



REDACTED PUBLIC VERSION

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TRAFFIC COMMISSIONER FOR SCOTLAND

GOODS VEHICLES (LICENSING OF OPERATORS) ACT 1995

J A DICKIE TRUCKIN LTD – OM2005355

PUBLIC INQUIRY HELD AT EDINBURGH ON 27 NOVEMBER 2018

DECISION OF THE TRAFFIC COMMISSIONER

Background

1. On 3 July 2017, an application was made by J A Dickie Truckin Ltd for a goods vehicle operator licence to operate 2 vehicles and 2 trailers from MacQueen's Yard in Oban. The application was signed by the company's sole director, Mr John Angus Dickie (b.1960) of Glasgow. He was nominated as transport manager. Certain historic matters were disclosed in the application form, with explanations given. The application was processed by the Central Licensing Unit in Leeds ("Leeds") and granted on Leeds' delegated powers. The licence came into force on 18 August 2017. Vehicles were specified from 11 September 2017.

Companies House records

2. Companies House records show that J A Dickie Truckin Limited SC569302 was incorporated on 21 June 2017. The director history is:

James Angus Dickie (b.1960)	21 June 2017 – 15 January 2018;
John McCormack (b.1962)	30 November 2017 – 19 March 2018 re-appointed 28 March 2018 – current;
Bradley Daniel Walker (b.1990)	16 March 2018 – 29 March 2018.

3. Initially, the registered office was 24 Gairbraid Court, Glasgow, G20 8HU but was changed on 16 January 2018 to Unit 3, Cocklaw Street, Kelty Industrial Estate, Kelty, KY4 0DT and on 12 June 2018 to Unit 10, M90 Commerce Park, Lathalmond, Dunfermline, KY12 0SJ. Initially Mr Dickie was sole shareholder.

4. On 4 January 2018, Companies House received notification of John McCormack as a person with significant control. On 18 June 2018, Companies House received notification of the cessation of James Angus Dickie as a person with significant control. Mr Dickie no longer holds shares in the company. These are held, according to the last public notification, by John McCormack(51) and Arlene Dunleavey(49).

The licence history

5. As noted at time of grant of the licence the owner, sole director and transport manager of the operator was Mr John Angus Dickie. Thereafter some changes were made to the licence. On 10 January 2018, a variation application was made to remove Mr Dickie's name from the licence and to add Mr John McCormack. No adverse matters were declared. An application was made to add Unit 3, Kelly Industrial Park, Cocklaw Street, Kelty, KY4 0DT as an operating centre for 2 vehicles and 2 trailers.
6. In May 2018, the licence authorisation was increased to 4 vehicles and 8 trailers from Unit 3, Cocklaw Street aforesaid. MacQueen's Yard at Oban was removed. Thus, by May 2018, the operator licence and relative records had been varied/changed to have J A Dickie Truckin Ltd with one declared director Mr John McCormack, with correspondence address and operating centre at Unit 3, Cocklaw Street, Kelty and authorisation for 4 vehicles and 8 trailers. Financial standing for the increased authorisation was demonstrated through bank statements in the company's name and a credit agreement with Credit on Tap in the company's name.
7. On 8 August 2018, Mr Dickie wrote to Leeds to say he was resigning as transport manager due to lack of payment since April 2018. Also on 8 August 2018, a GV80A variation application sought to remove Mr Dickie as transport manager and replace him with John McCormack (b.1962) as a 40 hour per week transport manager. Mr McCormack was already a transport manager for Graham Developments (UK) Ltd OM1125225 (6 hours). The GV80A form was signed by Mr McCormack in capacity as director and dated 30 July 2018. That form gave a different correspondence address i.e. Unit 10, M90 Commerce Park, Lathalmond, Dunfermline. Mr McCormack, as transport manager, gave the operating centre address for which he was responsible as 2 addresses: Unit 3, Kelty Industrial Estate, Kelty and Unit 10 M90 Commerce Park, Dunfermline address. A TM1 form was submitted as also Mr McCormack's CPC. The licence was amended to show Mr McCormack as transport manager.
8. A variation application lodged in July 2018 sought to increase authorisation from 4 to 7 vehicles and 8 to 12 trailers. That application remained outstanding.

Mr Thomas Malcolm and ATR Logistics

9. By letter dated 6 August 2018, Mr Dickie wrote to me in Edinburgh to say he had sold his company to John McCormack and Thomas Malcolm and that they owed him money and he was being threatened. He had not been aware of Mr Malcolm's past. He said ATR Logistics were working out of the same office as J A Dickie Truckin.
10. His letter was of interest to my Office given the reference to Mr Thomas Malcolm and ATR Logistics. ATR Logistics Ltd (hereinafter "ATR") was incorporated on 4 October 2016 (SC546846). The current registered office is Unit 2, Kelty Industrial Estate, Cocklaw Street, Kelty, KY4 0DT. The director history is:

Richard Murray Walter (b.1974)	4 October 2016 – 21 January 2017 and 4 February 2017 – 24 April 2017;
Allan Thomas Malcolm (b.1994)	4 February 2017 – current;

Mary Arlene Dunleavey (b.1970) 1 July 2017 – current
(who was Company Secretary from 4 October 2016 to 4 February 2017).

11. The correspondence address for Mr Murray and Mr Allan Thomas Malcolm is given as 9 Ballingall Park, Glenrothes, the address given for Ms Dunleavey when Company Secretary. Her director correspondence address is Unit 2, Kelty Industrial Estate, Cocklaw Street, Kelty, KY4 0DT.
12. Companies House records show the notification on 19 April 2018 of Thomas Malcolm as a person with significant control. He is the sole person in that capacity. The latest accounts for the company were signed on 4 July 2018 by Arlene Dunleavey, Director.
13. Thomas Andrew Malcolm was disqualified by the Sheriff at Kirkcaldy under the Company Directors Disqualification Act 1986 for the period 27 April 2011 to 26 April 2019.
14. There is a company T Malcolm T/A Scotland Executive Travel Ltd incorporated on 24 January 2018 (SC586608) of which Mary Arlene Dunleavey (b.1970) is sole director. The registered office and correspondence address is Unit 2, Cocklaw Street aforesaid. She is the sole shareholder.
15. ATR's first attempt to gain an operator licence was by application dated 6 February 2017, signed by Richard Walter as director. Mr Walter and Allan Malcolm (b.1994) were named as directors. Mr Thomas Malcolm was named as transport manager. That application was refused (see paragraph 4 of my ATR written decision of 18 December 2017). The next application for 6 vehicles and 6 trailers was dated 8 June 2017 signed by Allan Thomas Malcolm as director. Mrs Helen Goodyear was nominated as transport manager. The application was backed by a personal guarantee and indemnity given by Thomas Malcom. In paragraphs 7 – 11 of my 18 December 2017 decision, I set out why I had to call the application to a Public Inquiry.
 - “7. Since at least 1996, Mr Thomas Malcolm as an individual or a company director has engaged in activities which require an operator licence – goods or public service vehicle. My predecessor revoked the licence of Taphaul Ltd OM0035006 in 2000 and disqualified Taphaul and Mr Malcolm for 10 years – written decision dated 27 June 2000 refers. Mr Malcolm operating as a sole trader PM0002775 was disqualified for 3 years from holding a PSV licence on 27 June 2000, the decision expressly distinguished the disqualification period from goods vehicle and PSV operating.
 - “8. I saw Mr Malcolm at Public Inquiry on 6 February 2004 in his capacity as a PSV sole trader applicant PM1025971. He sought one vehicle and I granted same subject to conditions – my oral decision recorded in writing on 6 February 2004 refers. I saw Mr Malcolm again at Public Inquiry on 13 April 2005 in connection with that sole trader licence PM1025971 trading as Premier Travel. He was seeking an increase in authorisation which I refused in an oral decision [recorded in writing on 13 April 2005].
 - “9. Mr Thomas Malcolm was at a Public Inquiry on 12 February 2008 before Traffic Commissioner, Mr T Macartney. That Inquiry considered a variation application for Mr Thomas Malcolm's sole trader licence Premier Travel PM1025971; an application for a new licence Premier Executive Travel PM1067241 Ltd for 10 discs (withdrawn); and an application for a goods vehicle operator licence for Premier Recovery Services Ltd (OM1074492). Traffic Commissioner Mr Macartney found that Mr Malcolm had not been truthful and had applied for the goods vehicle licence whilst still disqualified, an offence under s28(2) of the 1995 Act. The application was refused for lack of repute. The increase in authorisation for OM1025971 sole trader licence was refused. Mr Macartney's oral decision was recorded in writing on 12 February 2008. This licence was

not continued in February 2009. As from that date, Mr Thomas Malcolm has not held an operator licence.

“10. Mr Thomas Malcolm was disqualified from being a director in April 2011 in Kirkcaldy Sheriff Court.

“11. Given the foregoing background, I directed that this application by ATR would have to be considered at Public Inquiry. I was concerned that the application might be an attempt to defeat or circumvent previous regulatory action and to abet Mr Thomas Malcolm”.

16. The Public Inquiry duly convened on 2 November 2017, with Ms Dunleavey, director, Mr Kelly Solicitor and Mrs Helen Goodyear nominated transport manager present. My office had received an email from former director, Mr Rik Walker, who wrote

“13. At inception of ATR Logistics Ltd, I was completely on board because Thomas Malcolm was acting as an advisor only. Within a few months, he had taken over the day to day running of the company and I had been kept out of several important decisions including Factoring. I resigned as director and subsequently have no further involvement with the company. Mary Arlene Dunleavey has been appointed as director along with Allan Malcolm. Mary is Thomas’s partner. Without Thomas, the company would not be running and currently sub-contracting all jobs. Thomas Malcolm IS ATR Logistics Ltd. The current directors front it on his behalf as he is currently banned from running a company. This is information that I feel the traffic commissioner should be aware of during the public inquiry. I am just one person in a long line of people that Thomas has manipulated for his own ends”.

17. The Public Inquiry was adjourned and ATR sought to withdraw the application. I refused withdrawal. On 23 November 2017, Mrs Goodyear withdrew her CPC from the application. Mr Kelly was not instructed to appear at the reconvened Public Inquiry and, in the event, no one from or on behalf of ATR appeared on 15 December 2017.

18. For reasons set out in my decision at paragraphs 21 – 26 I refused ATR’s application for a licence. At paragraphs 24 – 26 I wrote

“24. I pause here to make reference to the relevant case law and what is meant by “fronting”. In Utopia Traction Ltd T2011/34, the Upper Tribunal defined front as “In the context of vehicle operator’s licensing ‘fronting’ means that a person, partnership or company, which does not have an operator’s licence, uses the operator’s licence held by another entity to conceal the fact that they are behaving in a way which requires them to have an operator’s licence of their own. In other words it deprives the Traffic Commissioner of the right to control an ‘operator’, when Parliament has said that such an entity should be within his or her jurisdiction.

“25. Ms Dunleavey in her email of 14 December 2017 says she is not a front for Thomas Malcolm. Absent her evidence, I speculate that she may even believe that for she is not the first person to be manipulated by someone with a background of non-compliance such as Mr Malcolm has. She may think that her full time work in the Accounts Department and her name at Companies House are all that are required. Traffic Commissioners and regulators such as myself have long learned that the onion rings have to be peeled; that the corporate veil has to be pierced; and that persons such as Mr Malcolm do not tend to be benign or disengaged life partners.

“26. I am not in the slightest doubt that this application is a front for Mr Thomas Malcolm who has been a disqualified operator and is a disqualified person

under the Companies Acts. As such, I cannot find repute and I refuse the application on that ground. Professional competence cannot be satisfied given the absence now of a nominated transport manager. I make no finding either way in respect of financial standing”.

JA Dickie Truckin Ltd (hereinafter “Dickie”)

19. Given the letter from Mr Dickie; given that my Office could identify from perusal of the Dickie bank statements that there was a steady pattern of intromissions between the Dickie account and ATR/Thomas Malcolm and associated others, including Arlene Dunleavy, I directed that J A Dickie Truckin Ltd, Mr Dickie himself, Mr John McCormack (he as director and transport manager), Mr Thomas Malcolm as shadow director, Ms. Arlene Dunleavy as shadow director and Mr Allan Malcolm as shadow director, be called to a Public Inquiry to be held at Edinburgh on 27 November 2018. The usual call up letters and PI briefs were issued.

Public Inquiry

20. The Public Inquiry was called to be held at the Stamp Office at 10am on 27 November 2018. Mr Dickie was present but unrepresented. Mr John McCormack did attend at the Stamp Office, with solicitor Mr N Kelly. Mr Kelly presented productions to the caseworkers for my attention. Additional material from Mr Dickie was copied to me and copied to Mr Kelly. The requirement to peruse these additional productions from Mr Dickie and from Mr Kelly for the company necessarily delayed the starting time for the Inquiry until sometime after 11am. I was then told that Mr McCormack had left the building and that Mr Kelly was withdrawing from acting.
21. The Public Inquiry duly convened. As is usual professional courtesy, I took from Mr Kelly that he had to withdraw from acting. He had been instructed for the company. Given the privilege between solicitors and their clients, I could not probe further. I then proceeded to ask questions and to hear from Mr Dickie. There was no attendance by any of Mr Thomas Malcom, Ms Arlene Dunleavy or Mr Allan Malcolm. Mr McCormack did not return to attend the Inquiry

Service of documents

22. Mr Dickie attended at the Public Inquiry and no issue arises as to him having proper notice of this Inquiry.
23. Mr McCormack, director at Companies House and transport manager for the licence, attended at the Stamp Office on due date and time and with legal representation. I am satisfied that he was aware of the proceedings and that service was effected.
24. Mr Thomas Malcom was served with the call up letter and brief at 1 Glenesk Grove, Kelty, and Royal Mail confirmed delivery. Arlene Dunleavy’s signature appears as accepting the delivery. Service to Ms Arlene Dunleavy at the Unit 2, Kelty Industrial Estate, Cocklaw Street was met by a return to sender as addressee gone away. A further attempt at service on Ms Dunleavy at the address 1 Glenesk Grove, Kelty, at which service on Mr Thomas Malcolm had been effected, was met by a refusal to accept the delivery. I am satisfied that Arlene Dunleavy, through her relationship and proximity to Thomas Malcolm, knew of these Public Inquiry proceedings and that she was called and that she chose not to accept service, attend or engage.
25. Service on Mr Allan Thomas Malcolm at 9 Ballingall Park, Glenrothes was returned “gone away” by Royal Mail and at Unit 10, M90 Commerce Park, Dunfermline, KY12 0SJ was met

with not at this address. Given that Unit 10 is ATR and Dickie business premises, that he is a director of ATR and that as recently as 18 October he was paid by Dickie, I have to suspect that the Royal Mail was misled and that the call up letter and brief would have reached Allan Thomson had the envelope been accepted at Unit 10.

Productions

26. As well as the Public Inquiry brief I had a copy of the original GV79 application by Mr Dickie for this licence.

From Mr Dickie I also had:

1. email from Mr Dickie in which he forwarded email to him from Ray Webster re: recovery of money;
2. copy letter from HMRC, dated 26 October 2018, re outstanding payments due by J A Dickie Truckin Ltd for PAYE/NIC **[REDACTED]**;
3. copy emails between Mr Dickie and Thomas Malcolm in November 2017, January, February and March 2018;
4. photostats of text messages between Mr Dickie and Mr Thomas Malcolm and Mr John McCormack.

From Mr Kelly for the company:

Inventory of financial productions

1. **[REDACTED]** bank statements 31 July to 31 October 2018;
2. Finance Agreement;
3. letter from Finance company;
4. Mr Kelly's calculation of financial standing.

Non financial productions

1. **[REDACTED]** Credit Contract;
2. unsigned Share Sales and Purchase Agreement;
3. Decathlon contracts;
4. copy letter, dated 18 April 2018, to James Dickie;
5. letter to operator from "Are you owed money" 28 August 2018;
6. email thread 5 November 2018 12:00;
7. email thread 5 November 2018 13:35;
8. copy letter operator to **[REDACTED]** 22 November 2018.

Financial Standing

27. The financial standing required for a licence of 4 vehicles is £21,150. The operator had an outstanding application to increase to 7 vehicles and 8 trailers which would require finance of £34,350.
28. The call up letter required evidence of 3 months financial standing. That was not satisfied by the productions lodged on the day of this Inquiry. **[REDACTED]**.
29. **[REDACTED]**.

30. In the operator's favour, it does appear as if drivers are paid from the Dickie account and not by ATR. Allan Malcolm appears to be paid a wage commensurate with other drivers.
31. The operator has failed to demonstrate financial standing for the current authorisation. It follows that the variation application to increase authorisation has to be refused. Absent anyone from the operator at the Public Inquiry and given the wider aspects of this case, no period of grace or other plea in relation to finance was made and accordingly this licence must be revoked on the ground of lack of continuing financial standing in terms of section 27(1) of the 1995 Act.

Mr Dickie's evidence

32. A letter dated 21 March 2018 in the brief addressed to Mr Dickie and signed by him and Messrs John McCormack (as director) and Thomas Malcolm (as shareholder) confirmed that Mr Dickie was no longer liable for PAYE, tax, VAT, Corporate tax, any accounts related to the company and that Mr McCormack and Mr Malcolm indemnifies. However, he had to remain as major shareholder due to the goods operator licence. A monthly payment of **[REDACTED]** would be paid to him.
33. In oral evidence, Mr Dickie told me he was working as an agency driver having previous involvement as an operator and with his wife's former licence. He had a hankering to be an operator again and had contacts in the Oban area. So he applied for the licence using his personal financial resources and with a friend as a fellow driver. He put a vehicle on the road about a month after grant of the licence. The enterprise was not very successful. He lost money.
34. He received a call from Helen Goodyear whom he'd known for about 6 years through her work with various hauliers. She asked if he was interested in selling his company and that if he was, it had to happen that day. He thought that strange. It was all very quick and, in hindsight, he should have looked into it more. However, it gave him a chance to make up his losses and get money back. The story from her was that there was a contract opportunity. That led to him going to Broxburn, to ATR, and meeting Tommy Malcolm and John McCormack. The discussion was mostly with Thomas Malcolm with John McCormack hovering about. He was told that his company would run alongside ATR; he would be an external transport manager and he would get a van job with it. The price for the licence was **[REDACTED]** in 5 payments from October to February. He handed over control to Mr Malcolm and was used as a front. Helen Goodyear was paid off by Mr Malcolm as surplus to requirements. He got the 5 payments with a lot of hassle. He went to Broxburn 4 or 5 times. Arlene Dunleavey was in the office but she did not speak to him. He did not meet son Allan Thomas Malcolm but believed him to be a driver. He was not getting the regular payments he had expected. He went to a debt collector. Originally, the amount was to be **[REDACTED]** per week then became **[REDACTED]** per month. The money was to keep him quiet. He had made a grave error of judgment for which he wanted to apologise. He was threatened and became scared of Malcolm and McCormack and saw the only way to break that was by contacting the Commissioner. He had no intention of operating or being a transport manager again.
35. Mr Dickie produced text messages between himself and Messrs Thomas Malcolm and McCormack. I do not repeat the content here but I have had regard to these – many were about money and the bargain between them and “funds for the traffic commissioner”.

Evidence from the company productions

36. Absent any representative of the company or any of the other parties called, I have had to draw what I can from the productions.

37. Production 1, dated 27 October 2018, appears to be a credit agreement signed by Mr McCormack as director of the company for insurance for the company.
38. Production 2 is an unsigned incomplete share sale and purchase agreement between James Angus Dickie and John McCormack for the shares in J A Dickie Truckin Ltd. One completed detail is a figure of **[REDACTED]** as purchase price. [Interestingly, the definition clause of director includes each person who is a director or shadow director of the company]. Reference is made to the operator licence OM2005355. The directors are stated as John McCormack and Bradley Daniel Walker. A registered charge with Advantedge is noted. A condition of the agreement is that the licence is valid and subsisting. There is no evidence that this agreement was ever finalised or signed.
39. Production 3 is a Road Haulage Agreement between the company and Decathlon UK Ltd signed on 5 September 2018, with undated letter from Decathlon Transport Manager and Bay Leader to confirm the transfer of the contract for general haulage from ATR Logistics Ltd to J A Dickie Truckin Ltd and with copy safety guidelines.
40. Production 4 is a letter, dated 18 April 2018, from Mr McCormack as director to Mr Dickie hand delivered to home address in which Mr McCormack claims that Mr Dickie has failed to meet certain conditions:-

“The specific failures which cause this reaction are as follows:-

- “you failed to maintain the agreed balance on your **[REDACTED]** bank account which was required to meet the Operators licence criteria, you did in fact withdraw over **[REDACTED]** without advising us of this, thus leaving the account in overdraft which did not meet the terms stipulated by The Office of the Traffic Commissioner.
- “You failed to supply the required “original” documents such as bank statements and credit card statements to support the stated Operators Licence requirements. What you did supply were photographs of statements and credit card, all supplied in a Tesco plastic bag and left for collection on your kitchen window ledge!
- “You failed to attend my office at least one day per week as agreed.
- “You failed to respond to numerous telephone requests to meet in person.

“These failures show a total lack of commitment and professionalism by you and as such we intend to have you removed from both Companies House register and the company Operators Licence”.

41. Production 5 is a debt collection letter, dated 28 August 2018, from You are Owed Money Ltd to the company – sum due **[REDACTED]**.
42. Production 6 is an email thread of 5 November from the debt collector to Mr McCormack at 12:00 relative to a proposed payment of **[REDACTED]** which will be held escrow until Mr McCormack receives a letter from Mr Dickie saying he stops further action.
43. Production 7 is an email thread of 5 November from Mr Dickie to the debt collector to effect that if paid **[REDACTED]** in full he would take no further action against the company and will take back everything he said to the Traffic Commissioner.
44. Production 8 is a letter dated 22 November 2018 from Mr McCormack to Santander in which Mr McCormack alleges that Mr Dickie has been making unauthorised withdrawals and that he, Mr McCormack, is involved in police action against threats from Mr Dickie.

Case Law and Senior Traffic Commissioner Guidance

45. In coming to my decision I have had regard, in particular, to the Senior Traffic Commissioner's Guidance Statutory Guidance documents 1, 3 and 10 and to the undernoted case law:-

Bryan Haulage (No.2) T2002/217 (must I put this operator out of business);
Priority Freight T2009/225 (can I trust this operator in future);
Thomas Muir (1999 SLT666) decision of the Court of Session (integrity of regulatory regime);
Martin Joseph Formby T/2012/34 (trust);
Aspey Trucks T2010/49 (the compliant industry);
C G Cargo and Sukhwinder Singh Sandhu T2014/41 (disqualification);
Arnold Transport & Sons Ltd v DOENI NT/2013/82 (fair competition);
Utopia Traction Ltd T/2011/357 (fronting)
Silvertree Transport Ltd T/2012/071 (fronting)

Consideration of the evidence and my decision

46. In so far as I can ascertain matters I find the factual nexus in this case to be as follows. I find that when Mr Dickie applied for this licence he did so genuinely. He fully disclosed his past involvement and some difficulties. His funds came from his own resources. However, the venture was more romantic (last stage of career) than profitable and it quickly failed to deliver what he hoped.
47. Then came the call from his acquaintance in haulage, Helen Goodyear. ATR was desperate to have an operator licence. I had thwarted its attempts – as disclosed in my decision of 18 December 2017. The gaining of the contract with Decathlon and potential profit made sub-contracting unattractive and potentially risky. Thomas Malcolm needed an operator licence and, not being able to get one himself, he embarked on the plan to buy a company with a licence and to use others as his placemen. Arlene Dunleavey might have been too visible but Messrs McCormack and Walker would not be. They became directors and very quickly Mr McCormack became sole director.
48. I am in no doubt from the nature of the productions that Mr McCormack was to have come to this Public Inquiry to argue that he was a genuine man of business, undertaking the transactions of the company, that he had been notified to the Office of the Traffic Commissioner as director and as transport manager and with no attempt to hide; that he had been due to sign a formal agreement with Mr Dickie; that he found himself dealing with a very unsatisfactory person in Mr Dickie who thought he could extort money to the prejudice of Mr McCormack's honest endeavours in building up a company. I can only surmise that script and I would have greatly preferred Mr McCormack to have faced me and to have stood up for his repute in this jurisdiction. By walking away from the Stamp Office, Mr McCormack walked away from any positive assessment I might have of his repute whether as operator, as director of a company, or as a transport manager. I find that he walked away because he knew he was embroiled in a fronting arrangement and that he could not counter the evidence which pointed to his role in fronting.
49. I am not in the slightest doubt that J A Dickie Truckin Ltd and the operator licence held by it is being used for the business and financial purposes of Thomas Malcolm and that he directs the company and its business; makes the decisions, gives the orders. In this, he has the very close lieutenant, Arlene Dunleavey, for she is placed into roles at Companies House and into shareholding.
50. Were this a genuine arrangement and not a fronting or circumvention of operator licensing and of the Companies Act then I would have expected Thomas Malcolm and Arlene Dunleavey to have attended to argue that I would be wrong to find that this company was a

front and that they were shadow directors. I gave them the opportunity of attendance. Fairness required such. They did not take it.

51. There is case law of the Upper Tribunal in respect of shadow directors. The leading case is that of David Keith Bradley and Julie Bradley 2014/ 11 & 12. In that case the status of persons within a company and involved in the company's business was discussed including the distinction between control and participation.
52. There are some similarities between the Bradley cases and the instant case. Mr Bradley was a disqualified person and subject to Companies Acts undertakings and could not be a company director. He was the leading force in the transport side of the business. Ms Dunleavey is his domestic partner but also working at the heart of the business and involved in the financial intrusions, appointments and shareholding.
53. In Bradley the Tribunal considered 2 authorities – Secretary of State for Trade and Industry v Dennis George Hollier and Others [2006] EWCH 1804 (Ch) and Holland v Commissioners for HMRC and another [2010] UKSC 51 and the three ways in which a person can be a director of a limited company. These are directors de jure; shadow directors; and directors de facto. In the instant case only Mr McCormack has been appointed lawfully at Companies House and he does have the status of director de jure.
54. "Shadow director" is defined in section 251 of the Companies Act 2006 as in relation to a company a person in accordance with whose instructions or directions the directors of the company are accustomed to act. At paragraph 12 of the Bradley decision the Tribunal records "That definition is followed by a provision designed to exclude a person giving professional advice to the directors of a company from being held to be a shadow director. Whether or not a person comes into the category of a shadow director is a question of fact to be decided by assessing the evidence in each individual case. The essential feature would appear to be that a shadow director must be shown to play a part in the corporate governance of the company in question by telling the de jure director or directors what to do. It is not necessary to show that a shadow director gave all the directions or instructions necessary for the company to function. It is sufficient if he is shown to play a part in the corporate governance of the company by giving directions or instructions."
55. The third category is directors de facto with reference to Hollier – see paragraph 20; and paragraph 21 sets out a series of questions. What matters is not the title. It is whether the person was part of the system by which the business was directed and controlled.
56. In this case, the overwhelming evidence is of Mr Thomas Malcolm being the instigator and driving force. This is the lead role. Mr John McCormack is the placeman or the puppet, albeit in a core operational contracts management role. I find that Thomas Malcolm is a shadow director for J A Dickie Ltd and that he is a controlling presence.
57. I find that Arlene Dunleavey's role places her at the centre of the arrangements made. I come to that view given that she is a director at Companies House of ATR; given the banking intrusions and the part she plays in Mr Malcolm's businesses and past attempts to secure a licence. I am as sure as I can be that her role is that also of shadow director of Dickie.
58. In respect of Allan Malcolm, I am not persuaded that I have sufficient evidence to find that he is a shadow director of Dickie. Mr Dickie described him as a driver and did not see anything of him. There is no doubt his name has been and is used by father Thomas Malcolm for Companies House purposes and was used in ATR's attempt to gain an operator licence. However I am not sure that in respect of Dickie, that he is in shadow director role. Accordingly I make no orders in respect of him but should he ever apply for an operator licence, in whatever guise, that will be scrutinised very closely.

59. Given Mr Malcolm's history in goods vehicle operating and that he is a disqualified director; given that a company was bought solely for its operator licence and for no other purpose – J A Dickie Ltd had no assets worth buying – it had debt – I cannot find any repute attached to this licence. The usual *Bryan Haulage (No.2) T2002/217* and *Priority Freight T2009/225* questions are utterly redundant. This operator has to be put out of business. There is no trust and no possibility of trust. This is a case of the type identified in *Utopia Traction* and *Silvertree*. Applying the guidance in Statutory Document No.10 this is a severe case.
60. The licence has to be revoked on grounds of loss of repute, material change, loss of financial standing and loss of professional competence given the loss of any repute of Mr McCormack might have had - see below for my decision on Mr McCormack.
61. In respect of Mr McCormack's repute as a transport manager I have to consider whether it is a proportionate response to find against his repute following EC1071/2009. In this case I find that it is. He was very well aware that an operator licence was being bought for a man, Thomas Malcolm, who had no repute and would not be granted a licence. Having found against his repute, I have to disqualify him as a transport manager. I have to put a period on that disqualification and to consider if any rehabilitation measures should be directed. Absent his attendance at the Public Inquiry, I am in great difficulty in assessing such. I will make the disqualification as a transport manager immediate and for five years. I fix that period to reflect the seriousness of his role in undermining the purposes of operator licensing which include fair competition. That it is not longer reflects that he has not come to previous adverse attention. I do not order any rehabilitative measures. He has 5 years to reflect on the meaning and worth of professional integrity and fair endeavour. It is unlikely that he will be accepted on any future licence without consideration of his repute at a hearing.
62. Having revoked the operator licence, I now apply my powers of disqualification. This is a case in which it is wholly appropriate to use such powers. I have guidance available to me in the Senior Traffic Commissioner's Guidance document No.10 and, in particular, Annex 3. This is a severe case. I also have guidance from the case law and, in particular, *C G Cargo and Sukhwinder Singh Sandhu T2014/41*.
63. The persons associated with this licence cannot be trusted. There will be a 10 year disqualification of the company (which may become academic as the company may not survive); a 5 year disqualification of Mr McCormack as a director as there is no reason to distinguish the period of transport manager disqualification from that of director in this case; and a lifetime disqualification of Mr Thomas Malcolm given his very long history of non-compliance and previous 10 year disqualification. I restrict the period of disqualification of Ms Dunleavy to 5 years. I distinguish her as her adverse history is nowhere as long or great as that of Mr Malcolm. However she has been at the heart of the rotten-ness in the use of this Dickie licence for ATR and has made her living that way.
64. There will be a 4 year director disqualification of Mr John Dickie to reflect that he has lost his repute. In respect of his repute as a transport manager it is proportionate that I find that he has lost his repute and to disqualify him. The period will be 4 years to reflect the seriousness of knowingly selling a licence. That it is not longer is because belatedly he felt he had to tell me, to get out of mess he had been party to creating. None of this would have happened had he not sold his licence and continued in association with Messrs Malcolm and McCormack. He faced the music. He came to the Inquiry and I take that into account in the period of disqualifications. The period is academic for he told me that he will not seek to be operator or transport manager again and I believe him in that respect. What has befallen him in terms of disqualification, worry and stress is a tale for the telling to any other person tempted to sell an operator licence. Nothing good ever comes of that for the people who seek to buy operator licences are people to avoid at all cost.

Decisions

65. The goods vehicle operator licence held by J A Dickie Truckin Ltd is revoked with effect from 23:59 on Monday 3 December 2018 in terms of sections 26 and 27 of the 1995 Act.
66. J A Dickie Truckin Ltd is disqualified for 10 years and Mr John McCormack, director, is disqualified for 5 years with effect from 23:59 on 3 December 2018 from applying or holding an operator's licence in this or any other traffic area in terms of section 28(1) and 28(4) of the 1995 Act will apply, that is if the disqualified person:
- (a) is a director of, or holds a controlling interest in-
 - (i) a company which holds a licence of the kind to which the order in question applies, or
 - (ii) a company of which such a company is a subsidiary, or
 - (b) operates any goods vehicles in partnership with a person who holds such a licence, that licence of that company, or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 26.
67. Mr James Angus Dickie, sometime director, is disqualified for 4 years with effect from 23:59 on 3 December 2018 from applying or holding an operator's licence in this or any other traffic area in terms of section 28(1) and 28(4) of the 1995 Act will apply, that is if the disqualified person:
- (a) is a director of, or holds a controlling interest in-
 - (i) a company which holds a licence of the kind to which the order in question applies, or
 - (ii) a company of which such a company is a subsidiary, or
 - (b) operates any goods vehicles in partnership with a person who holds such a licence, that licence of that company, or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 26.
68. Mr Thomas Malcolm, shadow director, is disqualified for life with effect from 23:59 on 3 December 2018 from applying or holding an operator's licence in this or any other traffic area in terms of section 28(1) and 28(4) of the 1995 Act will apply, that is if the disqualified person:
- (a) is a director of, or holds a controlling interest in-
 - (i) a company which holds a licence of the kind to which the order in question applies, or
 - (ii) a company of which such a company is a subsidiary, or
 - (b) operates any goods vehicles in partnership with a person who holds such a licence, that licence of that company, or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 26.
69. Ms Arlene Dunleavey, shadow director, is disqualified for 5 years with effect from 23:59 on 3 December 2018 from applying or holding an operator's licence in this or any other traffic area in terms of section 28(1) and 28(4) of the 1995 Act will apply, that is if the disqualified person:
- (a) is a director of, or holds a controlling interest in -

- (i) a company which holds a licence of the kind to which the order in question applies, or
 - (ii) a company of which such a company is a subsidiary, or
 - (b) operates any goods vehicles in partnership with a person who holds such a licence, that licence of that company, or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 26.
70. Mr John McCormack is disqualified as a transport manager in terms of Schedule 3 of the 1995 Act for 5 years with effect from 23:59 on 3 December 2018.
71. Mr James Angus Dickie is disqualified as a transport manager in terms of Schedule 3 of the 1995 Act for 4 years with effect from 23:59 on 3 December 2018.

Joan Aitken
Traffic Commissioner for Scotland
Edinburgh

29 November 2018