



Appeal No.: T/2018/68
NCN: [2019] UKUT 0075 (AAC)

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

**IN AN APPEAL FROM THE DECISION OF:
NICK JONES, TRAFFIC COMMISSIONER FOR WALES
DATED 8th OCTOBER 2018**

Before:

**Elizabeth Ovey, Judge of the Upper Tribunal
Andrew Guest, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper Tribunal**

**Appellants: (1) D&A FREIGHT LOGISTICS LIMITED
(2) D&A OO3 LIMITED**

Attendance: Mr. James Backhouse of Backhouse Jones, solicitors

**Heard at: Field House, 15-25 Breams Buildings, London EC4A 1DZ
Date of hearing: 11th December 2018
Date of decision: 21st February 2019**

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that:

1. The appeal of D&A Freight Logistics Limited be ALLOWED and the case be REMITTED to the Traffic Commissioner for Wales for reconsideration.
2. The appeal of D&A 003 Limited be DISMISSED.

SUBJECT MATTER: Financial standing: (1) continuation of licence by Traffic Commissioner when fee not paid; (2) whether associated company was a subsidiary; loss of repute - operating trailers without authority; subsequent developments.

CASES REFERRED TO: *T/2000/6 Cassels; T/2002/217 Bryan Haulage (No. 2); T/2004/362 and T/2004/72 Britannia Hotels Limited and Langsam; T/2009/225 Priority Freight; Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13; *T/2014/008 Duncan McKee* ([2014] UKUT 254 (AAC))

REASONS FOR DECISION

Preliminary

1. This is an appeal against the decision of the Traffic Commissioner for Wales (“the TC”) dated 8th October 2018.
2. By his decision in relation to the First Appellant, D&A Freight Logistics Limited (“D&A Freight”), the TC decided that:
 - (1) D&A Freight no longer satisfied the requirement under sections 13A(2) and 27(1)(a) of the Goods Vehicles (Licensing of Operators) Act 1995 to have sufficient financial standing;
 - (2) D&A Freight also no longer satisfied the requirement under those provisions to be of good repute.

He therefore revoked D&A Freight’s operator’s licence with effect from 23.59 hours on Friday 12th October 2018, stating that the short period of notice was because D&A Freight did not have authority to operate trailers.

3. By his decision in relation to the Second Appellant, D&A 003 Limited (“D&A 003”), the TC decided that D&A 003 no longer satisfied the requirement to have sufficient financial standing and revoked the licence forthwith. He noted that the licence went Continuation Not Sought (“CNS”) on 30th September 2018 (that is to say, a continuation fee became payable on that day and D&A 003 chose not to pay it), but stated that it was continued for the purpose of enabling him to consider regulatory action.
4. The Appellants were not legally represented at the hearing before the TC but promptly instructed Backhouse Jones, a well-known and highly experienced firm of solicitors in this field. A notice of appeal dated 11th October 2018 was filed and an application for a stay was made. The application was refused by the TC on 12th October 2018 but was granted in relation to D&A Freight by Judge Levenson on 19th October 2018. Judge Levenson refused the application in relation to D&A 003 on the ground that it had no effective licence, whether as a result of the non-renewal of the licence or by reason of the TC’s order.
5. Both Appellants pursued their appeal and were represented by Mr. James Backhouse of Backhouse Jones at the hearing before us. We are grateful to him for his helpful submissions.

The facts

The call-up of D&A Freight

6. D&A Freight was called to the hearing by a call-up letter dated 3rd September 2018. The operator and licence details showed that the licence started on 5th October 1995 and there was authorisation for 25 vehicles and no trailers. It was linked to the licence held by D&A 003 and to a revoked licence previously held by D&A Media Bristol Limited (“D&A Media”). The issues of concern included the following:

- (1) a driver, Mr. Darren Smith, had been stopped by a traffic examiner on 18th May 2017 in circumstances which suggested that the vehicle he was driving was potentially being used on the operator licences for all three of D&A Freight, D&A 003 and D&A Media;
- (2) the sole director of D&A Freight, Mr. Andrew Emmett, was also a director of D&A Media, which had gone into administration in June 2018 owing a substantial debt to H. M. Revenue and Customs;
- (3) Mr. Richard Grimes, the sole director of D&A 003, had been a director of D&A Freight from 1st to 28th February 2016, giving rise to the question what connection there was between the two companies;
- (4) there was doubt as to D&A Freight’s financial standing, the requirement being that it should show access to an average of £113,550 over the last three months.

7. The call-up letter went on to state that Mr. Smith had been called to the inquiry so that the TC could consider his fitness to hold his licence and that D&A 003 had been called to attend at the same time. The background to the call-up letter is as follows.

8. D&A Freight had previously been called Swansea Bakeries Limited and changed its name on 24th February 2017. Mr. Emmett became a director on 2nd March 2016, effectively in succession to Mr. Grimes, and there was one other director until 31st October 2016 (who had been a director since 1st June 1999). It is stated on p.8 of the bundle that Mr. Emmett was only added to the licence in June 2017. This was after the incident on 18th May 2017 when Mr. Smith was stopped, but apparently before any communication was received from the Office of the Traffic Commissioner (“the OTC”).

9. On 9th July 2018 Mr. Blake from the OTC wrote to D&A Freight referring to the investigation begun as a result of the incident on 18th May 2017 and to the possibility that potentially three different operators were either operating the same vehicle or employing the same driver and to the administration of D&A Media. The letter asked for a detailed explanation of all entities under the “D&A” name, including their current statuses and the relationships between each.

10. In response, Mr. Paul Carless of SPC Transport Consultancy Service wrote on 23rd July 2018 enclosing a statement of affairs for D&A Media, giving an explanation for the failure of that company and stating that the director of D&A Media (who was in fact Mr. Emmett) had bought the company from the administrator to acquire the

intellectual property and some minor assets, but did not propose to apply for a licence in that company's name. The three companies were said to be closely associated, although there was no explanation of the nature of the association, and it was also stated that Mr. Emmett wished to increase the authorisation on the licences for D&A Freight (OG0083686) and D&A 003 (OG1122928) from 25 vehicles to 51 vehicles and to surrender the licence for D&A Media (OH1112496), which authorised 22 vehicles. This was despite the fact that the D&A Media licence, which had been revoked by the time of the call-up letter, is stated at p.5 to have authorised 62 vehicles and 40 trailers. The statement of affairs showed a total debt of £1,347,663 owed to HMRC, which included sums in respect of underdeclarations of VAT, surcharges and late payment penalties in respect of PAYE, and an estimated total deficiency as respects creditors of £1,402,796.

11. When Mr. Smith was stopped by the traffic examiner, he said that he was employed by D&A Media, which operated the vehicle. Investigation showed that the vehicle was not specified on the D&A Media licence and that it had been driven four times in May 2017 without a digital tachograph card. The transport manager of D&A Media, Mr. Bennett, confirmed that the driver on those occasions was Mr. Smith and that as a result he had been dismissed (p.57). Following further investigation Mr. Keith Chadwick as the transport manager of D&A 003 confirmed that at the relevant times Mr. Smith was employed by D&A 003 and no one else would have driven the vehicle (p.58).

12. As a result of previous involvement with the regulatory system, Mr. Emmett's reputation was found to be tarnished in October 2006 and he was disqualified for 18 months in May 2009.

The call-up of D&A 003

13. D&A 003 was called to the inquiry by a call-up letter also dated 3rd September 2018. The operator and licence details showed that the licence started on 14th October 2013 and there was authorisation for 22 vehicles and 22 trailers. The issues of concern included the involvement of Mr. Andrew Emmett in the business. The background to the call-up letter is as follows.

14. D&A 003 had previously been called Media Link Cardiff Limited and had changed its name on 14th August 2015. Its original director was a Mr. Michael Wood, who made the original application for an operator's licence. Mr. Grimes was appointed a director on 5th January 2015 and Mr. Wood resigned on 6th April 2015.

15. Mr. Chadwick was also the transport manager of D&A 003 at the time of a previous public inquiry held on 8th July 2015 following the proposed nomination as transport manager of Mr. David Idris Emmett (p.216). Mr. David Emmett was found to have lost his reputation as a transport manager in November 2007 and to have obtained an acquired rights certificate by means of a false declaration. An undertaking was given that he was to play no part in the management, administration or control of the business, including as a consultant, and that any attempt to do so would be immediately reported to the TC. The bundle includes the call-up letter for the 2015 public inquiry and other material relating to that inquiry showing clearly the unhappy history of Mr. David

Emmett in relation to the regulatory system. It appears that Mr. David Emmett is Mr. Andrew Emmett's father (*italicised paragraph 25 on p.285*).

16. Mr. Chadwick resigned as transport manager on 8th June 2018. The OTC required D&A 003 to apply to add a replacement transport manager by 2nd July 2018 and warned that failure to respond to the letter would result in revocation of the licence. No response was received and the licence was revoked with effect from 22nd August 2018. Mr. Grimes was informed of the revocation by an e-mail and attached letter dated 23rd August 2018. This led to a response from Mr. Grimes by e-mail of the same date to the effect that Mr. Bennett had been appointed transport manager on 2nd August 2018, on which date an application to the OTC had been sent, and that D&A 003 had in fact written to the OTC to say that Mr. Chadwick had left and D&A 003 would be taking steps to appoint a new transport manager. A copy of a letter dated 1st June 2018 about Mr. Chadwick's departure was provided.

17. As a result, the OTC replied on 24th August 2018 stating that the TC had decided to hold a public inquiry on 8th October 2018 but wanted specified matters to be dealt with in writing three weeks before the inquiry and asked for evidence of financial standing within the same timescale. He would revisit the decision on revocation on receipt of the information.

Events following the call-up letters

18. The next event as respects D&A 003 was that on 10th September 2018 Mr. Grimes wrote to the OTC stating that as of 17th September 2018 he would no longer be a director of the company, the company would no longer operate in the goods related transport industry and he was surrendering the licence. This met with the response, by a letter dated 13th September 2018, that the TC would consider the request to surrender the licence at the public inquiry and the company was still required to attend.

19. The next event as respects D&A Freight was that on 20th September 2018 Mr. Carless telephoned the OTC to explain that he had just learnt that Mr. Andrew Emmett had a long-standing holiday booking in Dubai from 4th to 9th October 2018. He repeated that by e-mail sent on 24th September 2018, attaching copies of the holiday documentation, and requested a short adjournment. He suggested as an alternative that Mr. Grimes might be able to answer the TC's questions, referring to him as winding down his involvement with "these licences". The TC refused the request for an adjournment in the light of the fact that the call-up letter was sent on 3rd September 2018.

20. As a result, Mr. Grimes was again appointed a director of D&A Freight and is recorded as having attended the inquiry as a director of both companies, although it is not clear exactly how he came to continue as a director of D&A 003. Mr. Emmett did not attend, but Mr. Carless represented both companies and Mr. Bennett, the proposed transport manager of D&A 003, was also present, although Mr. Carless made it clear at the outset that his clients did not wish to continue with the D&A 003 licence. As already stated in paragraph 3 above, that had gone CNS on 30th September 2018.

21. Finally, some evidence of financial standing in relation to D&A Freight was provided by Mr. Carless under cover of an e-mail sent on 3rd October 2018. Mr. Carless

explained that he would be relying on Mr. Grimes to explain the figures. What does not appear to have been addressed at that stage is that much of the information related to another company, D&A 004 Limited.

The public inquiry

22. The TC dealt first with Mr. Smith, the driver who had been stopped on 18th May 2017 and also called to the inquiry. He then turned to D&A 003 and stated that he had declined the request to surrender because he wanted to take regulatory action. As he had not been given evidence of financial standing he proposed to revoke the licence. He also pointed out that such evidence of financial standing as had been produced by D&A Freight showed an average balance of £523, whereas the required standing was £113,550.

23. At that point, the TC stated that one of the issues about which he had particular concern was that “the person who is not here is David Idris Emmett, David Emmett,” and he referred to the undertaking given, at a hearing at which he noted Mr. Grimes was present, that Mr. David Emmett would have no involvement in D&A 003. It appeared to him that the undertaking had been breached. It was explained by Mr. Grimes and Mr. Carless that Mr. David Emmett had not been involved in the business and it was his son who was away on a family holiday.

24. The focus then switched back to D&A Freight and its financial standing. The substance of the case made on behalf of D&A Freight was that:

- (1) D&A Freight had changed its factoring company on 6th July 2018 and there had been substantial teething problems leading to a significant reduction in cash receipts while the new company dealt with verification and dispute issues;
- (2) A new D&A entity, D&A 004 Limited (“D&A 004”), was now in existence and there had been substantial movements of cash between D&A Freight and D&A 004. It was D&A Freight’s understanding that the bank balances of D&A 004 could be taken into account in assessing D&A Freight’s financial standing.

25. The case ran into difficulty because of the fact that the information given about the factoring arrangements related to D&A 004 rather than to D&A Freight and the TC put to Mr. Carless, which Mr. Carless accepted, that the information had no relevance to the D&A Freight licence (p.115E). Further, there was no resolution linking the companies by virtue of which it would be possible to take the finances of D&A 004 into account in assessing the financial standing of D&A Freight (p.119E). Mr. Grimes explained that advice had been taken from Backhouse Jones, but the TC expressed scepticism on the point because the advice appeared to have been incomplete and in his view Backhouse Jones would give correct advice, not incomplete advice.

26. A further point then arose in connection with trailers. Mr. Carless told the TC that there had been a meeting between Mr. Andrew Emmett, Mr. Grimes and himself about five months earlier at which it had been agreed that the various transport interests of the three companies should go on to one operator’s licence, which should be the

D&A Freight one. D&A Freight, however, did not have authorisation for trailers and so it needed such authorisation. Mr. Grimes and Mr. Carless between them gave evidence to the apparent effect that D&A Freight had vehicles out on the road with trailers, culminating in an acceptance by Mr. Grimes that it would appear that D&A Freight had been running trailers illegally in the last month.

27. On behalf of D&A Freight Mr. Carless sought a period of grace in respect of financial standing and also in respect of authorisation for trailers. It was expected that matters would be resolved by the end of November 2018.

28. The TC then proceeded to give his decision, there having been a short adjournment in which he had been typing it. As respects D&A 003, he said:

“A licence renewal fee was not paid for D&A 003 Limited and it went continuation not sought on the system. It has been continued for the purposes of allowing me to take regulatory action. Companies House shows it as proposed to strike off. No financial evidence has been produced for D&A 003 Limited and it is accepted that the licence will need to be revoked”.

29. As respects D&A Freight, he said:

“The finance produced for today amounts to £526 when averaged over three months in accord with the Senior Traffic Commissioner’s Statutory Guidance. It was suggested that the difficulties arose because of a change in factoring companies and this resulted in what has been claimed to be a temporary shortfall. Unfortunately this claim is only substantiated by oral assertions from Richard Grimes. He claims formal links with subsidiary companies, but no other evidence of Director resolutions was produced. Richard Grimes appeared to be unaware of the need for this ...

D&A Freight Logistics has authority for 25 vehicles and nil trailers. However, I am now told that all vehicles are tractor units and so without trailers it cannot operate. Then I ask if trailers are operated today and I am told, yes, they are.

There was an attempt to surrender the D&A 003 Limited licence and in (*inaudible*) it more recently went to CNS with no renewal fee paid. It is not claimed that there is an existing authority to operate under D&A 003 Limited.”

30. What is said under the heading “Material Considerations and Findings of Fact” includes the following:

- (1) there is an acceptance that the D&A 003 licence must end on the basis it no longer satisfied the requirement for financial standing;
- (2) operations for D&A Freight are run illegally as there was no authority for any trailers;
- (3) the directors have been juggling finances between the two companies in an endeavour to be solvent. To allow D&A Freight to continue despite its financial problems would be unfair to good, compliant operators;

- (4) repute is an issue in relation to D&A because it is running trailers without authority. In answer to the *Priority Freight* question, the TC does not trust the operator and in answer to the *Bryan Haulage* question it is proportionate to revoke the licence.

31. On the above basis the TC reached the decisions set out in paragraphs 2 and 3 above. The TC also made adverse findings against D&A Freight under sections 26(1)(c)(iii), 26(1)(ca), 26(1)(e) and 26(1)(f) of the Goods Vehicles (Licensing of Operators) Act 1995. On consideration of the call-up letter, which identified these among other statutory provisions as matters of concern, we understand that the TC was finding that:

- (1) there had been a prohibition or prohibitions in respect of vehicles owned by D&A Freight in the last five years (see section 26(1)(c)(iii) of the Act);
- (2) D&A Freight had made statements when applying for its licence which had not been fulfilled about notifying changes in financial circumstances (section 26(1)(e));
- (3) D&A Freight had not fulfilled the undertaking given when it applied for its licence that the vehicles would be kept fit and serviceable (section 26(1)(f)).

32. Evidence of the prohibitions was provided with the call-up letter. The failure to inform the TC of changes in financial circumstances was canvassed during the public inquiry. It is not clear to us on what basis the finding under section 26(1)(ca), which relates to fixed penalty notices or conditional offers, was made, although we note that the call-up letter for D&A 003 identified a penalty notice.

33. Finally, the TC explained that he was going on a short holiday in a little over a week's time and to assist in case of an application for a stay pending an appeal, he would not grant a stay.

The appeal

34. Both D&A Freight and D&A 003 appealed against the TC's decision by a notice of appeal dated 11th October 2018. We summarise the grounds of appeal as follows:

- (1) the TC did not set out any statutory basis allowing him to reinstate a licence which had terminated automatically under the CNS procedure;
- (2) having nevertheless set aside the termination of D&A 003's licence for the purpose of considering regulatory action, the TC revoked the licence for lack of financial standing, but it was not necessary to demonstrate financial standing in the circumstances. In the absence of other regulatory concerns, the licence should have been left terminated;

- (3) D&A Freight had shown fundamental compliant intention in relation to financial standing, both by putting money into the operator's bank account by way of transfer from an associated company and by the evidence of the factoring arrangement, and the TC erred in failing to grant a period of grace;
- (4) alternatively, the TC could have curtailed the licence to 12 vehicles, that being the number of vehicles actually held under the licence, for which the financial standing requirement would have been easily met;
- (5) the TC misunderstood the facts relating to D&A Freight's fleet, which was mixed, so that it could operate rigid vehicles lawfully under its current licence. It was accepted that the use of trailers would not be permitted until an application to add trailers had been granted;
- (6) there was not sufficient cogent evidence to justify the finding of loss of repute in relation to D&A Freight;
- (7) it was unreasonable to refuse the adjournment sought by Mr. Emmett so that he could be present at the inquiry.

Having regard to those grounds, the Upper Tribunal was requested to quash the revocation of D&A Freight's licence and either to determine financial standing or to remit it for reconsideration and to quash the revocation of D&A 003's licence and allow it to remain terminated through CNS.

35. At the same time, an application for a stay was made by both appellants. We summarise the grounds of the application as follows:

- (1) the starting point is that a stay should normally be granted to maintain the status quo pending an appeal;
- (2) there were no road safety, safety of passengers, fair competition or other regulatory observances which would be compromised by the granting of a stay;
- (3) it could not be said, having regard to the grounds of appeal, that the appeal had no merit;
- (4) it was not fair or reasonable for the TC to fetter his statutory discretion in relation to the granting of a stay before he had had the opportunity to consider the grounds of appeal;
- (5) the short notice of the revocation of the D&A Freight licence arose from the TC's factual error in failing to appreciate that D&A Freight had a mixed fleet.

36. The TC did reconsider the question of a stay and on 12th October 2018 gave a written decision setting out his reasons for refusing a stay which clearly took into account the subsequent arguments raised. Again in summary they were:

- (1) the call-up letter for D&A 003 identified undisputed failings in addition to the lack of financial standing and the rationale for reinstating the licence was to enable the TC to consider whether it was necessary to make a disqualification order, although in the event that was not necessary;
- (2) the evidence did not show financial standing for D&A Freight and in the TC's view there were very strong fair competition issues, having regard to the switching between three entities, one of which went into administration with debts of £1.4 million;
- (3) having engaged in such switching, the directors may have failed to appreciate that there was no authority on the D&A Freight licence for trailers. It was Mr. Grimes and the representative who said that all the D&A Freight business was conducted with tractor units and trailers.

37. The application for a stay was urgently renewed in the Upper Tribunal. On 19th October 2018 Judge Levenson dismissed the application by D&A 003 but granted the application by D&A Freight, stating that the grounds of appeal were reasonably arguable and in the circumstances it was proper to grant a stay at that stage.

38. At the hearing on 11th December 2018 both appellants were represented by Mr. James Backhouse of Backhouse Jones, who helpfully provided a skeleton argument in addition to the grounds of appeal. In the skeleton and in his oral submissions Mr. Backhouse dealt first with the position of D&A 003 and we follow that course.

The D&A 003 appeal

39. The first question is whether the TC had power to take action against D&A 003's licence after it had terminated because the required fee had not been paid. Mr. Backhouse referred in his skeleton to section 45 of the Goods Vehicles (Licensing of Operators) Act 1995 and said that the only power to "resurrect" a licence is where there are exceptional circumstances and no application was made to request such exceptional circumstances. As a result, he said, the TC had no lawful power to reinstate the licence. In his oral submissions he modified the point somewhat, so that he accepted that there was jurisdiction in principle but argued that the TC had failed to identify the exceptional circumstances in question and so, as we understand the argument, could not rely on the power.

40. Section 45 reads as follows, so far as material:

“(4) If any fee or instalment of a fee in respect of the continuation in force of an operator's licence is not duly paid by the prescribed time, the licence terminates at that time.

(5) A traffic commissioner may, if he considers there to be exceptional circumstances that justify his doing so in any case where subsection ... (4) has applied, direct that as from the time mentioned in that subsection its effect in that case be disregarded.”

41. There is thus a clear power in subsection (5) for a traffic commissioner to direct that the effect of the non-payment of the fee is disregarded. We accept that the traffic commissioner must consider that there are exceptional circumstances which justify his doing so, but there is nothing which requires that the operator must request the exercise of the power. The traffic commissioner is at liberty to do so of his own motion. This appears from *T/2000/6 Cassels*, in which the Transport Tribunal made clear that an operator is not entitled to allow a licence to lapse to avoid an adverse finding and the traffic commissioner can make use of section 45(4) to ensure that such a result does not occur.

42. We recognise that in this case the TC dealt with the matter somewhat informally and did not, as pointed out in the grounds of appeal, identify the statutory basis on which he was proceeding. Nor did he spell out the exceptional circumstances. In our view, however, the course he took was in substance well justified in view of the questions which arose as to the way in which the three licences had been operated and the other outstanding matters in relation to the licence which were identified in the call-up letter. The degree of informality is understandable given that at the hearing the TC made clear what he proposed to do and no point was taken on his power to do so. The decision refers to the licence having been continued for the purpose of allowing him to take regulatory action, a justification consistent with *Cassels*. While it might have been preferable if the TC had given the greater detail which appears in the decision refusing the stay, we conclude that in the circumstances we have set out, the degree of informality did not cause any injustice to D&A 003 and does not require us to set aside the TC's decision.

43. Mr. Backhouse then argued that even if the TC had power to do what he did, it was not a proportionate exercise of discretion to reinstate the licence simply to revoke it for lack of financial standing. He pointed out that although the call-up letter did refer to a number of other matters, the TC did not consider them but revoked the licence for lack of financial standing without more. He said that if D&A 003 did not wish to continue the licence, it was not necessary to show financial standing. In support of his submission he referred to *T/2004/362 and T/2004/72 Britannia Hotels Limited and Langsam*, citing paragraph 8, which deals with the financial standing of Mr. Langsam.

44. The facts of *Langsam* in relation to financial standing were very different from the facts of the present case. The financial standing required there was £4,200 and there was evidence before the traffic commissioner that Mr. Langsam was a shareholder in Britannia Hotels Limited which had a £50 million balance sheet, from which it appeared that even if Mr. Langsam had only a 1% shareholding (in fact he owned 50% of the shares), it was worth £18,000. Further, there was nothing in the way Mr. Langsam operated his vehicles to lead to the conclusion that his finances were not as they should be. Those circumstances, coupled with his wish to surrender the licence "which made the issue hypothetical", as the Transport Tribunal put it, meant that it was disproportionate to make a finding that he did not have financial standing and the proportionate approach would have been to make no order and to allow Mr. Langsam to surrender his licence.

45. In the present case, no attempt had been made by D&A 003 itself to provide evidence of financial standing and the only external evidence was that (i) it was closely

associated (in the words of Mr. Carless in his letter dated 23rd July 2018) with two other companies, one of which had gone into administration with an estimated deficiency as respects creditors of £1.4 million and the other of which had not produced satisfactory evidence of its own financial standing and (ii) it no longer had access to park its vehicles at the sites where they had previously been parked. There was thus material to support a conclusion that D&A's finances were not what they should be.

46. We remind ourselves that the task of the Upper Tribunal, on hearing an appeal from a traffic commissioner, is to review the material before the traffic commissioner, and the Upper Tribunal will only allow an appeal if the appellant has shown that “the process of reasoning and the application of the relevant law require the tribunal to take a different view”, as explained in *Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40. The question for us is whether the TC was plainly wrong, not what decision the Upper Tribunal would have made if it had been in the TC's place.

47. Applying that test, we do not accept Mr. Backhouse's submission that we should interfere with the TC's exercise of his discretion. As we have already said, we consider that he was well justified in making a direction under section 45(5) of the 1995 Act, so that the D&A licence was still in force at the date of the public inquiry. Having ensured that he was able to consider the matter, he took the view that the purposes of proper regulation were sufficiently met by revoking the licence on the ground of lack of financial standing without pursuing the further issues raised by the call-up letter. No objection was taken to his proposed course of action at the time and it had the practical effect of bringing about the end of the licence, which D&A 003 wished to achieve in any event.

48. Mr. Backhouse pointed out that there is what he described as “an adverse tick on the record.” That adverse tick, however, has to be considered in the context that:

- (1) it is open to D&A 003 and Mr. Grimes, and to Mr. Emmett in so far as it concerns him, to refer to the circumstances that a decision had already been made not to continue with the business of D&A 003 and no attempt had been made to argue that the licence should be kept alive;
- (2) consideration of the wider regulatory history will in any event reveal the evidence which points to the conclusion that D&A 003 in fact lacked financial standing.

In that context, we conclude that the adverse tick does not demonstrate a disproportionate exercise of discretion calling for our intervention.

49. For those reasons we dismiss D&A 003's appeal.

The D&A Freight appeal

50. The first issue on this appeal is the question of financial standing: that is to say, whether D&A Freight should have been granted a period of grace to show financial standing. In addition to the points made in the grounds of appeal, the skeleton argument raised a specific point that funds available to D&A 004 should be taken into account by

virtue of reg. 30(7) of the Goods Vehicles (Licensing of Operators) Regulations 1995, S.I. 1995 No. 2869.

51. That regulation provides as follows, so far as material:

“(1) A holding company may apply to a traffic commissioner –

...

(b) if it already holds a licence in respect of [a particular traffic] area, for a variation of its licence ... which would have the effect, if the application were granted, of including in the licence ... already held by, the holding company, goods vehicles in the lawful possession of a subsidiary of that company specified in the application.

...

(7) In a case where the applicant for, or the holder of, a standard licence is a holding company and the goods vehicles used, or to be used, under the licence belong to, or are in the possession of, a subsidiary of that holding company, the provisions of these Regulations apply as if –

...

(b) for purposes of, or relating to, the reputation and financial standing of the holding company, the activities, relevant convictions and financial resources of the subsidiary were activities, convictions and resources of the holding company; ...”

52. Mr. Backhouse argued that at the public inquiry Mr. Grimes attempted to explain that D&A 004 is a subsidiary of D&A Freight and is specified on the D&A Freight licence, with the consequence that the financial resources of D&A 004 are to be taken into account as financial resources of D&A Freight in accordance with reg. 30(7). He referred to pp. 114 and 119 of the transcript and contended that those pages show that the TC failed to appreciate that that was what Mr. Grimes was saying and thought that Mr. Grimes was saying that the two companies formed part of a group but had not taken into account the Statutory Guidance of the Senior Traffic Commissioner requiring a resolution of the directors and had not produced any such resolution. The current Statutory Guidance on Finance makes clear at paragraph 22 that where there is a group, the company which holds the licence must be able to demonstrate that it has financial standing and that the traffic commissioner will have to be satisfied as to the detail of any guarantee within the group.

53. Having read the passages to which we were referred in the context of what shortly precedes and follows them and having noted that at some points what was being said was inaudible, we think there is substance in the point that Mr. Grimes and the TC were to some extent at cross-purposes. The transcript shows that there was some cutting across of questions and answers which makes it difficult to be certain what the evidence was. Mr. Grimes certainly seems to have been ill-prepared for the hearing and to have failed to produce evidence which ought to have been produced, but it is of course the case that he had only very recently become a director of D&A Freight again. Further,

while, in the absence of a resolution, the TC appeared sceptical about Mr. Grimes' assertion that advice had been obtained from specialist solicitors, that scepticism may not have been justified if the advice was to follow the reg. 30(7) route.

54. This issue clearly has an impact on the question whether the TC erred in refusing to grant a period of grace. If D&A 004 is indeed a specified subsidiary and reg. 30(7) applies, the funds in its bank account should be taken into account, as should the factoring arrangement. In his oral submissions, Mr. Backhouse accepted that if D&A Freight's financial position was considered over the three months preceding the public inquiry, it could not show financial standing because of the impact of the factoring problem, but he drew attention to the substantial D&A Freight bank balances in the early part of the year and to the transfer from D&A 004 of funds sufficient to give D&A Freight a balance of £108,700 on 5th October 2018, as against a required amount of £113,550.

55. We recognise that the evidence of financial standing before the TC was far from satisfactory. There was no explanation of why D&A 004 was incorporated at a time when, on the evidence given at the inquiry, D&A Media was in, or about to enter, administration owing substantial debts and when it had been decided to stop operating D&A 003 and to concentrate resources in D&A Freight. The bank statements show substantial sums moving both ways between D&A Freight and D&A 004, again without explanation but with some appearance that D&A 004, having received funds from D&A Freight, was then putting D&A Freight in funds to meet outgoings. Apart from such evidence as there is connected with the factoring arrangement, there is no evidence of D&A 004's own resources. The D&A Freight bank statements show a number of returned cheques and returned direct debits. Arguably, however, this was connected with the difficulty which followed the initial entry into the new factoring arrangement (a difficulty of which, as the TC pointed out, he was not kept informed) and was not indicative of long-term problems.

56. Mr. Backhouse referred us to the case of *T/2014/008 Duncan McKee* ([2014] UKUT 254 (AAC)) on the question when a period of grace should be granted. In that case it was said that:

“Traffic Commissioners will need some tangible evidence, beyond mere hope and aspiration, that granting a period of grace will be worthwhile, and that there are reasonable prospects for a good outcome.”

In broad terms, his submission was that D&A Freight had shown financial standing for a long period; that had been followed by a weak period attributable to the factoring problems; there was evidence to show that the balance now available on the factoring account was sufficient to meet the financial standing requirement; looking at that and taking into account the resources of D&A 004 generally and D&A Freight's position at the date of the inquiry, the *McKee* test was satisfied.

57. The difficulty with the TC's decision on this issue is that, while he took into account the fact that there had been juggling between company accounts, he appears to have treated D&A 004's resources, and in consequence the whole factoring issue, as irrelevant in the absence of a resolution by D&A 004 in satisfactory terms that it would

support D&A Freight. This brings into play the whole issue of the apparent misunderstanding in relation to D&A Freight.

58. That misunderstanding itself cannot be entirely divorced from the fact that the TC refused an adjournment to enable Mr. Andrew Emmett to attend the inquiry. We do not say that the decision to do so was a wrong exercise of discretion, given that there clearly was delay in making the application, although a pre-booked family holiday will often be a good reason for granting an adjournment, as the TC recognised in giving his reasons for refusing a stay. In our view, however, the facts that the sole director, until very recently, of D&A Freight was not present and that Mr. Grimes was in effect stepping into the breach would have justified making a slightly greater allowance for lack of familiarity with the situation on the part of Mr. Grimes.

59. We also bear in mind that, as set out in paragraph 23 above, at a very early stage the TC expressed his concern about the absence of Mr. David Emmett and the apparent breach of the undertaking, known to Mr. Grimes, relating to him. In our view there is a real risk that the impression given was that the adjournment was refused because the TC mistakenly thought that it was Mr. David Emmett who was seeking it, not Mr. Andrew Emmett.

60. Having regard to all those points, we conclude that if the TC's sole ground for revoking D&A Freight's licence was his finding as to financial standing, it would be wrong to allow the determination to stand without further consideration of the position of D&A 004, including the factoring arrangement, and would be in the interests of justice to set aside his determination and to remit the matter for a further hearing on the issue of financial standing. In fact, the TC also relied on the further ground of loss of repute arising from the fact that D&A Freight was running trailers without authority. It is therefore necessary to consider this further aspect before deciding on the disposition of the appeal.

61. In reaching his determination on loss of repute, the TC correctly asked himself what he described as the *Priority Freight* question and the *Bryan Haulage* question. The *Priority Freight* question takes its name from *T/2009/225 Priority Freight*, the question being whether it is likely that the operator will operate in compliance with the regulatory regime in future. The *Bryan Haulage* question takes its name from *T/2002/217 Bryan Haulage (No. 2)*, the question being whether the conduct is such that the operator ought to be put out of business. As the TC said, having answered the former question in the negative and the latter question in the affirmative, the decision to revoke the licence was a natural consequence.

62. As we read the TC's decision, this part of it was based solely on his understanding that D&A Freight was operating trailers without authority to do so. (Although we have noted above in paragraph 31 that the TC made some other adverse findings, they do not appear to have been material for present purposes.) We agree that that was what Mr. Carless and Mr. Grimes told the TC, although Mr. Grimes appears to have said that by way of deduction from what had been said earlier by Mr. Carless rather than of his own knowledge (see p.122D of the transcript). The point made in the grounds of appeal is that it should have been evident to the TC from the list of authorised vehicles at p.10 that D&A Freight was operating a mixed fleet. It was therefore possible for D&A Freight to operate lawfully, albeit with rigid vehicles and not using trailers.

This is clearly another area in respect of which the evidence of Mr. Andrew Emmett might have been of assistance.

63. We do not accept the submission in the grounds of appeal that there was not substantial cogent critical evidence which might support a loss of repute. The acceptance by D&A Freight's representative and by the only director who attended the hearing that D&A Freight was, or appeared to be, running trailers without authority is undoubtedly substantial cogent critical evidence. In the unusual circumstances of this case, however, we accept that there was material before the TC as to the nature of D&A Freight's fleet which pointed in a contrary direction and showed that the licence was capable of being operated lawfully. Coupled with the matters relating to the issue of financial standing, we have decided, with some hesitation, that the TC's decision to revoke the licence should indeed be set aside and the matter should be remitted for further hearing. That is not to suggest that the task facing D&A Freight will be an easy one.

Subsequent developments

64. In conclusion, we advert to the fact that while we have been considering this decision, we have received from the OTC a public inquiry statement dated 11th February 2019 which contains information about a number of concerns in relation to the continuing operation of D&A Freight's licence and in particular contains evidence that D&A Freight is operating trailers without authority.

65. This material cannot affect our decision, since under paragraph 17(3) of Schedule 4 to the Transport Act 1985 the Upper Tribunal is precluded from taking into consideration any circumstance which did not exist at the time of the determination which is the subject of the appeal. The new material relates exclusively to events which, on the evidence, occurred after 8th October 2018. If we had been able to take it into account, it would of course have been necessary to allow D&A Freight an opportunity to deal with it.

66. We must, however, make clear that D&A Freight currently has no authority to operate trailers. This is recognised in paragraph 22 of the grounds of appeal. The stay granted by Judge Levenson does no more than to allow D&A Freight to continue for the time being to operate in accordance with its licence, which does not authorise the use of trailers. The new material seems to contain a suggestion by D&A Freight that it is using trailers while it awaits our decision. The most favourable possible outcome for the appeal was that D&A Freight could continue operating under its existing licence without any variation to its terms; no variation was in issue on the appeal. A variation to permit the use of trailers would need to be applied for separately, as was recognised by Mr. Carless at the inquiry and in the grounds of appeal. If D&A Freight is operating trailers at present, it is doing so unlawfully.

67. Our decision on D&A Freight's appeal as set out in paragraph 63 above therefore stands and the matter is remitted to the TC, who will no doubt make arrangements for it to be heard and for such further steps as he may think appropriate in the light of the new material to be taken.

68. Finally, we express our regret that this decision was not produced more speedily, owing to Judge Ovey's other professional commitments.

E. Ovey
Judge of the Upper Tribunal
21st February 2019