

Neutral Citation Number:

Appeal No. T/2015/56

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

**ON APPEAL FROM THE DECISION OF
TRAFFIC COMMISSIONER FOR SCOTLAND**

Dated: 27 August 2015

**Before: A Gamble, Judge of the Upper Tribunal
A Guest, Member of the Upper Tribunal
J Robinson, Member of the Upper Tribunal**

Appellant: MAP DEVELOPMENTS (SCOTLAND) LTD

**Attendances: Mr G Anderson, Advocate, instructed by Mr C Anderson,
Solicitor of Levy and McRae, Solicitors, for the Appellant**

**Heard at: George House, 126 George Street, Edinburgh EH2 4HH
Date of hearing: 15 February 2016
Date of decision: 20 May 2016**

DECISION OF THE UPPER TRIBUNAL

The appeal is refused. The decision of the Traffic Commissioner for Scotland dated 27 August 2015 is confirmed. It will take effect from 00 hours on 3 June 2016.

SUBJECT MATTER: Fitness to hold a restricted goods vehicle licence

CASES REFERRED TO:

Redsky Wholesalers Ltd [2014] UKUT 0157 (AAC)
Redsky Wholesalers Ltd [2013] UKUT 0194 (AAC)
Bradley Fold v Traffic Commissioner (North West Area) [2011] RTR 13

REASONS FOR DECISION

1. This is an appeal by the company registered under the name of MAP Developments (Scotland) Limited, the appellant company, against the decision of the Traffic Commissioner for Scotland dated 27 August 2015. The appellant company was incorporated on 7 November 2008. Its sole directors and shareholders are Marc Allan and Albert, aka Bert, Cameron.
2. By her decision the Traffic Commissioner held that she was not satisfied for the purposes of section 13B of the Goods Vehicles (Licensing of Operators) Act 1995 that the appellant company was not unfit to hold a restricted goods vehicle licence. Accordingly she refused their application for such a licence which had been received on 17 November 2014. The appellant company sought to operate five vehicles under such a licence, if granted. One vehicle, CA11MAP was indicated as being in their possession.
3. The Traffic Commissioner took the decision under appeal after a Public Inquiry which commenced on 17 July 2015 and was then adjourned to 17 August 2015 when it was concluded. The Public Inquiry and the Traffic Commissioner's decision involved parties other than the appellant company. However the proceedings in the Upper Tribunal relate only to the Traffic Commissioner's decision in respect of the appellant company.
4. A hearing took place before us on 15 February 2016. The appellant company was represented at that hearing by Mr G Anderson, Advocate, instructed by Mr C Anderson, Solicitor of Levy & McRae, Solicitors. We are grateful to Mr Anderson for his oral submissions at the hearing.
5. Another company with the name MAP Plant and Vehicle Hire Limited with the same directors and shareholders as the appellant company was granted a restricted goods vehicle licence on 9 September 2009. An application for a restricted Goods Vehicle Operators Licence in the name of the appellant company was made thereafter in which they stated that it was for the purpose of consolidation with the restricted licence granted to MAP Plant and Vehicle Hire Limited. In that connection the appellant company was asked by the Central Licensing Office in Leeds if the reason for the new application was the insolvency of MAP Plant and Vehicle Hire Limited. By a letter dated 23 December 2013 the appellant company confirmed that MAP Plant and Vehicle Hire Limited was "solvent and not under threat from any creditor". That letter bore to be signed in handwriting by "B. Cameron", "pp" also in handwriting for "M Allan, Director", in typescript. In fact and in complete contrast to the representation made in the letter of 23 December 2013 a provisional liquidator for MAP Plant and Vehicle Hire Limited was appointed on 24 December 2013.
6. The appellant company's application for a restricted goods vehicle licence described in paragraph 5 above thereafter came before a Deputy Traffic Commissioner for Scotland at a Public Inquiry which he convened on 17 July 2014. After the Public Inquiry the Deputy Traffic Commissioner refused that application.

7. In paragraph 12 of her decision the Traffic Commissioner deals in considerable detail with the Public Inquiry of 17 July 2014 and the Deputy Traffic Commissioner's decision which resulted from it. Paragraph 12 reads as follows:

"12. In the event the matter was considered by Deputy Traffic Commissioner, Mr McFarlane, at a Public Inquiry held on 17 July 2014. A transcript of that Public Inquiry was available to this Public Inquiry and I have had regard to its content. Deputy Traffic Commissioner, Mr McFarlane's decision is set out at page 38 of the transcript where he focuses on the fitness of the applicant company, MAP. He had heard evidence that as at 1 November 2013 because of financial issues MAP Plant and Vehicle Hire Ltd had ceased to trade, a matter not notified to the Traffic Commissioner's office as required within 28 days. The Central Licensing Office in Leeds requested confirmation that the company was solvent and that there was no immediate prospect of there being any liquidation or the like. A letter was sent from Leeds on 16 December 2013 seeking confirmation that MAP Plant and Vehicle Hire Ltd was solvent and not under threat of action from any creditor or HM Revenue & Customs. A reply was sent, dated 23 December 2013, in which it was confirmed that the company is solvent and not under threat of action from any creditor. A provisional liquidator was appointed the following day. The letter was signed by "B Cameron" and underneath that in manuscript was "pp M Allan" and underneath that the word "Director". "The recipient of that letter and at the end of the recipient process would be the Traffic Commissioner. It is confirming a situation which, on face value, one would accept and that would expedite, no doubt, the completion of the processing of this application had it not been for the discovery that, contrary to what that letter was saying, the company was liquidated the following day". The Deputy Traffic Commissioner went on to say that in the 18 years in which he had been a Deputy Traffic Commissioner he had never come across such a dreadful misrepresentation. He then went to consider the role of the directors, Messrs Allan and Cameron. He expressed the thought that the transfer of the business was a device and that the applicant company was a legal vehicle to at least apply for an operator's licence. He concluded "I say that Messrs Allan and Cameron have been unscrupulous with regard to how they have gone about the cessation of trading with MAP Plant and Vehicle Limited avoiding liabilities, avoiding potential claims just by closing the company down and continuing to trade through another private limited company medium fulfilling the same contracts, with the same vehicles, with the same personnel, from the same place and the question of being unscrupulous, in my view, is put beyond doubt with a letter of 23rd December 2013, a deliberately misleading letter sent to deceive the Traffic Commissioner in the hope that it would trigger the issue of the licence that was presently under application. Taking all these matters together I am absolutely certain that the company is not fit to hold a restricted operator's licence and the application is refused". As stated that decision was taken by Deputy Traffic Commissioner, Mr McFarlane, on 17 July 2014."

8. There was only a gap of some four months between the Deputy Traffic Commissioner's decision and the appellant company's application which was determined by the Traffic Commissioner in the decision under appeal. However, information regarding what the appellant company regarded as changes of circumstances between the Deputy Traffic Commissioner's decision and their application was lodged by them in connection with that application. That information is laid out by the Traffic Commissioner in paragraph 14 of her decision as follows:

"14. In support of MAP's application under consideration a letter dated 13 November 2014 was written to Leeds by Mr Allan. He enclosed a copy of the last company's administration report and referred to the Deputy Traffic Commissioner's findings from 17 July 2014 and listed what he considered had changed since the decision of 17 July 2014 and listed 10 points:

1. We have appointed a new external auditor and accountancy firm;
2. 98% of all creditors on the administrators list have been paid in full;
3. As per the administrators report the main reason the company failed was due to a huge amount of theft which went unchecked for a number of months, we now have the staff that do monthly audits on all sites and we no longer work in Ireland;
4. The main reason we are applying for a new licence is from February this year we have been solely reliant on external contractors, which are a huge cost and have proved unreliable and our business has suffered as a consequence.
5. We have now been appointed with an industry qualification (Lloyds Register EMEA. W.I.R.S.). This qualification will enable us to grow substantially within the water rehabilitation industry. In order to carry this work out to a high standard, we are required by some clients to be on standby 24 hours a day for water mains bursts and leaks and we would struggle to compete using external haulage companies.
6. All our creditors including HMRC are up to date and are working with us.
7. We would eventually like our company to grow to a point where we had 80 full time staff working for us.
8. At the public enquiry (sic) our accountant came under heavy criticism from the Deputy traffic commissioner, that accountant is no longer employed by us in any capacity.
9. Whilst the deputy traffic commissioner considered the company to be unfit to hold an operator's licence, both my lawyer and myself believed the commissioner was meaning this in financial terms and nothing to do with our maintenance or record keeping of our vehicles.

10. We would welcome any inspection of any of our records to prove we are a company of good standing.”

9. The Traffic Commissioner treated the Deputy Traffic Commissioner’s decision of 17 July 2014 as follows in paragraph 78 of her decision:

“78. MAP was refused a restricted operator’s licence by Deputy Traffic Commissioner Mr McFarlane on 17 July 2014. I do not rehearse the evidence in that case or his reasoning but I have them fully in mind and they can be referred to. The Deputy Traffic Commissioner heard evidence from Mr Allan (Mr Cameron not present) and much of that evidence was Mr Allan’s account of business difficulties in Northern Ireland and was repeated in Mr Allan’s evidence at this Inquiry. I heard nothing in this Inquiry capable of diverting me from complete accord with the decision taken by the Deputy Traffic Commissioner. I am in no doubt having read the papers in that case that Messrs Cameron and Allan knew what was going on and the disingenuous answers given to my Office in the context of that refused application. I am not able to take a different view of MAP’s fitness at that time. The positive is the MAP appears to have paid the creditors of MAP Plant and Vehicle Hire Ltd to continue to get business and trade with those suppliers who had been due money by that liquidated company. Of course, without such payments, supplies and business dealings would have been resisted.”

10. Mr Anderson submitted that the Traffic Commissioner was obliged to form her own assessment of all of the evidence before her and that the Public Inquiry which she conducted was not a rehearing of the Public Inquiry before the Deputy Traffic Commissioner but rather one convened to determine the merits of the appellant company’s application of 17 November 2014. The Deputy Traffic Commissioner’s decision of 17 July 2014 was part of the background to the Public Inquiry which took place on 17 July 2015 and 17 August 2015 but no more. We agree with those submissions. However we do not accept Mr Anderson’s further and more radical submission that the Traffic Commissioner gave undue weight in her decision to the earlier Deputy Traffic Commissioner’s decision relating to the appellant company. We consider that she was entitled as the primary fact finder to take the approach which she did to that earlier decision. That approach was not an irrational way for her to assess the evidential value of the Deputy Traffic Commissioner’s decision. We paid heed to paragraph 6 of the decision of the Upper Tribunal in *Redsky Wholesalers Limited* [2014] UKUT 0157 (AAC) to which Mr Anderson drew our attention. Unlike the view taken by the Upper Tribunal in that case, we do not consider that the earlier decision “dominated” the proceedings before the Traffic Commissioner in this case. Rather, as explained in detail below, it was events subsequent to the Deputy Traffic Commissioner’s decision, albeit evaluated in the light of that decision, which formed the essential basis of the Traffic Commissioner’s decision. In any event, we note that in paragraph 6 just cited, the Upper Tribunal accepted that a Traffic Commissioner was entitled to be concerned at a short gap between an earlier negative Traffic Commissioner’s decision and an application which fell for disposal by him.

11. Mr Anderson further submitted that the contents of the letter detailed in paragraph 14 of the Traffic Commissioner's decision and cited by us in paragraph 8 above were positive features of the case from the appellant company's point of view and, in particular, provided evidence of a favourable change of circumstances. Again we accept those submissions. However we note that the Traffic Commissioner did accept those positive features in paragraph 78 of her decision cited in paragraph 9 above and, in our judgement, she took appropriate account of them as part of her weighing of the totality of the evidence. Her approach in paragraph 84 of her decision which is really its key paragraph is similar. There she refers to listening "attentively" to oral evidence from Mr Allan about factors of the case which were positive from the appellant company's point of view. However at the end of the day that evidence was outweighed by the issues discussed below, a determination well within the province of the Traffic Commissioner as the primary fact finder involving no irrationality. Thus we reject Mr Anderson's submission that the Traffic Commissioner took insufficient account of written and oral evidence reflecting positively on the application which she was charged with determining. In our judgement, such evidence was given sufficient consideration by her.

12. The key flaw in Mr Anderson's able submissions is that the nub of the Traffic Commissioner's decision is *not* the earlier Deputy Traffic Commissioner's decision *per se* but rather what in paragraph 84 of her decision she calls "the practical circumvention" of that decision in the period between its date and the application which she was charged with determining. With admirable clarity, she expresses herself thus in the concluding sentences of paragraph 84:

"However having had regard to all of the evidence and most notably that evidence in relation to the practical circumvention of the Deputy Traffic Commissioner's decision, I cannot come to a decision that MAP is not unfit to hold a restricted operator's licence in terms of section 13B of the 1995 Act. I refuse the application."

Earlier in paragraph 84 she refers to her findings of fact on what she correctly labels the "unlawful operating" by the appellant company and rightly says that such conduct "goes directly to fitness and trust".

13. That "unlawful operating" was the use by the appellant company of another operator Alisdair Young of Fort William as a front for their operations. That conclusion rests on the DVSA evidence set out in detail in paragraphs 29 – 35 of the Traffic Commissioner's decision. She was fully entitled to accept that evidence. She also analyses all the relevant evidence on this crucial aspect of the case and makes appropriate findings of fact based upon it in paragraphs 75 and 79 – 81 of her decision. We consider those findings to be rational, well-founded on the available evidence and well within the province of the Traffic Commissioner to make.

14. Further, we have no doubt that the Traffic Commissioner's findings just referred to in paragraph 13 above provide a solid foundation for her conclusion expressed in paragraph 84 of her decision, cited in paragraph 12 above that the appellant company were attempting to get round and indeed to outwit the Deputy Traffic Commissioner's decision which it must be emphasised had deprived them of any legal right to operate goods vehicles. We draw attention in this connection in particular to the detailed information contained in paragraph 34 of the Traffic Commissioner's decision which was provided at the Public Inquiry by evidence from a Traffic Examiner. That information establishes operations by the appellant company without an operator's licence amounting to some 9,300 miles in total on

sixty nine occasions in relatively short periods narrated there. Such behaviour, in our view, established consistent (indeed almost daily) illegality and a flagrant breach of the statutory regulatory regime. Far from being plainly wrong, the Traffic Commissioner's decision, on the basis of findings of fact establishing such behaviour, to refuse to hold that the appellant company was not unfit to hold a restricted operator's licence was, in our view, clearly correct. Mr Anderson submitted that the appellant company's "circumvention" of the Deputy Traffic Commissioner's decision even if it amounted to wilful defiance of that decision was only one factor to weigh in the balance. To a degree we accept that submission. However, we are satisfied that the Traffic Commissioner was correct to take the view that it was nonetheless the key factor among others in the evidence in this case and one which justified her in taking her decision.

15. Further, Mr Anderson submitted that the Traffic Commissioner should have had regard to the prospects of future compliance with the statutory regulatory regime. In that connection he referred us to paragraph 18 of the decision of the Upper Tribunal in *Redsky Wholesalers Limited* [2013] UKUT 0194 (AAC) where it is stated that "consideration of the likelihood of future compliance should inform the approach taken." We accept that submission. However we are satisfied that the factor of future compliance was sufficiently, albeit implicitly, taken into account by the Traffic Commissioner. Thus her decision cannot be faulted for a failure to take account of it. In reaching that conclusion we refer in particular to paragraph 82 of her decision where she narrates advice which the appellant company has received from MVC Scotland Limited, paragraph 83 which refers to "Good Contracts" secured by the appellant company with Scottish Water and a general reference to "others involvement likely (to) be positive" in paragraph 84. In the light of those passages from her decision we do not consider that the Traffic Commissioner erred in regard to the question of future compliance. She sufficiently took it into account.

16. Mr Anderson invited us to set aside the Traffic Commissioner's decision and to replace it with one granting the appellant company a restricted Goods Vehicle Operators Licence with strict conditions and undertakings as to future compliance along the lines of those which he drafted and placed before us. We reject that submission for the reasons given above as summarised in paragraph 17 below.

17. Our task is to determine whether reason and the law impel us to take a different view from that taken by the Traffic Commissioner in the decision under appeal. See paragraph 40 of the judgement of Lord Justice Leveson in *Bradley Fold v Traffic Commissioner (North West Area)* [2011] R.T.R. 13. That test is often alternatively phrased in the Upper Tribunal as to whether a Traffic Commissioner's decision is plainly wrong. (We so express ourselves in paragraph 14 above). For the reasons given in detail above we are not so satisfied. We thus confirm the Traffic Commissioner's decision. It will take effect from midnight on 3 June 2016, two weeks after the date of this decision.

(Signed)
A J GAMBLE
Judge of the Upper Tribunal
Date: 20 May 2016