**Appeal No.** T/2016/65 & 66

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)**

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE SCOTTISH TRAFFIC AREA (Ms J Aitken)**

**Dated: 12 October 2016 (hearing dates: 9 & 29 August 2016)**

**Before:**

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| **Mr E. Mitchell** | **Judge of the Upper Tribunal** |
| **Mr A. Guest** | **Member of the Upper Tribunal** |
| **Mr G. Inch** | **Member of the Upper Tribunal** |

**Appellants:** **Miss Carrie McKendry & Mr Douglas McKendry**

**Interested Party:** **Driver & Vehicle Standards Agency**

**Attendances:** Mr McDonald (non-legally qualified representative) for Miss and Mr McKendry.

Mr Nesbit (of counsel) for the Driver and Vehicle Standards Agency, instructed by Woodfines Solicitors

**Heard at:** George House, 126 George Street, Edinburgh
**Date of hearing**: 9 March 2017 (with subsequent written submissions)
**Date of decision:** 24 May 2017

**DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that this appeal is dismissed.

**SUBJECT MATTER:-**

Impounding of public passenger vehicles under Public Service Vehicles (Enforcement Powers) Regulations 2009; legal status of partnerships under Scots law.

**CASES REFERRED TO:-**

*Sadler v Whiteman* [1910] 1 K.B. 868.

## REASONS FOR DECISION

### Background

1. Mr McKendry held an operator's licence granted to him under the Public Passenger Vehicles Act 1981 ("1981 Act") as a sole trader. This licence was revoked in 2004. In that year a traffic commissioner refused to grant a licence under the 1981 Act to a partnership whose members were Mr McKendry and his wife Mrs McKendry, However, a commissioner did grant an application made by Mrs McKendry as a sole trader. The wife's licence was subject to a condition that Mr McKendry was not to be engaged in the management of the operation. The licenced business operated under the trading name McKendry Coaches.

2. The vehicle referred to in these reasons as vehicle 1 was purchased using Miss McKendry's credit card on 9 April 2015. The vendor issued a VAT invoice addressed to McKendry Coaches. While Miss McKendry was listed as the registered keeper of vehicle 1, VAT on the purchase was reclaimed from H.M. Revenue & Customs by McKendry Coaches.

3. The Office of the Traffic Commissioners' (OTC) file contains a document dated 14 March 2016 written by Stuart's Coaches which records that vehicle 2 was sold to McKendry Coaches having been paid for in cash by Mr McKendry.

4. On 8 March 2016, the estate of Mr McKendry's wife, trading as McKendry Coaches, was sequestrated by the sheriff at Edinburgh Sheriff Court. The date of sequestration was 28 October 2015. The reasons given by the Scottish Traffic Commissioner (hereafter "the Commissioner") in these cases indicate that she was not immediately informed that Mrs McKendry's estate had been sequestrated. As explained below, where an individual's estate is sequestrated any licence held by that individual which was granted under the 1981 Act terminates.

5. The Commissioner's reasons state that sequestration was linked to McKendry Coaches' financial difficulties. The reasons also state that the appointed Trustee in Sequestration of Mr McKendry's wife's estate attempted to close down the business and seize the coaches but "this was met by an action of interdict" lodged on 15 April 2016.

6. On 10 May 2016, the OTC received an application dated 9 March 2016 for the grant of a PSV operator's licence to a partnership whose members were Miss McKendry and a Ms Lander. Those ladies were both described in the OTC public inquiry 'brief' as daughters of Mrs McKendry. The OTC's acknowledgement letter of 18 May 2016 states "you have no authority to operate any public service vehicle for hire or reward in any capacity until you have been granted authority to do so by the traffic commissioner".

7. By letter dated 17 June 2016, the Commissioner directed that Mrs McKendry's PSV operator's licence "has now been terminated" due to the sequestration of her estate.

8. On 7 July 2016 examiners of the Driver and Vehicle Standards Agency (DVSA) detained two public passenger vehicles. The vehicles' registration numbers were SIL 3924 (vehicle 1) and WJI 2321 (vehicle 2). Vehicle 1, a 56 seater coach, had just taken passengers to the 'T in the Park' music event. Vehicle 2, another 56 seater coach, was in the course of carrying passengers to the same event.

9. On 17 July 2016, Miss McKendry applied to the Commissioner for return of vehicle 1 and Mr McKendry (her father) applied for return of vehicle 2. Both applications asserted that the applicants were the owners of the respective vehicles and were made on statutory ground (c) that is the owners did not know the vehicles had been or were being used without the necessary licence required by the 1981 Act.

10. Competing applications were made by an individual acting in the capacity as Trustee in Sequestration of Mrs McKendry but they were withdrawn before the final hearing before the Commissioner.

11. The Commissioner conducted hearings on 9 and 29 August 2016. Mr McDonald appeared as representative for Miss McKendry and Mr McKendry, and a traffic examiner appeared for the DVSA.

**The Traffic Commissioner's decision**

12. The Commissioner concluded that both vehicles were owned by a partnership whose members were Mr McKendry and his wife ("the partnership"), rather than the applicants for return of the vehicles.

13. The Commissioner concluded that vehicle 1 was purchased by Miss McKendry but she was not the owner. She purchased vehicle 1 as agent for the partnership. In arriving at that conclusion, the Commissioner relied on findings that Miss McKendry was not registered for VAT, the VAT paid on the purchase was reclaimed by McKendry Coaches (the partnership's trading name), the purchase invoice was addressed to McKendry Coaches at their trading address, following its purchase the vehicle had been used solely by McKendry Coaches and the absence of any hire agreement or such like between Miss McKendry and McKendry Coaches.

14. The Commissioner concluded that vehicle 2 was not owned by Mr McKendry but was instead owned by the partnership. In arriving at this conclusion, the Commissioner relied on her findings that the purchase of the coach was a business transaction intended to benefit McKendry Coaches and it reclaimed the VAT paid on the purchase.

15. The Commissioner was, of course, aware that McKendry Coaches ostensibly operated under a licence granted to Mr McKendry's wife as a sole trader. However, that did not cause the Commissioner to doubt her conclusion that the operation was, in fact, carried on by a partnership whose members were Mr McKendry and his wife. In arriving at that conclusion, the Commissioner relied on: her findings about the operation's regulatory history, which included an attempt by the Commissioner to prevent Mr McKendry's involvement in its management; bank letters which showed that from at least 2013 the bank was engaging with Mr McKendry and his wife as a partnership trading as McKendry Coaches; and evidence given at the hearings that the operation had always been carried on by a partnership. As the Commissioner herself noted, her findings also suggested that the partnership had been carrying on an unlicensed passenger transport business.

16. On those findings, the Commissioner concluded that she was not faced with applications for return made by the owners of the vehicles and so the applications had to be rejected. However, she also made findings as to whether the Appellants were aware that the vehicles had been used without a licence. We now turn to that aspect of the Commissioner's decision.

17. By application dated 9 March 2016, but not lodged until 10 May 2016, Miss McKendry and Ms Lander applied for a PSV operator's licence. The OTC's acknowledgement of the application informed the applicants that "there is no authority to operate any public service vehicles for hire or reward in any capacity until

you have been granted authority to do so by the traffic commissioner". As previously noted, the vehicles in question were detained on 7 July 2016.

18. The Commissioner found that both Mr McKendry and Miss McKendry were aware that their wife's and mother's (respectively) estate had been sequestrated. The Commissioner concluded that they were both aware that the vehicles were being operated as public service vehicles without the necessary licence. In summary, the Commissioner relied on her findings about Miss McKendry's application for a PSV licence and, in the case of both Appellants, their day-to-day involvement in the transport business.

**Legislative Framework**

*Powers to detain and destroy or sell unlicensed public service vehicles*

19. Regulation 3(1) of the Public Service Vehicles (Enforcement Powers) Regulations 2009 ("2009 Regulations") permits an "authorised person" to detain a vehicle and its contents. The power to detain is exercisable "where an authorised person has reason to believe that a vehicle is being, or has been, used on a road in contravention of section 12(1) of the Act". Below, a reference to a regulation is to a regulation of the 2009 Regulations.

20. For the purposes of the 2009 Regulations:

(a) "vehicle" means "a public service vehicle adapted to carry more than 8 passengers" (regulation 2(1));

(b) "authorised person" means an examiner appointed by the Secretary of State under section 66A of the Road Traffic Act 1988 or a person acting under the direction of an examiner (Schedule 2B(1)(1) to the 1981 Act).

21. The "Act" referred to in regulation 3(1) is the 1981 Act, section 12(1) of which provides:

> "A public service vehicle shall not be used on a road for carrying passengers for hire or reward except under a PSV operators' licence granted in accordance with the following provisions of this Part of this Act."

22. Regulation 5 confers powers of immobilisation in connection with the power to detain under regulation 3. Regulation 8 permits an authorised person to direct that a vehicle detained under regulation 3 be delivered into the custody of a nominated custodian (commonly referred to as impounding).

23. Regulation 11 permits the owner of a vehicle detained under regulation 3 to apply to a traffic commissioner for the return of the vehicle. Other than in the case of hired vehicles, "owner" is defined by regulation 2(1) as follows:

> "the person who can show to the satisfaction of the authorised person that, at the time the vehicle was detained, the person lawfully owned the vehicle (whether or not that person was the person in whose name the vehicle was registered under the Vehicle Excise and Registration Act 1994)".

24. The grounds on which a regulation 11 application may be made are set out in regulation 10(3) which reads as follows:

> "(3) The grounds are—
>
> (a) that, at the time the vehicle was detained, the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle);
>
> (b) that, at the time the vehicle was detained, the vehicle was not being, and had not been, used in contravention of section 12(1) of the Act;
>
> (c) that, although at the time the vehicle was detained it was being, or had been, used in contravention of section 12(1) of the Act, the owner did not know that it was being, or had been, so used;
>
> (d) that, although knowing at the time the vehicle was detained that it was being, or had been, used in contravention of section 12(1) of the Act, the owner—
>
> (i) had taken steps with a view to preventing that use; and
>
> (ii) has taken steps with a view to preventing any further such use."

25. A regulation 11 application must specify the ground on which it is made and include a statement of evidence to support the application (regulation 11(2)).

26. If a traffic commissioner determines that one or more regulation 10(3) grounds is made out, the commissioner must order the nominated custodian to return the vehicle to its owner (regulation 14).

27. If a regulation 11 application is unsuccessful, regulation 16(2) permits the nominated custodian, with the permission of the authorised person, to sell or destroy the vehicle. This power cannot be exercised until the time for appealing to the Upper Tribunal against the traffic commissioner's determination has expired or, if an appeal is made, the appeal has been finally been disposed of (regulation 16(3)).

*Effect of sequestration on a licence granted under the 1981 Act*

28. Section 57(2) of the 1981 Act provides that "a PSV operator's licence…held by an individual terminates if he [or she]…in Scotland, has his [or her] estate sequestrated".

*Partnerships*

29. The Partnership Act 1890 ("1890 Act") applies throughout Great Britain although in certain respects it makes different provision for England and Wales (on the one hand) and Scotland (on the other hand).

30. Section 1(1) of the 1890 Act provides that "partnership is the relation which subsists between persons carrying on a business in common with a view of profit". Section 4(1) provides that persons who have entered into a partnership are "called collectively a firm".

31. Section 4(2) of the 1890 Act provides that, in Scotland, "a firm is a legal person distinct from the partners of whom it is composed". By contrast, in England and Wales, longstanding authority holds that a firm is not a separate legal entity. In *Sadler v Whiteman* [1910] 1 K.B. 868 the Court of Appeal of England and Wales held:

> "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."

32. Section 31(1) of the 1890 Act provides that "subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner". In Scotland, this needs to be read with section 47 which is headed "Provision as to bankruptcy in Scotland". Section 47 provides:

> "(1) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum.
>
> (2) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof."

**Proceedings before the Upper Tribunal**

33. The Appellants' appeal form advanced the following arguments:

(a) "the Traffic Commissioner has taken matters into consideration that in law ought not to have been considered which has resulted in a wrong conclusion being reached which in all of the circumstances of this case is manifestly unreasonable";

(b) the decision "is contrary to the Traffic Commissioner's own rules and regulations insofar as she has allocated ownership of the two buses to a non-legal entity";

(c) the decision "is so unreasonable it amounts to a "Wednesbury unreasonable" decision that was based on matters it was outwith her jurisdiction to decide". At the hearing, Mr McDonald argued the matter was outside the Commissioner's jurisdiction because an operator's licence was in existence on 7 July 2016;

(d) "at the time of the alleged incident there was no current operator and the extrapolation of events has been exaggerated out of all proportion accordingly the penalty is excessive";

(e) "the conclusions reached were not founded upon the evidence led by both of the Appellants who were both honest and forthright in their submissions to the hearing supported by documentation".

34. At the hearing before the Upper Tribunal, Mr McDonald, who appeared for the Appellants and described himself as a "paralegal friend" in the Upper Tribunal appeal form:

(a) informed the Tribunal that he wished to rely on the Partnership Act 1890 and supplied a copy of that Act as originally enacted (in 1890). When asked if this copy reflected the current provisions of the 1890 Act, Mr McDonald said it was "more or less" the same but could not elaborate any further. The Upper Tribunal concluded it was pointless to hear argument based on legislation that might be out of date. The Tribunal informed Mr McDonald that he was permitted to provide a supplementary written submission after the hearing, constructed by reference to the up-to-date provisions of the 1890 Act;

(b) argued the Commissioner's decision was contrary to guidance in the Senior Traffic Commissioner's statutory documents concerning the position of finance companies who become involved in licensing matters;

(c) asserted that the Commissioner overlooked the evidence he (Mr McDonald) gave at the hearing on 29 August 2016 (as well as appearing as a representative, he gave evidence of his involvement in the application for a PSV licence received by the OTC

on 10 May 2016). Mr McDonald took us to the hearing transcript at pp. 209 and 210 of the OTC file. Those pages describe Mr McDonald's evidence that:

> - he had been dealing with the McKendry's "legal business" for the past year (including matters connected to the sequestration of Mrs McKendry's estate);
>
> - he knew revocation of Mrs McKendry's licence was inevitable given the sequestration of her estate;
>
> - while the new application for a licence was under consideration he made several telephone calls to the OTC to find out the "status" of the application;
>
> - Mrs McKendry complied with the OTC request to return her licence documentation by 1 July 2016;
>
> - the statutory objection period for the new licence application expired on 28 June 2016 and he rang the OTC on 29 June 2016. As a result of that telephone conversation, he assumed the licence was "probably going to be granted". He thought the process was like taxing a car: "if you forgot to get it taxed until about the middle of the month, it automatically put you back to the beginning of the month despite the fact that you didn't have physical possession of it". We note that reflects an email which Mr McDonald sent to the OTC on 18 July 2016 in which he stated he misunderstood the application procedure and, as a result, gave his client "incorrect information". The implication seems to be that Mr McDonald claimed he mistakenly told the McKendrys that, by July 2016, use of the vehicles to carry passengers was authorised by a PSV licence;

(d) argued the Appellants could not have been guilty of the offence under section 12(5) of the 1981 Act of using an unlicensed vehicle contrary to section 12(1) because they could avail themselves of the statutory defence in section 68(3). The section 68(3) defence applies to a person who proves "that he took all reasonable precautions and exercised all due diligence to avoid the commission" of the offence. Mr McDonald argued the Appellants could not be adjudged to have known the vehicles were being used in contravention of section 12(1) (for the purposes of ground (c) for challenging an impounding decision) since the section 68(3) defence applied to them. The Commissioner should have taken this point herself even though it was not addressed in the submissions made at the impounding hearings;

(e) the Commissioner was not entitled to find that Mr McKendry and his wife operated the coach business as a partnership. We found this argument a little surprising given the transcript of the hearing before the Commissioner on 9 August 2016. At p.225 of the OTC file (p.27 of the transcript) the following exchange is recorded:

> "THE TRAFFIC COMMISSIONER…Are you telling me that McKendry's Coaches has been operated as a partnership over the years since your licence went. Your sole name licence went and there now seems to be a partnership called McKendry Coaches that has been represented to the Bank of Scotland. Yes?
>
> A. Yes."

It appears that, at this point, the Commissioner was questioning Mr McKendry rather than Mr McDonald.

We asked Mr McDonald why Mr McKendry confirmed in his evidence to the Commissioner that the business had always operated as a partnership. He said Mr McKendry was "brow-beaten" into giving incorrect evidence;

(f) upon being asked to elaborate on the argument that the Commissioner's reasons were flawed, he responded that "she was wrong". We asked if he had any more to say and he responded "no, she was wrong" although, shortly after this, he argued the Commissioner was not entitled to find that a partnership existed and that this was not a case involving wilful or criminal acts.

35. After the hearing, Mr McDonald supplied the further written submissions referred to at the hearing. However, they did not only deal with the Partnership Act 1890. Mr McDonald wrote that the Upper Tribunal prevented him from developing his argument that, when the 'T in the Park' booking was taken, the vehicles were the property of "ordinary citizens" who had allowed their buses to "utilise the existence of a valid Operator's licence". We take this to be an argument that, when the booking was taken, Mrs McKendry's operator's licence remained valid. Mr McDonald went on to argue that, since the licence was valid when the booking was taken, there was "no infringement of section 12 of [the 1981 Act]".

36. Mr McDonald also wrote that, at the hearing, the Upper Tribunal stopped him when he was about to present an argument by reference to section 33(1) of the Partnership Act 1890. Section 33(1) provides that "subject to any agreement between the partners, every partnership is dissolved by the death or bankruptcy of any partner". Section 33(1) was then addressed by Mr Nesbit which amounted to a violation of Mr McDonald's clients' rights under Article 6 of the European Convention on Human Rights.

37. Mr McDonald's written submission did not present any proper argument by reference to the 1890 Act. All he wrote on this topic was:

> "I produced a copy of the Partnership Act 1890 right at the start of the hearing and the bench questioned the validity of the said Act and gave me seven days to produce the status of the said Act and accordingly produce the Legislative Status and copy of the current Act.
>
> I submit that the Tribunal should delete all reference to any partnership in the Traffic Commissioner's decision and to allow this appeal as being unsound in Fact and Law and to return the two buses to the appellants forthwith."

38. With his written submission, Mr McDonald also supplied a copy of the Wikipedia entry for the Partnership Act 1890.

39. Mr Nesbit, who appeared for the DVSA and for whose assistance during the hearing we are grateful, argued:

(a) case law establishes that the applicant must prove ownership on a balance of probabilities before an application under the 2009 Regulations can succeed (decision of the Transport Tribunal in *David Pritchard* 2011/029). A vehicle registration document is not determinative of ownership;

(b) if ownership is established and an applicant seeks to rely on ground (c) for recovery of an impounded vehicle, it is for the applicant to prove the absence of knowledge referred to in ground (c) (decision of the Transport Tribunal in *Industrial and Corporate Finance* (2007/30 & 31));

(c) under the 2009 Regulations, there is no residual discretion to order return of an impounded vehicle where an applicant fails to make out a statutory ground for return (decisions of the Transport Tribunal in *Nolan Transport* (T/2011/60); *Frank Meager* (T/2004/152); *Romantiek Transport BVBA* (T/2007/172)). Mr McDonald's argument that the 'penalty' imposed by the Commissioner was disproportionate was misconceived and could not succeed;

(d) Mr McDonald's argument that the Commissioner had 'allocated' ownership of the vehicles to a non-legal entity betrayed a misunderstanding of Scottish partnership law. A partnership is a perfectly "legal" entity in Scots law;

(e) Mr McDonald had not identified any flaw in the Commissioner's reasoning to support his argument that her partnership finding was *Wednesbury* unreasonable (or irrational). Furthermore, the Commissioner's finding could not be described as plainly wrong. It was amply justified on the evidence and the Commissioner was entitled to place particular reliance on evidence that a bank account was opened in the name of McKendry Coaches and that entity was registered for VAT. Mr Nesbit also drew attention to Miss McKendry's evidence at the hearing before the Commissioner that

she bought vehicle 1 'for the business' and argued there was no basis on which the Upper Tribunal could find that Mr McKendry was 'brow-beaten' into giving incorrect evidence that the operation was a partnership;

(f) similarly, Mr McDonald had not come close to establishing that the Commissioner lacked jurisdiction;

(g) the statutory defence in section 68 of the 1981 Act was only relevant in criminal proceedings. It had no relevance in an impounding case;

(h) while the Commissioner did not need to address whether the Appellants had knowingly used unlicensed PSVs (once she had decided that the Appellants had failed to make out their cases on ownership), her findings could not be considered plainly wrong;

(i) at the hearing, Mr Nesbit, having been supplied with a copy of Mr McDonald's version of the 1890 Act, drew our attention to section 33 of that Act and submitted that bankruptcy, as referred to in section 33(1), was akin to sequestration. However, he did not have a modern copy of the Act and noted that section 31 was not an issue raised in the Appellants' written case. As a result, he could not confidently make submissions on the relevance of section 33 at the hearing. We informed Mr Nesbit that, if Mr McDonald wished to advance an argument by reference to the 1890 Act, he would have to supply a supplementary written submission and, if necessary, the Upper Tribunal would permit the DVSA to respond to any such submission;

**Conclusions**

40. There are two broad issues on this appeal. One concerns the Commissioner's finding that neither Appellant owned the vehicle whose return they sought. The other concerns the Commissioner's alternative finding that statutory ground (c) was not made out on either application. Due to the way in which this appeal has developed, we shall deal with the second issue first.

41. The Commissioner found that neither Appellant had persuaded her that, on 7 July 2016, they were unaware that the vehicles were being used in contravention of section 12(1) of the 1981 Act. We find no flaw in the Commissioner's reasoning. Her finding was not plainly wrong and, in fact, having considered all the evidence we agree with it.

42. The Commissioner found that Mr McKendry continued to be involved in the day-to-day running of McKendry coaches, a finding that was plainly justified by the evidence. She also referred herself to the very clear warning supplied to Miss McKendry and Ms Lander by the OTC that, until their application was granted, their

partnership had no authority to operate PSVs. The Commissioner knew that those operating McKendry Coaches were aware that, as a result of the sequestration of Mrs McKendry's estate, her PSV licence was terminated. That was confirmed by a direction given by the Commissioner in June 2016 and the evidence given at the hearings before the Commissioner. And, no doubt, the licensing consequences of sequestration must also explain why a fresh application for a partnership licence was made by Miss McKendry and Ms Lander. The Commissioner was clearly unimpressed by Mr McDonald's evidence that he had led the McKendrys to believe the partnership licence would be granted because he thought it was a formality.

43. All those findings provide ample support for the Commissioner's conclusion that Miss McKendry and Mr McKendry knew, on 7 July 2016, that the two vehicles were being used without the necessary PSV licence. Mr McDonald's argument that section 12(1) was not breached because, when the T in the Park booking was taken, Mrs McKendry's licence was extant does not work. Section 12(1) is not concerned with booking or contracting for the use of a vehicle. It is concerned with its actual use. When the vehicles were used on 7 July 2016, they were not being used by a licensed operator. In any event, the Commissioner's direction of June 2016 was merely declaratory, the termination of Mrs McKendry's licence having already come about by operation of law upon the sequestration of her estate.

44. We now turn to ownership. At the outset, we shall make some observations about Mr McDonald's presentation of this aspect of the case. Before the Commissioner, it was said that there was a partnership. Before the Upper Tribunal, Mr McDonald's initial case was that there was not a partnership. But his post-hearing written submissions, in that he says he wanted to construct a case at the hearing by reference to section 31 of the 1890 Act, suggest that he now argues there was a partnership after all (which was dissolved upon the sequestration of Mrs McKendry's estate). That is entirely contrary to his stance at the hearing before the Upper Tribunal. It seems to us that Mr McDonald will assert a partnership existed when he thinks that will advance his clients' case but not when he thinks it will harm his clients' case.

45. We now deal with the various arguments Mr McDonald made in relation to ownership:

(a) in Scotland, a partnership is a legal entity. Unsurprisingly, the Traffic Commissioner for Scotland was well aware of that legal fact;

(b) Mr McDonald has failed to identify any matter taken into account by the Commissioner that should have been left out of account;

(c) the Commissioner's decision was not contrary to the Senior Traffic Commissioner's guidance. Statutory document no.5 *Legal Entities* clearly recognises

the position of a partnership under Scottish law. In paragraph 25, the document states "in Scotland a partnership is a separate legal entity". Mr McDonald also argued provisions of a statutory document dealing with the position of finance companies assist his clients but he failed to explain how they were relevant in the present case which did not involve a finance company;

(d) Mr McDonald has entirely failed to persuade us that the Commissioner's findings or decisions were Wednesbury unreasonable (irrational) or plainly wrong. He has also failed to persuade us that the Commissioner was acting outside her jurisdiction;

(e) we accept Mr Nesbit's argument that the Commissioner had no residual discretion to order return of the impounded vehicles and so Mr McDonald's argument that the 'penalty' was excessive must fail;

(f) the Commissioner was not bound to accept the evidence given by Mr McDonald and the McKendrys at the hearings before the Commissioner. To the extent that such evidence was not accepted, clear reasons were given;

(g) Mr McDonald's evidence was not overlooked. It was not accepted, a different thing entirely;

(h) there is absolutely no basis on which we could properly find that Mr McKendry was 'brow-beaten' by the Commissioner into giving incorrect evidence that the operation was a partnership. The transcripts of the hearings do not support this allegation and, furthermore, the finding that a partnership existed was consistent with the evidence of a partnership bank account and the partnership's VAT registration.

46. We shall briefly deal with section 33 of the Partnership Act 1890 and Mr McDonald's argument that his clients were unfairly prevented from putting a section 33 argument to the Upper Tribunal.

47. We are unconvinced by Mr McDonald's post-hearing submission that he intended to present a section 33 argument at the hearing. This would have undermined his main contention that there was no partnership (since section 33 can only apply if a partnership exists).

48. Mr McDonald also argues his clients' right to a fair trial under Article 6 of the European Convention on Human Rights was infringed by the Upper Tribunal refusing to permit him to advance his 1890 Act arguments at the hearing. We reject this.

49. Mr McDonald came to the hearing with a copy of the 1890 Act as originally enacted (in 1890, of course). We were not willing to hear extended argument based on legislation that might not have been current. Mr McDonald had put himself forward as

a ‘paralegal’ and should therefore have been well aware of the tendency for legislation to be amended following its enactment. The Upper Tribunal’s management of the hearing was in response to his inadequate preparation of his clients’ case. In any event, he was given the opportunity post-hearing to develop his 1890 Act arguments in writing but failed to take that opportunity. Mr McDonald’s written submission says he wanted to present a section 33 argument at the hearing but fails to go on to explain what that argument was.

50. Mr McDonald had a fair opportunity to put an argument by reference to the 1890 Act but did not take it.

51. We also note that the Commissioner was not asked to address the 1890 Act. Mr McDonald has not explained why, in those circumstances, the Commissioner’s failure to deal with the 1890 Act is a proper basis for allowing this appeal.

52. We accept, however, that section 33(1) of the 1890 Act clouds the legal picture. We also note that, in Scotland, section 33 needs to be read with section 47 of the 1890 Act. We were not referred to section 47 but it has to be taken into account when considering the application of section 33 in Scotland.

53. If there was a partnership comprised of Mr & Mrs McKendry, it may have dissolved upon the sequestration of her estate. We say ‘may’ since section 33(1) is “subject to any agreement between the partners”. And so the sequestration of Mrs McKendry’s estate would not necessarily have dissolved their partnership.

54. Furthermore, even if a partnership was dissolved by the sequestration of Mrs McKendry’s estate and, by operation of the rules on application of partnership property following dissolution in section 39 of the 1890 Act, the ownership of the partnership’s property in the form of the two vehicles passed to some extent to Mr McKendry, we do not see how that would have helped him before the Commissioner. The Commissioner’s rejection of his case on statutory ground (c) for recovery of an impounded vehicle would still have defeated his application. This scenario would not have helped Miss McKendry either. Dissolution of the partnership would not have conferred upon her ownership of vehicle 1 and so her application would still have fallen at the ownership hurdle.

55. We make the above points simply to satisfy ourselves that section 31 of the 1890 Act, even if taken into account by the Commissioner, would not have made a difference to the outcome. Our reasons are not to be read as suggesting that the Commissioner was at fault by failing to take into account section 31 of the 1890 Act.

56. For the above reasons, we dismiss this appeal.

57. It has taken the Upper Tribunal longer than expected to complete this decision. This was partly due to the need to take into account post-hearing written submissions. We hope the delay has not caused the parties frustration and apologise if it has.

**Mr E. Mitchell, Judge of the Upper Tribunal,**
**24 May 2017**
**(signed on original)**