

[2019] UKUT 265 (AAC)

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

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

Dated: 18 February 2019

Before:

Marion Caldwell QC	Judge of the Upper Tribunal
Mr. George Inch	Member of the Upper Tribunal
Mr. Stuart James	Member of the Upper Tribunal

Appellant: MACDONALD GROUNDWORKS LTD

Attendance:

For the Appellant: Mr R R McIlvride QC, instructed by Anderson Strathern

Heard at: George House, 126 George Street, Edinburgh.

Date of Hearing: 2 July 2019

Date of Decision: 27 August 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed to the extent that we (1) set aside the Traffic Commissioner's decisions (i) revoking the appellant's licence; (ii) disqualifying the appellant from holding or obtaining an operator's licence until 19 May 2002; and (iii) refusing variation applications to nominate a new transport manager, add additional operating centres, and increase the licence authorisation; and (2) we remit to the Traffic Commissioner for redetermination the appellant's variation applications made on (a) 10 October 2016, for substitution of a new transport manager for the existing transport manager; (b) 25 January 2017, for authorisation of an additional operating centre; and (c) 22 February 2017, for authorisation of an additional operating centre and to increase the licence authorisation from 5 vehicles and 5 trailers to 15 vehicles and 8 trailers.

Subject Matter

Shareholder of operator which was a limited company. Disqualified Company Director. Shadow director. Loss of operator's repute. Revocation. Disqualification.

Cases referred to:

Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695

Catch22Bus Ltd and Higgs [2019] EWCA Civ 1022

Crompton t/a David Crompton Haulage v. Department of Transport North Western Traffic Area [2003] RTR 34

McCaffrey v. Secretary of State for Transport 2006 SC 664

In Re Muck it Ltd v Secretary of State for Transport [2006] RTR 9

Revenue and Customs Commissioners v Holland [2010] 1 WLR 2793

Salomon v A Salomon & Co Ltd [1897] AC 22 HL (E)

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Scottish Traffic Area given on 18 February 2019. The appeal was considered at an oral hearing at which MacDonald Groundworks Ltd was represented by Mr R R McIlvride QC.
2. In summary, the Traffic Commissioner revoked the goods vehicle operator licence held by the appellant on the ground of loss of repute in terms of section 27 of the Goods Vehicle (Licensing of Operators) Act 1995 (“1995 Act”); refused variation applications to add two additional operating centres, to increase vehicle authorisation and to nominate a new transport manager. In addition, the appellant was disqualified until 19 May 2022 from applying for or holding an operator licence in the Scottish or any other traffic area in terms of section 28(1) of the 1995 Act with conditions in section 28(4) applying.

The Relevant Legislative Provisions

3. Section 2 of the 1995 Act provides that no person shall use a goods vehicle on a road for the carriage of goods, for hire or reward, or in connection with any trade or business carried on by him, except under a licence issued under the Act.
4. In terms of section 13A of the 1995 Act, the holder of a standard operator licence must be, in addition to some other requirements, of good repute. (Section 13A(2)(b) and paragraphs 1-5, 9 and 12 of schedule 3 to the 1995 Act.)
5. Paragraph 1 of schedule 3 provides:
 - (2) *In determining whether a company is of good repute, a traffic commissioner shall have regard to all the material evidence including, in particular, -*
 - (a) *any relevant convictions of the company or of any of its officers, servants or agents; and*
 - (b) *any other information in his possession as to the previous conduct of -*
 - (i) *any of the company’s officers, servants or agents, or*
 - (ii) *any of its directors, in whatever capacity,*

If that conduct appears to him to relate to the company’s fitness to hold a licence.

6. Section 26 of the 1995 Act provides that the Traffic Commissioner may direct that a licence be revoked on any of a number of grounds. Those grounds include failure to fulfil any undertaking recorded in the licence (s 26(1)(f)) 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)). That would include change of ownership of the operator
7. In terms of section 27, the Traffic Commissioner must revoke an operator licence if it appears to him that the operator is no longer of good repute (s27(1)(a)). Section 28 provides that where a licence has been revoked, the Traffic Commissioner may order that the person who was the holder of the licence be disqualified from holding or obtaining a licence for either a fixed or indefinite period.

Background

8. The following is a summary of the background to this appeal taken from the decision of the Traffic Commissioner dated 18 February 2019 and other documentation within the bundle for the Traffic Commissioner and public inquiries in this case.

Gary MacDonald and MacDonald Groundworks Limited

9. Gary MacDonald was a director of Highland Quality Construction Limited (“HQC”) from 30 November 1994. Colin Thomson was a director from 1 January 2009. HQC was granted a standard operator licence in 1995. In June 2010 a receiver was appointed to HQC. The operator licence was revoked on 6 September 2010 due to the receiver not wishing to make use of it. HQC failed with losses in excess of £9m. Both directors resigned on 5 May 2014. Gary MacDonald and Colin Thomson admitted that they had misapplied company funds by arranging payments to connected parties and had unlawfully disposed of assets subject to hire purchase, resulting in further loss to creditors and the finance company. Gary MacDonald admitted that he had diverted company funds to his own partnership business. Both Gary MacDonald and Colin Thomson respectively signed a form of company director disqualification admitting their unfit conduct and undertaking that for a period of 8 years (in Gary MacDonald’s case) and 6 years (in Colin Thomson’s case) commencing on 20 May 2014 not to act as (i) a director of a company, (ii) a receiver of a company’s property or (iii) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company except with the leave of the court. (Pages 580 to 585 and 989.)
10. Shortly before Gary MacDonald and Colin Thomson were required to resign as directors of HQC, the appellant company in this case, MacDonald Groundworks Limited, was incorporated on 5 March 2014 with 1 share issued and paid. The director was Stephen MacDonald who held the share. Stephen MacDonald is Gary MacDonald’s son. On 23 October 2015, Michelle MacDonald was appointed as a director. Michelle MacDonald is Gary MacDonald’s wife. On 3 November 2015 the issued share was transferred to Michelle MacDonald.
11. On 8 March 2016 the appellant was granted a standard operator licence for 5 vehicles and 5 trailers. The transport manager nominated was William MacDonald. He is not related to Gary MacDonald.

12. On 16 September 2016 Lee Thomson was appointed a director of the appellant and on 19 September 2016 Stephen MacDonald and Michelle MacDonald resigned as directors. These changes were intimated to the office of the Traffic Commissioner. In October 2016, William MacDonald was to be replaced as transport manager by Colin Thomson. On 14 November 2016 the share in the appellant company was transferred to Gary MacDonald who was then listed at Companies House as the Person with Significant Control. The change of ownership of the share in the appellant was not intimated to the Office of the Traffic Commissioner.
13. On 25 October 2016 a variation application was submitted to add Colin Thomson as transport manager and to remove William MacDonald. On 25 January 2017, the appellant made a variation application to add Kyleakin Quarry, Isle of Skye as a new operating centre for 4 vehicles and 2 trailers. On 22 February 2017 variation applications were made to add Lairgandour, Inverness as a new operating centre and to increase authorisation to 15 vehicles and 8 trailers.

Gary MacDonald's other business interests

14. Prior to his disqualification as a director, Gary MacDonald had been a director of many other companies. These are listed in paragraphs 18 and 19 of the Traffic Commissioner's decision (page 989-993). He has also been involved in other businesses. Some of the companies and businesses with which he has been involved had held operator licences. In particular, he had been a director and shareholder of HRL Scrap and Waste Solutions Ltd ("HRL") and an owner of a business trading as Daviot Farms. HRL and Daviot Farms were called to a public inquiry before the Traffic Commissioner in June 2011. Following that public inquiry, the Traffic Commissioner, among other things, suspended the Daviot Farms licence for 4 weeks and Gary MacDonald and Colin Thomson (the latter being transport manager) were given a warning as to their repute (page 139). There was a public inquiry before the Deputy Traffic Commissioner on 20 March 2013 to consider a variation application by HRL to increase authorisation to 6 vehicles and 3 trailers and an application for a licence made by Daviot Farms Limited of which Gary MacDonald was a director. HRL's variation application was granted. At a later public inquiry in 2014 the Deputy Traffic Commissioner was made aware by them that Gary MacDonald and Colin Thomson were likely to be disqualified as company directors (pages 335 to 383).
15. Gary MacDonald was a director and secretary of Daviot Farms Limited from 14 July 2010 to 28 February 2014. Colin Thomson was a director from 1 August 2011 until 28 April 2014. Daviot Farms Limited held an operator licence. The resignations of Gary MacDonald and Colin Thomson as directors were intimated to the Office of the Traffic Commissioner. Gary MacDonald and Colin Thomson continued to work for the company after resignation as officers. Daviot Farms Limited changed its name to Daviot Group Limited on 30 July 2015. Gary MacDonald was a shareholder in that company until about late 2016. His contract with Daviot Group Limited precluded him from having control of any other company. He left Daviot Group Limited in about late 2016. Daviot Group Limited went into liquidation and was wound up in October 2017.

The Public Inquiry

16. The Traffic Commissioner wished to investigate the appellant's variation applications. A call up letter was issued on 13 September 2017 (page 15) to consider, *inter alia*, whether the appellant had breached the conditions of its licence, whether there had

been a material change of circumstances since the licence was granted and whether the appellant was of good repute. The letter stated that the Traffic Commissioner would consider, among other things, the fact that there had been a change of ownership of the appellant to Gary MacDonald which had not been notified to the Traffic Commissioner; that Gary MacDonald and Colin Thomson had given an undertaking not to act as directors, manage or in any way control a company, and that had not been declared to the Traffic Commissioner; and, that there were links between HRL and the appellant. HRL was also called to the inquiry.

17. In addition to the matters mentioned in the previous paragraph the Traffic Commissioner intended to consider the variation applications. As we have remitted these matters for determination by the Traffic Commissioner, these issues will not be addressed except where relevant to the decision of this tribunal.
18. The Public Inquiry commenced at Inverness on 20 October 2017. The Traffic Commissioner heard evidence from Lee Thomson, director of the appellant, Gary MacDonald, Colin Thomson, Michael Dunlop, transport consultant, and others.

Lee Thomson's evidence

19. Lee Thomson said that the appellant had been set up by Stephen MacDonald as a small groundworks business but that had not worked out for him. He said that he, Colin Thomson, Gary MacDonald and William MacDonald left Daviot Group Limited as a team. When he and Gary MacDonald were exiting Daviot Group Limited they planned to take over the appellant company and restructure it. Lee Thomson would be director running the business, Gary MacDonald would own the company and be operational. He said that they had taken legal advice and been advised that even with the director's disqualification there was nothing to prevent a disqualified director being a person with significant control of the company. Michelle McDonald had taken the shareholding in trust until Gary MacDonald could take on ownership. He described the nature of the appellant's work and their workforce. Lee Thomson said he was the sole director with statutory responsibility and he ran the business. The staff and others were aware of that. He was responsible for operator licensing. He also had a construction/commercial director role. He had a good working relationship with Gary MacDonald and Gary MacDonald did not push him around. Lee Thomson made the decisions. He accepted that they should have advised the Traffic Commissioner of the change of ownership. He took responsibility for that.

Gary MacDonald's evidence

20. He agreed with the evidence of Lee Thomson. He said that whilst he remained a shareholder of Daviot Group Limited his agreement precluded him from taking control of any other company. Gary MacDonald said his role in the appellant was "hands on", on site, and that was what he liked. That was what he had done all his working life. He would take instructions if instructions were needed. He said that it was important to the outside world that he was seen as the owner of the business because of his history. Lee Thomson decided what happened within the business. Gary MacDonald said he could give advice if asked about contracts, but jobs were taken on without consulting him.
21. Gary MacDonald said that he had no issue with telling the Traffic Commissioner what she needed to know. He had previously discussed the forthcoming director

disqualification with the Deputy Traffic Commissioner at a public inquiry. Regarding the change of ownership of the appellant to himself, he would be relying on others to provide that information to the Traffic Commissioner. He had not been trying to hide that change from the Traffic Commissioner.

Michael Dunlop's evidence

22. Michael Dunlop said that he was a transport consultant who assisted William McDonald and Colin Thomson on the transport side of the business. He makes the variation applications. He had never been involved in intimating anyone's shareholding; it was not something he would have discussed. He had not been aware that the shareholding in the appellant had changed. He did not feel that anyone had been trying to hide the fact that Gary MacDonald and Lee Thomson had been disqualified. He had advised them to tell the Deputy Traffic Commissioner at the public inquiry in 2014 about the disqualifications.

Colin Thomson

23. Colin Thomson gave evidence that he was seeking appointment as transport manager for the appellant. His current role with the appellant was looking after the operator licence and all that went with that. He had attended the public inquiry into Daviot Farms Limited which was heard by the Deputy Traffic Commissioner. He said they had written to the Deputy Traffic Commissioner to advise him of the pending directorship ban. He said the failure to inform the Traffic Commissioner of the change of ownership of the appellant was purely an oversight by the company. He said that it was news to him that a change of shareholding had to be intimated to the Traffic Commissioner.
24. The Traffic Commissioner's Note of Directions following that inquiry and dated 4 July 2018 is at pages 262 to 275. As the Traffic Commissioner made plain in her Note of Directions, she regarded director disqualification as a very serious matter; it was a mark of there having been dishonesty in relation to the duties of a company director. She stated that the evidence she had seen showed that Gary MacDonald was someone who would place family members in convenient roles (page 274). At that stage, she said, she was tending in the direction of ordering the revocation of the appellant's licence. She decided to reconvene the inquiry to obtain for consideration the papers relating to the public inquiry into Daviot Farms Limited which had been held before the Deputy Traffic Commissioner in 2014 and to allow the appellant to lodge further documentation. In addition, she wanted further information about a serious incident that had occurred on 21 May 2018 when a wheel detached from one of the appellant's vehicles whilst travelling.
25. The Public Inquiry reconvened in Edinburgh on 20 December 2018. The transcript is at pages 729 to 796. This was mainly concerned with the wheel detachment incident and submissions.

The Traffic Commissioner's Decision

26. The Traffic Commissioner's decision is at pages 987 to 1010. The Traffic Commissioner stated that there were two issues at the heart of the public inquiry, *"Firstly the role and place of Mr Gary MacDonald in both licences and the relevance of his presence to repute and fitness of the respective licences. Secondly in relation to MGL (the appellant) there was an adverse report from DVSA concerning an adverse*

maintenance investigation, an 'S' marked wheel related prohibition at annual test on 22 January 2018, and a trailer wheel loss incident and 'S' marked prohibition of 21 May 2018." (Paragraph 68.) This decision will not address the maintenance issues.

27. In her consideration of the evidence and submissions and the relevance of Gary MacDonald to the appellant's licence, the Traffic Commissioner found as follows (some spelling and name errors have been corrected):

120. The requirements for an operator licence include good repute – section 13A of the 1995 Act refers. Schedule 3 provides that in determining whether a company is of good repute, a traffic commissioner shall have regard to all material evidence, including in particular any relevant convictions of the company or any of its officers, servants or agents and any other information in possession of the traffic commissioner as to the previous conduct of any of the company's officers, servants or agents or any of its directors in whatever capacity if that conduct appears to the traffic commissioner to relate to the company's fitness to hold a licence."

121. MacDonald (the appellant) was incorporated on 5 March 2014 with registered office at Lairgandour. The director history is set out at paragraph 10 above. When application was made for this licence, Mr Gary MacDonald was not a director or shareholder. At no time did Gary MacDonald or anyone connected with the licence intimate to the Office of the Traffic Commissioner that ownership and control had transferred to Mr Gary MacDonald. Over the years, Mr Gary MacDonald has used his son or wife to be his place people in directorships or shareholding of his businesses.

122. Gary MacDonald was concerned about the impact of the Company Director Disqualification on his businesses and he took advice. Within the Public Inquiry brief were productions relevant to how Mr MacDonald organised his businesses. The names of his wife Mrs Michelle MacDonald and of his son came to be used. It is plain for the discussions with his advisers, that Gary MacDonald was determined to stay in business and to continue the civil engineering and groundworks undertaking by his companies including HQC and Daviot Farms Ltd. For him this line of business was not only enjoyable but hugely remunerative for him personally. He discussed using himself as a sole trader and or models of sub-contracting. To get the shelter of limited liability again and to secure lender interest, he had to take on board a script.

123. I pause here to say that I am in agreement with the submissions by Mr McIlvride that nowhere in statute is there a provision which expressly prevents a person who has been disqualified under the Company Directors Disqualification Act 1986 whether by order of the court or following from a signed Undertaking such as given by Mr MacDonald from either being the 100% shareholder and owner of a company or from being the Person with Significant Control which a 100% or majority shareholder such as Mr MacDonald is with MacDonald and with HRL. If there is such a provision or argument, then alas I have not found it or been steered to it.

124. I also pause to record that I am sure that it is not for me as Traffic Commissioner to fill what some might see as a lacuna in the law, a gap which allows persons such as Mr MacDonald with significant unfit conduct as set out in the Schedule to the Undertaking to own companies outright or significantly with others. A person can be disqualified as a director but yet benefit from his or her shareholdings (wealth) having the protection of limited liability even where their shareholding is 100% or such as to make them a PSC. It does not seem right and especially so where the extent of the shareholding is such as to out-vote all others. Thus, a disqualified director can appoint directors. It is for Parliament to provide such

prohibition on shareholding and ownership, not for me as a Traffic Commissioner to decide as if the law were different.

125. It might then be thought that would be an end to my involvement with Mr MacDonald's Companies Act disqualification and its relevance to repute and fitness of a company holding an operator licence. I do not find that to be so simple given the terms of Schedule 3 of the 1995 Act and that operator licensing is a fair competition jurisdiction.

126. If Mr Gary MacDonald had applied for the MacDonald licence and I knew that its owner was a person of such unfit conduct as to have been disqualified under the Companies Act for 8 years, I would not have granted it. I would have used my gatekeeping powers to keep the company out of operator licensing. I could not have found the necessary trust between Commissioner and operator.

127. Here I find myself dealing with an extant licence, in which members of the MacDonald family were used to get the licence; where the difficulties with Daviot were not disclosed; where MacDonald secured a licence and the difficulties with Daviot were not disclosed; where Mr MacDonald's disqualification was not disclosed; and where his becoming 100% owner was not disclosed. All of this goes to trust between Traffic Commissioner and operator and to the repute of the entity which holds the operator licence. Quite simply MacDonald has lost my trust and that imperils the licence.

128. I heard the evidence of Mr Lee Thomson at this hearing and also back in October 2017. He comes across well. He has confidence and can assert that he is in control. I am not in the slightest doubt that he was chosen by Mr MacDonald to be the confident front for him and to do what he required. Mr Thomson has true belief in himself and is skilled and competent. However, I am not in the slightest doubt that Mr MacDonald fully engaged with the advice given by his legal advisers and that Mr MacDonald knew that there had to be "a line to take" should anyone come near and ask about his involvement. I am not in the slightest doubt that Gary MacDonald controls MacDonald Groundworks Ltd. The legal advice was the script. Everything thereafter is a carefully orchestrated play.

129. There are questions which a Traffic Commissioner must pose to herself – the Bryan Haulage question, the Priority Freight question and she must also bear in mind the integrity and purposes of the regulatory regime as considered in the Court of Session Thomas Muir case. I have posed these questions to myself and I have reminded myself of Mr Gary MacDonald's history in this jurisdiction as well as the 8 year director disqualification. Fundamentally I do not trust a person who has been disqualified for 8 years.

130. Do I have to put this operator out of business – can I trust this operator in future? I am in not the slightest doubt having heard the evidence, that the loss of the operator licence will affect the profitability of this business but it will not put this company out of business. As to future trust, I cannot trust Mr MacDonald. I do not doubt his competence at his trade but I cannot trust one who has affected fair competition as he has done. Fair competition is at the heart of operator licensing as is trust. Whilst I listened to Mr MacDonald's evidence in relation to the process of disqualification and how expensive and unsatisfactory he found it, that evidence cut no ice with me in face of the undertaking and the Schedule of Unfit Conduct. I was not persuaded by Mr McIlvride's submissions thereanent.

131. *Having decided that I must revoke the MacDonald licence, I now consider my powers of disqualification. I consider that this case is one for disqualification. The period of disqualification comes to me as an obvious one. It should march with that made under the Undertaking which in Mr MacDonald's case runs from 20 May 2014 to 19 May 2022. That will be the period of disqualification. Should there be a change of ownership of MGL (the appellant) prior to 19 May 2022, then it would be for the new owners to intimate that material change and to make an application for the removal of the disqualification.*

28. The Traffic Commissioner went on to decide that the appellant had lost its good repute in terms of section 27 of the 1995 Act, she revoked the licence and disqualified the appellant.

The appeal to the Upper Tribunal

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

29. 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.

30. The following principles are drawn from the decision of the Court of Appeal in the case of *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport* [2010] EWCA Civ. 695:

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.

The Appellant 'assumes the burden' of showing that the decision appealed from is wrong.

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.

Grounds of Appeal

31. The grounds of appeal are at page 967. Mr. McIlvride kindly provided an outline note of argument upon which he expanded at the Upper Tribunal hearing. The outline argument summarised the principal legal propositions on which the appellant relied as follows:-

- (i) *in considering the questions of revocation and disqualification it is important to bear in mind the distinction to be drawn between the appellant, its*

employees and its shareholders. See, by analogy, Muck it Ltd v Secretary of State for Transport [2006] RTR 9;

- (ii) *in considering whether revocation is appropriate on the basis of loss of repute, the question is not whether the relevant conduct has been so serious as to amount to a loss of repute but whether it is so serious as to justify revocation: Muck it Ltd, (above).*
 - (iii) *a “shadow director” is “a person in accordance with whose directions or instructions the directors of the company are accustomed to act”: Companies Act 2006, section 251(1).*
 - (iv) *in determining whether a person who is not a de jure director of a limited company is nevertheless a “de facto” director relevant factors to be considered are ‘First, whether the person was the sole person directing the affairs of the company (or acting with others equally lacking in a valid appointment), or if there were others who were true directors, whether he was acting on an equal footing with the others in directing its affairs... Second, whether there was a holding out by the company of the individual as a director, and whether the individual used the title... [and] Third, taking all the circumstances into account, whether the individual was part of “the corporate governing structure’: Revenue and Customs Commissioners v Holland [2010] 1 WLR 2793, per Lord Collins of Mapesbury at para 91 (citations omitted).*
 - (v) *a person who has been disqualified from acting as a director of any limited company is not, in consequence, disqualified from owning shares in a limited company, even if he holds a controlling interest in that company’s shares: See Companies Act 2006, sections 790A and 790C, and Schedule 1A, paras 1,2 and 4.*
32. Mr. McIlvride said the essence of the Traffic Commissioner’s decision was in paragraphs 127 to 131 (see above). In reviewing the Traffic Commissioner’s decision and the evidence, it was submitted that the Traffic Commissioner had erred in law by (i) taking into account irrelevant matter; (ii) materially misdirecting herself in law; (iii) making perverse or irrational findings on matters which were material to her decision; and, (iv) reaching decisions to revoke and disqualify which no reasonable tribunal properly directing itself on the law could have reached.
33. It was submitted that the Traffic Commissioner placed weight on her findings that:
- (i) members of Gary MacDonald’s family had “been used” to obtain the appellant’s licence; that when the licence had been obtained the “difficulties with Daviot” (i.e. Daviot Group Limited) had not been disclosed; that Gary MacDonald’s disqualification from acting as a director of a limited company from 20 May 2014 until 19 May 2022 had not been disclosed; and that Gary MacDonald’s acquisition of the whole shares of the appellant had not been disclosed (all para 127);
 - (ii) Gary MacDonald controls the appellant (para 128); and
 - (iii) in those circumstances the appellant had lost the Traffic Commissioner’s trust and the Commissioner could not in the future trust a person who has

affected fair competition as Gary MacDonald had done (paragraphs 127 and 130).

34. We shall deal with each ground, and our decision on that ground, in turn. However, at this point it should be borne in mind that as the Traffic Commissioner was considering a decision which was liable to lead to the revocation of the appellant's licence and the likely closing or significant curtailment of the business, the burden of proof was on the Traffic Commissioner. There was no burden of proof on the appellant to prove that it was still of good repute. (See *Muck It Ltd. v Secretary of State for Transport* [2006] RTR 9). As a matter of general principle, the burden of proof is on the party alleging that the state of affairs has changed, rather on the one maintaining that it has remained the same. (*McCaffrey v. Secretary of State for Transport* 2006 SC 664, paragraphs [22] - [23]).

Ground (i)

35. Mr. McIlvride submitted that the Traffic Commissioner had before her evidence that when the licence was obtained, Gary MacDonald was precluded by his contract with Daviot Group Limited from holding shares in a competing company. His contract was lodged as a production and was at page 705. Lee Thomson gave evidence that the appellant company had originally been for Gary MacDonald's son, but that had not worked out. Then when Gary MacDonald left Daviot Group Limited, he took the shareholding. (This evidence is narrated by the Traffic Commissioner at paragraph 33 of her decision). Mr. McIlvride submitted that this evidence had not been dealt with by the Traffic Commissioner; nor had she explained on what basis she inferred that Gary MacDonald's family was used to get the licence.
36. We agree with the submissions for the appellant, for the reasons given, that the Traffic Commissioner has made insufficient findings in fact to conclude that Gary MacDonald's family were used to obtain a licence on his behalf. The Traffic Commissioner has not explained on what basis she reached that conclusion. While the Traffic Commissioner may have had her suspicions, she has not explained on what evidence she relied to draw this inference. Nor has the Traffic Commissioner explained what she made of the evidence from Gary MacDonald and Lee Thomson about the appellant being set up by Gary MacDonald's son and, initially, run for the son's own purposes. Clearly, she rejected that evidence. The appellant is entitled to know why the evidence was rejected however; the Traffic Commissioner has not explained this. Therefore, her fact finding and reasoning on this issue are inadequate.
37. The appellant submitted that in placing weight on what the Traffic Commissioner characterised as a failure to disclose "difficulties with Daviot" the Traffic Commissioner had regard to an irrelevant matter. There was no evidence to suggest that either Michelle MacDonald or Steven MacDonald, who were the directors and shareholders of the appellant when it applied for its licence, had any involvement with Daviot Group Limited. Accordingly, they had no obligation to disclose information on the financial position of Daviot Group Limited either when the application for the appellant's licence was made or at any time thereafter.
38. Nor was there any obligation, it was submitted, on the appellant to disclose any information on Daviot's financial position or difficulties after Gary MacDonald acquired his shareholding in the appellant in November 2016. He sold his shares in Daviot in late 2016 and had no further connection with that company (Lee Thomson's evidence

and Gary MacDonald's evidence, respectively narrated at paragraphs 32 and 47 of the Traffic Commissioner's decision). Had it been known that the Traffic Commissioner intended to place weight on the fact of Daviot Group Limited's financial difficulties it could have been established in evidence precisely when Gary MacDonald sold his shares in Daviot Group Limited but there is no finding that he continued to hold any shares in Daviot Group Limited after he acquired his shareholding in the appellant. In any event, Daviot Group Limited was placed in liquidation in October 2017 (para 21 of the Traffic Commissioner's decision). There is no finding (nor was there any evidence) to the effect that it had been experiencing any financial difficulties a year earlier, when Gary MacDonald was one of its shareholders. Even if Daviot Group Limited's entering into liquidation in 2017 were to be treated as giving rise to the inference that it was in financial difficulties a year earlier (which is not accepted), the reputé of the appellant cannot reasonably be considered to be affected simply because its shareholder had been connected, in the capacity of a shareholder only, with another limited company which experienced financial difficulties. In the absence of any finding that Daviot Group Limited was in fact in financial difficulties in 2016, it was submitted that the Traffic Commissioner plainly had regard to an irrelevant matter in placing weight on Daviot Group Limited's financial difficulties in late 2017.

39. We agree that the Traffic Commissioner seems to have attached some weight to the fact that the appellant had not disclosed information about Daviot Group Limited having financial difficulties. It is correct, as the appellant submits, that there is no evidence and no findings in fact that when the licence was applied for, the appellant had any connection with Daviot Group Limited or that Daviot Group Limited was in financial trouble. Gary MacDonald's evidence was that he had got out of Daviot Group Limited, in late 2016, disposing of his shares and ceasing to work for them. There was evidence that his contract with Daviot Group Limited meant he could not have a shareholding in a competing company. While there was no precise evidence as to exactly when Gary MacDonald sold his shareholding in Daviot Group Limited, what evidence there was tends to suggest this was before, or around the time, he acquired the share in the appellant. Nor is there any evidence which was before the Traffic Commissioner that, even if there had been a connection which placed a duty of disclosure on the appellant, Daviot Group Limited had been in financial trouble at that time. The only finding the Traffic Commissioner makes about Daviot Group Limited's financial state of affairs is at paragraph 21 where she records that a liquidator had been appointed to Daviot Group Limited in October 2017; that was about 18 months after the licence had been granted, 11 months after Gary MacDonald ended his involvement with Daviot Group Limited and 11 months after the share in the appellant had been transferred to Gary MacDonald. Accordingly, the fact that the Traffic Commissioner took into account a failure to disclose information about Daviot Group Limited was immaterial and irrelevant to the issues she had to decide.
40. Mr. McIlvride submitted that the Traffic Commissioner erred in law in placing weight on what she characterised as a failure by the appellant to disclose Gary MacDonald's disqualification from acting as a director of a limited company. In doing so she has had regard to an irrelevant matter or alternatively has misdirected herself in law. There was no obligation on the appellant to disclose that a shareholder (even if a person with significant control) was disqualified from acting as a director.
41. It was submitted that even if there had been a duty on the appellant to disclose that Gary MacDonald was disqualified from acting as a director (which was not accepted) the Traffic Commissioner's finding, effectively being a finding that the appellant sought to conceal that disqualification from her, is perverse or irrational. The Traffic Commissioner herself recorded that the disqualification proceedings brought against

Gary MacDonald and Colin Thomson were voluntarily disclosed by them, and copies of the undertakings given by them which resulted in their disqualification, had been provided to the Deputy Traffic Commissioner at a public inquiry in September and November 2014 relating to Daviot Farms Limited (later Daviot Group Limited), notwithstanding that the disqualification proceedings related to another company (paragraphs 97 to 101). She attaches no weight to that previously volunteered information about the disqualification.

42. The appellant accepted that it ought to have informed the Traffic Commissioner when Gary MacDonald became its sole shareholder in November 2016. Mr Lee Thomson, the sole director of the appellant since 16 September 2016, accepted responsibility for that failing (para 39 of the Traffic Commissioner's decision). He said he did not know that this should have been intimated. There was also evidence from Michael Dunlop, a transport consultant, that even he had not realised that the change in shareholding should have been intimated. Mr. McIlvride submitted that that was not the same as saying that Gary MacDonald was concealing his ownership. If he had wished to do that, he could have taken the shareholding in the name of a nominee. Further, the failure to intimate the change in shareholding by the appellant was not conduct so serious as to warrant the revocation of the licence.
43. We agree that the Traffic Commissioner does appear to have taken the view that Gary MacDonald's disqualification as a director was "not disclosed", the implication being that it was deliberately concealed. To reach such a conclusion she must have rejected the evidence of Gary MacDonald, Lee Thomson and Michael Dunlop on this issue. She has not explained why she rejected their evidence. We agree that the Traffic Commissioner has not explained how she reconciles the open admission of the director disqualification to the Deputy Traffic Commissioner in 2014 with her conclusion that the disqualification had been deliberately concealed from her on this occasion. She may have had good reasons for so finding. For example, she may have considered that the earlier admission to a different Deputy Traffic Commissioner was an attempt to obtain advice from the Deputy Traffic Commissioner as to future applications, the disclosure having been made at a time Gary MacDonald was no longer a director or majority shareholder of the operator concerned. However, this is speculation. Whatever her reason, she has not explained it. Her reasons for this finding are therefore inadequate and an error of law and may have tainted her approach to the evidence on other issues.
44. The operator licence is at pages 42 to 46. Conditions attached to the licence under section 22 include that within 28 days the office of the Traffic Commissioner is informed of any changes in the ownership of the business; this would include changes in shareholding that cause a change in the control of the company. Events which affect the repute of the licence holder must also be notified. (See also section 22(2) and (4)). Accordingly, as the appellant accepts, the change of 100% ownership ought to have been notified to the Traffic Commissioner. As regards, notification of Gary MacDonald's disqualification as a company director, the Traffic Commissioner does not specify in her decision when she considers this should have been notified. We consider that, at the same time as the change in ownership ought to have been notified, the appellant would have been bound to inform the Traffic Commissioner that the owner of the company was a disqualified director, as this is a matter which, potentially, could affect the good repute of the licence holder. Matters relevant to good repute are not confined to unlawful conduct or to conduct related to road transport operations. The requirement of schedule 3 it to have regard to all the material evidence. In a regulatory system based on trust, previous evidence of dishonest conduct of the 100% owner of the operator, could be highly material to the good repute

of the operator. See *Crompton t/a David Crompton Haulage v. Department of Transport North Western Traffic Area* [2003] RTR 34 and *Catch22Bus Ltd and Higgs* [2019] EWCA Civ 1022 (paragraphs 5 to 7). We therefore do not agree that there was no requirement that the appellant advise the Traffic Commissioner that the owner of the operator was disqualified from acting as a company director.

Ground (ii)

45. Mr. McIlvride submitted that in finding that Gary MacDonald controlled the appellant, the Traffic Commissioner further misdirected herself in law in failing to distinguish between the roles and powers of the members of a company and the directors of that company. Thus, it is correct to say, as the Traffic Commissioner has found at para 128, that Gary MacDonald as sole shareholder “controls” the appellant in the sense that any sole or majority shareholder has a controlling interest. The implication of her finding was that Lee Thomson was a mere cat’s paw. That, he said, was the foundation of her conclusion that the operator (that is, the company) had lost its repute. However, the Traffic Commissioner has made no finding, nor was there any evidence, to the effect that Gary MacDonald had in any way sought to ignore or circumvent his disqualification as a company director by attempting to act as a shadow director or *de facto* director of the appellant. On the contrary, the Traffic Commissioner found that the sole director of the appellant, Lee Thomson, is “skilled and competent.” Mr Thomson is, in addition, subject to the common law and statutory duties imposed on directors of limited companies and there is no finding that he has ever failed to comply with those duties.
46. It was submitted that the Traffic Commissioner had failed to have proper regard to the distinction between a company and its shareholders. He referred to the distinction made between a company and its subscribers clarified by Lord Macnaughten in *Salomon v A Salomon & Co Ltd* [1897] AC 22 HL (E), at page 51. Relying on that, in *Holland* Lord Hope of Craighead distinguished between a company and its directors:- “One can properly say... that a company is at law a different person from its directors...”. (At paragraph 42.)
47. We consider that the Traffic Commissioner’s fact-finding and reasoning on this issue are flawed. She has not made a specific finding that Gary MacDonald occupied the position of director, even although not expressly called that. However, we agree that is the implication of her finding that he “controlled” the appellant. The Traffic Commissioner’s determination implies that Gary MacDonald had obtained legal advice to circumvent his disqualification; that he had treated the legal advice like a script and a “line to take” should anyone ask about his involvement in the company. However, she has not identified any evidence that led her to infer that. To reach such a conclusion she must have rejected the evidence of Gary MacDonald and Lee Thomson that the legal advice was sought and was being followed to comply with the law, that Lee Thomson was the only person who acted in a director role, with Gary MacDonald confining himself to operations. It is implicit in her finding that she considered that the reality of the situation was that Lee Thomson was a director in name only and that Gary MacDonald was a shadow director, that is someone who was the sole person directing the affairs of the appellant, or acting on an equal footing with the true director; or that he was held out as a director; or that he was part of the corporate governing structure (See *Holland*). That may have been what the Traffic Commissioner believed; however, she has not explained what the evidence was that would allow her to draw such inferences and to conclude that Gary MacDonald controlled and directed the appellant. Nor has she explained why she rejected the

evidence of Gary MacDonald and Lee Thomson on these issues. On those aspects therefore her reasoning is inadequate and materially flawed.

Ground (iii)

48. It was submitted that given her erroneous findings, the Traffic Commissioner erred in holding that the appellant could not be trusted and had lost its repute simply by reason of a shareholder's disqualification from acting as a director. Responsibility for the management of the appellant's affairs rested with Lee Thomson as the sole director. There was no finding that the appellant/operator had done anything justifying a finding that it has lost its repute or could not be trusted in the future, as a consequence of anything done or omitted to be done by the appellant or by Mr Thomson as its sole director. She had failed to have proper regard to the distinction between a company and its shareholders.
49. Mr. McIlvride argued that the Traffic Commissioner had also misdirected herself in law in holding that the appellant could not be trusted because Gary MacDonald had "affected fair competition". That finding failed to have regard to the fact that Gary MacDonald and the appellant were separate legal entities and the fact that Gary MacDonald was not a director, *de facto* director or shadow director of the appellant.
50. He submitted that a shareholder of an operator may previously in his conduct as a director of an entirely different limited company have affected fair competition in that other company's market but that does not provide an adequate or reasonable basis for a finding that the appellant has affected fair competition in such a way as justifies revocation and disqualification. There is no finding, nor was there any evidence to suggest, that the appellant had done or attempted to do anything which might affect fair competition in any way.
51. It was submitted that, given her approach to the evidence before her and her reasoning, that the only reasonable inference was that the Traffic Commissioner had penalised the appellant because Gary MacDonald had acquired the share in the appellant, something he was legally entitled to do, whilst he was disqualified as a director. She had identified the appellant with Gary MacDonald. This was apparent from the fact that the disqualification imposed was for the remaining period of Gary MacDonald's disqualification.
52. Mr. McIlvride said the Traffic Commissioner should have distinguished between the conduct of the shareholder and the conduct of the appellant company. It was not relevant that she could not trust Gary MacDonald, he was not controlling the company.
53. It is clear from her decision that Gary MacDonald did not have the Traffic Commissioner's trust. This, she held, was because he had been disqualified as a company director for 8 years and such disqualification was a mark of dishonesty (paragraphs 59 and 129). Likewise, she found that Gary MacDonald had affected fair competition in the past and so could not be trusted within the regulatory regime not to affect fair competition in the future. The question then arises whether the Traffic Commissioner was entitled to attribute that past conduct of Gary MacDonald to, and to identify it with, the appellant. As was accepted in the Court of Appeal in *Catch22 Bus Ltd* paragraph 7:

There must therefore be some connection between the conduct in question and the fitness of the person to hold the licence (though there is no requirement that the conduct be directly connected with road transport).

54. The “person” in this case is the appellant company. A “company” is a different “person” at law from its shareholders (*Salomon*). Ownership of 100% of the shares of the operator company does not necessary imply that the shareholder is acting as a director or managing the company. As we have previously noted, there was no evidence, nor has the Traffic Commissioner made findings in fact, that would satisfy the factors outlined in *Holland*, quoted at paragraph 31(iv) above, to allow her to conclude that Gary MacDonald was acting as a “director” of the appellant company. In the absence of such a finding, her reasoning that the appellant could not be trusted because she could not trust Gary MacDonald, is flawed. (See *Edward Coakely*, t/a C.R.A. T/2011/63 paragraph 6(ii) and *George Jenkins Transport Limited T/2004/36*.)
55. On a subsidiary point, and for completeness, in deciding that Gary MacDonald, and thus the appellant, could not be trusted, the Traffic Commissioner made reference to Gary MacDonald’s history in this jurisdiction. However, she does not specify what it was about his history she considered relevant. There is a reference in her decision to the fact that she had issued a warning to him about his good repute in 2011. If she considered that warning and the conduct giving rise to it relevant to her finding that she could not trust Gary MacDonald, she has not explained why. However, this issue is not material in the absence of a finding that Gary MacDonald was acting as a shadow or *de facto* director of the appellant.
56. Given the material errors of law we have identified in the Traffic Commissioner’s decision, her decision that the appellant had lost its repute in terms of section 7 cannot stand and must be set aside together with the disqualification. We agree with Mr. McIlvride’s submission that the failure to intimate the change of ownership of the appellant, of itself, is not sufficiently grave to warrant revocation in terms of section 26(1)(f) or (h).
57. 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).

Decision

58. The appeal is allowed to the extent that we (1) set aside the Traffic Commissioner’s decisions (i) revoking the appellant’s licence; (ii) disqualifying the appellant from holding or obtaining an operator’s licence until 19 May 2002; and (iii) refusing variation applications to nominate a new transport manager, add additional operating centres, and increase the licence authorisation; and (2) we remit to the Traffic Commissioner for redetermination the appellant’s variation applications made on (a) 10 October 2016, for substitution of a new transport manager for the existing transport manager; (b) 25 January 2017, for authorisation of an additional operating centre; and (c) 22 February 2017, for authorisation of an additional operating centre and to increase the licence authorisation from 5 vehicles and 5 trailers to 15 vehicles and 8 trailers.



MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 27 August 2019