



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

**Appeal No. T/2018/81 and T/2019/04
[2019] UKUT 0112 (AAC)**

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before: A I Poole QC Judge of the Upper Tribunal
Mr M Farmer Member of the Upper Tribunal
Mr G Inch Member of the Upper Tribunal

Appellants: J A Dickie Truckin Ltd and Mr John McCormack
Mr Thomas Malcolm

Upper Tribunal Hearing: 28 March 2019

Heard at: George House, 126 George Street, Edinburgh EH2 4HH

No appearance for any parties.

Date of Decision: 1 April 2019

DECISION OF THE UPPER TRIBUNAL

The Upper Tribunal consents to withdrawal of the appeals in case T/2018/81.

In case T/2019/04, the Upper Tribunal DISMISSES the appeal.

Subject Matter: revocation; disqualification; failure to attend Public Inquiry; withdrawal; proceeding in absence; fresh evidence on appeal.

Cases referred to:

Bradley Fold Travel Ltd v Secretary of State for Transport [2010] EWCA Civ 695
T/2014/11 & 12 David Keith Bradley & Julie Bradley
2009/524 Ocean Transport Ltd
2001/11 Pagoda Travel
T/2015/36 W Martin Oliver Partnership
Ladd v Marshall [1954] 1 WLR 1489

REASONS FOR DECISION

The appeals

1. There were two separate appeals listed for determination at an oral hearing before the Upper Tribunal sitting on 28 March 2019. Appeal T/2018/81 comprised appeals by J A Dickie Truckin Ltd, and its sole director and transport manager Mr John McCormack, against orders made in respect of them by the Traffic Commissioner for Scotland in a decision dated 29 November 2018 (the “**Decision**”). Appeal T/2019/04 was an appeal by Mr Thomas Malcolm against a disqualification decision made by the Traffic Commissioner in the same Decision. In the Decision the Traffic Commissioner, exercising powers under Sections 26-28 and Schedule 3 of the Goods Vehicles (Licensing of Operators) Act 1995:
 - 1.1 Revoked the goods vehicle operator licence held by J A Dickie Truckin Ltd with effect from 23:59 on Monday 3 December 2018 on grounds of lack of continuing financial standing, and disqualified J A Dickie Truckin Ltd for 10 years with effect from 23:59 on 3 December 2018 from applying for or holding an operator’s licence;
 - 1.2 Disqualified Mr John McCormack, Director, for 5 years with effect from 23:59 on 3 December 2018 from applying for or holding an operator’s licence; and disqualified him as a transport manager for the same period;
 - 1.3 Disqualified Mr James Angus Dickie for 4 years with effect from 23:59 on 3 December 2018 from applying for or holding an operator’s licence; and disqualified him as a transport manager for the same period;
 - 1.4 Disqualified Mr Thomas Malcolm for life with effect from 23:59 on 3 December 2018 from applying for or holding an operator’s licence;
 - 1.5 Disqualified Ms Arlene Dunleavey for 5 years with effect from 23:59 on 3 December 2018 from applying for or holding an operator’s licence.No appeals were made to the Upper Tribunal in respect of the orders in 1.3 and 1.5 above.

2. The background to the appeals is that, on 3 July 2017, an application was made by J A Dickie Truckin Ltd (the “**Company**”) for a goods vehicle operator licence to operate 2 vehicles and 2 trailers from a yard in Oban. The application was signed by James Angus Dickie, who was then the company’s sole director, who was also nominated as transport manager. A Standard National Goods Vehicle Operator Licence was granted and came into force on 18 August 2017. James Angus Dickie was joined as director by John McCormack on 30 November 2017; John McCormack remained a director until he resigned on 19 March 2018; and was then reappointed on 28 March 2018 and was still director at the time of the Decision. At some point James Angus Dickie appears to have sold the Company, later telling the Traffic Commissioner in a letter dated 6 August 2019 that he had sold it to John McCormack and Thomas Malcolm. An unsigned sale and purchase agreement at page 298-312 of the papers is between James Angus Dickie and John McCormack.

3. Ultimately, the Traffic Commissioner directed that the Company, James Angus Dickie, John McCormack, Thomas Malcolm, Arlene Dunleavey and Allan Malcolm be called to a public inquiry to be held at Edinburgh on 27 November 2018, under the Goods Vehicles (Licensing of Operators) Act 1995. She did so by issuing call-up letters dated 30 October 2018. The letters had some overlapping content, but were personalised to each of their addressees.
4. The call-up letter issued to the Company and John McCormack stated that the Traffic Commissioner had reviewed the case and was concerned about aspects of the Company's operation.

"It has therefore been decided to hold a Public Inquiry, to investigate the apparent shortcomings and to give you the opportunity to explain what you are doing to improve compliance with the rules and the fulfilment of undertakings that were given at the time the licence was applied for and show evidence to support this".

The call-up letter also said:

"The Traffic Commissioner requires that your nominated transport manager, Mr John MacCormack, attends the inquiry and is prepared to give evidence as to how he meets the requirements to exercise continuous and effective management of the transport activities".

The call-up letter also contained a section headed "Evidence the Traffic Commissioner will Consider" and that evidence was set out as follows.

"A letter has been received advising the Traffic Commissioner of the sale of JA Dickie Truckin Ltd to John MacCormack and Thomas Malcolm. This claim would appear to be corroborated by a number of changes that have been made since the licence was granted and these are detailed in the Public Inquiry brief.

The Traffic Commissioner regularly encounters licence holders or "fronting directors" which attempt to defeat or circumvent decisions or regulatory action which she has previously taken or intends to consider. In this instance, the Traffic Commissioner must be satisfied that the change in ownership and subsequent amendments which have been made to licence JA Dickie Truckin Ltd OM2005355 are in no way an attempt to abet Thomas Malcolm to circumvent regulatory action or the scrutiny which an application bearing his name would necessitate. The regulatory history of Thomas Malcolm is detailed in the Public Inquiry brief.

Examination of the information held by JA Dickie Truckin Ltd OM2005355 has brought up a number of links between this licence and the company ATR Logistics Ltd which currently has two directors, namely Mary Arlene Dunleavey and Allan Thomas Malcolm. Due to their application for an operator's licence, ATR Logistics Ltd attended a

Public Inquiry on 15 December 2017 which it was established Mary Arlene Dunleavey is the partner of Thomas Malcolm and Allan Thomas Malcolm is the son of Thomas Malcolm.

Due to the above, the Traffic Commissioner will be considering the potential role of Thomas Malcolm, Mary Arlene Dunleavey and Alan Thomas Malcolm as shadow directors for JA Dickie Truckin Ltd.

Other evidence the Traffic Commissioner will consider at the Public Inquiry is:

The online variation application submitted on 11 July 2018, and all supporting documentation and correspondence.

The GV80A variation application received on 8 August 2018 and TM1 form received on 13 September 2018 along with all supporting documentation and correspondence”.

The call-up letter contained a further section headed up “The Traffic Commissioner’s Powers”. This included reference to a power to revoke a licence in its entirety and then said:

“If the Traffic Commissioner revokes a licence, she may also disqualify the company or any of its directors for a specific period or indefinitely from holding another operator’s licence, and from being a director of any company which holds such a licence. For this reason it is important that you attend the Inquiry”.

The call-up letter also had a section headed up “Transport Manager – Mr John McCormack”. In that Section it said:

“The Commissioner must review your nomination as transport manager and has decided to hold a Public Inquiry to consider whether you meet the requirements to be of good repute and professionally competent. At the hearing the Traffic Commissioner will consider whether you fulfil the requirements in respect of your good repute and professional competence. If the Traffic Commissioner determines that you are no longer of good repute or professionally competent, there is a mandatory requirement that she must order that you be disqualified (either indefinitely or for such period as the Commissioner thinks fit), from acting as a transport manager. You should note that while any disqualification order is in force you may not act as a transport manager for any road transport undertaking in the European Union and any certificate of professional competence issued to you ceases to be valid for the period of disqualification”.

The call-up letter also said:

“What you *must* do now:

- **Confirm your attendance** using the form attached. The Traffic Commissioner is unlikely to allow a postponement, unless the circumstances are exceptional. **If you do not attend, the case will be heard in your absence”.**

In the Decision, the Traffic Commissioner found at paragraph 23 that, given John McCormack attended the Stamp Office on the due date and time and with legal representation, she was satisfied he was aware of proceedings and that service was effected.

5. The call-up letter addressed to Thomas Malcolm and dated 30 October 2018 was addressed to 1 Glenesk Grove, Kelty. In the Decision, the Traffic Commissioner noted at paragraph 24 that Thomas Malcolm was served with the call-up letter and brief at 1 Glenesk Grove, Kelty, and Royal Mail confirmed delivery. Arlene Dunleavey’s signature appears as accepting the delivery. Arlene Dunleavey was at the relevant time Thomas Malcolm’s partner. In the appeal papers Thomas Malcolm indicated that he had moved from that address on 21 November 2018. However that was some time after the call-up letter was sent, receipt of the letter was signed for by his partner, and his appeal to the Upper Tribunal is predicated on him having taken legal advice as to whether attend the Public Inquiry or not. It can be inferred that Thomas Malcolm was aware of the contents of the Traffic Commissioner’s call-up letter addressed to him.
6. The call-up letter to Thomas Malcolm stated, among other things, that the Traffic Commissioner was concerned about aspects of the Company’s operation and:

“It has therefore been decided to hold a Public Inquiry to investigate her concerns and to give you the opportunity to address her on your involvement and show evidence to support this. The Traffic Commissioner will then decide whether she can trust you to comply in the future, whether any action is needed and, if so, what form that action might take”.

The letter contained the same passage quoted above from John McCormack’s letter under the heading “Evidence the Traffic Commissioner will Consider”, except the following words appeared in bold:

“Due to the above, the Traffic Commissioner will be considering the potential role of Thomas Malcolm, Mary Arlene Dunleavey and Alan Thomas Malcolm as shadow directors for JA Dickie Truckin Ltd.”

The call-up letter also contained a passage headed “The Traffic Commissioner’s Powers”. This contained the same passage quoted above in relation to the Company and John McCormack about the Traffic Commissioner, if she revokes a licence, also being able to disqualify the company **or any of its directors** for a specific period **or indefinitely** from holding another operator’s licence (bold added).

Finally, as with John McCormack's letter, the call-up letter to Thomas Malcolm contained this passage, in mixed bold and plain typeface:

“What you *must* do now:

- **Confirm your attendance** using the form attached. The Traffic Commissioner is unlikely to allow a postponement, unless the circumstances are exceptional. **If you do not attend, the case will be heard in your absence.**
 - **Start to collect your own evidence** to allow you to set out your case at the inquiry. This should include anything which you think will help show you are a compliant operator or are taking steps to address the failings identified. **You must provide this evidence to the office of the Traffic Commissioner no later than 20 November 2011”.**
7. The Public Inquiry was duly held. It is not in dispute that there was no attendance by Thomas Malcolm, Arlene Dunleavey or Allan Malcolm. Although John McCormack was at the inquiry initially with legal representation, additional material from James Angus Dickie comprising emails and text messages was produced and copied for parties and the Traffic Commissioner on the morning of the hearing. The Public Inquiry commenced late to allow parties and the Traffic Commissioner to read it. That resulted in John McCormack leaving the building before the Public Inquiry commencing and the solicitor acting for the Company appearing at the Public Inquiry to indicate that he had withdrawn from acting. A letter from Mr Kelly, the solicitor who had been acting for the Company and John McCormack, has been produced by John McCormack before the Upper Tribunal, confirming the basis of the advice given to John McCormack not to attend the hearing (p706). In summary, it was advised that email and text message threads produced on the morning of the hearing made it impossible credibly to argue that there was no arrangement with James Angus Dickie; and there were serious problems with financial standing. John McCormack was advised that formally giving evidence could have incriminated him. Ultimately the only witness to give evidence was James Angus Dickie.
8. After the Inquiry, on 28 November 2018, Thomas Malcolm emailed the Traffic Commissioner saying “Following on from Tuesdays public enquiry which my lawyer advised me not to attend, I would like to request a meeting with yourself to discuss my situation”.
9. On 29 November 2018 the Traffic Commissioner signed her Decision. In the Decision, the Traffic Commissioner revoked the Company's goods vehicle operator licence and disqualified it for 10 years, and also disqualified John McCormack as a director and transport manager for 5 years. She found that John McCormack was 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. At paragraph 61 she expressed great difficulty in assessing the

period of disqualification and rehabilitative measures as John McCormack had not attended the hearing. She imposed a lifetime disqualification on Thomas Malcolm given his very long history of non-compliance and previous 10 year disqualification (paragraph 64). A series of decisions made by Traffic Commissioners in relation to Thomas Malcolm in the past are contained in the Upper Tribunal papers between pages 87 and 112. They show that Thomas Malcolm had been disqualified for 10 years by a Traffic Commissioner on 27 June 2000, and disqualified from being a director in April 2011 in Kirkcaldy Sheriff Court. A company, ATR Logistics Ltd, had on 18 December 2017 been refused licences after a Public Inquiry, on the basis of its connection with Thomas Malcolm.

10. John McCormack wrote on 3 December 2018 stating he wished to appeal the Decision because he believed his solicitor's advice not to give evidence was the wrong advice and he felt he needed an opportunity to defend his reputation and clarify several points raised at the Public Inquiry by Mr Dickie. John McCormack also asked for a stay of the Traffic Commissioner's decision. On 4 December 2018 the Traffic Commissioner declined to stay at that stage because she had not seen any grounds of appeal and given the nature of the decision she made. In a note of 6 December 2018, she reconsidered after an appeal was made to the Upper Tribunal, but refused the application for a stay. She stated that John McCormack chose to leave the public inquiry venue and not give evidence. Given that the sole director and transport manager had left the building, and the evidence led, it was not a licence the Traffic Commissioner wished to remain in force for any time. She stated she was not entitled to look behind solicitor/client communications but the solicitor involved, Mr Kelly, was an experienced transport solicitor with a lengthy practice in the jurisdiction. A further application for a stay was made to the Upper Tribunal, which was refused on 14 December 2018.
11. On 5 December 2018 the Decision was emailed to Thomas Malcolm, attempts for it to be delivered by post having failed. Thomas Malcolm responded saying that he had sought advice from a lawyer called Tom Docherty who informed him that he would not need to go to the Public Inquiry because the Company was not his. He also stated that he was only involved with Angus Dickie while he was employed with ATR Logistics and merely introduced him to Mr John McCormack. He said he had sought a meeting with the Traffic Commissioner. On 6 December 2018 the Traffic Commissioner's office sent an email to Mr Malcolm saying:

"Miss Aitken has advised that she has declined to meet you. The issues were set out in the call-up letters to the Public Inquiry and you did not attend that formal legal opportunity to address her. It is not usual practice nor expected that the Traffic Commissioner will meet with a party who does not like her decision and did not attend a Public Inquiry. Given the evidence before her, she came to the decisions set out in her written decision of 29 November 2018".

Appeal T/2018/81

12. The Company and John McCormack appealed against the orders made in respect of them. The grounds of appeal were:
- (i) John McCormack believed that the solicitor's advice not to give evidence was the wrong advice. On reading the Traffic Commissioner's decision, he disagrees with a number of aspects of the evidence recorded, including findings of ties to Thomas Malcolm and ATR Logistics.
 - (ii) He operates his company in a professional manner and had no external influences impacting on his business.
 - (iii) He considers the timing of the revocation, so that he received the decision by recorded delivery on the same day the licence was revoked, did not give him sufficient time to organise hauliers to carry out pre-arranged contract work.
13. The hearing was set down for 10.30am on 28 March 2019. Written notification of the date, time and place of the meeting was sent to the Company and John McCormack and Thomas Malcolm at the addresses held for them by the Upper Tribunal on 30 January 2019, and stating:
- "Please ensure that the attached Attendance at Hearing form is completed and returned to this office within 10 days of the date of this letter".
- When no such form was received, the Upper Tribunal issued Case Management Directions on 20 February 2019. These Directions gave notice that subject to receiving representations, to be received within 14 days, it was proposed that the appeal be struck out and the appeal would be at an end. Email responses were received from Thomas Malcolm on 25 February and 5 March 2019 saying the response form hadn't been received, and confirming attendance together with a witness by the name of Helen Goodyear. A copy of the hearing notice was sent by email to Thomas Malcolm on 26 February 2019. Thomas Malcolm then confirmed in an email of 5 March 2019 that both of the appeals T/2018/81 and T/2019/04 were proceeding, following further inquiry by the Upper Tribunal.
14. On the morning of the hearing, following a telephone call from Thomas Malcolm at 9am to the Upper Tribunal, John McCormack emailed the Upper Tribunal at 09.50. John McCormack stated in that email:

Sir

I am ill and will not be able to attend the tribunal appeal being held this morning in Edinburgh, I apologise and accept the findings of the original hearing

Regards

John McCormack

Administrative staff from the Upper Tribunal responded to that email at 10.51 saying:

Good morning,

Thank you for your email this morning at 09.50. We note you now accept the findings of the original hearing. In the circumstances, we will treat this as written notice that you wish to withdraw the appeal of the company and yourself against the decision of the Traffic Commissioner.

No further communication was received from Mr McCormack on 28 March 2019 following this email.

15. The members of the Upper Tribunal convened to consider the appeals at 11.30am. It was decided, in relation to appeal T/2018/81, to consent to the notice of withdrawal under Rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Registrar to the Upper Tribunal was requested to issue the necessary notification to parties under Rule 17(5) that the withdrawal had taken effect, and the proceedings in the Upper Tribunal in respect of appeal T/2018/81 were therefore at an end.

Appeal T/2019/04

16. Thomas Malcolm appealed against the lifetime disqualification order made in respect of him. The grounds of appeal may be summarised as raising two separate grounds of appeal:
- (i) The Traffic Commissioner's decision should not stand because Thomas Malcolm had been advised by a solicitor not to attend the hearing, but he disagrees with her factual findings made in the absence of evidence on his behalf.
 - (ii) He also disputed the factual findings made by the Traffic Commissioner, on the basis that the Traffic Commissioner had erred in finding he was a shadow director. He helped both John Angus Dickie and John McCormack from time to time, and parked his own minibus and taxis in their yard, but was not a shadow director.

17. A hearing was set down for 28 March 2019 at 10.30am in Edinburgh. It was intimated to Thomas Malcolm as set out in paragraph 13 above. On 5 March 2019 Thomas Malcolm emailed the Upper Tribunal saying:

I will be attending the hearing on the 28th March 2019 i will also be bringing a witness by the name of Helen Goodyear also with me, please confirm this email as confirmation that i will be attending this hearing

Decision to proceed in absence in Appeal T/2019/04

18. On 28 March 2019, the day of the hearing of the appeal, Thomas Malcolm contacted the Upper Tribunal by telephone at 9am to say he also was unwell and would not be attending. He was asked to send an email confirming his position and whether he had medical evidence he was unable to attend. In response, an email was received at 11.15am saying he was not able to attend the hearing unfortunately due to illness and asking for the hearing to be postponed. He stated in the email that he had contacted his specialist nurse

at the hospital for an appointment, he had recently gone through infusions of infliximab, had undergone major bowel surgery that removed part of his small bowel, and was “still attending the specialist nurse at the Kirkcaldy Victoria hospital and Queen Margaret Hospital Dunfermline having repeated blood tests still due to the symptoms of Crohn’s disease coming back”. He stated this made him sick from time to time as he had good days and bad days. He then said “I have been ill from last weekend with sickness, this can be flared up with stress or viruses”, and that he looked forward to hearing from the Upper Tribunal with a further date. He pasted in a definition of infliximab: “(trade names Remicade among others) is a chimeric monoclonal antibody biologic drug that works against tumor necrosis factor alpha (TNF- α) and is used to treat autoimmune diseases.)”

19. No independent medical support of his unfitness to attend the hearing before the Upper Tribunal was provided.

20. The Upper Tribunal sat to consider both appeals at 11.30am. Given Thomas Malcolm’s non attendance, the first matter the Upper Tribunal considered in relation to appeal T/2019/04 was whether it should proceed in Thomas Malcolm’s absence under Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Upper Tribunal decided that it should. The Upper Tribunal was satisfied that Thomas Malcolm had been notified of the hearing. Written notification of the date, time and place of the meeting was sent to Thomas Malcolm at the address held for him by the Upper Tribunal on 30 January 2019. His emails on 25 February, 5 March and on the morning of the hearing indicated that he was aware of the hearing. The Upper Tribunal then went on to consider whether it was in the interests of justice to proceed with the hearing and decided that it was. The Upper Tribunal took into account that Thomas Malcolm had received a lifetime disqualification which was a serious matter, that he had not given evidence before this order was made as he had not attended the Public Inquiry, and that he had emailed saying he was too unwell to attend the hearing before the Upper Tribunal. The Upper Tribunal also took into account the following:

20.1 There was no independent certificate by a registered medical practitioner of Thomas Malcolm’s unfitness to attend. The Upper Tribunal was not prepared to take Thomas Malcolm’s assertion that he was unfit to attend on medical grounds at face value. Both John McCormack and Thomas Malcolm had apparently become too unwell to attend on the day, but this seemed the type of coincidence calling for independent verification of Thomas Malcolm’s unfitness to attend the hearing before it could be accepted. The history of adverse findings against Thomas Malcolm by the Traffic Commissioner and the sheriff at Kirkcaldy did not support his credibility and reliability. He appeared already to have been economic with the truth in relation to this particular appeal to the Upper Tribunal. At page 374 there was an email from him to the Traffic Commissioner’s office saying he was going to appeal the Traffic Commissioner’s Decision and containing an assertion “I was only involved with Angus Dickie whilst he was employed with ATR Logistics and merely introduced him to Mr John McCormack”. As he had chosen not to attend the Public Inquiry he may

have been unaware of the many emails and texts lodged by James Angus Dickie before the Traffic Commissioner, between 242 at 283 of the Upper Tribunal papers, which at the very least cast serious doubt on his assertion. On Thomas Malcolm's account he had been unwell since the weekend, and it was unclear to the Upper Tribunal why, if that was so, he had been unable in that time to obtain medical certification of unfitness to attend. On the evidence available to it, the Upper Tribunal was not persuaded on the balance of probabilities that Thomas Malcolm was in fact too unwell to attend.

- 20.2 Thomas Malcolm's history of non-attendance both before the Traffic Commissioner and Upper Tribunal. There was no guarantee that he would attend any rescheduled hearing.
- 20.3 Sufficient information was before the Upper Tribunal for it to be able to decide the grounds of appeal, given their nature.
- 20.4 The overriding objective of dealing with cases fairly and justly in Rule 2 of the Upper Tribunal Rules, in particular considerations of cost (the Members of the Upper Tribunal having convened from different parts of the UK to hear the appeal) and avoiding delay, so far as compatible with proper consideration of the issues.
- 20.5 The powers of the Upper Tribunal to set aside its decision in appeal T/2019/04 under Rule 43, should Thomas Malcolm in the future produce to the Upper Tribunal independent medical certification that he was unfit to attend the hearing on 28 March 2019.

After balancing all relevant factors, the Upper Tribunal was persuaded that it should proceed in Thomas Malcolm's absence, and not accede to his request for a postponement.

The role of the Upper Tribunal in an appeal from a decision of a Traffic Commissioner

21. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

"...the Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport".

However, under paragraph 17(3):

"(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal".

The Upper Tribunal's jurisdiction relating to matters of fact is primarily a review function, and:

"the first instance decision is taken to be correct until the contrary is shown...An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective

grounds upon which the court ought to conclude that a different view is the right one. ...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category". (*Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56 at paragraph 44, applied to the Upper Tribunal's jurisdiction by the Court of Appeal in *Bradley Fold Travel Ltd v Secretary of State for Transport* [2010] EWCA Civ 695).

The Upper Tribunal will not disturb findings of fact by the Traffic Commissioner unless plainly wrong, and in accordance with the test above.

22. The powers of the Upper Tribunal in disposing of an appeal are (a) to make such order as it thinks fit; or (b) to remit the matter for rehearing and determination the Traffic Commissioner (paragraph 17(2) of Schedule 4 to the Transport Act 1985).

The first ground of appeal in Appeal T/2019/04

23. As set out above, the first of the grounds of appeal in T/2019/04 is that the Traffic Commissioner's decision should not stand because Thomas Malcolm had been advised by a solicitor not to attend the hearing, but he disagrees with the findings she made in the absence of evidence on his behalf.
24. In contrast to the Company and John McCormack at page 720, no independent proof that Thomas Malcolm was advised by a solicitor not to attend was lodged before the Upper Tribunal. It was for the Upper Tribunal to decide whether it accepted Thomas Malcolm's assertion that he had received this advice. The Upper Tribunal accepted that, in general terms, solicitor and client privilege attached to communications between Thomas Malcolm and his lawyer. However, there are limits to that privilege. If the only purpose of adducing a statement is to show that it has been made, then statements made by a solicitor to the client are not confidential (Walker and Walker on Evidence 4th Ed para 10.2.5). In any event, solicitor and client privilege can be waived. The Upper Tribunal considered that Thomas Malcolm had waived solicitor client privilege by raising the matter as part of his appeal, at least to the extent that Thomas Malcolm had sought advice and that the content of that advice had been not to attend the Public Inquiry. In these circumstances, the Upper Tribunal found it significant that no independent support for Thomas Malcolm's assertion had been lodged. In the absence of such evidence, the Upper Tribunal was not persuaded to the balance of probabilities that Thomas Malcolm had in fact received such advice. The history of findings against Thomas Malcolm by the Traffic Commissioner and the Sheriff at Kirkcaldy, as well as the apparent conflict between his assertion at page 374 of the papers and the many emails and texts between pages 242 and 283 (see paragraph 20.1 above), were adverse to his credibility to the extent that the Upper Tribunal was not prepared to accept as fact that

Thomas Malcolm had received legal advice not to attend the Public Inquiry in the absence of independent support.

25. Further, even if that were wrong, and the Upper Tribunal had to accept Thomas Malcolm's position that he had received such advice and had not attended the hearing in reliance on it, the Upper Tribunal did not consider that it would follow that the Traffic Commissioner had erred in fact or law so that the appeal should be allowed. There was therefore no substance to this ground of appeal.
26. It is true that the Traffic Commissioner must act in accordance with natural justice. One aspect of natural justice is that the Traffic Commissioner must provide an opportunity to make representations before making decisions which adversely affect people. One of the ways in which this can be done is by the Traffic Commissioner ordering a Public Inquiry. The Traffic Commissioner has wide powers to hold a Public Inquiry under Section 35 of the 1995 Act, which provides:

“(1) A Traffic Commissioner may hold such inquiries as he thinks necessary for the proper exercise of his functions under this Act.”

Section 29 of the Act has the effect that it is mandatory to hold a Public Inquiry if requested to do so by a person concerned, before the Traffic Commissioner is entitled to make certain orders, including disqualification orders. Public Inquiries therefore play an important part in operators' licensing and disqualification. They provide an opportunity for persons to be heard before orders are made. Cases such as 2001/11 *Pagoda Travel* establish that where disqualification is being considered, the potential subject of that order should be given notice of the evidence and the intention to make a disqualification order, and an opportunity to make representations.

27. In this case, the Traffic Commissioner ordered a Public Inquiry. She served notice of it on Thomas Malcolm. Thomas Malcolm was well aware of the system of Public Inquiries before the Traffic Commissioner since he had previously been involved in proceedings before the Traffic Commissioner. Relevant parts of the call-up notice to the Public Inquiry which Thomas Malcolm received are set out above. The salient points are that the call-up notice:
- 27.1 contained a section setting out the evidence that the Traffic Commissioner would consider, expressly saying in bold type it would consider the potential role of Thomas Malcolm as shadow director of the Company;
 - 27.2 explained that the Traffic Commissioner's powers included being able to disqualify any of the directors of the Company, both for limited and indefinite periods;
 - 27.3 warned Thomas Malcolm in bold type that if he did not attend the case would be heard in his absence.

28. The Upper Tribunal acknowledges that a lifetime disqualification is a serious matter, and before such an order can be made, the subject of that order has

to be given notice of the evidence, the intention to make a disqualification order, and an opportunity to make representations. But the Traffic Commissioner did that. She made it plain in the call-up letter that Thomas Malcolm's role as shadow director was to be considered, that she had powers to disqualify directors indefinitely, and that if Thomas Malcolm did not attend the case would be heard in his absence. The role of shadow directors is understood in the industry, as perhaps can be seen from the unsigned sale and purchase agreement in respect of the Company at pages 298-299 of the Upper Tribunal's papers, which defines Director as "each person who is a director or shadow director of the Company". It is clear in the jurisprudence of the Upper Tribunal that the powers in Section 28 of the 1995 Act to disqualify directors extend to shadow directors; *T/2014/11 & 12 David Keith Bradley & Julie Bradley*, and paragraphs 51 to 55 of the Traffic Commissioner's Decision.

29. Where a person has been given a reasonable opportunity to make representations, if they choose not to avail themselves of the opportunity, there will be no breach of natural justice. It is not difficult to see the potential for abuse of the system if people are entitled not to attend hearings of which they have been given proper notice, and then complain the result should be overturned because they have not been heard. This is why there are cases where the outcome has been upheld, even where a party has not been there because they were over an hour late (eg *Ocean Transport Ltd 2009/524*). If advice is given by a solicitor not to attend which a client takes, but later considers to have been wrong, that is a matter for the client to take up with the solicitor. It does not mean that the Traffic Commissioner's Decision should be overturned on appeal for error of law or fact. It was quite plain from the terms of the call-up notice itself that Thomas Malcolm should attend the Public Inquiry, what the Traffic Commissioner was concerned about, the orders she could make, and what the consequences might be if he did not turn up, whatever advice Thomas Malcolm might have been given. While acknowledging that Thomas Malcolm was not, in fact, heard before the disqualification order against him was made, the Upper Tribunal did not consider that, on the facts, there was a breach of natural justice. It was not prepared to allow the appeal on this first ground.

The second ground of appeal in Appeal T/2019/04

30. As set out above, the second ground of appeal is essentially a challenge to the facts found by the Traffic Commissioner because Thomas Malcolm does not agree he was a shadow director. In dealing with this ground of appeal, it is necessary to address the issue of fresh evidence, and the role of the Upper Tribunal in appeals of this nature.

Evidence of Helen Goodyear

31. In an email to the Upper Tribunal dated 5 March 2019, Thomas Malcolm indicated that he would be bringing in witness by the name of Helen Goodyear to the hearing of his appeal on 28 March 2019. The email did not say what it was she was intended to speak to and in the event she was not at

the hearing. However, it is evident from the transcript of the hearing before the Traffic Commissioner, in respect of which the Traffic Commissioner made findings at paragraph 34 of the Decision, that James Angus Dickie gave some evidence about her involvement. His evidence was that he received a telephone call from Helen Goodyear asking if he would like to sell his operator's licence and the company. He had known her for about 6 years through various jobs. She then telephoned him again saying "It's gotta happen today". She was later paid off by Thomas Malcolm, but just before that she had told James Angus Dickie that Thomas Malcolm had made threats he was going to break his legs. It is also clear from the Traffic Commissioner's Decision at paragraph 16 that Helen Goodyear had previously had involvement with a company called ATR Logistics Ltd, which the Traffic Commissioner had found in a decision of 18 December 2017 was a front for Thomas Malcolm who was a disqualified operator and a disqualified person under the Companies Act. From this, it is likely that Helen Goodyear was to be called in relation to Thomas Malcolm's challenge to the facts found by the Traffic Commissioner.

32. Helen Goodyear was not at the hearing before the Traffic Commissioner. Her evidence is therefore fresh evidence and the principles on which the Upper Tribunal will admit such evidence are well established. As set out in the case T/2015/36 *W Martin Oliver Partnership*, the test to be applied is whether the following conditions (originally taken from *Ladd v Marshall* [1954] 1 WLR 1489 in the Court of Appeal) are met.

- (i) The fresh evidence must be admissible evidence.
- (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry;
- (iii) it must be evidence that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
- (iv) It must be evidence which is apparently credible and not necessarily incontrovertible.

33. Without knowing the content of the evidence Helen Goodyear might have given, it was not possible for the Upper Tribunal to make any decision on conditions (i), (iii) and (iv), although given the Traffic Commissioner's findings, and the email from John McCormack dated 28 March 2019 saying he accepted the findings of the original hearing, there was at least doubt that condition (iii) could be met. However, the Upper Tribunal was not satisfied that the second of these conditions was met, and that was sufficient to render Helen Goodyear's evidence inadmissible. It could be seen from the contents of the call-up letter sent to Thomas Malcolm, set out above, that Thomas Malcolm was expressly advised to start to collect his own evidence for the Public Inquiry. If Helen Goodyear had relevant evidence to give, then Thomas Malcolm should have arranged for her to be present at the Public Inquiry to give evidence. On the basis that condition (ii) was not met, the Upper Tribunal found that fresh evidence from Helen Goodyear would not be admissible and could not have been led before the Upper Tribunal in support of Thomas Malcolm's appeal.

Evidence of Thomas Malcolm

34. Given the inadmissibility of Helen Goodyear's evidence before the Upper Tribunal, and John McCormack having in his email of 28 March 2019 accepted the findings of the Traffic Commissioner, the second ground of appeal appeared to rest solely on Thomas Malcolm wishing to give evidence that he was not a shadow director to show the Traffic Commissioner was wrong in fact. Again, the evidence of Thomas Malcolm on the facts of the case could only be considered by the Upper Tribunal if it met the tests for admission of fresh evidence set out above. There was nothing before the Upper Tribunal to indicate that Thomas Malcolm could not have given evidence at the Public Inquiry. His position was that he had chosen not to attend on the advice of his lawyer. The Upper Tribunal considered that, with reasonable diligence the contents of the letter from the Traffic Commissioner would have been read, and they demonstrated to the reader they should attend. Accordingly the second condition for admission of his fresh evidence was not met, and Thomas Malcolm's evidence as to fact could not be considered by the Upper Tribunal. The basis of this second ground of appeal therefore falls away and it fails.
35. Further, even if Thomas Malcolm could satisfy the conditions for admission of his evidence as fresh evidence before the Upper Tribunal, that would still not be enough for the second ground of appeal to succeed. As set out above, the role of the Upper Tribunal is not a rehearing of the facts. The Upper Tribunal will not intervene just because a different view of the facts from that taken below is reasonable and possible. It must be shown that there are objective grounds upon which the Upper Tribunal ought to conclude that a different view is the right one. In this case, Thomas Malcolm's position was that the Traffic Commissioner's view that he was a shadow director was wrong. But the Upper Tribunal will only interfere if the view of the facts taken by the Traffic Commissioner meets the test of being plainly wrong, and not just because a different view of the fact is reasonable and possible. Thomas Malcolm's position was that he disagreed with the facts found by the Traffic Commissioner, but that was not sufficient for an appeal before the Upper Tribunal to be allowed. There was nothing before the Upper Tribunal to indicate that the threshold for the Upper Tribunal to allow an appeal for error of fact had been reached.

Conclusion

36. Accordingly, for reasons given above, the Upper Tribunal consented to withdrawal of the appeal by the Company and John McCormack in T/2018/81. That was sufficient to dispose of appeal T/2018/81. The Upper Tribunal was not persuaded by the grounds of appeal against the Decision brought by Thomas Malcolm in T/2019/04, and dismissed the appeal.

A I Poole QC
Judge of the Upper Tribunal
Date: 1 April 2019