

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

**Case No. T/2018/65
[2019] UKUT 163 (AAC)**

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE
SCOTTISH TRAFFIC AREA (Ms J Aitken)**

Dated: 11 September 2018

Before:

**Marion Caldwell QC
Mr. George Inch
Mr. Stuart James**

Judge of the Upper Tribunal
Member of the Upper Tribunal
Member of the Upper Tribunal

Appellant:

MR LINDSAY CRAFT

Attendance:

For the Appellant: Mr N Kelly, Solicitor.

Heard at: George House, 126 George Street, Edinburgh.
Date of Hearing: 26 February 2019
Date of Decision: 15 May 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject Matter

Disqualification. Restricted licence.

Cases referred to:

Arnold Transport & Sons Ltd v DOENI NT/2013/82
Aspey Trucks T2010/49
Bryan Haulage (No.2) T2002/217
Dundee Plant Hire T2013/47
Kyle Seafoods (2009/483)
Martin Joseph Formby T/2012/34
Optimus Access Ltd T/2015/12
Priority Freight T2009/225
Redsky Wholesalers Ltd T/2013/007

Thomas Muir (Haulage) Ltd. v Secretary of State for the Environment,
Transport and the Regions 1999 SC 86
West Mix Ltd 2005/537

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Scottish Traffic Area given on 11 September 2018.
2. In summary, the Traffic Commissioner (i) revoked the licence held by Lindsay Craft trading as Scrap a Car Scotland (OM 1097007) in terms of section 26(1) of the Goods Vehicles (Licensing of Operators) Act 1995; (ii) disqualified Lindsay Craft for three years from applying for or holding an operator licence in any traffic area in terms of section 28(1) and (4) of the 1995 Act; and (iii) refused an application by Scrap a Car Scotland.Com Ltd (OM 20011733) as she was not satisfied that the company and its sole director, Lindsay Craft, were not unfit to hold a licence and that the director was now a disqualified person in terms of section 28(4) of the Act. The appellant appeals against the disqualification only.

The Relevant Legislative Provisions

3. Section 2 of the 1995 Act provides that a person may not use a goods vehicle on the road for the carriage of goods for hire or reward or in connection with a business or trade carried on by him except under a licence issued under the Act. The operator licence specifies the maximum number of vehicles that may be used under it (section 6).
4. A licence is not required for use of a recovery vehicle provided it carries no more than two disabled vehicles (Vehicles Excise and Registration Act 1994, schedule 1, part V, paragraph 5 and the Recovery of Vehicles (Number of Vehicles Recovered) Order 1989). There are other exceptions to section 2 that are not relevant to this appeal.
5. In terms of section 13 of the 1995 Act in determining an application for a restricted operator licence, the traffic commissioner must be satisfied, among other things, that the applicant is not unfit to hold an operator's licence (s 13(4)). Section 13B provides:-

The requirement of this section is that the applicant is not unfit to hold an operator's licence by reason of—

- (a) any activities or convictions of which particulars may be required to be given under section 8(4) by virtue of paragraph 1(e) or (f) of Schedule 2;*
- (b) any conviction required to be notified in accordance with section 9(1) (convictions etc required to be notified subsequent to the making of an application).*

6. Section 26 provides that the traffic commissioner may direct that a licence be revoked on any one of a number of grounds including the bankruptcy of the holder (s26(1)(g)) and that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence (s26(1)(h)).
7. Section 28(1) provides that where the traffic commissioner directs that the licence be revoked under s 26 the commissioner may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from holding or obtaining an operator's licence. Where the traffic commissioner

disqualifies the licence holder, s 28(4) provides that the commissioner may specify that if that person, during the period of disqualification:-

- (a) *is a director of, or holds a controlling interest in—*
- (i) *a company which holds a licence of the kind to which the order in question applies, or*
 - (ii) *a company of which such a company is a subsidiary, or*
- (b) *operates any goods vehicles in partnership with a person who holds such a licence, that licence of that company or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 26.*

Background

8. The following is a summary of the background to this appeal taken from the decision of the Traffic Commissioner dated 11 September 2018 and other documentation within the bundle for the Traffic Commissioner and public inquiry in this case.
9. On 27 July 2010, Lindsay Craft was granted a restricted goods vehicle operator licence with authorisation for 1 vehicle and 1 trailer. In the application form he declared that he had been sequestrated in the past. The trading name was Craft Recovery and the main business was vehicle recovery.
10. On 14 April 2014 the appellant was sequestrated again following action by HMRC for non-payment of VAT.
11. On 23 April 2014, Heather Cameron applied for a restricted operator licence for 4 vehicles (reference OM1129444). Miss Cameron's application was for vehicle recycling from Strathore Road, Thornton ("Strathore Road") and with an email address which had Scrapacarscotland within it. She gave a trading name of Scrap a Car Scotland. By covering letter of 11 May 2014 to the Leeds Central Licensing Unit ("Leeds") she wrote that she was starting a new internet vehicle recycling service, with one five car transporter and 2 x 7.5t transporters and a 7.5t HIAB truck. That application was later withdrawn. Miss Cameron was, and is, the appellant's domestic partner.
12. In May 2015, at 5-year renewal of the Craft Recovery licence, the appellant sought a change of trading name to Scrap A Car Scotland. The operating centre was Strathore Road. He added Miss Cameron as a partner, later writing to advise that she was a domestic partner, not a business partner. The appellant did not declare the 2014 sequestration.
13. On 12 May 2016 Scrap A Car Scotland.Com Ltd was incorporated. The sole director is the appellant. Miss Cameron was a director from 12 May to 13 December 2016. The appellant is also director of Scrap A Car Holdings Ltd. He is the person with significant control of both companies. At no time has either of the companies held a goods vehicle operator licence.
14. On 27 January 2017 Scrap A Car Scotland.Com Ltd applied for an operator licence to operate 6 vehicles and 4 trailers from Strathore Road. The sole director and contact person for the application was Mr Craft. 4 vehicle registrations were given on the application BX51 NPJ; P5 SWT; KIG 6497 and HX56 NCD. AM Phillip of Glenrothes were nominated as providers of safety inspections. Mr Craft declared that he held the sole trader licence which would be surrendered on grant of this application. The sequestrations in 2005 and 2014 were declared. The latter sequestration had not

previously been declared to the Office of the Traffic Commissioner by Mr Craft as a sole trader licence holder.

15. A DVSA traffic examiner's investigation in 2017 reported, among other things, encounters with unauthorised vehicles being used by Mr. Craft or ScrapacarScotland.com Ltd. The report stated that Mr. Craft was aware that he was operating more vehicles than authorised and that he had been advised not to operate in excess of the licence. A notice of shortcomings was issued on 21 December 2017.
16. The Traffic Commissioner was concerned about Mr. Craft and his operation and directed that the applicant company and Mr Craft, as operator, be called to a conjoined Public Inquiry before any determination was made on the licence application. Call up letters were issued dated 24 July 2018 to Mr Craft and to Scrap a Car Scotland.com Ltd. The letters listed a number of issues which were of concern including the appearance that:-
 - a) Mr Craft was operating more vehicles than the maximum number on the sole trader licence;
 - b) The vehicles or drivers had been issued with prohibition notices by DVSA or police in the past 5 years;
 - c) That he or his drivers had been issued with fixed penalty notices in the past five years;
 - d) That he had failed to advise the Traffic Commissioner within 28 days that he had been sequestrated;
 - e) That there had been a material change of circumstances since the licence had been issued in that the trading name had been incorporated in May 2016.
17. A copy of the DVSA traffic examiner's report was provided with the call-up letter in which, it was stated, the issues were set out in more detail. In particular, it was highlighted that the DVSA report stated that Mr Craft and/or the limited company may have operated as many as 7 vehicles when the sole trader licence only authorised one vehicle and that Mr. Craft was aware of this.

The Public Inquiry

18. The Public Inquiry was held at Edinburgh on 28 August 2018. Those present were Mr Craft, represented by Mr N Kelly, Solicitor, Glasgow. Mr Thomas Gracie of Cupar Training Services and Mr Elliot Scott of AM Phillip attended as witnesses but Mr Scott was not called to give evidence. DVSA was represented by Traffic Examiner Mr J Cobban.
19. Mr Craft advised the Traffic Commissioner that he no longer sought trailer authorisation. The Public Inquiry briefs were taken as read into the record. As well as details of the licence/applications and the DVSA report, the evidence for the company contained pages from the company's website, including photographs of vehicles.

DVSA evidence

20. The DVSA evidence comprised the Traffic Examiner's report, with associated productions including photographs supplemented by brief oral evidence at the Inquiry.
21. DVSA was aware that Mr Craft held a restricted licence for one vehicle specified as BX51 NPJ.

22. On 8 May 2017, the Traffic Examiner checked unladen vehicle EU03 XMX at Invergowrie. The driver stated his employer was Scrap a Car Scotland and he was en route to Errol to collect cars. On 1 November 2017, at Crombie, a Vehicle Examiner encountered RC53 CUE in livery of Scrap a Car Scotland.com Ltd laden with 2 vehicles. The driver said the vehicles belonged to Mr Craft and were being transported to Strathore Road to be dismantled and parts transported to Eastern Europe.
23. On 21 December 2017, the Traffic Examiner attended to see Mr Craft but he was ill. He met Mr Thomas Gracie who had been hired as a transport consultant to assist. Mr Gracie said he attended twice a week, totalling 12 hours. The Examiner completed a Traffic Examiner Operator report (TEOR). The Examiner found the systems set up to be robust and showing compliance in all areas. By this, the Examiner meant that scorings of '1' were given against the systems boxes. The Examiner comments section recorded that on 8 January 2018 the Examiner spoke to Mr Craft "who is aware that he has been operating more vehicles than authorised". Mr Craft had applied in March 2017 to increase the vehicle authorisation to 6 vehicles in name of the company. He had 36 employees and had to use the vehicles to get the cars to his site. The Traffic Examiner advised Mr Craft that he should not be operating more vehicles than the one authorised.
24. On 9 February 2018, the Examiner visited the operator again and examined analogue charts and digital charts for 9 vehicles over dates in 2017. No more than 6 vehicles were operated (i.e. the number of vehicles sought in the application). The TEOR Examiner comment notes that charts show 4 vehicles in regular use in 2017 and digital data show 5 vehicles in regular use in 2017.
25. On 24 April 2018, a Traffic Examiner on a road check at Blackburn A96 checked SK17 VNU in livery of Scrap A Car Scotland.com Ltd. No disc was displayed. The driver said he was employed by Scrap A Car Scotland going from Thornton to Old Meldrum. The vehicle was laden with cars.
26. On 12 June 2018, a Traffic Examiner on duty in Moray encountered LNZ 5108 laden with three vehicles. The driver said he was employed by Scrap A Car Scotland.Com (pay slip showed the company paid him). The driver was en route from Thornton to Huntly via Keith and was laden with scrap cars. Downloading the vehicle and driver card data showed the Examiner that the vehicle had been in regular use since 9 May 2018.

Mr. Craft's evidence

27. Mr Craft gave evidence and stated that the sole trader licence was not used any longer. It was the company which was operating HGVs. The company had 2 Scania's - SK17 VNU and EM67 LLY which were in possession and under R & M Contracts with Scania; CR15 FTY, SR17 GKN, LNZ 5108 were all being replaced. The company had 5 vehicles in possession. Four new vehicles were on order.
28. He said the limited company was seeking a licence for 6 vehicles. He understood that there had to be trust between an operator and the Traffic Commissioner. His background is that from leaving school he went into the Army for about a year. He married; divorced in 2005 which led to the 2005 bankruptcy when the solicitor claimed £2,500 in fees which he considered was due by his ex-wife. The solicitor sued him and sequestrated him. He was solvent. He went to the Court of Session to get the bankruptcy overturned. That cost him more. He could not explain why the discharge from the Accountant in Bankruptcy showed May 2008 rather than 2006. It had taken over a year from the bankruptcy to get everyone who had claimed paid.

29. He gained his LGV driving entitlement and in 2003 started to seek employment driving lorries for others. He was driving lorries for companies which did the same work as he was doing now. He decided to start recycling vehicles. He got the operator licence for one vehicle and a trailer and operated an 18 tonne Scania.
30. He said that in 2014 HMRC did a VAT inspection and found that he ought to have been registered for and charging VAT. HMRC claimed VAT on a year's sales. He was unable to pay and was sequestrated. At the time the books were being done by an older man in a nearby town who had not advised properly. He tried to do a deal with HMRC but they refused. The turnover at the time was well over a six figure sum. He didn't think they needed to charge VAT as they were selling the vehicles on. He had not been doing it to be cheaper than competitors. It was a mistake which cost him. He was discharged from the bankruptcy after a year. He apologised for not telling the Traffic Commissioner at the time. It was chaos; it was at the back of his mind; he had Heather and 2 children; he was trying to make ends meet.
31. When they ran into difficulty with HMRC, Heather Cameron said she had funds which she could put into the business and become involved. The application was withdrawn as they broke up for a while.
32. On the advice of his accountants he incorporated the company. What they did was take a car and drain and dismantle it on a production line and recycle the parts. They are licensed by SEPA and have implemented drainage and concrete surfacing to satisfy SEPA. In the last 2-3 years the business had become huge. He said that he markets the company by advertising and on local radio; they cover the whole of Scotland.
33. He said he had been open with DVSA. He did not know why there was a delay in his licence application. He had made numerous phone calls and was told they were awaiting reports.
34. He brought Mr Gracie in to advise on transport matters given the increase in business and the plans for the future. Mr Gracie is qualified with a CPC and is a trainer.
35. He gave details of the considerable investment the company had made in the premises and in ordering new vehicles. The company was financially healthy. He had ordered the new vehicles in the hope of an operator licence. The vehicles had to be ordered in advance with nearly a year lead in. For the operator licence Mr Gracie or Mr Scott at AM Phillips would have systems in place. He could not see a way forward without an operator licence. He said he wanted the business to run properly. The business model does not fit the 2 vehicle exemption. He used to run smaller vehicles. The business wouldn't survive with smaller vehicles and he would have to downsize and lay off people. It was not cost effective to take a 2-car transporter to the Isle of Skye or Dumfries and Galloway. It was accepted that there had been unlawful operating.

Mr. Gracie's evidence

36. Mr Thomas Gracie said he traded as Cupar Training Services and had had a lifetime of involvement with transport, including being a transport manager and HGV driver. He is an accredited driver CPC trainer. Periodically he is asked by operators to look at their systems. He became involved with Mr Craft about a year earlier. He undertook a small audit and found that Mr Craft had nothing in place. He asked about the operator licence and was told it was in process. He checked driver licences and then worked on drivers' hours, induction and vehicle checks. He went to the business a couple of days per week, though initially he went in a week at a time to get everything in place. He does downloading monthly and finds very few infringements; though there were some

Working Time Directive issues as Mr Craft was not aware of the Working Time Directive regulations. He could not commit to being transport manager should the licence move to a standard licence as he had other customers.

The Traffic Commissioner's Decision

Findings in Fact

37. The Traffic Commissioner's principal findings in fact are summarised below.

1. *Mr Lindsay Craft has held a restricted operator licence for one vehicle since 27 July 2010. He is aware of the requirement to hold an operator licence.*
2. *Mr Craft disclosed that he had been sequestrated in 2005.*
3. *Mr Craft was sequestrated following action by HMRC on 14 April 2014.*
4. *This material change in the financial circumstances of the licence holder was not notified to the Office of the Traffic Commissioner.*
5. *Mr Craft continued to operate and completed the standard 5-year checklist for the licence on 11 June 2015. The Office of the Traffic Commissioner being unaware of Mr Craft's circumstances did not instigate revocation.*
6. *By failing to notify the sequestration, Mr Craft was able to continue to use the licence. Contemporaneously to Mr Craft's sequestration, an application dated 25 March 2014 was made by his life partner, Ms Cameron, to gain an operator licence for 4 vehicles using same operating centre, for same purposes and using same form of email address.*
7. *I find that was an attempt to expand the operational side of the business at a time when Mr Craft was bankrupt and could lose his operator licence and could not be granted an operator licence.*
8. *From at least 2014, Mr Craft's sole trader business was expanding such that on advice the company was incorporated in May 2016. The company accounts showed the rapid expansion of the business.*
9. *I find that the company began using exempt and non-exempt goods vehicles from sometime in 2016 without an operator licence. The company has continued to use exempt and to operate non-exempt goods vehicles for which an operator licence is required from 2016 to the present day. As at the day of the Public Inquiry, the operation of goods vehicles for which a licence is required had not ceased.*
10. *Mr Craft as director was warned by DVSA that the company's operation of goods vehicles was unlawful and should stop. The form on which the company applied for a licence warned that there was no authority to operate before a licence was granted.*

11. *The company had at times operated 5 vehicles for which there was no operator licence or discs.*
12. *Until the engagement of Mr Gracie, neither Mr Craft nor the company had proper arrangements in place which would have met the licence undertakings. I find that by December 2017 Mr Gracie had introduced systems which could have satisfied the licence undertakings had a licence for 6 vehicles been granted.*
38. The Traffic Commissioner found that Mr Craft's business began to expand rapidly and employee numbers increased. The use of smaller vehicles that would fall within the exempt category became inconvenient and less profitable. In the context of extensive, expensive expansion, unlawful use developed and became the norm. The unlawful use continued notwithstanding Mr. Craft being on notice from DVSA that the company did not have authority to operate; he preferred to expand his business than to obey the law. She stated that the motive for unlawful use was not hidden from the inquiry: it was for profit and expansion. She inferred from the evidence that the significance of the sequestration in 2014 was not lost to the appellant and it was for that reason that Miss Cameron made an application for a licence to allow the Scrap a Car business to gain an operator licence and to continue its expansion.
39. In reaching her decision, the Traffic Commissioner said that she had regard to the Senior Traffic Commissioner Statutory Guidance Documents, in particular Nos 1 (on fitness) and 10 (decision making and proportionality) and to the undernoted appeal cases:-
- (a) Thomas Muir (Haulage) Ltd. v Secretary of State for the Environment, Transport and the Regions 1999 SC 86;
 - (b) Aspey Trucks T2010/49 (gatekeeping);
 - (c) West Mix Ltd 2005/537 (unlawful operating);
 - (d) Kyle Seafoods (2009/483) (unlawful operating);
 - (e) Optimus Access Ltd T/2015/12 (unlawful operating);
 - (f) Redsky Wholesalers Ltd T/2013/007 (tests of repute and fitness);
 - (g) Dundee Plant Hire T2013/47 (options for the Traffic Commissioner);
 - (h) Arnold Transport & Sons Ltd v DOENI NT/2013/82 (fair competition);
 - (i) Martin Joseph Formby T/2012/34 (trust);
 - (j) Bryan Haulage (No.2) T2002/217 (putting out of business);
 - (k) Priority Freight T2009/225 (trust for the future).
40. She stated that the case law underlined the seriousness of operating without a licence and the importance of fair competition. She said the traffic commissioner was entitled to assess any licence application and when information was withheld and unlawful operating came to light, an applicant could not expect a speedy grant and a green light welcome. Mr. Craft had offended against not only HMRC but also fair competition.
41. She had to concern herself with gatekeeper issues as identified in *Aspey Trucks*. This was a highly visible and highly marketed operation, operating beyond the exemptions in place for vehicle recovery.
42. With the case of *Thomas Muir* in mind and the case law that places trust at the heart of operator licensing she had to have regard to securing respect for the regulatory regime and its purposes. She said that she could not grant a licence to a person or company where there has been brazen flaunting of the requirement for an operator licence and self-serving priority given to business expansion and profiteering; she had to protect fair competition and the purposes of the licensing regime.

43. She noted that Mr Craft had ceased to use his sole trader licence. That licence was liable to revocation on the grounds of his bankruptcy in 2014 (section 26(1)(g) and (h) of the 1995 Act). By omitting to notify the traffic commissioner's office of his sequestration in 2014 he was able to continue operating and to have a licence issued for the vehicles specified on the licence. Given her findings in fact about the way in which he had operated as an individual and as a company, she considered that he could not be trusted to comply with the regulatory regime; she found that the appellant could no longer be said to be not unfit to hold an operator licence; she therefore revoked the sole trader licence.
44. In considering whether or not to disqualify the appellant under section 28 and, particularly if the power in section 28(4) were used, she had in mind that the company's application would be doomed as he was the sole director of the company. In the circumstances, she decided that this was a case that called for disqualification. She took into account the advantage gained by the appellant by not advising of his sequestration in 2014. That advantage had started, she found in May 2014 when operating by the company commenced, when drivers began to be paid by the company and not the sole trader. (The reference to "the company" in the preceding sentence should probably be to Scrap a Car Scotland.) The company had been incorporated and had been operating without a licence since 2016. The overarching negative feature was the deliberate unlawful operating by the company of which the appellant was the owner and controller. Other negative features were that there were no proper compliance arrangements in place when Mr. Gracie first assessed the company and the fact that unlawful operation was not stopped by the warnings on the licence application and letter of acknowledgment from the Leeds Central Licensing Unit or by the warnings from DVSA. On the positive side, the systems put in place by Mr. Gracie would have ensured compliance, had the operation been carried out under a licence. Other positive features were that the appellant had disclosed the 2014 sequestration in the company application; he had been candid with DVSA and at the public inquiry. His position was that having applied for a licence he expected to get it and he had to continue as planned or his business would not be profitable otherwise. These positive elements, she said, served to mitigate the period of disqualification. Bearing in mind the STC Guidance on disqualification, she therefore limited the period of disqualification to three years together with a section 28(4) direction.
45. Following the public inquiry the appellant advised the Traffic Commissioner that he was about to take his CPC and that he had booked a course with RHA, albeit no vouching was provided. She was advised that he had altered his fleet so that any operation would be exempt. She considered that these actions came too late and did not alter her decision on disqualification. She was provided with evidence that the appellant had been telling the truth about his 2005 sequestration being recalled in 2006 (and not 2008 as some paperwork indicated). However, she observed that the 2005 sequestration had been declared but the 2014 sequestration had not been notified, as it should have been during the currency of the sole trader licence.
46. It is not necessary for the purposes of this appeal that we deal with the refusal of the company's licence application.

The appeal to the Upper Tribunal

47. The appellant was dissatisfied with the Traffic Commissioner's decision relating to his disqualification and appealed to the Upper Tribunal. His grounds of appeal are at page 1178-9. In addition, Mr. Kelly helpfully provided a written submission on which he

expanded at the Upper Tribunal hearing. In summary, the grounds of appeal were as follows:-

- a. The Traffic Commissioner erred in law in finding that there had been unlawful operation for 4 years. She had erred in concluding that all operation post-2014 was unlawful and by taking no cognisance of compliant operation, such as when the exemption applied for carrying only two vehicles, and the fact that the systems in place were compliant;
- b. After the inquiry the Traffic Commissioner had been advised that the appellant planned to have future training; that he had changed his fleet so that only two vehicles could be carried at a time and would therefore be exempt; and, evidence was supplied to confirm that he had been truthful about his 2005 sequestration being recalled in 2006. It was submitted that in considering disqualification she had failed to take sufficient account of all of this.
- c. Disqualification was disproportionate having regard to all the circumstances.
- d. The Traffic Commissioner failed to indicate at the inquiry that she was minded to consider disqualification and should have invited submissions on this issue.

Discussion and decision

48. The following principles (extracted from the Digest of Traffic Commissioner appeals) as to the proper approach to an appeal in the Upper Tribunal can be found in the decision of the Court of Appeal in the case of Bradley Fold Travel Ltd and Peter Wright v The Secretary of State for Transport [2010] EWCA Civ 695:

- (1) *The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.*
- (2) *The Appellant ‘assumes the burden’ of showing that the decision appealed from is wrong.*
- (3) *In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; the Appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view.*

The tribunal sometimes uses the phrase “plainly wrong” as a shorthand description of this test. (Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, NT/2013/52 & 53 paragraph 8).

49. Having considered the evidence, and the submissions made for the appellant we are not satisfied that the decision of the Traffic Commissioner was “plainly wrong”.

50. Traffic Commissioners must be able to trust those to whom they grant operator’s licences to operate in compliance with the regulatory regime. The public and other operators must also be able to trust operators to comply with the regulatory regime (T/2012/34 Martin Joseph Formby t/a G & G Transport).

51. In NT/2013/82 Arnold Transport & Sons v. DOENI at paragraphs 12 & 13 the Tribunal said:

11. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.

12. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "actions speak louder than words", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.

52. The question of whether or not the appellant could be trusted to comply with the regulatory regime in the future was a legitimate issue that the Traffic Commissioner had to address. In considering the issue of trust she had the undisputed evidence that the appellant had failed to disclose his 2014 bankruptcy within 28 days as he was obliged to do, as he knew or ought to have known. Not only that, when his 5-year licence renewal came around in 2015 he again failed to disclose the bankruptcy. While there may have been instances of exempt use (indeed, the Traffic Commissioner made a finding in fact about exempt use), the appellant frankly admitted both to the DVSA and to the Traffic Commissioner that the company was routinely transporting more than two vehicles at a time as it would not be cost-effective to limit the loads to two vehicles. That was unauthorised use that flouted the regulatory regime and which continued up to the date of the public inquiry. The appellant had been aware that he was not authorised to carry more than two vehicles at a time; or to operate more than the one vehicle authorised under the sole trader licence; he was explicitly informed of this on more than one occasion by DVSA. However, he ignored their advice. While it is regrettable that the company's application took so long to be determined, that does not entitle an applicant to commence or continue with unauthorised operations. Meantime, the appellant did nothing to rectify the situation and continued to use unauthorised vehicles and to transport more than two vehicles at a time. His conduct lies somewhere between the

third and fourth group described by the Tribunal in Arnold Transport. It was therefore not unreasonable for the Traffic Commissioner to place little weight on assurances as to future conduct made after the public inquiry. To have accepted such late assurances, given what had gone before, would send the wrong signal to the industry. In the circumstances, we cannot hold that disqualification was disproportionate or, in any other way, plainly wrong.

53. We do not accept the submissions for the appellant about the length of the disqualification. The Traffic Commissioner had the advantage of seeing, hearing and assessing the witnesses. The evidence suggested that the company's operation had been growing over a number of years and, during that period, unlawful use of vehicles was a significant factor in that growth. The Traffic Commissioner did a balancing exercise and considered positive and negative features; she took account of the appellant's candour with DVSA and at the public inquiry and the areas in which there was compliance. However, she considered those positive features to be outweighed by the deliberate unlawful operating. (See paragraph 44 above.) Taking all of that into account, we are unable to impugn her reasoning in deciding that a period of disqualification of three years was appropriate given the circumstances.
54. Regarding the appellant's credibility and the subsequent provision of vouching to show that he had been telling the truth at the public inquiry about when his 2005 sequestration had been recalled; this misses the point that the real issue, insofar as trust was concerned, was the deliberate concealment of the 2014 sequestration during the currency of the sole trader licence.
55. We find no substance in the point made by Mr. Kelly that there was no warning at the public inquiry that the Traffic Commissioner was considering disqualification and no invitation to address her on that possibility. The appellant was made aware of this in the call up letter (page 11) and experienced practitioners in this jurisdiction, such as the appellant's solicitor, would also be aware of that power and that possibility. The Traffic Commissioner could easily have been addressed on the issue of disqualification in advance, in case she found it necessary to revoke the sole trader licence.
56. We have had in mind the guidance of the Court of Appeal in Bradley Fold. We have considered whether the Traffic Commissioner's approach to the witnesses and to the evidence, her process of reasoning and the application of the relevant law requires us to adopt a different view from her. For the reasons that we have given the answer to those questions is in the negative. We find no flaw in her analysis and nothing disproportionate in her conclusions. Accordingly, the appeal is dismissed.

Marion Caldwell

MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 15 May 2019