

BCA LEGAL ACTION DISMISSED

An attempt by the Bus and Coach Association Limited to force the hand of the Department for Transport to prosecute community transport organisations who operate without public service vehicle operator's licences (known as "O" licences) has failed. In a judgment of the High Court handed down on the 6th December, Lord Justice Leggatt and Mr Justice Lewis rejected a claim that the department was operating an unlawful non-prosecution policy. The Court also refused to grant a legal declaration setting out circumstances in which a CTO would be compelled to obtain an O licence.

The Community Transport Association, Mobility Matters Campaign Limited and Onebus Limited played a very significant role in the proceedings as "interested parties" opposing the claims which represented a significant threat to community transport provision in the UK.

The case mattered because had the BCA succeeded the whole operation of community transport with its reliance on thousands of volunteers would have been undermined. If larger organisations were prevented from operating with business-like efficiency and scale, fewer and worse services would have been provided to some of the most vulnerable groups in society.

The decision is likely to influence the guidance expected shortly from the Department. Some of the key points emerging from the case are:

- The fact that a road transport operator is a "not for profit" organisation or registered charity is not in itself sufficient to remove the need for an O licence if it operates vehicles suitable for carrying more than eight passengers. The organisation's overall objectives may not be the same as its purpose in providing transport services.
- If an organisation provides passenger transport for no payment from either passengers or a "transport organiser", no O licence is required
- If paid road transport is an organisation's main activity rather than an activity ancillary to something else, the question then arises as to whether its services are provided "exclusively for non-commercial purposes"
- Whether an organisation's purposes are non-commercial requires an examination of the particular facts from which its purpose may be ascertained. Even if an activity is commercial in nature because it is large or has paid employees or tenders for contracts, that does not mean that the organisation's purpose in providing the service is bound to be commercial. A European case called Lundberg which found that an individual was engaging in commercial activity was found to be irrelevant as the test in that case was not concerned with purpose at all.
- In establishing the relevant purpose, it is necessary to look at the totality of an organisation's road passenger transport activity to ascertain whether any of it is for a commercial purpose.
- The fact that an organisation covers its costs or even makes a profit from providing a particular service does not necessarily mean that its purpose is partly commercial
- If a service is provided simply to obtain revenue and for no social purpose, then that is a commercial purpose even if the surplus generated is then used for some other social purpose. An example from another area might be a shop operated by an international development charity simply to raise revenue for its work. The answer

might be different if the shop were operated by a charity for the homeless and sold goods cheaply to homeless people even if the shop made a surplus.

- Although an organisation may operate in a way which closely resembles a commercial business that is not determinative of its purpose. An inference as to purpose is to be drawn from all of the relevant circumstances such as:
 - Are charges below a commercial level?
 - Whether and to what extent is the organisation providing services under competitive procurement processes? For non-commercial purposes, one might expect to see that procurement is being used as the mechanism by which a socially useful service is provided.
 - What is the size and scale of the organisations operations within the market for road passenger transport services? Arguably this should be the whole of the EU market.
 - Does the organisation benefit from volunteers or is it able to pay less than a full market rate? This would suggest a social purpose.

It is very important to stress that these potentially relevant factors must not be used as a “checklist”. An organisation may be perfectly properly engaged in activity which by its nature is commercial but not doing it for a commercial purpose. Organisations relying on the non-commercial exemption, cannot use their charitable status to generate revenue from road transport unless the provision of the road transport is itself for a social or non-commercial purpose.

A lot of progress has been made in heading off what could have developed into an existential threat for many CTO's. There is now a good opportunity for a clear and practical approach to community transport licensing reflected in appropriate guidance from the DfT.

John Gould

Russell-Cooke LLP