

Neutral Citation Number: [2016] UKUT 0095 (AAC)

Appeal Nos. T/2015/53/75/76

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

**ON APPEAL from the DECISION of
Nick Denton, Traffic Commissioner
for London and the South East of England dated 13 August 2015**

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
George Inch, Member of the Upper Tribunal
Andrew Guest, Member of the Upper Tribunal

Appellants:

LIAM MALONEY & LIAM MALONEY PLANT HIRE LIMITED

&

THOMAS RYAN & EURO SKIPS LIMITED

Attendances:

For the Appellants: Mr Nesbitt of Counsel instructed by OTB Eveling LLP.

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 26 January 2016

Date of decision: 18 February 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that:

- a) The appeal by Liam Maloney against the order disqualifying him for a period of three years BE ALLOWED to the limited extent that the period of disqualification is reduced to two years, ten months with effect from 13 September 2015.
- (b) The remaining appeals BE DISMISSED with immediate effect.

SUBJECT MATTER:- adverse maintenance findings; operating in excess of authorisation, financial resources, “fronting”; good repute and disqualification.

CASES REFERRED TO:- Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695; Priority Freight 2009/225; Bryan Haulage (No.2) 2002/217; Internlink Express Parcels Ltd v Night Trunkers Ltd & Anor (2001) EWCA Civ 360; Silvertree Transport T/2012/71; Farooq Ahmed & Haroon Ahmed T/2009/517.

REASONS FOR DECISION

1. These are appeals from the decisions of the Traffic Commissioner for London and the South East of England (“TC”) made on 15 August 2015 and 13 November 2015 when he revoked the restricted operator’s licences held by the Appellant companies, Liam Maloney Plant Hire Limited (Plant Hire) and Euro Skips Limited (“Euro Skips”) and disqualified Liam Moloney (“Mr Moloney”) from holding or applying for an operator’s licence for a period of three years and disqualified Thomas Ryan (“Mr Ryan”) for a period of eighteen months. The orders were made as a result of adverse findings made under ss.26 and 27 of the Goods Vehicle (Licensing of Operators) Act 1995 (“the Act”). The appeal against the revocation of Plant Hire’s licence was withdrawn during the appeal hearing. The appeal against the disqualification of Mr Moloney remained in issue. And whilst it is accepted that the operator’s licence of Euro Skips was rightly revoked on the grounds of lack of financial resources, other findings justifying revocation continue to be the subject of appeal along with the disqualification of Mr Ryan.

Background Circumstances – Plant Hire

2. The factual background to the appeal appears from the documents, the transcript and the TC’s written decisions. By an application received by the Central Licensing Unit (“CLU”) on 28 July 2014, Plant Hire applied for a restricted licence authorising five vehicles. The operating centre was situated at Unit 10 Station Approach, Oldfield Lane North, Greenford and Mr Moloney was the sole director of the company. The maintenance contractor was named as Noel Wright. No interim authorisation was requested.
3. Whilst the application was being processed, three vehicles which were being operated by Plant Hire were stopped by the DVSA on 27 August

2014, 25 September 2014 and 30 October 2014. The second vehicle to be stopped was issued with an immediate “S” marked prohibition for missing propeller shaft bolts, loose wheel nuts and tyre damage. As a result of the unauthorised use of these vehicles, it was determined that the Plant Hire’s application for a licence was to be considered at a public inquiry. The hearing took place on 17 November 2014 and the company was represented by Philip Brown of AMD solicitors. Mr Moloney told DTC Baker that the vehicle stopped on 27 August 2014 had been used by a driver without permission; the vehicle on 25 September was being used because Mr Moloney thought that his transport consultant, Paul Shea, had told him that an interim licence had been granted and the vehicle on 30 October should not have been on the road but had been taken by a driver to go to the garage. When questioned by Mr Brown about compliance, Mr Moloney assured the DTC that “everything is going to be done 100% from now on, not 99%”. Upon Mr Moloney undertaking that an independent audit of the company’s compliance systems would be undertaken and provided to the Office of the Traffic Commissioner (“OTC”) by 17 February 2015 along with the company’s proposals for implementing any recommendations within the report and that a copy of the driver disciplinary code was to be provided to the OTC by 15 December 2014, the DTC granted the application with effect from 24 November 2014.

4. Plant Hire then failed to comply with the undertakings given by Mr Moloney. Whilst the audit report was dated 9 February 2015, it was not provided to the OTC until 23 March 2015 and only following a chasing letter sent by the OTC on the 11 March 2015. The report was not accompanied with the company’s proposals for implementing the audit recommendations. As for the disciplinary code, two chasing letters had to be sent by the OTC before the code was provided on 9 January 2015.
5. On 31 December 2014, the OTC received an application to increase Plant Hire’s vehicle authorisation to fifteen and to add an additional operating centre at Glebe Farm, West End Road, South Ruislip. An interim licence was granted in respect of the new operating centre on 6 May 2015 which did not include any interim authority for an increase in the number of authorised vehicles. As a result of the application, reports from a vehicle examiner and two traffic examiners were submitted to the TC.
6. Vehicle Examiner (“VE”) Mitchell submitted an adverse maintenance investigation report dated 28 April 2015. He had conducted a maintenance investigation on 12 March 2015, which he had marked as unsatisfactory for the following reasons:
 - Nine prohibitions had been issued up to 1 April 2015. Prohibition types totalled six immediate, eleven delayed and ten advisory with one “S” marked. There were no PMI (“preventative maintenance inspection”) records for six of the

eight vehicles which had been issued with prohibitions. When three of the vehicles were stopped, they were not specified on the company's licence although they were added later that day, with other vehicles being removed as there was no margin in the vehicle authorisation and another three vehicles which had been stopped had never been specified on the licence, before or following roadside encounters.

- The prohibition rate over two years was 89% compared to the national average of 30%.
- There were no PMI records for six vehicles which were said to be used solely off road and these vehicles had never been specified on the licence although two prohibitions in September 2014 and January 2015 had been issued to two of those vehicles, which demonstrated that the vehicles had been used on the roads.
- The driver defect reports contained mistakes for example, the wrong vehicle registration number or odometer readings. Quality checks were recommended.
- Since 17 November 2014, two driver's hours prohibitions had been issued equating to a rate of 29% (national average 10%) and four graduated fixed penalty notices had been issued.
- Two new maintenance contractors (Westway Commercials and O'Loughlin Commercials) were being used although no contracts were available and none had been provided to the OTC.
- During the course of the investigation, VE Mitchell checked one vehicle and issued a delayed prohibition for a missing wing, which was then welded back on whilst VE Mitchell was on site.

VE Mitchell noted that the first time pass rate at annual test was 100% (two vehicles) but there may have been other vehicles that had been tested which had not been specified on the licence. He gave an example of vehicle KE03 DPU. VE Mitchell concluded that the company was using more vehicles than its authorisation and that a "shuffling of the pack" exercise took place when vehicles not specified were stopped by the DVSA. Further, it was clear from the prohibitions that there were shortcomings in the company's maintenance systems.

7. In response to VE Mitchell's findings, Mr Moloney wrote a letter dated 19 March 2015 stating that all the company's vehicles had been obtained from reputable commercial vehicle dealers and had been supplied fully serviced and as a result, no first use inspections had taken place prior to the vehicles being used. He accepted that it may have been good practice to undertake such checks. As for the prohibition history, he considered that this had been fully explained to DTC Baker in November 2014 although there was prohibition for loose wheel nuts which was the fault of the maintenance contractor. Finally, he assumed that the prohibition issued by VE Mitchell during his investigation was for a "minor" matter as otherwise the driver would have reported the defect and it would have been repaired (It is of note

that many of the prohibitions had been issued after DTC Baker held his public inquiry).

8. The reports submitted by Traffic Examiners (“VE”) Kalyan and Cox can be summarised as follows:

- Vehicles operated by Plant Hire were stopped on 4 December and 9 December 2014; neither was displaying licence discs and the vehicle stopped on 9 December was carrying goods which were not the property of the company. That vehicle was registered to SLS Haulage & Civil Engineering Limited (“SLS Haulage”). Its sole director was Stephen Murphy and the company was located at the same operating centre as Plant Hire. SLS Haulage was not the holder of an operator’s licence. A question was raised as to whether a standard licence was required. The company was contacted and within a short time, this vehicle was added to the licence.
- On 19 March 2015, a vehicle was stopped which was not displaying an operator’s licence, it was being operated in excess of the company’s vehicle authorisation and it was carrying goods which were not the property of Plant Hire. A standard operator’s licence was therefore required for that activity.
- On 1 April 2015, a vehicle being operated by the company was stopped and found not to be displaying a licence disc. Within twenty five minutes of the encounter, the vehicle was specified and another removed from the licence.
- On 30 April 2015, two vehicles operated by Plant Hire had been stopped by DVSA officers. Neither was displaying licence discs. One, which was registered to SLS Haulage was driven by Joseph Barry who only held an Irish driving licence, his UK licence having been revoked as a result of his failure to submit his licence to the DVLA following the commission of a road traffic offence. He was therefore treated as a foreign driver and as a result of there being no evidence that he had undertaken any driver CPC training, a fixed penalty notice was issued in respect of that and another was issued for exceeding four and a half hours driving without the required break. By reason of the above, Barry was driving the vehicle whilst uninsured. The other vehicle stopped that day, was registered to Oldfield Haulage Limited with the same address as Plant Hire’s operating centre. Its operator’s licence had been revoked. Mr Moloney had been a director of the company for one month in 2014. Stephen Murphy had also been a director.
- On 8 May 2015, a vehicle registered to the company and being operated by it, was stopped displaying the operator’s licence disc of JJ Transport Ltd. The vehicle was not specified on any licence. VE Kaylan rang JJ Transport Ltd and spoke to Catherine McDaid who stated that the vehicle had been sold to Plant Hire.

- On 12 May 2015, another vehicle was stopped and found to be displaying an expired disc issued to Leonard George Pearce Limited. The vehicle was registered to Andrew and Gary Cook trading as LG Pearce Haulage.
- When Mr Moloney was interviewed about the above matters, he told VE Kalyan that the company owned fourteen vehicles and employed fourteen drivers but not all of the vehicles were used. Some of them were operated only on site work and there were about seven operating on the road. One of the vehicles stopped on 30 April 2015 was being operated under the operator's licence of McDaid Transport whilst the other should have been specified on the company's licence by the CLU following an application. He confirmed that the company was the operator of all of the vehicles which had been stopped. Mr Moloney was not asked about the use of an expired disc in the name of another operator on 12 May 2015.
- As it was considered that there was a pattern to Plant Hire's activities in operating unspecified vehicles and then specifying those vehicles following roadside encounters whilst at the same removing another vehicle, an s.99ZA letter was sent with a deadline for the production of documents and digital data of 15 May 2015. The deadline was not met and so TE Cox attended the operating centre and spoke to Mr Moloney on the telephone. Mr Moloney confirmed that he continued to employ Joseph Barry despite the fact that his licence had been revoked and no action had been taken to rectify the position. Mr Moloney was instructed to direct Mr Barry back to the operating centre. It was TE Cox's view that neither Mr Barry nor Mr Moloney had appreciated the significance of the revocation of Barry's licence and had done nothing to resolve it.
- TE Cox requested that he be allowed to review the company's systems but Mr Moloney asked for the review to be postponed as the employee, Adele, who could assist him was in Ireland. Mr Moloney agreed to inform TE Cox when Adele had returned. He did not. On 27 May 2015, TE Cox contacted Mr Moloney again and was told that Adele was now available but that TE Cox could not undertake the systems review because another one of Plant Hire's vehicles had been stopped that day and the driver had been "harassed" by DVSA staff. Mr Moloney took the view that he was being victimised. He was instructed to contact a Senior Traffic Examiner to make a complaint. In the circumstances, no compliance review took place.
- In the interim, on 27 May 2015, two further vehicles were stopped which were being operated by Plant Hire in excess of its margin and without displaying a licence disc. It was of concern to TE Cox that these vehicles were on the road only six days after Mr Moloney had been interviewed by TE Kaylan. Further, one of the vehicles was registered to the motor trade and was in the livery of Thames Materials Limited. The driver did not have a UK driving licence, the licence having been revoked. The

driver of the other vehicle was obstructive during the encounter. He ignored directions to follow a DVSA vehicle and when he eventually stopped, he claimed to be working for "Daveys Transport" which did not exist. Documents in the vehicle related to Thames Materials and the livery of the vehicle was also of that operator although the decals had been removed. The driver later agreed that he was in fact working for Plant Hire.

- On 9 June 2015, another vehicle was stopped which displayed a disc issued to a Northern Ireland operation, Laurence McDaid trading as Davey Transport. The driver said he had been employed by Laurence McDaid of 10, Station Approach, Greenford for the previous three weeks (the same address as Plant Hire's operating centre), having arrived in this country to work three weeks and three days before he was stopped). The vehicle was registered to Oldfield Haulage Limited having been acquired from Thames Materials Limited. Mr Moloney was later interviewed. He said that the driver had been mistaken when he said that he was working for McDaid. He was working for Plant Hire, undertaking site work which did not require a licence. Mr Moloney stated that he was under the impression that if an empty lorry returned to the operating centre having been working on site, it did not require an operator's licence. The driver had worked for the company for six months. As for the disc displayed in the window, Mr Moloney stated that he had forgotten to remove it.
- By 9 June 2015, the number of prohibitions issued to vehicles known to have been operated by the company had increased to eleven with a rate of 73% over two years (national average 29%). There had been three drivers' hours prohibitions and five graduated fixed penalty notices for drivers hours and records offences and one for a dangerous load.
- VE Cox concluded that his investigation established that the company had operated sixteen vehicles over the previous seven months which did not display a valid operator's licence disc and whilst as a result of earlier encounters, the vehicles had then been added to the licence, latterly the vehicles had simply been driven above the margin. It was difficult to ascertain with any degree of accuracy how many vehicles Plant Hire had operated or whether its systems were compliant. However, it was known that during a number of roadside encounters it was obvious that the company had not locked into the vehicles' digital data systems. He queried whether any drivers' hours checks were undertaken or any driving licence checks in view of the fact that two drivers had been found to hold revoked UK licences. Mr Shea, the transport consultant maintained to VE Cox that he had had no involvement with the company save during the initial application for the licence and the variation application. He had explained to Mr Moloney that he could not operate vehicles above the licence authorisation.

9. In preparation for the public inquiry which was scheduled to take place on 4 August 2015, written representations were submitted on behalf of Plant Hire. It no longer required the additional operating centre; first use PMI's were now undertaken; a foreman/driver, Declan Doherty, had been appointed to check the drivers defect reports. He was also registered to attend a transport manager CPC course; PMI's were now being undertaken by an in-house mechanic, Alan Doherty using a new, in house workshop and a mobile fitters van; the use of vehicles in excess of Plant Hire's margin was the result of Mr Moloney's false impression that vehicles returning from "on site" work did not need an operator's licence when returning to the operating centre and there had also been a problem with members of staff specifying vehicles because they did not know the password to the CLU website; the vehicle displaying the McDaid disc was owned by Plant Hire but was being used by McDaid; Joseph Barry had passed his driver CPC; one vehicle which had been stopped carrying a load may have been on its way to its annual test; the DVSA evidence was accepted; four drivers including Barry had been dismissed; at least three members of staff would attend the operator compliance seminar; Mr Moloney's knowledge about operator licensing was "lacking" and his apparent lack of co-operation with TE Cox was as a result of a misguided impression that he was being victimised; it was accepted that it was unlikely that an increase in vehicle authorisation would be granted until the company had achieved a period of compliance. Enclosed with the representations were a number of tachograph analysis reports dated July 2015, signed by drivers to acknowledge that identified infringements had been brought to their attention.
10. TE Cox also prepared an addendum report for the public inquiry. He had identified a further five vehicles which were associated with Plant Hire's licence. The company's systems were unsatisfactory by default. He could not say how many vehicles were in fact being operated or how many drivers were employed. The number of prohibitions had increased to thirteen.

The Public Inquiry Hearing – Plant Hire

11. At the public inquiry, all of the DVSA officers were in attendance, along with Mr Moloney, Aidan and Declan Doherty and Miss J McGonagle on behalf of Plant Hire. Mr Brown represented Plant Hire and at the outset, he withdrew the application to increase the company's vehicle authorisation. Mr Moloney had accepted that he had not educated himself about operator duties and he acknowledged that compliance was required.
12. Mr Moloney then gave evidence. In addition to the contents of the written representations, he stated that after the company had been granted a licence, he had been left on his own and had not received any training. Declan Doherty was now his compliance manager and Mr Moloney was going to attend the operator licence compliance course in

September 2015. He had not had the time to attend the course before. He had delegated the task of complying with the undertaking given when the licence was granted, to provide a copy of the driver disciplinary procedure to the OTC and he had not checked whether it had been sent. He could not say why proposals for implementing the recommendations in the maintenance audit had not been submitted along with the report. He accepted that the company's verbal driver defect reporting system had not worked. Defect books had been issued to the drivers and drivers' entitlements were now checked every three months. Many of the prohibitions related to tyres which were constantly damaged on construction sites. Other prohibitions related to broken indicators and others related to loose wheel nuts. Whilst the vehicles were now fitted with wheel nut indicators, the company did not have a re-torque procedure. Whilst Mr Shea had been producing drivers' hours infringements reports, the company had not been acting upon them. Mr Moloney only one occasion when a vehicle had been stopped carrying a load of stone. A contractor on a site upon which Plant Hire was working had requested that it be moved. He repeated that he had not realised that a vehicle needed an operator's licence if it was not carrying a load and the use of more vehicles than authorised was because he had lost track of the vehicles which were specified. The vehicle which had been stopped on 30 May 2015 which was not displaying a disc but which was registered to Oldfield Haulage Limited (Mr Moloney had been a director of this company and its operator's licence had been revoked) was being operated by Oldfield Haulage. It had been insured by Plant Hire because Sean Gleeson, who was the director of Oldfield Haulage had told Mr Moloney that the insurance premiums for the vehicle were too expensive for the company to pay. Mr Moloney had helped his friend by insuring the vehicle for Oldfield Haulage. The reason why another vehicle was displaying a disc issued to J&J Transport Limited was that Plant Hire had purchased vehicles from McDaid and the vehicles were displaying the discs when the company took possession of them. He went on to accept that having submitted an application for an increase in vehicle authorisation, he had simply gone ahead and operated the additional vehicles without waiting for the application to be granted. He maintained that Mr Shea had assured him that the application would be granted. He acknowledged that he had made a mistake but now he had staff to assist in compliance. He had since sold "a couple of lorries" to Euro Skips Limited, which operated from the same "yard" as Plant Hire. He could be trusted to run a complaint operation in the future.

13. Prior to Mr Brown's closing submissions, VE Mitchell told the TC that having inspected the records that had been produced that morning, it was clear that there were still mistakes being made by drivers during their daily defect walk round checks and also during the PMI inspections, for example, the brakes of vehicles were still only being checked by way of road testing. Alan Doherty offered an undertaking that roller brake testing would take place four times a year and that the test dates would be entered onto the forward planner.

14. Mr Brown accepted that at first blush, this was a case which justified revocation because of “wholesale non-compliance”. That was however the result of misunderstandings on the part of Mr Moloney and he should be given credit for his honesty before the TC and for having introduced systems and in particular, Declan Doherty and Alan Doherty. Mr Moloney could “demonstrate his desire” to be complaint and he deserved the opportunity to do so. Mr Brown accepted that Plant Hire was in the “last chance saloon”. He offered undertakings that audits would be undertaken in relation to drivers’ hours and maintenance.
15. The TC then adjourned for the preparation of a written decision. On the following day, he received a report from PC Dan Shead of the Metropolitan Police. On 4 August 2015 (the day of the public inquiry), vehicle EY11 NDJ, laden with soil/muck was stopped. The vehicle was not displaying a disc and was not specified on any licence. The driver stated that the operator was Euro Skips and he showed the officer a Waste Transfer Note in that name. The driver said that he had worked for the company for three weeks. His boss was “Declan” but he could not give the name of a company director or any other person employed by Euro Skips. He had been driving the vehicle since 7 July 2015. The officer noted that Euro Skips had an operator’s licence authorising ten vehicles with ten specified. It therefore did not have a margin to accommodate this vehicle. The registered keeper of the vehicle was Mr Moloney since 20 July 2015 and it was insured by Plant Hire and the vehicle digital tachograph was locked to Plant Hire. Both the driver and PC Shead attempted to speak to someone at Euro Skips by telephone but without success. PC Shead issued the vehicle with two immediate prohibitions for insecure tailgate fittings (three out of four bolts missing) and both stop lamps being inoperative. The Tribunal notes that this vehicle had also been stopped on 20 May 2015 when it was being operated by Plant Hire but at that stage was registered to the motor trade and was in the livery of Thames Materials Limited.
16. Plant Hire was asked for any comments about PC Shead’s report. Mr Brown responded. He stated that Mr Moloney had said that he had sold a “number” of vehicles to Euro Skips and the vehicle in question was one of them. He had disposed of the vehicle “some weeks ago” in order to demonstrate compliance. The insurance and the registered keeper details had not been changed because Euro Skips had not paid for any of the vehicles. The vehicle had been specified on the licence of Euro Skips the week before it was stopped by PC Shead (and the Tribunal notes that it was as a result of an administrative error that it had not been although it replaced another vehicle which was also in use). Mr Brown explained that the reason why the driver had said that he was working for Plant Hire was because he had worked for the company prior to he and others transferring to Euro Skips along with the vehicles. He denied on behalf of Mr Moloney that the “Declan”

referred to by the driver was Declan Doherty. Mr Moloney was prepared to attend a re-convened hearing if required.

The TC's decision in respect of Plant Hire

17. The TC found that Plant Hire had failed to fulfil a condition on its licence, by failing to notify the change of original maintenance provider and the subsequent change to in-house provider (s.26(1)(b) of the Act); that the company's vehicles had not been kept in a roadworthy condition (s.26(1)(c)(iii) of the Act); fixed penalties for drivers' hours and tachograph offences and for a dangerous load had been incurred (s.26(1)(ca) of the Act); the company had failed to fulfil various undertakings, namely, that the laws relating to the driving and operation of vehicles would be observed and in particular, that drivers held the relevant driving entitlement; vehicles were operated without being specified and in excess of the margin and by insuring a vehicle which Mr Moloney had said was being operated by Oldfield Haulage Limited, he had facilitated the unauthorised use of that vehicle by Oldfield Haulage Limited which did not hold an operator's licence. Further, his actions in insuring the vehicle constituted a fraud on the relevant insurance company. All of these matters fell within s.26(1)(f) of the Act along with: failing to act upon the drivers' hours analysis data provided by Mr Shea; vehicles were not kept fit and serviceable; driver defect reporting system was ineffective; the driver disciplinary code was not submitted in accordance with an undertaking; neither were the maintenance audit or the company's proposals for implementation of the recommendations. The TC did not make any findings in relation to the possible use of the operator's licence of Euro Skips but determined that an investigation would take place and Euro Skips would be called to a public inquiry.
18. The TC then undertook the requisite balancing exercise. Whilst his order of revocation is not the subject of appeal, his findings are relevant to the issue of Mr Moloney's disqualification. In addition to the matters set out in paragraph 17 above, the negative features of the case were that Mr Moloney "jumped the gun" first of all in operating vehicles before Plant Hire had been granted a licence and again after applying for a three-fold increase in vehicle authorisation. His assurances given to the DTC in November 2014 that he would be 100% compliant had turned out to be worthless not only in terms of the number of vehicles operated but the roadworthiness of those vehicles and compliance with the drivers' hours and tachograph rules. It was for him to arrange training for himself and he failed to do so.
19. On the positive side, of the vehicles that had been tested in the name of Plant Hire, there was a 100% pass rate; Declan Doherty had been appointed to ensure compliance; a written driver defect reporting system had been implemented; driving entitlement was now being checked; undertakings had been offered to undergo further audits, to have roller brake testing and to continue with independent tachograph

analysis; Mr Moloney had booked himself onto a operator licence compliance course.

20. The TC found that the steps taken were “too little and too late”. But for Mr Moloney’s promise of 100% compliance in November 2014, in view of Plant Hire’s history of unauthorised operation, the application for a licence would have been refused. Mr Moloney must have been aware of the importance of compliance but he did little or nothing to ensure that it was achieved. “Worse”, he knowingly operated many more vehicles than the five authorised and continued to do so even after vehicles which were not specified on the licence had been stopped and he had been warned about unauthorised operation. He operated without regard to the law. At public inquiries “he is long on promises and short on delivery”. The TC had no doubt that this would continue. Mr Moloney had demonstrated that he was not a person who the TC could trust to run a compliant operation. The answer to the “Priority Freight” question (supra) was extremely unlikely. The TC further had no doubt that the conduct of the operator was such that it ought to be put out of business (the Bryan Haulage question (supra)).
21. As for the disqualification of Mr Moloney, the TC determined that his lack of attention to compliance and the degree of non-compliance justified disqualification. The TC was inclined to give him credit for admitting that he simply operated more vehicles than authorised rather than continuing with a pretence that some vehicles were lent out to other operators or were running unloaded. However, the suspicions that Mr Moloney may have simply transferred the ten extra vehicles which Plant Hire had hoped to legitimately operate to Euro Skips would undo all of that credit. The TC determined to reserve his decision on “whether” to disqualify Mr Moloney until after the public inquiry into Euro Skips. If his suspicions were unfounded, Mr Moloney could expect a disqualification for around twelve months. If they were made out, the disqualification would be significantly longer.

Euro Skips – background circumstances

22. Euro Skips was incorporated on 28 April 2014. Its sole director was Amritpal Jandu. It was granted a restricted operator’s licence on 18 September 2014 authorising ten vehicles. Its operating centre was situated at Unit 9, The Goods Yard, Oldfield Road North and its maintenance provider was VMR Solutions. No vehicles were specified on the licence until 18 June 2015. Between that date and 31 July 2015, ten vehicles were then specified.
23. On 31 July 2015, a prohibition was issued to a vehicle for a tachograph which had not been properly sealed. Quite apart from the vehicle which had been stopped by PC Shead on 4 August 2015, another vehicle had been stopped on 5 August 2015 and was issued with a fixed penalty notice as a result of the driver failing to produce any evidence of a driver CPC.

24. On 6 August 2015, by way of an electronic application, Mr Jandu was replaced as director by Thomas Ryan with effect from 29 July 2015. Then by an application received on 7 September 2015, Euro Skips applied for a new licence with an operating centre in Denham, Uxbridge with a vehicle authorisation of ten. Maintenance was described as being "in house". The application failed to disclose the existence of the existing licence and did not indicate whether it would be surrendered upon the grant of a new licence. No response was received to a written enquiry from the CLU about these issues.
25. By a letter dated 11 September 2015, Euro Skips was called to a public inquiry. Maintenance (prohibitions having been issued), drivers' hours and records (fixed penalty notices having been issued) and the company's links to Plant Hire were issues raised in the letter. A copy of the TC's decision in respect of Plant Hire was enclosed along with the report of PC Shead. Euro Skips was put on notice that Mr Moloney had also been invited to attend the hearing. It would appear that the application for a new licence had not been processed by that stage and a further call up letter was issued on 30 September 2015. It made clear that the evidence the TC would be considering would include evidence of any possible links with Plant Hire.
26. A third call up letter was sent out to Euro Skips on 12 October 2015 attaching a further report from PC Shead. Following the roadside encounter on 4 August 2015, the officer sent an s.99Z letter to Mr Jandu requesting details of the company's operator's licence and copies of the vehicle's documents, tachograph calibration certificate, test certificate and proof of insurance by 12 August 2015. On 6 August 2015, in response to the s.99Z letter, PC Shead received a telephone call from someone stating to be "Thomas Ryan" who identified himself as the director of the company (at that stage, company house details continued to show Mr Jandu as the director). He was aggressive in his manner claiming that "we have done nothing wrong". He was invited to attend an interview and his response was that it was a "waste of time". He was advised that if he was refusing to attend an interview, the matter would be reported to the TC but the man did not respond apart from stating that he was going on holiday the following day until 10 September 2015 and that he would call PC Shead upon his return. Then on 10 August 2015 Jo-Anne McGonigle called PC Shead. Ms McGonigle was or had been an employee of Plant Hire and had attended the public inquiry with Mr Moloney on 4 August 2015. She explained that the vehicle he had stopped should have been specified on the Euro Skips licence and that the fact that it was not was an error on the part of the CLU. She agreed to send the documentation required by the s.99Z letter electronically and in due course she did send some documents. Despite numerous reminders, the outstanding documents required were: the vehicle registration document, the annual test certificate, the insurance certificate and the tachograph calibration certificate.

The Euro Skips Public Inquiry held on 21 October 2015

27. At the hearing, Mr Ryan and Mr Moloney were present and represented by Mr Brown who at the outset explained that the application for a new licence meant that Euro Skips was seeking a total authorisation of twenty vehicles over two licences. Analysis of the company's bank statements (produced for the period 1 September to 21 October 2015 only) demonstrated that there were no funds in the account between 1 September and 24 September and no overdraft facility. Then between 24 September and 5 October, there was a balance of £500 or less. The balance then increased without satisfying the average required to operate either ten or twenty vehicles until the day of the public inquiry when it increased to £44,208. £35,400 was required for twenty vehicles. However the three month average remained insufficient to demonstrate sufficient financial resources. It was noted by the TC that there had been three substantial payments into the account from: Anytime Concrete (a company operated by McDaid) and Thames Materials Limited (which Mr Ryan stated was for the carting of muck). Mr Ryan stated that he had set up the bank account one month before the hearing and that he had never seen the company's original bank statements which should have been in existence prior to taking over the company. He had purchased the company with zero assets and had bought the shares. The reason for doing so was that having been a construction site manager for twenty years, he had been given an opportunity to "get into haulage" and he saw it as a new challenge. He had known Mr Moloney for twenty years. The large payments into the bank account were the result of him giving his clients 90 days to pay their invoices. He was leasing vehicles from a finance company and the reason why there were no payments to that company from the bank account was because he was paying for them out of his own account. When it was put to Mr Ryan that Mr Moloney had contended during the previous public inquiry that Mr Ryan had bought the vehicles from Plant Hire, he said that he had bought them and he was trying to work out a different lease agreement with the finance company. Other vehicles not under lease had been paid for by him with cash given to Mr Moloney. The cash came from the sale of a house. There was no documentation to confirm this.
28. Mr Moloney then interceded and stated that Mr Ryan had paid him £40,000 as a "retainer". It was a verbal agreement to the effect that when Mr Ryan was "up and running" he would pay Mr Moloney "X amount". The £40,000 was for the good will of the company and for the vehicles. Mr Moloney had introduced Mr Ryan to Mr Devlin, a finance man and he was drawing up contracts for Mr Ryan. Mr Ryan had paid the monthly instalments under the lease agreements for two months although the legal agreements remained with Mr Moloney. The payments were in cash to Mr Devlin. The log books had been transferred to Euro Skips.

29. Mr Ryan continued. He had paid for the vehicle leases in cash as he did not have a cheque book for his personal bank account. In any event he generally held his money in cash. It was put to Mr Ryan that Euro Skips may have been used as a device to enable Plant Hire to operate more vehicles than it was authorised to do so. It was important that affairs be kept separate whereas it had transpired that Plant Hire was the lessee of the vehicles when Mr Ryan had, on his account, been operating the vehicles for two or three months. Mr Ryan assured the TC that he would have everything in the name of Euro Skips within a further two or three months. He agreed that all of the vehicles specified on the licence had come from Plant Hire.
30. His evidence turned to the vehicle stopped by PC Shead on 4 August 2015. He said that he did not know who "Declan" was and neither did the driver as he was foreign and he had simply heard the name being used. Mr Ryan denied that anyone by the name of "Declan" had been employed by Euro Skips at that time. He had taken on Declan and Alan Doherty along with Jo-Ann McGonigle a couple of days after Plant Hire's licence had been revoked. They knew the vehicles, the drivers and they had the knowledge required to operate ten vehicles. There was no record of salary payments being made because Mr Ryan had paid the staff in cash and had only started on-line banking on 24 September 2015.
31. Mr Ryan was taken to the records he had produced for vehicle KX06 JHZ which had been transferred to Euro Skips on 10 June 2015. The invoice for the tachograph calibration was dated 1 July 2015 and was paid for by Mr Moloney. Mr Moloney interceded and said that he had sold all of the vehicles as roadworthy and so had paid for various tests to be undertaken. Mr Ryan could not say whether he had paid vehicle excise duty on transfer of the vehicle to Euro Skips as his accountant dealt with all of that.
32. The insurance documents produced by Mr Ryan were gone through. Between 24 October 2014 and 24 October 2015, the vehicle fleet was insured by Liam Moloney Plant Hire Ltd &/or Oldfield Haulage Ltd. There was a temporary cover note for the period 10 September to 8 October 2015 in the name of Liam Moloney Plant Hire Ltd &/or Euro Skips Ltd. As at the date of the hearing, only the former insurance covered the fleet. Mr Ryan asserted that Plant Hire's insurance covered the vehicles until about two weeks before the hearing and they were now insured by Euro Skips. He had delayed obtaining cover because insurance for ten vehicles was expensive. (Following the hearing, the TC received a cover note dated 22 October 2015 covering the period from that date to 24 October 2015 and an insurance certificate issued 24 October 2015 covering 10 September to 24 October 2015).
33. Mr Ryan was asked about the prohibitions issued by PC Shead on 4 August 2015. He thought that the defects identified would have been

dealt with by the mechanic upon the vehicle's return to the operating centre and that the damage was probably caused on site, although he could not say which site. He did not think that the driver was aware that the defects existed although he had not spoken to the driver about them.

34. Mr Ryan denied that he had seen the s.99Z letter that had been sent by PC Shead as it had been sent to Mr Jandu. He denied that he had telephoned PC Shead on 6 August 2015 in response to the letter. He would not have identified himself as "Thomas" Ryan even though that is how he signs his name. He calls himself "Tom". He did not know who did speak to PC Shead. He believed that Ms McGonigle had sent all of the documents listed in the s.99Z letter and he had not been aware of the lengthy discourse between PC Shead and Ms McGonigle about them. He accepted that Plant Hire was insuring the vehicle on 4 August 2015. The TC required all outstanding documents to be produced to him at the conclusion of the public inquiry including Mr Ryan's bank statements, insurance documents and copy invoices from the finance company relating to the vehicle leases. Mr Ryan said that there was no point producing his own bank statements because he had paid for everything in cash. He had not been funding the company by way of a director's loan.
35. Mr Brown then made his closing submissions in relation to Euro Skips. He reminded the TC that vehicles do not have to be registered to the users of vehicles. As for who owned the vehicles, Mr Moloney had said that he had "sold" the vehicles to Euro Skips. That was an "easy colloquial term" for what had taken place. There were various methods for disposing of vehicles. All of the vehicles were specified on the licence of Euro Skips. Mr Ryan knew little about operator licensing and he needed to attend a seminar. It had been a steep learning curve for him. He had learnt something from the collation of the documents for each vehicle for presentation at the public inquiry. This had been undertaken by Mr Shea. It was accepted that Euro Skips needed to have an audit if the TC was minded to grant the second licence. As for the issue as to whether Euro Skips was a "front" for Plant Hire, what had taken place was that Mr Moloney had disposed of his vehicles. Mr Moloney is not a director of Euro Skips and was not involved with the company. He asked that the TC take Mr Ryan at face value. Not everything was right with the operation. Documents had not been produced to PC Shead although Mr Ryan had now learnt the importance of document production. He knew that he could not be involved with Mr Moloney and he was trying to operate compliantly. Apart from the "convoluted way" that vehicles were transferred to Euro Skips, there was little evidence to suggest that Mr Ryan was operating a company for Mr Moloney. Mr Moloney is a publican but he wanted to protect his future. He was distressed by the decision to revoke. Mr Ryan had Declan Doherty who had passed the first part of the transport manager CPC and the TC could be satisfied that the company was fit to hold a licence despite the unusual business transaction between Mr

Ryan and Mr Moloney. He offered an undertaking that Mr Ryan receive operator licensing training.

36. The TC observed that it appeared that what had taken place was that once Mr Moloney had realised that he could not operate more than five vehicles, the vehicles, drivers and administrators of his company had simply transferred to Euro Skips and that nothing had changed apart from the director of the company. If that view was correct, then it amounted to a deliberate attempt to deceive the TC and warranted a long disqualification.
37. Mr Moloney then gave evidence. He said that he had already “served one month of his disqualification”. Prior to the public inquiry into Plant Hire, he had already started to dispose of the surplus vehicles and then he disposed of the rest. He had no involvement with Euro Skips. He was a publican (the TC asked which establishment Mr Moloney managed so that he could avoid it). Mr Moloney was “done and dusted” with operator licensing and he would not be appealing the order of revocation. What was the point? He had disposed of his vehicles and staff so that Mr Ryan could have a proper back up team. Plant Hire continued in business in soft strip out demolition. He had told Mr Ryan that he was going to stop operating and Mr Ryan had said that he was thinking of doing something different. Mr Moloney “ran” Mr Ryan to a solicitor and got him to sign things because if there was any come back, it would be on Mr Moloney. Mr Moloney produced a letter from Hancock Quinns solicitors dated 20 October 2015 which informed the TC that they had been “instructed that acting on behalf of (Plant Hire) (Mr Moloney) has sold to Euro Skips Limited ... the company’s lorries and lease of the a yard at Station Approach .. and that Euro Skips has taken over the contracts of employment of 13 employees .. and finance agreements relating to 6 lorries operated by the company”. The TC observed that this did not support Mr Moloney’s assertion. In conclusion, Mr Moloney stated that he did not consider that he had been given a chance at the previous public inquiry.
38. In his closing submissions in relation to Mr Moloney, Mr Brown did not attempt to persuade the TC that disqualification was wrong in principle but he did urge him to keep the period of disqualification to an absolute minimum. He had been willing to be trained. Any period of disqualification should be such as to allow him back into the industry at some stage in the future. He had been taking steps at the date of his public inquiry to be compliant.
39. Following the public inquiry, Mr Brown submitted the documents that had been required by the TC. PC Shead also sent an email concerning the conversation he had had with the man calling himself “Thomas Ryan” on 6 August 2015. The man had called from telephone number: 07591 599475, which was the same number which had been used by Ms McGonigle when contacting PC Shead by telephone. It was also the number recorded on the operator’s licence. In response, Mr Brown

informed the TC that Mr Ryan's mobile number was different to the above number.

The TC's decisions in relation to Euro Skips and Mr Moloney dated 13 November 2015

40. The TC found that Euro Skips lacked sufficient financial resources for its existing authorisation, let alone for an additional ten vehicles. The application for a licence in the Eastern Traffic Area was refused under s.13B, 13C(4) and 13D of the Act. Fixed penalty notices and prohibitions had been issued (s.26(1)(ca) and (c)(iii) of the Act and the undertaking to keep vehicles fit and serviceable had not been fulfilled (s.26(1)(f) of the Act). There was no evidence that Mr Moloney had in fact sold Plant Hire's vehicles to Euro Skips. Some of the leased vehicles continued to be leased by Plant Hire and transfer had not taken place by the date of the public inquiry. The vehicles were insured by Plant Hire until 10 September 2015 after which insurance was in the joint names of Plant Hire and Euro Skips. As at the date of the hearing, the vehicles were insured by that insurance policy and whilst Mr Ryan had produced an insurance certificate in the name of Euro Skips it had been back dated. Euro Skips did not insure the vehicles between 8 October and 22 October 2015 and any claim made upon the policy would have been invalid.
41. The TC was satisfied that Plant Hire had continued to operate in excess of five vehicles (contrary to s.6 of the Act). There was no evidence to support the assertion that on 4 August 2015, the vehicle stopped by PC Shead was in fact operated by Euro Skips. The vehicle was registered to Plant Hire; Plant Hire insured it and Plant Hire was locked into the tachograph unit; there was no evidence that Euro Skips had paid the driver's wages; indeed the company lacked a bank account at the material time. The TC was satisfied that the "Declan" referred to by the driver was Declan Doherty. Whilst Mr Ryan claimed he had taken Plant Hire's staff so that they did not lose their jobs, this was unconvincing as the outcome of public inquiry was unknown at that stage (the Tribunal observes that it was probably taking place as the vehicle was stopped). Plant Hire and Euro Skips ran as the same business. The TC found that Euro Skips' licence had undergone a material change, having been used to enable Plant Hire to operate beyond its authority and to then enable it to carry on operating once Plant Hire's licence was revoked. Mr Ryan demonstrated that he had virtually no knowledge of operator responsibilities and virtually no interest in them. During much of the hearing, he looked to Mr Moloney in search of answers. He was a cipher.
42. The TC considered that the above findings were negative. There was little that could be described as positive. The company did eventually provide all of the documentation required by PC Shead and efforts had been made to put the company on a firmer legal footing but there was hardly any documentation. The TC found Mr Ryan to be an

inconsistent and unreliable witness. His account of the arrangement for the transfer of vehicles changed several times. His account of how he was paying all of the outgoings of the business i.e. with cash, was not credible. It was clear that he had little involvement in the business and he was an aggressive witness. The TC was satisfied that it was he who called PC Shead on 6 August 2015. Mr Moloney was similarly unreliable. He maintained that he was a publican. Probing revealed that Plant Hire was an active demolition business which would have required “muckaway” transport services now provided by Euro Skips, with the same drivers and vehicles as were employed by Plant Hire.

43. Euro Skips was not fit to hold a licence. It was a device for the continuation of Plant Hire. It had started to operate the vehicles prior to the vehicles being paid for, transferred, taxed, insured and the digital data locked into. The TC had no alternative but to revoke the licence. He had no faith in Mr Ryan’s ability or willingness to comply in the future and in any event, the whole purpose of the company was to defeat the regulatory regime. Euro Skips deserved to go out of business. Further, Mr Ryan’s lack of attention to his regulatory responsibilities and his willingness to assist Mr Moloney and his lack of candour with the TC justified a period of disqualification of two years. That time would allow him to rehabilitate himself, ensure his business operates on a legal footing and to educate himself as to an operator’s responsibilities.
44. In a separate decision, the TC determined that Mr Moloney should be disqualified for three years, such order being back dated to 13 September 2015. The reasons for doing so was Mr Moloney’s lack of attention to compliance; the numerous fixed penalties and prohibitions and prolonged operation of vehicles beyond the five authorised, despite warnings; the fact that he operated vehicles prior to Plant Hire’s application for a licence was originally considered and did so again when an application was made to increase the authorisation; Mr Moloney deceived the TC in stating that having accepted that his application for an increase in authorisation would not be granted, he had sold his surplus vehicles to Euro Skips when he had “done no such thing”. Euro Skips was a device to circumvent restrictions placed on Plant Hire’s licence and he had sought to side step the effects of regulatory action. There were no positive features to weigh into the balance and as a result a period of disqualification for three years was justified.

The Upper Tribunal Appeal

45. At the hearing of these appeals, Mr Nesbitt represented Mr Moloney, Euro Skips and Mr Ryan and submitted two skeleton arguments for which we were grateful. Dealing first with Euro Skips, Mr Nesbitt’s first submission was that the TC did not have any regard to, or apply, the legal test of “who is an operator” when determining that Euro Skips was not the operator of the vehicles specified on its licence. Rather, the TC

used the words “front”, “vehicle” and “cipher” in describing Euro Skip’s relationship with Plant Hire but did not explain what he meant by them. Mr Nesbitt referred the Tribunal to paragraph 3 of the Tribunal’s decision of T/2012/71 Silvertree Transport Limited in which “fronting” is defined:

“In the context of vehicle operator’s licensing “fronting” means that a person, partnership or company, which does not have an operator’s licence, uses the operator’s licence held by another entity to conceal the fact that they are behaving in a way which requires them to have an operator’s licence of their own. In other words it deprives the Traffic Commissioner of the right to control an “operator”, when Parliament has said that such an entity should be within his or her jurisdiction”.

The starting point for consideration of the issue of “fronting” is s.58(2) of the Act which provides that:

“For the purposes of this Act, the driver of a vehicle, if it belongs to him or is in his possession under an agreement for hire, hire-purchase or loan, and in any other case the person whose servant or agent the driver is, shall be deemed to be the person using the vehicle, and references to using a vehicle shall be construed accordingly”.

Mr Nesbitt further referred to the Court of Appeal authority of Interlink Express Parcels Limited v Night Trunkers Ltd & Anor (2001) EWCA Civ 360 which confirmed that the correct test to be applied was: who had control or the right to control the driver of the vehicle in question. Mr Nesbitt submitted that the TC had fallen into error because he had failed to apply this test and as a result his decision could not be regarded as safe and should not be allowed to stand.

46. We are satisfied that there is nothing in this point. The TC made it abundantly clear as to what he meant by the word “front” and spelt out that he considered that Euro Skips operator’s licence was being used by Plant Hire in the first instance to operate vehicles in excess of its authorisation and then, once its licence had been revoked, it had continued to use the licence to continue to operate all of its vehicles. The TC’s decision could not be clearer and upon his analysis, the conduct amounted to “fronting”. And if there was any doubt about it, we have noted that as early as May 2015, Adam Doherty, Plant Hire’s in house maintenance provider, was completing PMI records in the name of Euro Skips for vehicles which were registered to and insured by Plant Hire. At that stage, Euro Skips did not have any vehicles specified on its licence and Mr Ryan was not its director. It is implicit in the TC’s analysis of the evidence (and the absence of it) that Euro Skips was not the operator of the vehicles but rather that Plant Hire was and that accordingly, it was Plant Hire and Mr Moloney who was controlling the drivers whether by himself or through his staff. The absence of any evidence that Mr Ryan operated the vehicles or employed the staff who had purportedly transferred to Euro Skips was

striking and could only have led to one conclusion which is the one that the TC in fact came to.

47. Mr Nesbitt's next point was that the TC failed to undertake any or sufficient analysis of the issues in order to come to the findings he did upon the issue of Euro Skips being a "front". Mr Nesbitt accepted from the outset that the arrangement which Mr Moloney and Mr Ryan purportedly entered into was "over casual" in that it lacked formality and documentation. Even accepting that there was a lack of funds going into the Euro Skips bank account, that there was an absence of any evidence that the vehicle finance agreements had been transferred (or indeed were in the process of being transferred), that one vehicle was still locked into Plant Hire's system, that there was no evidence of "TUPE" transfer of undertaking letters relating to the staff who had purportedly transferred (and we add, that the vehicles remained insured by Plant Hire), these matters did not mean that the informal arrangement was not a genuine one. The real issue was whether, in early August 2015, Plant Hire drivers were being controlled by Euro Skips or its staff and directors. There was only one piece of third party evidence about the true position and that was the statement of PC Shead which recorded that the driver stopped on 4 August 2015 had said that he was driving for Euro Skips. This was an important piece of evidence as it was the only evidence that went to the issue of "who controlled the drivers?". There was no evidence at all that Plant Hire was the operator of the vehicles despite the driver's assertion that it was "Declan" who gave him instructions. Mr Nesbitt submitted that the Tribunal should reflect upon the issue. Despite any scepticism it may have about the arrangement between Mr Moloney and Mr Ryan, it was in fact a perfectly legal arrangement and it was conceivable that two good friends, who were directors of two different companies, could come to an arrangement similar to the one that Mr Moloney and Mr Ryan had come to and that one of them would transfer assets to the other without the "usual formalities". Mr Nesbitt accepted that "all aspects" of the arrangement would give rise to "suspicions" but it was capable of being lawful. Mr Moloney had to deal with the vehicles which Plant Hire had operated in excess of its licence margin and it was perfectly appropriate for the company to divest itself of excess vehicles. If a director in those circumstances, had a friend who was also a director of a company with a licence, then why not make those vehicles available to him? The alternative explanation was that Mr Moloney and Mr Ryan had been too informal in their arrangement and that they had then been confronted with legal problems (such as the vehicle lease agreements) which they had not anticipated. The TC had "jumped" from having been suspicious about the arrangements to a finding that Euro Skips was a "front".
48. We cannot agree that this ground of appeal should succeed. There was little, if anything, apart from the oral evidence of Mr Moloney and Mr Ryan, upon which the TC could properly conclude that despite the very material irregularities in Euro Skips "set up", that it was capable

of being genuine. The TC did not find Mr Moloney or Mr Ryan to be credible or reliable witnesses and the Tribunal does not lightly interfere with findings concerning witnesses when the TC was in the best position to assess those witnesses and determine what to make of them. The Tribunal has struggled to find any positive feature that the TC could have taken into account to weigh in the balance against the overwhelming evidence that Euro Skips was a “front”. We have no doubt that the TC undertook the appropriate analysis of the evidence and came to the correct conclusion upon it.

49. Mr Nesbitt’s next point was that the approach of the TC during the public inquiry and his subsequent findings in his decision were contradictory. The TC made repeated references to Euro Skips having “operated” vehicles not only during the hearing but also in his decision. These references were at odds with the TC’s ultimate decision. Mr Nesbitt took the Tribunal to some relevant passages. In stating that Euro Skips had been “operating” the vehicles, the TC then later contradicted himself by finding that Euro Skips was not the operator of the vehicles.
50. The Tribunal indicated to Mr Nesbitt during the course of his submissions that we did not consider that his point was made out. The TC’s comments during the public inquiry had to be read in context. The TC’s role in a public inquiry is, by necessity, inquisitorial. He was bound to refer to Euro Skips as “operating” vehicles whilst asking relevant questions and it would have been wrong for him to do otherwise. Such references do not preclude the TC from coming to the decision that he ultimately did, which was inevitable in the circumstances.
51. Mr Nesbitt’s final point in relation to Euro Skips was that Mr Ryan was not given fair and reasonable notice about an important issue to be considered at the Euro Skips public inquiry, namely, whether Euro Skips was operating as a “front” for Plant Hire. This omission from the call up letter was too serious to be overlooked. Mr Nesbitt went through the correspondence. The original call up letter set out issues of concern and then went onto identify the evidence that was to be considered: a copy of PC Shead’s statement and a copy of the TC’s decision in the Plant Hire case. It was indicated that Mr Moloney had been called to the public inquiry as well. The second call up letter then highlighted that the TC was going to consider “possible links” with Plant Hire. Mr Nesbitt took the Tribunal to the Tribunal case *T/2009/517 Farooq Ahmed & Haroom Ahmed* in which it was held that a call up letter lacked fairness in that at its highest, the call up letter merely mentioned the “apparent connection” with another company. Further, when Mr Ryan was giving evidence, the TC did not put his suspicions to Mr Ryan. The failure of the TC to properly identify the issue of “fronting” in the call up letters and his failure to put his suspicions to Mr Ryan were so serious that the overall decision could not be regarded as safe.

52. We are again satisfied that there is nothing in this point. The TC's decision in relation to Plant Hire was enclosed with the first call up letter. Paragraph 27 of that decision could not have been clearer about the reasons why Euro Skips was being called to a public inquiry. Mr Brown represented Plant Hire in that public inquiry and he represented Mr Ryan and Euro Skips. It is not suggested that he did not appreciate the reasons why Euro Skips was being called to a public inquiry. He is after all, a former Senior Traffic Commissioner for England and Wales. The two call up letters along with the decision in Plant Hire and the report of PC Shead, when taken together, made it plain and obvious that the TC was concerned that Euro Skips was a device being used by Plant Hire to operate more vehicles than it was authorised to do and then latterly continued to operate vehicles when it had no authority to do so. As for the submission that the TC failed to put his suspicions to Mr Ryan, it is clear from pg 510 of the Transcript that the TC set out his stall as to the suspicions he had. If Mr Ryan had been in any doubt about it, then Mr Brown would have been in the best position to advise him as to the issue and Mr Brown would have been in the best possible position to obtain instructions and to adduce the relevant evidence to dispel the TC's concerns. He did not do so.
53. To conclude in relation to Euro Skips and Mr Ryan, we are satisfied that neither the facts or the law impel us to allow this appeal as per the test in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695. Neither are we satisfied that Mr Ryan's disqualification for a period of two years was either wrong or disproportionate. This is a bad case of deceit perpetrated against the TC so as to undermine his regulatory regime. For the reasons given by the TC, an order of two years was appropriate and proportionate.
54. Turning then to Mr Moloney's period of disqualification for three years, we agree with the TC that Mr Moloney's wrong doing justified a lengthy period of disqualification and that three years is neither wrong nor disproportionate. However, we also agree with Mr Nesbitt that the TC's approach as to when that period of disqualification commenced was in error. In his decision dated 13 August 2015, the TC determined that he would reserve his decision as to "whether" he would disqualify Mr Moloney until the conclusion of the public inquiry into Euro Skips. He had not therefore ordered a period of disqualification for Mr Moloney at that stage. Some correspondence then passed between Mr Brown and the TC on this subject and the TC indicated that he would "back date" any period of disqualification to the date of the revocation of Plant Hire's licence. We observe (and this is subject to there being full argument on the point at some future date) that there is no statutory power provided by s.28 of the Act to enable TCs to make an interim disqualification order (not that the TC purported to do so in this case). Neither does that section enable a TC to order that a period of disqualification be back dated. In any event, to hold otherwise would be in breach of the rules of natural justice. Whilst we sympathise with

the position that the TC found himself in, rightly suspecting as he did, that Mr Moloney was using Euro Skips as a “front” and in the circumstances wishing to defer his decision on disqualification to take account of the outcome of the Euro Skips public inquiry, he should have disqualified Mr Moloney from the date of the second decision rather than back dating the order of disqualification. It is however clear that the TC did not intend for Mr Moloney to serve a period of disqualification for three years commencing later than 13 September 2015. In the circumstances, we are satisfied that the proportionate approach should be for the Tribunal to order that the period of disqualification of Mr Moloney be reduced by a period of two months to a period of two years, ten months and to that limited extent his appeal is allowed.

55. Save for the limited findings in paragraph 54 above, these appeals are dismissed.

A handwritten signature in black ink, appearing to read "Judge Beech". The signature is written in a cursive, flowing style.

**Her Honour Judge J Beech
18 February 2016**