



## ROAD TRANSPORT FORUM

### Failed Companies

One of the problems facing transport companies in the present economic climate is customers going into liquidation owing large sums of money. Not all legitimate businesses succeed at the first attempt. Companies can fail for any number of reasons and there are times when directors find their company can no longer trade.

There is no legal prohibition against forming a new company from the remnants of a failed business. Where the assets of one company are moved to another legal entity (sometimes referred to as a pre-pack 64) but with no obligation to pay the failed company's debts, it is often colloquially referred to as a "phoenix company". Often some or all of the directors remain the same. These arrangements can allow a business to start again with the profitable elements of the failed business. In some cases, the new company has the same or a similar name to the failed business.

A director of a failed company is allowed to become a director of a new company unless he or she is subject to a disqualification order or an undertaking, is personally adjudged bankrupt, or is the subject to a bankruptcy restrictions order or undertaking.

The Insolvency Act 1986 requires liquidators to obtain the best price for a business and its assets. It is an offence for a director of a company that has gone into insolvent liquidation to be a director of a company with the same or a similar name, or concerned in its management, without the leave of a court. The liquidator can also take action to recover funds where the failed company has entered into a sale at a lower than market value at a time when the company was unable to pay its debts.

A history of involvement with dissolved companies without any evidence of actual wrongdoing will not of itself amount to a loss of repute by the holder of an operator's licence. However the use of "phoenix" arrangements to avoid

previous liabilities may be regarded by Traffic Commissioners as amounting to an unacceptable business practice. This can be aggravated by continuing to operate without licence authorisation.

It is important that operators who find themselves in difficulties inform the Traffic Commissioner of developments. Save in exceptional circumstances, the directors of a company that goes into administration will have been aware that it was in financial difficulty for a sufficient period of time to enable them to inform the Traffic Commissioner of the material change in the financial position prior to administration. A failure to inform the Traffic Commissioner of a material change, including for instance a CVA or an IVA, may lead to adverse conclusions being drawn against the fitness of those directors to hold a licence or be in the transport industry at all.

Jared Dunbar, of Dyne Solicitors, says that we often find insolvency practitioners understand little about the Operator's Licence regime. Both operators and administrators should be aware that Regulation 31 of the Goods Vehicles (Licensing of Operators) Regs 1995 may be used with the support of the administrators. This regulation allows the liquidator, administrator or receiver to apply to the Traffic Commissioner for permission to continue using the Licence (for 12 months or up to 18 months in special cases). If the administrator etc does not make this application, then the licence will be subject to surrender or revocation. The company/administrator should not continue to operate vehicles unless the application has been granted. Also, Operator's Licences are not transferrable, so if someone is considering purchasing the assets from an insolvent company to set up a new company and continue trading, then an application for a new Operator's Licence must be submitted. That new company, if it needs to start using the vehicles quickly, should remember to apply for an interim licence as well.

## Restricted Licences Inappropriate for Skip Vehicle Operators?



In a recent case in the West Midlands the Deputy Traffic Commissioner made reference to two Upper Tribunal decisions in which the Tribunal expressed the view that skip vehicle operators require a standard national licence and not a restricted licence.

The first such case is the 2009 appeal of 1st 4 Builders Ltd against a decision of the then North Eastern Traffic Commissioner Tom McCartney refusing the company's application for a restricted two vehicle licence on financial grounds. The nature of the business was described as "skip hire/waste transfer".

In dismissing the appeal the Tribunal said: "One of the mandatory requirements that must be fulfilled before a Traffic Commissioner can grant an operator's licence is that the applicant is of appropriate financial standing. The purpose of the requirement is to ensure that an operator has sufficient funds available in order to service and maintain its vehicles. The amount of finance that must be available to an operator is stipulated by the European Community and is set out in the Financial Guidance Note for Operators. . . . there is no discretion in relation to the sums that are required to be available. In this case, the appellant applied for a restricted licence which required £4,800 to be available, although we are satisfied that such a licence is unlikely to be appropriate for a skip hire and waste transfer business; a standard national licence must be held. That would require the appellant to have funds available in the sum of £9,600. The appellant did not provide evidence of adequate funds for either a restricted or standard licence. . . . and in the circumstances, the application was bound to be refused and this appeal was bound to fail."

The second case is the 2010 appeal of Flowers 2000 Private Co Ltd, trading as Cargo Carriers Transport, in which the company appealed against the decision of South Eastern & Metropolitan Deputy Traffic Commissioner Miles Dorrington revoking its three vehicle standard national licence on the grounds it had lost its reputation because of drivers' hours and tachograph infringements, and its sole director and transport manager driving for two years without the appropriate category of driving licence. The company also failed to supply evidence of adequate financial standing. The company's business was described as a skip hire business.

It was argued on behalf of the company that the Deputy Commissioner should have given it more time to satisfy him that it was of appropriate financial standing and that he should have advised its director to apply for a restricted licence.

The Tribunal considered there was nothing in the point, saying that the appellant was not of appropriate financial standing to hold a standard national licence and it was not the role of the Deputy Traffic Commissioner to provide legal advice to the appellant as to how it operated its business and with which type of licence.

In a footnote to their decision dismissing the appeal the Tribunal said: "By way of a footnote, we would like to comment that the Tribunal is aware that the appellant has submitted a new application for a restricted licence. Without wishing to 'tie the hands' of the Traffic Commissioner in his approach to this application, we anticipate that the application will be considered at a public inquiry so that the issue of whether a restricted licence is the appropriate type of licence for the appellant's business can be considered and for the appellant to demonstrate that it has systems and procedures in place for ensuring that the drivers' hours and tachograph rules are complied with and that against the background of this case whether the input of a transport manager would be appropriate despite the fact that one is not required for the holding of a restricted licence."

John Dyne, of Dyne Solicitors, says he didn't read into these cases the Tribunal was saying specifically skip operators need a Standard Licence. Surely it is a question of fact. In my view if the skip operator is moving own stock in trade (i.e. waste transferred to him/ it) and brings it back to own MRF for recycling etc that is restricted. It would be different if the carrier was simply carrying waste from A-B as a haulier – i.e. had no interest in the waste beyond hauling it.

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