

Neutral Citation Number: [2017] UKUT 0221 (AAC)

Appeal No. T/2017/07

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

**IN AN APPEAL FROM THE DECISION OF
Kevin Rooney, DEPUTY TRAFFIC COMMISSIONER for the
WEST OF ENGLAND TRAFFIC AREA dated 1 December 2016**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Leslie Milliken, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper Tribunal**

Appellant:

MICHAEL HAZELL (No.2)

Attendances:

For the Appellant: The Appellant appeared in person

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 25 April 2017

Date of decision: 3 May 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED

SUBJECT MATTER:- Whether financial standing for an increase in the authorisation of vehicles operated under a standard international PSV licence from one vehicle to fourteen could be solely met by reliance upon undrawn credit card balances.

CASES REFERRED TO:- T2010/45 Stephen McVinnie t/a Knight Rider; T/2015/22 Euromar Limited; 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 Traffic Commissioner for the West of England Traffic Area ("TC") made on 1 December 2016 when he refused Mr Hazell's application to increase the authorisation of PSV vehicles on his standard International PSV licence from one to fourteen upon the basis that he had failed to establish financial standing.

Background

2. The factual background to this appeal appears in the public inquiry documentation and the DTC's decision. Prior to 5 June 2014, Mr Hazell had in his possession a standard national operator's licence authorising three vehicles, operating under the name of hirethisbus.com. In addition, he was a director of Carmel Coaches Limited, along with his father Anthony Hazell and his sister, Carolyn Alderton with an authorisation of forty vehicles. Mr Hazell was also the transport manager for his own licence and was nominated as a second transport manager on the Carmel Coaches licence, his father being the other transport manager.
3. On 5 June 2014, the licences of Carmel Coaches and hirethisbus.com were revoked following findings that Mr Hazell had been unlawfully lending his licence discs to Carmel Coaches; that the maintenance of vehicles operated under both licences was unacceptably poor over a sustained period of time despite warnings and opportunities to rectify the deficiencies; that Mr Hazell and his father Anthony had lost their good repute. Professional competence was also an issue. Carmel Coaches, Mr Hazell and his father were disqualified from holding or applying for any operator's licence for a period of 18 months. An appeal made to the Upper Tribunal was unsuccessful. For the full background circumstances leading to the TC's decision to take regulatory action, see the decision T/2014/53/54 Carmel Coaches Limited; Anthony Grove Hazell; Michael James Hazell. It would appear that following the revocation of the Carmel Coaches licence, the business continued to operate with a new licence in the name of CM Coaches Limited with Carolyn Alderton, Mr Hazell's sister, being one of three directors (her directorship was not notified to the Office of the Traffic Commissioner) and with Anthony Hazell overseeing the operation despite his disqualification (page 163 of the bundle).
4. By an application received by the Office of the Traffic Commissioner ("OTC") on 17 August 2015, Mr Hazell applied for a standard international PSV licence authorising one vehicle. On 26 April 2016, the application was considered at a public inquiry by TC Sarah Bell. By that stage, Mr Hazell had also submitted an application for a second PSV operator's licence in the names of Mr Hazell and Hazellways Limited operating as a partnership with an authorisation request of eleven vehicles. Mr Hazell told the TC that he had made the application in the name of a partnership because some of the financial standing for the authorisation came from credit cards

held in Mr Hazell's name and the remainder from a loan from Carmel Coaches. As for his own licence application, that too was reliant on credit card facilities, as the financial standing demonstrated by the bank statement evidence fell well short of the sum required. The TC advised Mr Hazell that operators were not encouraged to run and fund an operation in the way he proposed as credit cards were expensive and not an "ideal" way of funding a business. The TC was concerned that Mr Hazell continued to look to Carmel Coaches for funding and was apt to confuse operating entities for example, his maintenance was to be undertaken by Carmel Coaches but there was no maintenance agreement. He also wanted his father to be involved in his operator's licence despite his continued loss of good repute. After much discussion, the TC granted Mr Hazell's application subject to the following requirements:

- a) The submission of a maintenance contract from the proposed maintenance provider, Carmel Coaches Limited;
- b) A condition that Anthony Hazell took no part in the business;
- c) A condition that Mr Hazell submit three months' bank statements no later than 17 November 2016 demonstrating financial standing;
- d) An undertaking that a full systems audit be undertaken in November 2016;
- e) An undertaking that the vehicle operated under the licence shall be specified on the operator's licence at all times and that the authorised vehicle shall only display the Michael Hazell licence disc.

It is implicit from the grant of the application that the TC had found that Mr Hazell had regained his good repute.

5. On 19 May 2016, (less than a month after his licence had been granted) Mr Hazell applied to increase the vehicle authorisation on his licence to fourteen. On the same date, Carmel Coaches Limited applied for a standard international PSV licence authorising fifteen vehicles with Anthony Hazell nominated as the transport manager. On 26 May 2016, Mr Hazell appealed the imposition of the two conditions on his licence as set out in b) and c) above. That appeal was heard on 16 September 2016. The Upper Tribunal's decision was published on 2 December 2016. Mr Hazell's appeal was allowed to the limited extent that c) above was amended to include the submission of credit card statements as well as bank statements to the TC in order to demonstrate financial standing. In allowing the appeal, the Upper Tribunal stated: *"If credit card funding is available, whilst not ideal, we see no reason why this cannot be taken into account"*.
6. In the interim, Mr Hazell, his father and Carmel Coaches Limited were called to a public inquiry which took place on 1 December 2016 before TC Kevin Rooney. The purpose of the hearing was to consider: Anthony Hazell's application that his good repute be restored; the application for a licence by Carmel Coaches and the variation application made by Mr Hazell which included an application for condition b) above be removed from his licence. The day before the hearing, Mr Hazell emailed the OTC to say that he did not want condition b) to be removed from his licence. During the public inquiry he explained that this was because he had anticipated that the Upper Tribunal would have published its decision on his appeal prior to 1 December 2016 and he was concerned that as the imposition of the condition was one of the

matters which was yet to be determined by the Upper Tribunal, he did not want to interfere with that process.

7. At the hearing on 1 December 2016, the TC made it clear from the outset that he was concerned by the structure of the family businesses and that between Mr Hazell, his father and his sister, Carolyn, there were four separate licences either in existence or being applied for (the sole trader licence of Mr Hazell, CM Coaches Limited, Carmel Coaches Limited and Carmel Coaches Bristol operated by Carolyn Alderton). Anthony Hazell provided the history of the family business to the TC and discussions took place about the possibility of all operations being undertaken by Carmel Coaches Limited in the future with the other licences being surrendered.
8. The TC considered Mr Hazell's application in a closed session. Mr Hazell was now able to show financial standing for one vehicle from money held in his bank account. However, for an increase in his authorisation of thirteen vehicles, he required an additional £48,100 of financial standing which he sought to demonstrate by the provision of evidence to show that he had unused credit card facilities that equalled that figure. The TC began by stating:

“Whilst it might be viable to run a one or even a two vehicle operation on a credit card, it is not sustainable to run a 14 vehicle operation on a credit card. Interest rates on those are 18/19 per cent. It is not a way to run a business. It is not a sensible business model. I am going to be very open with you now and say I am not going to accept the credit cards in terms of financial standing and I have legal backing to do that. There is a case, Stephen Mcvinnie t/a Knight Rider where the Traffic Commissioner at the time in 2010 discounted credit cards for very similar reasons to why I am”.

The TC went on to advise that it was a matter for his discretion as to whether he would accept credit card facilities in any given case.

9. Mr Hazell submitted that he had followed the Senior Traffic Commissioner's guidance on financial standing which confirmed that credit cards were an acceptable source of financial standing. Overdrafts were just as costly as credit cards but those were accepted. The credit card facilities were not there for Mr Hazell to actually use as to do so would mean that the available amount would be reduced below £48,100. The credit was a backup and even if it were to be used, no interest fell to be paid if the card was paid off within a month of its use. Credit cards were in fact the cheapest way of funding financial standing. Anthony Hazell then interjected stating that his bank had advised him to open a credit card and a charge card account rather than apply for an overdraft and this he had done to assist with financial standing of Carmel Coaches Limited. The TC indicated that he would be “relaxed” about a small part of financial standing being demonstrated in this way but not when it was for thirteen out of fourteen vehicles. In response to a query by Mr Hazell about whether alternative finance would be accepted, the TC indicated that it was “a bit late”, Mr Hazell having been given clear advice by TC Bell about reliance upon credit cards in April 2016 and he had been given an ample opportunity to demonstrate financial standing. In any event, the TC was “nervous” about giving Mr Hazell a large authorisation because of the significant problems he had faced in the past and that it seemed to be sensible for Mr Hazell to address his financial issues

and the management structure of the family businesses and “*incompetence issues*” and to take it “*step by step*”. Mr Hazell indicated that he thought that he “*deserved*” an opportunity to have an increase in authorisation.

10. The TC gave an oral decision which was then confirmed in a written decision. The TC found that Anthony Hazell’s good repute had been restored and he removed condition b) from Mr Hazell’s licence along with a similar condition on the licence of CM Coaches Limited. His determination on the licence applications was as follows:

“I have been very open with you this morning because I want to try and sort this out. I have to look at you as a family and a family business in that there are transactions going on (inaudible) bank statements that it might be separate licences, it might be separate managers but actually you are the overall group. What I would be minded to do is to refuse your application, the sole trader licence application and grant the limited company application in full, which gives you an additional fifteen vehicles. Then you can go away and think about how you want to structure your finances and your business in the future. You might have to take some time to think about how that works. That settles me in that I do not think that is too big a step up for you. It does not take you back towards the size where you were having problems and it gives you a chance to establish yourself again and start building the business.”

In his written decision, the TC stated this in relation to Mr Hazell’s application:

“The bank statements demonstrate access to a little more than the amount needed for one vehicle. The variation to add 13 vehicles requires an additional £48,100. As with the original application, Mr Hazell sought to demonstrate access to this through a significant number of different credit cards. Less than 5% of the additional finance was available from his own means. Lending rates on the credit cards were indicated at around 18% APR. There was nothing in the bank statements that would show that Mr Hazell would have any means to repay the cards should he find it necessary to call upon them.

The purpose of financial standing is explained in the recitals to EU Regulation 1071/2009 as follows “It is necessary for road transport undertakings to have a minimum financial standing to ensure their proper launching and administration.” It can be acceptable for a part of that to take the form of credit cards. But I find it unacceptable for virtually all of it to rely on such a high-cost source of money. The Upper Tribunal has supported this position in T/2010/43 Stephen Mcvinnie t/a Knight Rider where it stated “There were personal credit cards statements, but Traffic Commissioners are rightly sceptical of credit cards without some evidence of an operator’s ability to service the debt or possible debt”. I saw no such evidence and I therefore reject the credit card evidence”.

There is a benefit to Michael Hazell in this decision in that I can take a more relaxed approach to the application to grant a new application to Carmel Coaches Limited with an authority for 15 vehicles (Michael Hazell is a director of that business). I was concerned at the size of the potential overall increase in authority for the Hazell family’s group of PSV businesses. In not granting the increase to this sole trader licence, I find myself able to grant the limited company application in full”.

The Appeal

11. At the hearing of this appeal, Mr Hazell appeared in person. His grounds of appeal as set out in the notice of appeal can be summarised as follows: the TC's refusal of Mr Hazell's application was based solely on the type of finance he had chosen to use to demonstrate financial standing. When making his application he had referred to the Senior Traffic Commissioner Guidance on the subject and that document made it clear that credit cards could be relied upon and Mr Hazell was aware that credit cards were commonly used by operators to demonstrate financial standing. The TC determined that the use of credit cards to demonstrate financial standing of £48,100 was too large a figure but Mr Hazell had not seen any documentation regarding the percentages which would be acceptable and he was not aware of any defined limits decided in test cases. Mr Hazell referred to the established test for what is considered to be available capital or reserves which can be taken into account as set out in paragraph 3 of *T/2015/22 Euromar Limited*, namely those which are "*capable of being used, at one's disposal, within one's reach, obtainable or easy to get*". Mr Hazell had presented documents consistently showing available funds for fourteen vehicles which complied with that test.
12. Mr Hazell did not consider that the case of *Stephen Mcvinnie (supra)* was helpful as the case was not solely concerned with financial standing and the Appellant in that case was only paying modest or minimum payments to service the debt, thus demonstrating that his ability to properly service the debt was inadequate. By contrast, Mr Hazell had made several calls to the OTC to ensure that the evidence he was presenting was acceptable and in an adequate format. He had very little debt on his credit cards and he was able to service that small amount of debt. He believed that his circumstances were sufficiently different from those in the *Stephen Mcvinnie* case. Whilst reliance on credit cards was undesirable, it must be recognised that the working capital generated from the operation of one vehicle was different to that generated by 14 vehicles. It was unrealistic to expect financial standing for 14 vehicles to be generated by one vehicle. TC Bell had acknowledged that she would accept credit cards as a source of funding although she failed to include that source when requiring production of bank statements within six months of the start of the operation. Unfortunately, the Upper Tribunal decision amending that condition was not published until a day after the hearing before TC Rooney and Mr Hazell believes that had it been published earlier, the outcome of the appeal would have been different.
13. In his oral submissions to this Tribunal, Mr Hazell repeated what he had set out in his grounds of appeal. Whilst adopting the description of credit card facilities set out in the Upper Tribunal decision dated 2 December 2016, as not being "ideal", he nevertheless submitted that their use was permissible and he fully met the test of "available capital or reserves". He was surprised that the TC had rejected his variation application upon the basis of financial standing. Mr Hazell submitted that it would benefit himself and other operators if the Upper Tribunal gave guidance as to the percentage or level of financial standing that could be relied upon from credit card facilities.
14. Mr Hazell rejected the finding of the TC that the acceptance of credit card balances was a matter for his discretion. Financial standing was "*very black and white*". In

answer to a question about the commercial realities of using credit cards to demonstrate financial standing, Mr Hazell submitted that he needed fourteen vehicles because customers in the past had required that he had access to that size of fleet. He would not however need to draw down all of the £48,100 in one go and he was sure of that by virtue of his previous experience as an operator. As for the interest rates payable on credit card balances, he could avoid these by taking advantage of free balance transfers to other credit cards. He considered this to be a modern way of demonstrating financial standing and his internet research satisfied him that credit cards were cheaper than overdrafts. As for being able to service credit card debt, the credit card companies had already made that assessment of him, otherwise they would not have issued him with the credit cards in the first place. He accepted that his position was unusual and that the normal course of business planning was for an operator to build their fleet up over time, building up reserves and trust with their bank in order to be granted an overdraft facility.

The Upper Tribunal's Determination

15. Our starting point is that financial standing can be demonstrated in a variety of ways and the total figure in any given case can be made up by a portfolio of different sources. The willingness of Traffic Commissioners to accept a particular source of funds which are said to be available will depend upon the facts of each individual case, the nature of the source of funds and the amount relied upon from that source. The most reliable evidence of available funds will be cash in either bank accounts or reserves which have been held over a period of time; the least reliable is undrawn credit card balances. There are other sources of available funding which fall in between those extremes. For example, factoring arrangements (or invoice finance agreements) may appear on their face to be a suitable source of financial standing but much will depend upon the detailed terms of the arrangement. The reasons why Traffic Commissioners are rightly sceptical of an operator's reliance upon undrawn credit card balances are that the high interest rates charged on balances are not compatible or consistent with a viable business model and may place an unacceptable financial burden on the business. Further, because of those high interest rates, in all likelihood, the higher the dependence on credit cards to show financial standing, the less likely it will be that an operator will in fact use the facilities if required to do so because of the high cost of that borrowing. So, whilst credit card facilities may be "*available*" to an operator, Traffic Commissioners may also make an assessment of whether they are truly "*available*" in the sense that they will in fact be used. There is of course the issue of fair competition. To allow an operator to rely on a large credit card facility without having prudently built up a working reserve which can be relied upon to establish financial standing places that operator at an unfair advantage over those who have prudently built up their reserves and their operation over time.
16. We do not agree that financial standing is "*black and white*". Neither do we agree that Traffic Commissioners do not have a discretion in relation to accepting or rejecting a particular source of funding or accepting or rejecting the level of reliance upon that source. Each case is fact sensitive and this tribunal will not give any guidance or prescribe the percentage of financial standing which can be made up by undrawn credit card balances save to say that as a general rule, large operators

should not be relying upon credit card facilities at all. There may be exceptions. We must make clear that whilst Mr Hazell sought advice and guidance from the Upper Tribunal upon this issue, we did not give him such advice or guidance and any comments made by the Tribunal members during the course of the hearing should not be construed in that way.

17. It follows that we are satisfied that the TC was entitled to refuse Mr Hazell's application to increase his vehicle authorisation upon the basis that reliance upon multiple credit card balances in the total sum of £48,100 was not an appropriate means of demonstrating financial standing and his reasons for his decision are beyond criticism. We reject Mr Hazell's submission that credit card balances should be considered by Traffic Commissioners to be a more economic source of financial standing than overdraft facilities because his internet research shows that to be the case. We have no evidence before us about the economic comparison between credit card facilities and overdraft facilities but in any event, an overdraft facility has been given to an operator by a financial institution which has been able to form its own view as to the creditworthiness or otherwise of the operator. The existence of the overdraft in itself gives comfort to Traffic Commissioners. The same cannot be said of credit card companies and it follows therefore that we reject Mr Hazell's submission that the fact that credit cards have been issued in the first place, demonstrates that the credit providers have made their own assessment as to whether the holder of the cards are in a position to repay the credit offered. Whilst we have not had the benefit of evidence as to what checks and risk assessments are undertaken by credit card providers, we doubt that they would be comparable to risk assessments undertaken by a bank when considering whether to grant an overdraft facility. The reason for the high interest rates is a reflection of the increased risk of default by credit card holders.
18. Finally, we should deal with the issue of whether the TC's decision would have been different if he had had the benefit of the Upper Tribunal decision dated 2 December 2016. We are sure that it would not have made any difference. The Upper Tribunal was considering an appeal in relation to an application for a licence authorising one vehicle and as the TC himself stated during the course of the public inquiry, credit card balances are one of the acceptable sources of financial standing for operators with one or perhaps two vehicles. The comment of the Upper Tribunal that credit card facilities whilst "*not ideal*" can be taken into account must be read in the context of the case. We reiterate that each case will of course be fact sensitive.
19. To conclude, we are satisfied that the TC's decision was not plainly wrong in any respect and that neither the facts or the law applicable in this case should impel the Tribunal to allow this appeal as per the test in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695*. The appeal is dismissed.

Postscript

20. Both appeals heard on 25 April 2017 raised issues about financial standing. This appeal was solely concerned with that issue. Nevertheless, the documentation relating to finances was missing from both appeal bundles. There is no explanation as to why the documentation is missing from the bundle relating to Mr Hazell's

appeal save that on the “Document Bundle Checklist from the Traffic Area Office”, the Case Worker has in Section F (which concerns financial evidence), marked it as “N/A” which we take to mean “not applicable”. Quite how financial information relating to an appeal which is solely concerned with financial standing is considered to be not applicable is beyond this Tribunal. All financial evidence must be retained and if it is provided during the course of the hearing itself, the originals must either be kept or copied and retained for inclusion in the appeal bundle if the grounds raise an issue relating to finances. The absence of the documentation did not prevent the Tribunal determining the issues in this case but there may well come a time when an appeal will be allowed and remitted for further hearing if relevant evidence has not been included in the appeal bundle without good reason being given.

A handwritten signature in black ink that reads "Judge Beech". The signature is written in a cursive, flowing style.

Her Honour Judge Beech
3 May 2017