statement because he had received legal advice to the effect that to do so would serve no purpose and that, in all the circumstances the Traffic Commissioner’s decision was not proportionate.

10. We considered the appeal at an oral hearing. Mr Bishop represented himself. During the course of the hearing he said that he felt his written grounds contained all of his concerns regarding the decision. The point he was making regarding his attempt to surrender the licence relating to BVTL (which the Traffic Commissioner refused to accept) was that he had been seeking to act properly in doing so rather than continue to use the licence when the company was in a poor financial position. The primary reason why he had not attended the Public Inquiry was because he had not been able to afford legal representation. He had not been aware that he could have attended without legal representation. Further, the call up letters referred to issues prior to his involvement with the two companies so he thought he had nothing very much to answer to. He had not provided a witness statement because, prior to the Inquiry taking place, he had spoken to a solicitor who had told him it would be pointless as no notice would be taken of it. He had not thought, as we understand it, that the Public Inquiry would be considering the incident referred to above when a vehicle had lost two wheels whilst in service. That specific incident, he said, had not been referred to in the call up letters though he did acknowledge that the incident had occurred when he was the sole Director of BVTL.

He had not appreciated the difficulties there had been with either company in the respective lead-up periods before he **[became involved with them]**. With BVTL Adam Smith had made pre-purchase enquiries and he had taken Mr Smith’s word for it that there were no problems. With respect to WGL he had had no indication of the previous problems before taking over but felt he had been made to take the blame for them. As to call up letters he received, none of them had called him to a Public Inquiry as

a Transport Manager. It was unfair that he had now effectively been prevented by the Traffic Commissioner's decision from being a Transport Manager in the future. The Public Inquiry had covered matters not referred to in the call up letters. He had no further points to make.

The Upper Tribunal's Reasoning

11. Prior to addressing the specific points made by Mr Bishop we would wish to say something as to our general impression of certain matters he told us about at the hearing. Insofar as they might be relevant we do have some concerns. We do not think that Mr Bishop would really have thought, as he told us, that he would not be able to attend the Public Inquiry without legal representation. Traffic Commissioners exercise judicial functions and we cannot readily think of a Court or Tribunal where a litigant would not be permitted to attend a hearing to present his or her own case and/or to give evidence. Against that background, there would have been no reason for Mr Bishop to have thought as he claims he did. Further, he had indicated that he had obtained some legal advice and, no doubt, if he had asked the person providing such advice, as presumably he would have done, whether he would be able to attend in person he would surely have been told that he could. Further, we do not think it likely that he would have received legal advice which would discourage him in the face of his not attending, to at least submit a witness statement though we can readily understand that he might have been advised that attending in person would be better. We found Mr Bishop's contentions that he did not really appreciate that the Public Inquiry related to him to be unconvincing. We think he would have clearly appreciated that concerns concerning him would be covered and, of course, had he been in any doubt he could have checked with the Office of the Traffic Commissioner. We do not accept his contentions that he had been entirely unaware of the difficulties with both companies in the lead up to his taking over. We feel sure he would have been concerned to protect his investment by making pertinent enquiries and even if it had been the case that he had been "stung" when becoming the [Director] of BVTL (which we do not accept) this would only have served to have made him even more cautious when becoming the owner of WGL. So, we have to say that we do not feel Mr Bishop has been wholly frank before us. We now turn to the particular points he had made in his written grounds of appeal and in his oral arguments to us.

12. First of all, there is the point he makes regarding the attempted surrender of the licence relating to BVTL. There is no doubt that he did attempt to surrender that licence. The Public Inquiry had initially been scheduled to take place on 23 and 24 March 2015 and it was prior to that date that he had contacted the Traffic Commissioner's Office indicating his wish to surrender it. The Traffic Commissioner declined to accept that request and this was notified. As confirmed in her decision, the

Traffic Commissioner declined the surrender because the accounts and annual return relating to the company were overdue and the compliance history needed to be considered. The Traffic Commissioner did, though, suspend both licences on 21 March 2015 when granting an adjournment of the Public Inquiry.

13. Insofar as this ground of appeal might be thought to have amounted to an attack upon the Traffic Commissioner for failing to accept the surrender we would reject it. We consider it to have been perfectly proper for the Traffic Commissioner to refuse the surrender for the reasons she gave. At the hearing we did not, in fact, understand Mr Bishop to be making that point (though it was less clear on the basis of what he had said in writing) but, rather, we understood him to be contending that, in effect, his willingness to surrender the licence was an indication that he was seeking to act in a proper manner and should have been regarded, in some way, as mitigation. However, we do not agree with that. The issues with which the Traffic Commissioner was concerned, insofar as those issues related to Mr Bishop and his stewardship of the two companies, were linked to a number of aspects of his behaviour and we cannot see that his later willingness to surrender a licence did amount to serious mitigation as to any of the failings identified. It follows we cannot fault the Traffic Commissioner for not finding that it did. We see nothing, therefore, in this ground of appeal.

14. As to the point relating to the absence of the witness statement, we cannot see that the Traffic Commissioner actually took a point against Mr Bishop as a result of his not sending such a statement to her, albeit that we did not find his explanations as to why he did not do so to be plausible.

15. In fact, the Traffic Commissioner simply noted that there was no such statement and took the view that her task was to reach decisions concerning the issues raised by the Public Inquiry on the basis of the material which was before her. Again, therefore, her approach simply cannot be faulted.

16. There is the ground relating specifically to WGL to the effect that the Traffic Commissioner wrongly held against Mr Bishop compliance issues which had arisen prior to his taking over. Of course, we fully accept that he is not to be blamed for matters with which he had no involvement in and which occurred prior to his becoming the owner and sole Director of the company. However, in our view, the Traffic Commissioner was very conscious of all of that. She had set out in detail the various problems, which WGL had had, prior to his involvement and, at paragraph 31 of the written reasons was concerned to differentiate between the problems which had occurred before that involvement and those which had occurred afterwards. Indeed, in looking at that paragraph, it is apparent that her questioning at the Public Inquiry had revealed that there had been two prohibitions and seven advisory notices

issued since he took over. One of the prohibitions had related to a fuel leak and the other to a brake fuel leak. It cannot be said that those were matters which lacked seriousness. In our view the Traffic Commissioner did not seek to hold Mr Bishop responsible for matters which had occurred before his proprietorship of WGL nor, if he was seeking to make this further point, did she attach too much weight to the matters which she properly found to be his responsibility and which related to concerns arising after he had become the owner. Again, therefore, we see no merit in this ground.

17. We now turn to Mr Bishop's contention that the content of a letter that he had written to the Traffic Commissioner's Office and which is dated 6 February 2015 had been ignored. This was not a matter he sought to develop at the oral hearing but, nevertheless, we have carefully considered it. In the letter Mr Bishop stated that he was writing to provide the Traffic Commissioner with "a full appraisal of the situation at Western Greyhound after taking over...". Of course, he had taken over, as noted above, some time prior to the date of that letter. He pointed out in the letter that he had made an application to add a transport manager onto the relevant licence and that two other persons were undergoing training as potential transport managers. He said that systems had been put in place as to safety and compliance and that he had reinstated some previously suspended bus services. We would accept that, taken at face value, the content of the letter, if accurate, would suggest that he was seeking to address some issues of concern. We would also accept that the Traffic Commissioner, in her decision, does not make any specific reference to the content of that letter. Indeed, she observed at paragraph 13 of her decision that she was without any material representations from either Mr Smith or Mr Bishop in relation to their tenure (presumably a reference to both BVTL and WGL) save for a letter which Mr Bishop had written on 16 March 2015. That might be an indication that the Traffic Commissioner had overlooked the letter of 6 February 2015 or it might have simply reflected a view she had taken that what was contained in it did not amount to relevant representations with respect to the issues she had to decide. Assuming it was the former, though, we really cannot see that the contents could have impacted upon the Traffic Commissioner's adverse findings. Of course, the letter related to WGL only so had no relevance to BVTL. As to WGL the Traffic Commissioner had based her view of his tenure of that company largely upon failings which had been demonstrated to have occurred after, albeit shortly after, his taking over. He had not, in his letter of 16 February 2015, sought to specifically address or explain those failings or deny them. Accordingly, we think that even if the letter had been overlooked a different outcome could not possibly have resulted.

18. We now turn to Mr Bishop's contention that matters were dealt with by the Traffic Commissioner at the Public Inquiry which he had not been warned about in the call-up letters. It is clear from what he told us in oral evidence that his primary if not sole concern in this regard was a failure to

call him to a “transport managers Public Inquiry”. He felt that the decision had effectively debarred him from being a transport manager without his having had an opportunity to address his fitness to be one.

19. It is, at this stage, worth reminding ourselves as to certain of the legislation governing the licensing of public service vehicles. A Traffic Commissioner’s power to disqualify an operator is to be found in Section 28 of the Transport Act 1985. Section 28(1) provides “where a Traffic Commissioner revokes a PSV operator’s licence, he may order the former holder to be disqualified, indefinitely or for such period as he sees fit from holding or obtaining a PSV licence”. Where the operator is a company, Section 28(5)(a) of the 1985 Act extends the power to disqualify officers of that company. There are, in fact, different provisions in relation to disqualification of transport managers and they may be found at Paragraph 7A-C of Schedule 3 to the Public Passenger Vehicles Act 1981. There is an express provision that notice must be given before disqualification of a transport manager can be considered. Further, if the Traffic Commissioner finds that a transport manager has lost his repute or is no longer professionally competent, he/she must order disqualification.

20. The terms of the Traffic Commissioner’s decision are set out above. There is then, of course, the subsequent clarification in response to Mr Bishop’s email of 3 December 2015 to which we have already made reference.

21. It is to be noted that the Traffic Commissioner purported to act under Section 28 only in disqualifying both companies and Mr Bishop personally. It seems clear that Mr Bishop was disqualified under Section 28(5)(a) although that is not expressly stated, on the basis that he was the Director of both companies.

22. A number of call up letters were sent to Mr Bishop either personally or in his capacity as a Director. Those were sent on 19 February 2015 (one each in respect of the two companies), on 26 February 2015 and on 9 March 2015. It seems to us entirely clear from the text of those letters, despite Mr Bishop’s claimed understanding to the contrary, that matters relating to his stewardship of the companies would be considered. We also note that one of the letters referred to the issue of his good repute. It is right to say, though, as Mr Bishop indicates, none of the letters made any specific reference to his fitness or otherwise to be a transport manager. It is also right to say that the Traffic Commissioner, in her decision, did not expressly disqualify him from acting as a transport manager nor did she appear to purport to do so. In fact, she could not have done so as the requirements under Paragraph 7A of Schedule 3 to the 1981 Act regarding notice being given prior to any disqualification

of a transport manager had not been complied with. So, under the terms of the decision, Mr Bishop is not expressly disqualified from acting as a transport manager.

23. The difficulty for Mr Bishop, though, would seem to be, leaving aside for the moment the purported clarification in response to his email, that the terms of the decision would effectively preclude him from acting as a transport manager. The key wording here is "...or being involved in management, administration or control of the transport operations of any entity that holds or obtains such a Licence...". It is, however, worth exploring why it would seem that the Traffic Commissioner chose to adopt that form of wording. There might be an argument, we suppose, that such wording goes beyond the strict powers of the Traffic Commissioner but we have concluded that that is not the case. In this context we have had regard to what was stated in **Leslie John Ings (Appeal 2005/457)**. In that case the Traffic Commissioner had granted an interim licence to an appellant subject to a condition that his son, who was disqualified, was not to be employed or involved in the business in any way. The then Transport Tribunal upheld the Traffic Commissioner's decision and said this;

"The purpose of the Traffic Commissioner's jurisdiction is to regulate the conduct of operators so as to ensure, first and foremost, compliance with the legislative framework of operator's licensing. When a Traffic Commissioner has exercised his powers under s. 28 of the Act, he must ensure that the purpose of the order is not undermined or defeated by a disqualified person becoming involved with the management of another operator's licence. In the event of a disqualified person wishing to be employed by another operator, whomsoever they may be, the Traffic Commissioner must be satisfied that the role that they are to play within the structure of that company would not cause them to be in breach of the order of the disqualification..."

As is apparent from the part of the Traffic Commissioners written reasons we have set out, she was concerned regarding the risk of "fronting". It would appear that it was her concern about that aspect which led to her couching her decision in the terms she did and that she had the previous approach of the Transport Tribunal in **Ings** in mind. Viewed from that perspective, it seems to us that what the Traffic Commissioner did was reasonable, rational, appropriate and was within her powers. It is not something we would wish to interfere with. Additionally, and in any event, it does not seem to us that, even if the Traffic Commissioner had acted outwith her powers (and we have expressly concluded that she did not) Mr Bishop would have suffered any prejudice. That is because the Traffic Commissioner had found that he had lost his good repute (see paragraph 33 of the decision) and, in that context, it is really very difficult to see how he could satisfy good repute for the purposes of being a transport manager for any

new or different operator (see Article 4 of EC Regulation 1071/2009 and Senior Traffic Commissioner's Guidance "Statutory Document No. 3 Transport Managers" (2015, paragraph 5)). We would, though, take the view that the "clarification" offered by the Transport Commissioner's Office in response to Mr Bishop's email does not, in fact, form part of the Traffic Commissioner's actual decision. It will be recalled that it had been indicated in the affirmative when Mr Bishop, having received the decision had enquired as to whether the terms of the decision meant that he was "unable to perform middle management or supervisory duties". Indeed, we do not think that the Traffic Commissioner's Office was intending that that would, of itself, form any part of the decision. There is, of course, a general principle that once a court or tribunal has promulgated its decision it loses jurisdiction to further decide the case save for a limited number of exceptions such as corrections (see **DEG – Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy [2001] All ER 878**). Whilst a Public Inquiry before a Traffic Commissioner is not a court or tribunal hearing, Traffic Commissioners do exercise what are essentially judicial functions. It seems to us, therefore, that, whilst Mr Bishop clearly did think the clarification formed a part of the actual decision, it did not. In our view, though, particularly in light of what we have said about the clarification, the decision does not appear to completely exclude Mr Bishop from any involvement in the passenger service vehicle business. He would, however, need to show "clear blue water" (see paragraph 4 of the decision in **Ings** referred to above) between his duties and the management of any new operator he may be employed by or involved with. No doubt, if he does contemplate working in this sort of business in the future he will, or at any rate should, seek advice.

24. The final argument pursued by Mr Bishop was one to the effect that the decision was simply disproportionate. We do not think it was. As we have noted above, the Traffic Commissioner had found there to be significant concerns with respect to Mr Bishop's stewardship of both companies. Further, she gave careful consideration to the question of proportionality as reflected at paragraphs 34 and 35 of the decision. She adopted the legally correct approach and, in our view, properly found that the failings which had been demonstrated were sufficiently significant to lead to the conclusion that revocation was both appropriate and proportionate.

25. It follows from all of the above that the appellant's appeal fails, though he may, conceivably, take some very limited comfort from what we have had to say about the status of the "clarification".

Conclusion

26. The appellant's appeal to the Upper Tribunal is dismissed.

Signed:

MR Hemingway

Judge of the Upper Tribunal

Date:

28 June 2016

**[Corrected 5 July 2016 under rule 42 Tribunal Procedure
(Upper Tribunal) Rules 2008]**