Neutral Citation Number: [2016] UKUT 0442 (AAC)

Appeal No. T/2016/35

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of
Richard McFarlane, Deputy Traffic Commissioner
for Scotland dated 11 May 2016

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
George Inch, Member of the Upper Tribunal
Michael Farmer, Member of the Upper Tribunal

Appellants:

CITY SPRINTER LIMITED & JOHN PAUL HEALY

Attendances:
For the Appellants: None for either Appellant

Heard at: George House, 126 George Street, Edinburgh, EH2 4HH
Date of hearing: 4 October 2016
Date of decision: 10 October 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal BE DISMISSED forthwith save that the penalty ordered under s.39 of the Transport (Scotland) Act 2001 is to be paid by (28 days of this decision).

SUBJECT MATTER:- Financial Standing; good repute; whether the Appellant had established a reasonable excuse for the cancellation of a registered bus service.

CASES REFERRED TO:- Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Deputy Traffic Commissioner for Scotland ("the DTC") made on 11 May 2016 when he revoked the operator's licence of City Sprinter Limited ("CSL") upon the grounds of lack of professional competence, inadequate financial standing and loss of good repute under s.17(1) of the Public Passenger Vehicles Act 1981 ("the Act") resulting in CSL being disqualified from holding or obtaining an operator's licence for a period of two years under s.28 of the Transport Act 1985. CSL was also ordered to pay a penalty of £4,750 under s.39 of the Transport (Scotland) Act 2001 as a result of the cancellation of a registered bus service, such payment to be made within three months. In respect of the present director John Paul Healy ("Mr Healy") and Ian Cunningham (who had been a director and who was found to be acting as a shadow director), the DTC found that they had lost their good repute and were disqualified from holding an operator's licence or from being a director of any company which holds such a licence for a period of one year under s.28 of the 1985 Act. The orders were to come into effect at 23.59 on 27 May 2016. A stay was subsequently granted. There are no appeals in respect of the revocation of the operator's licence or in respect of the finding that Mr Cunningham had lost his good repute.

Background

2. The factual background to the appeal appears from the documents, the transcript and the DTC's written decision. On 12 April 2012, CSL was granted a standard national public service vehicle operator's licence authorising the use of nineteen vehicles. On 13 May 2013, CSL was called to a public inquiry subsequently held on 26 August 2013 for the DTC to consider an adverse maintenance report triggered by the issuing of an "S" marked PG9; the lack of a nominated Transport Manager since the resignation of the previous nominated Transport Manager on 22 May 2012; a change of operating centre with effect from 8 April 2013 without notification to the Traffic Commissioner ("TC"); the failure to operate a registered service (no.38) according to its timetable; deficiencies in the checks on drivers entitlement to drive; drivers hours infringements; and finally, financial standing. The DTC accepted the nomination of Archie Brown, the person who had been acting as Transport Manager since May 2012; he accepted the change of operating centre to 131 Woodhead Road, South Nitshill Industrial Estate, Glasgow; he found that changes had been made by CSL in respect of CSL's other shortcomings. He was not however satisfied that CSL was of the appropriate financial standing and determined that he would revoke the operator's licence unless further evidence of

financial standing was produced within fourteen days of the date of his decision (the fourteen days expiring at the close of business on 8 October 2013). The decision was not in fact posted until two days after it had been signed. On 9 October 2013, further evidence of financial standing was submitted to the office of the Traffic Commissioner ("OTC"). This was deemed to be "too late" by the DTC and the licence was revoked on 13 October 2013. On the 13 February 2014, the Upper Tribunal allowed an appeal from that decision (*T/2013/76 City Sprinter Limited)* and the matter was remitted to the DTC for further consideration of financial standing. At this stage, Mr Healy and Mr Cunningham were directors.

3. At the reconvened public inquiry held on 12 May 2014, the DTC concluded that CSL was of appropriate financial standing but nevertheless required CSL to demonstrate that it continued to be of appropriate financial standing on a monthly basis for the following three months. Financial evidence was produced by CSL in accordance with the direction, reliance being placed upon a letter from Claim Bridging Limited dated 22 August 2014, providing a facility of £100,000 to 15 January 2015. The DTC was not satisfied by this letter and requested that CSL and Claim Bridging Limited complete a finance agreement which was submitted on 13 October 2014. The agreement was not accepted by the DTC and on 10 November 2014, a further letter was issued to CSL requiring full bank statements for the months January to March 2015. No response to this letter was received by the OTC.

4. A follow up letter was sent on 11 May 2015, informing CSL that in the absence of the bank statements previously requested, the DTC was proposing to revoke its operator's licence. CSL was given until 25 May 2015 to provide the bank statements. On 18 May 2015, Mr Cunningham (who had resigned as a director on 29 August 2014 without the OTC being informed) telephoned the OTC to say that he had posted the "bridging letter" in November 2014 and that he would call back as soon as possible. On 18 May 2015, he contacted the OTC and advised that he could submit the required bank statements but that they would not show sufficient financial standing. Those statements were subsequently received on 27 May 2015.

5. In the meantime, on 29 May 2014, the OTC wrote to CSL advising that it had come to the TC's attention that CSL was without a Transport Manager. CSL was given until 12 June 2014 to provide information concerning its professional competence. In response, Ian Howie, who was the workshop foreman for CSL notified the OTC that he had been fulfilling the role as Transport Manager since April 2014 and that a TM1 form along with his CPC certificate had been submitted to the OTC. Following the departure of CSL's general manager, Mr Howie could not find any trace of either the application or Mr Howie's original CPC certificate. He had applied for a replacement. A TM1 form was subsequently submitted on 15 August 2014. It would appear that the OTC did not deal with that application once the replacement certificate

was submitted. On 8 June 2015, the OTC received a letter from Wojciech Wojnar, who identified himself as the new Transport Manager for CSL, Mr Howie having resigned on 8 June 2015. Before his nomination could be considered, Mr Wojnar notified the OTC of his resignation on 25 June 2015. CSL did not nominate an alternative to Mr Wojnar, neither did it ask for a period of grace.

6. On 28 April 2015, the TC received a letter from Kendall Property Management Limited on behalf of Strathcarron Estate Limited concerning CSL's operating centre at 131 Woodhead Road, Glasgow. The letter read:

"*I refer to the premises noted above and City Sprinter Limited who until recently were the tenants of the property.*
At the outset of their tenancy we were asked to provide a letter to be passed to the Traffic Commissioner confirming their tenancy and their permitted use of the premises. In the circumstances my client has asked that we inform you that the tenancy to City Sprinter has now been terminated for non-payment of rent, we are now raising court action to recover the arrears of rent and associated costs. I have attached a copy of the formal termination notice for your information. .."

The termination notice was dated 3 April 2015 and was headed "*Notice of termination of lease – irritancy".* The notice identified CSL as "*the tenant under the lease"* and the subject of the lease being "*more particularly described in the said lease".* It referred to the "*Pre-Irritancy Warning Notice dated 17 February 2015"* in which CSL was given notice of Strathcarron's right to terminate the lease (that notice was not disclosed to the TC). The termination notice went on to refer to "*clause 11 of the lease"* and that the notice had also been served on CSL's registered office and Mr Healy's registered address (191 Station Road, Shotts, ML7 4BA). The termination date of the lease was the 5 April 2015.

7. The OTC wrote to CSL asking for an explanation of the circumstances in which the lease of the operating centre had been terminated. On 21 May 2015, Mr Healy responded stating that CSL had spent substantial monies on the premises and had been waiting over 18 months for a lease to be provided and CSL was now in dispute with its landlord. CSL's legal representatives had made it clear that the company would not be vacating the premises until the matter had been resolved.

8. Then on 23 June 2016, the TC received an email from Pen Underwriting concerning CSL's fleet insurance. It read:

"*I write to inform you that we have received instructions from City Sprinter's insurance broker Arthur J Gallagher, to cancel the motor fleet insurance .. due to non payment of premium. Cancellation was effective 13th May 2015.*

The purposes (sic) of this email is firstly to inform you of the withdrawal of motor insurance and secondly highlight that there may be possibility (sic) the cancellation has been ignored by City Sprinter. We have no evidence to suggest that any alternative insurance arrangements have been made and therefore the potential of City Sprinter operating in breach of the Road Traffic Act. .."

Provided to the TC was the Notice of Cancellation dated 6 May 2015, addressed to 131 Woodhead Road and giving notice of the cancellation date of 13 May 2015 due to non-payment of premium. Also provided was a Notice of Cancellation dated 23 June 2015 confirming cancellation of the policy on 13 May 2015. That too was addressed to the operating centre.

9. At 11.22am on 1 July 2015 the OTC sent an email for the urgent attention of Mr Healy and Mr Cunningham. The email from Pen Underwriting was attached. The OTC email continued:

The Traffic Commissioner is extremely concerned about (the cancellation of the fleet insurance) and requires the company to provide the following evidence to this office by no later than 5pm tonight: evidence of motor insurance for the company's entire fleet.
.. failure to produce this information .. as required .. will result in the matter being referred to Police Scotland."

As a result of that email, Mr Cunningham telephoned the OTC and spoke to Ms Dick, Senior Team Leader of that office and expressed his "shock" at receiving the cancellation notice. He stated that legal advice had been received that they should dispute the insurance cancellation because of the lack of notice. Mr Healy then wrote in an email at 15.30 in the following terms:

"Further to your discussion with Ian we did not receive any 7 day notice of cancellation from ERS as is required by law so as we can make alternative arrangements our legal team advises this is a requirement with this type of policy. We did receive a copy of a letter yesterday which was sent on Monday stating ERS have already cancelled our policy. We have tried to contact them today to find out what is happening. Our policy clearly states we have cover until 10th July 11.59pm. We are going to suspend our services immediately if we cannot get clarification today. Any advice would be appreciated as we must take action now. Please contact us as a matter of urgency".

10. Mr Cunningham then forwarded the insurance certificate and spoke to Ms Dick again stating that whilst the cancellation notices had not been received at the operating centre, they may have been sent to Chiltern Travel Limited, an associated company. It was noted however, that the address on the notices was clearly that of the operating centre. Nevertheless, Mr Cunningham advised that he had been in contact with another insurance provider and that cover could be arranged at a cost

of £16,000 which "they" were prepared to pay. Nothing else was heard from CSL.

11. At 17.28 on the same day, Ms Dick emailed CSL reminding the directors of the TC's concerns and that the responsibility to comply with the law was upon the company. At 23.18, Mr Healey responded stating:

"*Due to both our concerns with regard the lack of clarity regarding cover we have no option but to suspend our service until further notice. We will be in contact tomorrow".*

12. On 3 July 2015, the Evening Times published an article entitled "*Police launch probe into bus company Sprinter".* It noted that commuters had been *"left stranded"* the day before as a result of the unexpected withdrawal of the 38 registered bus service. One of the drivers stated "*many customers had paid up front for weekly and monthly tickets costing £10 and £30 ..I've sold quite a few of them this week. I actually picked up the phone to a woman who was asking what she was going to do now. I didn't know".* The article asserted that Mr Healy had said that he was unaware of investigations by the police or the TC and *"insisted it was his decision to stop running the service. He said: "The company just couldn't afford to run anymore, to be honest. We've been struggling for a while now, trying to run against First Bus. It's impossible. Last week they had seven buses out to every one of ours. It's just been an uphill struggle" .. He was unable to say whether customers who paid up front for weekly and monthly tickets will be refunded. He added: "We'll see what we can do about that*. *We will probably be putting the* c*ompany into voluntary liquidation".*

13. On the day before the publication of the article, a call up letter was sent to the directors of CSL notifying them of a public inquiry scheduled to take place on 3 August 2015. Financial standing, the letter from Kendall Property Management Ltd, professional competence, the cancellation of the fleet insurance policy, the failure to operate and "effectively abandon" the 38 registered service and good repute were all in issue.

14. On the morning of the public inquiry, two letters were hand delivered to the OTC. The first, dated 27 July 2015, gave notice to the DTC of CSL's "*wish*" to surrender its nineteen discs which were enclosed with the letter and to cancel the number 38 registered bus service. The second letter date 30 July 2015 requested an adjournment of the public inquiry on medical grounds. A medical certificate dated 31 July 2015 was enclosed stating that Mr Healy was unfit to travel for one week due to illness. Despite the unsatisfactory nature of the medical certificate and the very late delivery of the letters, in the interests of fairness, the DTC adjourned the hearing to 3 September 2015.

15. On 1 September 2015, a further request for an adjournment was made by Beltrami & Co, solicitors instructed by Mr Healy, upon the basis that his instructions had been received very late, there had been no opportunity of meeting Mr Healy (he lives in Ireland) and further medical evidence was available vouching for Mr Healy's ill health. As a result, the public inquiry was adjourned to 18 November 2015. On 2 September 2015, J.A. Shaw & Co, a firm of solicitors based in Ireland, wrote to the OTC on behalf of Mr Cunningham. The letter informed the DTC that Mr Cunningham rejected the contention that he was a shadow director of CSL and enclosed a letter from Mr Healy which confirmed that Mr Cunningham had resigned as a director of CSL in 2014 and asserting that Mr Cunningham "*has not attended this office since then".*

16. Two days prior to the public inquiry, J.A. Shaw & Co wrote to the OTC advising that Mr Cunningham would not be attending the hearing as he would be abroad on business. A witness statement signed by Mr Cunningham was enclosed. That stated that Mr Cunningham had not been a director of CSL since 29 August 2014 when it became apparent to him that he could not fulfil his duties as a director due to other business commitments. He did not attend the operating centre for about eight months thereafter and did play any role in the company. Mr Cunningham's family had invested heavily in CSL both financially and in terms of time. They were the "*big losers in all of this".* Mr Healy had "*put his heart and soul into the business and tried to protect the customers and the employees .. to the detriment of both his health and financial well-being".* In relation to the fleet insurance, Mr Cunningham had been in touch with the OTC because Mr Healy was "*under huge mental stress"*. The figure of £16,000 mentioned by him during the course of conversations in relation to the cost of insurance represented a monthly payment. Mr Healy's decision to stop the registered bus service and hand back the vehicle discs was a "*brave and correct decision".*

<u>The Public Inquiry</u>

17. At the hearing on 18 November 2015, Gary McAteer, solicitor of Beltrami & Co represented CSL and Mr Healey. No one appeared on behalf of Mr Cunningham. At the outset, Mr McAteer stated that there was a *"story to be told"* and that he could make submissions in relation to it or he could ask Mr Healy appropriate questions "*as and when".* The DTC endorsed the former suggestion.

18. Mr McAteer told the DTC that Mr Healy had grown up in the bus industry. His father owned a company in Ireland and Mr Healy had commenced his own transport business in Ireland which had done "*relatively well".* That was Enfield Coaches Limited. Mr Healy then spotted a gap in the Scottish market and incorporated CSL. He invested in that business to a significant extent along with "*other parties"* and much of that investment had been lost. Financial advice

had been received after the business was established and that led to the public inquiry in 2013. After the second hearing at which the DTC was satisfied that the financial standing requirements were met, it would appear that Mr Cunningham had sent letters concerning a bridging facility in November 2014 which had not been received by the OTC which led to the request for bank statements for the period January to March 2015. He submitted that those statements were "*sufficiently robust to have met financial standing if they had been presented in a timely manner"* although he accepted that the "*events"* would give rise to a natural suspicion given the impending failure to provide the registered service. Mr McAteer submitted that the press report in the Evening Post contained inaccuracies and contrary to the reported statement by Mr Healy that the company was not making any money, there was in fact an intention to continue operations.

19. The catalyst for the fleet insurance being cancelled was that Chiltern Travel Limited, of which Mr Healy is sole director, had been forced into administration in England. Mr McAteer stated that the fleet insurance for both Chiltern Travel Limited and CSL had been arranged through a finance company and a broker so that the ultimate insurer (Equity Red Star) received a payment on behalf of CSL. It was "*questionable"* whether the notice of cancellation was received by CSL but in any event, CSL had continued to pay the premiums and in the circumstances, the insurers had no power to terminate the insurance. When Mr Healy had contacted the insurers asking for a copy of the insurance policy, he was told that he was not entitled to a copy because CSL was in administration. It was assumed that "*the insurer being in known receipt of premium or part premium for one entity has taken a view, whether or not they were entitled to".* It was contemplated that CSL had a right to bring proceedings against the insurer. Mr McAteer went onto describe the insurance arrangements of CSL as being "*circuitous".* The payment of the insurance premium to the broker was through Close Brothers Finance and "*to the operator's knowledge there was no failure to pay any premium"* for CSL. There was a failure to pay a premium by Chiltern Travel because it had been placed in administration arising out of a dispute over the financing of a vehicle. As a result, the insurer cancelled both fleet policies. If it transpired that CSL had in fact been operating without insurance, then that was out with the company's knowledge. The first "*proper"* notice of the cancellation of the fleet insurance was the email from the OTC on 1 July 2015. CSL then immediately attempted to deal with the issue. Mr Cunningham's statement referred to his attempts to arrange alternative insurance cover but the monthly premium quoted was £16,000 when the previous monthly premium had been £12,800. Further the alternative insurer was insisting upon the annual payment up front which CSL could not pay. It was in those circumstances that Mr Healy made the decision to cease the operation of the registered service. If the fleet insurance had not been terminated, then CSL would have continued to operate.

20. In relation to Mr Cunningham's involvement in the organisation of alternative insurance cover, Mr McAteer submitted that this was only because of the type of stress that Mr Healy was under at that time and this was contributed to by a "*developing dispute"* over the operating centre. Whilst it was asserted in the letter sent to the OTC by Kendall Property Management Limited informing the TC that the lease had been irritated as a result of non-payment of rent, that was not the case. It was Mr Healy's case that the lease of the operating centre had never been finalised. An English firm of solicitors had represented CSL's interests in the matter and "*there had been missives"*. It transpired that rent had been paid by CSL up to the point when the premises were no longer wind and water tight as a result of significant problems with the roof and at that point, rental payments were withheld. Once CSL ceased operating the registered bus service, the operating centre was "*essentially abandoned".* Mr McAteer was suspicious of the motives of Kendall Property Management Limited for bringing the termination of the lease to the attention of the OTC. He submitted that it was evident that Kendall was more concerned with putting pressure on CSL to resolve the dispute rather than the fulfilment of a public duty. Mr McAteer characterised the dispute as "*technical*" with "*ongoing rumblings*" but the overall relevance of it was whether it was a sign that the company was failing to meet its commitments at that time against the background of the public inquiry in 2013 when one of the issues was financial standing.

21. Mr McAteer referred to the letter from Claim Bridging Limited which had been relied upon in support of financial standing. Was it a "true" document or an "enabling" one? The broad answer to "*all of this*" was the level of investment made by the parties into CSL; the fact that it was not a rogue operation; the fact that CSL was not in liquidation or administration at the time of the public inquiry; the drivers and staff had been paid off; there were no significant creditors. Indeed, there was a significant outstanding claim against Transport Scotland and it was Mr Healy's case that the assets of the company should easily cover all debts outstanding, leaving a surplus.

22. The issue or professional competence was then dealt with. Archie Brown, the Transport Manager accepted by the DTC following the 2013 public inquiry, left CSL and Mr Howie took over although CSL continued to look for a *"very capable, ambitious, competitive"* Transport Manager and they "*happened*" upon Wojnar. His employment was however, short lived as his expectations were different to those of CSL. Mr Howie nevertheless continued to work for the company and he remained available to be nominated as a Transport Manager although he was not CSL's "*ideal choice*" and he had not confirmed that he was willing to be nominated a second time.

23. Mr McAteer then turned to Mr Healy's other business interests. Enfield Coaches Limited continued to trade in Ireland. Chiltern Travel Limited had gone into administration at relatively short notice and the assets of

the company were transferred to Enfield Coaches UK Limited (which does not hold an operator's licence) with some of the Chiltern Travel fleet returning to Ireland to be operated by Enfield Coaches Limited. The finance agreements with Close Brothers had been re-negotiated.

24. Mr McAteer accepted that he did not have any documentation to support the submissions he had made and he accepted that in the absence of any up to date financial standing evidence or an operating centre, CSL's operator's licence fell to be revoked. However, Mr Healy hoped that once CSL's accounts had been finalised, he would be in a position to go "*back to basics*" and commence operation with Mr Howie as Transport Manager. It was submitted that Mr Healy had overstretched himself geographically and that this would be addressed.

25. Returning to the issue of Mr Cunningham's role in the business once he had resigned as a director, this was not a case where a director was acting as a shadow director so as to avoid responsibility and penalties in the event that a business failed. Mr McAteer had spoken to Mr Cunningham and had told him that his attendance at the public inquiry was important for his reputation. However, the key issue was Mr Healy's good repute which he could not afford to lose. He submitted that the short way of dealing with the issues was for the DTC to revoke CSL's licence and not make any adverse findings in respect of good repute or alternatively, the longer way would be to look in more detail at the submissions made and obtain support from them.

26. The DTC expressed concern about the assertions that important correspondence (such as the insurance termination notices) had not been received by CSL at the operating centre although he considered that the key issue was the situation with the insurance itself. Mr Healy confirmed that there had not been any problems on a day to day basis with receiving post at the operating centre. The DTC highlighted that whilst the position adopted by CSL was that the insurance company did not, as a matter of law, have any authority to terminate the insurance, the DTC could not recall an insurer ever writing to the OTC regarding cessation of vehicle insurance. Good repute was in issue along with the failure to continue with the registered bus service. There were significant consequences for not giving notice of the cancellation of a service or for failure to obtain short notice cancellation of it. The insurance situation was linked to that and needed to be vouched. The DTC was surprised that CSL did not have in its possession a copy of its own fleet insurance policy and he considered there to be "*a lot riding*" on that document. Mr McAteer advised that the insurance company would not provide a copy of the policy because it was under the mistaken impression that CSL was in administration. This was to be obtained. The DTC then adjourned the hearing to allow CSL to "*look further into the issues we have identified this morning all with a view to vouching the situation to assist me in really considering the repute of the company and its directors".* The DTC indicated that the hearing

would either reconvene or written submissions could be provided depending upon the outcome of the investigations.

27. On 17 December 2015, Mr McAteer sent a number of documents to the DTC which had been provided by the insurance company. They did not include the policy document itself and Mr McAteer asked for the DTC's forbearance. On 5 January 2016, the OTC wrote to Mr McAteer highlighting that the issue of insurance featured in the call up letter sent out on 2 July 2015. In the circumstances, the DTC would not give CSL any further time and required final written submissions to be submitted by 29 January 2016.

28. On 29 January 2016, Mr McAteer wrote to the OTC advising that the policy document remained outstanding. Mr Healy's good repute was balanced on the issues arising out of the cancellation of the fleet insurance and it was Mr McAteer's submission that there was no legal basis for the insurers to have acted in the way they did without warning the company of its precipitate decision. In essence, the insurers had taken "*umbrage*" at the fact that another related entity had not paid its insurance premium and had cancelled the insurance for both entities despite the fact that a contract of insurance could not be qualified in that manner. This precipitate decision meant that the whole operation was jeopardised and CSL was bound to take a decision to cease to operate in the absence of insurance, which could only be regarded as the "*correct moral and legal route"* at that time. The DTC was reminded that there were no "*substantial creditors*" nor had the company gone into liquidation. Mr McAteer indicated that he did not intend to make submissions at that point in respect of the other failures of CSL as the DTC was already aware of CSL's position in relation to them. In essence, the events which gave rise to the failure to operate a registered service are connected to the cancellation of the insurance.

29. Then on 8 February 2016, Beltrami & Co provided the OTC with the policy of insurance. Condition 10 of the General Conditions states:

"*We, or your insurance advisor may cancel this insurance by sending seven day notice, in writing to your last known address ...".*

It was accepted on behalf of CSL that the policy allowed for cancellation of insurance without cause. However, it was reiterated that the insurers conduct was unpredictable and out with the control of CSL.

<u>The TC's decision dated 11 May 2016</u>

30. The DTC began by revoking CSL's operator's licence upon the grounds that the operator lacked appropriate financial standing and professional competence. The Tribunal should add at this stage that the DTC's rejection of the documentation purporting to demonstrate a bridging

facility of £100,000 was plainly right and the fact that it was not drawn upon at the time when CSL was seeking alternative insurance cover supports the DTC's findings (indeed it was never drawn upon). The DTC described CSL's financial standing as "*precarious*". We note that the bank statements covering the periods January to March 2014 and January to March 2015 did not even begin to demonstrate the financial standing necessary to operate nineteen vehicles and there was no basis upon which Mr McAteer could properly submit (as he did) that the evidence of financial standing was "sufficiently robust" to meet the requirements if the issue had been dealt with in a more timely fashion.

31. The DTC then turned to good repute. He determined that the management CSL had become less effective in 2014 and continued to be so up to the date when the company ceased trading. This was evidenced by the resignation of Archie Brown, the Transport Manager. When his resignation came to the attention the OTC, CSL was required to nominate a new Transport Manager. From that date, no Transport Manager had been formally accepted by the TC and no period of grace had been sought. This was a "*very serious matter".* Mr Healy had been the sole nominated director for CSL since August 2014. He accepted that he was not at the operating centre on a daily basis and the DTC had gained the "*distinct impression"* that the day to day management of the company was in the hands of an Accounts Administrator and a Transport Manager who had not been accepted by the OTC. The DTC did however acknowledge that Mr Healy had not been enjoying the best of health in 2015.

32. A recurring theme of the operator was that it was claimed that some correspondence had been sent to the OTC which had not arrived and that some correspondence had not been received at the operating centre, for example, the "*all-important"* Notice of Cancellation of the fleet insurance dated 6 May 2015 which informed CSL that its insurance would be terminated on 13 May 2015 and the further Notice of Cancellation dated 23 June 2015 confirming the termination of insurance on 13 May 2015. The Notices were correctly addressed. It was the responsibility of the operator to ensure that there was a facility for where correspondence was to be delivered at that address.. The DTC determined that he did not accept that CSL did not receive either or both of those Notices. He further determined that the cancellation of the policy had been "*proper and lawful"* having been in accordance with Condition 10 of the General Conditions of the policy. It followed that CSL had knowingly used its fleet of vehicles without insurance from on or about 13 May 2015 to 1 July 2015 which was "*another most serious matter".* The directors must have been aware t there were insufficient funds to pay the insurance premiums.

33. In undertaking the required balancing exercise in relation to good repute, the DTC noted that there had not been any adverse reports from any enforcement agency or third party; there were no issues to do with maintenance, the use of vehicles, drivers hours offences or record

keeping and no notifiable convictions or prohibitions. There were however issues to do with the management of CSL; the continuing failure to have a Transport Manager accepted on the licence; the failure to remain of appropriate financial standing; the failure to notify the TC that CSL had ceased to be of appropriate financial standing with the continuation of operations in those circumstances; permitting the use of vehicles whilst uninsured; the cessation of a registered service without the required notice of cancellation or seeking or obtaining from the TC cancellation at short notice.

34. In considering the actions of the "*directors"* of CSL, the DTC was satisfied that despite Mr Cunningham's resignation as director of CSL, he nevertheless continued to act as a "*shadow director"* in accordance with s.251 of the Companies Act 2006. He was involved in establishing financial standing in November 2014 and again in May 2015. He was involved with the issues arising out of the cancellation of the fleet insurance policy in July 2015. Further, the bank statements for CSL's Wages Account continued to be addressed to him. The DTC was satisfied that the adverse findings set out in paragraph 33 above demonstrated that the directors had not discharged their duties in a *bona fide* manner. Added to the adverse findings was the fact that CSL had continued to occupy the operating centre after the termination of the lease on 5 April 2015. CSL did not have an operating centre after that date. The combination of the adverse findings led the DTC to conclude that Mr Healy and Mr Cunningham had breached the relationship of trust between CSL and the TC and the DTC could not trust either director to comply with the undertakings of an operator's licence and CSL deserved to be put out of business as a result of the identified shortcomings. The DTC then made the orders of disqualification as set out in paragraph 1 above and concluded that in the absence of a reasonable excuse for failing to operate a registered service, the appropriate figure for a penalty under s.39 of the Transport (Scotland) Act 2001 was £250 per vehicle and ordered a total penalty of £4,750.

The Upper Tribunal Appeal

35. At the hearing of this appeal, Mr Healy failed to appear and was unrepresented, Beltrami & Co having given notice to the Upper Tribunal that they had withdrawn from the appeal due to lack of instructions. In the circumstances, we considered the grounds of appeal previously submitted by Mr McAteer. The first point was that the submissions made on behalf of CSL, established that financial standing had been in place throughout the life of licence, the availability of the operating centre had been addressed by reference to the civil dispute between CSL and its landlord and whilst no Transport Manager had been accepted on the licence, there had been someone fulfilling that role throughout the life of the licence. It followed that the only issues of significance by the end of the hearing was the lack of insurance and uninsured operations. The DTC accepted that it was the

"*pivotal issue"* regarding the management of CSL. In the circumstances, the DTC had erred in law in that *"he had regard to facts which he ought not to have given regard and failed to have regard to facts which he ought to have, nor was it the case that the DTC advised the operator at the inquiry that these facts were still outstanding in terms of the need for an explanation".* The sole purpose of the adjournment was for CSL to obtain more information upon the issue of insurance. In the absence of an indication that further information or explanation was required on the other matters, the DTC should not have taken them into account when considering good repute.

36. We are satisfied that there is nothing in this point. The call up letter, which was dated 2 July 2015, clearly set out the issues to be considered by the DTC. He did not take into account any matter which had not been referred to in the call up letter and which had not been addressed by Mr McAteer. In effect, Mr Healy and CSL had the benefit of four months in order to prepare the company's case on the issues raised. It is striking that not one document or piece of evidence (apart from a letter written by ERS refusing to disclose the fleet insurance policy) was produced during the course of the hearing to support any of the submissions made by Mr McAteer, which in the circumstances were nothing more than bare assertions. This is not a criticism of Mr McAteer's conduct of the case. We have no doubt that if documents had been made available to him which supported or tended to support the submissions he had made, he would have placed them before the DTC. The DTC's findings on loss of repute concentrated upon the cancellation of the insurance policy, CSL's knowledge of that cancellation and the continued operation of vehicles thereafter. That alone would have been sufficient to find a loss of good repute. However, the DTC relied upon the following additional grounds:

    a) The absence of financial standing and the continuation of operations without notifying the TC of the material change: the DTC had previously determined that the purported bridging facility could not be relied upon by CSL. Nothing was put before the DTC to persuade him to change his mind on that issue. The only evidence of financial standing was the bank statements and it was self evident on the face of them that from January 2014 that financial standing was not satisfied, contrary to Mr McAteer's assertions that the requirement was met throughout the life of the licence until shortly before the public inquiry. As at the date of the hearing, it was accepted that CSL did not meet this requirement. We fail to see what other evidence could have been obtained if required upon this issue when the bank statements clearly demonstrated the true position;

    b) The failure to vacate the operating centre upon the termination of the lease: CSL was given notice of termination of the lease by reason of a Pre-Irritancy Warning letter dated 17 February 2015 (not within the papers but referred to in the termination notice).

There then followed the Notice of Termination dated 3 April 2015. It is surprising to say the least that CSL did not have any available documentation concerning the alleged dispute with the landlord which was relied upon to justify its failure to pay rent and to vacate the operating centre upon the termination of the lease or to support the assertion that the lease had never been finalised despite "*missives"*. Neither was it suggested that such documentation could be made available if necessary and we reject Mr McAteer's submission in the grounds of appeal to the contrary. It was incumbent upon CSL to show that the termination of the lease was not something that should be considered to be adverse to the good repute of either company or the directors but in any event, the DTC did not rely upon the termination itself due to non-payment of rent but the fact that CSL did not vacate the premises once that had taken place (and we note, inform the TC of the position);

c) The lack of an accepted Transport Manager from April 2014: we fail to see what else could have been provided in relation to this point. The DTC's findings were based upon the position as accepted by CSL and Mr Healy.

We repeat that upon the basis of the findings made by the DTC in relation to the cancellation of the insurance and the continued operation of vehicles thereafter, that good repute was lost.

37. The next point in the grounds of appeal was that the DTC gave insufficient weight to the criticisms made of the evidence relating to insurance. The "*broad submission"* was that the insurers were driven by some motive other than public interest and altruism in informing the TC of the cancellation of the fleet insurance and that ERS had taken a precipitate decision for reasons which were not reasonable or in accordance with the terms of the contract. Neither was there evidence of the Notice of Cancellation having been sent by recorded delivery. Further, the DTC "*recorded"* that CSL had paid its insurance premiums and therefore the email sent by Pen Underwriting was wrong. The DTC appeared to have made a finding of fact based either on the letter from Pen Underwriting or based upon the contractual condition allowing for cancellation when there was no proper reason for terminating the insurance policy. The DTC should in fact have reconvened the public inquiry in order to test the evidence of Mr Healy on the issues going to his good repute.

38. We reject this submission. The motive of the insurers in informing the TC that CSL's fleet insurance had been cancelled is irrelevant to the issues, indeed they are to be applauded for doing so as in the absence of such notification, it was likely that public service vehicles would have continued to be operated without insurance cover until 10 July 2015 when the insurance policy would otherwise have come to an end. Neither is the method of service of the notices of cancellation relevant.

There is no requirement in the policy for the notices to be served by recorded delivery, whatever the industry norm. Whilst the DTC "*recorded*" submissions made about the payment of insurance premiums by CSL, he did not find that they were in fact paid. Rather, he found that there were insufficient funds to pay for the insurance premiums and we note that the bank statements produced do not appear to show any such payments. It was incumbent upon CSL/Mr Healy to provide some evidential support for the payment of the premiums. If the payments were being made, whether via Chiltern Travel or otherwise, then a financial trail should have been put before the DTC and explained. The bottom line is that the DTC found that CSL did receive the notices sent to the operating centre and that finding cannot be categorised as being plainly wrong. The DTC rightly found that there was a recurrent theme of important documents either not being received at the operating centre or not being received by the OTC when it was asserted they had been sent by CSL. It is incredible that both notices of cancellation were not received at the operating centre and the assertion to the contrary is not worthy of belief. It follows that the DTC's finding that CSL knowingly continued to operate public service vehicles without insurance was inevitable once he had found that the notices had been received by CSL.

39. Turning then to the penalty imposed by the DTC under s.39 of the Transport (Scotland) Act 2001, the next point was that once CSL had discovered that they were uninsured and "*having been held to ransom*" by another insurance company from whom CSL sought insurance, the only correct and inevitable decision to take was the cancellation of the registered service. Mr Healy was suffering from stress and Mr Cunningham was trying to help (and as a side, there was no evidence upon which to infer he was a shadow director) and accordingly a penalty should not have been imposed. Alternatively, the amount was excessive in all of the circumstances.

40. We are not satisfied that the DTC's approach to the imposition of a financial penalty was wrong. This was a serious case. Having found that CSL had continued to operate public service vehicles knowing that the fleet insurance policy had been cancelled and without making any attempt to cancel the registered service or apply for short notice cancellation, it was inevitable that the DTC would impose a financial penalty. Indeed, CSL did not attempt to formally cancel the registered service until the morning of the public inquiry on 3 August 2015 and only stopped operating vehicles on 1 July 2015 when the TC and Police Scotland became involved. No reasonable excuse for the failure to operate the service was available to CSL and there was little mitigation to be relied upon. The aggravating features were that public service vehicles had been operated without insurance, no application was made to the TC for short notice cancellation and CSL continued to permit drivers to accept payment for weekly and monthly tickets from passengers. The public were then left "high and dry" by the abrupt termination of the service with some being out of pocket. The

maximum penalty is £550 per authorised vehicle. It would have been open for the DTC in this case to impose near to the maximum figure per vehicle. Instead, he stepped back from that and imposed a figure of £250 per vehicle and bearing in mind the aggravating features, that was an entirely proportionate figure particularly against the background of the submissions made on behalf of CSL at the public inquiry that the company was essentially solvent.

41. We note that there is no specific reference in the grounds of appeal to the length of the periods of disqualification of either CSL, Mr Healy or Mr Cunningham. For the avoidance of doubt, we are satisfied that all three orders are entirely proportionate bearing in mind the circumstances of this case and we note that against the background of this case, it was open to the DTC to find that Mr Cunningham was a shadow director justifying a period of disqualification.

42. To conclude, we are satisfied that the TC's decision is not plainly wrong in any respect and that neither the facts or the law applicable in this case should impel the Tribunal to allow these appeals as per the test in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695*. The appeals are dismissed.

Her Honour Judge J Beech
10 October 2016