



Appeal Nos. T/2019/39
NCN: [2020] UKUT 0064 (AAC)

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

**IN AN APPEAL FROM THE DECISION OF
Simon Evans, Traffic Commissioner for
The North West of England dated 18 April 2019**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal**

Appellant:

UPRIGHT SCAFFOLD LIMITED

Respondent:

DAVID BRAND

In attendance: Colin Davies on behalf of the Appellant. David Brand gave notice that he was unable to attend but made written submissions

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 7 January 2020

Date of decision: 20 February 2020

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be dismissed.

SUBJECT MATTER:- The suitability of the proposed operating centre on environmental grounds; whether conditions should have been attached to the licence; whether the undertaking to obtain a Certificate of Lawful Use should have been required of the owner of the proposed operating centre

CASES REFERRED TO:- 2003/87 Jonathan Hansford t/a Jonathan Hansford Plant Hire; Bradley Fold Travel Ltd v Secretary of State for Transport (2010) EWCA Civ 695

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the North West of England (“the TC”) made on 18 April 2019 when he:
 - a) Granted an interim restricted operator’s licence with immediate effect for one vehicle with an operating centre at Border Villa, Clay Gap Lane, Rawcliffe, Preston (“the operating centre”) under s.13 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”);
 - b) Attached the following conditions to the interim licence pursuant to s.23 of the 1995 Act:
 - i. There shall be no operation, movement, loading or unloading of the authorised vehicle at the operating centre before 07:30 hours daily or after 18:00 hours Monday to Friday; and there shall be no such operation, movement, loading or unloading whatsoever on Saturdays, Sundays or Bank Holidays;
 - ii. The vehicle authorised under the licence shall not exceed 7.5 tonnes gross vehicle weight;
 - c) Required an undertaking from the Appellant through Mr Davies, the owner of the operating centre, that he would obtain from the relevant local authority, a Certificate of Lawful Use of the operating centre for the use of a large goods vehicle in connection with a scaffolding business by 31 July 2019 at the latest.

Background

2. The background relevant to the appeal can be found in the appeal bundle, the transcript of the hearing and the decision letter and is as follows. The Appellant company (“USL”) was incorporated in 2015 and has operated a scaffolding business from the operating centre since incorporation using 3.5 tonne vehicles. The sole director of the company is Jason Little. Colin Davies is the owner of the operating centre (which is also his family home); he also owns the scaffolding equipment and is an equal shareholder in USL along with his wife and Mr Little.
3. By an application submitted on 18 June 2018, Mr Little applied for a restricted operator’s licence authorising one 7.5 tonne vehicle. A letter of objection was received by the Office of the Traffic Commissioner (“OTC”) on 9 July 2018 from David Brand who lived at The Gables, which, according to Traffic Examiner Batten, is approximately 130 metres away from the entrance to the operating centre on Clay Gap Lane. In summary, Mr Brand complained that the scaffolding business already generated a lot of noise which greatly

impacted on the environment, wildlife and neighbourhood and that the operation of a large goods vehicle from the operating centre would increase that disturbance. He further complained that the headlights from the proposed vehicle would be intrusive and he considered that Clay Gap Lane was unsuitable for use by large goods vehicles. He asserted that Mr Davies did not have planning permission to operate a business from his home address.

4. Whilst Mr Brand did not agree to his letter and environmental representations being provided to Mr Little, the OTC wrote to Mr Little to inform him that a representation had been received and summarised the content of the documents. Mr Davies responded. He submitted that a scaffolding business had operated from his premises for 15 years and that he did not require planning permission for such use to continue. The scaffolding was generally stored away from the proposed operating centre although there were four to six vehicle movements a day associated with USL. These would reduce to two to four vehicle movements a day if the licence was granted. The operating centre was to be used to park "*my vehicle*" securely overnight with movements commencing between 7.00am and 8.00am in the morning, returning between 5.00pm and 6.00pm each evening. He asserted that the nearest occupier of premises on Clay Gap Lane was 400 metres away. The lane itself was used by much larger vehicles than that proposed by USL, with a bus depot situated further down the lane with an authority for fifteen vehicles.
5. In October 2018, Traffic Examiner ("TE") Batten prepared an environmental report for the TC. He noted that Mr Little failed to attend the first appointment, without explanation. The relevant points to be noted are as follows:
 - Mr Brand's premises was approximately 130 metres away from the proposed operating centre.
 - Immediately next to the proposed operating centre was Clay Gap Farm which was unoccupied on the day of his visit.
 - Whilst sitting in his car outside the Clay Gap Farm, TE Batten could hear the clanking of scaffolding being loaded onto a 3.5 tonne hire vehicle in the operating centre. Should the Farm be sold (as it now has been), both noise from the scaffolding operation and the flood lighting would doubtless become a major issue to the new owners.
 - Wyre Borough Council's Planning Administration Department did not have any records showing that a planning application had been submitted for a business to be operated from Border Villa.
 - Mr Little informed TE Batten that the business hours of USL were five days a week with weekend work "*once in a blue moon*". Daily vehicle operation was between around 7.30am and 5.00pm. Work in Manchester would involve the vehicle leaving at 6.15am at the earliest. Vehicle loading normally took place upon return to the operating centre at the end of the working day and would take 20 minutes.
6. On 2 November 2018, the OTC wrote to USL and noted that Mr Little had "*scarcely engaged with this office during the application process and has*

apparently relied heavily on Mr Colin Davies for both correspondence, accommodating the traffic examiner during their visit and the financial standing of the applicant limited company". It was further noted that TE Batten had commented upon Mr Little's apparent lack of knowledge regarding drivers' hours and operator licensing and that the comments made by Wyre Council staff suggested that the proposed operating centre may not be lawfully available for use as an operating centre. USL was informed that the TC was proposing to refuse the licence application unless the company provided various items of documentation (including written confirmation from the local planning authority that Border Villa was available for use as an operating centre) along with undertakings that Mr Little would attend an operator licence management course and provide evidence of financial standing into the future and further agree to a condition that the vehicle would not be operated, moved, loaded or unloaded at the proposed operating centre before 0600 hours and after 1800 hours on any given day and a condition that the authorised vehicle would not exceed 7.5 tonnes.

7. In a letter dated 7th November 2018, Mr Davies took issue with the majority of the requests made save for the proposed conditions. He reluctantly agreed to provide evidence of financial standing following the grant of a licence and averred that he did not require planning permission as the scaffolding operation at the operating centre had not been subject to planning enforcement procedures in seventeen years.
8. The application was called up to a public inquiry which took place 15 April 2018. In the lead up to the hearing, Mr Davies provided a letter from his accountant to confirm that he and his wife had, from 2003 until USL was incorporated, rented the yard at the rear of their home to Mr Jackson of Hambleton Scaffolding. He also produced a letter from ML Planning Consultancy Ltd setting out s.171B of the Town and Country Planning Act 1990 which provides:

"Where there has been a breach of planning control consisting in the change of use of land, no enforcement action may be taken after the period of ten years beginning with the date of the breach".

The letter averred that if an activity which required planning permission had been carried out on land without planning permission, the activity became lawful after a period of ten years and gained immunity from planning control.

9. On 15th March 2019, the OTC responded to the above, stating:

"the Traffic Commissioner notes the company's position that it will benefit from the "protection" embodied in section 171B of the Town & Country Planning Act 1974 (sic), since the breach of planning control consisting of a change of use of land took place more than 10 years earlier.

The Traffic Commissioner would now wish to receive from you a Certificate of Lawful Use issued by the Local Authority, which confirms the position that the proposed use of the site would be lawful in accordance with Section 192 of the above Act".

10. On 26 March 2019, Mr Davies sent to the OTC, a copy of a “*Guide to Maintaining Roadworthiness Audit*” which was entirely lacking in substance as USL did not have any systems in place, some financial information and a letter in which he averred that a Certificate of Lawful Use was “*not compulsory, so I feel its just another unnecessary cost implication on the company ... I owned Border Villa, prior to Hambleton Scaffolding starting operating from this address in 2003 after I had purchased the scaffolding, so have witnessed this throughout, and as such, have no need to confirm to myself that the site is now lawful under the said act*”. He considered that the letters already provided to the TC were “*more than adequate*”. In respect of Mr Brand, Mr Davies informed the TC that USL was a direct competitor to the scaffolding company owned by Mr Brand. With regards TE Batten, his report contained “*numerous mistakes*” and was “*very misleading and seem biased in places (sic)*”.

Public Inquiry

11. In attendance at the hearing was Mr Little, Mr Davies and Mr Brand. The TC commenced by setting out his jurisdiction in environmental cases and advised the parties that he had attended Clay Gap Lane, had paused at the entrance of Border Villa and have walked along the lane with Mr Brand. The TC noted that the company had already agreed to the operation time restrictions set out in paragraph 6 above although those restrictions might not be sufficient to address Mr Brand’s objections.
12. Mr Brand then gave evidence. He repeated the written representations that he had made and averred that the noise of scaffolding poles being moved could be heard all day, including the mornings. He had not complained to Mr Davies about the noise because he did not want to upset him. Mr Brand considered that the noise would increase with the use of a larger vehicle. The road had been “*ruined*” by large vehicles using it. He denied that his business was a competitor to USL; his was a “*blue-chip*” operation employing 45 staff, including a transport manager. He denied that his representations had been driven by malice.
13. Having already provided some background information about USL, Mr Little told the TC that he did not arrive at the proposed operating centre until 7.30am and the vehicle would leave between 7.30am and 8.00am, returning to the yard at 4.00pm. There was then the following exchange:

“TC *If I were to place a condition on the licence which says that you cannot load a vehicle before half past seven in the morning, as opposed to the six o’clock offer that you have made, what difficulties would that cause you as a business? Would it cause any?*”

JL *Well not really, no, cos we can always –*

TC *Would there be any days when you would want to load before half past seven in the morning?*

JL There are ways to work round it where .. when we, we can always come back a little bit earlier in the afternoon, get back for half past three and load up ready for tomorrow so you're all loaded up

TC I must admit that thought was going through my mind. I think there is a discussion in here, I think it is in Mr Batten's report, you talk about the occasional trip to Manchester and you say .. fair enough I might want to start earlier on that day?

JL But I only put in question is if I got a job in Manchester (sic) .. obviously driving through traffic .. it's just obviously you wanna be away for half past six in the morning to .. get into Manchester for eight o'clock ... but that was only a question that I put .. it's not like I've done any jobs in Manchester anyway .. we have actually done one job in Manchester for a commercial firm but we hired the gear from George Roberts so we obviously didn't take our own .. we hired the gear, they dropped it off for us and we just went every day to go and erect it to get the job done".

In relation to noise, Mr Little considered that there would be less noise pollution in loading a 7.5 tonne truck as there would be no need to use a ladder rack which was required on a smaller vehicle.

14. Mr Davies then told the TC that he had been living at Border Villa for eighteen years. There were trees along the drive which reduced noise; there was always the option of planting a few more. He also had a fork lift truck which would help reduce the noise of loading the poles. Mr Davies (who is a builder by trade) had won a contract to build a large extension, requiring extensive scaffolding. He purchased the scaffolding off George Roberts and Bob Jackson then erected it. The scaffolding was taken down in 2004 and taken to Border Villa and Mr Davies agreed with Mr Jackson that he could use the scaffolding and the yard for payment. This arrangement continued until 2015 during which time, Mr Jackson operated a 7.5 tonne vehicle without the authority of an operator's licence. He was "dodgy". Mr Davies had not applied for a Certificate of Lawful Use because whilst it cost only £262, such certificates were only necessary if one intended to sell a business. Mr Davies volunteered that he was "happy" to apply for a certificate and that he would "pursue" it although it would take seven or eight weeks assuming the application went smoothly.
15. In his closing remarks, Mr Brand agreed that a fork lift truck would help reduce the noise of loading the poles although there would be an echo effect if loading under a corrugated roof. Trees were not an immediate option for noise reduction as they would take twenty years to grow.
16. In answer to the TC, Mr Davies indicated that he would be prepared to alter the undertaking previously given with regard to operating hours by delaying the commencement of operations to 7.30am although he queried whether there could be any further negotiation on the point, for example, 7.00am so as

to allow sufficient time to travel to certain locations? No further negotiations took place.

The Traffic Commissioner's decision

17. The TC's reasons for granting an interim operator's licence with the conditions and undertaking set out in paragraph 1 above were as follows:

"The application for an operator's licence comes before me as valid representation has been made (sic) by the occupier of land in the vicinity of the proposed operating centre, who considers his enjoyment of his property may be prejudicially affected by the use of a single large goods vehicle, and its loading/unloading with scaffolding equipment might have on him and his family.

Having weighed the arguments, having visited the site, which is rural in nature and driven along the largely single track but well used road, I have concluded that the site is suitable for use as an operating centre. I take into account in reaching my decision the statement of Traffic Examiner Batten. .. The locale is not unused to large goods vehicles and associated equipment and a nearby operating centre of a Public Service Vehicle operator.

Further, I am satisfied that the conditions now attached, willingly offered for the most part, will serve to prevent or minimise any adverse effects on environmental conditions arising from the use of a single large goods vehicle. In that regards I take account of the fact that the location has been used by this operator since 2015, albeit hitherto operating only vehicles out of scope of operator licensing.

A single matter remains outstanding at the point of consideration of this application, and which drives my decision to grant only an interim authority. This relates to the availability of the site for use. The owner of the site has obtained professional advice and has assured me that a certificate of lawful use is capable of issue, which would state that "the use of the site as an operating centre for vehicles used under any operator's licence would be lawful".

I require to see evidence of that authority, which is said to be available in 8-10 weeks, before considering whether the application can be granted in its full form".

The appeal to the Upper Tribunal

18. The grounds of appeal submitted by Mr Davies can be summarised in this way:

a) Vehicle operation time restrictions

- i. These were imposed as a result of Mr Brand's representations which were untrue. His business is in direct competition with USL and that had motivated his complaints. If there had been any truth to them, then Mr Brand would have complained in the previous fifteen years when Mr Jackson had been operating from Border Villa.

- ii. Mr Brand had not produced any evidence of recorded levels of intrusive noise affecting his property because any noise that he could hear would be negligible.
- iii. Mr Brand's representations and his identity were withheld from Mr Davies despite three requests which prevented USL from obtaining any evidence of noise levels in the vicinity of The Gables.
- iv. TE Batten's report was incorrect and biased. Mr Davies thought it "*bizarre*" that the Traffic Examiner could not comment on the level of noise at Mr Brand's property yet felt able to comment on noise levels at Clay Gap Farm. Further, Mr Davies did not appreciate TE Batten taking photographs of his home without permission.
- v. The loading of scaffolding onto a vehicle takes 30 minutes. The use of a larger vehicle had reduced vehicle movements to four times a day rather than four to six times a day. USL was still able to use 3.5 tonne vehicles without restriction, seven days a week.
- vi. Other operators in the area were not burdened with the same time restrictions.
- vii. The prohibition on loading or movements of the vehicle before 7.30am was unworkable and made the business untenable.

b) Certificate of Lawful Use

- i. The request for a Certificate of Lawful Use was made at a late stage in the application process. He considered the evidence provided was sufficient and that a certificate was not required.
 - ii. Those involved in USL were genuine, law abiding, truthful and honest individuals who felt that they had been treated like "*liars*" whilst the costs incidental to the application had mounted.
 - iii. Mr Davies was "*absolutely astounded at the seemingly deliberate lengths being taken to deny us a restricted operator's licence for 1 vehicle of 7.5t gvw*". He would not allow anyone to upset his neighbours.
19. In his written submissions dated 10th October 2019, Mr Brand repeated his representations and urged the Tribunal to dismiss the appeal. He was upset about being called a "*liar*" by Mr Davies. He referred to other matters which had not been before the TC, for example, that he had witnessed USL's authorised vehicle being unable to enter the drive of Border Villa without undertaking a three-point turn, which was dangerous; that he had seen vehicles in the livery of Blackpool Scaffolding Co at the operating centre giving rise to concerns that other companies were using the operating centre. Mr Brand was also concerned about the ability of Mr Little to ensure operator licence compliance and that wildlife would be significantly disrupted by the use of the operating centre generally and specifically, as a result of the use of a fork lift truck. He did not think that Mr Davies had applied for a Certificate of Lawful Use.

The appeal hearing

20. At the hearing of this appeal, Mr Davies attended, accompanied by Mrs Davies. Mr Brand was unable to attend.
21. Mr Davies repeated the contents of his grounds of appeal. He added that the TC had given too much weight to the evidence of Mr Brand. USL had already made concessions by agreeing to restrict vehicle movements to 6.00am to 6.00pm seven days a week and those hours should have been accepted by the TC. He conceded that nine out of ten times, there was no requirement for the vehicle to move before 7.30am. With regard to the Certificate of Lawful Use, Mr Davies admitted that he was being “*stubborn*” because “*they have been stubborn with me*”. The application had taken two years to process. At the conclusion of his submissions, Mr Davies volunteered that the TC had been fair to USL save in respect of operating hours and the Certificate of Lawful Use.

Discussion

22. The grant of a restricted operator’s licence is dependent upon the Applicant satisfying the TC that the application fulfils the requirements set out in ss.13B and 13C of the 1995 Act and in particular s.13C(5):

“The licence must specify at least one place in the traffic area concerned as an operating centre of the licence-holder, and each place so specified must be available and suitable as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds)” (our emphasis).

By s.14(2) of the 1995 Act:

“A traffic commissioner may refuse an application to which this section applies on the grounds that, as respects any place in the traffic area concerned which if the licence were issued, would be an operating centre of the holder of the licence –

- (a) the parking of vehicles used under the licence at or in the vicinity of the place in question would cause adverse effects on environmental conditions in the vicinity of that place; or*
- (b) the place in question would be unsuitable for use as an operating centre of the holder of the licence on other environmental grounds.”*

By s.14(3) of the 1995 Act:

“A traffic commissioner may not refuse an application for an operator’s licence on the ground that any place would be unsuitable as mentioned in subsection (2)(b) if:

- (a) at the date the application was made, that place was already specified in an operator’s licence as an operating centre of the holder of that licence, or*

- (b) the applicant has produced to a traffic commissioner a certificate in force in respect of that place under –*
(i) section 191 or 192 of the Town and Country Planning Act 1990 ...”

The “*certificate in force*” referred to in s.14(3)(b) is a Certificate of Lawful Use.

23. For the sake of completeness, it is appropriate to note that the combined effect of s.34(2)(a) of the 1995 Act and Regulation 15(1) of the Goods Vehicles (Licensing of Operators) Regulation 1995 is that in making any determination with respect to the suitability of any place on environmental grounds which has not previously been used as an operating centre, the TC is entitled to take into account any information about any planning permission or application for planning permission relating to the land. Whilst the existence of planning permission is not determinative of the issue of suitability on environmental grounds, it is of relevance.
24. We are satisfied that the combined effect of the above provisions is that a TC is entitled to consider, when determining the issue of suitability on environmental grounds, whether the proposed use of land as an operating centre is lawful in planning terms by virtue of permission having been granted. In the absence of planning permission, the TC is then entitled to consider whether the operating centre has been used unlawfully as such for ten or more years and that there is a Certificate of Lawful Use issued in respect of that use. The existence of such a certificate means that even if the use may be unsuitable under s.14(2)(b) of 1995 Act, the use is protected by the certificate on an estoppel basis (see 2003/87 Jonathan Hansford t/a Jonathan Hansford Plant Hire).
25. In this case, Mr Davies does not have the benefit of planning permission and it is therefore plain and obvious that the TC was entitled to require an undertaking from him to produce a Certificate of Lawful Use in the precise terms of s.14(3)(b) of the 1995 Act i.e. that the use of Border Villa “*as an operating centre for vehicles used under any operator’s licence is or would be lawful*”. This is particularly so when Mr Davies had persistently asserted that he was entitled to such a certificate and stated during the public inquiry that he was willing to provide one and agreed to an undertaking that he would do so.
26. Turning then to Mr Davies’ grounds of appeal dealing with this issue:
- i. The request for a Certificate of Lawful Use made by the OTC was not made at a late stage. The issue was first raised in the OTC letter dated 15 August 2018 and again in the OTC letter dated 2 November 2018. The request for a Certificate made in the letter dated 15 March 2019 was the third. Mr Davies had been given ample time to apply for a certificate and have it available for the TC to take account of in reaching his decision.
 - ii. Mr Davies had been obstructive and un-cooperative on this issue throughout the proceedings and he failed to appreciate the detail of the regulatory regime and what is required of operators when applying for a

licence. The TC was entitled to request sight of a Certificate of Lawful Use and such a request did not amount to Mr Little and Mr Davies being treated like “liars”.

- iii. The assertion that the TC had gone to deliberate lengths to deny USL an operator’s licence is wholly unfounded, not least because, at present, the company has the benefit of an interim licence.

All of the points raised on the issue of the Certificate of Lawful Use are without merit.

27. Of course, the provision of a certificate is separate to the TC’s determination that he was entitled to attach conditions to the licence under s.14(2)(a) of the 1995 Act, being satisfied as he was that the parking of vehicles at Border Villa would cause adverse effects on environmental conditions in the vicinity. This was a determination he was entitled to make on the evidence. He had visited the Clay Gap Lane and was in the best possible position to assess the representations made by Mr Brand. Turning then to Mr Davies’ grounds of appeal:

- i. Whilst he did not state it in terms in his short, written reasons, it is clear that the TC considered Mr Brand’s representations to be well founded. That was a determination he was entitled to make.
- ii. It was not for Mr Brand to produce evidence of intrusive noise levels but rather for USL, once notice was given of representations on the issue, to establish that the use of Border Villa as an operating centre was not unsuitable on environmental grounds.
- iii. Mr Brand was entitled to request that his identity and his specific representations be withheld from USL. However, the OTC set out in adequate detail, the issues raised by Mr Brand at an early stage so that USL could respond to them.
- iv. The allegation that TE Batten’s report was biased is unfounded. Whilst there may be some minor errors in the body of the report, they were not material and did not influence the ultimate decision of the TC. Mr Little, if not Mr Davies, was aware that the operating centre was going to be inspected. Taking photographs is a normal part of the reporting process.
- v. The efficiencies gained by using a 7.5 tonne vehicle were discussed during the public inquiry. The difficulty that Mr Davies now has is that the operational restrictions attached to the licence are in line with the comments made by Mr Little to TE Batten and in line with the evidence Mr Little gave during the public inquiry. He is the Managing Director of the company. The TC’s determination that the restriction on movements would prevent or minimise the adverse effect of using the authorised vehicle is beyond criticism.
- vi. The fact that other operator licences in the area do not have the same restrictions attached cannot assist USL as each case is based upon its facts.
- vii. The evidence of Mr Little as set out in sub-paragraph v. above and Mr Davies’ comments to the Tribunal in paragraph 21 above, do not support the contention in the grounds of appeal that the 7.30am

prohibition on loading and movement of the authorised vehicle is unworkable or that it makes the business untenable.

The points made by Mr Davies on this issue are, again, without merit.

28. There is one point which should be made in relation to the TC's use of terminology in his short, written reasons. When considering the existence of a Certificate of Lawful Use, he described this issue as relating to the "availability" of the operating centre. That was an error on his part. "Availability" is a question of fact and is principally concerned with the operator's right to use the operating centre, whether by reason of ownership or agreement, by way of example. The certificate issue goes to "suitability".

Conclusion

29. We are satisfied that the TC's decision was not plainly wrong in any respect and that neither the facts or the law applicable in this case should impel the Tribunal to allow this appeal as per the test in Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695. The appeal is dismissed.
30. At the conclusion of the appeal hearing, Mr Davies informed the Tribunal that the authorised vehicle was in use although he had not complied with the undertaking to obtain a Certificate of Lawful Use by 31 July 2019. On 13 January 2020, Mr Davies applied to the Tribunal for a retrospective extension of time within which to comply with the undertaking attached to the interim licence. By an order dated 16 January 2020, the time by which the undertaking was to be complied with was extended to 4pm on 11 March 2020.



**Her Honour Judge Beech
20 February 2020**