

## [2016] AACR 40

(Ian Phillips (trading as T and R Phillips Haulage) [2016] UKUT 156 (AAC))

Judge Mitchell  
Mr M Farmer  
Mr S James  
22 March 2016

T/2015/74

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### **Traffic Commissioner – licence – termination by law, withdrawal or surrender – application of Goods Vehicles (Licensing of Operators) Act 1995 to partnerships**

In September 2014 Mr Phillips failed to report the death of his business partner, Mr Walters, to the Office of the Traffic Commissioners (OTC) within 28 days as required under the terms of the road transport operator's licence. In February 2015 he did write to the OTC to report the death, to confirm his new partner and to apologise for his delay (due in part to ill-health and family bereavements). In March he took the OTC's advice and applied for a regulation 31 direction under the Goods Vehicles (Licensing of Operators) Regulations 1995 so that he could be treated as the licence-holder. That application was granted in June during a preliminary hearing before a Deputy Traffic Commissioner (DTC) who explained that Mr Phillips would also need to apply for a new licence, as the direction would expire on 2 September 2015. On 3 July Mr Phillips applied for a sole trader's licence but heard nothing further until an officer from the OTC wrote to him on 23 September to say that the Traffic Commissioner was considering revoking the operator's licence (it appears the application Mr Phillips sent in July had not been received). Thereupon, Mr Phillips asked the OTC officer for advice on what he should do. He continued to remain in regular contact with that official and followed whatever advice he received. On 30 October 2015 the officer told Mr Phillips to request an interim licence, but the Traffic Commissioner revoked Mr Phillips' licence on 3 November 2015 on the basis of the officer's submission that Mr Phillips had failed to take suitable steps to obtain a licence. Mr Phillips appealed to the Upper Tribunal (UT) against that decision.

*Held*, allowing the appeal, that:

1. the original partnership licence had ceased to exist upon Mr Walters' death; the partnership was dissolved under section 33(1) of the Partnership Act 1890 and the operator's licence terminated under section 16(5) of the Goods Vehicles (Licensing of Operators) Act 1995, the partnership's dissolution being a termination event under regulation 29 of Goods Vehicles (Licensing of Operators) Regulations 1995 (paragraphs 53 to 54);
2. the DTC was authorised to grant a regulation 31 direction, treating Mr Phillips as holding the former partnership's licence: *Sadler v Whiteman* [1910] 1 KB 868. If regulation 31(2) was properly construed it followed that it was not a licensed partnership, but its members, which carried on a business. Where one of two actual holders of an operator's licence died, then that was tantamount to the death of the actual licence-holder for the purposes of regulation 31. If that was wrong, then a purposive interpretation that equates dissolution of a partnership on the death of a partner with the regulation 31(2) specified events should be adopted (paragraphs 55 to 60);
3. the DTC was satisfied that special (or exceptional) circumstances existed to justify making a regulation 31 direction exceeding the default maximum period, to allow Mr Phillips a reasonable opportunity to make an application and for the OTC to consider it before the direction expired, but erred in assuming that the default maximum period had already expired by the date of his direction (paragraph 61);
4. the Traffic Commissioner wrongly proceeded by considering revocation of the original partnership's licence which had terminated upon Mr Walters' death, not the deemed licence under the regulation 31 direction. The deemed licence had been conditional upon Mr Phillips taking reasonable steps to progress his application and, as he had done so, it remained in force at the time of the Traffic Commissioner's revocation decision (paragraphs 62 to 65);
5. the Traffic Commissioner's decision was a nullity if it concerned the original partnership licence or plainly wrong if it concerned the deemed licence under the regulation 31 direction; if the Commissioner relied upon the official's misleading submission, then he erred in law (*Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409) or alternatively the flaws in the decision rendered it wrong (paragraphs 68 to 72).

The decision was set aside and the matter remitted to the Traffic Commissioner for re-determination.

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**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

IT IS HEREBY ORDERED that this appeal is ALLOWED. The decision of the traffic commissioner taken on 3 November 2015 is set aside. Under paragraph 17(2) of Schedule 4 to the Transport Act 1985, the matter is remitted to the traffic commissioner for re-determination. Any necessary case management decisions for the re-determination are to be given by a traffic commissioner.

**REASONS FOR DECISION**

1. Something went badly wrong in this case. Before the traffic commissioners, the appellant, Mr Phillips, became mired in what can rightly be described as a bureaucratic nightmare. For no good reason, he came within inches of losing a successful haulage business, employing over 50 staff, that he and his ancestors had spent decades building up.

2. We expect the Office of the Traffic Commissioners (OTC) to take a long, hard look at our decision on this appeal. The treatment of Mr Phillips was unacceptable. Why did things go so badly wrong? Principally, this was due to an official in the OTC, for reasons known only to himself, presenting the traffic commissioner with a misleading and distorted description of Mr Phillips' willingness to co-operate with the OTC. Acting on that description, the traffic commissioner revoked the relevant operator's licence.

**The hearing before the Upper Tribunal**

3. Mr Phillips attended the hearing with his wife. Three weeks beforehand, Mr Phillips had heart surgery. He told us that his cardiologist advised him not to attend the hearing, being concerned that the stress of a hearing might affect his health. Mr Phillips ignored his cardiologist's advice. He told us he had to attend because his livelihood, and those of his staff, depended on it. That was a brave and decent thing to do. We hope Mr Phillips did not find the hearing unduly stressful. From our perspective, Mr Phillips, with his wife's assistance, put his case forward clearly and courteously and he understood why the Upper Tribunal had previously suggested that he reconsider his decision to withdraw his appeal.

**Background**

*The partnerships' operator's licence*

4. With effect from 28 August 2012, a traffic commissioner granted the partnership T & R Phillips Haulage (the partnership) a standard international licence under section 3 of the Goods Vehicles (Licensing of Operators) Act 1995. The partnership was comprised of Mr Ian Phillips and his father-in-law Mr Owen Walters. Mr Phillips was also the operator's transport manager and the appeal papers contain copies of the relevant qualifications by which he demonstrated his professional competence as transport manager.

5. The application which led to that licence was made on a standard form by which the applicant gave a number of undertakings including "I will ensure that the traffic commissioner is notified within 28 days of any other changes, for example ... a change to Limited Company status or partnership, that might affect the licence, if issued". However, the licence itself does not include (as it could have done) a condition under section 22 of the Goods Vehicles (Licensing of

Operators) Act 1995 requiring a traffic commissioner to be informed of a change in the ownership of the business.

6. Sadly, Mr Walters passed away on 2 September 2014.

*Events leading up to the preliminary hearing*

7. On 4 February 2015, a Vehicle & Operator Services Agency traffic examiner carried out, on one day's notice, an inspection at one of the business' operating centres. The examiner's report of 5 February 2015 states that "three vehicles and three trailers were inspected and no serious defects were noted". There were, however, deficiencies in the maintenance records for a single trailer about which "suitable advice was given". The examiner stated that "the shortcomings found in the maintenance records would normally be insufficient to justify a [public inquiry]" but that the OTC "may wish to call the Operator to an inquiry due to the change in entity".

8. By letter dated 5 February 2015, Mr Phillips informed the OTC that his wife (Mr Walters' daughter) "would now be a partner in the business". In this letter Mr Phillips apologised for his late notification of Mr Walters' death and said he had been very unwell following spinal surgery complications and had recently lost his mother. Before us, Mr Phillips accepted that he should have informed the OTC well before he did. We agree. He should have informed the OTC within 28 days of Mr Walters' death. Mr Phillips did not attempt to justify his late notification but he did ask us to take into account that, as he had informed the OTC, he was during this period recovering from spinal surgery complications and had to deal with two family bereavements.

9. In response, on 2 March 2015 the Central Licensing Office in Leeds wrote to Mr Phillips drawing his attention to the traffic commissioners' power to give a "regulation 31 direction" "that a person carrying on the trade or business of a licence-holder is to be treated as if they were that licence-holder". That was a reference to regulation 31 of the Goods Vehicles (Licensing of Operators) Regulations 1995 (SI 1995/2869) which is concerned with the regulatory consequences of certain events, including "the death of the actual holder of a licence" (regulation 31(2)). Below, we deal with regulation 31 in more detail although we observe that the 2 March 2015 letter correctly informed Mr Phillips that, normally, a regulation 31 direction cannot have effect for more than 12 months but that, in special circumstances, a traffic commissioner may give a regulation 31 direction that has effect for 18 months.

10. Mr Phillips responded by letter of 4 March 2015 in which he stated that he wished "to replace my late business partner Mr Walters with his daughter and my wife Mrs Sharon Phillips". He went on:

"As Mrs Phillips is Mr Walters sole heir and beneficiary she inherited his share of the business and wishes to be a partner which follows the last wishes of my late father-in-law Mr Walters."

11. On 27 May 2015, the OTC informed Mr Phillips in writing that a "preliminary hearing" would be held to "consider ... whether or not to call a Public Inquiry". By separate letter the OTC wrote to Mr Phillips stating that the hearing would address "an unsatisfactory maintenance investigation report", whether the partnership licence ought to be revoked under section 26 of the

1995 Act and whether the traffic commissioner should give a regulation 31 direction. The date on that letter seems to have been a misprint because the hearing was held on 23 June 2015.

12. That “unsatisfactory maintenance investigation report” concerned the 5 February 2015 traffic examiner’s report which, as we have noted, expressed the opinion that, normally, the record-keeping shortcomings identified would not justify calling the operator to a public inquiry.

*The preliminary hearing*

13. The preliminary hearing was conducted by Deputy Traffic Commissioner (DTC) Seculer. The transcript of the hearing records the following:

- Mr Phillips informed the DTC that he had heard nothing in response to his March 2015 application for a regulation 31 direction;
- the DTC informed Mr Phillips that a regulation 31 direction was essentially a “holding position” pending “a new application in respect of a change in a business”;
- the DTC informed Mr Phillips that “you cannot just substitute names on a partnership. It is a change in legal entity”. He needed to make a fresh application for an operator’s licence as either a sole trader or a partnership. The DTC indicated that Mr Phillips should contact the Central Licensing Office in Leeds if he had queries about the application process;
- the DTC said “so the maintenance regime was satisfactory as far as the Vehicle Examiner is concerned and that is good enough for me” and “I am satisfied that I can deal with the shortcomings such as the Vehicle Examiner identified them by way of a warning on the Licence so there will be no need for a formal public inquiry on those matters”.

14. The DTC also said this:

“The fact that your father-in-law passed away in September 2014 means you are already up against the clock in terms of the amount of time that’s necessary. There’s provision for six months under Regulation 31. That can possibly be extended in exceptional circumstances, which I would be prepared to find, for a further six months but then that is the maximum period of time. So when you leave here today ... [at this point the transcript indicates that the parties started discussing the process by which a fresh application could be made and culminated in the DTC indicating that Mr Phillips ‘would be best advised to put in an application as a sole trader’].”

15. The transcript makes it very clear that DTC decided, on the day, to give a regulation 31 direction:

“As far as the new application is concerned then I will grant the section 31 application in terms of allowing the existing licence but that will not be able to continue under the legislation beyond September so you will need to immediately (inaudible) ...”

16. That decision was reflected in a letter dated 25 June 2015 which stated “the partnership licence is allowed to continue for three (3) further months under regulation 31 to allow the new application to be made”. The letter was signed by an official in the OTC, not by the DTC himself. In the light of the transcript of the hearing, it is clear that the DTC thought he was

giving a regulation 31 direction that would expire on 2 September 2015 (one year after Mr Walters' death).

17. The DTC clearly misunderstood his powers under regulation 31, to which we return later in this decision. The DTC thought that, normally, a regulation 31 direction has effect for no more than six months (it is 12 months) and that, in exceptional circumstances, it can have effect for 12 months (it is 18 months, and in "special circumstances"). It is however right that we observe the transcript shows the DTC was doing his best, without prejudging the outcome of a fresh application, to identify a sensible course of action that Mr Phillips might wish to take in order to regularise the business' regulatory position. The transcript also shows that the DTC treated Mr Phillips with conspicuous fairness.

*The July 2015 "application"*

18. The papers include a document dated 3 July 2015 by which Mr Phillips purportedly made an application on the standard form for a sole trader's licence. We note that the form states that "a straightforward application should normally take no more than 9 weeks". The standard form does not inform applicants that they should expect an acknowledgement of receipt from the OTC but the accompanying guidance notes do. The standard form requires the application form to be sent by post and no provision is made for emailed applications.

*Conduct of the Office of the Traffic Commissioners in September and October 2015*

19. On 23 September 2015, an OTC official wrote to Mr Phillips stating:

- "you were given a period of 3 months to make an appropriate application for a new licence";
- the traffic commissioner was considering revoking the operator's licence under section 26 on the ground of a material change of circumstances (death of a member of the licensed partnership);
- the traffic commissioner "considers that the partnership no longer satisfy the requirement to be of good repute or of the appropriate financial standing";
- formal notice was given under section 27(2) of the 1995 Act that the traffic commissioner was considering revoking the operator's licence. Mr Phillips was invited to make written representations on that proposal by 14 October 2015 and by the same date to request a public inquiry;
- "if no request for a Public Inquiry is received by this date the partnership's operator's licence will be revoked". We observe that, in that case, what was the point in inviting Mr Phillips to make written representations?

20. The letter was sent by email and hard copy. The email was addressed to both Mr Phillips and the late Mr Walters. No doubt this was a slip but we observe that it was insensitive to issue the email to the late Mr Walters.

21. What happened next within the OTC makes for very unhappy reading.

22. By email dated 28 September 2015 (sent at 14:18) Mr Phillips wrote to the official stating he was "shocked and surprised at the [23 September 2015] letter as I had been expecting to hear

that my licence application had been granted”. Mr Phillips understood the 23 September 2015 letter to mean his application for a sole trader’s licence had been refused and asked “why have I had no correspondence to this effect”. The official replied by email that same day requesting the reference number for Mr Phillips’ application. At 16:03 Mr Phillips replied that he would scan a copy of the application form and supply it the following day.

23. At 13:32 on 29 September 2015, Mr Phillips emailed the official an electronic scan of a copy of an application form dated 3 July 2015 together with associated documents, including copies of his CPCs (certificates of professional competence). He expressed concern that the application appeared not to have been received and requested confirmation. The official replied on 1 October 2015 that “I have searched the database for your application ... and cannot find any currently registered or ongoing applications with the particulars provided”. The official suggested that Mr Phillips take the matter up with the Central Licensing Office.

24. On 7 October 2015, Mr Phillips emailed the same OTC official stating that the Central Licensing Office had no record of receiving his application and added “I’m not exactly sure what course of action I should take, should I re-submit the copies I sent you with a covering letter explaining the loss or should I make application”. Mr Phillips also asked how he could comply with the requirement to supply original CPC certificates since he had sent the originals with the 3 July 2015 application. On 12 October 2015, the official replied suggesting that Mr Phillips (a) “send off the application again with a covering letter explaining what has happened and request an interim licence” and (b) seek replacement CPC certificates from the issuing body.

25. On 13 October 2015, Mr Phillips emailed the official stating he had been told by the CPC issuing body that it would take at least 20 days to obtain replacement CPC certificates. Mr Phillips asked “would it be possible to submit the application with photocopies to start the process until originals arrive?” On 30 October 2015, the official’s emailed response was to “recommend that you send off whatever information you have to get the process started with a request for an interim licence”.

#### *The Traffic Commissioner’s decision*

26. It is with some dismay that we observe that on 3 November 2015 the same official prepared a submission for the traffic commissioner, entitled “Proposal to Revoke Operator’s Licence”, in the following terms:

- the DTC had granted a “regulation 31” for three months to allow Mr Phillips to make a “suitable application”;
- in a telephone call on 28 September 2015 Mr Phillips claimed to have made an application but no record of its registration could be found;
- “Mr Phillips went away to investigate this matter with the Central Licensing Office and ... he would look into getting this sent off again and progress with the new application”. However, “I have checked the system again today and cannot find any application involving Mr Phillips”;
- “if [Mr Phillips] has not taken these suitable steps to ensure that an application was placed within the window given to him then he has nobody but himself to blame ... Furthermore he has had an additional period of time from the 28 September 2015 when he made contact following receipt of the minded to revoke letter to ensure that the application and request for an interim licence was made”.

27. The Traffic Commissioner (TC) for the Wales Traffic Area (Mr N Jones) gave a decision on 3 November 2015 in these terms:

“I am advised that when the regulation 31 authority was granted it was made abundantly clear that the obligation on the remaining partner to apply for a fresh licence was spelt out – with the time limit. I am also told that after sending the minded to revoke letter, there has not been any request for a public inquiry. In view of this I revoke the operator’s licence as recommended by [the DTC] under section 26(1)(h) and section 27(1) of the Act.”

28. We shall not mince our words. The official’s submission to the TC was an unacceptable distortion of the events of September and October 2015. It supplied the TC with a misleading picture of Mr Phillips’ willingness to co-operate with the regulator. We have no doubt that the Traffic Commissioner for the Wales Traffic Area and the Senior Traffic Commissioner will agree that the handling of Mr Phillips’ case fell well below an acceptable standard.

29. The continued viability of this haulage business, and the jobs of fifty or so staff, hung on the TC’s decision. For the official to have drafted a submission in these terms was profoundly wrong. The submission conveyed the clear impression that Mr Phillips could not be bothered to “get his house in order”. However, the correspondence shows that, within hours of Mr Phillips having appreciated that the application dated 3 July 2015 appeared to have been mislaid, he supplied that very same official with a scanned copy of the application form, together with numerous supporting documents. Then Mr Phillips promptly took steps to investigate the fate of that application and made it very clear to the official that he was ready and willing to do whatever was necessary to resurrect his application but the spanner in the works was the need to supply original CPC certificates since the originals, said Mr Phillips, had been supplied with the missing 3 July 2015 application.

30. We find it astonishing that, two working days after the official told Mr Phillips that he should send in whatever documentation he had to “get the [application] process started” – being documentation that Mr Phillips had already emailed to the official on 29 September 2015 – the official should inform the TC that Mr Phillips only had “himself to blame” for his predicament. But that was not the end of the official’s wrongful interference with Mr Phillips’ case.

31. Mr Phillips contacted the official after receiving the TC’s decision. The official responded with an email in which he said “I can further confirm that the Traffic Commissioner was made aware of your current situation in respect of the application and weighed this against the period of time that was allowed for you to place and progress a suitable application”. Not only was this factual assertion at odds with the contents of the official’s submission to the TC (which distorted the correct picture regarding Mr Phillips’ application) it involved the official giving his own reasons for the TC’s decision.

### **Mr Phillips’ appeal to the Upper Tribunal**

32. On 4 December 2015, the TC refused Mr Phillips’ application for a stay of his revocation decision. The TC’s decision suggests he remained under the impression that, during September and October 2015, Mr Phillips took no steps to resurrect the apparently mislaid application of July 2015. However, the Commissioner seems to have been concerned about the potential implications of revocation because he also gave delegated authority to OTC officials to grant Mr

Phillips an interim licence “if paperwork is in order”. The Commissioner added “I would wish to expedite the grant of a new licence”.

33. Around this time, Mr Phillips’ wife started to deal with his application. By email of 4 December 2015, she informed the OTC that this was because Mr Phillips had been taken to hospital with chest pains.

34. On 4 December 2015, the Upper Tribunal received Mr Phillips’ appeal. His grounds of appeal were:

“It is my belief that the commissioners office acted unfairly and prematurely in revoking my operators licence before I had the opportunity to submit a new application to change the status of the business from that of a partnership to a sole trader.”

35. On 22 February 2016, Mr Phillips informed the Tribunal that he wished to withdraw his appeal. He thought it would serve no useful purpose since his new application for a sole trader’s licence was under consideration within the OTC. Under rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) the withdrawal of an appeal does not take effect unless the Upper Tribunal consents.

36. In many cases, the Upper Tribunal readily consents to the withdrawal of an appeal. But our provisional views on two aspects of this case, as revealed by the appeal papers, led us to instruct Upper Tribunal staff to write to Mr Phillips to inform him that the Tribunal might not agree to his request to withdraw his appeal. Those aspects were the handling of Mr Phillips’ case by the OTC and an apparent misunderstanding on the part of traffic commissioners of the special regulatory rules for licence-holders who are partnerships, a matter on which the Upper Tribunal’s views might be of general benefit.

37. At the hearing before us, it was clear that Mr Phillips no longer wished to withdraw his appeal. In any event, we would not have agreed to withdrawal of the appeal and so, formally, under rule 17(2) the Upper Tribunal does not consent to withdrawal of this appeal.

## **Legislative framework**

### *Licences and applications*

38. Section 2(1) of the Goods Vehicles (Licensing of Operators) Act 1995 (1995 Act) prohibits any “person” from using a goods vehicle on a road for the carriage of goods for hire or reward, or in connection with any trade or business, without an operator’s licence issued under the Act. The modifications made to the 1995 Act by regulation 29 of the Goods Vehicles (Licensing of Operators) Regulations 1995 (1995 Regulations) show that a partnership itself, rather than its individual members, may be granted an operator’s licence.

39. By section 8 of the 1995 Act, applications for operators’ licences are to be made to a traffic commissioner. Applications must be in writing on a form supplied by a traffic commissioner, and signed by the applicant (regulation 4 of the 1995 Regulations). Section 8(4) of the 1995 Act permits a traffic commissioner to require an applicant to supply “any further information” that the commissioner may reasonably require and, by section 8(6), this is to be provided in the form required by the traffic commissioner. Regulation 5 requires an application to be sent to a traffic commissioner “so as to reach him not less than 9 weeks before” the licence



is intended to take effect although regulation 6 allows a commissioner to dispense with the regulation 5 requirement. Regulation 8(1) permits a commissioner to decline to proceed with an application if it appears to the commissioner that granting the licence would contravene section 8(2) of the Act (no more than one operator's licence to be held for a particular traffic area).

40. The 1995 Regulations do not contain rules about service of applications. This means the general provisions in section 7 of the Interpretation Act 1978 apply, which are as follows:

“Where an Act [or secondary legislation] authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

#### *Termination and revocation of operators' licences*

41. The general rule under section 16(2) of the 1995 Act is that an operator's licence “shall continue in force indefinitely”. The Act also specifies two means by which a licence ceases to be in force, namely “revocation or other termination under any provision of this Act or any other statutory provision”.

42. Section 16(5) provides that “an operator's licence held by an individual terminates if he dies”. It is important not to overlook that certain provisions of the 1995 Act, in so far as they apply to partnerships, are modified by regulation 29 of the 1995 Regulations (as authorised by section 46 of the 1995 Act). This includes the termination provisions. Regulation 29(8) modifies section 16(5) so that an operator's licence granted to a partnership terminates if “the partnership is dissolved”.

43. Section 26(1) of the 1995 Act confers power on a traffic commissioner to direct revocation of an operator's licence on specified grounds which include “that since the licence was issued ... there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue ... of the licence” (section 26(1)(h)).

44. Section 27 of the 1995 Act requires a traffic commissioner to direct revocation of a standard operator's licence in certain cases, including where it appears to the commissioner that “the licence-holder no longer satisfies the requirements of section 13A(2)”. These are the requirements to be met on an initial application for a standard licence and include that an applicant must be of “good repute” and have “appropriate financial standing”.

45. The 1995 Act imposes procedural requirements in connection with the giving of a revocation direction under section 27:

(a) before giving a direction, a traffic commissioner must give the licence-holder notice that s/he is considering giving a direction (section 27(2));

(b) the notice must state the grounds on which the commissioner is giving the direction, and invite written representations (section 27(3)(a));

(c) any such representations must be received by the commissioner within 21 days of the notice (section 27(3)(b));

(d) the commissioner “may not give a direction under subsection (1) without considering any representations duly made under this subsection” (section 27(3));

(e) the commissioner may not give a direction without first holding a public inquiry, if an inquiry is requested (section 29(1)).

46. Section 29(2) permits the commissioner to direct that revocation shall not take effect until expiry of the time for appealing to the Upper Tribunal, and if an appeal is made, it is disposed of (conventionally referred to as a “stay”).

#### *Regulation 31 directions*

47. Section 48(1) of the 1995 Act enacts the general rule that an operator’s licence is “neither transferable nor assignable”. However, section 48(3) goes on to authorise regulations to enable a traffic commissioner to “direct that any operator’s licence is to be treated (for such purposes, for such period and to such extent as may be specified) as held not by the person to whom it was issued but by such other person carrying on that person’s business, or part of that person’s business, as may be specified”.

48. Regulation 31 of the 1995 Regulations are made section 48 of the 1995 Act. They are concerned with certain events, including:

- the “death of the actual holder of a licence” (regulation 31(2)(a));
- the “bankruptcy of the actual holder of a licence” (regulation 31(2)(c));
- “in the case of a company ... the actual holder of a licence going into liquidation or entering administration” (regulation 31(2)(d)).

The “actual holder of a licence” is defined as “the person to whom the licence was issued”.

49. Regulation 31(4) confers the following power on a traffic commissioner:

“After the happening of any of the events mentioned in paragraph (2) a traffic commissioner may direct that a person carrying on the trade or business of the actual holder of the licence is to be treated for the purposes of the 1995 Act as if he were the holder thereof for such purpose and to such extent as is specified in the direction for a period not exceeding –

(a) if it appears to the traffic commissioner that there are special circumstances, 18 months;

(b) in any other case, 12 months.

from the date of the coming into force of that direction.”

50. We note that a regulation 31(4) direction does not transfer an operator's licence to the person specified in the direction. All it does is treat the person as if he were the holder of the operator's licence (in other words, that person is deemed to be the licence-holder).

51. Regulation 31(6) shows that the licence treated as held by the deemed licence-holder is capable of revocation under section 27 of the Act. It does this by specifying that, in the case of a standard licence, section 27 does not require a commissioner to revoke the deemed licence simply because the holder does not satisfy the requirement of professional competence. The necessary inference is that a licence under regulation 31 is capable of being revoked under the 1995 Act. As explained below, licence revocation decisions may be appealed to the Upper Tribunal.

52. Rights of appeal to the Upper Tribunal against traffic commissioner decisions are contained in section 37 of the 1995 Act. They include a right of appeal against a revocation direction given by a traffic commissioner under section 26(1) or section 27(1). This right of appeal is conferred on "the holder of an operator's licence". There is no right of appeal against a decision to make, or not make, a regulation 31 direction.

### **What really happened in this case?**

#### *Termination of the partnership's licence*

53. Upon Mr Walter's death, the partnership was dissolved. The general rule in section 33(1) of the Partnership Act 1890 is that "every partnership is dissolved as regards all the partners by the death...of any partner". While this is subject to any contrary agreement between the partners, no such agreement could lawfully provide for what was a two-person partnership to continue as a one-person "partnership". It would not be a partnership at all, as defined by section 1(1) of the 1890 Act ("partnership is the relation which subsists between persons carrying on a business in common with a view of profit").

54. As a result of the partnership's dissolution, its operator's licence terminated under section 16(5) of the 1995 Act. Its dissolution was a termination event (see regulation 29 of the 1995 Regulations). From Mr Walter's death, therefore, the partnership's licence ceased to exist.

#### *Regulation 31 directions in respect of partnership licences*

55. The next question is whether DTC Seculer was capable in law of giving a regulation 31 direction that treated Mr Phillips as holding the former partnership's licence. This is what the DTC purported to do.

56. Regulation 31 applies on the occurrence of certain events, including the death of the actual holder of a licence. It does not in terms apply to the dissolution of a partnership whether on a partner's death or otherwise. Despite that, we have concluded that, in this case, the DTC had power to give a regulation 31 direction.

57. The long-standing Court of Appeal authority of *Sadler v Whiteman* [1910] 1 KB 868 at 889 holds that:

"The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both

as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity ... It is not correct to say that a firm carries on business; the members of a firm carry on business in partnership under the name or style of the firm.”

58. Construing regulation 31(2) against a backdrop of partnership law involves taking into account that a licensed partnership does not itself carry on business. Its members do. On that basis, there were two actual holders of this operator’s licence (two persons carrying on the licensable activity for the purposes of the 1995 Act). When one of them died, that amounted to the actual holder of the licence dying for the purposes of regulation 31. We note that the Senior Traffic Commissioner’s statutory guidance proceeds on that basis.

59. The above interpretation of regulation 31 accords with the literal interpretation of regulation 31 (if it is construed on a properly informed legal basis). If, however, we are wrong about that we would adopt a purposive interpretation that equates dissolution of a partnership on the death of a partner with the regulation 31(2) specified events.

60. Regulation 31 recognises that, in reality, there is a distinction between an operator and its business. The death of the licence-holder, including the corporate death of a company licence-holder, does not lead to the disappearance of all aspects of its transport operations. The trucks, the operating centres, the staff, the contracts, the customers whose businesses depend on timely deliveries continue to exist. Without regulation 31, all of the operations carried out by the former licence-holder would have to stop. The significant disruption that this would entail would in some cases be wholly unnecessary and not in the public interest. That is why regulation 31 exists: to prevent that disruption when it would not be appropriate. For this reason, we would equate dissolution of a partnership on the death of a partner (which is the case with which we are concerned) with either the death of the actual holder of a licence or the liquidation of a company licence-holder. Parliament must have intended that, on such dissolution, the traffic commissioners should have power to prevent the disruption to the operator’s business that would otherwise arise.

#### *The nature of this regulation 31 direction*

61. The next question is just what sort of regulation 31 direction did the DTC make. The transcript of the hearing before the DTC shows:

(a) he misunderstood the time-limits applicable to regulation 31 directions. He thought the general rule was that directions have effect for no more than six months (it is 12 months) and that, in exceptional circumstances, they could have effect for 12 months (it is 18 months, and in “special circumstances”);

(b) the DTC was satisfied that special (or exceptional) circumstances existed to justify making a regulation 31 direction that lasted for longer than the default maximum period, albeit the DTC was proceeding on the mistaken basis that, by the date of his direction, the default maximum period had already expired;

(c) the period specified by the DTC was connected to the anticipated fresh application for a sole trader’s licence that Mr Phillips intended (and needed) to make. However, the DTC did not in terms state that he was fixing a regulation 31 period that would give Mr

Phillips a reasonable opportunity to make an application for a fresh licence. The DTC said:

“As far as the new application is concerned then I will grant the section 31 application in terms of allowing the existing licence but that will not be able to continue under the legislation beyond September so you will need to immediately (inaudible) ...”

(d) the DTC chose to make a regulation 31 direction for what he thought was the maximum permitted period (of 12 months). He could have specified an earlier date but did not. Despite that, we do not think that the DTC, had he appreciated the true nature of his regulation 31 powers, would simply have granted a regulation 31 direction having effect for 18 months;

(e) the DTC would have been aware that, even for straightforward applications, the OTC turnaround time was nine weeks (as is stated on the standard application form). We think, therefore, it is likely that the DTC proceeded on the basis that, if he made a direction expiring 12 months after Mr W’s death, that would provide Mr Phillips with a reasonable opportunity to make an application and a reasonable opportunity for the OTC to consider his application before the direction expired. That was, in our view, the specified purpose of the DTC’s regulation 31 direction.

### **Why Mr Phillips’ appeal succeeds**

62. For a number of reasons, we conclude that the TC’s decision was plainly wrong. We allow Mr Phillips’ appeal and set aside the TC’s decision.

63. Firstly, the TC failed to appreciate the legal nature of the case before him. The TC proceeded on the basis that he was considering whether to revoke the partnership’s licence. However, that had already terminated by operation of law upon Mr Walters passing away on 2 September 2014. If there was a relevant licence in existence, it was a licence in respect of which Mr Phillips was treated as the licence-holder by virtue of the regulation 31 direction.

64. That means we need to address whether the DTC’s regulation 31 direction remained operative at the point at which the TC gave his revocation decision. If it did not, there was no licence in existence to revoke.

65. We decide that the DTC’s regulation 31 direction did remain operative (and it follows, we observe, that in the light of our findings it remained operative after September 2015 and so continued to render the relevant transport operations licensed). We make that finding for the following reasons:

(a) the DTC’s confusion as to the legislative time-limits for regulation 31 directions means we cannot with confidence conclude that, had he been aware of the correct time-limits, he would have made the same direction;

(b) viewed through a correct legal prism (the correct terms of regulation 31), our view is that the DTC gave a regulation 31 direction that was to have effect for so long as Mr Phillips was taking reasonable steps to progress his application for a sole trader’s licence and, thereafter, while it was under consideration in the OTC. That was its specified

purpose. But that is, of course, subject to the time-limits in regulation 31 itself. Under regulation 31, if the DTC's direction took effect from the date it was given, the usual maximum period of 12 months would expire on 23 June 2016 and the maximum extended period would expire on 23 December 2016. If the direction took effect from the date of Mr Walter's death, the 18 month period would expire on 2 March 2016. We are not sure of the date from which the DTC's direction was intended to take effect but, whatever that date was, it remained operative when the TC purported to revoke Mr Phillips' licence;

(c) we are not in fact convinced that Mr Phillips failed to make an application on 3 July 2015. We find that, on that date, Mr Phillips did place his completed application form in the post. We make that finding because Mr Phillips, within hours of having been informed in September 2015 that the OTC did not have his application, sent a scanned copy of the application form and its associated documents. We think it is fanciful to suggest that, within a matter of hours, Mr Phillips could have fabricated those documents. Instead, Mr Phillips simply made electronic copies of the documents that he posted on 3 July 2015;

(d) section 7 of the Interpretation Act 1978 applies where a letter containing a document/s has been properly addressed, pre-paid and posted. We find that Mr Phillips did those things on 3 July 2015. In those circumstances, section 7 presumes that the letter was served in the ordinary course of post. The presumption is disapplied if "the contrary is proved". We do not feel able to conclude that the presumption operated in this case because we have not given the OTC the opportunity to supply evidence about their procedures for receipt of post. If the appeal turned on this point, we would have directed further evidence from the OTC. In the circumstances, however, that is not necessary;

(e) on 29 September 2015, Mr Phillips emailed the OTC. His email contained a copy of the 3 July 2015 application form together with copies of the associated documents. Since the application form requires the necessary information to be sent by post to a specified postal address, our view is that this did not amount to the making of an application under the 1995 Act (in the light of section 8(6) of the Act). However, there was nothing unreasonable about Mr Phillips' actions in submitting an emailed copy of the July 2015 application form. Had he been informed by the OTC that he needed to post a hard copy application form, he would have done so;

(f) Mr Phillips did not receive an acknowledgement of his 3 July 2015 application. If he had read the applications guidance notes, he would have appreciated, well before the end of September 2015, that his application had not been registered with the OTC. Does that mean Mr Phillips failed to take reasonable steps to progress his application for a sole trader's licence, in accordance with the specified purpose of the DTC's regulation 31 direction? We decide that, while Mr Phillips' failure to read the applications guidance notes was blameworthy, it did not amount to him failing to take reasonable steps to progress his application.

66. We make the finding in paragraph 65(f) taking into account: Mr Phillips' prompt attempts to regularise his application once he realised it had not been registered; our finding that at no point did he act dishonestly; and our finding that he did promptly put his 3 July 2015 application form in the post following the preliminary hearing before the DTC. It may well have been a different matter had Mr Phillips failed to take prompt steps to regularise his application,

once he became aware that the 3 July 2015 application had not been registered. But at all times thereafter he acted in accordance with the advice he was given by an OTC official.

67. The upshot is that the DTC's regulation 31 direction remained operative and did not expire in September 2015. The regulation 31 direction, which was extended beyond the usual default maximum period of 12 months, was effectively conditional on Mr Phillips taking reasonable steps to progress his application. Mr Phillips did take reasonable steps and so the regulation 31 direction remained in force after September 2015 and was in force when the TC gave his purported revocation decision.

68. We now come to the TC's decision to revoke the operator's licence. In one sense, this decision might be considered a nullity because it proceeded on a mistaken legal basis (that the TC was considering whether to revoke a partnership licence that had already terminated). If, however, the decision is construed as a decision to revoke the "deemed licence" under the regulation 31 direction, it was plainly wrong and must be set aside.

69. It seems that the TC was unaware of the steps taken by Mr Phillips during September and October 2015 to regularise his licence application. We say that because the TC's decision records that he had been "advised" of certain matters. That must be a reference to the OTC official's submission to the TC recommending revocation of the licence and which effectively described Mr Phillips as having done nothing to sort out the regulatory mess in which he found himself.

70. The OTC official's misleading submission to the TC led him to err in law, rendering his decision plainly wrong. Where an official fails to present to a regulator an accurate and fair record of a person's compliance record, the regulator will err in law if s/he relies on that record in making a regulatory decision (*Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409).

71. If, however, we proceed on the assumption that the TC had taken into account all the relevant evidence, rather than simply relying on the contents of the official's submission, there are a number of flaws in the decision that render it plainly wrong:

- (a) the decision failed to take into account that Mr Phillips had promptly, and in accordance with OTC advice, done all he could to resurrect his application for a sole trader's licence once he appreciated that the July 2015 application had not been registered with the OTC;

- (b) the decision failed to take into account, and give weight to, the fact that Mr Phillips posted a duly completed application form back in July 2015;

- (c) the decision was taken in contravention of the requirement in section 27(3) of the 1995 Act that, before revoking under section 27, a commissioner must consider any written representations made by the licence-holder. The decision notice does not show that Mr Phillips' written representations were considered at all.

72. Furthermore, the basis for the TC's decision to revoke under section 27 is entirely unclear. Section 27 requires a traffic commissioner to revoke a licence in certain cases, including where the licence-holder is not of good repute or lacks appropriate financial standing. There is no explanation at all as to which section 27 case applied and why it was found to apply.

## **Disposal of the appeal**

73. We allow this appeal and set aside the TC’s decision (if it was in fact a valid decision) to revoke Mr Phillips’ “deemed” regulation 31 licence. There is nothing else we need do other than to remit the matter to the traffic commissioner for re-determination. Our decision takes out of the equation, for regulatory purposes, the TC’s purported revocation of the regulation 31 deemed licence. The regulation 31 direction continued to have effect. Hence, Mr Phillips continued to be treated as the licence-holder of the licence originally granted to the partnership. We are satisfied that the terms on which the regulation 31 direction was granted (or to use the statutory language, the “purpose” for which it was given) continued to be met. This is because, to recap, we find that Mr Phillips continued to take reasonable steps to progress his application for a sole trader’s licence. Accordingly, the underlying transport business continued to operate lawfully under the “deemed” regulation 31 licence granted to Mr Phillips.

74. At the hearing, Mr Phillips informed us that a traffic commissioner has called him to a further public inquiry to consider whether to grant his application for a sole trader’s licence. He told us that the date for the inquiry has been fixed for 7 April 2016. We suggest that the public inquiry for the sole trader’s licence application should also consider the matter that we have remitted to the traffic commissioner in this case.

75. We also urge Mr Phillips to consult his solicitor about the implications of our decision. It may have a bearing on the way in which he presents his case at the public inquiry in relation to his sole trader’s licence because our findings mean that, in recent months, Mr Phillips has not been carrying on an unlicensed haulage business.

76. There remains one area of potential uncertainty. If the DTC’s regulation 31 direction ceased to have effect on 2 March 2016, there is a question as to whether, since then, the business has been properly licensed. In the light of Mr Phillips’ unacceptably poor treatment by the OTC, we would hope that the traffic commissioner looks favourably on the application for an interim licence that Mr Phillips informs us that he has made (if it has yet to be determined). We recognise, however, that this is a matter for the traffic commissioner.