**Appeal No. T/2018/27**

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

**ON APPEAL from the DECISION of Joan Aitken TRAFFIC COMMISSIONER for Scotland and DEPUTY TRAFFIC COMMISSIONER for England and Wales**
**Dated 2 May 2018**

**Before:**

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| **Kenneth Mullan** | **Judge of the Upper Tribunal** |
| **Mr S. James** | **Member of the Upper Tribunal** |
| **Mr A. Guest** | **Member of the Upper Tribunal** |

**Appellant:**

**Allen Transport Ltd; Daniel Allen**

**Attendances:**
For the Appellant: Mr M Laprell instructed by DWF LLP

**Heard at:** George House Edinburgh
**Date of hearing**: 20 November 2018
**Date of decision:** 4 March 2019

## DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED IN PART. Our revised decision is set out in paragraph 55 below.

**SUBJECT MATTER:-** Out-of-area usage; admission of new grounds of appeal and fresh evidence before Upper Tribunal; proportionality of sanction

**CASES REFERRED TO:-** NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI; T/2015/36 W. Martin Oliver Partnership; *GIA/2481/2018*; Bramley Ferry Supplies Ltd v HMRC [2017] UKUT 214 (TCC); T/2014/72 Ian Russell Nicholas t/a Wigan Container Services v Secretary of State for Transport; Cavendish Green Ltd v HMRC [2018] UKUT 66 (TCC); T/2014/77 Leedale Ltd

## REASONS FOR DECISION

### The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Traffic Commissioner for Scotland/Deputy Traffic Commissioner for England and Wales dated 2 May 2018.

2. The factual background to this appeal appears from the documents and the Traffic Commissioner's decision and is as follows:-

   (i) Allen Transport Ltd with a registered address in Middlesex was incorporated on 15 February 2013 with a sole Director Mr Daniel Allen.

   (ii) On 2 January 2014 Allen Transport Ltd, with a correspondence address and an operating centre in London was granted a standard international operator's licence for ten vehicles and two trailers in the South Eastern and Metropolitan Traffic Area (SEMTA). Mr Daniel Allen was nominated as Transport Manager. This licence will be referred to in this decision as the 'SEMTA licence'.

   (iii) On 14 January 2014 Allen Transport Ltd, with correspondence addresses and operating centres in Scotland was granted a standard international operator's licence to operate twelve vehicles and two trailers. This licence will be referred to as the Scottish licence.

   (iv) In April 2017 Allen Transport applied to increase the authorisation of the Scottish licence to seventeen vehicles and two trailers. The variation application attracted opposition from Aberdeenshire Council because of concerns about road safety at the point of access and egress at one operating centre. The use of this operating centre was subject to a condition imposed in September 2016 requiring works to be done to the satisfaction of the Council, that variation having been subject to a Council objection. By 31 May 2017 the Council had reached an understanding with the operator in respect of the access to the site and the Council's formal objection was withdrawn.

   (v) On 11 April 2017 a Traffic Examiner, when on duty at a road check in Aberdeen stopped and checked a vehicle. The vehicle bore a disc from the Scottish licence of Allen Transport Ltd but that vehicle had been de-specified from the licence in September 2016. The driver stated that he was employed by Allen Transport Ltd. The Traffic Examiner found no infringements for that day but noted that the driver had forty-two tachograph charts from 2 March 2017 and that charts for other drivers were within the vehicle.

   (vi) In light of the variation application and the adverse encounter with the DVSA the Traffic Commissioner decided that she should see the operator at a preliminary hearing. As part of the preparations for the preliminary hearing the Traffic

Commissioner asked a caseworker to provide her with performance reports for both the Scottish and SEMTA licences. It was noted, on perusal of the annual test reports for the SEMTA licence that the vehicles specified on that licence had been presented for annual test, not in London but in Scotland. In her written decision, the Traffic Commissioner has asserted that this anomaly was put to Mr Allen at the preliminary hearing held on 26 January 2018 and '… he had to admit to the operation of these vehicles not in SEMTA where authorised but in Scotland and not over a short period.' As a result, the Traffic Commissioner decided that there would have to be a Public Inquiry.

(vii) The Traffic Commissioner consulted with the Traffic Commissioner for SEMTA and it was agreed that both the Scottish and SEMTA licences would be considered at the Public Inquiry. Call-up letters to that effect were prepared as was a call-up letter for Mr Daniel Allen as Transport Manager.

(viii) The Public Inquiry took place on 29 March 2018. The Appellant was present and was represented.

3. On 2 May 2018 the Deputy Traffic Commissioner made a decision to the following effect:

'The operator licences (OM1125842 and OK1122186) held by Allen Transport Ltd will be revoked in terms of sections 26 and 27 of the 1995 Act. The revocation of OK1122186 will be of immediate effect.

Allen Transport Ltd and Mr Daniel Allen are no longer of good repute and will be disqualified for TWO YEARS (2 years) from applying for or holding an operator's licence in this or any other traffic area in terms of section 28(1) and 28(4) of the 1995 Act will apply, that is if the disqualified person:

(a) Is a director 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.

Mr Daniel Allen is no longer of good repute as transport manager and he is disqualified in terms of Schedule 3 of the 1995 Act.

The order of revocation of OM1125842 and the three aforesaid disqualification orders will be effective from 23.59 on 30 May 2018.'

4. The Appellant was notified of the decision of 2 May 2018 by way of correspondence dated 4 May 2018.

**The application for a stay**

5. By way of correspondence dated 18 May 2018 an application was made for a stay of the decision of the Deputy Traffic Commissioner.

6. On 21 May 2018 the application for a stay was refused by the Traffic Commissioner.

**The appeal to the Upper Tribunal**

7. On 18 May 2018 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.

8. On 22 May 2018 a further application for a stay of the decision of the Traffic Commissioner dated 2 May 2018 was also received in the office of the Upper Tribunal.

9. On 24 May 2018 the application for a stay was granted by an Upper Tribunal Judge.

10. The appeal was listed for oral hearing on 20 September 2018.

11. On 11 September 2018 a Case Management Direction was issued to the Appellant's representative. It was noted that in the grounds of appeal there was a submission that the majority of the vehicles did not have to be specified on the Scottish licence because they were used on a new road construction site. There was a detailed description of that construction site, an adjoining section of publicly accessible road and the movement of vehicles in this area. It was determined that it would be beneficial to have some sort of visual representation (map/diagram/photograph) of the areas described to assist the Upper Tribunal's understanding of the point which is being made and a Direction to that effect was made.

12. Further grounds of appeal were received from the Appellant's representative on 12 September 2018.

13. Materials in response to the Case Management Direction were received in the office of the Upper Tribunal on 19 September 2018.

14. Due to adverse weather conditions, and resultant travel delays, the oral hearing listed for 20 September 2018 was postponed.

15. The appeal was re-listed for oral hearing on 20 November 2018. The Appellant was present and was represented by Mr Laprell, instructed by DWF LLP. The Respondent was not represented although permission was given for observers from the office of the Traffic Commissioner to be present. We are very grateful to Mr Laprell for his carefully prepared and well-articulated written and oral submissions.

16. At the conclusion of the oral hearing, the Appellant's representative was asked to provide a further submission on a specific issue, namely, the interpretation of Schedule 3, Part 1, paragraph 3 of the Goods Vehicles (Licensing of Operators) Regulations 1995, which relates to classes of vehicles for which a licence is not required under regulation 33. On 29 November 2018, the further submission was received, for which we are grateful.

**The Deputy Traffic Commissioner's findings in fact**

17. The Deputy Traffic Commissioner made the following findings in fact:

> 'Allen Transport gained work on the Aberdeen Western Peripheral Route (AWPR), a major road infrastructure site, and its substantive work moved from the London area to Aberdeenshire. The authorisation on the Scottish licence of 12 vehicles was fully utilised. Applications to vary the licence by use of a new operating centre in 2016 and to increase authorisation in 2017 received objections from Aberdeenshire Council on road safety grounds.
>
> From sometime in 2015, Allen Transport started to use vehicles specified on the SEMTA licence to work continuously on the contract. The London operating centres ceased to be the place where the SEMTA vehicles were normally kept. Maintenance and presentation for annual tests took place in Scotland.
>
> Allen Transport is in material breach of the SEMTA licence in that the vehicles specified thereon were operated outwith SEMTA from sometime in 2015 which continued until vehicles were fully removed from the SEMTA licence on 20 March 2018.
>
> From sometime in 2015, Allen Transport has operated goods vehicles in Scotland in excess of the authorisation specified on the licence granted on 14 January 2014. On the balance of probabilities I find that such excessive use has been to the extent of a minimum of 12 vehicles, including vehicles specified on the SEMTA licence. Such excess use did not reduce until sometime after the call to Public Inquiry.
>
> Mr Allen as director and transport manager was not remote and was directly engaged in the leadership and management of Allen Transport's operations on the AWPR contract. He became Aberdeen-based, albeit with visits to London and Ireland. He knew that SEMTA vehicles were being operated in Scotland. No one other than him was responsible for the deployment of such vehicle resource to Aberdeenshire. He was and is in command. He is not new to operator licensing having held an operator's licence since 2004. He is sole director. No one else controlled Allen Transport.
>
> Allen Transport applied to increase the authorisation in Aberdeenshire by the addition of 5 vehicles. This was not done for the purpose of removing the SEMTA vehicles from operating in Scotland but to gain an even greater overall vehicle authorisation to offset sub-contracting and to gain greater work on the AWPR and associated projects. The operator's transport consultant Paul Shea was aware that vehicles were operating in Scotland.
>
> The objections of Aberdeenshire Council to the operator's operating centre variation applications require agreement to widen access and contribute to road safety and signage measures. The operating centre at Newmacher would be a suitable operating centre for an increased level of authorisation.

> The operator has demonstrated financial standing to the level of authorisation on the SEMTA and Scottish licences as now or if increased to 17 vehicles in Scotland.
>
> The operator has not had a 100% pass rate at annual test and vehicles have attracted prohibitions. The operator could not demonstrate that vehicles subject to in-house maintenance and repair were brake tested to the good practice standards of the DVSA Guide to Maintaining Roadworthiness. Driver daily walk round checks needed improvement. Very recent test presentations have passed first time.
>
> The operator requires drivers to keep records of their driving and duty time in line with the EC drivers' hours rules but monitoring of such was deficient and infringements were not analysed in a timely and consistent manner. The arrangement with Mr Paul Shea was peculiar and flawed. The instances of missing mileage and infringements were not serious – no MSIs.
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> The operator does not deduct PAYE or NI from his driver's wages.
>
> The operator's drivers who did not have UK driving licenses were not registered with DVLA.
>
> Allen Transport Ltd most likely would not have come to my attention in a material way but for the objections by Aberdeenshire Council to variation applications and the happenstance of a Traffic Examiner encountering one of the operator's vehicles displaying a disc for a vehicle which had been de-specified. DVSA has not had the local resource to follow up that encounter but it concerned me and I decided to see the operator at a preliminary hearing for I was not going to grant any variation application to increase an operator's authorisation when there had been this adverse encounter. At face value, non-compliance cannot be rewarded with an increase in authorisation.'

## The Deputy Traffic Commissioner's reasoning

18. The Deputy Traffic Commissioner began by noting that the use of vehicles in Scotland well in excess of the extant authorisation on the Scottish licence and any extended authorisation through the variation application, through the cover of the SEMTA licence was '… no incidental behaviour or the ignorant act of, say a traffic controller, lower in the management line of responsibility but the act of the director/transport manager.' The act of using the SEMTA licence in the manner in which it was deliberate and was aimed at rectifying the lack of vehicles available on the Scottish licence to service the 'very attractive' and excessive work on the AWPR. The use of the SEMTA licence in Scotland avoided any difficulties, anticipated and real, which a Scottish variation application might unveil.

19. The Deputy Traffic Commissioner made reference to a submission made by Mr Allen that many vehicles were 'site' vehicles which did not go on the road but were able to access the AWPR site from the operating centre. The consequence of this was that the Appellant's '… operation

now would have vehicles in excess of the Scottish specified '12'.' The Deputy Traffic Commissioner noted that the Appellant:

> '… had to concede that some purported site only vehicles had to use the road to get between the site and operating centre. Short of DVSA having a presence at the operating centre I wondered out loud how there could be any reassurance that the 'site' vehicles would not be operated on the road. All vehicles have to come back to the operating centre for their PMIs or other than mobile unit maintenance. I was told this would be by low loader and it was suggested in discussion in the latter stages of the inquiry that photographs could be taken. That the discussion descended into such serves to illustrate how trust comes into my decision in this case.'

20. The Deputy Traffic Commissioner then noted the positives in the case These were:

    (i) first time for this entity at Public Inquiry;

    (ii) ability to show financial standing for the overall number of vehicles used;

    (iii) the annual test rate was improving and past failures had elements of being let down by contractors;

    (iv) the prohibition rate is not high; there are no prohibitions of an aggravated nature;

    (v) agreement to road alignment and adjustments requested by Aberdeenshire Council to make the operating centre suitable;

    (vi) the instruction to TLS to undertake a full audit and report thereon and the disclosure of that report and implementation of recommendations (e.g. in relation to driver licences; brake testing);

    (vii) the intention to retain the services of TLS;

    (viii) the long standing practice of recording of drivers' duty time and hours on tachographs even if solely on site;

    (ix) the nature of the infringements found were at the lower end of the scale and, for the most part, missing mileage was readily explained;

    (x) modern office and facilities and modern computer equipment.

21. Against those positive factors, the Deputy Traffic Commissioner noted that a transport manager has to know the fundamentals of operator licensing. Operator licensing had been area based since the passing of the 1995 Act and for all of the time spent by the Appellant as an operator. The Appellant could not claim ignorance of the fundamental area basis for operator licensing as, through his company, he had applied for two licences, with all of the requirements for such applications, in two different areas. As such, the Appellant had ignored a fundamental of operator licensing. That could not be excused and in

giving weight to the integrity and purposes of the regulatory regime and to fair competition, the Deputy Traffic Commissioner concluded that the Appellant had 'abused fair competition.'

22. The Deputy Traffic Commissioner commented on the use by the Appellant of a transport consultant and that two aspects of the work of the consultant – the posting of data and aggregation of clients – was not undertaken on a 'disciplined' basis. The Deputy Traffic Commissioner remarked that she wondered whether the use of the transport consultant was designed to '… create a veneer of compliance – enough to keep enforcement agencies at bay but with a lack of overall integrity.'

23. The Deputy Traffic Commissioner observed that it was difficult to find that a transport manager had repute if he used an out of area licence as had happened in this case. Her approach had been that she had not found it possible to see repute as divisible when the transport manager is also the controlling and sole director and where the breaches of licence undertakings is of such a nature as to raise the question as to whether that person can retain their repute.

24. The Deputy Traffic Commissioner noted that trust was at the heart of operator licensing. She remarked that she had to consider whether she could trust the Appellant in the future. The Deputy Traffic Commissioner noted that the Appellant had shown himself to be untrustworthy with the SEMTA licence by using it out of that area and over a sustained period of time. Her impression of the Appellant was that he would comply if he was under scrutiny but that this was different from complying because that was the right course of action. The Deputy Traffic Commissioner, having seen the Appellant at the Public Inquiry, concluded that she did not believe that she could trust him.

25. After posing the *Bryan Haulage* question, the Deputy Traffic Commissioner concluded that she had to put the Appellant out of business. She concluded:

> 'I cannot have an operator/transport manager who thinks it acceptable to act as this operator did. The purposes of operator licensing and integrity need to be guarded and in this case in terms of Statutory Document 10, Annex 3, I consider this to be a severe case involving a severe and fundamental breach of trust. I cannot see a way round revocation of both licences. Not to revoke would send a very odd message to all those operators who dutifully respect the area fundamental of operator licensing. Thus I have not been able to craft an outcome limited to curtailment or suspension. I cannot separate (the Appellant) and the company. (The Appellant's) conduct is affecting that of the company.
>
> In other cases, the positives which I have identified would be very persuasive and I would have given much weight to them. I do not find that all is bad in this operation. There are positive features as I have identified but the balancing act does not favour them given the fundamental negatives on the other and my reservations. I know that the decision to revoke will have serious consequences for Allen

Transport and for some employees. Others will find alternative work without difficulty. Regulatory action does hurt.'

26. On the basis of this reasoning, the Deputy Traffic Commissioner made the decision which is set out in paragraph 3 above.

**The grounds of appeal**

27. In the Skeleton Argument, prepared for the oral hearing of the appeal, Mr Laprell set out the following grounds of appeal:

    (i) At paragraph 31 of her decision, the Deputy Traffic Commissioner summarised the evidence of Mr Daniel Allen as set out in his witness statement and in relation to the use of vehicles on roads. Her summary was that until two weeks before the Public Inquiry, the vehicles did not need to go on public roads as the operating centre joined up to the construction site with no road in between. The vehicles remained on site save for returning to the operating centre for 6 weekly PMIs.

    (ii) At paragraph 97 of the decision, the Deputy Traffic Commissioner found that, in evidence, Mr Allen had had to concede that some purported site only vehicles had to use the road to get between the site and the operating centre. In fact, the correct factual position was that that had only been the case for the previous two weeks. Nonetheless it was conceded that it was the case that the three sections of the construction site were divided by short sections of road at the points with the construction site crossed two significant rivers. The result was that for short distances the site only vehicles did go on public roads.

    (iii) It was accepted that one vehicle was specified on the OK Licence for the period from 26 January 2018 to 20 March 2018 and operated in the Scottish Traffic Area. Accordingly it operated out of area for less than eight weeks.

    (iv) Without exception, the issue was whether or not vehicles used on the construction site needed to be specified on the OM Licence. It was the operator's case that all the vehicles used in Scotland but not specified on the Scottish licence were exclusively on site. If that were the case they would not need to be specified on the OM Licence in Scotland. Accordingly the extent of the regulatory non-compliance would be limited.

    (v) It was accepted that the operator's contention in his witness statement that none of the unspecified vehicles which were in Scotland were used on public roads is not substantiated in his evidence to the Public Inquiry. It was submitted that the proper interpretation of the evidence was that, until two weeks earlier, the vehicles had been able to travel from the operating centre onto the northern section of the site without going on a public road. If they went onto the central section or the southern section they had to travel short distances on public roads at the

points where the site was broken by a public road which crossed the site.

(vi) When the Public Enquiry evidence from Mr Allen did not match the submission being put forward, all involved, and in particular the Deputy Traffic Commissioner and the operator's representative ought to have reflected on the implications of that. There was no break in the proceedings and no other explanations were considered as to whether or not there was a legal obligation to have the vehicle specified on a licence for the work which they were doing. The operator's solicitors had not given prior consideration to other possible explanations which was the direct result of the clear instructions which they had that the vehicles never went on public roads.

(vii) Following receipt of the decision, consideration was given to 2 new issues which, it was submitted, ought to have been considered by the Deputy Traffic Commissioner.

(viii) The first of these was whether, when the vehicles did cover the short distances on public roads, they were laden or unladen. It was asserted that sections 2 and 6 of the Goods Vehicles (Licensing of Operators) Act 1985 apply only to vehicles used for the carriage of goods on public roads. If the vehicles were used laden whilst off road but never carried goods on public roads, they did not need to be specified on an operator's licence.

(ix) The second new issue emerged at a conference with Mr Laprell, this issue was whether an exemption set out in Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations 1995, as provided for in regulation 33 of the Regulations, might apply. The potential exemption was that under paragraph 3 of Part 1 of Schedule 3, a licence was not required for:

> 'a vehicle used on a road only in passing from private premises to other private premises in the immediate neighbourhood belonging … To the same person, provided that the distance travelled on a road by any such vehicles does not exceed in the aggregate 9.654 km (6 miles) in any one week.'

(x) It was acknowledged that there was no evidence in Mr Allen's witness statement nor in his oral evidence which would bring him within either of these exemptions. Further, in relation to the Schedule 3 exemption, there was no evidence of the geographical requirements which would meet it.

(xi) It was submitted, however, that the hearing process had been unfair to Mr Allen and the operator. It was asserted that '… Enough was known about the site, its layout and its ownership for enquiries to be made as to whether this exemption could have applied. The potential application of this exemption should have been the subject of evidence in the Public Inquiry or of an

adjournment to find out. So far as the question of whether the vehicles were on public roads whilst laden was concerned, had further enquiry been made then certain material facts could have been found.

(xii) The operator had submitted supplementary evidence dealing with the potential application of the relevant exemptions. It was conceded that the limits on the willingness of the Upper Tribunal to admit and determine the evidence is not underestimated. Reference was made to the case of *2015/036 William Martin Oliver Partnership*. It was agreed that in this case it could not be said that the evidence would not have been available at the time of the Public Inquiry in the sense that it could have been assembled had it been appreciated in advance that it would have assisted. It was not available, however, in the context of the Public Inquiry as the issues were believed to be.

(xiii) The principal submission, however, was not that the Upper Tribunal should hear that new evidence, assess it and determine it, which was the *Ladd v* Marshall concept. It was rather it that it demonstrated that there was a feeling in the process of the original Public Inquiry which justified a rehearing of which that evidence could be properly assessed. There was a failure at the Public Inquiry to appreciate the need to consider the laden/unladen issues and/or the Schedule 3 Part one paragraph 3 exemption when there were sufficient pointers to the need to do so.

(xiv) It was submitted that had the facts as they were believed to be by the Deputy Traffic Commissioner on the basis of the evidence which she had heard been correctly set out, the balancing exercise would have resulted in a different conclusion. In particular, the decision at no point recognised the very limited on road use of all the material vehicles other than one. There was no acknowledgement at any point, even on the basis of the Deputy Traffic Commissioner's findings of fact, that this was very much less serious than operating out of area where an operator didn't have a licence in that area. There was no acknowledgement that, when the vehicles were on site and off road for the vast majority of the time, account had to be taken of those matters in determining the appropriate sanction. Once that was coupled with matters set out in paragraph 98 of the Deputy Traffic Commissioner's decision it was submitted that the decision to revoke was disproportionate and could not be justified. There were effectively no road safety implications consequent upon the conduct which occurred and the basis for the finding that the Deputy Traffic Commissioner could not trust the operator was not justified on the premise set out.

28. At the conclusion of the oral hearing, the Appellant's representative was asked to provide a further submission on a specific issue, namely, the interpretation of Schedule 3, Part 1, paragraph 3 of the Goods Vehicles

(Licensing of Operators) Regulations 1995, which relates to classes of vehicles for which a licence is not required under regulation 33. On 29 November 2018, the further submission was received

**The appendix to this decision**

29. In the Appendix to this decision, we have set out a summary of the authorities and legislative provisions relating to (i) the proper approach on appeal to the Upper Tribunal in this jurisdiction (ii) the proper approach to fresh evidence before the Upper Tribunal (iii) the proper approach to the admission of a new ground of appeal before the Upper Tribunal.

**Our analysis**

30. We begin by addressing the submission made by Mr Laprell that we should consider a ground of appeal which was not before the Deputy Traffic Commissioner and was, accordingly, before us *de novo*. That ground of appeal was the potential application of the exemption to hold a goods vehicle operator's licence for a particular category of vehicle. As was noted above, the exemption is to be found in paragraph 3 of Part 1 of Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations 1995, as provided for in regulation 33 of the Regulations.

31. Mr Laprell is candid in accepting that this is a new ground of appeal. It was not addressed in evidence or submission before the Deputy Traffic Commissioner. It did not appear in the original grounds of appeal to the Upper Tribunal attached to the notice of appeal received in the office of the Upper Tribunal on 18 May 2018. The first reference to this ground of appeal is in correspondence which was forwarded to the office of the Upper Tribunal on 12 September 2018 from the office of Mr Laprell's instructing solicitor. In that correspondence, the following submission was made:

> 'We respectfully request that the Grounds of Appeal previously submitted in the above case be amended on the terms below.
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> Whilst it is acknowledged that this point was not submitted to the Learned Traffic Commissioner at the Public Inquiry, there was sufficient evidence before the Traffic Commissioner to have triggered scrutiny of whether the Operator's vehicles fell within paragraph 3 of part 1 of Schedule 3 to the Goods Vehicles (Licensing of Operators) Regulations 1995.
>
> …
>
> Alternatively, whether the Operator's advocate was taking the point or not, this being an inquisitorial process, the Learned Traffic Commissioner ought to have enquired.'

32. The new ground of appeal was also set out in the Skeleton Argument prepared for the oral hearing of the appeal before us. It is included in a section which is headed 'The new issues which ought to have been considered'. It is conceded by Mr Laprell that following a 'conference', presumably with the Appellant and his instructing solicitor, he had carried out 'some further research' and that this 'included a further

exemption which it is considered applies in this case'. As was noted above, it was accepted that there was no evidence in Mr Allen's witness statement or in his oral evidence which would, in general terms, bring the Appellant within the exemption. More particularly, there was no evidence as to whether the geographical requirements would be met. It was submitted, however, that the issue should have been the subject of evidence in the Public Inquiry or 'of an adjournment to find out.'

33. Following the preliminary hearing, the Traffic Commissioner made a decision to convene a Public Inquiry. The 'call-up' letter to the Public Inquiry was sent to the Appellant on 22 February 2018. A copy of the letter is included in the file of documents which is before us. In our view, it could not be more categorical in outlining to the Appellant the significance of the issues which the Traffic Commissioner intended to consider at the Public Inquiry, the importance of seeking legal representation, the requirement to adduce evidence considered to be relevant, the powers of the Traffic Commissioner and the requirements imposed on the Appellant in connection with the Public Inquiry.

34. It is clear that the Appellant understood the importance of the Public Inquiry. E-mail correspondence was received in the office of the Traffic Commissioner from a solicitor engaged by the Appellant on 22 March 2018. Subsequently a witness statement was forwarded which set out in considerable detail the background to the Appellant's operator's licences, the nature of the work undertaken on the AWPR including the use of unauthorised vehicles, the DVSA encounter and the actions which the Appellant intended to introduce to mitigate the effects of what had occurred. The latter included the engagement of traffic consultants and a copy of a further detailed report from the consultants was subsequently forwarded to the office of the Traffic Commissioner.

35. At the Public Inquiry itself, the Appellant was represented by Counsel and his instructing solicitor was present. The traffic consultants engaged by the Appellant were also present. As the transcript of the Public Inquiry manifests, the Appellant's representative was given every opportunity to make submissions on behalf of the Appellant and was able to lead the Appellant in evidence.

36. Applying the principles set out in the Appendix on the proper approach to the admission of a new ground of appeal before the Upper Tribunal, we have no hesitation in concluding that it is not appropriate to admit this new ground. In making this determination we have given consideration to the factors to be taken into account by the Upper Tribunal in considering an application to admit a new ground of appeal as set out in paragraph 10 of *Bramley Ferry Supplies Ltd*.

37. As in the case of *Bramley Ferry Supplies Ltd* the new ground of appeal was introduced at a very late stage in the proceedings. It did not appear in the original grounds of appeal to the Upper Tribunal attached to the notice of appeal received in the office of the Upper Tribunal on 18 May 2018. The first reference to this ground of appeal is in correspondence which was forwarded to the office of the Upper Tribunal on 12 September 2018 from the office of Mr Laprell's instructing solicitor, some

eight days before the scheduled date of the oral hearing before the Upper Tribunal.

38. It is conceded by Mr Laprell that the ground is entirely new. We see no reason why the ground could not have been raised before the Deputy Traffic Commissioner at the Public Inquiry and in the original grounds of appeal to the Upper Tribunal, We cannot ignore that both of those stages of the proceedings the Appellant had access to legal representation. We have noted that in *Bramley Ferry Supplies Ltd* one factor which was determinative of the refusal to admit the new ground of appeal was that there was little merit in that ground. We are of the view that the first new ground of appeal in the instant case is certainly arguable but it is definitely not conclusive.

39. As in *Bramley Ferry Supplies Ltd* we are of the view that this is an attempt by the Appellant's representatives to have a 'second bite at the cherry' and also agree with the conclusions set out in that case that:

> 'If we were to allow the application to introduce a new ground of appeal and adduce new evidence in these circumstances, we would permit an unsuccessful party to reopen issues that have been dealt with appropriately at the original hearing and risk the hearing becoming an iterative process. In our view, it would not be in the interests of effective case management and accordingly not in the interests of justice, to permit the Appellant to reopen this issue in this way,'

40. The application to admit a new ground of appeal was accompanied by an application to adduce fresh evidence in support of it. That fresh evidence would, no doubt, have included the oral testimony of the Appellant. To the extent that we have determined that it is not appropriate to admit the new ground of appeal, the application to adduce fresh evidence is redundant. Nonetheless, we would wish to record that based on the principles set out in the Appendix on the proper approach to fresh evidence before the Upper Tribunal any application, had it been meaningful must fail. In arriving at this determination we have considered the principles set out by Upper Tribunal Judge Wikeley in paragraphs 20-24 of his determination in *GIA/2481/2018*.

41. The basis for our conclusion that the fresh evidence application would not succeed is that it fails the test that it must be evidence which could not have been obtained, with reasonable diligence, for use at the Public Inquiry. We remind ourselves of what was said by the Upper Tribunal in paragraph 34 of its decision in *Cavendish Green Ltd v HMRC*:

> 'It is important to appreciate that it is not sufficient for an appellant to say that the overriding objective should be to achieve the right result on the appeal come what may. An appeal hearing is not a hearing *de novo*, and it is inherent in the *Ladd v Marshall* approach that even if new evidence is credible and may have an important influence on the result of the case, an appellate court may decline to admit that evidence if the first of the criteria is not met. That is because an appeal inevitably involves delay, expense and the increased utilisation of the limited resources of the tribunal system. Hence there is a clear policy

justification for requiring a party to present his entire case at first instance and not, without good reason, giving him a "second bite of the cherry" on different facts on appeal. The first-tier hearing and any appeal should not simply become an iterative process."

42. We repeat what we said about the notice given to the Appellant in the call-up letter to the Public Inquiry about the significance of the proceedings and the preparations which he should undertake. Once again, we cannot ignore that the Appellant had legal representation at the Public Inquiry and that detailed evidence was adduced on his behalf for consideration at the Public Inquiry. In our view, with reasonable diligence that evidence could and should have included the evidence now sought to be admitted.

43. We have considered whether the Deputy Commissioner ought to have, in any event, considered the issue of the potential application of the exemption to hold a goods vehicle operator's licence in paragraph 3 of Part 1 of Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations 1995, as provided for in regulation 33 of the Regulations. There is no doubt that proceedings before a Traffic Commissioner are inquisitorial – see the comments in paragraph 8 of *T/2014/72 Ian Russell Nicholas t/a Wigan Container Services v Secretary of State for Transport*, quoting from paragraph 6 of *Susan Tattersall [2013] UKUT 0409 (AAC)*, namely that:

> 'Public Inquiries are inquisitorial and Traffic Commissioners are entitled and, indeed, expected to test the case being made by those who come before them.'

44. These points were reinforced in T/2014/77 Leedale Ltd where the Tribunal said, at paragraph 90:-

> 'Public inquiries are hearings conducted by statutory regulators whose functions are to ensure road safety, fair competition and compliance. The hearings are by necessity inquisitorial and one of the functions of TCs is to probe and test the evidence put forward by an operator.'

45. Nonetheless, we are of the view that there has to be a limit to the ambit of the Traffic Commissioner's inquisitorial role. In our view, in a balanced and objective way, the Traffic Commissioner is under a duty to explore all of the relevant issues, and assess the evidence linked to those relevant issues, even where some or all of those issues have not been raised by parties to the proceedings. Balance also means that the Traffic Commissioner does not require to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it. Further, as in the present case, the Traffic Commissioner is entitled to rely on the advocacy of a professional and informed representative and trust that the issues raised by the representative and evidence adduced in support of those issues are determinative of the operator's case.

46. In the instant case, the Appellant was represented by a solicitor and counsel. The ground of appeal, now sought to be advanced, is idiosyncratic and not one which is often advanced before a Traffic Commissioner. In such circumstances, the inquisitorial role of the Traffic

Commissioner does not extend as far as the identification, in the absence of a specific submission, of discrete grounds of appeal.

47. Mr Laprell advanced not just one but a second new ground of appeal. As noted above, this was whether, when the vehicles did cover the short distances on public roads, they were laden or unladen. It was asserted that sections 2 and 6 of the Goods Vehicles (Licensing of Operators) Act 1985 apply only to vehicles used for the carriage of goods on public roads. If the vehicles were used laden whilst off road but never carried goods on public roads, they did not need to be specified on an operator's licence.

48. As with the first new ground of appeal, we have concluded that it is not appropriate to admit this new ground. In respect of our determination, we repeat what we said in paragraphs 31 to 39 above and adopt the reasoning set out therein in connection with this application.

49. As with the first new ground of appeal, the application to admit a second new ground of appeal was accompanied by an application to adduce fresh evidence in support of it. Once again, that evidence would have included the oral testimony of the Appellant in respect of what was, quite literally, happening on the ground within the AWPR. We are mindful that we asked the Appellant's representatives to produce for us a visual representation of the AWPR. Nonetheless, the second new ground of appeal would be dependent on us acceding to an application to adduce other relevant evidence, including that of the Appellant. We refuse the application to adduce this further evidence and in support of this determination adopt the reasoning set out in paragraphs 40 to 42 above.

50. We have noted Mr Laprell's submission that it was not the case that '… the Upper Tribunal should hear that new evidence, assess it and determine it, which was the *Ladd v* Marshall concept. It was rather it that it demonstrated that there was a feeling in the process of the original Public Inquiry which justified a rehearing of which that evidence could be properly assessed. There was a failure at the Public Inquiry to appreciate the need to consider the laden/unladen issues … when there were sufficient pointers to the need to do so.'

51. That submission goes, of course, to the ambit of the Deputy Traffic Commissioner's inquisitorial role. We accept, of course, that the Deputy Traffic Commissioner was obliged to determine whether the relevant legislative provisions were met. It is the case, however, that this issue is sufficiently discrete that, if it was so central to the Appellant's case, it was incumbent on the Appellant's representative to raise it. We accept, that the issue of what was happening on the AWPR was addressed in the evidence which was before the Deputy Traffic Commissioner, including the Appellant's witness statement and in his oral testimony at the Public Inquiry. The Appellant's witness statement was, no doubt, prepared on his behalf by his legal representatives and he would have been prepared in what to say in his evidence before the Public Inquiry. The Appellant's legal submissions to the Deputy Traffic Commissioner on the applicability of the relevant legislative provisions ought to have been based on an assessment of the evidence available to the

Appellant's legal representatives. Once again, the submissions which are made before use are redolent of the Appellant's representatives seeking to have 'a second bite of the cherry' and putting right the omissions or frailties of the submissions which were made to the Deputy Traffic Commissioner. It is an attempt to utilise arguments about the ambit of the Deputy Traffic Commissioner's inquisitorial role to place the responsibility on her rather than on the Appellant's legal representatives.

52. We turn to the issue of the proportionality of the sanctions which were imposed by the Deputy Traffic Commissioner. In the Skeleton Argument, Mr Laprell argued that the decision of the Deputy Traffic Commissioner fails to recognise the 'very limited' on-road use of all of the vehicles other than the one in particular. He submitted that there was no acknowledgement that the operator's conduct was much less serious than operating out of area where there was no licence for that area. Mr Laprell asserted that the decision to revoke was disproportionate and could not be justified.

53. We have no hesitation in confirming the decision of the Deputy Traffic Commissioner to revoke both the SEMTA and Scottish licences. The conduct of the operator in making use of a licence out-of-area was deliberate and calculated. The operator chose to ignore alternative courses of action including making an application to increase the authorisation on the Scottish licence or sub-contracting the extra work which he had been offered. The decision to revoke was balanced and proportionate. We see no reason to deviate from an immediate revocation of the SEMTA licence and a period of four weeks' notice of revocation for the Scottish licence to permit an orderly winding-up of any outstanding business.

54. With respect to the Deputy Traffic Commissioner, we cannot say the same about her decision to disqualify both Allen Transport Ltd and Mr Daniel Allen. As was noted in paragraph 20 above, the Deputy Traffic Commissioner found that there were many positives in this case, which, in our opinion, were not given sufficient weight. The impression which we have been given is that this was not a fundamentally bad operator who had flouted advice or ignored direction from the DVSA and should be out of the industry for some time. We are of the view that the operator should be given the opportunity to adjust their operation in the short term to achieve full compliance and make an application for a new licence to a new Traffic Commissioner supported by a clear and unequivocal commitment to work with the regime and a detailed description of the operational model and controls they would use to ensure ongoing compliance. It is the case, of course, that any application for a new licence will not necessarily be successful.

**Disposal**

55. We substitute the following decision for that of the Deputy Traffic Commissioner:

> 'The operator licences OM1125842 and OK1122186 held by Allen Transport Ltd will be revoked. The revocation of OK1122186 will be of

immediate effect. The revocation of OM1125842 will be from 23.59 on Wednesday 3 April 2019.'

**Kenneth Mullan, Judge of the Upper Tribunal,**
**4 March 2019**

## Appendix

### The proper approach on appeal to the Upper Tribunal

In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

> 'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. ('*Bradley Fold*') Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: *"the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view"*. The Tribunal sometimes uses the expression *"plainly wrong"* as a shorthand description of this test.'

At paragraph 4, the Upper Tribunal had stated:

> 'It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'

### The proper approach to fresh evidence before the Upper Tribunal

In T/2015/36 W. Martin Oliver Partnership, the Upper Tribunal said the following, at paragraphs 40 to 41 and 45 of its decision:

> ‘40. We begin by considering the proper approach to be adopted when the Upper Tribunal, in an appeal against a decision of a Traffic Commissioner, is met with an application by a party to the proceedings to adduce new or fresh evidence. We have no hesitation in confirming that the proper approach is as set out in the decision of the then Transport Tribunal in Thames Materials and confirmed by the Upper Tribunal in Cornwall Busways Limited. We have already noted that the decision in Thames Materials has a conclusive basis in the decision of the Court of Appeal in Ladd v Marshall. Further, we have noted that the former Transport Tribunal has been consistent in its application of the principles in Thames Materials.
>
> 41. The appellate structure in the transport jurisdiction was the subject of significant revision with the implementation of the Tribunals, Courts and Enforcement Act 2007. Appeals from decisions of the Traffic Commissioner lie to the Upper Tribunal – see Article 7(a)(viii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008. At that stage there was an opportunity to revisit the jurisprudence of the former Transport Tribunal to determine whether that jurisprudence remained appropriate or required revision in light of the new tribunal appellate structure or in light of other procedural developments. In respect of the procedure to be adopted for applications to adduce fresh evidence, the Upper Tribunal endorsed the former procedure of the Transport Tribunal relying on its consistency and coherency – see Cornwall Busways Limited.
>
> …
>
> 45. For the record, therefore, we repeat that the test to be applied is whether the following conditions are met:
>
> ‘(i) The fresh evidence must be admissible evidence.
>
> (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
>
> (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
>
> (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.’

The Appellant in T/2015/36 W. Martin Oliver Partnership sought permission to appeal against the Upper Tribunal’s decision. In refusing the application, the Court of Appeal Judge (Rt Hon Lord Justice Flaux) gave the following reasons:

> “1. The sole ground of appeal is that the Upper Tribunal erred in law in applying the principles derived from Ladd v Marshall [1954] 1 WLR 1489 to its determination as to whether to allow fresh evidence to be

adduced. The applicant argued before the Upper Tribunal and argues in its grounds of appeal and counsel's skeleton argument that a more flexible approach, somewhat akin to that adopted in criminal appeals under section 23 of the Criminal Appeals Act 1968 should have been adopted.

2. The Upper Tribunal and its predecessor the Transport Tribunal has consistently followed the principles of laid down by the Court of Appeal in Ladd v Marshall in considering application to adduce fresh evidence. The Upper Tribunal followed and applied those principles here. It was entirely correct to do so.

3. The ground of appeal is unarguably hopeless and totally without merit."

To this analysis specific to the transport jurisdiction we would add the following more general remarks of Upper Tribunal Judge Wikeley is paragraphs 19 to 24 of his determination refusing permission to appeal in *GIA/2481/2018*:

'19. Instead, the issue of the Crown Dependencies' joint letter is most appropriately treated as an application to the Upper Tribunal to admit that evidence when considering the application for permission to appeal (and, in fairness, Mr Ustych for the Home Office puts it that way in the alternative).

**The Crown Dependencies' joint letter: to admit or not to admit?**

20. Classically, the admissibility of new evidence on appeal involves consideration of the three *Ladd v Marshall* [1954] 1 WLR 1489 criteria, the first of which is that "the evidence could not have been obtained with reasonable diligence for use at the trial". Mr Ustych candidly (and correctly) conceded that he might face a struggle in showing that the first leg of the *Ladd v Marshall* test was met. Those criteria, of course, are principles rather than rules (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 at 2325 *per* Hale LJ as she then was). Furthermore, and in any event, this Tribunal has a broad power to admit evidence, whether or not it would be admissible in a civil trial and whether or not it was previously available: see rule 15(2)(a) of the 2008 Rules. As that power involves the exercise of a discretion, the starting point must be that cases should be dealt with fairly and justly in accordance with the overriding objective under rule 2. The *Ladd v Marshall* criteria should therefore be borne in mind, being persuasive but without being determinative, when exercising the discretion under rule 15(2)(a); see further *Reed Employment Plc v HMRC* [2014] UKUT 160 (TCC) and *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 214 (TCC).

21. For example, in *Bramley Ferry Supplies Ltd v HMRC*, where an application to introduce new evidence on an application for permission to appeal was refused, the Upper Tribunal concluded as follows (at paragraph [24]):

> "…In making this application and the application to admit a new ground of appeal, the Appellant seeks to have a "second bite at the cherry" having seen the concerns raised by the judge about the strength of the evidence, which he set out in the FTT Decision after taking into account all of the other matters raised at the initial hearing. If we were to allow the application to introduce a new ground of appeal and adduce new evidence in these circumstances, we would permit an unsuccessful party to reopen issues that have been dealt with appropriately at the original hearing and risk the hearing becoming an iterative process. In our view, it would not be in the interests of effective case management and accordingly not in the interests of justice, to permit the Appellant to reopen this issue in this way."

22. Likewise, in *Cavendish Green Ltd v HMRC* [2018] UKUT 66 (TCC) the Upper Tribunal expressed its view as follows:

> "34. It is important to appreciate that it is not sufficient for an appellant to say that the overriding objective should be to achieve the right result on the appeal come what may. An appeal hearing is not a hearing *de novo*, and it is inherent in the *Ladd v Marshall* approach that even if new evidence is credible and may have an important influence on the result of the case, an appellate court may decline to admit that evidence if the first of the criteria is not met. That is because an appeal inevitably involves delay, expense and the increased utilisation of the limited resources of the tribunal system. Hence there is a clear policy justification for requiring a party to present his entire case at first instance and not, without good reason, giving him a "second bite of the cherry" on different facts on appeal. The first-tier hearing and any appeal should not simply become an iterative process."

23. Although Mr Frankel did not make detailed submissions on the point, understandably focussing his arguments on the 'pure' FOIA aspects of the application, he did effectively make the same point (see e.g. his contention that the Home Office was seeking to have a second bite of the cherry: skeleton argument at §61).

24. Plainly the observations in *Bramley Ferry Supplies Ltd* and *Cavendish Green Ltd* are not determinative of the application in the present case. They do, however, set the analytical framework for the proper consideration of the Home Office's application. The reality is that no reason, let alone any good reason, has been proffered for the failure by the Home Office to produce the Crown Dependencies' joint letter (or e.g. witness evidence to similar effect) at an earlier juncture when it could have been properly considered by the FTT. To that extent the application therefore falls, or at the very least stumbles, at the first fence of the *Ladd v Marshall* criteria. Can it surmount the latter

> two hurdles? Mr Webber would doubtless also dispute whether the latter two criteria are met – namely that the evidence would probably have an important influence on the outcome and the evidence must be apparently credible. Even if he is wrong on both those points, the fact remains that there is rightly a considerable public interest in finality where litigation has been properly conducted. It is not just a matter of "the increased utilisation of the limited resources of the tribunal system" (as it was put in *Cavendish Green Ltd*); there is the obvious prejudice and costs that would be incurred by the other parties to these proceedings (here Mr Webber and the Information Commissioner). Frankly I do not see how it is remotely arguable that it would be fair and just for the Home Office to be allowed to introduce this new evidence (whether at the stage when the First-tier Tribunal was considering the permission application or now before the Upper Tribunal).'

In *Cavendish Green Ltd*, the Upper Tribunal said the following about the proper procedure to be adopted when an application is made to adduce fresh evidence, in paragraphs 41 and 42 of its decision:

> '41. Although the Overriding Objective in Rule 2(2) indicates that dealing with a case fairly and justly in the Upper Tribunal includes avoiding *unnecessary* formality, this approach to the introduction of new evidence on an appeal simply will not do. It is well understood that an appeal to the Upper Tribunal is not simply a hearing de novo, and it must be emphasised that as Rule 15(2) makes clear, the admission on appeal of new evidence that was not before the FTT is not a matter of right, but a matter upon which the Upper Tribunal must exercise a discretion.
>
> 42. In our view, an appellant seeking to adduce fresh evidence on appeal should make a formal written application, supported by evidence addressing the *Ladd v Marshall* criteria or providing other reasons for the exercise of discretion by the Upper Tribunal, as soon as practicable on or after the submitting of a Notice of Appeal. The Upper Tribunal can then seek the respondent's representations on the application, which may be capable of being dealt with as an interlocutory application before the substantive hearing, thus saving both time and costs. An appellant cannot simply indicate informally an intention to submit fresh evidence, and take the silence of the respondent (notwithstanding the absence of an application), to be consent.'

In relation to the application of the principles to the facts of the case before it, the Upper Tribunal said the following at paragraphs 44 to 48:

> '44. As far as the first of the Ladd v Marshall criteria is concerned, Mr Zwart accepted that the additional evidence now sought to be adduced as to the height of the wall at the date of sale was available to Cavendish Green at all material times prior to the hearing before the

FTT. However, he submitted that it could not have been obtained with reasonable diligence for use before the FTT for the following reasons:

> (1) the papers received from HMRC, including the Statement of Case, focused only on the question of whether there had been sufficient construction above ground at the site;
>
> (2) he was only instructed on the matter two days before the hearing before the FTT, and the parties ran out of time at the hearing to deal with the planning permission issues; and
>
> (3) accordingly, he could not reasonably have been expected to obtain the further documents dealing with the planning permission issue in advance of the hearing and neither could that be expected of the appellant itself, as a lay person.

45. We reject those submissions. Any force that there may have been in them up to the conclusion of the oral hearing before the FTT is negated by the fact that the planning permission point and the factual understanding of the FTT that the construction of the wall had been completed by 31 May 2012 were raised expressly by the FTT in its directions dated 3 June 2016. Cavendish Green then had ample opportunity to deal with the point and to adduce the additional evidence necessary to address the impression that the FTT had gained as to the height of the wall. But it neither drew attention to item 12 of the schedule of variations, nor sought to adduce any new evidence.

46. Mr Zwart suggested to us that he did not think it was open to him to take that course because all that was being sought by the FTT was submissions on the planning permission issue rather than the adducing of further evidence. We would make the obvious point that an application to adduce additional evidence at the FTT stage is far more appropriate and efficient than seeking to do so for the first time on appeal to the Upper Tribunal. In any event, the FTT's directions made it clear that there was liberty to apply for a variation or extension of the directions, which plainly could have been utilised for that purpose at the time.

47. In short, the FTT made it abundantly clear that it was proceeding on the factual basis that the wall had been completed at the time of the sale; and it was open to Cavendish Green to take any necessary steps to put the FTT right before the Decision was given, but it failed to do so. This was therefore an issue that could and should have been resolved at the FTT level.

48. Mr. Zwart did not advance any other convincing reasons why, exceptionally, the further evidence of Mr. Pettie should be admitted. It was also apparent that without such evidence, the new material from the planning portal would not take matters further.

In *Bramley Ferry Supplies Ltd*, the application to adduce new evidence was coupled with an application to admit a new ground of appeal. Having reviewed the relevant jurisprudence, including *Ladd v Marshall* and *Reed Employment*, the Upper Tribunal noted, in paragraph 20:

> 'Some of the factors that we have taken into account in our consideration of the application to admit a new ground of appeal – such as the delay in making the application - apply equally to this application.'

In paragraphs 21 to 24, the Upper Tribunal stated:

> '21. In *Ladd v. Marshall*, Denning LJ, as he then was, set out three conditions that should be fulfilled to justify the admission of new evidence when he said (at page 1491):
>
> > "…first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."
>
> 22. Given the rather different context of the Upper Tribunal Rules, we accept the points raised by Mr Bedenham that we should not apply the criteria in *Ladd v. Marshall* as strict rules in the exercise of our discretion as to whether to admit new evidence. The principle governing the exercise our discretion under Rule 15(2) must be that we should deal with cases fairly and justly in accordance with the overriding objective. That requires us to take into account all of the circumstances of the case.
>
> 23. That having been said, the *Ladd v Marshall* criteria are not irrelevant. We agree with the Tribunal in *Reed Employment* that the *Ladd v. Marshall* criteria are of "persuasive authority as to how to give effect to the overriding objective": see *Reed Employment* [97]. The *Ladd v. Marshall* criteria should therefore be borne in mind when exercising our discretion under Rule 15(2)(a): see *Reed Employment* [100]. So whilst we take into account the fact the stay has been granted and that there is a possibility for HMRC to respond to the introduction of new evidence, we also have regard to the fact that the first of the criteria in *Ladd v Marshall* is not fulfilled. The Appellant has had an opportunity to put this evidence before the FTT; the evidence of Ms Wallis could have been obtained with reasonable diligence before the hearing.
>
> 24. Furthermore, as Mr Pritchard pointed out, the documents attached to Ms Wallis's witness statement are essentially the same as those that were attached to the witness statement of Mr Panesar, which was in

> evidence before the FTT. That evidence was challenged and the Appellant failed to rebut the challenges raised by HMRC, at least in part because Mr Panesar did not attend the hearing and so was not available to be cross examined on his statement. In making this application and the application to admit a new ground of appeal, the Appellant seeks to have a "second bite at the cherry" having seen the concerns raised by the judge about the strength of the evidence, which he set out in the FTT Decision after taking into account all of the other matters raised at the initial hearing. If we were to allow the application to introduce a new ground of appeal and adduce new evidence in these circumstances, we would permit an unsuccessful party to reopen issues that have been dealt with appropriately at the original hearing and risk the hearing becoming an iterative process. In our view, it would not be in the interests of effective case management and accordingly not in the interests of justice, to permit the Appellant to reopen this issue in this way.'

**The proper approach to the admission of a new ground of appeal before the Upper Tribunal**

In *Bramley Ferry Supplies Ltd*, an application was made to admit a new ground of appeal before the Upper Tribunal. The main challenge to a decision of a First-tier Tribunal Judge to refuse an application to admit an appeal out of time. The new ground of appeal before the Upper Tribunal involved a challenge to the First-tier Tribunal Judge's finding of fact that the appeal was made out of time. It was submitted that the existing evidence and new evidence, also sought to be admitted for the first time by the Upper Tribunal, supported the new ground of appeal. Further, although the additional ground had been advanced at a late stage in the proceedings, it was in the interests of justice to admit it.

The application to admit the new ground of appeal was opposed on the basis that:

(i) The application had been made far too late. The appellant had the opportunity to raise the additional ground of appeal in its request for permission to appeal to the Upper Tribunal and in the notice of appeal. No application was made at either stage. No reason had been given for the delay.
(ii) This was an entirely new ground of appeal.
(iii) The new ground of appeal had no merit.
(iv) If and to the extent that the additional ground relied upon the new evidence it was misconceived. The judge's findings of fact could only be challenged under the principles in *Edwards v. Bairstow* by reference to the evidence before the judge at the time.

At paragraphs 10 to 14 of its decision, the Upper Tribunal set out the following principles relevant to the admission of a new ground of appeal before the Upper Tribunal:

'*Discussion*
10. There is no specific rule in the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Upper Tribunal Rules") governing the Upper Tribunal's power to admit a new ground of appeal. It follows that, in considering a new ground of appeal, the Upper Tribunal should exercise its powers in accordance with the overriding objective in Rule 2 namely "to deal with cases fairly and justly". In applying that principle, we considered that the following factors were of particular relevance.

11. There was a significant delay before the new ground was raised. The Appellant sought permission to appeal on 6 July 2016. There was no reference to the additional ground in that request. When permission to appeal was refused by the FTT, the Appellant sought permission to appeal from the Upper Tribunal on 18 August 2016. No reference was made to the additional ground of appeal. The additional ground was only raised in a notice of application to the Tribunal made on 12 April 2017, eight days before the scheduled hearing of the appeal. No good reason has been given for the delay.

12. The new ground of appeal is entirely new. It challenges the judge's finding of fact that the appeal was made out of time rather than his decision as to whether to permit a late appeal. We agree with Mr Pritchard that the Appellant could and should have raised this intended challenge when it first applied for permission to appeal, and that Mr Bedenham was unable to offer a satisfactory, or indeed any, explanation of the Appellant's failure to do so. We also do not accept Mr Bedenham's argument that there would be no prejudice to HMRC; absent a material and unforeseeable change of circumstance a respondent should be able to assume that a finding of fact which has not been challenged in an application for permission to appeal has been finally determined, and that it has no need to address the point further.

13. There is little merit in the additional ground. The Appellant produced evidence on this point to the FTT, in the shape of a witness statement provided by the senior partner, Mr Panesar, of the firm of solicitors acting for it. That evidence was challenged by HMRC, but Mr Panesar declined an invitation to give oral evidence. Even so, the judge took the evidence into account (FTT Decision [6] and [8]), but did not consider that the Appellant had discharged the burden of showing that the notice of appeal had been submitted within time. As he put it, he was "unable to find that the email was sent to the Tribunal before 24 December 2015" (FTT Decision [9]). The solicitors must have known that the burden of proof was on the Appellant, yet they simply failed to produce adequate evidence to discharge it. In our view, the judge was entitled, if not required, to give less weight to Mr Panesar's evidence when he declined to be cross-examined about it.

14. Furthermore, to the extent that the new ground of appeal relies upon the evidence of Ms Wallis – as Mr Bedenham suggested that it

did – we agree with Mr Pritchard that it would be inappropriate to admit the new ground. The Upper Tribunal has jurisdiction to hear appeals from the FTT only on a point of law arising from the decision of the FTT: section 11(1) of the Tribunals, Courts and Enforcement Act 2007. The decision of the House of Lords in *Edwards v. Bairstow* - to the effect that the courts can overturn on appeal a decision of the fact-finding tribunal on a matter of fact where the facts that are found are such that "no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" (see Lord Radcliffe at page 36) – can only apply to the facts found by the tribunal on the evidence before it. There can be no error of law on the basis of the principles applied in *Edwards v. Bairstow* by reference to evidence that was not in front of the judge.'