



Neutral Citation Number: [2019] UKUT 0302 (AAC)

Appeal No. T/2018/22

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

**IN AN APPEAL FROM THE DECISION OF  
Kevin Rooney, Traffic Commissioner for  
the West of England dated 2 May 2018**

**Before:**

**Her Hon. Judge J Beech, Judge of the Upper Tribunal  
Leslie Milliken, Specialist Member of the Upper Tribunal  
David Rawsthorn, Specialist Member of the Upper  
Tribunal**

**Appellants:**

**SHEPPARD COMMERCIAL SERVICES LIMITED**

**In attendance:** Mr Laprell of Counsel instructed by Backhouse Jones solicitors on behalf of the Appellant and Mr Sadd of Counsel instructed by the Government Legal Department on behalf of the Secretary of State for Transport

**Heard at:** Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

**Date of hearing:** 17 to 19 September 2019

**Date of decision:** 7 October 2019

**DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that the appeal be ALLOWED and that the matter be remitted for rehearing

**SUBJECT MATTER:-** Adequacy of call up letter; Good repute; Balancing exercise

**CASES REFERRED TO:-** 2009/225 Priority Freight & Paul Williams; 2002/217 Bryan Haulage No.2; Bradley Fold Travel Ltd v Secretary of State for Transport (2010) EWCA Civ 695

## REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the West of England ("the TC") made on 2 May 2018 when he found that Sheppard Commercial Services Ltd ("Sheppard") had lost its good repute and revoked the company's operator's licence with effect from 30 June 2018. The Traffic Commissioner granted a stay of his decision on 11 May 2018.

### The Background

2. The background relevant to this appeal can be found in the appeal bundle, the transcript of the hearing and the written decision of the TC and is as follows. Sheppard, which operates as an established maintenance provider and DVSA approved testing centre, was granted a standard national operator's licence in March 2002. Graeme Roberts ("Mr Roberts") purchased the company from Keith Sheppard in 2009, having previously been employed within the company and became the managing director and transport manager. By that stage, the company had an authorisation of 15 vehicles with 11 in possession and 15 trailers with none in possession.
3. In 2015, Mr Roberts agreed to sell 50% of the company to Ian Percival ("Mr Percival") who was also appointed a director although he did not undertake any day to day functions within the company. The extent of his involvement was that he and Mr Roberts would meet once a month to discuss on-going issues. Once Mr Percival had purchased 50% of the company, Sheppard then became the nominated maintenance contractor for Mr Percival's transport company, IPL Haulage Limited ("IPL"), which had a fleet of 35 vehicles and 80 trailers.
4. On 3 November 2017, a vehicle operated by IPL was the subject of a roadside check and was found to have an Ad Blue Emulator ("ABE") fitted to the wiring loom of the Selective Catalytic Reducer (the "SCR" system). Mr Percival admitted to Vehicle Examiner Collins ("VE Collins") that the device had been fitted to address a defect in the AdBlue/SCR system to enable the vehicle to pass an MOT in October 2017. At that stage, IPL was expecting delivery of replacement vehicles but delivery had been delayed. The vehicle was issued a delayed "S" marked PG9 for modification of the SCR system along with an immediate PG9 for a fractured brake drum. VE Collins then undertook a follow up maintenance investigation and provided a public inquiry brief for the TC. It was not suggested by VE Collins that Sheppard had any involvement in the fitting of the ABE nor any knowledge of the same, the device having been concealed under the floor of the nearside foot well and would not, in the normal course of PMI inspections, be discovered. Neither did Mr Percival suggest that Sheppard had been involved in the fitting of the ABE.
5. By call up letters dated 27 February 2018, IPL, Mr Percival and Sheppard were called to a public inquiry. The letter sent to Sheppard simply referred to the maintenance investigation into IPL which had been carried out by VE Collins "*following the illegal fitment of emissions control equipment*" to the

relevant vehicle. The letter informed Sheppard that *“The Traffic Commissioner had reviewed your case and is concerned about aspects of the company’s operation”* and that a public inquiry was to be held for the TC to *“investigate these apparent shortcomings and to give you the opportunity to explain what you are doing to improve compliance ...”*. The letter did not explain why the TC was concerned about aspects of the company’s operation (whether it be the company’s maintenance operation or vehicle operation) nor did it explain why it was considered that the fitting of an ABE to an IPL vehicle was something that might adversely affect the licence of Sheppard bearing in mind that Sheppard was not implicated in the fitting of the device. Neither did it set out the *“apparent shortcomings”* referred to in the letter save in this respect:

*“.. the issues of concern to the Traffic Commissioner are that it appears:*

*a) You have breached the conditions of your licence, namely*

*i. That you failed to notify the Traffic Commissioner of events which affect your good repute”*

The letter did not identify the events which Sheppard should have notified to the TC or why they might affect the company’s repute.

6. The letter did set out the evidence which the TC would consider:

- a) A copy of VE Collins’ maintenance investigation into IPL;
- b) An Operator Information and Performance report relating to Sheppard;
- c) Previous Public Inquiry documentation dated 9 November 2010 and 4 March 2011.

No reference was made to either b) or c) above during the course of the public inquiry or in the TC’s written decision.

7. The letter directed Sheppard that it needed to show access to an average of £69,550 *“over the last three months”* i.e. for the three months ending 27 February 2018.

8. In the lead up to the public inquiry, Mr Roberts submitted financial evidence for the three months to 29 March 2018. The evidence demonstrated more than adequate financial standing up to 28 February 2018 as was required by the call up letter. However, the bank statements also showed that on 1 March 2018, IPL transferred a total of £60,000 in three amounts all described as *“loan”*.

9. In a separate email, Mr Roberts set out the circumstances in which he had acquired Sheppards and how it came to be that Mr Percival became a 50% shareholder and director of the company. Mr Roberts denied that either he or the company had *“ever been involved with or have knowledge of any such adblue “blocker” or system inhibitor being fitted on our premises or with our knowledge either for IPL or any other customer that we may have. Quite simply it is not in our reputable or commercial interests to do so or encourage the practice of (sic)”*.

## The public inquiry

10. The hearing took place on 17 April 2019. In attendance was Mr Percival, represented by James Backhouse of Backhouse Jones solicitors and Mr Roberts who was not represented. The TC asked Mr Roberts whether he understood that the loss of repute of one director (i.e. Mr Percival) could have an impact on the Sheppard licence. Mr Roberts responded:

*"I undertand it could have an impact on the licence sir, but I'm in Sheppard's. I'm the Managing Director. I bought the business in 2009 from Keith Sheppard and it was purely a financial or financially advantageous deal in 2015 to bring Mr Percival on. Financially advantageous to me personally and for Sheppard in terms of the considerable increase in work. And although Mr Percival is on there as a director our running of the company is limited really to meetings every third week of the month just to discuss how the business is going".*

The TC then concluded that Mr Roberts was aware of the potential outcomes of the hearing and so he would proceed despite Mr Roberts being unrepresented. The TC acknowledged receipt of the financial evidence and indicated that no issues arose from the evidence although he had noted inter-company loans which he would deal with when Mr Roberts gave evidence. He did not say what concerns he might have had. The TC then heard submissions from Mr Backhouse on behalf of IPL and Mr Percival who then gave evidence. Whilst the TC asked Mr Percival questions, he did not ask him about his role in Sheppard or about the loans.

11. Mr Roberts then gave evidence. He again explained how it was that he had acquired Sheppard. The TC then asked him about why he was using the log in details of Keith Sheppard to access the operator licensing system and then went into a private session to discuss finances. The TC asked about the loans. Mr Roberts explained that he assessed cashflows on a monthly basis and having received the call up letter, he projected the company's cashflow and he was concerned that if customers made late payments, he was at risk of failing to establish financial standing. He was not prepared to take that risk and as he had not done anything wrong, he spoke to Mr Percival and suggested that as he had caused Sheppard to be under scrutiny, that he should safeguard the company against late payments. Mr Roberts indicated that the call up letter was unclear as to whether he needed to produce financial evidence up to the date of the call up letter or the date by which the evidence was to be delivered to the Office of the Traffic Commissioner ("OTC"). Having appeared at a public inquiry before Traffic Commissioner Sarah Bell in the past, he did not want to get it wrong. The TC's response was:

*"I have to say that it causes me some significant concern, that transaction." You have put some money in the bank account and taken it back out again purely so that you would be sure of showing financial standing for a public inquiry .. it has got to be within the entity and it has got to belong to the entity .. and so it does not belong to you".*

12. The private session was then ended and the TC then heard closing submissions from Mr Backhouse on behalf of IPL and Mr Percival. The TC

did not “*flag up*” the concerns that he might have had arising out of the evidence he had heard in respect of the loans; the possible adverse findings that might be justified in respect of Sheppard on the basis of the evidence; he did not ask Mr Roberts to make any closing comments or submissions; he did not ask Mr Roberts to comment upon the possible finding of loss of good repute and what might have been weighed in the balance; he did not ask what effect the revocation of the Sheppard licence would have on the company’s viability.

### The Traffic Commissioner’s decision

13. In his written decision dated 2 May 2018, the TC found that Mr Percival had lost his good repute and disqualified him from acting as a transport manager for a period of two years. Upon findings of loss of good repute and professional competence, IPL’s licence was revoked. As for Sheppard, he found that Mr Percival was a statutory director of the company and his conduct was directly relevant to the good repute of Sheppard. Further, Mr Roberts had told the TC that the IPL loan was to ensure financial standing even though the requirements were met in any event when the loans were discounted. Nevertheless, that did not discount the repute issues arising out of the money transfer. Sheppard did not notify the TC that one of its directors had incurred a prohibition as a result of the fitting of an ABE designed to hide a material defect from the DVSA Standards Assessor when the vehicle was presented for MOT. Section 26(1)(b) of the Goods Vehicles (Licensing of Operators) Act 1995 was made out. The TC went on:

*“45. Section 173 of the Companies Act 2006 requires that a director exercise independent judgment. Section 174 requires that he exercise reasonable care, skill and diligence. (Sheppard) was responsible for the maintenance of the IPL fleet. As a DVSA Authorised Testing Facility, Mr Roberts is closer than most to the enforcement agency and the standards required. It would be reasonable to expect that, in exercising his independent judgement, care, skill and diligence, he would have identified the deficiencies in the service he was providing.*

*46. Had Mr Roberts also exercised his independent judgment, care, skill and diligence in relation to his operator licence obligation to ensure that financial standing was met on a continuous basis, he may not have instigated the reckless act of transferring funds from IPL to (Sheppard) in an attempt to frustrate my assessment of his financial standing”.*

14. In considering what action to take against Sheppard, the TC determined that all the adverse findings he had made in relation to Mr Percival applied to Sheppard. The positive features were that the financial matters appeared to be an isolated incident. There was no wider compliance failings. The negative features were that Mr Percival had been involved in fitting an ABE which was a “*most serious matter*”. The second serious feature was the ease with which both directors sought to:

*“cheat the analysis of financial standing for the public inquiry. That to do so was unnecessary makes the act of cheating all the more cynical. Mr Roberts exhibited not a care in the world that he had committed such a fraudulent act. He is reckless in the extreme. It is inevitable, having made findings I have*

*about both directors .. that I find that the conduct of (Sheppard) also falls in to the serious category”.*

The TC asked himself whether he could trust the company in the future (the Priority Freight question) and determined that in respect of matters such as drivers' hours and maintenance, that he could. However, the speed taken by the directors to circumvent the financial standing analysis meant that he could not actually trust anything they said or did. Many operators lost their licences because they could not show financial standing. Sheppard sought to circumvent the financial standing analysis by transferring money between companies. Many operators spent a great deal of money repairing defective vehicles. One of Sheppard's directors sought to circumvent that by fitting an ABE. Operator licensing is about fair competition as well as road and public safety. The honest industry would expect Sheppard to be brought to an end and that was the TC's assessment. Mr Roberts was a businessman. The TC was of the opinion that revocation of the company's licence would make him more aware of the value of a licence and for that reason, the TC did not find disqualification to be necessary.

### The Appeal

15. This appeal was listed as one of a number which were linked by reason of the common feature that vehicles operated by the Appellants had been fitted with devices which the DVSA believed were ABEs. The Sheppard appeal was included because it was linked to the IPL/Percival appeal. It was determined that as a result of that common feature, the appeals should be heard together and the Secretary of State for Transport invited to be joined as a Respondent so that the generic issues arising out of the appeals could be determined in an informed manner. As it transpired, IPL and Mr Percival withdrew their appeals as IPL was granted a new operator's licence and presumably, Mr Percival's good repute was restored. As a result, whilst we heard this appeal as part of the "AdBlue appeals", we considered it appropriate to issue a separate decision so that Mr Roberts could be informed of the outcome as soon as possible.
16. At the hearing, Sheppard was represented by Mr Laprell of Counsel, instructed by Backhouse Jones. Mr Sadd represented the Secretary of State for Transport. Skeleton arguments were submitted for which we were grateful; the Secretary of State took a neutral stance which was entirely appropriate in the circumstances.

### Discussion

17. This appeal is allowed for the following reasons:
  - a) The call up letter failed to give Mr Roberts as Managing Director of the company, any real understanding of why the company was called to the public inquiry, the implications of adverse findings made in respect of IPL and Mr Percival and did not spell out the specifics of the "concerns" that the TC had or the particulars of the failure to notify mentioned in the letter (see paragraph 5 above);

- b) There can be no criticism of the call up letters in failing to notify Mr Roberts or Mr Percival that the TC was likely to make adverse findings in relation to inter-company loans when the issue only arose once the financial evidence had been submitted. However, once the TC had noted the loans, he failed to put any questions to Mr Percival about them (as the lender), he failed to ask Mr Backhouse to deal with them in closing submissions and he failed to spell out to Mr Roberts what his concerns were and the possibility of a finding of “*cheating*” and “*fraud*” in respect of them. We do not consider that the comments made by the TC (set out in paragraph 11 above) were sufficient in this regard. These are serious allegations and justified a further call up letter unless Mr Roberts and Mr Percival were prepared to deal with the allegations without an adjournment. The fact that Mr Percival was represented is immaterial because Mr Percival was not asked any questions about the loans and the issue was not properly dealt with in the hearing. It is of note that:
- i. Sheppard did not have an overdraft facility and could well have requested one if need be;
  - ii. The company had adequate financial standing throughout irrespective of the loans;
  - iii. If Mr Roberts had read the call up letter to mean that financial evidence was only required up to the date of the letter, then the loans would not have been requested at all;
  - iv. The TC described Mr Roberts as being “*reckless*” in the “*fraud*” he had perpetrated. There is an inconsistency in the TC’s terminology in that one cannot have a reckless fraud.

The issue of the loans required further and detailed analysis of the position and it was plainly wrong to make findings of “*cheating*” and “*cynical*” conduct without that analysis and putting those allegations to Mr Roberts if not Mr Percival;

- c) Whilst Mr Percival was a 50% shareholder and one of two directors, his role within the company did require some further analysis before his failings as a director and transport manager of IPL could be laid at the door of Sheppard, justifying the revocation of its licence. It may be, that if the position was clear, Mr Roberts would have suggested an alternative business model which did not include Mr Percival, we do not know;
- d) In paragraph 13 above, paragraph 45 of the TC’s decision is set out. The “*deficiencies in the service*” referred to by the TC are not identified. It may be that the TC is inferring that Sheppard should have identified the presence of the ABE on the IPL vehicle. If that is the case, then there is no evidence to lead to such an inference. If that is not what the TC is inferring, then what was it?
- e) Paragraph 12 above sets out the failings of the TC in the closing part of the hearing in relation to Mr Roberts. Further information was required by the TC to undertake the appropriate balancing exercise and in determining whether revocation was a proportionate response to the failings as found by him (the Bryan Haulage question).

## Conclusion

18. We are satisfied that the TC's decision was procedurally unfair and plainly wrong and as a result we are impelled to allow this appeal as per the test in *Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695*. The TC's order is set aside and the matter is remitted for reconsideration at a further public inquiry with a new call up letter.

A handwritten signature in black ink, appearing to read 'Judge Beech', written in a cursive style.

**Her Honour Judge Beech  
7 October 2019**