NCN: [2021] UKUT 323 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. T/2021/27**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Dated: 22 December 2021

Before: M Hemingway Judge of the Upper Tribunal
A Guest Member of the Upper Tribunal
S James Member of the Upper Tribunal

Appellant: Less Stress Relocations Ltd

Reference: OH1140680

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

CASES REFERRED TO

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] ECWA Civ 695.
Michael Hazell (No 2) [2017] UKUT 0221 (AAC).

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Less Stress Relocations Ltd ("the Operator") from a decision of the Traffic Commissioner for the West of England Traffic Area ("TC"), of 4 March 2021, to refuse its application to vary its Standard Goods Vehicles Operators Licence by increasing the number of vehicles it was authorised to operate under its terms, from 1 to 2. The Operator's director Mr Andryi Goncharov (who appeared before us) explained in a witness statement that the application had been prompted by increased customer demand.

2. According to Mr Goncharov, the Operator has been trading since 2013. The variation application was made on 2 February 2021. Receipt of it was acknowledged by the Office of the Traffic Commissioner ("OTC") by letter of 8 February 2021. However, the OTC indicated, in that letter, that it regarded the application as being incomplete. As to that, it pointed out that given the type of licence in force and the wish to operate two vehicles, it was necessary for the Operator to demonstrate that it had available to it the sum of £12,500 during a 28 day period, the last date of which should be no more than two months from the date of receipt of the application. It was further indicated that a statement which had been provided from an organisation called "Capital On Tap" was unacceptable because it was not in the name of the Operator (Less Stress Relocations Ltd). It was pointed out that it could only take into account financial evidence in the name of the Operator. It was further stated that a Barclay Card statement which had been provided, showing a credit limit of £3750, represented, of itself, insufficient funds.

3. The Operator went on to provide further documentation which included a letter from Capital On Tap confirming that the name of the user of the relevant facilities had been changed to Less Stress Relocations Ltd on 8 February 2021, that it had previously been in the name of Less Stress Removals but that the two organisations were one and the same. It was also confirmed that there was available to the Operator credit of up to £11000. The position of the Operator, therefore, was that, given that £11000 credit facility limit, it had demonstrated available finance in excess of that required.

4. On 4 March 2021 the OTC wrote to the Operator explaining that the Traffic Commissioner had decided to refuse the variation application under Section 17 and Section 27(1)(a) of the Goods Vehicles (Licensing of Operators) Act 1995. It was said that the Traffic Commissioner had indicated as follows:

> "Having regard to the Upper Tribunal decision in T/2017/7 Michael Hazell 2, I would not accept high cost money as being truly available for a significant proportion of financial standing for any period of time. The business has not evidenced that it would be able to service the high interest rates associated with a Capital On Tap loan. I conclude that this operation appears inadequately capitalised and that financial standing for the application is not demonstrated as being truly available".

5. A TC may, under the Goods Vehicles (Licensing of Operators) Act 1995, vary the terms of a licence by increasing the number of vehicles specified in that licence, but it is necessary for an applicant operator seeking such a variation to demonstrate a prescribed level of financial standing as identified by the TC in this case (see above). In *Michael Hazell (No 2)* [2017] UKUT 0221 (AAC) the provisions relating to financial standing were exhaustively considered and guidance as to the approach

to be taken by TC's when presented with a range of different types of evidence concerning access to finance was given. The Upper Tribunal relevantly said:

> "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 particular sources 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 arrangements) 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 operations over time".

6. It is very clear that the TC had the above passage in mind when making his decision to refuse the variation.

7. The Operator appealed to the Upper Tribunal. The grounds of appeal (Mr Goncharov told us he had been assisted by a law student in preparing them) are probably best understood as amounting to contentions that the circumstances obtaining in the *Hazell No 2* case were very different to those obtaining in the case of this Operator; that the TC had been wrong to conclude that the credit card facility did not amount to truly available monies in the circumstances of this case; that the business model of using credit card facilities was one which worked well for this Operator; and that the TC had erroneously failed to take into account monies owed to the Operator which it would find easy to collect.

8. We held an oral hearing of the appeal which Mr Goncharov attended. We are grateful to him for his open and straightforward approach. He told us that he would use credit facilities when required. Such facilities would not be used when other monies were available. The business had had no difficulties in operating in this manner in the past. There would always be sufficient to carry out necessary repairs to the vehicles. When the Operator had last renewed its licence, which was in 2020, no request for financial evidence had been made by the OTC. We were asked to allow the appeal.

9. The Upper Tribunal, in appeals such as this, has the function of hearing and deciding on all matters of fact or law. But it may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunals jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Another v Secretary of State for Transport* [2010] EWCA Civ 695. It was stated that the Upper Tribunal has the duty, on an appeal to it, to determine matters of fact and law on the basis of the material before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by a TC.

10. We endorse the guidance previously set out by the Upper Tribunal, with authority and thoroughness, in Hazell No 2. We do not think, however, that what is said in that decision necessarily excludes the granting of a licence or an appropriate variation even in circumstances where there is a

high level of reliance upon credit card or similar sorts of facilities. So, there is not an inflexible rule to the effect that all applications based largely or wholly on such facilities must necessarily be refused. The expectation, given the guidance in the above case, is that the majority, perhaps the vast majority, of such applications will be refused but that does not absolve a TC from assessing the particular circumstances of a particular Operator.

11. We did wonder, initially, whether the TC might have fallen into error by applying the sort of inflexible approach which we have said should not be applied. The phrase "*I would not accept high cost money as being truly available for a significant proportion of financial standing for any period of time*" does, when read in isolation, suggest such inflexibility. However, the TC did go on to indicate that he had asked himself whether the particular Operator before him had evidenced an ability to service the high interest rates associated with the On Tap facilities and had concluded that it had not. So, we are satisfied there was sufficient particular regard to the Operator's particular situation.

12. As to the various points made in the grounds of appeal, it is true that the circumstances obtaining in the case of Michael Hazell 2 were different from those obtaining here. But it will be rare, in any event, that the circumstances in two cases are exactly the same. In Hazell No 2 the Upper Tribunal was giving general guidance and was not limiting itself to the specific circumstances obtaining in the case before it. Further, as we have already pointed out, the TC who made the decision under appeal before us did have regard to the circumstances of this particular case. It was not ever a matter of dispute that the Operator in this case had access to money through credit card facilities. But there was the wider question of whether such was ultimately sustainable or whether the monies were genuinely available. It does not appear that there had been any serious attempt to rely upon debts owed to the Operator during the application process. But in any event, there was no clear evidence to show that any monies owed would be collected without difficulty.

13. In our view, notwithstanding that we were impressed with the clarity with which Mr Goncharov presented his case, there was not sufficient clear material presented to the TC regarding the ability of the Operator to sustain its business model based largely upon credit card facilities and the relatively high interest rates which would come with it, to enable us to say that the TC's decision was plainly wrong. We would not, however, and we are fortified in our view as to this having heard from Mr Goncharov, preclude the possibility that a more fully presented variation application might succeed in the future. We would also suggest that if, ultimately, such an application is made, the TC who has the task of deciding it might benefit from hearing from Mr Goncharov at a Public Inquiry. But these are not matters for us.

14. In the circumstances, and with a degree of hesitation and a degree of regret, we have decided we must dismiss this appeal.

MR Hemingway
Judge of the Upper Tribunal
Dated: 22 December 2021