



## **REDACTED PUBLIC VERSION**

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**TRAFFIC COMMISSIONER FOR SCOTLAND**

**GOODS VEHICLES (LICENSING OF OPERATORS) ACT 1995**

**MACDIARMID HAULAGE LTD – OM1108431**

**TRANSPORT MANAGER – GRAHAM COOPER**

**PUBLIC INQUIRY HELD AT INVERNESS ON 16 OCTOBER 2018**

**DECISION OF THE TRAFFIC COMMISSIONER**

### **Background**

1. MacDiarmid Haulage Ltd (Scottish Companies House SC392590) of Lochaber Rural Complex, Torlundy, Fort William, PH33 6SQ, was incorporated on 1 February 2011. The sole director and shareholder is Mr Donald MacDiarmid (b.1969). From 2006, Mr MacDiarmid held a sole trader operator licence for initially 1 vehicle and 1 trailer, then in 2007 to 3 vehicles and 3 trailers. (OM1057515) but that was revoked on grounds of change of legal entity.
2. Following a Public Inquiry held in January 2013 MacDiarmid Haulage Ltd was granted a standard national goods vehicle operator licence on 25 February 2013. The authorisation was increased to the current 6 vehicles and 6 trailers in September 2013.

### **Public Inquiry**

3. Following my receiving an adverse report from a DVSA Vehicle Examiner, I directed that the operator and transport manager, Mr Graham Cooper, be called to a Public Inquiry at Inverness on 16 October 2018. The usual call up letter and brief of papers were issued. In response, Mr Graham Cooper replied that he would not be attending (see below). Mr Donald MacDiarmid, director, attended and was unrepresented. He was aware that he could be represented and confirmed to me that it was his business decision not to be represented. I expressly checked with Mr MacDiarmid that he wanted to proceed without representation. DVSA was represented by Mr S Cuthbert, Vehicle Examiner.

## **Financial Standing**

4. [REDACTED].

5. [REDACTED].

## **Licence history**

6. On 8 January 2013, Mr MacDiarmid as a sole trader operator and the company as applicant were at a Public Inquiry before Deputy Traffic Commissioner McFarlane. Also attending was Mr MacDiarmid's sister, Mrs Catherine MacSween, who was transport manager on his licence. The Deputy Traffic Commissioner issued a written decision, dated 18 February 2013, which was copied into the brief for this Inquiry and which can be referred to for its terms. Mr MacDiarmid was represented by a solicitor and had the services of a transport consultant too. The Deputy Traffic Commissioner had to consider an adverse report from VOSA (now DVSA). Mr MacDiarmid had used a trailer out of test; a vehicle in excess of his authorisation; his transport manager Mrs MacSween had become an absent transport manager in name only, with no involvement for at least 2 years; he had a change of legal entity and operated without a licence in that entity; there was use of an unauthorised operating centre; there were inadequate systems for compliance, with drivers' hours and tachograph regulations and missing charts; Mr MacDiarmid did not know how to interpret digital data; there were numerous infringements identified by Mr MacDiarmid's consultant; there were prohibitions, albeit not 'S' marked, and the annual test fail rate was high. The Deputy Traffic Commissioner held back from a finding against MacDiarmid's repute but revoked the licence on material change and professional competence grounds. He refrained from disqualifying. The Deputy Traffic Commissioner then considered the company's application for a licence and was prepared to grant an interim licence for 3 vehicles and 3 trailers, not the 6 vehicles and 6 trailers sought. He disqualified Mrs Catherine MacSween as a transport manager for 9 months. The company renewed its application for 6 vehicles and 6 trailers and I saw the company in person of Mr Donald MacDiarmid at a Preliminary Hearing on 19 September 2013 at which Mr MacDiarmid assured me that he was and would be a compliant operator. I expressly reminded Mr MacDiarmid of that at this Inquiry.
7. An Office of the Traffic Commissioner letter was issued to the company on 3 October 2014 following a DVSA encounter – a vehicle was not specified and a trailer was out of test.

## **Transport Manager**

8. A letter dated 4 October 2018 was received from Mr Graham Cooper, transport manager. I quote it in full:

“This letter is to inform you that I will not be attending the public inquiry, referenced above. As transport manager for MacDiarmid Haulage, being fully responsible for the shortcomings as listed in the report, I have to accept full responsibility. I will not be making any further comments or references to Mr. Cuthbert’s report, other than in my statement. Were I attending the public inquiry, the best possible outcome I could expect would be to take further refresher courses or similar, but at the age of 70, that is not an option I would choose to take. I have therefore resigned as my position as Transport Manager from both Macdiarmid Haulage, and Loch Shiel garage. As this is a public inquiry, I would like it put on record that I be disqualified *at my own behest*. I enclose my original qualification certificate for your disposal”.

### **DVSA evidence**

9. The DVSA evidence to this Inquiry was a report and addendum from Vehicle Examiner Cuthbert. I took these as read.
10. The Vehicle Examiner’s interest in this licence arose from a Police Scotland/DVSA encounter with the operator’s trailer on 26 March 2018 for which an ‘S’ marked immediate prohibition was issued. The prohibition notice was issued by Vehicle Examiner Howden at Fort Augustus A82 and listed 9 immediate defects – offside outer tyre damaged, 7 defects for missing shock absorbers; and rear brakes stop light inoperative. An ‘S’ marking was given for poor workmanship.
11. On 5 April 2018 at Inverness GVTs, Examiner Howden imposed an immediate variation prohibition for a tyre failure on the same trailer as was prohibited on 26 March 2018. Later that day a further variation prohibition was imposed for inoperative service brake.
12. Vehicle Examiner Cuthbert conducted a maintenance investigation on 7 May 2018 by visiting the operator at Torlundy. Mr MacDiarmid undertakes the maintenance of the vehicles. He and transport manager Cooper were present and co-operated with the Examiner.
13. The Vehicle Examiner was not satisfied by what he found and listed these deficiencies:-
  - decelerometer tests not recorded;
  - no three monthly roller brake tests;
  - forward planner not up to 6 months;
  - MOT fail rate high;
  - prohibition rate high
  - ‘S’ marked prohibitions and variation for the trailer on 5/4/18;
  - No wheel torque register in use.
14. The Examiner inspected a vehicle and a trailer at his visit and found them in order. The Examiner was concerned that there were no undercover maintenance facilities – the pit was outside (photographs in the brief). Mr MacDiarmid said that he contracted out larger repairs but otherwise does the maintenance, including what happens if drivers find defects.
15. Over a 5-year period of 15 presentations, 6 failed. Over a 2-year period of 8 presentations, 1 failed – on 28 September 2017. The fail items were suspension and lamps. In the period from January 2013 to 27 April 2018, 20 encounters led to 7 vehicle prohibitions. In the 2 years to 27 April 2018, 6 encounters led to 3 vehicle prohibitions. The equivalent figures for trailers – 18/7 encounters – 7/2 prohibitions.

16. The Vehicle Examiner had to update his report and so to the foregoing figures should be added an 'S' marked immediate prohibition issued on 11 October 2018 to the operator's vehicle SK07 BNY during a Police Scotland road check. The immediate defect was tyre tread and cord damage, offside, axle 3 and a delayed defect anti-lock brake warning light sequence indicates fault, ABS inoperative, vehicle/trailer has a load-sensing valve. The vehicle was allowed to move to a tyre depot in the Longman area. The prohibition was 'S' marked as the defect should have been detected at first use check/daily walk round check. The driver was Ewen MacDiarmid, Mr MacDiarmid's son. Photographs in the Examiner's report showed the offside axle 3 tyre with cords exposed and damaged in the tread area.
17. The Vehicle Examiner formed the view at the investigation that the transport manager, Mr Cooper, did not have effective and continuous management of the transport activities and relied on Mr MacDiarmid. There was no evidence of the transport manager having any post qualifying training. In respect of the missing shock absorbers, Mr Cooper for his part was unaware of this as there was no mention on the inspection sheets. He was only aware on 26 March.
18. Mr MacDiarmid in his reply of 20 May 2018 to the Examiner said that he purchased the trailer as seen. He was aware that the shock absorbers were missing from the 4 rear axles. He fitted shock absorbers but the trailer's off site work led to regular damage to shock absorbers so he used the trailer in its original condition. The vehicle had been encountered before at roadside checks and no defects or references to missing shock absorbers mentioned. He concluded that the slow speed and weight meant road safety was not compromised. He had contacted the trailer manufacturer which was aware of the problem but had not been able to address it.
19. For the tyre defect variation he said someone must have missed it or the tyre was damaged over the 7 miles from operating centre to test centre. For the second variation, he had adjusted all the brakes apart from an axle 1 nearside and completely forgot to adjust it.
20. In his written comments in response to the maintenance investigation, Mr Cooper said that a new decelerometer had been ordered; 3 monthly brake tests arranged; the forward planner extended to 6 months; defect sheets being signed off; disappointment at the prohibition and test fail rate though MOT passes improving; he was unaware of the issue of the defects on 26 March 2018; he acknowledged there is damage to the inside of the wheel rim close to the bulge; Mr MacDiarmid forgot to adjust the axle 1 nearside service brake; a wheel torque register is in use.

## **Productions**

21. Mr MacDiarmid produced the undernoted documentary evidence:
  - 1) DVLA driver licence checks for John Hugh Mackenzie; letter dated 29/3/18 issued to driver re DVSA drivers' hours, fines and walk round checks and defect reporting and extracts from Gov.uk; Infringement report and analysis from Robert Russell of Stonehouse (who does tachograph analysis for the operator) – 3 infringements on this report;
  - 2) Infringement reports from Robert Russell for Ewen MacDiarmid – 5 daily rest offences in period 9 – 16 August 2018; 4 offences of failing to take 45 minutes break; one Working Time Directive offence; one excess speed (reports dated 17/8/18 and 9/9/18);
  - 3) DVLA driver licence check for Mr MacDiarmid; letter to all drivers signed 10/4/18; Robert Russell infringement reports dated 19/6/18 and 9/9/18 – 6 breaks offences; 1 Working Time Directive offence.

22. He also produced up-to-date PMI and defect sheets to the Vehicle Examiner. The latter had attended in advance of the Inquiry and the Examiner spent time with Mr MacDiarmid looking at maintenance records. The Vehicle Examiner found the standards of maintenance record keeping to be much improved. I observed to the Vehicle Examiner that there appeared to be a very low number of defects (only 4) recorded by drivers and he was of same view, that he would have expected to see more.

### **Mr MacDiarmid's evidence**

23. I record here that Mr MacDiarmid was taciturn with me and his evidence was very limited in what he wanted to say to me. I reminded him that he had given me assurances at the Preliminary Hearing. This is what I noted from him. He did not disagree with the DVSA evidence, it was factually accurate. He amplified for me that roller brake testing is carried out by Scania in Inverness, which was easy for them as the vehicles were transporting in the Inverness direction anyway.
24. Mr MacDiarmid explained the continued absence of shock absorbers on the wind farm roads on which the vehicles worked; they got knocked off and he was replacing them. When stopped at Fort Augustus, Vehicle Examiner Howden said the shock absorbers were missing. He'd been stopped before and had not been prohibited for being missing before. For the 'S' marked prohibition of 11 October 2018, he said the driver had not picked up on it; the driver should have checked. It was just off the shoulder of the tyre. The vehicle was headed for Scania to get the ABS repaired. All defects were repaired that evening.
25. Mr Cooper resigned as transport manager after getting called to the Inquiry. Mr Cooper had been coming to the office weekly and keeping everything in order. He checked the DDRs, inspection sheets, and normal run of the operation. He was carrying out his duties. He was paid [REDACTED] per month. Mr Cooper would tell him if he was weeks out on the inspection sheets. Tachograph analysis was from R L Russell who comes up every 4 weeks to download the data (all vehicles are digital) and thereafter provides infringement reports. Mr MacDiarmid would go through these with Mr Cooper and he would speak to the drivers and Mr Cooper would issue warning letters. Driver licences are checked with DVLA. Letters had been given to drivers warning them of DVSA's new powers to fine over drivers' hours. I noted that drivers' hours and speeding offences had been incurred by Ewen MacDiarmid. Mr MacDiarmid confirmed this was his son. Mr MacDiarmid himself had infringements.
26. He is operating 5 vehicles at present; all Scania tractor units; no rigids. The work takes them over the whole of the UK – timber haulage using the low loader. There are 4 drivers – himself, Ewan his son, John Mackenzie and David MacDonald. All 5 vehicles are not used every day. His business is purely haulage.
27. If the licence was revoked he would not be able to fulfil contracts and sub-contracting would be difficult as they have specialised equipment. They could not survive a month's suspension. They could not fulfil their contracts if curtailed to 3.
28. In respect of a new transport manager, he had a few options. His son Ewan MacDiarmid, aged 26, is a full time driver but has a CPC. His sister, Mrs Catherine MacSween, whom Deputy Traffic Commissioner McFarlane disqualified, had learned from her mistakes and could fulfil the role. She lives in Skye, works in a coach business and he sees her every Friday; or he could contract someone in. He had not done anything yet. He was sorry about what had happened and he didn't want it to happen again.

## **Consideration of the evidence and my decision**

29. This is the case of a professional haulier, the business of which is utterly dependant on holding an operator licence, yet again finding himself at Public Inquiry. The standards required of modern operator licensing are not unknown to him.
30. I found Mr MacDiarmid's demeanour at the Public Inquiry difficult. Getting the evidence from him was like "pulling teeth". I wondered if his approach was a deliberate strategy so that I would gain as little insight into his company's operation as possible. I decided to give a written decision to allow me to reflect fully on the evidence.
31. The adverse matters found by DVSA cannot be brushed aside. It is a fundamental of operator licensing that vehicles and trailers must be roadworthy with proper arrangements in place to secure such. The prohibition history this year is deeply worrying and shows that the operator and drivers are not to standard. That of 7 May had multiple defects and 2 variations were imposed before the trailer was in a fit condition to go on the public road – and I remind myself that this is timber haulage where safety standards simply cannot be lax in any respect.
32. The DVSA maintenance investigation revealed a maintenance operation which was below par. This is in-house maintenance for the most part yet the inspection pit is outside – this is outside in Torlundy in the Scottish Highlands where wind, sleet, hail and snow are features much of the year; no undercover facilities. It is little wonder that there is a lack of rigour in achieving the minimum standards required by the DVSA and the operator licence; little wonder that vehicles have not been prepared meticulously for prohibition clearance at DVSA test stations.
33. The prohibition of 11 October 2018 was a bad one. The driver was son, Ewen MacDiarmid, whom I learned has his CPC and may be nominated as transport manager.
34. The prohibition history was tabulated in the brief and the addendum – 2016 6 delayed prohibitions; 2017 1 immediate, 2 delayed; by October 2018 4 immediate, 2 endorsed 'S'.
35. In the operator's favour is that the annual test pass rate has greatly improved. For the period to 24 August 2018, there was only one fail (suspension and lamp defects) since August 2015 according to the DVSA performance report. This shows that the operator is capable, if so chooses, to achieve a standard of roadworthiness for annual test presentation.
36. The operator and transport manager do appear to have had systems for checking driver licences and giving information to the small team of drivers. The reports lodged from Mr Russell do show that vehicle and driver card downloads were happening and analysis produced. I have noted that there are infringements, including break offences, by Mr MacDiarmid himself and by son Ewen. I was only shown a few sheets so I have no idea what the level of compliance is or why infringements were arising.
37. On finance, this operator has neglected to have in place the continuing financial standing, which is mandatory. Mr MacDiarmid had to be taken through the financial standing requests at the original Public Inquiry and at the Preliminary Hearing in 2013. He should not need it explained to him yet again. Periods of grace are not automatic but matters of discretion.
38. This is a 6 vehicle licence. Mr MacDiarmid is not coping with the current 5 vehicles. His operation needs to be curtailed such that he can concentrate on becoming compliant. He told me he had vehicles he could sell. He needs proper modern facilities at Torlundy, that is a message he has to take from this Inquiry. I have to take action against this licence to

secure road safety and fair competition. Compliance comes at a cost, including investment in proper facilities and I have to be fair to those compliant operators who do invest to be compliant.

39. There will be a 2-stage curtailment of this licence. This licence will be curtailed to 3 vehicles from 23:59 on Friday 23 November 2018 for the remainder of 2018 and to 9 January 2019. If there is a satisfactory transport manager nominee and satisfactory evidence of continuing financial standing by 9 January 2019 I will remove that curtailment. There then will be a long term curtailment to 5 vehicles, with immediate effect, and any increase beyond 5 will require a formal variation and positive evidence of compliance with the licence conditions and undertakings. The amount required for 5 vehicles is £25,550. If there is not evidence of continuing financial standing for that amount by 9 January 2019, then the licence will be revoked for want of financial standing. If there is not a transport manager nomination by 9 January 2019, then the licence will be revoked for want of professional competence.
40. During the period of curtailment to 3 vehicles, that is from 23:59 on Friday 23 November 2018 to 23:59 on 9 January 2019, the suspended vehicles cannot be used on this or any other licence. I will allow the operator to decide which of the vehicles currently specified will be the 2 vehicles to be suspended, failing which I will decide. The discs for the 2 suspended vehicles must be returned to the Office of the Traffic Commissioner, Edinburgh, at the start of the curtailment.
41. I warn the operator and the director to their repute. It should not have taken a Public Inquiry; Preliminary Hearing; warning letter and prohibitions and now this Public Inquiry to secure compliance.
42. In respect of Transport Manager, Mr Cooper, he is agreed as to his fate as a future transport manager and I will disqualify him permanently as a transport manager.

### **Summary of my decision**

43. The operator is given a period of grace to 9 January 2019 to nominate a transport manager failing which this licence will be revoked on 9 January 2019 on grounds of lack of professional competence.
44. The operator is given a period of grace to 9 January 2019 to show evidence of continuing financial standing for 5 vehicles failing which this licence will be revoked on 9 January 2019 on grounds of lack of financial standing.
45. The authorisation on the operator licence is curtailed in 2 stages:

this licence will be curtailed to 3 vehicles from 23:59 on Friday 23 November 2018 for the remainder of 2018 and to 9 January 2019. If there is a satisfactory transport manager nominee and satisfactory evidence of continuing financial standing by 9 January 2019 I will remove that curtailment;

thereafter there will be a curtailment to 5 vehicles and any increase beyond 5 will require a formal variation and positive evidence of compliance with the licence conditions and undertakings.
46. During the period of curtailment to 3 vehicles, that is from 23:59 on Friday 23 November 2018 to 23:59 on 9 January 2019, the suspended vehicles cannot be used on this or any other licence. I will allow the operator to decide which of these vehicles currently specified will be the 2 vehicles to be suspended, failing which I will decide. The discs for the 2

suspended vehicles must be returned to the Office of the Traffic Commissioner, Edinburgh, at the start of the curtailment.

47. By request, Mr Graham Cooper is disqualified permanently as a transport manager in terms of schedule 3 of the 1995 Act.

Joan N Aitken  
Traffic Commissioner for Scotland  
Edinburgh

7 November 2018