



**DECISIONS OF THE TRAFFIC COMMISSIONER
FOR WALES**

Flintshire Logistics Ltd – OG2001966

&

Transport Manger – Malcolm Owen

Goods Vehicles (Licensing of Operators) Act 1995 (“the Act”)

Decisions made in respect of the operator’s licence held by Flintshire Logistics Ltd OG2001966 and announced at a public inquiry on 20 June 2018

1. The operator accepted that it no longer satisfied the requirement for financial standing, sections 13A(2) and 27(1)(a) of the Act.
2. The operator’s licence was revoked with effect from 23:59 hours on 22 June 2018.
3. It was accepted that the sole ground of revocation at the 20 June 2018 hearing was the issue of financial standing – and – that all other outstanding issues raised in the call up papers were to be considered at the adjourned hearing.

Further decisions made in respect of the operator’s licence held by Flintshire Logistics Ltd OG2001966 as a result of the adjourned public inquiry on 19 July 2018

4. Adverse findings are made under sections 26(1)(b); 26(1)(c)(iii); 26 (1) (e); 26(1)(f); and, 26 (1) (h) of the Act.
5. The operator no longer satisfies the requirement to be of good repute under sections 13A(2) and 27(1)(a) of the Act.

6. The operator no longer satisfies the requirement to be professionally competent under sections 13A(2) and 27(1)(a) of the Act.

7. A formal finding is made that Winston Dinorwyn Rogers has been a shadow director as defined by section 251 of the Companies Act 2006. This was conceded by solicitors for Winston Dinorwyn Rogers on 20 June 2018.

8. Winston Dinorwyn Rogers is disqualified from holding or applying for an operator's licence in any traffic area for a period of ten years, section 28 of the Act.

9. Doris Rogers is disqualified from holding or applying for an operator's licence in any traffic area for a period of three years.

Decisions made in respect of Transport Manager Malcolm Owen

10. Malcolm Owen has lost his repute as a transport manager. He is disqualified from holding or applying for any transport manager position, including anywhere within the EU, until he passes new examinations.

Background

11. Flintshire Logistics Ltd was granted a standard national goods vehicle operator's licence in June 2017 with authorisation for five vehicles and five trailers, at the time of the public inquiry there were three vehicles in possession. At the time of the original licence grant the sole director was Malcolm Owen, however he resigned from that position and at the time of the public inquiry the sole director was Doris Rogers. The operating centre in Atlas Yard, Corwen Road, Pontybodkin, Mold CH7 4TG was visited by DVSA examiners who conducted an investigation following a vehicle stop which revealed an HGV illegally using a device to by-pass its use of AdBlue. The examiners came to the conclusion that the business was a front for an individual who had previously been disqualified by me, Winston Dinorwyn Rogers ("Winston Rogers"). This resulted in a public inquiry being convened.

Public Inquiry

12. A public inquiry was convened for 20 June 2018, in attendance was the then sole director Doris Rogers, together with her son Winston Rogers. The operator was represented by Martin Smith, solicitor. In attendance from the DVSA were TE Sarah O'Brien together with VE Phillip Bramham.

13. The hearing was late in starting as a result of non-attendance from former transport manager and former director Malcolm Owen, he had sent a message to effect that his car had suffered a breakdown. Eventually it was conceded that he would be unable to attend, hence the need to adjourn. As set out in paragraphs 1 to 3, concessions as to fact were made formally. The inevitability of revocation was accepted and it was agreed that I revoke the licence on the sole ground of the lack of financial standing, it was conceded that I would consider all other matters including those under section 26 of the Act and also repute and professional competence at an adjourned hearing. This would enable me to come to findings of fact in relation to both the operator and transport manager. Revocation was not immediate as vehicles were on the road at the time of the public inquiry and there was a need for them to be driven back to the operating centre.

14. Transport Manager Malcolm Owen attended the adjourned hearing on 19 July 2018 unrepresented. Sole director Doris Rogers did not attend however the operator (the limited company) was again represented by Martin Smith, solicitor. Also in attendance was Winston Rogers together with a driver who it was perceived might be required to give evidence, in the event this was unnecessary.

Evidence

15. Before preparing this written decision, I have reviewed the following:

- Written public inquiry brief for Flintshire Logistics Ltd;
- Written public inquiry brief for Transport Manager Malcolm Owen;
- Contemporaneous handwritten notes from the hearings;
- A transcript of the initial hearing on 20 June 2018;
- Evidence given to me during the hearings;
- South Bucks District Council and another v Porter (FC) (2004) UKHL 33 in relation to written decisions generally; and,
- Aside from those quoted below, various authorities in relation to the approach to regulation, fitness, proportionality, and the burden of proof. – Thomas Muir (Haulage) Ltd v Secretary of State for the Environment, Transport and Regions (1999) SLT 666; Crompton trading as David Crompton Haulage v Department of Transport, North Western Area (2003) EWCA Civ 64; Muck It Ltd and others v Secretary of State for Transport (2005) EWCA Civ 1124; 2009/225 Priority Freight Ltd and Paul Williams; Fenlon 2006/277; and, 2002/217 Bryan Haulage (No. 2).

16. Early in 2012 a public inquiry was convened on a partnership licence held by Winston Rogers and another individual called Paul Porter, the business traded as Abbeylands Transport OG0094672. Winston Rogers was made the subject of a personal disqualification under section 28 of the Act. In a written decision I described Winston Rogers's failings as not ones of mere negligence, rather they were culpable. I went on to indicate that he should be kept out of the operator licensing system for a period of time and made a finding that he had misled a deputy traffic commissioner in 2008.

17. In March 2017 I held a public inquiry into Abbeylands Transport Ltd OG1109863, which had been granted a standard national operator's licence in May 2012 with Vanessa Rogers the sole director. The operator's licence was revoked and Vanessa Rogers was made the subject of a personal disqualification under section 28 of the Act. There were repeated failures to comply with undertakings and Vanessa Rogers failed to attend the hearing. It now transpires that Vanessa Rogers is the wife of Winston Rogers.

18. On 9 November 2017 HGV YJ08 SSK was stopped in Cumbria and found to be operating with an emissions cheat device, this triggered a DVSA investigation into the operator, Flintshire Logistics Ltd.

19. The six weekly PMIs and repairs were carried out in-house by Winston Rogers who appeared to be a competent mechanic despite a lack of formal qualifications. No brake checks were evident.

20. DVSA examiners gave evidence that Winston Rogers was the controlling mind of the business and that he was the individual who gave instructions to drivers and answered any queries, this was accepted as correct by Winston Rogers.

21. On being interviewed Winston Rogers admitted that he knew that the vehicle with the emulator did not use any AdBlue despite his personally owning the vehicle since November 2015. As explained by the DVSA examiners at the hearing, the vehicle of that age and specification would need add blue to meet Euro IV regulations. Winston Rogers admitted that he knew that the vehicle should have been using AdBlue, but did not check why that was not the case. Winston Rogers denied knowing of the emulator fitted to avoid use of AdBlue, despite this being inconsistent with his being a competent mechanic who owned the vehicle and who apparently ran the business.

22. It also transpired that no transport manager had been in place for at least five months as at the time of the investigation. . At the inquiry it was found that the period without a transport manager was even longer than this

23. It was conceded that no AdBlue had been used prior to the DVSA visit, although evidence produced to me demonstrated that AdBlue was used after the maintenance investigation.

24. DVSA examiners suggested that although Malcolm Owen was a director and transport manager for a time, it seemed that he had no control and the operator's licence before me was merely a means of Winston Rogers continuing with his haulage business.

25. Winston Rogers produced evidence of having attended a specialist two day refresher course a few weeks before the public inquiry.

26. In his oral evidence Malcolm Owen told me that he did not think about why it was that Winston Rogers was not a nominated director. He had known him for some time and had always liked him. He completed the application form for an operator's licence and had not appreciated that Winston Rogers had previously been disqualified, only learning about this on receipt of papers for the existing public inquiry. The business model described seemed a good idea, Winston Rogers told Malcolm Owen that he had had an accident in a truck in 2016 and as a result insurance costs for vehicles operated in his name would be expensive, hence the suggestion that Malcolm Owen be both director and transport manager with view to reducing costs. He was actually paid only £400 a month, less than drivers.

27. On taking on the transport manager role Malcolm Owen soon felt that he was unable to perform his duties properly because of interference from Winston Rogers, it was claimed to me that he was only in the role for three or four months in total. An attempt had been made by Malcolm Owen to surrender the operator's licence but this had not been accepted by the Leeds Licensing Team as he was not a director at that time, accordingly he did not have authority to request a surrender; as result the licence was reinstated.

28. Evidence on file shows some correspondence relating to Malcolm Owen expressing dissatisfaction with his transport manager position and resigning. Malcolm Owen claimed that he had had conversations with (named) individuals relating to his concerns about the operator's licence, but this was not part of my papers for the hearing. On my adjourning the public inquiry and asking for clarification from my Clerk, it emerged that there was some corroboration of Malcolm Owen's evidence with a file note referring to conversations with two separate people, unfortunately it did not go into sufficient detail as to the content of the (at least) two conversations.

29. Malcolm Owen told me how he had been trying to put things right on the operator's licence which was before me but had a number of difficulties, including a member of his family being ill. He also had a business repairing horseboxes (trailers). It was claimed that

he was working two days a week on the trailers now, but was only working for a single day a week during the period when he was transport manager for Flintshire Logistics Ltd.

30. I was told by Malcolm Owen that he realised that there was a vehicle which was used on the licence that required AdBlue, but he had thought that it had been merely parked in the yard. He conceded that he had not paid sufficient attention to detailed work as a transport manager and accepted that drivers posed any questions to Winston Rogers rather than to himself. I was told that he tried to put things right by talking to Winston Rogers but there was a lack of communication, Winston Rogers was always too busy.

31. It was conceded that vehicles were used without being specified on the licence, this because of his lack of attention to detail and his inability to perform a proper transport manager role. I was also told by Malcolm Owen that despite qualifying by examination in 1999, he had not attended any specialist transport manager refresher training.

Findings of fact and reasoning

32. I accept as correct the factual issues raised by DVSA examiners in their evidence, this includes vehicles being operated but not specified on the licence. The DVSA examiners who gave evidence did not know of the telephone calls made by Malcolm Owen to the Leeds Licensing office, have they done so they would have investigated this operator sooner. This illustrates the importance of OTC and licensing staff keeping accurate and detailed notes of telephone calls, and further, acting upon them. In this case receipt of calls should have resulted in accurate notes and prompt referral to the DVSA.

33. Winston Rogers was previously made the order of a personal disqualification under section 28 of the Act. Initially he attempted to circumvent this disqualification by getting his wife to “front” a business in an endeavour to hide his true role.

34. Later Winston Rogers persuaded a friend, Malcolm Owen, to be a director of a haulage business. For reasons I set out below, I accept the gist of what Malcolm Owen has told me and it is clear that Winston Rogers set out to exclude Malcolm Owen from any true role running the operator’s licence which was before me at public inquiry. As a result of Malcolm Owen resigning from his directorship, Winston Rogers persuaded his mother Doris Rogers to be a director. Doris Rogers was the sole director in name only and the controlling mind of business has always been Winston Rogers.

35. Having read the written evidence and having watched and listened to him in public inquiry, I place no reliance on what Winston Rogers tells me, he says what suits his purpose at the time. To put matters bluntly I do not trust Winston Rogers and do not trust what he may say.

36. Winston Rogers has accepted that he owned the HGV which had been fitted with an emulator device to circumvent use of AdBlue and that he knew that it was not using AdBlue. Moreover he accepted that he knew that a vehicle of that age and type should be using AdBlue but claimed that he did not know of the emulator. Evidence from Winston Rogers himself and from the DVSA was that he was relatively competent as a time served mechanic. I remind myself that he was also the controlling mind of the business.

37. When coming to any adverse finding of fact I am aware that proceedings in public inquiry are an inquisitorial process where findings are to the civil standard of proof, namely the balance of probabilities. However I seek to get to the truth of matters purely on evidence and I adopt the principle that was set out by the House of Lords in Re H and R

(1996)(1)FLR80 where it was confirmed that in all civil proceedings the standard of proof required must always be the balance of probabilities – with the helpful guidance that the more serious an issue or allegation, the more cogent the evidence that is required. Reflecting on the totality of the evidence and coming to findings of fact, I remind myself that I have found Winston Rogers to be an unreliable witness who says what suits his purpose at the time. I have no hesitation in confirming that Winston Rogers knew that the HGV owned and maintained by him was not using AdBlue – and further – that this was because either he fitted or he knew that an emulator had been fitted. I make this finding because Winston Rogers has consistently and persistently sought to mislead regulatory authorities as to the true state of affairs. This resulted in his disqualification by me in 2012. Later he sought to circumvent the disqualification by using his wife as a director. Later still he sought to continue his deceit of regulatory authorities by persuading Malcolm Owen to be a director and later, when he resigned, he used his mother as someone who was director in name only.

38. My finding in relation to actual knowledge as to the use of AdBlue is also consistent with an individual who has given an undertaking to Companies House but has continued to breach that undertaking.

39. In conducting a balancing exercise in respect of the operator I reflect that there is a positive feature, namely the controlling mind has attended a two-day refresher course shortly before the hearing before me. This is a very small positive feature and is dwarfed by the substantial negative features of this case. Winston Rogers, the controlling mind, has persistently and consistently sought to hide the true position from me.

40. I remind myself that operator licensing is based on trust and in 2012/034 Martin Joseph Formby t/a G & G Transport; the Upper Tribunal said *“traffic commissioners must be able to trust those to whom they grant operator’s licences, to operate in compliance with the regulatory regime. The public and other operators must also be able to trust operators to comply with the regulatory regime.”*

41. Judge Brodrick, in the case of 2006/277 Fenlon said:

“It has been said on many occasions that trust is one of the foundation stones of operator licensing. Traffic Commissioners must be able to trust operators to comply with all the relevant laws, rules and regulations because it would be a physical and financial impossibility to police every aspect of the licensing system all day and every day. In addition operators must be able to trust other operators to observe the relevant laws, rules and regulations. If trust between operators breaks down and some operators believe that others are obtaining an unfair commercial advantage by ignoring laws, rules or regulations then standards will inevitably slip and the public will suffer.”

42. I also remind myself of comments from the Upper Tribunal at paragraph 19 of NT/2013/028 Arnold Transport and Sons Limited v DEON!:

“the impact of unfair competition is insidious in that it gradually and subtly undermines the confidence of compliant operators that their competitors will comply with the regulatory regime and thus compete fairly. What matters is the perception that other operators are competing unfairly not whether they are achieving any benefit as a result. Once rumours, of unfair competition spread, (or clear evidence of it become apparent), the assumption will be made that it must be advantageous because there would be no point in running the risks involved if it was not. It is also corrosive because once rumours of unfair competition (at the very least), begin to spread the perception that some operators are competing unfairly (whether or not

they profit by doing so) has a damaging effect. It means that normally compliant operators will feel tempted to “cut corners” in relation to the regulatory regime in order to remain in business. Some may decide to resist that temptation but others are likely to succumb. The end result, if swift and effective steps are not taken to stamp out unfair competition, is that the operators who are most determined to remain compliant will be at greatest risk of being put out of business, even though they are the very operators who most deserve to remain in the industry. Trust, whether between operators and the traffic commissioner or between operators themselves, is all too easily destroyed. Rebuilding it, if that is even possible, is likely to be a long and slow process.”

43. In the case of 2007/459 KDL European Ltd the court said:

“We are satisfied of the need “to make an example of the operator so as to send a warning to the industry as a whole”. This is consistent with the approach by the five-judge Court of Session in the Thomas Muir case (see paragraph 2(xiii) above) where deterrence is expressly mentioned (“in particular for the purpose of deterring the operator or other persons from failing to carry out their responsibilities under the legislation”). This is not by way of punishment per se but, as Lord Cullen said, is “in order to assist in the achievement of the purpose of the legislation”. We answer the question posed in 2002/17 Bryan Haulage (No.2) “is the conduct such that the operator ought to be put out of business” in the affirmative. And we judge this at the date not only of the public inquiry but also of the appeal. This is a bad case and we hope that the message sent out will be clear to all.”

44. When I ask myself the Priority Freight question, I answer in the negative as I do not trust the controlling mind of the operator and in any event the limited company was set up with the sole intention of circumventing decisions of mine and to avoid bringing to my attention Winston Rogers’s true role. I answer the Bryan Haulage question in the affirmative.

45. A disqualification under section 28 of the Act is wholly appropriate for Winston Rogers in view of his persistent and calculated attempts to deceive me. I reflect that this is one of the occasions where an individual could be called a rogue. The report by Philip Hampton on regulation in March 2005 provided a very useful reference at paragraph 29: *“the penalty regime should be based on managing the risk of re-offending, and the impact of the offence, with a sliding scale of penalties that are quicker and easier to apply for most breaches with tougher penalties for rogue businesses which persistently break the rules.”*

46. Paragraph 2.71 of Philip Hampton’s report says: *“A common complaint of business, during the review’s consultation process, was that honest businesses were being undercut by businesses that operated outside the regulatory rules. These ‘rogue businesses’ were characterised as operating beneath the vision of regulators and tax authorities.”*

47. This definition has been adopted by others, see HSE policies. I consider that this definition of a rogue is applicable to Winston Rogers.

48. A rogue such as Winston Rogers merits a disqualification that reflects the scale and persistence of his deceit. On the facts of this case with the appalling history of deceit, I consider that it is consistent with the Senior Traffic Commissioner’s statutory guidance to disqualify Winston Rogers for ten years.

49. A disqualification is necessary for Winston Rogers’s mother, Doris Rogers. She knew or should have known that he had previously been disqualified. Similarly she knew or should have known that her daughter in law was previously disqualified by me for a deceit that was

replicated in this case. Reflecting on the facts of this case and the Senior Traffic Commissioner's statutory guidance, I feel that a disqualification for three years under section 28 of the Act is proportionate.

Specific findings and decisions in respect of Transport Manager Malcolm Owen

50. It is clear that Malcolm Owen communicated with the Leeds Licensing team on more than one occasion and it is also evident that full details of the separate conversations were not sufficiently spelt out. Applying the case law in *Re H and R (1996)(1)FLR80* that the more serious an issue or allegation, the more cogent the evidence that is required, it would be wholly wrong of me to make any finding that he knew of Winston Rogers's deceit or of the deliberate use of AdBlue in an HGV.

51. Notwithstanding the above I make a finding that Malcolm Owen should have known of the true position. He admitted in his evidence that he did not undertake sufficient due diligence prior to accepting a transport manager position. He also accepted that vehicles were operated whilst he was transport manager when they were not specified on the operator's licence. Malcolm Owen did not have the control required and he admitted that this was so. Indeed I acknowledge that he attempted to communicate his inability to undertake a proper transport manager role, but he did not do so as promptly as necessary, neither was he as clear and specific in his written communications as could be the case.

52. A concerning feature is that whilst being relatively open and admitting failures it is evident that Malcolm Owen has not had any specialist transport manager training since he qualified almost two decades ago. He lacks the knowledge and skills required of a transport manager today.

53. I find that Malcolm Owen loses his repute as a transport manager as a result of the failures, however for the avoidance of doubt I spell out that I do not make any finding that impugns his integrity. The loss of repute flows from his failure to undertake a transport manager role, a failure to undertake proper due diligence prior to taking up a position; a lack of knowledge as to the vehicle that was used regularly without AdBlue; vehicles operating without being specified on the licence; and a general lack of control due to his undertaking other work.

54. In this specific case the lack of knowledge and skills displayed by Malcolm Owen is such that I require him to requalify as a transport manager taking fresh examinations. I believe that this would be proportionate to the failings identified and indeed conceded by him.

Decisions

66. I make decisions as set out in paragraphs 1-10, above.

Other

67. I was told that in March 2018 Winston Rogers gave an undertaking to Companies House that he would not be a director for a period of three and a half years. This contradicts his formal admission to me through his solicitor that he was acting as a shadow director as defined by section 251 of the Companies Act 2006. Moreover he was still acting as a director up until 20 June 2018, indeed he admitted this to me through his solicitor.

68. A copy of this decision is to be provided to Companies House so that it can take such action as it deems fit.

A handwritten signature in black ink, appearing to read 'Nick Jones', with a horizontal line underneath.

Nick Jones
Traffic Commissioner for Wales
Comisiynydd Trafnidiaeth

15 August 2018