



TRAFFIC COMMISSIONER FOR SCOTLAND

GOODS VEHICLES (LICENSING OF OPERATORS) ACT 1995

MACDONALD GROUNDWORKS LTD – OM1143505

HRL SCRAP & WASTE SOLUTIONS LTD – OM1100262

PUBLIC INQUIRY HELD AT EDINBURGH ON 20 OCTOBER 2017 AND 20 DECEMBER 2018

DECISION OF THE TRAFFIC COMMISSIONER

Background – HRL Scrap & Waste Solutions Ltd (HRL)

1. HRL Scrap & Waste Solutions Ltd (hereinafter “HRL”) (SC380784) was incorporated on 21 June 2010. The registered address is Lairgandour, Daviot, IV2 6XN. The director history is:

Gary Donald MacDonald (b.1969) 21 June 2010 – 30 November 2012
(also Company Secretary from 21 June 2010 – 28 February 2014);
Ronald Hutchison Dyce (b.1957) 20 November 2012 to date.
2. Mr Gary MacDonald held all 100 shares until the transfer of 40 to Mr Dyce and 60 to Mr MacDonald’s wife, Michelle MacDonald, on 17 July 2014. As at the date of this Inquiry, Companies House now showed 60 shares held by Mr Gary MacDonald and 40 by Mr Dyce.
3. HRL applied for a restricted goods vehicle operator’s licence by application dated 7 October 2010, signed by Mr Gary MacDonald as owner and received for processing on 1 November 2010. Mr Ronald Dyce’s name was given on the application. Mr Gary MacDonald was noted as sole director. The operating centre and contact address was given as 24A Longman Drive, Inverness. HRL sought a restricted licence for 6 vehicles and 2 trailers for its business of scrap metal merchants and skip hire. The licence OM1093265 held by Gary and Michelle MacDonald t/a Daviot Farms was declared. Also declared was that HQC (Highland Quality Construction Ltd) (holding licence OM0033776) previously owned by Gary MacDonald had recently been put into receivership.
4. A restricted licence for 6 vehicles and 2 trailers was granted to HRL on 27 July 2011. This grant was made following my considering the application by HRL at a Public Inquiry held at Inverness on 21 June 2011 at which I also considered Gary MacDonald t/a Daviot Farms (OM1093265) and HQ Recyc Ltd (OM1095185). I issued a written decision dated 18 July 2011. That decision can be referred to for its terms *brevitatis causa* (lawyer’s words for as if fully repeated in this document). As of now the licence is for 6 vehicles and 3 trailers, with 3 vehicles specified as at the date of this Inquiry.
5. On 19 January 2017, HRL applied to use Schedule 4 of the 1995 Act to change operating centre to 3/5 Crossgate Road North, Inverness, IV3 8DU, the donor licence being MacDonald Groundworks Ltd (see below) signed by Lee Thomson as director on 9 November 2016. In a letter dated 6 March 2017 to Leeds, Mr Dyce explained “with regard to why we are taking

over the site from MacDonald Groundworks Ltd, I am an acquaintance of Lee Thomson, their director, and after discussion we decided for operational reasons it suits both companies to change sites....”

6. Mr Ronald Dyce has one other Companies House appointment – Café V8 Ltd (SC449308)
7. There was a Public Inquiry before Deputy Traffic Commissioner Mr R McFarlane on 20 March 2013 at which he considered a variation application by HRL to increase its authorisation to 6 vehicles and 3 trailers and an application for a licence made by Daviot Farms Ltd (OM1115960). The Inquiry also considered a DVSA Vehicle Examiner report and related matters. The Deputy Traffic Commissioner granted HRL's variation application.
8. The Public Inquiry brief for this Inquiry contained the standard DVSA Performance Report for HRL and showed, of 13 presentations at annual test over 5 years, one vehicle failed PRS. A Fixed Penalty Notice was issued on 17 September 2014 for no evidence of driver CPC training.
9. On 16 March 2017, Mr Dyce for HRL notified a speeding conviction by one of their drivers.

Background – MacDonald Groundworks Ltd (MGL)

10. MacDonald Groundworks Ltd (hereinafter “MGL”) (SC471723) was incorporated on 5 March 2014. The registered address is Lairgandour, Daviot. The director history as shown at Companies House is:-

Stephen James MacDonald (b.1987) 5 March 2014 – 19 September 2016;
Mrs Michelle MacDonald (b.1972) 23 October 2015 – 19 September 2016;
Lee Thomson (b.1971) 16 September 2016 to date.
11. The sole shareholder was Mrs Michelle MacDonald, Mr Stephen MacDonald having transferred his sole share on 3 November 2015. Companies House now shows Mr Gary MacDonald as sole shareholder and as at 14 November 2016 the Person with Significant Control.
12. MGL, under the signature of Michelle MacDonald dated 28 January 2016 with Mrs MacDonald designing herself as director, applied for a standard national licence for 5 vehicles and 5 trailers to be operated from 3/5 Carsegate Road North, Inverness. Mrs Michelle MacDonald (Ferguson) and Mr Stephen James MacDonald were named as directors. Mr William Martin MacDonald (b.1979) was nominated as transport manager. The licence was granted on 18 March 2016. Mr William MacDonald was replaced as transport manager by Mr Colin Thomson (b.1975) in October 2016.
13. There are variation applications relative to this licence:-

on-line variation dated 25 January 2017 to add Kyleakin Quarry, Isle of Skye as a new operating centre for 4 vehicles and 2 trailers;

on-line variation dated 22 February 2017 to add Lairgandour, Inverness for 15 vehicles and 8 trailers, that is an increase from 5 vehicles to 15 and trailers from 5 to 8.
14. These variations were considered at this Inquiry. MGL used the services of Michael Dunlop, transport consultancy.

Further background

15. Mr Lee Thomson (b.1972) was appointed as a director of Daviot Group Ltd from 1 August 2011 to 2 December 2015 and of MGL from 16 September 2016. He is a current director of Lee Thomson Ltd (SC523382). He was director of Quayside Waste Recycling from 19 June 2013 to 7 April 2016. Mr Lee Thomson entered into a Trust Deed in 2004. In a letter dated 30 September 2016 to Leeds, Mr Thomson explained that he had been discharged from the Trust Deed for 8/9 years and had no further financial difficulties.
16. Colin Thomson (b.1975) who holds the transport manager CPC qualification was transport manager of the Daviot Group Ltd OM1115960 until 30 September 2016. He became transport manager on the MGL licence on 25 October 2016. He remains the contact person for the licence. Mr Thomson was a director of Highland Quality Construction Ltd which held licence OM033766 revoked on 10 September 2010.

Company Director Disqualifications

17. The Insolvency Service web site on gov.uk discloses that Gary MacDonald and Colin Thomson, directors of Highland Quality Construction Ltd (hereinafter "HQC") were disqualified for 6 years from 20 May 2014 to 19 May 2020 (Mr Thomson) and 8 years from 20 May 2014 to 19 May 2022 (Mr MacDonald) over debts which HQC did not pay to a finance company. The press release narrated:

"In relation to Mr MacDonald, the investigation found that despite a charge for payment having been served on HQC and remaining unpaid, payments totalling £520,857 were paid to connected parties. Additionally, seven items of HQC's plant and machinery which were subject to finance were sold and the proceeds, diverted to an associated business. A further 10 items of equipment, belonging to a finance company, were disposed of without the consent of the finance company. These 10 items were sold for £486,000, resulting in a loss of that amount to the finance company;

"In relation to Mr Thomson, the investigation found that despite a charge for payment having been served on HQC and remaining unpaid, payments totalling £520,857 were paid to connected parties. Additionally, 10 items of equipment, belonging to a finance company, were disposed of without the consent of the finance company. These 10 items were sold for £486,000 meaning that a loss of £486,000 was suffered by the finance company as a result".

Mr Gary MacDonald and company histories.

18. Mr Gary MacDonald has been a director of the undernoted companies:
 - Highland Quality Construction Ltd - 30 November 1994 – 5 May 2014; (receivership)
 - Scotlog Storage Ltd – 16 December 2017 - 5 May 2014;
 - G.D.M. & Sons (Recycling) Ltd – 22 March 2001 – 27 May 2005; (dissolved)
 - The MacDonald Group of Companies Ltd – 22 March 2001 – 5 May 2014; (dissolved)
 - New County Planing (Scotland) Ltd – 16 August 2001 – 19 January 2012; (dissolved)
 - Kenneth Stewart (Strathpeffer) ltd – 24 August 2001 – 3 April 2014; (dissolved)

MacDonald Surfacing Ltd – 17 December 2001 – 12 April 2012; (dissolved)

HQ Recyc Ltd – 15 August 2002 – 5 May 2014; (dissolved)

M K Quality Plant Hire Ltd – 22 August 2003 – 2 March 2014; (dissolved)

Highland Stevedoring Ltd – 29 May 2007 – 21 December 2009; (dissolved)

Quality Demolition – 2 June 2008 – 6 May 2014; (dissolved) (dissolved)

Premier Plant (Inverness) ltd – 4 June 2008 – 14 May 2014; (dissolved)

HQC Construction Ltd – 16 June 2008 – 27 January 2011; (dissolved)

Quality Highland Fabricators Ltd – 16 June 2008 – 28 April 2011; (dissolved)

Highland Recycling Ltd – 24 September 2008 – 14 December 2012; (dissolved)

Johnston Metals Ltd – 23 March 2009 – 15 May 2014; (dissolved)

Kirimar Heavy Haulage Ltd – 26 June 2009 - 27 January 2011; (dissolved)

DFL Civils Ltd – 21 March 2011 – 1 August 2011. (dissolved)

The June 2011 Public Inquiry

19. The written decision of 18 July 2011 can be referred to for its terms and arose out of an adverse report from DVSA. Extensive evidence was given about the relationships of the various businesses. For the purposes of this case and for ease of reference, in 2011 the evidence of entities was captured in these paragraphs:

“Application by HQ Recyc Ltd – OM 1095185 (SC 234806)

1. H Q Recyc Ltd (formerly known as Highland Recycling Ltd – name changed on 21/3/2011) (Scottish Companies House No SC234806) of 12 Lotland Street, Inverness applied by application dated 23 February 2010 for a standard national goods vehicle licence to operate 25 vehicles and 8 trailers. The director part of the application form was left blank. The form was signed by Mr Gary Macdonald as owner. Mr Colin Thomson was nominated as transport manager. It was indicated at the answer to Q7 (b) that OM0033766 in name of Highland Quality Construction Ltd “will be reduced accordingly”. My office undertook Companies House searches which showed Mrs Michelle Macdonald to be company secretary and the sole current director to be Mr Gary Donald Macdonald appointed in 2002. Former directors included Messrs Malcolm Keith Leslie, Steven John McClenaghan and Colin Thomson (all for the same period of 1/1/2009 to 1/3/2010). There is another company Highland Recycling Ltd (Scottish Companies House No SC349039) which had name changes to Highland Recycling Ltd from Daviot Farms Ltd and DFL Civils Ltd. Mr Gary MacDonald (McDonald) is sole director. There is a further company DFL Civils Ltd (SC 395883). The application was processed so far but in view of connections with a licence held by Highland Quality Construction Ltd which held operator licence OM0033766 and in view of finance being offered in name of Mr Gary MacDonald (Farm) and only later a bank statement in name of Highland Recycling Ltd and also issues to do with the time the transport manager would have I directed that this application would have to be heard at public inquiry. My office also began to receive VOSA reports concerning the operation of vehicles connected to Highland Recycling/Highland Quality Construction and difficulties in establishing who was operating vehicles. VOSA highlighted to my office apparent connections between Daviot Farms – a partnership of Mr MacDonald and his wife Mrs

Michelle MacDonald; Highland Quality Construction Ltd; HQ Recyc Ltd; Highland Recycling Ltd; M K Leslie Ltd and H R L Scrap and Waste Solutions Ltd. On 2 November 2010, the applicant company H Q Recyc Ltd through Mr Colin Thomson sought to withdraw the application. I decline to allow that given what required to be inquired into in relation to all the connections.

“Highland Quality Construction Ltd (in receivership) - OM0033766 (SC154167)

2. Highland Quality Construction Ltd was granted a standard national goods vehicle operator licence in 1995 and had authorisation for 48 vehicles and 18 trailers. The directors were as aforementioned in paragraph 1. Mr Colin Thomson was nominated transport manager. This company went into receivership in June 2010, KPMG appointed. In view of the receivership and the receiver not exercising to continue the licence under regulation 31 of the Goods Vehicles (Licensing of Operators) Regulations 1995 the licence was revoked on 6 September 2010. There was regulatory history for that licence in that a warning was given following a conviction at Inverness Sheriff Court on 16 March 2010 in relation to an insecure load and no test certificate available. The first report of the receiver dated 16 August 2010 related to three companies being Highland Quality Construction Ltd., The MacDonald Group of Companies Ltd. and Kenneth Stewart (Strathpeffer) Ltd. Paragraph 3 set out the background and reasons for insolvency and the intercompany relationships. The failure of the companies was attributed to a substantial downturn in business in the preceding six months and monies withheld in a contract for work on the M80, which strained cash flow.

“Gary MacDonald & Michelle MacDonald T/A Daviot Farms – OM1093265

3. A standard national goods vehicle operator licence was granted to Gary MacDonald and Michelle MacDonald on 14 June 2010 and is authorised for 4 vehicles and 2 trailers. The application was dated 27 November 2010 and lodged days thereafter. The operator made a variation application – online on 1 July 2010 – to add 12 Lotland Street as an operating centre and to increase authorisation to 10 vehicles and 6 trailers. Mr Colin Thomson is the nominated transport manager. In view of the connections between this licence and the company in receivership and the VOSA Traffic Examiner inquiries, I decided that this licence and the variation application needed to be considered at Public Inquiry.

“HRL Scrap & Waste Solutions Ltd – application OM1100262

4. This company which has Gary MacDonald as its sole director has applied for a restricted licence for 6 vehicles and 2 trailers to operate from Longman Drive, Inverness. VOSA Examiners found AE54AED carrying scrap cars and without an operator licence on 27 August 2010. In view of this unlawful use and the connections with the other licences and applications I directed that this application would have to be heard at Public Inquiry.

“Farm Haulage Ltd – application OM1103823

5. In the weeks prior to the Public Inquiry I became aware of an application by Farm Haulage Ltd (SC 395464) of Lairgandour Farm, Daviot for a standard national licence for 6 vehicles and 2 trailers, the named sole director of that company being Stephen (otherwise Steven) MacDonald (b1987, appointed 14/3/2011) and transport manager Mr Donald MacDonald of Inshes, Inverness. I reasonably surmised (and it turned out accurately) that Stephen MacDonald was the son of Gary MacDonald and Donald MacDonald his grandfather. It was too late to give notice to call this application to the instant conjoined Public Inquiry but at the start thereof I indicated to parties and their agents and to VOSA that I knew of this application and its details as aforementioned. This application remains undecided awaiting my decision in the instant case. Interim authority has been refused.

“M K Leslie Ltd – OM 33474

7. M K Leslie Ltd was granted a standard national operator licence in December 1994 and has current authority for 22 vehicles and 3 operating centres, respectively at

Staneyhill Quarry, Lerwick, Shetland at 18 Lotland Street and 50 Seafield Road, Inverness. The directors are Messrs Malcolm Keith Leslie, Harry Anderson, Karl Davidson, and Wayne Leslie. The shareholders are Messrs Malcolm Leslie and Harry Anderson. Mr Malcolm Leslie is the transport manager. As mentioned in paragraph 1 above Mr Leslie was a director of Highland Quality Construction Ltd. and of H Q Recyc Ltd.

“Conjoined Public Inquiry

11. Mr Whiteford raised a preliminary issue in relation to OM1093265 in name of Gary and Michelle MacDonald T/A Daviot Farms. His client, Mr Gary MacDonald, at all times intended this to be a sole trader licence in his sole name. I was directed to the application form and finance which were in sole trader name and Mr MacDonald had signed as owner. There had been confusion between the Farm which is a partnership of both and this haulage business which is a sole trader. I therefore queried why Mrs MacDonald had been named at all and was told that this was down to Mr Colin Thomson who had filled in the forms even though Mr MacDonald had signed them. Mr Thomson was aware that Mr and Mrs MacDonald owned the Farm. Neither Mr MacDonald nor officials at Leeds had picked up that she was not a partner and it had not been noticed by Mr MacDonald when he got the licence and discs. There had not been a change of legal entity as there had not been a partnership in the first place. The variation application had been made by Gary MacDonald trading as Daviot Farms.

“Mr Gary MacDonald’s evidence

17. Productions were lodged for Mr MacDonald including a business structure diagram prepared by his accountants showing which of his businesses did what and also what companies he had which were dormant and which were winding down. It is important that I record here the content of that diagram. **Daviot Farms (Mr MacDonald as sole trader)** (which my office has as him and Michelle MacDonald) undertakes agricultural contracting, farming and plant hire. A new company incorporated on 14/7/2010 called **Daviot Farms Ltd.** undertakes civil engineering and fabrication. Another new company **HRL Scrap & Waste Solutions Ltd** undertakes scrap and waste services. A previous company Daviot Farms Ltd incorporated on 24/8/08 changed its name to DFL Civils Ltd on 14/7/10 and to Highland Recycling Ltd on 21/3/11 is being wound down. A previous company Highland Recycling Ltd incorporated on 31/7/02 changed its name to HQ Recyc Ltd on 21/3/11 and is being wound down. A new company DFL Civils Ltd was incorporated on 21/3/11 and is dormant. A new company HRL Recycling Ltd incorporated on 15/6/10 is dormant. Three other companies being Quality Demolition Ltd incorporated on 2/6/08; Johnston Metals Ltd incorporated on 12/5/08 and MacDonald Surfacing Ltd incorporated on 17/12/01 are dormant.

“20. Mr MacDonald said that his wife has no interest in the transport business which trades as Daviot Farms. They own the actual farm. He did nothing in relation to the discs and licence being in their joint names and now agreed that he should have dealt with that. He was seeking an increase in that licence to 10 vehicles and 6 trailers and operating centres at 12 Lotland Street, Inverness and the farm. He said that it was a coincidence that his companies went into receivership on 14 June 2010 and he and Michelle were granted the licence in their names within days and that these vehicles were for haulage. Within days again he had applied for a variation to increase the authorisation as he needed vehicles for haulage to keep the business going. At no time had VOSA interviewed him about his business use of vehicles.

“23. The application by Farm Haulage Ltd was by his 25 year old son who wanted a venture of his own in the farming industry. He could appreciate how it looked to me. It had nothing to do with his businesses. His father works on the farm and has an HGV licence. His father and his son want to have a licence to transport livestock.

“Mr Ronald Dyce’s evidence

24. Mr Ronald Dyce is general manager and employee, not a director, of HRL Scrap & Waste Solutions Ltd, which is owned by Mr MacDonald. The business is buying and selling scrap and most dealings are with Highland Council and Scottish and Southern Energy. There are 5 employees of which he is one. Not all of the loads require haulage – for example the Council delivers to them. In relation to the use of vehicle AE54 AED he had taken advice from one of his sources (revealed as Mr Thomson’s father) and he considered that as it was a breakdown vehicle it did not need a licence. They were carrying scrap cars – MOT failures. They bought the vehicle to recover cars and still have it but are not using it. At the interview with the Traffic Examiner the need for a licence was explained and an application was lodged in November 2010.

“Mr Colin Thomson’s evidence

26. Mr Thomson was a director of HQC and CPC holder and is CPC holder for Daviot Farms. He had assisted with the application for that licence and had put in Michelle’s name by mistake. He had been confused as the farm is in name of Gary and Michelle MacDonald. The advert was in name of Gary MacDonald. He has been employed by Gary MacDonald since the demise of HQC and transport manager since 14 June 2010. The variation proposed an increase to 10 vehicles and 6 trailers.

“Summary of my decisions

53. The application by HQ Recyc Ltd – OM 1095185 can be treated as withdrawn.

“54. The operator licence held by Gary MacDonald and Michelle MacDonald T/A Daviot Farms – OM1093265 will be amended by the deletion of Michelle MacDonald’s name. That licence will be suspended for 4 weeks with effect from 23.59 on 31 July 2011. During the period of suspension the vehicles currently specified on the licence will not be used on this or any other operator licence in this or any other traffic area. Mr MacDonald and Transport Manager, Mr Colin Thomson, are warned as to their repute. After the period of suspension has passed, whenever that is, the variation application to increase the authorisation to a total of 10 vehicles and 6 trailers can be granted.

“55. The application by HRL Scrap and Waste Solutions Ltd – OM1100262 will be granted to the extent of 3 vehicles and 2 trailers only. Paragraph 50 above gives guidance in respect of any future variation.

“56. The operator licence held by MK Leslie Ltd – OM0033476 will be curtailed to 15 vehicles with effect from 23.59 on 7 August 2011 for eight weeks and to 17 vehicles thereafter”.

Public Inquiry – 20 October 2017

20. The call up letters and briefs for this conjoined Public Inquiry were despatched on 15 September 2017 calling the operators to Inverness on 20 October 2017. At issue were changes to those involved with the licences, including transfer of ownership to Mr MacDonald and that Colin Thomson and Gary MacDonald had required to give undertakings to the Secretary of State not to act as directors, manage or in any way control a company.

Further development – Daviot Group Ltd

21. In October 2017, press reports emerged of the failure of the Daviot Group Ltd (DGL) and significant pre-tax losses and job losses. The reports referred to Wyvis Holdings and Rachel Kimbrick and David Mitchell. A liquidator had been appointed. The Daviot Group Ltd

(OM1115960) holds an operator licence. The changes of directors whereby Mr Gary MacDonald and Mr Colin Thomson had resigned had been notified to my Office. This turn of events for the Daviot Group Ltd was referred to during the Inquiry.

Finance

22. The call up letters required the respective operators to provide evidence of continuing financial standing. This was done and thus financial standing, by itself, was not an issue.

Public Inquiry

23. The Public Inquiry convened on 20 October 2017. Those present were Mr Lee Thomson, Director of MGL; Mr Gary MacDonald sole shareholder of MGL; and Mr Colin Thomson, transport manager. Mr T Docherty, Solicitor, Edinburgh appeared for MGL. Mr R Dyce, director of HRL appeared for that company which did not have legal representation. Mr Docherty was not in a position to formally act for HRL but his was an amicable presence, with no conflict of interest as Mr MacDonald owned both companies and was present. No one else had a claim over ownership of the companies. Mr William MacDonald, former transport manager, for MGL was present. Mr M Dunlop, transport consultant, was present as a person consulted by the companies.
24. At the conclusion of the Inquiry, Mr Docherty asked for time to lodge further documentation. I was content to allow that.

Productions

25. For the Inquiry, Mr Docherty lodged a folder with 6 productions being:-
1. Annual report and unaudited financial statements for the year ended 31 March 2017. [I have noted that the director resignation dates are not as at Companies House].
 2. Letter of 17 October 2017 from A9 Accountancy to Mr N Willetts, Financial Controller of MGL, that all tax returns and payments are up to date;
 3. CV Colin Thomson;
 4. Achilles paras 1 – 18.3 audit by James Coutts over 7-8 June 2017 and of Tealing Sub Station site;
 5. Statement of main terms of employment;
 6. Office of the Traffic Commissioner letter 17th November 2014 to Daviot Farms Ltd relative to proceedings on 26 September and 7 November 2014 before the Deputy Traffic Commissioner
26. The oral evidence and partial submissions were concluded on 20 October but Mr Docherty asked to submit further documentation and I was content that would be useful and granted that request.
27. Further documentation was provided by Mr Docherty under cover of emails of 3 November and 11 November 2017:
1. Written submissions for Deputy Traffic Commissioner Mr McFarlane considered in relation to the September 2014 inquiry.

2. Page from 2017 call up letter.
3. Service contract between Daviot Farms (Holding) Ltd and Gary MacDonald.
4. Settlement agreement between Daviot Group Holdings Ltd and Gary MacDonald.
5. Advice from BBM Solicitors Ltd.
6. Note by Senior Counsel and Junior Counsel for Gary MacDonald.

Preliminary matter – outstanding variation applications

28. As a preliminary matter, Mr Dunlop gave evidence on the variation applications: the first was to remove William MacDonald and to appoint Colin Thomson; the second on 25 January 2017 to add the operating centre at Kyleakin; the third to add Lairgandour Farm, Daviot, and to expand the licence to 15 vehicles and 8 trailers. He acknowledged that there had been a failure to notify change of ownership of the operator company.
29. In respect of operating centres, the plan had been effectively for HRL to swap its Longman base for MGL's at Carsegate. However, with the variation to have the operating centre at the Farm, the Longman Drive site was not required for MGL. The Daviot Group was based at the Farm, an enormous site. MGL could safely move there. The quarry site at Kyleakin is also an enormous area and the reason for it as an operating centre is to have parking when working out there.

Mr Lee Thomson's evidence

30. Mr Lee Thomson (b.1972) is the sole director of MGL. He confirmed that Mr Gary MacDonald is the 100% shareholder. Mr Thomson described his career working in landscaping and moving into construction. He was a director of the Daviot Group Ltd from 2011 – 2015. MGL's work is in heavy civil engineering. He, Gary MacDonald, Colin Thomson and William MacDonald came out as a team from the Daviot Group.
31. MGL has two principle contracts at present – a substantial development with Marine Harvest and the Quarry in Skye; flood defence work for SSE in Tayside, with Amey; and in addition future SSE work at their National Training Centre, Perth. The company has two broadband contracts in Skye, work on a community campus in Inverness; contracts with Global Infrastructure and Aggregate Industries. They have a growing workforce of 65. 5 employees work on the HGVs and another 10 or 12 have LGV licences and work in multi-disciplinary roles. 52 of the 65 are employees on PAYE; the balance are self-employed working uniquely for them. He has access to external and internal H.R. support. William MacDonald and Colin Thomson administer processes for drivers' hours and vehicle maintenance. Colin Thomson reports to a monthly operations meeting. Mike Dunlop does auditing as well.
32. He was appointed a director on 16 September 2016 not at incorporation on 5 March 2014. His other Companies House appointment is for Lee Thomson Ltd which is a consultancy. At the time when he became a director, Michelle MacDonald and Stephen MacDonald were the shareholders then Michelle MacDonald. At the time of his appointment as director on 16 September 2016 Gary MacDonald was doing a final settlement with the Daviot Group selling his shares, otherwise he would have been the shareholder of MGL; that when Mr Thomson became director the shares would transfer from Michelle MacDonald to Gary MacDonald. This restructuring of MGL had been planned through 2015/16 when relationships were breaking down in the Daviot Group. He resigned from the Daviot Group in December 2015, following 3 months consultations, due to the principal shareholder, Mr Rehman's interactions. There was a meeting with the Daviot Group shareholders in London at the end of November 2015 but he felt undermined. Then it was discussed that Gary MacDonald would sell his

shareholding. Whilst Mr Thomson resigned as a director in December 2015, it took Gary MacDonald to 2016 to sell his Daviot Group shares.

33. MGL was set up by Gary MacDonald's son, Steven, to run a small groundworks business but that did not work for Steven. In the interim it was sold to Michelle MacDonald and after Gary MacDonald exited Daviot Group, Gary MacDonald would take the shareholding and MGL would be re-structured with the team which had left Daviot Group. Their positions had become untenable given Mr Rehman's behaviours.
34. He was aware of the liquidation of the Daviot Group two weeks ago. David Mitchell, a director, had approached Gary MacDonald as shareholder and himself as director to discuss the potential as a going concern. There were preliminary ad hoc discussions. There was a bit of emotion involved and varying positions. They could not do due diligence. Then they heard the business had gone under. The liquidator had not been in touch.
35. His day-to-day role in MGL is director, running and promoting the business and having full statutory responsibility for the company. He is the commercial and construction director with a role in pricing, promotion and health and safety. He has full responsibility for the operator licence undertakings. He has the support of Mike Dunlop, William MacDonald and Colin Thomson and an in house health and safety man, Jim Mackay. They have Achilles certification, a pre-requisite of the SSE work. This involves audits of their competence and he referred to the productions to illustrate what went into such audits. Gary MacDonald has a hugely significant role in the business day to day operations. He as a director is responsible to Gary MacDonald as the shareholder but day to day, Gary MacDonald is operational. This was as in the Daviot Group over a good number of years and had not changed. Gary MacDonald is usually in boiler suit than business suit. He is one of the resources on the ground. Mr Thomson is not hands off given the size of the business. He too goes to sites.
36. Whilst Mr MacDonald is the 100% shareholder, Mr Thomson said he makes the decisions. They had had this relationship before when Gary MacDonald was defending the disqualification. Whatever the outcome of the disqualification, they had decided that he, Mr Thomson, would be running the business. They took advice when Gary MacDonald was disqualified. They did not want to lose Gary MacDonald's operational expertise. They got advice from BBM who were supporting Gary through the disqualification. It got to the stage where it was not financially viable for Gary to defend the disqualification. Then they had to get advice on where that left Gary in an operational role in the business. The advice was that so long as Gary MacDonald was not making decisions for the company or promoting it, day to day operational was acceptable. He had not been present at the 2014 Public Inquiry but that gave them the confidence it had been tested.
37. Gary MacDonald does not push him around. They have a good working relationship as proven over the last 7 years. His own skill set is different to that of Gary MacDonald. Gary is hands on and is shrewd and smart, whereas he runs the business. The same relationship was in place with HQC and was successful. The staff are clear that he, Mr Thomson, is director and responsible for running the company. Operationally people see their "box" as immediate supervisor. There is a lot of respect for Gary MacDonald operationally but people are clear that, he, Mr Thomson runs the company. Gary MacDonald owns the business and has strong operational respect.
38. Michelle MacDonald had been shareholder for a short period. With Daviot there was a shareholder agreement which prevented Gary MacDonald from being a shareholder of MGL. So at the time Mr Thomson was appointed director, Mr MacDonald was in an exit strategy from Daviot Group. The plans were for Mr MacDonald to be the shareholder. They had taken advice and had planned it well with Daviot but they could not influence the majority shareholder in Daviot.
39. He accepted that there had been a failure to intimate the change of shareholding in MGL to the Office of the Traffic commissioner. They had notified the directorship but not the

shareholding. He took responsibility. They had taken advice and notified the director. He accepted that they should have. The Person with Significant Control had to be dealt with and they went back to BBM. They were told that there was nothing stating that a disqualified director could not be a Person with Significant Control. It would have an impact significant if there were. He understood that the Traffic Commissioner needed to know with whom she was dealing and that was a crucial feature given trust. Had he been aware of the need to intimate, he would have done it at same time as change of director. As a company they were not trying to hide Gary MacDonald. Michelle MacDonald acquired the business in trust and that was the vehicle for going forward.

40. There is no link between MGL and HRL other than Gary MacDonald being shareholder and some trading. The companies are run separately and he is not involved with HRL.
41. Asked about the impact of regulatory action on the company, revocation and disqualification would have a huge impact. A suspension would impact on what they sell and deliver. It would affect their SSE work not to have the capability of their own transport; they are expected to have in house transport and that speciality is a comfort for them. It is part of their USP that they have their own employees and plant and equipment. They intended to increase the number of vehicles and trailers from current 5 and 5. If their application to increase was refused, that would affect the strategic opportunity they have with Aggregate Industries to establish a road surfacing division. The vehicles are very important even if only 5 and 5.
42. He confirmed that he is not related to Colin Thomson. Gary MacDonald and William MacDonald are not related.

Mr Gary MacDonald's evidence

43. Mr MacDonald recalled being at Public Inquiry before me in the past. He confirmed he is the sole shareholder in MGL. He confirmed Mr Thomson's evidence in relation to the situation with the Daviot Group and Mr Rehman. It had been a difficult time and exit was the only way but took longer than hoped. He had not been shareholder of MGL because when he was at Daviot Group Ltd he was prohibited by agreement with the shareholder, Mr Rehman, from taking control of any other company. In Daviot Group he was less hands on. In 2011 he was director and hands on. Hands on is what he does, is the current position and is what he enjoys doing, since he was 16. He would take instructions if instructions are needed. They have 2 large contracts and he spends 90% of his time in Kyleakin. All procedures are in place. The interface he has with Lee Thomson is on site.
44. The impact of the suspension imposed by the Traffic Commissioner in 2011 was that he vowed he would never be back at an Inquiry again. It did have an impact. He thought the business had the right people in place and trusted them to make sure it was compliant.
45. Regarding the director disqualification undertakings, he had taken advice from BBM about the impact of the disqualifications on him and Colin Thomson and it was quite simple - do not manage the company, he could be a site manager but not at board level or promotion. That was quite easy for him to fall back into an operations role.
46. With reference to the operator's production 6 and the Inquiry before Deputy Traffic Commissioner McFarlane on 26 September and 7 November 2014, he said he was not at any preliminary hearing before then but was at the Inquiry. The director disqualification was what most of the conversation was about. He could not recall what he said specifically but to not being a shareholder and not being responsible for the business. (At this point in his evidence, I observed that seemed to be evidence about his role with Daviot and not MGL). He had no issue about discussing the director disqualification with the Deputy Traffic Commissioner and had no reason to hide.

47. In answer to questions from me, he explained that he had been a shareholder of Daviot and then an employee. He had wanted out and it took until late 2016 to get out. It cost him to get out. Daviot Group Ltd leased from him at Daviot Farms. With new company appointments made in Daviot Group, he could see where it was heading and he was worried for the whole.
48. He and Michelle Macdonald are partners in the farm. His son Steven became independent in 2015 and so Michelle became the shareholder. They did not change that until he exited from Daviot. He became the shareholder rather than Michelle as to the outside world that was important given his history - that Mr Gary Macdonald owns the business. It would be spurious if Michelle owned the business.
49. There is no bank facility, no pot of gold. It has to be a cash business and Lee Thomson will decide what happens within the business. Lee consults him for an operational point of view. Their background is in surfacing and quarrying. For the Perth SSE job there was no consultation with Lee. The delivery of flood prevention in Dundee had been successful. He did not need to be involved in the pricing of jobs.
50. He and Ronnie Dyce have been friends for a long time. He funds the business as an investment and Mr Dyce runs it 100%. Mr Dyce does not account to him though he would expect a call if there was anything important. His accountant would make him aware if there were any issues

Mr Ronnie Dyce's evidence

51. Mr Dyce is director of HRL and V8 Cafe and works 7 days a week buying and selling scrap metals (copper). He currently operates 2 vehicles. He is moving to a smaller yard and does not plan on expanding. He is now at 2-3 Carsegate Road North. The business is successful. He could not buy out Mr Macdonald's interest. He has so much respect for Mr Macdonald. He knew he had been disqualified as a director. Loss of HRL's operator licence would have a big impact on the business.

Mr Colin Thomson's evidence

52. Mr Thomson's cv was produced. He sought to be transport manager for MGL. He had been at an Inquiry before Deputy Traffic Commissioner McFarlane at which the disqualifications and his role in Daviot Farms Ltd had been discussed. After 17 November 2014, he was transport manager for Daviot Farms Ltd. In respect of Daviot and Mr Rahman, his involvement was focussed on the operator licence as he was not a director or shareholder. He did have dealings with him.
53. In respect of the shareholding of MGL not being intimated to the Office of the Traffic Commissioner, it was news to him that should be done. He had intimated a conviction on the MGL licence to be open and honest. He had also intimated his resignation from Daviot on 30 September 2016 as that was when he put in his notice to leave and take up with MGL. He wants to be transport manager for MGL and is on the Daviot Farm licence.

Mr Michael Dunlop

54. Mr Dunlop is a transport consultant with his own company. He assists William MacDonald and Colin Thomson on the transport side and does audits and makes variation applications. One is for the Kyleakin site and the other is to transfer MGL to the farm. That was done when it was noticed that Daviot Group was downsizing and MGL could make more use of the farm especially as it belonged to them and was where maintenance was. He had never had involvement in intimating anyone's shareholding. He uses Companies House differently now and asks. There is no question about shareholding. He did not feel that anyone was trying

to hide from the Office of the Traffic Commissioner that Mr Macdonald and Mr Thomson were disqualified. He said to his clients before the preliminary hearing that they should bring it up in interests of transparency even if to their detriment. He did not know the shareholding had changed.

55. In respect of the Daviot Group liquidation, he himself was a creditor and helped the then transport manager write to the Office of the Traffic Commissioner. He also copied the liquidator's letter to Leeds.

Submissions on 20 October 2017

56. In submissions, Mr Doherty accepted that section 22 of the 1995 Act required intimation to be made. There is no specific reference in Statutory Document No 6. Advice had been taken on the question of director disqualification and the impact of Gary Macdonald being 100% shareholder. They had been careful. He was instructed to offer to let me see the legal advice taken. These are honest people with the safe operation of vehicles. Mistakes can be made. It was unfortunate and bitterly regretted. He submitted that they had made an innocent mistake and that repute was intact. The operator licence was of extreme importance and without it, the business would not survive. The accounts have been lodged. Here were responsible people trying to do things the right way. They had a good name for road safety.

Further information from Mr Docherty

57. The further information received is noted earlier in this decision. It constitutes legal advice and would normally be legally privileged client:solicitor/counsel. I was asked to treat it as if given in private session. Thus, I do not rehearse it in this public document.

Consideration of the evidence and my decision to reconvene the Inquiry

58. This case concerns the repute and material change of MGL which holds a standard licence and the fitness and material change of HRL which holds a restricted licence. The sole owner of MGL is an individual, Mr Gary Macdonald and he is the majority shareholder of HRL. The legislation is different in respect of standard and restricted licences so I will begin my considerations with MGL and return to HRL later.
59. Mr Gary Macdonald was at a Public Inquiry before me in 2011 when I had to consider a very tangled weave of entities. My written decision exposes just how difficult it was for DVSA and my own Office to know with whom we were dealing. Mr Macdonald is a serial entrepreneur who is very alive to the benefits and devices of limited liability. As Parliament has recognised through the creation of such limited liability, there is a commercial benefit to the limitation of liability as it helps spread the risks of commercial endeavour. However not all play the game, so to speak, and thus the Companies Acts provide for the disqualification of directors either by order of a court or by undertakings to the Insolvency Service. Gary Macdonald is a disqualified director for the reasons set out earlier in this decision. I regard director disqualification as a very serious matter indeed. The disqualification of a director does not happen easily or without a great deal of obstruction of those who would try and recover for creditors or understand why debts have not been met. It is a mark of there having been dishonesty in relation to the duties of a company director. Mr Macdonald was not new to company insolvency. However, it is very clear that he did not co-operate or limit the damage to creditors. As many do, he pled in this case that it was the costs of defending himself which led to the giving of the undertaking. I place no weight on that assertion especially given the length of disqualification. It is also very apparent from the facts in this case - that is the Companies House entries and the use of entities as seen in the 2011 case, that Mr Macdonald is one who will place family members in convenient roles - Mrs Michelle Macdonald's name comes and goes as to lesser extent so does that of son Steven.

60. Much was made of Deputy Mr McFarlane being told of the disqualifications and being reassured. Unfortunately I did not have with the Public Inquiry papers for the 2014 Inquiries or any transcripts of what was said to him (for that was in context of a licence held by Daviot Farms Ltd) and at this last lap of making my decision I have paused to consider whether I should obtain such and re-open this Inquiry. I have decided that I must do so for I am tending in the direction of ordering revocation of the MGL licence and given the consequences for the business of such an order, I must be as fair and as informed as I can. Thus even though there has been a delay in issuing my decision, I have to delay in the interests of any possibility of the MGL licence surviving.
61. The reconvening of the Public Inquiry would allow Mr Docherty to address me orally on his further productions and on in the law relating to the participation of disqualified directors who are Persons with Significant Control. It will allow HRL (whether through Mr Dyce or an agent instructed in the interests of him or HRL) to address me on whether I should or could distinguish the HRL restricted licence from MGL's standard licence.
62. The Inquiry was to be reconvened as soon as diaries could coincide, in Edinburgh (to facilitate the diaries) and would also consider a road safety matter which had come to my attention but which was within the knowledge of MGL for MGL had intimated the matter, namely a wheel loss incident of 21 May 2018.

20 December 2018 Public Inquiry

63. On 20 December 2018, I held a Public Inquiry to consider the goods vehicle operator licences held by MacDonald Groundworks Ltd (MGL) and H R L Scrap & Waste Solutions Ltd (HRL). The usual Public Inquiry call up letters and briefs were issued in advance. The attendees at the Inquiry on 20 December 2018 were Messrs Lee Thomson (sole Director of MacDonald), Gary MacDonald (100% shareholder thus owner of MacDonald and Person with Significant Control, majority shareholder and Person with Significant Control of HRL), Ronald Dyce (sole Director of HRL and minority shareholder thereof), Colin Thomson (nominated as transport manager for MacDonald and a person disqualified under the Companies Acts), William Martin MacDonald (current transport manager for MacDonald), Michael Dunlop (third party transport consultant engaged by MacDonald), and Vehicle Examiner A Williams (DVSA).
64. Mr R McIlbride QC instructed by Mr T Docherty, Solicitor, appeared for MGL. By choice, HRL did not have legal representation. Mr Dyce, Director, spoke for HRL.
65. This Public Inquiry diet flowed from Directions issued by me on 4 July 2018 following the Inquiry hearing on 20 October 2017.
66. The call up letters for this Inquiry referred to said Directions. I am mindful that as well as giving a decision on the repute of MacDonald and fitness of HRL, I have to give decisions on variation applications made by MacDonald to add Colin Thomson as transport manager; to add a new operating centre at Kyleakin Quarry, Isle of Skye, to add Lairgandour, Daviot, Inverness-shire as an operating centre, and to increase overall authorisation on the MacDonald licence from 5 vehicles and 5 trailers to 15 vehicles and 8 trailers.
67. HRL, which holds a restricted licence, has outstanding applications to add 3/5 Carsegate, Inverness and 12 Henderson Road, Inverness IV1 1SN as operating centres. In a letter of 12 December 2018 sending his bank statements for this Inquiry, Mr Dyce said he wished to reduce the licence authority to 4 vehicles and 2 trailers.
68. At the heart of this Inquiry were 2 issues. Firstly the role and place of Mr Gary MacDonald in both licences and the relevance of his presence to repute and fitness of the respective licences. Secondly in relation to MGL there was an adverse report from DVSA concerning an adverse maintenance investigation, an 'S' marked wheel related prohibition at annual test on

22 January 2018, and a trailer wheel loss incident and 'S' marked prohibition of 21 May 2018. I heard oral evidence from Messrs MacDonald, Dyce, Williams, Dunlop and Thomson.

69. I heard legal submissions from Mr McIlbride. I do not rehearse the oral evidence. The oral evidence was recorded and a transcript can be provided should the need ever arise.

Finance

70. As is usual, the operators had to show evidence of their finance for the licences. These operators were each able to show very comfortable balances and thus finance was satisfied. It is not in doubt that these businesses are currently solvent and successful.

Inquiry documentation

71. In preparing this decision, I have had available to me the undernoted documentation:
- (a) Public Inquiry brief for the Inquiry of 20 October 2017 – pages 1-145
 - (b) Public Inquiry brief for this hearing – paged 146- 478
72. Both operators brought boxes with their recent maintenance records and these were returned to them at end of the Inquiry.

MGL productions:

73. Inventory of Productions lodged by Mr Docherty for 20 October 2017
74. Report by M Dunlop dated 29 May 2018 relative to wheel loss incident on 21 May 2018
75. Bank statements
76. Company Director Disqualification Undertaking signed by Gary MacDonald on 29 April 2014 for 8 years from 20 May 2014 and Schedule of Unfit Conduct
77. Company Director Disqualification Undertaking signed by Colin Thomson on 29 April 2014 for 6 years from 20 May 2014 and Schedule of Unfit Conduct
78. To Whom it may concern statement dated 19 December 2018 from A9 Accountancy stating MacDonald turnover of £13million in year to 31 March 2018 and that up to date with corporation tax and VAT
79. MacDonald unaudited financial statements for year ended 31 March 2018
80. MacDonald Annual Report and Unaudited Financial statements year ended 31 March 2018
81. PMI inspection report dated 28 September 2018 for trailer
82. Copy wheel torque register

HRL productions:

83. Bank statements

List of Authorities for MacDonald

84. R v Seager [2010] 1 WLR 815
85. Secretary of State for Business, Innovation and Skills v Chohan (otherwise Re UKLI Ltd) ` 2015 BCC 755
86. Companies Act 2006 sections 790A and 790C and Schedule 1A paras 1,2 and 4

The wheel loss and DVSA concerns re the MGL operation

87. DVSA undertook a maintenance investigation of the operator in February 2018 following one of the operator's vehicles, V16 MGL, failing at annual test on 22 January 2018 and an 'S' marked prohibition issued. Maintenance is undertaken at the operator's registered office premises at Lairgandour, Daviot and the records are kept at the Farm Office there. The workshop is undercover, has a pit, roller brake tester and other facilities including a torque wrench and power wash. The trailers are maintained in house with vehicles going to Scania, Inverness. The annual test prohibition and failure was due to all 10 wheel nuts on nearside axle 2 being loose. The maintenance investigation was attended by Mr Colin Thomson and consultant Mr M Dunlop. The investigation was marked as unsatisfactory and the usual PG13F&G form was issued to the operator for response. The operator responded by way of letter dated 20 February 2018 from Mr Dunlop and also submitted a letter from Scania. That letter, dated 5 February 2018, acknowledged and apologised for serious failures on the part of their technician. Mr Dunlop gave assurances that his clients had reviewed their systems and in particular their internal procedures for wheel removals and re-torqueing.
88. On 21 May 2018, Examiner Cuthbert received a call from the Dingwall Police Road Policing Unit. STGO artic V80 MGL combination operated by the operator had suffered a wheel loss on the A835 near the Conon Bridge turn off at Leanig. The vehicle was driven by Mr Neil McIntosh who was unaware of the wheel loss until he stopped at the Kilcoy junction, some 2 miles further on. The front nearside outer wheel of the trailer detached and rolled alongside the trailer, crossed the southbound lane, struck a passing car, rebounded and hit the car behind the trailer causing extensive damage. There was dash cam evidence. Mr McIntosh claimed to have done his walk round check that day and the only defects related to lighting.
89. Examination of the inner wheel showed it loosely attached by one wheel stud and nut. The outer wheel was recovered and examined. (Photographs in the brief). The Examiner found that both wheels had suffered elongation of the stud holes, the inner and outer mating surfaces were in good condition with no pitting, corrosion or flaking present. The wheels had been removed some 2 weeks previously at a PMI to allow suspension repairs.
90. The Examiner was concerned that his maintenance investigation had been unsatisfactory including that driver defect books were not signed off confirming rectification. In respect of the wheel loss, clearly there had been a failing. It might have been in the re-tightening; it might have been poor daily walk round checking. Hi-visibility wheel nut pointers might have aided the driver but were not in use. From the torque register, he could not tell if the wheels had a final re-torque.
91. In oral evidence, Vehicle Examiner McIntosh who came in place of Vehicle Examiner Cuthbert who was no longer with DVSA, The Examiner looked at the operator's maintenance records. He recommended that when a trailer is tested that happens when the trailer is loaded especially if the trailer is carrying heavy loads. He had noted from the records produced at the Inquiry that a trailer had a defect to an inner tyre and yet there was no corresponding record on the torque register.

92. He was not present on 21 May and so had not seen trailer or wheels. His own theory was that the wheels were not fully clean, that the mating surfaces were affected by such. He came to such a view from the appearance of the studs and elongations. That the braking forces have pulled the studs back and forth. He was taking his opinion from the photographs in the brief.

Mr Dunlop's evidence in relation to the wheel insecurities

93. Mr Dunlop gave brief oral evidence. The wheel loss incident on 21 May was an extremely serious and distressing incident. Colin Thomson told him about it within an hour of it happening. He prepared a written report dated 29 May 2018, which also covered the failure at annual test on 22 January 2018. In his report he stated that he found Scania's written system to be poor and without a second retorquer before returning a vehicle to customer. In respect of the trailer wheel loss and second wheel insecurity on 21 May, he had looked at the use of that STGO trailer that day. Driver McIntosh had taken it from Inverness to Ullapool, loaded it with a dumper, then driven to Tornagrain, unloaded and then again to Ullapool. At Ullapool a digger was loaded and on way back from Ullapool, the wheel detachment occurred. Mr McIntosh was fully within his hours and breaks. The vehicle and trailer covered 400kms that day with 6hours 26 minutes driving without incident. He examined the trailer maintenance records and found the trailer received a PMI on 20 March with RBT. The torque register showed correct settings and re-torquing. Mr Dunlop interviewed the operator's mechanic who had undertaken the axle repair on 7 May and he said there were no outstanding issues when he released the trailer that day. Mr Dunlop interviewed driver McIntosh who has 35 years HGV driving experience including 24 years on STGOs. He said he had undertaken walk round checks start of the day and again after lunch at Ullapool given potential for punctures. As he was going uphill on the A835 to Tore he thought he might have a puncture and was going to pull over at a lay by a bit further on. Other motorists confronted him with the wheel loss. The police attended and charged him. DVSA attended and gave an 'S' marked prohibition.
94. Mr Dunlop's assessment of the reason for the wheel loss was the potential for strain and stress on the heavily loaded trailer given the winding nature of the loads and the Maryburgh roundabout but that said the trailer was designed to be able to go round. He recommended that MGL fit wheel pointers, that the STGO inspection frequency be reduced to 4 weeks and that there be toolbox talks to drivers on effective walk round checking and wheel checking. He could not identify a specific reason for the wheel loss. One theory was that the wheel had been damaged in the quarry. The driver said that there was a risk of punctures and that could have happened and the wheel sheered. The trailer was designed to carry heavy loads. The trailer manufacturer could not offer an explanation.
95. His view of the operator's fitters is that they are extremely competent. There is not cutting of corners and no intention to lose a wheel. The operator notified the wheel loss to the Traffic Commissioner – letter of 1 June 2018 [copied in the brief]. The operator has implemented the recommendations made by him in his 29 May report. Mr Dunlop and I had a dialogue about torque wrenches, settings and re-calibrations.

The Company Directors Disqualification Act Undertaking given by Mr Gary MacDonald

96. In these proceedings, for the first time, I was provided with copies of the respective Undertakings given by Mr MacDonald and by Mr Thomson. The Schedule to Mr MacDonald's Undertaking, which can be referred to for its terms, sets out the unfit conduct. It also records that Mr MacDonald did not dispute that Highland Quality Construction Ltd had an estimated deficiency towards creditors of £9,120,005.

Preliminary hearing in the case of Gary MacDonald t/a Daviot Farms OM1093265 and Daviot Farms Ltd OM1115960 - 14 January 2014 and later Public Inquiry for Daviot Farms Ltd

97. At the Public Inquiry on 20 October 2017, Mr Docherty referred to Mr MacDonald's appearance before the then Deputy Traffic Commissioner, Mr McFarlane. As I noted in my Directions of 4 July 2018 (paragraph 58) much was made of Deputy Mr McFarlane being told of the disqualifications and being reassured. I decided I should have regard to what Mr Docherty was saying and consider his point. Thus within the brief for this Inquiry, there are transcripts of the preliminary hearing of 14 January 2014 and of a Public Inquiry on 26 September 2014 and 7 November 2014. I have read these three transcripts. Given Mr Docherty's references to these earlier hearings I have drawn the following from the transcripts.
98. The preliminary hearing proceedings related to a sole trader licence held by Gary MacDonald and a licence held by Daviot Farms Ltd. It comes out of the preliminary hearing, that director disqualification are a possibility and that Mr Thomson thought this should be brought up. There is general dialogue about entities and legal processes and Deputy McFarlane takes from Mr Gary MacDonald and Mr Colin Thomson that there are Court of Session proceedings and that they are going to fight them. For reasons not apparent to me but perhaps simply an over-generous display of courtesy to Messrs MacDonald and Thomson in the room, Deputy Traffic Commissioner McFarlane more than once wishes them well.
99. The Public Inquiry proceedings of 26 September 2014 and 7 November 2014 concern the licence held by Daviot Farms Ltd OM1115690. Mr Colin Thomson was present as transport manager. Director Mr I Phillips was present for Daviot Farms Ltd. It is clear that the Undertaking given by Mr Colin Thomson was known to the Deputy Traffic Commissioner with a copy provided, and that it was discussed at that Inquiry. Evidence was taken from Colin Thomson about the circumstances of the Undertaking. Mr Thomson and Mr Gary MacDonald had resigned as directors of Daviot Farms Ltd. Mr Ian Phillips, a civil engineer by profession, gave evidence of his appointment as director – becoming director in May 2014 with Lee Thomson. This was Mr Phillips' first appointment as a director.
100. Deputy Mr McFarlane challenged Mr Thomson on the transfers by HQC. He also asked about who owned Daviot Farms Ltd (page 338 of the brief at 20A of the transcript) "But Daviot Farms Ltd was really Mr MacDonald's company, is it not? Is he not the sole shareholder?" to which Mr Phillips replied that he was not. Mr Phillips explained that the company was 51% owned by Mr Fasih Rahman with Mr MacDonald holding 49%. Mr MacDonald remained involved in the business in site operations. The Deputy Traffic Commissioner was concerned that Mr MacDonald would be making the decisions. He was concerned about Messrs MacDonald and Thomson and the repute of Daviot Farms Ltd.
101. The Inquiry was reconvened on 7 November 2014 and the transcript sederunt shows Mr Gary MacDonald to have been present as a witness. Deputy Mr McFarlane was handed a copy of the Undertaking signed by Mr MacDonald. Mr Docherty drew out evidence from Mr MacDonald about the demise of HQC and fighting against disqualification. Mr MacDonald denied dishonesty. In evidence, Mr Phillips confirmed that Messrs MacDonald and Thomson were still at Daviot Farms Ltd with Mr MacDonald being a shareholder and having good technical knowledge. He said that he and Lee Thomson were the decision makers. Deputy Traffic Commissioner Mr McFarlane discussed the concept of shadow director with Mr MacDonald and asked him further questions about himself and the businesses. Mr MacDonald has Daviot Farm and lives there. By summer 2015, Daviot Farms Ltd will be run from the Farm. Mr MacDonald stated that he liked to be out shifting the muck. He knew which side of the line to stay on and he was happy on that side of the line. Mr Docherty provided written submissions. Ultimately, the Deputy Traffic Commissioner found that he never had

any issues with Mr MacDonald and he did not find against the repute of Daviot Farms Ltd, the licence holder.

Daviot Farms (Holding) Ltd and Mr MacDonald/Legal advice to Mr MacDonald

102. Mr MacDonald had a service contract with Daviot Farms (Holding) Ltd – it pre-dated his disqualification. He entered a Settlement Agreement dated 23 August 2016 with that company.
103. Mr MacDonald took legal advice in April 2013 from Senior Counsel Alistair M Clark QC and Junior David M Thomson and in March 2017 he took advice from BBM Solicitors (Ms Heather Clark) and copy documentation reflecting that advice was within the brief for this Inquiry at pages 378 to 393. I have to give some outline of the areas where advice was sought as without disclosing such, my own reasoning may not be clear.
104. In 2013 he asked for Counsels' advice on the effects of a disqualification order/undertaking in relation to Daviot Farms Ltd and whether permission could be sought for him to remain as a director in that company. There was discussion about shareholding and the boundaries between shareholding and shadow directorship in terms of what control could be exercised. Counsels' Note went through de facto and de jure directorship and the jury question which arises in determining a de facto directorship. They considered what was meant by "management" and the proposal that Mr MacDonald might be employed as an Operations Manager with Daviot Farms Ltd with Lee Thomson being director. He also asked about himself and Mr Colin Thomson being employed by his sole trader business and contracting their services to DFL or alternatively contracts be won by DFL and run through the sole trader business.
105. Counsel set out the purposes of disqualification – "to protect the public against the future conduct of a person whose past record of behaviour indicates that he is a danger to creditors and others". Whatever arrangements were put in place must be real and genuine. Mr MacDonald ought not to be prevented from acting as a "contracts manager".
106. By March 2017 the legal advice was being sought in context of the 8 year disqualification of Gary MacDonald. It was noted that there was no specific statutory provision which stated that a PSC was automatically in breach of the licence undertaking. Ms Clark concluded that the disqualification and PSC regimes are distinct. Mr MacDonald may be a shareholder and PSC. "However, if Gary actually exercises significant influence or control over the Company by taking shareholder action personally or otherwise by influencing his proxy, it is probable that he would be in breach of his disqualification."

Further evidence on 20 December 2018

107. I had taken evidence from Messrs MacDonald, Dyce, Colin Thomson, Dunlop and Lee Thomson on 20 October 2017. Some brief further evidence was taken at this Inquiry on 20 December 2018 including some evidence heard in private. I am referring in particular to evidence on the impact of regulatory action on the finances and on restriction of expansion. That evidence, as with all oral evidence, was captured on the digital recording.
108. Mr Dyce did give some evidence in relation to VAT which he thought Mr MacDonald did not know about. From his demeanour and from what he told me about contact with accountants, I am in no doubt that Mr MacDonald did know what was going on with HRL.
109. Without going into figures, Mr Lee Thomson's remuneration was discussed with Mr MacDonald prior to him taking on the role of Director. He narrated the mechanism of his engagement in that he is paid through his own company. He had come from the Daviot Group

Ltd when it was breaking down. He came to MGL through his involvement with Daviot Group Ltd. He has no written contract. No dividends had been paid – the investment remains with the company.

110. Mr MacDonald is paid a salary as Head of Operations and is within a management structure in the organisation of which he, Mr Lee Thomson sits at the head.
111. Mr Gary MacDonald gave me evidence in private session about his remuneration package and how it would compare were he in equivalent position with equivalent civil engineering company. He still has the Farm. His son Stephen is working for himself on smaller scale. Michele MacDonald is mostly at home but does help with payroll.
112. Mr Lee Thomson said that their access to 5 vehicles and 5 trailers was fundamental to what they do and the pressure they are under. They have an opportunity to expand and are struggling with only 5 vehicles. Their customers expect that they should have their own vehicles and not have to go to others for transport. They really need 15 vehicles.
113. Mr Dyce gave further evidence about his business and business relationship with Gary MacDonald of whom he had highest praise. He wanted the business to stay at 3-5 Carsegate Road. He pays himself a salary from the business, not dividends. He runs the business. Gary does not know what he does. He had only seen Gary about 3 times in 2018 including this day of the Inquiry. Gary had not been in his office for over a year. He could not work with a better person. He confirmed he wanted to reduce to 4 vehicles and 2 trailers. Mr MacDonald has not taken a penny out of the business. He does not want to sell.
114. Mr Colin Thomson gave very brief evidence on the roadworthiness issues.

Mr McIlbride's submissions

115. Mr McIlbride took me through the case law and relevant sections of the Companies Act 2006. I do not need to reproduce the sections of the Act or the cases for these are within the public domain and readily accessible.
116. He submitted that there was a distinction to be made between Mr Colin Thomson qua transport manager and in other roles.
117. Mr McIlbride referred to his legal submissions in his closing submissions, that there was nothing, on his analysis, to say that a shareholder per se was in deemed control of the company, notwithstanding the level of remuneration. Lee Thomson determines what Mr MacDonald earns as an employee. The decision is for Mr Thomson alone. The fact that the remuneration paid to Mr Thomson has to be agreed with Gary MacDonald as shareholder does not give rise to a question re management of the company in sense of breach of the disqualification undertaking. That shareholders have to approve remuneration does not mean that shareholders are concerned in the management of a company in the meaning of the Company Director Disqualification Act.
118. On roadworthiness, the January 2018 prohibition was regrettable and accepted by Scania as their responsibility. In respect of the wheel loss, the critical issue is if there is any evidence for a finding that the company has failed in some way. Examiner Williams opined that the cause of many detachments is the quality of the mating surfaces. Mr Williams did not see the wheel. Examiner Cuthbert was there and plainly best and said that inner and outer wheels were in good condition with no corrosion and pitting present. The evidence was unsatisfactory. Mr Dunlop was unable to reach a conclusion. This was a case of a very serious detachment not attributable to neglect or a failure to maintain.

119. This is a business of 43 employees. Revocation or suspension for a significant period would jeopardise the company and its employees. The consequences are likely to be substantial. Mr Lee Thomson's evidence was compelling in respect of the dire consequences.

Consideration of the evidence and submissions and my decisions

The relevance of Gary MacDonald to these licences

120. The requirements for an operator licence include good repute – section 13A of the 1995 Act refers. Schedule 3 provides that in determining whether a company is of good repute, a traffic commissioner shall have regard to all material evidence, including in particular any relevant convictions of the company or any of its officers, servants or agents and any other information in possession of the traffic commissioner as to the previous conduct of any of the company's officers, servants or agents or any of its directors in whatever capacity if that conduct appears to the traffic commissioner to relate to the company's fitness to hold a licence."
121. MacDonald was incorporated on 5 March 2014 with registered office at Lairgandour. The director history is set out at paragraph 10 above. When application was made for this licence, Mr Gary MacDonald was not a director or shareholder. At no time did Gary MacDonald or anyone connected with the licence intimate to the Office of the Traffic Commissioner that ownership and control had transferred to Mr Gary MacDonald. Over the years, Mr Gary MacDonald has used his son or wife to be his place people in directorships or shareholding of his businesses.
122. Gary MacDonald was concerned about the impact of the Company Director Disqualification on his businesses and he took advice. Within the Public Inquiry brief were productions relevant to how Mr MacDonald organised his businesses. The names of his wife Mrs Samantha MacDonald and of his son came to be used. It is plain for the discussions with his advisers, that Gary MacDonald was determined to stay in business and to continue the civil engineering and groundworks undertaking by his companies including HQC and Daviot Farms Ltd. For him this line of business was not only enjoyable but hugely remunerative for him personally. He discussed using himself as a sole trader and or models of sub-contracting. To get the shelter of limited liability again and to secure lender interest, he had to take on board a script.
123. I pause here to say that I am in agreement with the submissions by Mr McIlbride that nowhere in statute is there a provision which expressly prevents a person who has been disqualified under the Company Directors Disqualification Act 1986 whether by order of the court or following from a signed Undertaking such as given by Mr MacDonald from either being the 100% shareholder and owner of a company or from being the Person with Significant Control which a 100% or majority shareholder such as Mr MacDonald is with MacDonald and with HRL. If there is such a provision or argument, then alas I have not found it or been steered to it.
124. I also pause to record that I am sure that it is not for me as Traffic Commissioner to fill what some might see as a lacuna in the law, a gap which allows persons such as Mr MacDonald with significant unfit conduct as set out in the Schedule to the Undertaking to own companies outright or significantly with others. A person can be disqualified as a director but yet benefit from his or her shareholdings (wealth) having the protection of limited liability even where their shareholding is 100% or such as to make them a PSC. It does not seem right and especially so where the extent of the shareholding is such as to out-vote all others. Thus a disqualified director can appoint directors. It is for Parliament to provide such prohibition on shareholding and ownership, not for me as a Traffic Commissioner to decide as if the law were different.
125. It might then be thought that would be an end to my involvement with Mr MacDonald's Companies Act disqualification and its relevance to repute and fitness of a company

holding an operator licence. I do not find that to be so simple given the terms of Schedule 3 of the 1995 Act and that operator licensing is a fair competition jurisdiction.

126. If Mr Gary MacDonald had applied for the MacDonald licence and I knew that its owner was a person of such unfit conduct as to have been disqualified under the Companies Act for 8 years, I would not have granted it. I would have used my gatekeeping powers to keep the company out of operator licensing. I could not have found the necessary trust between Commissioner and operator.
127. Here I find myself dealing with an extant licence, in which members of the MacDonald family were used to get the licence; where the difficulties with Daviot were not disclosed; where MacDonald secured a licence and the difficulties with Daviot were not disclosed; where Mr MacDonald's disqualification was not disclosed; and where his becoming 100% owner was not disclosed. All of this goes to trust between Traffic Commissioner and operator and to the repute of the entity which holds the operator licence. Quite simply MacDonald has lost my trust and that imperils the licence.
128. I heard the evidence of Mr Lee Thomson at this hearing and also back in October 2017. He comes across well. He has confidence and can assert that he is in control. I am not in the slightest doubt that he was chosen by Mr MacDonald to be the confident front for him and to do what he required. Mr Thomson has true belief in himself and is skilled and competent. However, I am not in the slightest doubt that Mr MacDonald fully engaged with the advice given by his legal advisers and that Mr MacDonald knew that there had to be "a line to take" should anyone come near and ask about his involvement. I am not in the slightest doubt that Gary MacDonald controls MacDonald Groundworks Ltd. The legal advice was the script. Ever thing thereafter is a carefully orchestrated play.
129. There are questions which a Traffic Commissioner must pose to herself – the Bryan Haulage question, the Priority Freight question and she must also bear in mind the integrity and purposes of the regulatory regime as considered in the Court of Session Thomas Muir case. I have posed these questions to myself and I have reminded myself of Mr Gary MacDonald's history in this jurisdiction as well as the 8 year director disqualification. Fundamentally I do not trust a person who has been disqualified for 8 years.
130. Do I have to put this operator out of business – can I trust this operator in future? I am in not the slightest doubt having heard the evidence, that the loss of the operator licence will affect the profitability of this business but it will not put this company out of business. As to future trust, I cannot trust Mr MacDonald. I do not doubt his competence at his trade but I cannot trust one who has affected fair competition as he has done. Fair competition is at the heart of operator licensing as is trust. Whilst I listened to Mr MacDonald's evidence in relation to the process of disqualification and how expensive and unsatisfactory he found it, that evidence cut no ice with me in face of the undertaking and the Schedule of Unfit Conduct. I was not persuaded by Mr McIlbride's submissions thereanent.
131. Having decided that I must revoke the MacDonald licence, I now consider my powers of disqualification. I consider that this case is one for disqualification. The period of disqualification comes to me as an obvious one. It should march with that made under the Undertaking which in Mr MacDonald's case runs from 20 May 2014 to 19 May 2022. That will be the period of disqualification. Should there be a change of ownership of MGL prior to 19 May 2022, then it would be for the new owners to intimate that material change and to make an application for the removal of the disqualification.

HRL

132. Mr Gary MacDonald was signatory to the licence application in 2010 at a time when he was director along with Mr Dyce. Each were shareholders, Mr MacDonald holding 60 to Mr Dyce's 40. The registered office address is Mr MacDonald's farm property at Lairgandour, Daviot. Briefly in 2014, Mr MacDonald transferred his shares in to his wife Michelle's name. The shares transferred back to him. That 2014 transfer coincided with Mr MacDonald having to sign the Disqualification Undertaking. That temporary change in apparent ownership of HRL was not intimated to my Office as a material change.
133. In relation to the HRL licence, the position could be different in law and I was vexed that HRL was not separately represented. Mr Dyce gave us theatre on a Friday afternoon and his evidence was entertaining but it provided the best of insights into what really goes on in Mr MacDonald's world. Mr Dyce very showily told us that Mr MacDonald did not know about a VAT matter. Mr MacDonald told us he did know for the Accountants kept him posted. Mr MacDonald keeps the beady eye on HRL even though he lets dear loyal hard working Mr Dyce think he is doing it all by himself. However the HRL licence can be distinguished from the MacDonald licence. It was granted in 2011. It is a restricted licence. Mr Dyce has been a shareholder throughout as has Mr MacDonald. Mrs MacDonald was used as a front for him in this licence for a brief period of shareholding change. There has not been the material change that has affected the MacDonald licence. Whilst the tests for repute and fitness are narrowing, given case law in that direction, the 1995 Act does distinguish fitness and repute and restricted and standard licences. As stated above, it is not for me to find that disqualified directors cannot own shares in companies or hold majority shares in companies. That is for Parliament. Thus when I approach the issue of HRL I am looking at it through the lens of the 1995 Act and the relationship of trust between operator and Traffic Commissioner. I find that I can distinguish HRL from MacDonald. The histories of the licences are different. Schedule 3 does not apply to a restricted licence.
134. In respect of HRL, it was not the subject of adverse report from DVSA other than a non 'S' marked delayed prohibition on 25 January 2018 and it has a 100% pass rate at annual test. I make no adverse findings in relation to fitness. I grant the variation to add 12 Henderson Road, Inverness as an operating centre and as requested by Mr Dyce the licence record will be amended to reflect his wish to reduce the authorisation to 4 vehicles and 2 trailers. This reduction is by request and grant not by regulatory action.
135. Had I not taken the decision to revoke MGL, I would have granted the application to allow Mr Colin Thomson to be transport manager, a very different role to that of owner. I would have granted the additional operating centre locations. I cannot say that I would have granted the increase in authorisations sought. I would have placed a regulatory marker against the licence given the serious roadworthiness issues in relation to wheel security – most likely by a curtailment of one vehicle for a while.

An observation

136. It has been drawn to my attention within my Office that 4 vehicles with MGL personalised plates have been specified on Mr Gary MacDonald's sole trader licence since September 2018. Whilst MGL has an authorisation of 5 vehicles, only 4 are specified.

Summary of my decisions

137. The goods vehicle operator licence held by MacDonald Groundworks Ltd is revoked on ground of loss of repute in terms of section 27 of the 1995 Act. The revocation will be with effect from 23.59 on 31 March 2019. Given the revocation of the licence, the variation

applications to add additional operating centres, to increase authorisation and to nominate a new transport manager are all refused.

138. MacDonald Groundworks Ltd is disqualified from 23.59 on 31 March 2019 to 19 May 2022 from applying for or holding an operator licence in this or any other traffic area in terms of section 28(1) of the 1995 Act and section 28(4) will also apply.
139. I warn HRL Scrap and Waste Solutions Ltd as to its fitness. By its request, the authorisation is reduced to 4 vehicles and 2 trailers and I grant the applications to add 3/5 Carsegate North, Inverness IV3 8DU and 12 Henderson Road, Inverness IV1 1SN as operating centres on the licence.

Joan N Aitken
Traffic Commissioner for Scotland
Edinburgh

18 February 2019.