



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

**Appeal No. T/2018/72  
NCN: [2019] UKUT 0089 (AAC)**

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE  
LONDON AND SOUTH EAST ENGLAND AREA (Miss Sarah Bell)**

**Dated: 24 September 2018**

**Before:**

<b>Marion Caldwell QC</b>	Judge of the Upper Tribunal
<b>Mr. George Inch</b>	Member of the Upper Tribunal
<b>Mr. John Robinson</b>	Member of the Upper Tribunal

**Appellants:**

**ST MICKALOS COMPANY LIMITED and MICHAEL TIMINIS**

**Attendance:**

**For the Appellants:** Simon Clarke, Barrister; instructed by Smith Bowyer Clarke, Solicitors.

**Heard at:** Field House, Breams Buildings, London EC4A 1DZ.

**Date of Hearing:** 15 February 2019

**Date of Decision:** 8 March 2019

**DECISION OF THE UPPER TRIBUNAL**

The appeal is allowed to the extent that the order for disqualification under section 28 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the Act”) disqualifying St. Mickalos Company Limited and Michael Timinis for a period of two years is set aside. Further, the case is remitted to the Traffic Commissioner for a rehearing only on the issue of the disqualification of St. Mickalos Company Limited and Michael Timinis.

**Subject Matter**

Disqualification. Requirement to allow submissions to be made on the issue of disqualification prior to consideration and determination of disqualification by Traffic Commissioner.

**Cases referred to:**

*David Finch t/a David Finch Haulage [2010] UKUT 284 (AAC)*

*Thomas Muir (Haulage) Limited v The Secretary of State for the Environment, Transport and the Regions (1999) SC 86*

*2001/11 Pagoda Travel*

*2002/40 Thames Materials Limited*

## **Introduction**

1. This is an appeal from the decision of the Traffic Commissioner for the London and South East England Traffic Area, given orally on 24 September 2018 and confirmed in a written decision dated 25 September 2018. In summary, the Traffic Commissioner revoked St Mickalos Co. Ltd.'s operator's licence (OK0209964) and disqualified the company and Michael Timinis for a period of two years from 23.45h on 8 November 2018 from holding or obtaining an operator's licence or being involved in any entity that holds or obtains such a licence in Great Britain, pursuant to section 28 of the 1995 Act.
2. The revocation of the licence has not been appealed. The only issue before the Upper Tribunal related to the order for disqualification.

## **The Relevant Legislative Provisions**

3. Section 28 of the 1995 Act provides that where the Traffic Commissioner directs that an operator's licence be revoked, he may order that the person who was the holder of the licence be disqualified either indefinitely or for a limited period, from holding or obtaining an operator's licence (section 28(1)). Section 28(4) provides as follows:-

*(4) Where the traffic commissioner makes an order under subsection (1) in respect of any person, the commissioner may direct that if that person, at any time or during such period as the commissioner may specify—*

*(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.*

*(5) The powers conferred by subsections (1) and (4) in relation to the person who was the holder of a licence shall be exercisable also—*

*(a) where that person was a company, in relation to any director of that company, and*

*(b) where that person operated vehicles under the licence in partnership with other persons, in relation to any of those other persons;*

*and any reference in this section or in section 26 or 29 to subsection (1) or (4) above includes a reference to that subsection as it applies by virtue of this subsection.*

## **Background**

4. The background to this appeal can be found within the papers and the Traffic Commissioner's written decision.
5. The company was incorporated on 16 April 1980 and was granted a restricted operator's licence on 1 July 1995. The authorisation was for 9 vehicles. The main business of the

company is catering supplies and food delivery service. Michael Timinis was born on 7 October 1977. He is a director of the company along with his father, Andreas Timinis who was born on 10 January 1951. It is accepted that Mr. Timinis Senior now plays only a minor role in the company and Michael Timinis is, in effect, the *de facto* sole director.

6. On 5 October 2006 the operator was called to a public inquiry and the Deputy Traffic Commissioner issued a formal warning in respect of convictions and prohibitions incurred by the operator. A traffic examiner carried out an investigation on 27 October 2016 which was unsatisfactory. On that occasion, the Traffic Commissioner issued the company with a warning and it accepted an undertaking for a director to attend an Operator Awareness Course by 30 March 2017; this was duly performed.
7. On 6 March 2018 a traffic examiner, Neil Rossiter, stopped one of the operator's vehicles, PO56 ULH, and found that the driver did not have a driver's card inserted. A prohibition notice and a fixed penalty notice were issued to the driver. On 5 April 2018 a vehicle examiner, Steven Whawell, carried out an investigation as a result of an "S" marked prohibition. The investigation was unsatisfactory for a number of reasons. A follow up visit was made on 16 April 2018 and further shortcomings were identified. On 6 June 2018 the traffic examiner stopped PO56 ULH which was being driven by Michael Timinis. Analysis of driver's hours records at the roadside revealed several offences. As a result of these issues, the Traffic Commissioner called the operator to a public inquiry by letter dated 14 August 2018 (page 9).

### **The Public Inquiry**

8. The public inquiry was held on 24 September 2018. Michael Timinis attended the public inquiry and he and the operator company were represented by their solicitor. On behalf of the operator a written submission was provided to the Traffic Commissioner prior to the public inquiry; the findings of the vehicle examiner and traffic examiner were accepted by the operator (pages 179-182). The submission outlined remedial action being taken by the operator to address the failings identified by the vehicle examiner and traffic examiner.
9. Mr. Rossiter and Mr. Whawell gave evidence at the public inquiry. As a result of the operator's admissions, their oral evidence was mainly concerned with steps taken by the operator since their examinations and investigations in an attempt to rectify the previous failings and whether and to what extent these had been successful. Michael Timinis gave evidence about the history of the company, the systems in place, how the failings had come about, what the operator had been doing in an attempt to rectify the mistakes, and the effect of revocation or curtailment on the business.
10. The Traffic Commissioner heard submissions from the appellants' representative then after an adjournment to consider her decision she gave her decision and reasons orally (pages 248-252). A written version of the oral decision was issued on 25 September 2018 (pages 398 to 401).

### **The Traffic Commissioner's Decision**

11. The Traffic Commissioner narrated the history of numerous regulatory failings, the admissions by the appellants and the significant lack of improvement in the situation despite warnings, training and announced visit by the traffic examiner. She concluded that Michael Timinis' judgment was flawed. She was deeply concerned about his approach to risk. She found that he had deliberately misled the traffic examiner at a roadside encounter, underpinned by a course of conduct.
12. She considered the guidance in *T2009/225 Priority Freight*, *NT/2013/82 Arnold Transport & Sons Ltd*, *Warnerstone Motors t/a The Green Bus Service 2009/410*, *Tarooq Mahmood t/a TM Travel T2011/041* and *Bryan Haulage No 2 2002/217*. The

Traffic Commissioner concluded that revocation of the licence was not disproportionate in light of the failings, lack of discernible improvements, lack of judgment and attitude to risk. She further concluded that the conduct was such that the operator ought to be put out of business.

13. The Traffic Commissioner held that pursuant to adverse findings under section 26(1)(c)(iii), (ca), (e), (f) and (h) of the 1995 Act the operator no longer satisfied the requirement of section 13B -- fitness. She revoked the licence with effect from 23.45h on 8 November 2018 and disqualified the company and Michael Timinis for a period of two years from the date of revocation from holding or obtaining an operator's licence or being involved in any entity that holds or attains such a licence, pursuant to section 28 of the 1995 Act.
14. On the issue of disqualification, she referred to the principles set out in *T2010/29 David Finch Haulage*:

*"14) The principles that derive from these and other cases on the point can be simply stated. The imposition of a period of disqualification following revocation is not a step to be taken routinely, but nor is it a step to be shirked if the circumstances render disqualification necessary in pursuit of the objectives of the operator licensing system. Although no additional feature is required over and above the grounds leading up to revocation, an operator is entitled to know why the circumstances of the case are such as to make a period of disqualification necessary."*

She then said:

*"14.... What I say is this, where significant risks to road safety are posed, even after, a public inquiry, a warning and further unsatisfactory assessments and investigations by DVSA, as here, in my judgment forced removal is required."*

### **The appeal to the Upper Tribunal**

15. The appellants appealed on the grounds that the Traffic Commissioner relied on a public inquiry decision made 12 years earlier in 2006 and failed to take into account the long period of compliance and the appellants' attempts to put things right when notified of the more recent issues (page 405).
16. In addition to the written grounds of appeal, the appellants provided a skeleton argument, for which we are grateful. The skeleton argument stated a single ground of appeal: that the decision to disqualify the operator and the *de facto* sole director, Michael Timinis from holding or obtaining an operator's licence or being involved in any entity that holds or obtains an operator's licence was in all the circumstances disproportionate. That ground of appeal fell into three parts:
  - i. General principles;
  - ii. The disqualification from holding or obtaining an operator's licence; and
  - iii. The disqualification from being involved in any entity that holds or obtains an operator's licence.

### **General principles**

17. Mr. Clarke submitted that in the course of the public inquiry itself there was no mention of disqualification; the only mention had been in the calling-up letter. Nor did the Traffic Commissioner invite the appellants' representative to address her on the issue of disqualification or the length of any such disqualification, before proceeding to disqualify both the company and the *de facto* sole director. Mere mention of disqualification in the

calling-up letter was not enough, he submitted. If there was a possibility of the sanction of disqualification, then the appellants were entitled to be heard on that.

18. The Upper Tribunal in *David Finch t/a David Finch Haulage [2010] UKUT 284 (AAC)* examined the earlier authority dealing with disqualification and held that disqualification was not an inevitable consequence of revocation (paragraph 14, quoted above at paragraph 14). Mr. Clarke submitted that while the Traffic Commissioner had quoted that familiar passage from *Finch*, there was no indication in her decision of any consideration of the part of the decision set out at paragraphs 7 and 8 of *Finch*:

*“7) The issue that troubled the tribunal to the greatest degree was simply the absence, throughout the hearing, and in the Traffic Commissioner’s written decision, of any focused discussion as to the need for, length of, or consequences of, a lengthy period of disqualification - and the absence of any intelligible reasons for the decision to not only impose a disqualification, but a disqualification of three years.*

*8) The power to disqualify is separate from the power to revoke, and is provided for under a separate section of the Act. The making of a disqualification order creates a special liability to criminal conviction if, during the period of disqualification, a person applies for or obtains an operator’s licence. It can extend across all traffic areas and affect licences other than the one to which the initial revocation related.”*

19. Mr Clarke referred the Tribunal to the Transport Tribunal decision in *2002/40 Thames Materials* which considered the principle described in *20001/11 Pagoda Travel*. In *Pagoda Travel* it was held that a failure to refer to the possibility of disqualification in the call-up letter was not cured by a subsequent opportunity to make representations. In *Thames Materials* the possibility of revocation was mentioned in the call-up letter, but no invitation was given by the Deputy Traffic Commissioner, and no submissions were advanced by the representative of the appellant, on the issue of revocation. A few days after the public inquiry had concluded the Traffic Commissioner’s Office then wrote to the appellant inviting further submissions on this issue. Mr. Clarke referred the Tribunal to the following passage in *Thames Materials*:

*“13. ....when he came to prepare his decision the Deputy Traffic Commissioner realised that Mr. Cropper had not addressed him on the consequences of revocation, suspension or curtailment and he realised that he had not expressly given Mr. Cropper an opportunity to do so. In our view the Deputy Traffic Commissioner was simply taking steps to remedy that defect in fairness to the Appellant. While this is not a case which is precisely on all fours with Pagoda Travel we think that the spirit of that decision requires that a letter such as that of 7<sup>th</sup> March asking for further representations should offer the operator the choice between a further oral hearing and making representations in writing. We appreciate that arranging a further hearing may well be inconvenient, but it seems to us that it is the price which has to be paid to ensure compliance with the obligation to provide a fair and public hearing.”*

20. Mr. Clarke stated that in the present case the question of disqualification was not addressed by the Traffic Commissioner and she did not expressly invite the appellants’ representative to address her on this issue; as she should have done. She should have invited submissions on whether or not there was a need for disqualification at all, if so, what length of disqualification was proportionate and appropriate; and, on the consequences of disqualification.
21. We agree with the general principles set out by Mr. Clarke and derived from the authorities to which he referred. If a traffic commissioner has disqualification or some other sanction in mind, then it is only right and fair that the operator should have an opportunity to address her specifically about that before any decision on disqualification or other sanction is made.

22. In the present case, it can be seen that the submissions (pages 243-248) deal mainly with mitigating features and indicia of trust to avoid revocation. The focus of the discussion between the appellants' solicitor and the Traffic Commissioner is impliedly about revocation. Having said that, neither the word "revocation" nor "disqualification" is used at any point during this passage. At times the Traffic Commissioner asks the solicitor where "*this ends up*" (page 245). She made it clear that she considered the conduct fell into the severe to serious category (pages 245 and 247). She commented that she would have to balance the negative aspects with the good and ask herself whether matters were so bad that this operator should be put out of business; issues relevant to revocation. However, what she did not do was specifically state that in the event she revoked the licence she would then have to consider disqualification and invite submissions on whether or not disqualification was necessary in this case, the consequences should disqualification be imposed, and how long any disqualification should be. When such serious sanctions as revocation and disqualification are under consideration, it is important to be clear so that no one is in any doubt about what has to be addressed.
23. In these circumstances, we are satisfied that the disqualifications for two years cannot stand and therefore we set them aside. The case is remitted to the Traffic Commissioner to consider anew the issue of disqualification and to hear submissions, if the appellants wish to make such submissions, on the need for, length of and consequences of any disqualification before reaching a decision on this matter.

#### Observations

24. Given our decision to set aside the disqualifications and remit to the Traffic Commissioner, it is not necessary for us to consider the other aspects of the grounds of appeal. However, we consider that it might be of assistance in the future if we make some further observations.
25. The Traffic Commissioner stated in her decision that "*forced removal*" was required (see paragraph 14 above). While we accept that this may just be another way of saying disqualification was necessary, on one view it could suggest a punitive order. Any regulatory action on a licence should be designed to assist in the promotion and achievement of the purposes of the legislation and not punishment. The emphasis should be on road safety and fair competition. (See *Thomas Muir (Haulage) Limited v The Secretary of State for the Environment, Transport and the Regions* (1999) SC 86; and STC 10, paragraphs 24-29.) Expressions connoting punishment are, perhaps, better avoided to prevent any confusion in the mind of the reader.
26. Section 28(4) of the 1995 Act provides that a traffic commissioner may, in addition to making a disqualification order, impose certain further restrictions as set out in paragraph 3 above. What the Traffic Commissioner purported to order in the present case was that the company and the *de facto* director must not be "*involved in any entity that holds or attains*" an operator's licence (emphasis added). That goes beyond the strict terms of section 28(4) and was something the Traffic Commissioner was not empowered to impose.



MARION CALDWELL QC  
Judge of the Upper Tribunal  
Date: 8 March 2019