

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

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE
SCOTTISH TRAFFIC AREA (Ms J Aitken)**

Dated: 23 June 2017

Before:

Marion Caldwell QC	Judge of the Upper Tribunal
Mr. David Rawsthorn	Member of the Upper Tribunal
Mr. Andrew Guest	Member of the Upper Tribunal

Appellants:

KIBEX LTD. and PAULA BAILLIE

Attendance:

For the Appellants: Mr. G. McAteer, Solicitor, Beltrami & Co.

Heard at: George House, 126 George Street, Edinburgh.

Date of Hearing: 6 December 2017

Date of Decision: 13 March 2018

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject Matter

Application for a standard national public service vehicle operator's licence to operate 4 vehicles; financial standing; good repute; shadow director; revocation of restricted licence; disqualification.

Cases referred to:

Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695

David Keith Bradley and Julie Bradley [2014] UKUT 0253 (AAC)
Bryan Haulage (No. 2) T2002/217

Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI NT/2013/52 & 53

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Scottish Traffic Area, made on 23 June 2017. In summary, the Traffic Commissioner revoked Kibex Ltd's restricted public service vehicle licence on the grounds of loss of repute and material change in terms of section 17(3)(b) and (d) and section 14ZB(a) of the Public Passenger Vehicles Act 1981; and disqualified Kibex Ltd, Kibex Ltd director Paula Baillie and shadow director Kieran White from holding or obtaining an operator's licence for a period of 30 months. In addition, the Traffic Commissioner refused the appellant's application for a public service vehicle operator's licence to operate 4 vehicles on the ground of failure to meet the requirements of financial standing and good repute in terms of section 14ZB(a) and 14ZB(b) of the 1981 Act.
2. The disqualification of Kieran White has not been appealed and is therefore not an issue in this appeal.
3. The orders made by the Traffic Commissioner were originally to take effect at 23.59 on 31 July 2017 but subsequently the Traffic Commissioner stayed implementation of her orders pending this decision. We now direct that they are to take effect from 23.59 on 24 April 2018.

The Relevant Legislative Provisions

4. The 1981 Act provides that on an application for a standard licence, the Traffic Commissioner must consider and be satisfied that the applicant is, among other things, of good repute and has appropriate financial standing (ss 14 and 14ZA). Further, as regards revocation of a licence, 1981 Act provides:

“Section 17(2) a Traffic Commissioner may, on any of the grounds specified in subsection (3) below, at any time –

(a) revoke a PSV operator's licence

(3) the grounds for action under subsection (2) above are –

(b) that there has been a contravention of any condition attached to the licence;

(d) In the case of a restricted licence, that the holder no longer satisfies the requirements of section 14ZB

5. Section 14ZB(a) requires that the traffic commissioner is satisfied that the applicant is of good repute (as determined in accordance with paragraph 1 of schedule 3).

6. Paragraph 1(2)(b) of schedule 3 provides, *inter alia*, that in determining whether a company is of good repute, a traffic commissioner shall have regard to all the relevant evidence and in particular to such information as the commissioner may have as to previous conduct of –
- (i) *The company's officers, employees and agents in relation to the operation of vehicles of any description in the course of any business carried on by the companies; and*
 - (ii) *Each of the company's directors, in whatever capacity, in relation to the operation of vehicles of any description in the course of any other business.*
7. Section 28 of the Transport Act 1985 provides, *inter alia*, as follows:
- (1) *Where the traffic commissioner for any traffic area revokes a PSV operator's licence, he may order the former holder to be disqualified, indefinitely or for such period as he thinks fit, from holding or obtaining a PSV operator's licence.*
 - (4) *where a traffic commissioner makes an order under subsection (1) above with respect to any person, he may direct that if that person, at any time during such period as he may specify –*
 - (a) *Is a director of, or holds a controlling interest in –*
 - (i) *a company which holds a licence of the kind to which the order applies; or*
 - (ii) *a company of which a company which holds such a licence is a subsidiary; or*
 - (b) *operates any public service vehicle in partnership with a person who holds such a licence;*
- the powers under section 17(2) of the 1981 Act (revocation, suspension, etc., of PSV operators' licences) shall be exercisable in relation to that licence by the traffic commissioner by whom it was granted.*

Background

8. The appellants are a limited company incorporated on 17 January 2013 and the sole director of the company, Paula Baillie. Paula Baillie is the only shareholder of the company. The business of the company is stated to be taxis and public houses and bars. The company leases and manages the Hazeldene Hotel at Gretna Green. Paula Baillie's domestic partner is Kieran White. They had been together for over 7 years by the date of the public inquiry. They live in family together with three children. Kieran White has been made bankrupt on two occasions. He was disqualified under the Companies Acts from acting as a company director in December 2010 for a period of four years. Taxi licences which he had operated in South Lanarkshire were revoked in 2013 as he was found not to be a fit and proper person as he had been operating taxis without insurance (pp. 357-8).

9. Kibex Ltd was granted a restricted passenger service vehicle operator's licence (PM1126620) on 22 July 2014 following a public inquiry on 6 June 2014. This was to allow the running of two 9 to 16-seater minibuses. That licence was granted subject to the following:
- a. *a warning as to the applicant's repute;*
 - b. *a warning that the licence was restricted meaning that the operation of the vehicles could not be the company's principal occupation;*
 - c. *a finance condition (not currently relevant);*
 - d. *the applicant's agreement to the following undertakings:*
 - (i) *The operator shall, during the life of the restricted licence, keep records of time spent and income earned from all occupations to enable primary occupation to be determined. Records shall be supported by primary evidence such as pay slips, P60 documents, invoices and tachograph records. Copies of the records shall be made available to DVSA or OTC officers on request.*
 - (ii) *Should income from, or time spent on, the minibus operation exceed that from all other sources for two consecutive months, the operator will apply for the standard national licence.*
 - e. *The application was granted on the express understanding that Miss Paula Baillie was the sole director of Kibex Ltd and that she and not Mr Kieran White was in control of the business. In the event of Mr White becoming a shareholder or director of Kibex Ltd, the licence had to be surrendered to the Traffic Commissioner unless the Traffic Commissioner had allowed Mr White to be a shareholder or director.*
10. On 14 September 2015 the appellants submitted an application for a new standard national public service vehicle operator's licence (OM1141087) for five vehicles, subsequently amended to 4 vehicles. The restricted licence was to be surrendered in the event that a standard licence was granted.
11. On 1 March 2016, Kieran White emailed the Office of the Traffic Commissioner in Leeds regarding the application for a standard licence. He said that while he was not involved in the management of the transport division of Kibex Ltd, he was involved in the overall day to day running of the business which included a hotel lease and pub. He was concerned about the delay in dealing with the application (p. 184.) He said they were a small family business and the delay was having an impact on "our overall business".
12. By letter dated 8 March 2016, the Traffic Commissioner informed the appellants that she had decided to convene a public inquiry to consider the application. A call up letter was issued on 18 October 2016 (page 15) stating that the Traffic Commissioner had concerns about the following issues:

- a. *It appeared that the appellants were operating more vehicles than the maximum number on the restricted licence;*
- b. *That the following statement made when applying for the licence was either false or had not been fulfilled:*
 - (i) *That the main occupation of the licence holder was not the operation of vehicles able to carry nine or more passengers;*
- c. *That the appellants had not honoured the undertakings agreed to when the application was made for the licence, namely:*
 - (i) *That the laws relating to the driving and operation of vehicles used under the licence would be observed;*
 - (ii) *That the Traffic Commissioner would be immediately informed of any changes or convictions which affected the licence;*
- d. *That the appellants had breached the conditions on the licence, specifically that the licence would be surrendered should Kieran White become director or shareholder without the Traffic Commissioner's consent;*
- e. *The vehicles and drivers had been issued with prohibition notices by DVSA or the the police in the past five years;*
- f. *That the appellants were no longer of good repute;*
- g. *That the appellants were no longer of the appropriate financial standing;*
- h. *That since the licence was issued there had been a material change in the circumstances of its holder, namely that Paula Baillie was not the controlling force in the business.*

A summary of the evidence to be considered at the public inquiry was provided. The letter explained the Traffic Commissioner's powers including the powers of revocation of an existing licence and disqualification from holding or obtaining a PSV licence.

13. By letter dated 26 July 2016 Miss Baillie sought to withdraw the application for a standard licence on health grounds. The Traffic Commissioner declined request to withdraw (p. 202).
14. A further letter from the Office of the Traffic Commissioner was sent on 28 October 2016 (p. 252) advising the appellants that the Traffic Commissioner was concerned that they were operating a 49-seater bus for hire and reward on a restricted licence. Internet prints in support of this allegation were attached.

The public inquiry

15. The public inquiry was set down for 22 November 2016. On that date a motion to adjourn made by Kieran White's solicitor was granted. The public inquiry ultimately took place on 2 December 2016. The appellants were represented by Mr McAteer at the public inquiry. Kieran White was represented by Mr Doherty, solicitor. Evidence

was given by James Sweetin, DVSA Traffic Examiner, Kieran White, Paula Baillie and John Edwards, proposed transport manager. The public inquiry was reconvened on 31

March 2017. On that occasion, Kieran White was represented by Mr. McAteer. Evidence was given by James Sweetin, Kenneth Purdie and Kieran White. The public inquiry was conjoined with that of another licence (PM 1027703) and licence holder however, as nothing turns on the facts and circumstances relating to them no further mention will be made of them in this decision.

16. The public inquiry briefs for the application and licence were taken as read into the record. Mr. Sweetin gave evidence that DVSA had carried out an investigation into the appellants and Kieran White as a result of which there were concerns as to who had effective control of Kibex Ltd and whether Paula Baillie was a director in name only. Statements taken from two contacts of Kieran White namely, Kenneth Purdie and David Lindsay were considered to suggest that Kibex Ltd was controlled by Kieran White. David Lindsay stated at the end of his signed interview statement (pp. 64-67) that Kieran ran Kibex Ltd but that it was in Paula Baillie's name. He had helped Kieran White finance the purchase of cars. Kieran White paid him in regular instalments from Paula Baillie's bank account. He said that it was always Kieran White he dealt with and that he made the decisions. Further inquiries revealed that Kibex Ltd had purchased a 53-seater coach, N3 GPD, from Photoflash Ltd (a company whose directors included Kenneth Purdie) on 27 November 2015. Odometer information suggested that between the purchase date and 12 May 2016, the coach had travelled approximately 6898 kilometers. Internet advertising suggested that Kibex Ltd was using the coach for hire and reward. As Kibex Ltd did not have an operator's licence for such use this gave rise to the suspicion that Kibex was operating the coach without a licence.
17. Kenneth Purdie, a director of Photoflash Ltd, was interviewed under caution by Traffic Examiner Hamilton. That interview (pp. 68 – 72) formed part of the evidence at the public inquiry. In that interview, Kenneth Purdie stated that he thought Kibex Ltd was owned by Kieran White and that Paula Baillie was just his girlfriend. He had not dealt with Paula Baillie in relation to Kibex Ltd, only Kieran White. He had sold him a bus through a finance company. He said he had never loaned an operator licence disc to Kibex Ltd. Photoflash Ltd allowed Kieran White to borrow a bus to take photographs of it parked to demonstrate that the parking site was appropriate for that size of bus.
18. Kieran White gave evidence that he had previously been made bankrupt on two occasions. As at the date of the public inquiry he worked at the Hazeldene Hotel in Gretna Green and also did driving work on contracts Kibex Ltd had. He was paid a set weekly wage of £178. The vehicles used were taxis and two 16-seater buses. He was in the hotel most days. He worked in the office. Day to day he did marketing and social media to bring in business. He administered hotel bookings. He set up the Kibex Travel social media page in 2015; he said it was his, he was the editor. He would also do whatever was needed such as work behind the bar or wash the dishes. (Pages 447-448.) He said he was part of the business and he and Paula Baillie discussed everything; he generally attended and contributed to the Monday meetings of Paula Baillie and the chef and manager in the hotel; he priced the school transport contracts before the company applied; he had access to the company bank account and debit card; he and Paula Baillie discussed the general running of the entire business (pages 550 and 552). He said Paula Baillie makes the ultimate decisions. He makes day to day decisions within his role with her permission (p. 465). The company's driving contracts were going well and they had discussed applying for a standard licence.

19. Kieran White denied that he was a shadow director of Kibex Ltd. Regarding David Lindsay, he got to know him when he, Kieran White, had a taxi in Carluke. In 2012, David Lindsay financed a taxi for Kieran White when the latter was unable to raise the finance himself. Kieran White's taxi business was called Kibex; the name was derived from his name and that of his daughter. He said if David Lindsay was asked about Kibex he would associate it with him, because that was the name of his taxi business in Carluke.
20. Regarding Kenneth Purdie and Photoflash Ltd, Kieran White knew them from his taxi days in Carluke as he had rented an office from them. In about July 2013, he obtained his PCV driving licence and was employed by Photoflash driving buses for them until about January 2014. After that, he did occasional driving work for them. That continued even after he had moved to Gretna Green.
21. Kieran White said that by November 2015, Paula Baillie believed that the grant of the standard licence was imminent and she asked him to start looking for a suitable bus to buy. He went to see a bus dealer in Carluke and then to Photoflash Ltd. He discussed the possibilities he had already looked at. He said Kenneth Purdie told him he would sell him N3 GPD for the same price the other dealer was offering to sell him a bus. He said he would have to discuss it with Paula Baillie. Also, the other dealer was going to do a trade-in deal for a 16-seater that Kibex Ltd owned. Kieran White knew N3 GPD as he had previously driven it for Photoflash Ltd. He discussed the proposal with Paula Baillie and gave her his opinion. N3 GPD was bought by Kibex Ltd for £40,000 through a finance company. Paula Baillie signed the finance agreement as the Kibex Ltd director. Kibex Ltd took possession of N3 GPD on 27 November 2015. The bus was parked at the Hazeldene Hotel or, latterly, at Longtown (p. 469).
22. Kieran White said that he told Kenneth Purdie that Paula Baillie believed that the grant of the standard licence was imminent. He said that Kenneth Purdie told him that it would be all right to use the bus for a couple of weeks of hires and to use Photoflash Ltd's disc (p. 454). When he collected the bus from Photoflash Ltd on 27 November 2015 the disc was in the bus. He said he did not take the disc without the knowledge of Photoflash Ltd. The bus was insured under Photoflash Ltd's insurance and also under Kibex Ltd's Insurance through the finance company. After delivery of the bus he said there was not much contact with Kenneth Purdie because his wife was terminally ill at the time and in hospital; she passed away a few months later. In support of his evidence that Kenneth Purdie and he had an arrangement that he would use the buses with the Photoflash disc, he made reference to a number of telephone text messages between himself and Kenneth Purdie. (The text messages are at pp. 400-421.) He said that Photoflash had asked for the disc back in December 2015 (p. 456). In a text message on 7 January, Kieran White wrote that the bus would be lying at Gretna except for the odd hire (p. 408).
23. Kieran White said he operated the bus at a time when Kibex Ltd only had a restricted licence but said he thought it was all right as he had a disc from Photoflash Ltd, the bus had Photoflash Ltd's legal lettering, the bus had an MOT and was insured. He bought tickets for "Polar Express" in Durham using the company's debit card; he advertised the tickets and travel to Polar Express on social media; he undertook that trip in N3 GDP on 12 December 2015. He admitted that he did not have the permission of Photoflash to use the bus for this purpose (p. 459). The first trip had to

be cancelled and the contact for refunds was Ann Burrows in Kibex Ltd's office. He said he did not tell Paula Baillie about the Polar Express trip in N3 GDP. Nor did

Photoflash Ltd know he was undertaking that trip with their disc. He did another four hires on N3 GDP from the St Nicholas Arms near Carlisle, a pub leased by Kibex Ltd. He said that pub had not been doing well and he suggested to Paula Baillie that they should try to make it into more of a football pub to try to get more money out of it. He did trips from that pub to football grounds. He sent the tachographs for these trips to Photoflash Ltd. He said Paula Baillie did not know about these hires. He was trying to make more money so that the St. Nicholas Arms did not harm Kibex Ltd. The starting point for the bus each time was Gretna Green and it was driven to the pub in Carlisle. (pp. 459-60). He was paid in cash. In addition, he said he drove N3 GDP empty, for pleasure.

24. He said he hid the hires in N3 GDP from Paula Baillie. She did not know about the hires and the use of N3 GDP until January 2016, by which time the hires were over. She was very angry as, he said, she knew the bus should not have been used without a licence. When asked by the Traffic Commissioner why he had hidden these hires when he thought he was not doing anything wrong, his response was that he did not think he was doing anything wrong and that he was telling the truth.
25. Paula Baillie gave evidence that Kibex Ltd had two 16-seater buses and three taxis and 5 part-time drivers, including Kieran White; they did school contracts and wedding-related work. She denied that Kieran White ran the business or was a shadow director. She was at the hotel most days but not as often as previously as she had a 21-month old toddler. Ann Burrows was in the office and did the accounts. Paula Baillie said she knew what was happening in the office; she was running the business not Kieran White. Kibex Ltd applied for a standard licence as the bus work was getting busier. She understood from the OTC in November that the grant of her licence was imminent and decided to buy a bigger bus with financing to buy it. The bus was parked up awaiting the licence. She said she did not know that Kieran White was using the bus for hires in November, December 2015 and January 2016. He had given her money for the children's Christmas and it was only when she asked him after Christmas where he had got the money that he told her he had been doing hires in the bus. She said she was very angry as she knew this was wrong.
26. Following the public inquiry in December 2016, Mr. Sweetin contacted Kenneth Purdie to ask him about the evidence of Kieran White that Kenneth Purdie had allowed him to use the Photoflash operator disc. Kenneth Purdie denied this. Kenneth Purdie's solicitor then wrote to Mr. Sweetin on 19 December 2016 denying that Kieran White had been given permission to operate the coach under the auspices of Photoflash Ltd; that the vehicle had been sold at market value and once paid for no further payments had been received from Kieran White, Paula Baillie or Kibex Ltd; on sale the insurance was cancelled; the operator disc had been left in the vehicle by mistake and as soon as Kenneth Purdie became aware of this he immediately demanded its return; no tachographs were received by Photoflash from Kieran White. The letter is at pages 367-8.
27. The Traffic Commissioner was provided with the letter from Kenneth Purdie's solicitor whereupon she re-convened the public inquiry.
28. Kenneth Purdie gave oral evidence at the re-convened public inquiry. He said that when Photoflash sold the bus to Kieran White the insurance was cancelled. At the time, Kenneth Purdie's wife was terminally ill and he had not been present when the bus was taken away on 27 November 2015. The disc had been left in the bus by

mistake. He contacted Kieran White a couple of times to get the disc back. He got it back, he said, in mid December 2015. Kieran White did not return any tachographs.

29. Photoflash did some repairs on the bus. There was no maintenance agreement. N3 GPD was not returned to Photoflash. He knew that Kieran White did not have a standard operator's licence at that time. He was shown the text messages but could not remember them, he did not recognize them and thought they related to Kieran White asking for advice on prices for starting his business with the bus. He also
30. thought Kieran White had a 33-seater bus as well as N3 GPD which was a 49-seater. In cross-examination he denied that there was any arrangement between Photoflash and Kieran White for the use of the bus by Kieran White with the Photoflash disc. He had not responded to a text from Kieran White about putting the bus on trains. Many of the text messages, he said, did not make sense. He said the bus had been sold and it was for Kieran White to decide what use he put it to. The bus was not insured by Photoflash once it was sold. If he had given Kieran White the disc, he, Kenneth Purdie, would have known it was illegal anyway.

The Traffic Commissioner's decision

31. The Traffic Commissioner found that the financial standing requirement for a licence for 4 vehicles was £20,900 and that for a limited company licence the finance needed to be in the name of the limited company. She found that the company did not have such finance. The vouching produced which was in the name of the company showed an average of only £12,847. That was sufficient for the existing restricted licence for which £4,800 was required. That the average vouched was £12,847 has not been disputed in the appeal.
32. The Traffic Commissioner found that Kieran White was a controlling presence in Kibex Ltd. That was based on Kieran White's evidence, the evidence of others and the inferences she was able to draw from that. In summary, Kieran White gave evidence that he had access to the online banking and the debit card of Kibex Ltd; that he was involved in every aspect of the company's hotel, pub and travel business.
33. She found that Kieran White was the driving force behind Kibex Ltd's plans to expand its transport operation. She found that Paula Baillie was content to proceed with this given the level of booking inquiries. The application for a standard licence had to be made by her as director. The delay in the progress of the application caused Kieran White to intervene and write to the OTC in Leeds. Kieran White, Paula Baillie and Kenneth Purdie gave evidence that it was Kieran White who borrowed a bus from Photoflash Ltd to take photographs to illustrate the parking available at the proposed operating Centre in Motherwell. It was Kieran White who looked for a vehicle to buy and who concluded the deal to buy N3 GPD. Paula Baillie, as director of Kibex Ltd, signed the agreement with the finance company. When Kieran White took delivery of N3 GPD, he did so for Kibex Ltd.
34. The Traffic Commissioner found that Paula Baillie knew Kieran White's personality, he was "no shrinking violet". He was paid a fixed weekly wage of £178 but, she found, he did not have the day-by-day accountability of an employee and was not restrained as an employee would be restrained. The Traffic Commissioner found that Kieran White was running Kibex Ltd along with Paula Baillie as their joint enterprise.

35. The Traffic Commissioner revoked the restricted operator's licence granted to Kibex Ltd; disqualified the appellant company and Paula Baillie for 30 months from holding or obtaining a licence; refused the application for a PSV operator's licence and made a s 28(4) direction (see paragraphs 1 and 7 above).

Grounds of Appeal and the Appeal before the Upper Tribunal

36. The grounds of appeal are at pages 726 and 733-4. These were expanded upon by the appellants' solicitor, Mr. McAteer at the appeal hearing before the Upper Tribunal. In summary, the main grounds of appeal are that:

- (a) there was insufficient evidence to show that Paula Baillie had been aware of Kieran White's unauthorized operations and so neither she nor Kibex Ltd was responsible for that;
- (b) the Traffic Commissioner was wrong in finding that there was no agreement between Kieran White and Kenneth Purdie to allow Kieran White to use Kieran Purdie's disc and to operate N3 GDP under Photoflash and that the Traffic Commissioner had failed to give due weight to the evidence which it was submitted proved such an agreement;
- (c) there was no evidence which would entitle the Traffic Commissioner to find that Kieran White was running the business and acting as a shadow director of Kibex Ltd;
- (d) even if the Traffic Commissioner was entitled to find that Kibex Ltd had operated N3 GDP without a licence that given the limited unauthorised use of the vehicle and the appellant's and Miss Baillie's history of compliance, it was disproportionate for the Traffic Commissioner to take the view that good repute was lost with the revocation and disqualification following; revocation of the existing licence would cause very significant commercial injury to the appellants;
- (e) it was open to the Traffic Commissioner to grant the application for the standard licence and that if there was insufficient financial standing or the number of vehicles applied for to grant authorisation for the fewer number of vehicles for which financial standing was established.
- (f) the Traffic Commissioner's impression of the credibility of Paula Baillie had been unfair and not justified by Miss Baillie's demeanour at the public inquiry; in particular, she was wrong to conclude that she was "sleekit".

Discussion

37. The following principles (extracted from the Digest of Traffic Commissioner Appeals) as to the proper approach to an appeal in the Upper Tribunal can be found in the decision of the Court of Appeal in the case of *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695*:

- (1) *The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material*

before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.

- (2) *The Appellant 'assumes the burden' of showing that the decision appealed from is wrong.*

- (3) *In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; the Appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view.*

The Tribunal sometimes uses the phrase "plainly wrong" as a shorthand description of this test. (*NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, paragraph 8).

38. Having considered the evidence, and the submissions made for the appellants we are not satisfied that the decision of the Traffic Commissioner was 'plainly wrong'.

39. Section 12 of the 1981 Act provides that a PSV must not be used on a road for carrying passengers for hire or reward except under a PSV operator's licence granted under the 1981 Act.

40. A standard operator's licence will not be granted unless, amongst other things, the applicant shows that it is of good repute, as determined in accordance with paragraph 1 of schedule 3 to the 1981 Act (s 14ZA(2)(b)). The burden of proof of this issue rests on the applicant, in this case, Kibex Ltd. In determining whether an applicant is of good repute the Traffic Commissioner must have regard to all the evidence and, in particular, to information that the Traffic Commissioner may have as to previous conduct of the company's officers, employees and agents in relation to the operation of vehicles of any description in the course of any business carried on by the company; and to the conduct of the company's directors, in whatever capacity, in relation to the operation of vehicles of any description in the course of any other business.

The unlawful use of N3 GPD

41. It is not in dispute that Kieran White operated a PSV, N3 GPD, to carry passengers for reward at a time when neither he, Paula Baillie nor Kibex Ltd had a PSV operator's licence. Kieran White's primary position was that he was operating the vehicle for Photoflash with their disc and their permission. This was disputed in evidence by Kenneth Purdie of Photoflash. The Traffic Commissioner has narrated all of the evidence which was before her about this issue and explained what she made of it and why she rejected Kieran White's evidence on this issue (paragraphs 86-95). She took into account the fact that Kieran White had a long history in the transportation of people, was a PCV licence holder, that he wanted to operate coaches and enjoyed the operating milieu of passenger road transport. He set up and populated the company's Facebook presence as Kibex Travel and organized and publicised pre-Christmas coach trips (and later other coach trips) for which he needed a coach and a licence. The purchase, sale and where necessary, the refund of tickets, had been organized by Kieran White through the Kibex Ltd bank account. Kieran White drove the bus on these trips.

42. The Traffic Commissioner explained that she had been open to considering that there might have been collusion between Kieran White and Kenneth Purdie to operate N3 GDP under the shelter of Photoflash. She considered the text messages between Kieran White and Kenneth Purdie to see if they supported Kenneth White's contentions. She considered that the text messages might not be genuine but in the absence of evidence about this she rejected this possibility. However, after a careful examination of the text messages, she found that they did not assist her as they were open to such interpretation as

to be possibly misleading; she therefore did not rely on them. She preferred the evidence of Kenneth Purdie that he had not agreed to the use of the Photoflash disc and had not sanctioned the operation of N3 GDP under the shelter of Photoflash. She found that he was patently bewildered by the text messages. She accepted his evidence that he had been absent when the bus was collected by Kieran White and the disc had been left in the vehicle by mistake. At the time, his wife was terminally ill. Photoflash had no involvement in the organisation of the coach trips or provision of the driver, nor did Photoflash share in any profit. On the whole she found Kenneth Purdie's evidence credible and thus rejected Kieran White's evidence and found that he had been operating N3 GDP without a standard operator's licence.

43. It is clear from the documents in the brief, transcripts of the public inquiry and from the Traffic Commissioner's decision that she carefully considered and weighed all of the evidence before her. She had the benefit of seeing and hearing the witnesses. She considered and commented on their demeanour and explained why she preferred Mr. Purdie's evidence. The decision at which she arrived was one that she was entitled to make and we can see no fault or unfairness in her reasoning on this issue.

The finding that Kieran White was acting as a "director" of Kibex Ltd

44. The Companies Act 2006 provides that, "In the Companies Acts 'director' includes any person occupying the position of director by whatever name called" (s 250). "Shadow director" means a person in accordance with whose directions or instructions the directors of the company are accustomed to act (s 251).

45. In the case of *David Keith Bradley and Julie Bradley [2014] UKUT 0253 (AAC)*, which concerned an operator's licence under the Goods Vehicles (Licensing of Operators) Act 1995, the director of the company was Mrs. Bradley. The other person involved in the company, her husband, was a disqualified person under the Companies Acts. The Upper Tribunal had to decide whether Mr. Bradley had been acting as a director. The Upper Tribunal considered the ways in which a person can be considered a "director" of a limited company.

9. *We are satisfied that there is now clear authority for the proposition that there are three ways in which a person can be held to be a director of a limited company. It is only necessary to refer to two authorities to justify this proposition. The first is Secretary of State for Trade and Industry v Dennis George Hollier & Others [2006] EWHC 1804 (Ch). The second is Holland v Commissioners for HMRC & another [2010] UKSC 51.*

10. *The three ways in which a person can be a director of a limited company are these: (i) directors in law, (de jure), (ii) shadow directors and (iii) directors in fact, (de facto). We will consider each category separately.*

Directors de jure

11. *Directors de jure are those who have been lawfully appointed as directors of the company in question and whose names appear as directors of that company on the register at Companies House. There should generally be no dispute as to whether or not a person is a director de jure. If there is then the fact that the person's name appears in the register at Companies House as a director of the company in question is likely to provide strong proof.*

Shadow Directors

12. *The expression 'Shadow Director' is defined in s. 251 of the 2006 Act, which provides that it means: "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". That definition is followed by a provision designed to exclude a person giving professional advice to the directors of a company from being held to be a shadow director. Whether or not a person comes into the category of shadow director is a question of fact to be decided by assessing the evidence in each individual case. The essential feature would appear to be that a shadow director must be shown to play a part in the corporate governance of the company in question by telling the de jure director or directors what to do. It is not necessary to show that a shadow director gave all the directions or instructions necessary for the company to function. It is sufficient if he is shown to have played a part in the corporate governance of the company by giving directions or instructions*

Directors de facto

13. *In the case of Hollier the Secretary of State applied for orders under s. 8 of the Company Directors Disqualification Act 1986, ("the 1986 Act"). The ground relied on was that in the light of information or documents obtained by the Secretary of State under provisions in the Companies Act:*

"it is expedient in the public interest that a disqualification order should be made against any person who is or has been a director or shadow director of any company". The case for the Secretary of State was that Dennis Hollier and some of the other Defendants, although not lawfully appointed as Directors were, nevertheless, de facto directors and, as such, liable to disqualification under s. 8 of the 1986 Act

14. *The case was tried by Etherton J, as he then was. His review of the law in relation to de facto directors begins at paragraph 61 of his judgment. He pointed out that s. 22(4) of the 1986 Act provides that: "the expression director includes any person occupying the position of director, by whatsoever name called". In other words the wording is exactly the same as s. 250 of the 2006 Act. Etherton J continued: "It is common ground, and is now well established, that for the purposes of the 1986 Act, 'director' includes a person who acts as a director even though never validly appointed as such (commonly referred to as a 'de facto' director)....."*

17. *In our view it is clear from Etherton J's review of the authorities in Hollier that there is no single detailed and all embracing test to determine who is or is not a de facto director. Equally it is clear that it is unwise and potentially misleading to look for or to concentrate on a single decisive factor. Instead what is required is an assessment of all the evidence relevant to the part that the person concerned has played. It is not necessary, in order to become a de facto director, that the person concerned is shown to have participated in decision making over the whole field of the company's activities. "A person may be a de facto director even though that person does not have day to day control over the company's affairs and even though he or*

she acts as a director only in relation to part of the company's activities", (Hollier paragraph 73).

18. *At paragraph 81 of the Hollier judgment Etherton J described being part of the corporate governing structure of the company as the 'touchstone' when deciding whether a person is a de facto director. A person can only be held to be a de facto director if they participate or have the right to participate in collective decision making on corporate policy and strategy and its implementation.*

46. The Traffic Commissioner found that Kieran White had a pivotal role in the company; he was involved in every area; that he had a supervisory role; had direct access to the company's online banking and debit card; he was the public face of Kibex Ltd, he set up the Facebook page and was perceived by others to be instrumental in Kibex Ltd. He was the driving force behind the expansion of the company's transport operation and Paula Baillie was content to go along with this. The application for the licence had to be made by Paula Baillie as director. Kieran White intervened with the OTC to attempt to speed up the progress of the application process. It was Kieran White who organized the photographs of a coach at the proposed operating centre in Motherwell and it was he who investigated the availability and pricing of coaches, organised the purchase of the coach from Photoflash and negotiated the price. Paula Baillie had to sign the finance agreement as Kieran White was unable to do so. When he took delivery of the coach he did so for Kibex Ltd. Payment was made to Photoflash for Kibex Ltd by the finance company. The finance agreement was in the name of Kibex Ltd. Although not a lawfully appointed director (de jure), the Traffic Commissioner concluded that Kieran White, in fact, acted as a "director" of Kibex Ltd. She found that Kibex Ltd was a joint enterprise business of Kieran White and Paula Baillie.

47. The Traffic Commissioner had evidence before her from a number of sources which entitled her to make such findings. The evidence of the interview under caution with David Lindsey was to the effect that although the company was in the name of Paula Baillie it was Kieran White who ran the company. It was argued for the appellants that Mr Lindsey would simply associate the name of "Kibex" with Kieran White because they had had dealings when Kieran White had previously run a taxi business under the name of Kibex. However, it is quite clear from the questioning and Mr Lindsey's answers that he clearly understood that he was being asked about a company called Kibex Ltd, and that this was different from the taxi business, he was aware that the company was owned by Paula Baillie and was in her name but all of Mr Lindsey's dealings with the company were with Kieran White and, he added, "Truthfully, Kieran runs it." (pages 64–67).

48. In his interview under caution, Kenneth Purdie was aware that Kieran White had been the owner of the taxi firm called Kibex Taxis. When asked who, in his opinion, owned the current company called Kibex Ltd operating in Gretna he said he thought it was still Kieran White. He stated that he had never dealt with Paula Baillie in relation to Kibex Ltd. He thought she was just Kieran White's girlfriend. The only person he ever had any dealings with in relation to Kibex Ltd was Kieran White. Kieran White had asked to borrow a bus to check if a site was appropriate for that size of vehicle, he came and collected it and drove it away. He said it was Kieran White who had bought the bus from Photoflash. (See pages 68-72.)

49. Kieran White's and Paula Baillie's evidence was to the effect that Kieran White was pivotally involved in the running of the company on both the hotel and transport sides (see pages 550-552). In his letter to the OTC, Kieran White stated that he was involved in the day to day running of the business and that the delay was having an impact on "our overall business". Kieran White took control of N3 GPD, a valuable asset of the company, and used it to generate income for Kibex Ltd. If Paula Baillie did not know about this, as she claimed, that meant that she was unable to exert control over Kieran White and company assets. She

was aware of Kieran White's history and also, as a result of that history, of the undertakings she has been required to give to the Traffic Commissioner for the grant of the restricted licence.

50. There was evidence from Kieran White that the bus was usually parked at Gretna then latterly at Longtown. He was admittedly using it for hires without a licence. If Paula Baillie had been genuinely in control of the company and concerned to ensure no unlawful use of the bus one would have expected her to know what use was being made of the bus and where it was when not parked at the hotel. Likewise, when Kieran White gave her money for Christmas expenses a director in control of the company would immediately query where this cash came from. Her assertions that she was in control of the company are unconvincing against this background.

51. Regarding the evidence of Kieran White and Paula Baillie, the Traffic Commissioner had to look at this in the light of the background of the previous Public Inquiry, what she knew of Kieran White and Paula Baillie, the undertakings which Paula Baillie had given and their demeanour at the public inquiry. She was entitled to infer from their evidence about Kieran White's involvement in the business and his use of N3 GPD that he was acting as a director. In making that finding The Traffic Commissioner had in mind and followed the guidance in Bradley, Hollier and Holland.

52. The Traffic Commissioner was unable to accept the assertions of Kieran White and Paula Baillie that the latter was not aware of the unlicensed use of N3 GPD to generate income. Based on the evidence which the Traffic Commissioner had heard of Kieran White's role in the business, that it was a joint enterprise with Paula Baillie and that they discussed everything, she was entitled to infer that Paula Baillie was aware of the operation of the vehicle and to find the assertions to the contrary implausible. We can find no reason to hold that she was obliged to have reached a different conclusion. In any event, having found that Kieran White was a shadow director, the directors of a company are collectively responsible for the company they manage.

53. In summary, it was not in dispute that Kieran White had operated N3 GPD for reward without holding an operator's licence; the Traffic Commissioner found that there was no agreement between Kieran White and Photoflash Ltd that the vehicle was being operated by Kieran White for Photoflash; she found that Kieran White operated the vehicle showing the Photoflash disc without the consent of Photoflash; she found that Paula Baillie was aware that Kieran White was using the vehicle to generate funds for Kibex Ltd without a licence and that Kieran White's participation in the running of Kibex Ltd amounted to acting as a shadow director. As indicated above, we can find no reason to hold that The Traffic Commissioner erred or was plainly wrong in reaching those conclusions.

Revocation of the restricted licence

54. At the public inquiry held to consider the application by Kibex Ltd for a restricted licence Paula Baillie had persuaded the Traffic Commissioner that Kibex Ltd was her company and controlled by her. The Traffic Commissioner had been concerned to prevent Kieran White having any involvement in an operator's licence because of his history of losing his taxi licence through driving without insurance, his previous sequestrations and having been disqualified as a company director. It was for that reason that the restricted licence had

been granted on conditions. Having found that Kieran White was acting as a shadow director in the company the Traffic Commissioner was bound to find that there had therefore been a material change of circumstances since the restricted licence had been granted and also a contravention of one of the conditions on which the licence had been granted. The Traffic Commissioner therefore had to go on to consider whether, in the circumstances, the restricted licence should be revoked (s17(2) of the 1981 Act).

55. In considering revocation the Traffic Commissioner was obliged to weigh the points in favour and against the operator. She also had to consider the implications of revocation for the appellant's business and whether, bearing those implications in mind, revocation would be proportionate. In this regard, she made reference to the case of *Bryan Haulage (No. 2) T2002/217* in which the Upper Tribunal held:

In cases involving mandatory revocation it has been common for findings to have been made along the lines of "I find your conduct to be so serious that I have had to conclude that you have lost your repute: accordingly, I have also to revoke your licence because the statute gives me no discretion". this two-stage approach is incorrect and ... the sanction has to be considered at the earlier stage. Thus, the question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes "is the conduct such that the operator ought to be put out of business?". On appeal, the Tribunal must consider not only the details of cases but also the overall result.

56. The Traffic Commissioner also had to ask herself how likely it was that this operator could be trusted to operate in compliance with the operator's licensing regime in the future (*Priority Freight T2009/225*). Operators cannot be checked on and monitored constantly; it is therefore of paramount importance that they can be trusted to operate compliantly, even when not being "watched" by the regulator.

57. On the positive side, the Traffic Commissioner noted that DVSA had not reported any roadworthiness concerns or prohibitions; there was sufficient finance for two vehicles; there were no operating centre issues and the principal occupation was genuine. The negative features were Kieran White's role as shadow director, his use of N3 GPD without a licence and his use of the Photoflash disc. She then considered the guidance in *Bryan Haulage* and observed that the operation of vehicles under the restricted licence was a small part of the overall business of Kibex Ltd. In considering the "*Priority Freight* question" of trust she answered that in the negative. Having seen and heard Paula Baillie and Kieran White and considering the latter's answers which she found to be dissembling and his demeanour she felt unable to place any trust in the company and the persons directing it. She no longer felt able to trust Paula Baillie; she had shown herself incapable of controlling Kieran White's involvement in the business.

58. Clearly, the Traffic Commissioner has had in mind the appropriate legal guidance when considering the question of revocation and she has applied the law correctly. The conduct of the director and shadow director in operating a vehicle without a licence in contravention of s 12 of the 1981 Act was a matter she was bound to take into account under paragraph 1(2)(b) of schedule 3 (see paragraph 6 above) when considering whether the company was of good repute. Her decision that the unauthorised operation of the vehicle and the breach of the condition that Kieran White would not control the company outweighed the positive factors she found cannot be said to be unreasonable or in error of law. Having seen and heard the witnesses and made the findings of fact that she did she was entitled to find that Kibex Ltd had lost its good repute. Good repute is a requirement of s14ZB and loss

of good repute is ground for revocation under section 17(2). In the circumstances, we are unable to hold that the Traffic Commissioner erred in her consideration of and reasoning regarding these issues or that her decision to revoke the restricted licence was in any way *disproportionate*.

Disqualification of Kibex Ltd and Paula Baillie

59. Section 28 of the Transport Act 1985 gives the Traffic Commissioner discretion following revocation of an operator's licence to disqualify the former holder of the licence either indefinitely or for such period as the Traffic Commissioner thinks fit. The power extends to disqualifying "any officer of a company" where the company was the holder of the licence. The appellants were advised of the power to disqualify following revocation in the Traffic Commissioner's letter dated 18 October 2016 (pages 15- 19).

60. Section 28 forms part of a system of regulation of the operation of public passenger vehicles and its purpose is for its powers to be used in order to achieve the objectives of the system of regulation such as the protection of the public and fairness to other operators who do comply with the regulatory requirements.

61. The Senior Traffic Commissioner's Statutory Document No. 10, paragraph 93 recommends that each case must be considered on its merits. In the case of a first public inquiry, it advises that Traffic Commissioners may wish to take as a starting point a disqualification period of between 1 and 3 years.

62. The Traffic Commissioner took into account the period of unlawful use of the vehicle which was approximately three months and also that the trust between the operator and the Traffic Commissioner had been adversely affected by the breach of the condition on which the licence had been granted. Taking these factors into account, the Traffic Commissioner imposed a period of disqualification of 30 months for both Kibex Ltd and Paula Baillie. (Kieran White was also disqualified for that length of time however, his disqualification is not the subject of appeal.) Further, the Traffic Commissioner made a direction under s28(4) of the 1985 Act to apply during the period of disqualification to the company and the directors.

63. We consider that the Traffic Commissioner has taken into account all the material and relevant considerations in this particular case which could bear on the question of disqualification, the period of the disqualification and the s28(4) direction. Given the evidence before the Traffic Commissioner and her conclusions we can find no defect in her reasoning.

Refusal of application for a standard operator licence

64. Having found that the company was not of good repute and did not have the appropriate financial standing for 4 vehicles, the requirements of ss 14 and 14ZA were not satisfied and therefore a standard licence could not be granted. In any event, given the Traffic Commissioner's disqualification orders, a standard licence could not be granted. The Traffic Commissioner's decision not to grant the licence cannot be faulted. It is therefore not necessary for this Tribunal to consider whether she ought to have made a different decision on the issue of financial standing.

Decision

65. In all the circumstances, the Tribunal concludes that the Traffic Commissioner's decision cannot be impugned. The appeal is dismissed.

(Signed)
MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 13 March 2018