



Neutral Citation Number: [2016] UKUT 0383 (AAC)

Appeal No. T/2016/13

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

**ON APPEAL from the DECISION of
Kevin Rooney, Traffic Commissioner
for the North East of England dated 15 February 2016**

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
Stuart James, Member of the Upper Tribunal
David Rawsthorn, Member of the Upper Tribunal

Appellants:

SNE HIRE & SALES LIMITED

Attendances:

For the Appellants: Mr Glover, solicitor of Fielden Marshall Glover Strutt Limited

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

Date of hearing: 12 July 2016

Date of decision: 25 August 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal BE DISMISSED and that the interim licence be terminated forthwith

SUBJECT MATTER:- Phoenix operations applying for operator's licences following the liquidation of a previous entity with a debt to the HMRC of £260,000; untruthful answers on application for an operator's licence; good repute; inadequacies in the call up letter.

CASES REFERRED TO:- Bradley Fold Travel Ltd & Peter Wright 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 North East of England (“ the TC”) made on 15 February 2016 when he refused an application for a standard national operator’s licence made by the Appellant (“Hire & Sales”). The refusal was under s.13B of the Goods Vehicles (Licensing of Operators) Act 1995 (“the Act”) and the TC also terminated their interim licence with effect from 23.59 on 14 March 2016.

Background

2. The factual background to the appeal appears from the documents, the transcript and the TC’s written decision. On the 13 August 2014, Scaffolding North East Limited (“Scaffolding”), which held a restricted operator’s licence authorising four vehicles, went into liquidation owing HMRC £260,000. The sole director and shareholder of Scaffolding was William Collard. In previous correspondence with the Office of the Traffic Commissioner (“OTC”), Cheryl Gray had described herself as “Company Secretary” of Scaffolding. She described herself in the public inquiry as the “General Manager” of Scaffolding. Prior to Scaffolding’s licence being revoked, there had been an allegation of unauthorised use of an operating centre in Birks Road, Heddon on the Wall, Newcastle. A preliminary hearing was listed in relation to that issue on 4 August 2015. No one from Scaffolding attended that hearing and it then became apparent that Scaffolding had gone into liquidation and the licence was revoked in-office on 13 August 2015.
3. On 17 August 2015 SNE Newcastle Limited (“Newcastle”) applied for a restricted operator’s licence authorising four vehicles. The four vehicles to be specified were those which had been specified on the Scaffolding licence and the proposed operating centre was the unauthorised operating centre which had been used by Scaffolding in Birks Road, prior to its licence being revoked. The sole director of Newcastle was Cheryl Gray and William Collard was a 49% shareholder. The correspondence addresses and the telephone numbers for Newcastle were the same as those of Scaffolding. At question 14g of the application for an operator’s licence, which asks whether, within the last twelve months, the company had purchased the assets or shareholding of any company that holds or has previously held an operator’s licence in any traffic area, the answer “no” was given. However, the four vehicles identified as those to be specified on the Newcastle licence were the same four vehicles which had been specified on the Scaffolding licence. Neither did the application identify the link between Scaffolding and Newcastle by virtue of Mr Collard

being the sole director and shareholder of the former and a 49% shareholder of the latter.

4. On 27 August 2015, the OTC wrote to Newcastle asking for further information. In particular, it required Newcastle to “*confirm what links the company has to Scaffolding North East Limited*”. By an email dated 8 September 2015, Cheryl Gray wrote:

“The company has overtook (sic) Scaffolding North East Ltd and I am now the owner and director of this new company, I purchased the vehicles and stock from scaffold north east, we now have no links to that company”.

5. On 15 December 2015, vehicle KD08 JWZ was stopped. It was displaying an operator licence disc in the name of Scaffolding. The driver said that he was employed by Newcastle, who were the owners of the vehicle and that he had taken his instructions on that day from “*William Collard, the boss*”. Following that road side encounter, Cheryl Gray emailed the OTC requesting an interim licence for Newcastle. John Maddison then telephoned the OTC later that day, stating that he would be hand delivering a letter to the OTC together with an application for an interim licence. That application was never delivered.
6. On 16 December 2015, Traffic Examiner Christine McLoughlin submitted an environmental report upon the suitability of 20 Birks Road as an operating centre. She concluded that the operating centre was unsafe on road safety grounds.
7. By an application dated 17 December 2015, SNE Hire & Sales Limited (“Hire & Sales”) applied for a restricted licence authorising eight vehicles. The four vehicles which had been specified on the Scaffolding licence and on the Newcastle licence were specified on the application. The sole director of the company was said to be Cheryl Gray although the application form was signed by John Maddison as a “director”.
8. The application was attached to a letter from TT Law which informed the OTC that Hire & Sales was “*involved in the supply of scaffolding equipment*”. It had recently “*took over*” (sic) the business of Scaffolding which had gone into liquidation. TT Law had been instructed that Hire & Sales had “won a substantial order” which would allow the company to re-hire several former employees of Scaffolding but it urgently required an operator’s licence. Such was the importance of securing the work that the company’s “*Managing Director, Mr John Maddison*” would personally deliver the application to the Leeds office. A failure to obtain a licence “*today*” would be disastrous for the company; the contract which had been “*hard won*” would be lost and several prospective employees would remain unemployed. The letter went on:

“Finally, we understand your office has raised a query over the relationship between the company and SNEL (Scaffolding). For the avoidance of doubt, SNEL’s assets were bought from its liquidators (via the company) by a third party and we are instructed that the previous officers of SNEL (Scaffolding) are not involved in the company.”

9. The application itself was unsatisfactory. It listed Cheryl Gray as the sole director but was signed by John Maddison purporting to do so in his capacity as director. Whilst the application was for a restricted licence, it named John Maddison as transport manager. The advert accompanying the application was in the name of John Maddison trading as SNE Hire & Sales. Question 13b(ii) which asked whether any person named in the application had ever been involved in a company that had gone into liquidation owing money, was answered in the negative. Of course, Cheryl Gray had been involved with Scaffolding and William Collard was a shareholder of Hire & Sales. Mr Maddison should also have been named (see below). Question 14b asked whether any person named in the application had ever held a licence in any traffic area and question 14d asked whether any person named in the application had ever had a licence suspended, curtailed or revoked. The answer was “no” when in fact, the Scaffolding licence had been revoked and John Maddison had been a director of City Scaffolding (Northern) Limited which held an operator’s licence which was revoked in 2011 following the company going into liquidation owing money.
10. By a letter dated 21 December 2015, Newcastle was called to a public inquiry listed for 9 February 2016. The TC’s principal concerns included Newcastle’s links to Scaffolding; the unauthorised use of a vehicle on 15 December 2015; the suitability of the proposed operating centre. Unfortunately, none of the documents relating to Newcastle were included in the Tribunal’s appeal bundle even though Newcastle was linked to both Scaffolding and Hire & Sales.
11. On 30 December 2015, the OTC wrote to Hire & Sales asking for further information and clarification of the company’s position. Cheryl Gray responded by email on 4 January 2016:

“Section 3b (sic)

At the time of signing the application John Maddison was not named director. After the application had been submitted it was decided that Mr Maddison should be a named director and the relevant paperwork was signed and sent to companies house.

Therefore the two named directors are Miss Cheryl Gray and Mr John Maddison.

In response to Section 14b Mr John Maddison was a named director of City Scaffolding for approximately 2 months. The company was liquidated but at no time was he advised that licence OB1091901 had been revoked or suspended.

The bank statements are held in the holding company name all payments from customers get paid into this account, there is a SNE Hire & Sales account that has surplus money please see attached email copy and let me know if this will suffice I can transfer money from the holding account to reflect this. ...”

In fact Mr Maddison was appointed a director of Hire & Sales on 7 January 2016. The “holding company” was in fact Newcastle.

12. An application by Hire & Sales for an interim authority was refused and by a letter dated 5 January 2016, Hire & Sales was called to a public inquiry, also to be held on 9 February 2016. The letter highlighted the unsatisfactory nature of the company’s application as set out above and also noted that the bank statements relied upon to provide financial standing were in the name of Newcastle and that both applications listed the same vehicles to be specified on each licence. The letter highlighted that Hire & Sales was linked to Newcastle.
13. On 7 January 2016, John Maddison hand delivered a letter to the OTC dated 6 January 2016 which we were informed had been written by Mr Maddison. It advised the OTC that the purpose of the letter was to clarify the issues in relation to both the applications made by Newcastle and Hire & Sales, *“in the spirit of openness and transparency with a view to progressing these matters”*. In relation to Newcastle, the letter advised that as a result of the negative environmental report and the fact that a vehicle had been stopped whilst being operated by Newcastle, the decision had been made to withdraw the application. The letter acknowledged that as Cheryl Gray was the sole director of Newcastle and that she was also a director of Hire & Sales, that the TC would be concerned about the unauthorised use of a vehicle by Newcastle and that the TC was likely to require further information. However, a further application for an interim authority in the name of Hire & Sales accompanied the letter and Hire & Sales would welcome an opportunity to appear at a public inquiry. After seeking legal advice, Hire & Sales wished to amend its application to one for a standard national licence. Enclosed was a completed TM1 form for John Maddison and a bank statement which demonstrated that the company was of financial standing for eight vehicles. Whilst the monies in the account had not been in there for twenty eight days, assurances were given that they would be ring fenced (transfers from accounts in the names of SNE Newcastle Ltd and Cheryl Gray were relied on). It was acknowledged that the application was *“not fully complete”* when it was submitted. Further information had been provided and it was acknowledged that John Maddison had attended a public inquiry in relation to a licence previously held by City Scaffolding Limited.
14. As for a further request for an interim authority, the letter advised that Hire & Sales wished to provide transport services to a linked company which provided scaffolding services. Until an interim authority was held by the company, the transport for those scaffolding services would

have to be “contracted-in” which would provide potential operational difficulties in terms of the availability of transport and lack of flexibility and increased overheads. It was suggested that the TC met with Cheryl Gray in order to receive her explanations about the links between the companies and the unauthorised use of a vehicle.

15. Having considered the letter and despite Hire & Sales’ links to Newcastle, Newcastle’s links to Scaffolding, Cheryl Gray’s links to Newcastle and Scaffolding and the unsatisfactory nature of the application generally, the TC granted Hire & Sales an interim licence. The TC’s brief decision reads:

“Concerns persist with the history of the directors/shareholders companies such that I cannot be satisfied on repute. However, I am content to issue an interim restricted licence for 4 vehicles only”.

The public inquiry hearing

16. The withdrawal of Newcastle’s application for a licence was not accepted by the TC. At the conjoined hearing which took place on 9 February 2016, Cheryl Gray appeared as sole director of Newcastle and as a director of Hire & Sales; John Maddison appeared in his capacity as a director of Hire & Sales and as the nominated Transport Manager, although he was not called up separately in that capacity. Mr Glover represented both companies. He confirmed that the Newcastle application was withdrawn because of the environmental issues arising out of the use of 20 Birks Road as an operating centre. He then summarised the position with Hire & Sales: the assertion in the newspaper advert that the application was being made in the name of Mr Maddison trading as Hire & Sales was a mistake; whilst it was wrong to describe Mr Maddison as a director of Hire & Sales in the licence application, that error had been rectified by him having been appointed as a director at a later date. Mr Glover accepted that there were some “*common themes*” between the companies and that the unauthorised vehicle use by Newcastle was something that affected Hire & Sales. The reason for the same four vehicles being listed on both applications was because the decision had been made not to proceed with the Newcastle application and to list the four vehicles on the Hire & Sales application instead. Mr Glover went through the other issues which Cheryl Gray would deal with in her evidence. The TC asked “*Are you going to deal with the apparent links with Scaffolding North East Limited and the history of that business?*”. Mr Glover confirmed that he was. He had notes and a flow diagram to assist him. He confirmed that William Collard owned 24.5% of the shares of Hire & Sales and that the driver of the vehicle being operated by Newcastle had referred to Mr Collard as his “*boss*”. The TC asked “*Can Ms Gray talk me through the liquidation of Scaffold North East Limited and the £260,000 debt to the Crown?*” to which Cheryl Gray and Mr Glover both replied “*yes*”.

17. Cheryl Gray then gave evidence. She confirmed that she was a director and shareholder of both Newcastle and Hire & Sales. She dealt first with the liquidation of Scaffolding. She referred to “we” when describing steps taken to discover that the company’s previous accountants had given “*bad advice*” to Scaffolding. When asked to clarify her reference to “we”, she said that she meant “*Mr Collard*”. It was discovered that none of the VAT returns for the company had been submitted by the previous firm of accountants and that as a result, a substantial debt was owed to HMRC which the company could not pay. Ms Gray had been “*just the General Manager in the office*” at the time. Attempts were made to come to an arrangement with HMRC but there were complications with “*pay as you earn*” and the position was not recoverable. They “*tried our hardest*” to avoid going into liquidation. When liquidation became inevitable, they were advised by the OTC that a new application for an operator’s licence was required. When Scaffolding went into liquidation, Mr Collard was the largest creditor. There then followed the application by Newcastle, although it was Hire & Sales which had purchased all of the Scaffolding assets, including the websites and telephone numbers. She denied that Mr Collard had any involvement in Hire & Sales although he did deal with the contractors.
18. Turning to the Newcastle application, Ms Gray stated that once the adverse environmental report had been filed, they knew that the application was not viable. It had also come to their attention that the landlord of the proposed operating centre did not have the necessary planning permission. They had sought advice from the Road Haulage Association (“RHA”) and in particular from Malcolm Dodds who advised that Hire & Sales should make an application. The decision to make a second application on behalf of Hire & Sales was made prior to the vehicle stop on 15 December 2015. Ms Gray asserted that at the time, she had genuinely believed that Newcastle had been granted an interim licence and that it was her “*fault for allowing the vehicles to go out*”. It was as a result of being told that there was no interim licence in place that they contacted the RHA. The vehicles were not used after that date until an interim licence was granted to Hire & Sales. It was a “*genuine mistake*” that the vehicle which was stopped was displaying the disc of the revoked Scaffolding licence and she should have removed the discs from all of the vehicles. She should have taken more advice before putting the vehicles on the road.
19. When they completed the application form for a licence in the name of Hire & Sales, Mr Maddison was under the impression (as a result of consulting Mr Dodds) that he did not have to refer to his links with a previously revoked licence (City Scaffolding) because five years had elapsed. Ms Gray was not aware that she had to make any reference to Mr Collard’s link to Newcastle (as the shareholder of both). The amended application for a standard national licence for Hire & Sales was because the vehicles would in fact be moving the scaffolding

equipment of “SNE Scaffolding Services” which employs the labour and holds the contracts.

20. Ms Gray explained that Mr Maddison would be responsible for the vehicles and she was responsible for the financial side. Whilst Mr Maddison was a non-shareholding director, he would be allowed to have continuous and effective management of the transport side of the business. He had already “*brought on board*” a variety of changes and he understood the rules and regulations. Hire & Sales had an in-house accountant to avoid the difficulties encountered by Scaffolding in relation to its finances. They wanted to move forward and make the company work.
21. In answer to questions asked by the TC, Ms Gray repeated that at the time of the unlawful use of the vehicle, she did not know that Newcastle did not have an interim licence. She was asked to look at a letter dated 27 August 2015 (not included within the appeal bundle) which warned in large, coloured print, that Newcastle did not have any authorisation to use vehicles weighing in excess of 3 ½ tonnes. She denied that she had received that letter but her email reply to it was then put to Ms Gray (8 September 2015). She accepted she had been mistaken. She was asked why Scaffolding did not attend the preliminary hearing concerning the unauthorised use of an operating centre. She did not know why no one from Scaffolding had attended and confirmed that all correspondence for Scaffolding was dealt with by either herself or Mr Collard. She confirmed that both Newcastle and Hire & Sales were set up in November 2014 but they did not start trading at that time. It had been the intention that SNE Scaffolding Services was going to employ the workers; Hire & Sales was going to hold the stock; Scaffolding North East was going to run simultaneously with Scaffolding Services and Newcastle was the holding company for all of them. The Newcastle application was made prior to Scaffolding going into liquidation because they were aware that the liquidation was going to take place and they wanted to avoid a gap in operations. She accepted that following the revocation of the Scaffolding licence, the four vehicles had in fact continued to operate up until 15 December 2015 without authorisation. Scaffolding had operated from an unauthorised operating centre because the authorised operating centre was close to houses and the operation “*was quite noisy*”. They were then offered Birks Road for Hire & Sales, which was more suitable.
22. John Maddison then gave evidence. He described himself as the Managing Director of Hire & Sales and the nominated Transport Manager. He had previously worked as the Contracts Manager for City Scaffolding Limited, commencing his employment in May 2010. He had only worked for City Scaffolding for a very short time. When he commenced his employment the company was jointly owned but about two or three weeks before the company went into liquidation, one of the owners (John Flowers) took control and made Mr Maddison the Managing Director. Then, within two weeks or so, the company was

“suddenly liquidated”. Mr Maddison had not been aware of the company’s financial difficulties at the time but he did attend two liquidation meetings and whilst he had attended a public inquiry when a fresh application had been made for a licence by Mr Flowers which had been *“incorrectly signed”*, he had not been told that the operator’s licence held by City Scaffolding had been revoked. It was for that reason that he answered question 14(d) on the Hire & Sales licence application form in the negative. He realised that this answer was incorrect but he had taken advice from Malcolm Dodds from the Road Haulage Association who had stated that as five years had passed, the information about him having been connected to City Scaffolding need not be divulged.

23. After City Scaffolding went into liquidation, John Flowers then set up James Ingleford Scaffolding and Mr Maddison was then employed by that company for three years. He joined Hire & Sales on 7 or 8 December 2015. His responsibilities were to look after the maintenance of the fleet and *“looking after the labour, instructing them on what the requirements are – as Managing Director overall the run of the company and .. maintaining standards”*. Since the interim licence had been granted, the vehicles were being maintained every eight weeks, a daily driver defect report system was in place and minor defects were being rectified in house. He had commenced a regime of tool box talks about loads and security, vehicle checks and drivers cards. He had also instituted a three monthly regime of checking the driver’s driving licenses and they had all signed a declaration that they would take their driving licences in to to be checked. If they did not do so *“the company has the authorisation to do a check .. themselves .. through the DVLA”*. He did not think that the drivers would exceed the drivers’ hours limits because the drivers were in fact *“labourer/drivers”* undertaking minimum driving, five days a week. All the vehicles were tracked. Mr Maddison was downloading the digital drivers’ hours information but he had obtained quotes for the analysis to be undertaken by an outside agency. Mr Maddison assured the TC that in future, he would ensure that all information given to the OTC was correct.
24. In answer to questions asked by the TC, Mr Maddison accepted that the question on the licence application concerning previous involvement in a company that had gone into liquidation, was not vague. But he insisted that Mr Dodds had advised him that his involvement with City Scaffolding need not be divulged (the TC doubted whether Mr Dodds would give such advice). Mr Maddison stated that when he started working with Hire & Sales, he had been told by Cheryl Gray that *“everything was in place”* but he did not look at the vehicles until he appreciated that he was to be the Transport Manager. He was not therefore aware that the vehicles were displaying discs issued to a revoked licence. He was not aware of the warning given in the letter of 27 August 2015 that the company did not have any authorisation to operate the vehicles. The TC returned to Mr

Maddison's involvement with City Scaffolding. Mr Maddison accepted that he was appointed as a director of that company on 21 June 2010 and that the liquidation had taken place on 28 October 2010 (with revocation of its licence in 2011). That period could not be described as a "*couple of weeks*". He did not know the full amount the company owed when it went into liquidation as he had been a managing director in name only. The TC informed Mr Maddison that City Scaffolding had owed £281,000 to its creditors and that HMRC had been owed £63,000.

25. In his closing submissions, Mr Glover asked the TC to take account of the fact that Hire & Sales had written to the OTC with the intention of clarifying matters and with a desire to be transparent and open in relation to its application and links with the other entities. It was clear that the Hire & Sales application had "*issues*" and that the company was not in the strongest position in terms of the application. However, the stopping of the vehicle on 15 December 2015 had triggered a "*very positive response*" from the company. Advice from the RHA had been sought, the company's position had been regularised and there was a potential for operating "*going forward*". Mr Maddison had put all of the necessary systems in place as a Transport Manager. The officers of the company had accepted their mistakes.

The TC's decision dated 15 February 2016

26. Dealing first with the application made by Newcastle, the TC found that the proposed operating centre was unsuitable on road safety grounds and that Cheryl Gray had "*freely explained*" that the Newcastle application was a "*device*" to allow the business of Scaffolding to continue, having wiped out its considerable debt to the public purse. He found that such conduct made Newcastle unfit to hold an operator's licence. Further, when asked to explain the links between Scaffolding and Newcastle, Cheryl Gray had written stating that she was the owner and director of Newcastle and that she had purchased the vehicles and stock from Scaffolding and there were "*now no links*" to Scaffolding. This was not the case. Mr Collard was the former director and shareholder of Scaffolding and held a 49% share in Newcastle (we would add, that the driver of the vehicle which was stopped on 15 December 2015 said that Mr Collard was "*his boss*"). The TC concluded that Cheryl Gray had been untruthful in her response to the enquiry.
27. Turning to Hire & Sales, the TC noted that financial standing had been demonstrated by a transfer of money from Cheryl Gray which was surprising bearing in mind that the company had been operating. He would therefore have expected to see financial standing demonstrated over the period it had been operating. That was not however, insurmountable and he was satisfied that financial standing had been met.

28. The success or otherwise of the application turned on good repute and the onus was on the company to satisfy him of its good repute. It had been "*freely explained to me by Ms Gray that Hire & Sales was also a device to allow the business of .. (Scaffolding) .. to continue having wiped away its debt to the Crown. That in itself is enough to conclude the applicant is not of good repute*".
29. Cheryl Gray had also admitted that "*the applicant company*" had continued to use vehicles unlawfully throughout 2015. The TC was in no doubt that by virtue of the correspondence from the OTC that Cheryl Gray knew that the use of the vehicles following the liquidation of Scaffolding was unlawful and that is what had driven her to make the early application for a new operator's licence by Hire & Sales. He found that the "*applicant company*" chose to operate vehicles without the benefit of an operator's licence. The issue of the untruthful statement in Ms Gray's email dated 8 September 2015 applied equally to the Hire & Sales application as did the other adverse findings made in relation to Newcastle and that as a result Hire & Sales lacked good repute.
30. As for Mr Maddison, he failed to declare his involvement in City Scaffolding both in respect of it having gone into liquidation and having had its operator's licence revoked. He sought to blame the RHA for his failure but it was Mr Maddison who signed the application. He had also been in post with Hire & Sales for a full week before the vehicle was stopped on 15 December 2015. His failure to check the vehicles and the discs in the windows, demonstrate a lack of due diligence and this appeared to strongly resemble his failures as Managing Director of City Scaffolding (whether he was in post for two weeks or four months) in respect of the financial problems that business was in. Following the hearing, the TC had seen that company's Statement of Affairs which Mr Maddison had in fact signed when the company went into liquidation.
31. The TC was critical of Mr Maddison's reference to conducting three monthly checks on drivers' licences by asking them to "*fetch their licences in*". This was not a positive feature because it demonstrated that Mr Maddison was significantly out of date as a Transport Manager. Driver licence counterparts no longer exist and operators must check a driver's status on line.
32. At best, Mr Maddison had a poor memory and lacked attention to detail. At worst, he had been deliberately untruthful and misleading. Either way, he had failed to demonstrate that he had the necessary good repute to be a transport manager. He had not been called up separately in that capacity but he could expect any future application to be a transport manager to receive significant scrutiny and to answer the inconsistency between his evidence as to lack of knowledge of the financial position at liquidation of City Scaffolding and his signing of the Statement of Affairs.

The Upper Tribunal Appeal

33. At the hearing of this appeal, Mr Glover represented Hire & Sales and he produced a skeleton argument for which we were grateful. His first point was that the TC had been unduly harsh in finding that Ms Gray had explained that Hire & Sales was a device (along with Newcastle) to allow the business of Scaffolding to continue having wiped away its debt to the Crown. He was also critical of the following:
- a) The call up letter sent to Hire & Sales did not make reference to its possible links to Scaffolding, although it did make reference to its links to Newcastle. As the links to Scaffolding became one of the main issues upon which the TC concluded that Hire & Sales lacked good repute, it was essential that the concerns about those links be highlighted in the call up letter so that the issue could be properly addressed at the public inquiry. Such reference should have included the fact that Scaffolding failed to attend the hearing scheduled for 4 August 2015, as this was something the TC asked Ms Gray about and was mentioned under the heading “*Background*” in the TC’s decision.
 - b) The exchange that had taken place between the TC and Ms Gray about the timings of Scaffolding’s liquidation, Newcastle’s application and the continued operation of the vehicles between the former’s liquidation (and licence revocation) and the vehicle being stopped on 15 December 2015, displaying the licence disc of Scaffolding, was ambiguous and related to the operation of the vehicles by Newcastle, not Hire & Sales. Again, this should have been referred to in the call up letter sent to Hire & Sales;
 - c) At the outset of the public inquiry, the TC asked where Mr Collard was and whether he was to be called to give evidence. If the TC considered that Mr Collard’s presence at the hearing was required, that too should have been included in the call up letter.
34. Having considered this ground of appeal and in particular, the asserted deficiencies in the call up letter, the Tribunal requested a copy of the call up letter sent to Newcastle on 21 December 2015 (summarised above) to ascertain whether it contained any reference to the TC’s concerns about links between Scaffolding and Newcastle, which it did. The letter was sent to Mr Glover by email on 25 July 2016, inviting further representations. In response, Mr Glover submitted that it had not been the intention of Hire & Sales to “*avoid or divert from the commonality*” between Newcastle and Hire & Sales. However, the fact that the links between Scaffolding and Newcastle were referred to in the Newcastle call up letter, did not mean that the issue did not need to be raised in the call up letter sent to Hire & Sales. In any event, the Newcastle call up letter did not state that the TC wished to explore the circumstances in which Scaffolding went into liquidation.
35. Having considered all of the above representations, we are satisfied that there is nothing in this ground of appeal for the following reasons:

- a) The TC's determination that Ms Gray had stated that both Newcastle and Hire & Sales were devices to allow the business of Scaffolding to continue, following liquidation and the wiping out of debts (and in particular to the HMRC) was a finding that he was entitled to make upon the evidence before him. We cannot say that the TC was plainly wrong in his assessment of the evidence; indeed, it was plainly right;
- b) It was abundantly clear that as the applications of both Newcastle and Hire & Sales were being processed, the OTC and the TC were concerned that Newcastle was a "*phoenix operation*" (that is, an entity which applies for a licence in order to continue operating the business of a linked entity which has either gone into liquidation and/or had its operator's licence revoked) with or without a degree of "*fronting*" arising out of the liquidation of Scaffolding and that Hire & Sales was another "*phoenix operation*" arising out of the decision to withdraw the Newcastle application as a result of unlawful operation of vehicles and the request that a previously unauthorised operating centre be authorised for use by Newcastle when it was not suitable for such use. All three companies were inextricably linked and that too was abundantly clear from the evidence of Ms Gray. The TC was entitled to find that in the circumstances, neither Newcastle nor Hire & Sales was of good repute;
- c) It is correct to state that there is no direct reference to Scaffolding in the Hire & Sales call up letter, but there is such reference in the call up letter sent to Newcastle. No one was in any doubt that Ms Gray was going to have to deal with the history of the three companies and the links between them. Ms Gray was prepared to deal with the issue (although she had left a file at home) as was Mr Glover, who is an experienced practitioner in commercial road transport regulation. There was no request for an adjournment or some additional time in order to marshal the necessary evidence. When asked whether the parties were able to deal with the circumstances in which Scaffolding went into liquidation, both Ms Gray and Mr Glover answered in the affirmative. Ms Gray gave clear evidence about Scaffolding's liquidation, the basis upon which Newcastle made its application for a licence and the basis upon which the decision was made to withdraw that application and apply for a licence in the name of Hire & Sales. We do not consider in the circumstances, that the absence of any reference to Scaffolding in the call up letter sent to Hire & Sales is something that gives rise to any unfairness in this case. Further, whilst the failure of Scaffolding to attend the hearing on 4 August 2015 was referred to by the TC during the course of the public inquiry, it was not relied upon at all by the TC when came to the adverse findings that he did and in the circumstances, we are not satisfied that this is something that should have been flagged up in a call up letter. The links to Scaffolding were sufficient and obvious;
- d) As for the absence of any reference to the unauthorised use of vehicles by Newcastle in the call up letter sent to Hire & Sales, for

the same reasons already given, there could not have been any unfairness arising out of the absence of any such reference. The matter was clearly flagged up in the Newcastle call up letter and it was acknowledged in the email sent by TT Law on 6 January 2016 that the TC would be expecting to hear evidence from Ms Gray about the unauthorised use of vehicles by Newcastle when consideration was being given to the Hire & Sales application as she was a director of both companies. It was abundantly clear to the parties what the issues were in this case. As for the exchange between the TC and Ms Gray about whether Newcastle had continued the operation of Scaffolding without the benefit of an operator's licence, we do not interpret it as being ambiguous. It was clear from her evidence, that Ms Gray was accepting that once Scaffolding had gone into liquidation, the vehicles continued to operate in the name of Newcastle (which was described as the holding company of both Scaffolding and Hire & Sales) undertaking the same business without any gap. To use ordinary language it was "*business as usual*" and that continued when Hire & Sales was granted an interim licence.

- e) Finally, in relation to the TC's enquiry about whether Mr Collard was going to be called to give evidence, the TC pointed out that it was for Newcastle and Hire & Sales to determine how best to present their cases and the absence of Mr Collard did not feature at all in the TC's adverse findings of fact.

In all of the circumstances, this ground of appeal fails.

36. Mr Glover's next point related to the TC's finding under the heading "*The application of Hire & Sales*" that the "*applicant company*" had continued to use vehicles unlawfully throughout 2015. This was incorrect as it was Newcastle who had been responsible for unauthorised use and to that extent, the TC's decision was plainly wrong.
37. We accept that at first reading, the TC's reference to the "*applicant company*" under that heading, is a reference to Hire & Sales. However, it is implicit in the TC's findings that both Newcastle and Hire & Sales were devices deployed by the officers of Scaffolding in order to continue operating a scaffolding business following liquidation and revocation of its operator's licence. The three companies were in effect "*one and the same*". This is a clear case of two successive "*phoenix operations*" although the TC did not say so in those terms. The paragraph to which this ground of appeal relates must be read in that context. At best this ground of appeal is a technical point and at worst it has no merit what so ever and as a result, this ground of appeal fails.
38. Mr Glover's next point related to the TC's assessment of Mr Maddison which he described as "*damning*". Mr Maddison had not been called to the public inquiry as Transport Manager for consideration to be given to his good repute. He was then faced with dealing with matters that had

taken place five years before. Further, the TC's assessment of Mr Maddison as being "*significantly out of date*" was unfair. Mr Glover repeated the evidence given by Mr Maddison as to the systems he had put in place and submitted that the TC's reliance upon Mr Maddison making reference to requiring the drivers to bring in their driving licences was unfair as he had made it clear that he was aware that the company could check the status of drivers on line. In short, the TC should not have made any findings about Mr Maddison's good repute without calling him to a public inquiry separately from the company.

39. Our starting point is that Mr Maddison was the Managing Director of Hire & Sales. When considering the good repute of a company, the TC is entitled, by virtue of paragraph 1 of Schedule 3 of the 1995 Act, to consider any information about the previous conduct of any of the company's directors, in whatever capacity, when considering whether the company is of good repute. It is clear that Mr Maddison had to deal with some difficult issues before the TC in his capacity as Managing Director of Hire & Sales. He had previously been involved in a company which had gone into liquidation and which had had its operator's licence revoked when he was a director of that company. The application form that he had completed on behalf of Hire & Sales contained inaccurate and untruthful information about his previous involvement in such a company. The call up letter raised these issues and it follows that it would not have come as any surprise to Mr Maddison when he was asked questions about his involvement with City Scaffolding and its status at the time. It is also clear that Mr Maddison had given unsatisfactory evidence about the degree of involvement he had had with City Scaffolding and as to his knowledge about that company going into liquidation. He told the TC that he did not know that the operator's licence of City Scaffolding had been revoked yet the letter dated 6 January 2016, informed the OTC that Mr Maddison had attended a public inquiry relating to that licence. There was also the issue of his lack of due diligence when he joined Hire & Sales. He was not aware that the vehicles, which at that stage, were still being operated by Newcastle, were displaying discs issued to Scaffolding and that Newcastle did not have any authority to operate those vehicles. Whilst he was recruited as a Director of Hire & Sales, he will have been aware of Newcastle and the reasons why an application for Hire & Sales was being considered. There can be no doubt that against that background the TC was entitled to make adverse findings about the good repute of Mr Maddison as the Managing Director of Hire & Sales and in his capacity as transport manager when it came to a lack of due diligence.
40. However, the TC's finding that Mr Maddison was "*significantly out of date*" as a Transport Manager was unfair in all of the circumstances. He had not been called to the public inquiry to consider the issue of his practical competence as a Transport Manager which might affect his good repute and the TC's conclusion was based on one feature of Mr Maddison's evidence concerning the checking of driving licences. He

did say that he was aware of a company's entitlement to check a driver's status on line and without further questioning about his state of knowledge, the TC should not have come to the conclusion he did solely on that point. We note that Mr Maddison attended a two day CPC refresher course in December 2014 and his up to date knowledge should have been explored by the TC if he was considering making the finding that he did. The difficulty for Mr Maddison is the extent to which the Tribunal's decision can assist him against the background of the findings that relate to him as the Managing Director of Hire & Sales (which cannot be described as plainly wrong) as opposed to him being a transport manager. The TC acknowledged that Mr Maddison had not been called up in that capacity and that his findings did not preclude Mr Maddison from applying to be nominated as a transport manager in the future but he rightly pointed out that his application would receive significant scrutiny. It seems to us, that the TC's approach was correct. He has not made a formal finding of loss of good repute as a transport manager otherwise the TC would have been compelled in law to disqualify him from holding such a role but Mr Maddison should not have been further disadvantaged (over and above the TC's findings in relation to Mr Maddison's conduct as a Director) in the future by a finding that he was "*significantly out of date*" as a transport manager without greater scrutiny. His knowledge and expertise in that capacity will have to be considered separately in due course if and when he chooses to apply to be the nominated transport manager on another licence.

41. To conclude, whilst we are satisfied that the TC should not have concluded that Mr Maddison was "*significantly out of date*" as a transport manager without further enquiry, we are otherwise satisfied that the TC's decision is not plainly wrong in any other respect and that neither the facts or the law applicable in this case should impel the Tribunal to allow this appeal as per the test in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695*.
42. We should say something about the delay in completing this decision. The Tribunal's appeal bundle only contained those papers which directly related to the appeal of Hire & Sales rather than all papers relating to all three entities which were before the TC at the public inquiry. As a result, the call up letter sent to Newcastle was not within the papers and so the Tribunal asked for a copy and then gave Mr Glover an opportunity to make further representations about it. As a result of the holiday commitments of his clients and Mr Glover himself and as a result of clarification being sought by Mr Glover as the points which the Tribunal invited further representations upon, Mr Glover's representations were received on 18 August 2016.
43. We consider that in the future, when there is an issue in relation to linked entities in circumstances similar to those in this case and that a conjoined hearing has taken place, consideration should be given to

whether all of the papers before a TC at a public inquiry, should be placed before the Tribunal irrespective of whether all entities before the public inquiry have appealed.

A handwritten signature in black ink, appearing to read "Judge Beech". The signature is written in a cursive, flowing style.

**Her Honour Judge J Beech
25 August 2016**