IN THE UPPER TRIBUNAL **NCN: [2020] UKUT 279 (AAC)**
ADMINISTRATIVE APPEALS CHAMBER **Appeal No. T/2020/18**

(TRAFFIC COMMISSIONER APPEALS)

APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the North West of England dated 31 January 2020

Before: M R Hemingway: Judge of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal
A Guest: Member of the Upper Tribunal

Appellant: Gaskells Midlands Ltd

In Attendance by telephone:
For the Appellant: Mr J Backhouse

Heard remotely by telephone

Date of Hearing: 17 September 2020

Date of Decision: 5 October 2020

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed.

Subject matter:

Financial standing: Clarity of instructions.

Introduction and decision in full

1. This is an appeal from a decision of the Traffic Commissioner ("the Commissioner") for the North West of England. That decision was communicated by letter of 31 January 2020. The Commissioner decided to refuse an application made by a company called Gaskells Midlands Limited ("the appellant") for a standard national goods vehicle operator's licence. We held a remote hearing by telephone, utilising BT Meet Me, with the consent of the appellant's legal representative. In deciding to hold a telephone hearing, as opposed to a traditional face-to-face hearing, we took into account fairness, the principles of natural justice, the "overriding objective" (see rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and the desirability of holding remote hearings where appropriate bearing in mind disruption caused by the coronavirus pandemic.

2. We have decided to allow the appeal. We have, accordingly, set aside the decision of the Commissioner as notified in the letter of 31 January 2020 as having been made in error of law. We refer the matter to the Commissioner to clarify the information required from the appellant and to make a fresh decision once the appellant has had a proper opportunity to provide that information and any relevant accompanying argument.

The Background

3. There is, in this case, an extensive and rather complicated factual background. But not very much of it is directly relevant to the issues we have been called upon to decide in this appeal. So, in providing our written explanation for the decision we have reached, we have concentrated upon what is relevant. But we stress that we have read all of the documentation provided to us for the purposes of this appeal even if not specifically mentioned.

4. There is a company called Gaskells North West Limited which has links to the appellant company. As we understand it, both have the same directors. On 14 January 2019 the Office of the Traffic Commissioner (OTC) wrote to the appellant calling it and Gaskells North West Limited, and three different transport managers, to a Public Inquiry (PI). As already touched upon, many issues were raised in the various call up letters and ventilated at the PI. But as to the appellant, the only issue which is now relevant to us was that relating to its financial standing. The appellant was represented at the PI by one Mr Jonathon Backhouse (in fact the brother of Mr James Backhouse who represented the appellant before us). The Commissioner had, in advance of the PI, been sent bank statements which, in isolation and on the face of it, suggested that the appellant met the financial standing requirements which an applicant for the above type of licence is required to meet and which are to be found at section 13A(2)(c) of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act"), with some ease. But a set of unaudited business accounts had also been provided by the appellant which related to a 12 month period ending on 31 March 2018. Those accounts were accompanied by a note which, understandably in our view, concerned the Commissioner. The difficulty stemmed from the following wording as contained in that note:

> "Although the company is technically insolvent these accounts have been prepared on a going concern basis on the understanding that the company will continue to receive financial support from its directors and companies under common control".

5. It seems that the appellant, and we think those representing the appellant, had not anticipated any difficulty at all with respect to satisfying the Commissioner at the PI that the financial standing requirements were met. That apparent confidence was based upon the bank statements. But the Commissioner informed the applicants representative at the PI that when preparing it, he had noticed the wording contained in the above note. He expressed substantial disquiet but decided to afford the appellant an opportunity to provide further written material which might assuage his doubts. Understandably, since the focus was primarily upon the other extensive issues which had necessitated the PI, not a great deal was said about the financial standing. But it is perhaps worth recording what was said about it at the end of the PI. We do so now:

> "**Mr Backhouse** – and fire-dance. Sir, the bank is always well above the figure required. The accounts present that statement, to which you referred us earlier, because the company owes significant sums of money to the two investors in it in the accounts. However, on a liquidity scale today, they are well above the standard. I think you have got some financial bank statements from the company.
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> **The Traffic Commissioner**: I have, but I am not thinking that this is a licence I can grant with that entry which is there -
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> **Mr Backhouse**: Yes
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> **The Traffic Commissioner**: - that this company is technically insolvent. That is public information, so I am not giving anything away.
>
> **Mr Backhouse**: I think, yes.
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> **The Traffic Commissioner**: I am prepared to put the application on one side while you get yourself sorted out but finding the company to be of financial standard with that is a struggle.
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> **Mr Backhouse**: Is challenging, except for the fact, Sir, I think they are not audited accounts, so you are not normally prepared to look at non-audited accounts. For financial standing you require the bank test.
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> **The Traffic Commissioner**: Yes, it is the bank test, but if I knew that that was the position, you would still be in trouble.
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> **Mr Backhouse**: Sir, let me take some further instructions on it. I need to speak to an accountant, I do not understand enough about that, those comments.
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> **The Traffic Commissioner**: I am thinking, I mean, I will add it in to the decision that you have twenty-eight days to sort yourself out, so I suppose I am saying, probably I am going to be saying I am proposing to refuse this, but

> I will give you some time to resolve the financial position, potentially. Well, even that though is then dependant on everything else, but…"

6. The Commissioner then issued a decision of 19 November 2019 in which he dealt with and decided the other matters though not the matter of the appellant's compliance with the financial standing requirements. But as to that, having recorded that he had seen and digested the note only when preparing for the PI, he said this;

> "64. I raised my concern with Mr Backhouse, who also represents this company, that contrary to my early belief that financial standing was met, I no longer took the view that such a finding could be sustained. I indicated that pressed to make a decision at the hearing, I would be minded to refuse the application for want of financial standing, which is not met otherwise than through the support of directors as individuals or other companies. I pointed out (and it was agreed) that Gaskells Midlands Ltd is neither a parent company nor a subsidiary of Gaskells.
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> 65. In fairness, however, in the light of the fact that this matter had not been appreciated (by either of us) until just before the Public Inquiry that I would be prepared to allow the applicants 28 days to address the matter further, but failing that I would determine the application by refusing it, without further notice, (subject only to the decision I was then yet to make about the relevance of one of its directors' convictions to the repute of the company)".

7. The appellant (through one of its directors but not through its legal representative) responded by sending in a new set of unaudited accounts which related to the 12-month period ending on 31 March 2019. and which did not have attached to it a note stating it was technically insolvent. The covering letter which accompanied that set of accounts suggested the Commissioner had "*indicated that he wished to see a new set of accounts that did not describe the company as technically insolvent*". Pausing there, that was not what the Commissioner had said even if that was the erroneous understanding of the appellant's directors.

8. In his subsequent decision of 31 January 2020, the Commissioner repeated what he had said about financial standing (part of which we have set out above) in his decision of 19 November 2019. He then acknowledged that he had received the further set of unaudited accounts. He made it clear (as we just have above) that he had not simply wanted a new set of accounts without an accompanying note stating the appellant was technically insolvent. He observed that even the set of accounts now produced came with a note which included a reference to the appellant having "*the continued support of both the company's directors and principal creditors*", and which said those directors and creditors had indicated "*they will not seek payment from the company for at least twelve months from the date of approval of the financial statements*" and that they had, at the time of the preparation of the accounts, "*a reasonable expectation that the company has adequate resources to continue in operational existence for the foreseeable future*". But not reassured by those comments, he noted that the accounts themselves indicated an increase in net liabilities from the previous year and, in short, a good deal of debt. He concluded that "*the reality is that the company continues to meet its day to day working capital requirements from the support of its directors and their companies*" and he suggested that other methods of evidencing financial standing rather than directors'

personal capital or money held by their separate companies, ought to have been provided. He concluded with the words:

> "In those circumstances, I find that financial standing is not met by the applicant company and therefore that the application must fail".

The arguments deployed in this appeal

9. Mr Backhouse provided what we regard as four separate, albeit overlapping to some degree, grounds of appeal. He also provided a helpful skeleton argument. We have to say we were not persuaded by a number of arguments put by Mr Backhouse but we shall focus upon the ground which we have found persuasive. That was what we have called ground 4. As expressed when the appeal was launched, that ground, in our view, amounted to a contention that there had been unfairness because the Commissioner had not offered the appellant a proper opportunity to meet his concerns, such as could have been given had there been a further PI hearing or at least, as it is put in the grounds, "*further dialogue*". During his oral submissions to us, Mr Backhouse argued, amongst other things, that the Commissioner had failed to communicate, with an appropriate degree of specificity, what sort of evidential material he was seeking. It was contended that, had he done so, such evidence of a persuasive nature could and very probably would have been provided.

Why we have allowed the appeal

10. We have found this case to be a marginal one. We accept that, speaking generally, the Commissioner's approach to the many issues before him (and as we say we have simply focused upon the issue relevant to this particular appeal) was commendably thorough. But with respect to financial standing it is right to say, as indeed does Mr Backhouse, that relevant bank statements which would ordinarily have been regarded as easily sufficient to evidence satisfaction of that requirement, had been provided. Further, it was clearly (though through no fault of anyone) only at a very late stage that the possibility that that requirement might not be met was raised. As we have said, we understand why the Commissioner was concerned given the content of the note which had accompanied the earlier set of unaudited accounts. We do not dispute the right of the Commissioner to warn of the likely outcome having identified concerns, and to give an opportunity for those concerns to be rectified in writing. We do not, therefore, detect unfairness translating into an error of law simply through the Commissioner not reconvening the PI. We would also make the point, as to that specific issue, that the appellant, neither through its representative or otherwise, ever asked that the PI be reconvened for the purpose of the provision of further evidence and further oral argument. Such a request could have been made at the end of the PI or later in writing.

11. Mr Backhouse has also argued that the Commissioner did not send a proper signal as to what sort of additional evidential material he was looking for. We are resistant to any general proposition that specific indications will always be required in any case where more time to address an issue is being given. Further, there will be cases, particularly in the context of an ably represented appellant (as here) or an experienced one, where it can properly be said that it would be for an appellant to

work out what might be required to meet a statutory requirement and then provide it. There will also be cases where a Commissioner might not be able to give such a signal because it is not at all obvious what sort of evidence might be capable of satisfying a particular requirement so that an indication cannot realistically be given but that it is nevertheless appropriate for reasons of fairness to afford a chance for an appellant to come up with something. But we do not think this case quite falls within any of those categories. Further, the circumstances were a little unusual in that there was evidence which would normally have sufficed by some way. It was not wholly obvious what sort of further evidence the Commissioner had wanted to see or indeed whether he had anything specific in mind or not. It may be that if a clearer signal had been sent out, the appellant might have provided evidence relating to the financial wherewithal of the two directors/creditors which would have fed into an assessment as to their ability to actually comply with the stated intention not to seek payment from the appellant for the twelve-month period indicated in the statement which accompanied the more recent unaudited accounts or for a longer period. Other sorts of evidence, if specified, might have been provided too.

12. We have concluded then, that there was, in this case, a breach of the rules of natural justice so as to amount to an error of law. So, we set aside the Commissioners decision. We do not have the evidence to go on to attempt to remake the decision ourselves and so we remit. We do so, so as to enable the Commissioner to say more by way of clarification as to what he is seeking from the appellant even if it is no more than an indication by reference to relevant Statutory Guidance, and thus to enable the appellant to have an opportunity to provide more than it has to date. In any event, we think the appellant will by now have a clearer idea of what it might be appropriate to provide. Once that opportunity has been given, (which might appropriately be thought to be given by way of an oral hearing if the appellant wants one which we assume it does) we think the Commissioner will be in a better position to decide the disputed question of financial standing. Although the facts are not the same we consider our decision to be in line with the approach taken by the Upper Tribunal in Enviro Kleen (Scotland) Limited: *T/2018/009:* [2018] UKUT 0144 (AAC).

Signed:

M R Hemingway
Judge of the Upper Tribunal

Dated: **5 October 2020**