

IN THE EASTERN TRAFFIC AREA



- 1) ANDREW JAMES SMITH & DOUGLAS JAMES SMITH
t/a A & D TRANSPORT – OF1131389**
- 2) HIGHGATE TRANSPORT LIMITED – OF1144105**
- 3) WENDY SUSAN SMITH – TRANSPORT MANAGER**
- 4) DRIVER PETER REGINALD JOHNSON**

WRITTEN DECISION OF THE TRAFFIC COMMISSIONER

Decision

1. I make the following Directions:

- a) following adverse findings under sections 26(1)(b); 26(1)(c)(i); 26(1)(c)(iii); section 26(1)(f); section 26(1)(h) of the Goods Vehicle (Licensing of Operators) Act 1995 and that Andrew James Smith and Douglas James Smith no longer meet the mandatory and continuing requirements for good repute, financial standing and professional competence as required under sections 13A(2)(b), (c) and (d), Operator's Licence OF1131389 is revoked under section 27(1)(a) of the said Act, with effect from 23:45 on 9th December 2019;
- b) following adverse findings under sections 26(1)(b); 26(1)(c)(i) & (ii); 26(1)(c)(iii); section 26(1)(f); section 26(1)(h) of the Goods Vehicle (Licensing of Operators) Act 1995 and that Highgate Transport Ltd no longer meets the mandatory and continuing requirements for good repute, financial standing and professional competence as required under sections 13A(2)(b), (c) and (d), Operator's Licence OF1144105 is revoked under section 27(1)(a) of the said Act, with effect from 23:45 on 9th December 2019;
- c) on a finding, pursuant to paragraph 16 of Schedule 3 of the Goods Vehicle (Licensing of Operators) Act 1995, that Wendy Susan Smith is no longer of good repute, she is disqualified from relying on her Certificate of Professional Competence for an indeterminate period, not shorter than 10 years from the date of this decision.

d) pursuant to section 28 of the Goods Vehicle (Licensing of Operators) Act 1995, Andrew James Smith is disqualified from holding or obtaining an operator's licence and also from being involved in management, administration or control of the transport operations of an entity that holds or obtain such a Licence in Great Britain, for a period of three years from the date of this decision.

e) pursuant to section 28 of the Goods Vehicle (Licensing of Operators) Act 1995, Douglas James Smith is disqualified from holding or obtaining an operator's licence and also from being involved in management, administration or control of the transport operations of an entity that holds or obtain such a Licence in Great Britain, for a period of ten years from the date of this decision.

f) pursuant to findings that Peter Reginald Johnson is unfit to hold a licence entitlement, he is disqualified under section 115 of The Road Traffic Act 1988 from holding an LGV or PCV vocational driver's licence for an indeterminate period subject to application to a Traffic Commissioner.

Background

2. Andrew James Smith & Douglas James Smith t/a A & D Transport held a Standard International Goods Operator's Licence authorising operation of 2 vehicles and 2 trailers from Yarmouth Business Park. Wendy Smith was the nominated Transport Manager.

3. Highgate Transport Ltd held a Standard National Goods Operator's Licence authorising operation of 2 vehicles and 2 trailers from the same Operating Centre in the Yarmouth Business Park.

4. The grounds for this Public Inquiry flowed from a roadside encounter on 7th September 2017 with vehicle DA10 FZT, which was being driven by a Richard James Burnett, who confirmed he was driving for the partnership. It was found that he had been driving, using a digital card issued to the transport manager. That use thereby concealed excess driving on 16, 23, 30 August and 4 September 2017. The vehicle was registered to Douglas Smith, but its road tax had expired on 18th October 2016.

5. Traffic Examiner, Mr Reid carried out further enquiries (statement at page 47 partnership bundle). He details how a 'notice to produce' was served on the operators,

giving until 22nd September 2017 to comply. Douglas Smith requested a 10-day extension but indicated that the transport business would not continue. An email was received from Douglas Smith requesting a 10-day extension and that vehicle RV08 KVM had been sold and that the tachograph data had not been retained. His answers in interview regarding this sale were vague and unconvincing. At best they indicate a chaotic and careless approach to compliance, with little regard to the enforcement agency.

6. Mr Reid was able to identify the following offences:

Douglas James Smith – 1 x insufficient daily rest
3 x insufficient daily rest/incorrect use of mode switch.

From the Highgate brief - 1 x exceeding 4.5 hours driving without a break

Andrew James Smith – 1 x insufficient daily rest
1 x insufficient weekly rest.

Peter Reginald Johnson – Exceed 9 hours driving
12 x Exceed 4.5 hours cumulative driving
6 x Insufficient daily rest
2 x Exceed 10 hours driving

7. He was told that Peter Johnson and Richard Burnett no longer worked for the partnership. Mr Reid also confirmed with Mrs Smith that she had not been using the vehicle on the above dates. In fact, Mrs Smith did not hold a current entitlement to drive that vehicle.

8, Douglas and Wendy Smith were interviewed under caution on 4th December 2017 and Andrew Smith on 6th December 2017.

9. Mrs Smith was already on notice following the Examiner's telephone call from the roadside. The Examiner telephoned Mrs Smith as arranged on 8th September 2017 but there was no reply and no response to the message that was left. The vehicles were removed from the partnership operator's licence on 14th September 2017. At the

interview, Mrs Smith stated that she did not realise that she was no longer in possession of her digital card until she received a call from the DVSA examiner. She does not drive the vehicles specified on the licence as she only holds provisional LGV driving entitlement and that on the days her card was used she did not drive the vehicle, but Mr Burnett did. She asserted that the partnership had stopped operating, that Mr Burnett's employment had been terminated the day he was stopped, and that Peter Johnson stopped work 4 or 5 weeks prior to that.

10. The Examiner was required to issue a final request for data from Mr Smith on 9th October 2017, but again there was no reply. When finally interviewed he enquired into the likely size of penalty for the failure to produce. Mr Douglas Smith claimed that he had stopped trading in October 2017 and that Mr Andrew Smith's role was purely one of maintenance, i.e. that this was not a partnership. He described his wife's role: to sort out the driver's hours and make sure all the sheets were correct. He confirmed that the drivers were given instruction from the customer, 'LPS'. His answers around feeder journeys caused me some concern. He stated that he did not instruct Mr Burnett to use his wife's driver card. He indicated that the driver was on a set wage with no incentive to break the law. When asked if driver hours rules to be an inconvenience he replied, "*I agree that they are necessary. But on certain data it's not, but that's my opinion. But I do technically abide by them, yeah or try to*". He was even less certain about his ability to comply with modern requirements: "*This modern feature is a bit beyond me*".

11. Andrew Smith's involvement was consistently described as limited to maintenance. He simply forwarded the notices to produce. He viewed them as having no relevance to him, but I do not understand why when he was on notice of the Public Inquiry in 2016.

12. On 21st February 2018 vehicle HX57 EZO was stopped whilst being driven by driver Darren Gleave. He confirmed that he was employed by Highgate Transport Ltd, but the vehicle was not displaying an Operator Licence disc. Mr Reid (page 50 of the company bundle) indicates that a Mrs Sarah Smethurst was the registered Director at that time. She is Douglas Smith's daughter. He was appointed a Director only 6 days later and Mrs Smethurst resigned on 16th May 2018 leaving Mr Smith as sole Director, but Mrs Smith was already in place as the transport manager. Mr Smith was the registered keeper of the vehicle from 19th December 2017, interestingly the Examiner's analysis showed Mr

Gleave to have been driving since the day before and Mr Smith's card had been used to record a journey on 14th December 2017.

13. Mr Gleave was found to be driving DG63 AXM on 6th March 2018 (statement of Examiner, Richard Mutimer at page 78 of the company bundle). The vehicle was found to have been untaxed since 31st August 2015. This led to further enquiries and eventually DVSA received vehicle data for vehicles DG63 AXM and DE11 UDG, but no driver data was received. Mrs Smethurst blamed an error in the original hardware and the replacement machine also (page 85). Mr Gleave was subsequently convicted for:

- 1 x offence of insufficient daily rest
- 1 x offence of exceeding 9 hours driving
- 1 x offence of exceeding 10 hours driving
- 1 x offence of exceeding 4.5 hours driving without a break.

14. Douglas Smith was convicted on 27th April 2018 for failing to produce records from the partnership operation and fined £550 at Ipswich court. Driver Richard Burnett was convicted on 5th February 2019 for 3 charges of failing without reasonable excuse to make a relevant record or entry and fined a total of £266.

15. At 12.15 hrs on 3rd September 2019, vehicle FG63 UDB was stopped by Thames Valley Police, having triggered the in-car ANPR system, showing the vehicle's excise licence had expired. The vehicle was displaying an operator licence disc in the name of this partnership but for vehicle F63UDB. The partners have apparently been issued with notices of intended prosecution. The decision to operate using this operator's disc and the intervention of Wendy Smith to subsequently insure the vehicle, as confirmed by a PC Pilling, clearly indicate that the previous indication that operations were being wound up is inaccurate. I have no evidence that the operators or transport manager sought to correct that information.

16. On the same day vehicle BT60 UJJ was stopped by DVSA. The statement of Traffic Examiner, Susan Lee (page 106) sets out how the driver, Peter Turner, confirmed that he was employed by this partnership, namely A & D Transport. The Examiner found that the tachograph head had been programmed with the vehicle registration mark of T555

NJD. The vehicle was untaxed and was not specified on OF1131389. On speaking to Douglas Smith, he admitted that the vehicle should have been specified on the licence held by Highgate Transport Ltd. He also admitted that he had been in possession of the vehicle for 5 weeks and whilst Mrs Smith had been feeling unwell for 3 weeks, the vehicle should have been taxed. That said he tried to blame a contractor for the calibration being out of date. I can give weight to the hearsay evidence given by the Examiner as she was still in the vehicle cab when she heard the call from Douglas Smith to Mr Turner. Mr Turner said to Mr Smith *"I told you the registration was wrong"* to which Mr Smith replied *"I know"*.

17. The convictions are a matter of record. There is no record of notification having been received by the Office of the Traffic Commissioners.

The Issues

18. As a result of the above, call up letters dated 23rd September 2019 refer to:

- the partnership's failure to notify the conviction of partner, Douglas Smith – section 26(1)(b); that convictions – sections 26(1)(c)(i); prohibitions – section 26(1)(c)(iii); breach of undertakings on the condition of vehicles, driver defect reporting and systems for drivers' hours and tachographs – section 26(1)(f); material change – section 26(1)(h) and by reference to the mandatory and continuing requirements for good repute, financial standing and professional competence;
- the company's failure to notify the conviction of the Director and driver Gleave – section 26(1)(b); those convictions – sections 26(1)(c)(i) & (ii); prohibitions – section 26(1)(c)(iii); breach of undertakings on the condition of vehicles, driver defect reporting and systems for drivers' hours and tachographs – section 26(1)(f); material change – section 26(1)(h) and by reference to the mandatory and continuing requirements for good repute, financial standing and professional competence;
- the transport manager on both licences is called in her own right to consider her repute by reference to the duty for continuous and effective management.

19. It was subsequently noticed that an application had been made by East Anglia Transport Ltd for a standard national for 4 vehicles and 4 trailers, i.e. the sum total of the two existing operator licences. The director and nominated CPC holder was given as Peter Johnson. Mr Johnson had started to make a previous application as a sole-trader in February 2019, linking him to 8 Bonds Meadow, the correspondence address for Douglas Smith and Highgate Transport Ltd. This application proposed using the same external maintenance contractor as named on the company and partnership licences and located at the same Yarmouth Business Park. I noted that his CPC was issued in 1978 with no other experience and has not previously acted as a TM. I was concerned as to the source of funds deposited to support the application. Mr Johnson was the subject of an IVA from 2013, which was not declared on the application. This was blamed on an error. Within months of being discharged from the IVA in May 2019 he claimed to have moved a significant sum from a personal account. This decision will be published and therefore made available to the relevant insolvency practitioner, whose details can be found at pages 61-62 of that bundle (and are available from the Insolvency Register).

20. As I remained to be satisfied as to the repute of the operator and nominated CPC holder (noting the age of the qualification and that it did not prevent the commission of offences to which I refer below). I made the decision to call to this hearing to consider sections 13A(2)(b), (c), (d) by reference to 13A(3)(b) and Article 4, 13C(2) and (4). I also decided to consider Mr Johnson's conduct as a driver. These concerns were reflected in the call-up letter of 12th November 2019. Mr Johnson indicated that he was content for his application to be considered on 10th December 2019, but he subsequently withdrew the application leaving only the driver conduct matter.

The Hearing.

21. The Public Inquiry was called at the request of the operators and followed a proposal to revoke. The proposal to revoke the partnership licence was dated 16th July 2019, with a response received on 31st July 2019 (page 158). That was apparently signed by both partners but written from the point of view of Douglas Smith. (Andrew Smith admitted during the first hearing that there was no effective partnership and he had no

access to financial statements.) Douglas Smith clearly states that there have been no convictions since grant and that there has been no material change. He admits that it was only as a result of Mr Reid's involvement that there has been an attempt to implement systems for drivers' hours. A response of the same date can be found at page 117 of the company bundle in which Douglas Smith questions what might impact on the company's repute and that of its transport manager, and the relevance of an incident on 7th September 2017 to the company.

22. The operators and transport manager were originally called to Public Inquiry on 28th October 2019. They were originally represented by solicitors, who attempted to secure an adjournment on the basis that there was 10 days between a return from holiday. I refused that request. On the morning of 28th October 2019, I was passed an email via Sarah Smith (aka Smethurst) dated 27 October 2019 indicating that: *Doug Smith is unable to attend he was rushed into hospital this morning I have attached the letters from hospital as evidence on this email. Wendy smith and Andrew smith will still attend if needed to or could we possibly postpone until Doug smith is in better health.* In fact, the attached letters indicate that Mr Smith was examined on the morning of 27th. There is nothing in the correspondence to the GP to indicate that Mr Smith would be unfit to attend the Public Inquiry. Statutory Document No. 9 on Case Management is very clear:

Requests for adjournments on medical grounds should be supported by medical evidence which states if and why a party cannot attend a hearing. Any court is not automatically bound by a medical certificate and may exercise its discretion to disregard a certificate, which it finds unsatisfactory and in particular where:

- *the certificate indicates that the party is unfit to work (rather than to attend the hearing);*
- *the nature of the ailment (e.g. a broken arm) does not appear to be capable of preventing attendance at a hearing;*
- *the party is certified as suffering from stress/anxiety/depression and there is no indication of the party recovering within a realistic timetable.*

23. On 22nd October 2019 my office received a letter dated 17th October 2019, signed by Douglas and Andrew Smith. I was confused by this letter as the solicitor had previously provided me with an invoice from Brittany Ferries as evidence that Mr Smith was not returning from holiday until 18th October 2019. The letter states: *The operator licence is due to renew in December 2019. We will not be renewing as we are dissolving the partnership.*

24. At the first hearing Mrs Smith notified me that her lawyer was unavailable. She attended with a retired solicitor, who I established would act as a McKenzie Friend.

25. The Office of the Traffic Commissioner wrote communicating the outcome of the first hearing on 31st October 2019. Supplementary statements from Mr Reid dated 31st October 2019 and 29th November 2019, statements of Helen Norman of DVSA dated 12th and 29th November 2019, and statement of Traffic Examiner Raymond Hawkins dated 27th November 2019, relating to continued operation of vehicles subject to a direction under section 26(6), served 2nd December 2019. Ms Norman has access to the National ANPR network on behalf of DVSA and was able to confirm the operation and the change in registration numbers, as does Mr Reid. Mr Hawkins stopped the vehicle being operated under the operator's licence granted to Thunder Trucks Ltd. OTC wrote to Thunder Trucks Ltd and Highgate Transport Ltd to alert them to the current direction on 29th November 2019.

26. The Public Inquiry was reconvened on 10th December 2019 but none of the parties attended.

Further Evidence

27. In the call up letter of 23rd September 2019, the operators were asked to produce financial evidence and maintenance documents and drivers' hours systems documentation. Both operators, partnership and company were given until 18th October 2019 to submit financial evidence. Highgate Transport Ltd supplied copy statements. The partnership supplied no financial evidence. I referred to the previous failure by the partnership in that regard, which had then led to a Public Inquiry. No-one was present with authority to confirm the authenticity of the bank statements. I also noted that the

current annual company accounts dating to September 2018, which were lodged with Companies House on 28th June 2019 showed the company as dormant, as did the previous accounts for the year to September 2017. Copy financial evidence was received from Highgate Transport Ltd in advance of the hearing date. No financial evidence was received from the partnership.

28. I requested maintenance records for 15 months and evidence of drivers'; hours and tachograph compliance. In advance of the hearing date my office received the following:

- Driver Weekly Infringement print outs in the name of A & D Transport (the partnership's trading name) for Peter Reginald Johnson from 7th March to 11th August 2019 when driving SP16 DVC. Douglas Smith told Mr Reid that Mr Johnson had stopped working for the partnership on 18th July 2017, Mrs Smith was confused about when Mr Johnson stopped work but was emphatic that it was before Mr Burnett was stopped;
- Driver Weekly Infringement print outs in the name of A & D Transport for Nicholas Joseph E Turner to 2nd June 2019 when driving SP16 DVC and T500 ADB;
- Driver Weekly Infringement print outs in the name of A & D Transport for Konstantin Sasmurin from 25th February to 11th August 2019 when driving SP16 DVC. Financial evidence indicates that he is employed by Highgate Transport Ltd.
- Driver Weekly Infringement print outs in the name of A & D Transport for Saulius 'Sonny' Liorentius from 5th November 2018 to 30th June 2019 when driving FG63 UDB;
- Incomplete Vehicle Unit Unaccounted Distance reports for T500 ADB from 23rd March 2019 to 13th July 2019 including long periods where there is no VU information. The legal statement appears to be missing from the bottom of each page;
- Preventative Maintenance Inspection reports in the name of Highgate Transport for DG64 VRE dated 2nd February – 24th August 2019, apparently signed by Andrew Smith. They suggest decelerometer testing but with no printouts and no record of whether this was in a laden condition, even after new brake pads were fitted on 2nd February 2019. DG64 VRE was specified on 23rd September 2019 (having been removed from the company licence on 22nd May 2019). There is

evidence of limited driver defect reporting between February and September 2019 but the reports are headed 'weekly'.

- Preventative Maintenance Inspection reports in the name of A & D Transport for SP16 DVC dated 20th July – 31st August 2019, apparently signed by Andrew Smith. They suggest decelerometer testing but with no printouts and no record of whether this was in a laden condition. SP16 DVC was specified on the partnership licence from 6th June to 12th September 2019 but is no longer specified on a licence.
- Preventative Maintenance Inspection reports in the name of Highgate Transport for T500 ADB dated 20th July 2019 only, apparently signed by Andrew Smith. They suggest decelerometer testing but with no printout and no record of whether this was in a laden condition. T500 ADB was specified on the company licence from 17th September 2018 to 8th May 2019 but is no longer specified on any licence.
- Preventative Maintenance Inspection reports in the name of A & D Transport for F693 UDB dated 20th October 2018 – 21st September 2019 only, apparently signed by Andrew Smith. They suggest decelerometer testing but with no printout and no record of whether this was in a laden condition. FG63 ADB is specified on the partnership licence. There is evidence of limited driver defect reporting between October 2018 and September 2019 but the reports are headed 'weekly'.

29. Very few of the driver infringement reports appeared to have been signed. A number disclosed serious breaches of the legislation.

30. There continued to be vehicles specified on the partnership licence despite the attempts by the partnership and transport manager to persuade DVSA that the operation was packing up, on or around 19th September 2017. In the letter dated 31st July 2019 this was changed to 'downsizing'. In the letter of 17th October 2019, I was told that the operation is running down towards December 2019.

31. In the absence of financial evidence to show that the partnership has the necessary funds available to support its establishment and the safe operation of vehicles I referred

to the approach described by the Upper Tribunal in *2012/005 A N D Haulage Ltd* and the use of suspension to secure compliance with directions. The Tribunal described the use of the power as a powerful spur to rapid action and to how it can provide a measure of protection to the public in cases where it appears, on paper, that there are real concerns as to road safety. The Tribunal urged caution and I therefore considered the questions which the Tribunal posed:

- (i) Is it necessary to compel the operator to do something? – evidence of financial standing is outstanding, Douglas Smith is absent without appropriate medical evidence, the information provided by the partnership is inconsistent with that provided to DVSA and suggests continued operation
- (ii) Is the threat to road safety so serious that suspension pending action is essential? – the Tribunal itself has repeatedly described drivers' hours compliance as fundamental to road safety, admissions have been made to DVSA that there has been a material change in entity and a failure to manage the operator's licence. I refer to the documentary evidence produced today and the indications in correspondence with my office;
- (iii) Is suspension to prompt the operator to do something proportionate to the situation before the Traffic Commissioner? – I judge that it will, if the letter of 17 October 2019 is to be believed.

32. The partnership was present in the form of Andrew Smith. The company was not. I accepted that the presentation at hospital on a Sunday might not have allowed time to obtain relevant medical evidence. Douglas Smith was said to be at home so I expected evidence to be submitted within 7 days so that I could relist this matter as quickly as justice allows. I drew back from suspending the licence of the company but on the basis of an adverse finding under section 26(1)(h) on the material change in the financial position of the partnership, I suspended that operator's licence until acceptable verified or original financial evidence is produced which meets the prescribed sum and is in a form as set out in Statutory Document No. 2. I made an order under section 26(6) preventing the use of vehicles specified on the partnership licence from being operated under another operator's licence during the period of suspension.

33. Traffic Examiner Raymond Hawkins states that on 26th November 2019, YNZ9178 was stopped at Elmswell pulling a semi-trailer C389558. The combination was laden with a shipping container in the name of Open Ultra, with a delivery note indicating that the vehicle was en route to Leicester. The driver was identified as John Martin Finnegan who confirmed that he was driving under the instruction of A & D Transport and had been employed for the last 3 weeks. However, the vehicle was displaying a Standard International Goods Vehicle Operator Licence disc in the name of Thunder Trucks Limited, OF2003278. Mr Finnegan later claimed to have made a mistake and then asserted that he was working for Thunder Trucks Ltd and that A & D Transport intended to buy that company in the New Year. Mrs Smith is listed as the Transport Manager for Thunder Trucks Ltd. Mr Finnegan was issued with an Immediate Prohibition Notice relating to a seriously under inflated off-side outer tyre on axle 3. The Examiner downloaded the driver's tachograph card and vehicle unit. The vehicles' tachograph unit was recalibrated on 9th November 2019 when its registration number was changed from DG64 VRE to YNZ9178. That vehicle was made the subject of a direction under section 26(6) preventing its operation from 28th October 2019 and was therefore being operated illegally. As already indicated, Douglas James Smith's card had been used whilst driving the vehicle on 31st October 2019, i.e. 3 days after that direction was made. Analysis showed that it had been driven for 47 minutes and had travelled 50 km. A workshop card was inserted on 9th November 2019 connected to the recalibration, but Douglas Smith's card was inserted again on 11th November 2019 when the vehicle was driven for 45 minutes and covered 28 km.

34. The other vehicle which was the subject of the direction preventing its operation from 28th October 2019 held the registration FG63 UDB. That registration was changed to YNZ9180 and was then specified on the operator's licence held by Highgate Transport Ltd on 5th November 2019. The statement of Helen Norman, who is authorised to access the Automatic Number Plate Recognition system on behalf of DVSA. She conducted a search of the data base and confirmed sightings of that vehicle being used west bound on the A14 on 31st October 2019 and on the same road travelling east, then west and then east again on 1st November 2019.

35. The medical evidence was not forthcoming within the agreed timetable, so I decided to relist at a date giving Douglas Smith sufficient time to prepare. I

subsequently received information from DVSA to indicate that the digital tachograph card issued to Douglas James Smith had been used in a vehicle, which then bore the registration number YNXZ9178, on 31st October 2019 and again on 11th November 2019. In the meantime, Mrs Smith resigned from the partnership licence leaving them without a Transport Manager and unable to demonstrate professional competence from 5th November 2019.

36. I refer to the application had been made by East Anglia Transport Ltd at paragraph 19 above. In the course of correspondence, emails were received from "*Wendy Smith <eatransportltd@gmail.com>*" even in response to questions regarding his links to the partnership and company. At page 49 of that bundle I found an email dated 15th October 2019 purporting to come from Mr Johnson, using the above email address, claimed that he "*used to drive them I finished with them about 12 months ago*". I refer to the documentation above – that statement is untrue. I retained concerns as to the repute of the applicant due to the links identified below, the previous history and the offences recorded against the sole Director; as to the availability of the finance as the source has not been identified and the timing of its provision leads to further questions regarding the veracity of the application, Mr Johnson having also failed to declare the IVA; for the same reasons

37. On 2nd December 2019 the Office of the Traffic Commissioner in Cambridge received three letters, in the same font and format, all dated 28th November 2019. The first was signed by Mr Johnson, who indicated that East Anglia Transport Ltd, wished to withdraw its application so that he did not need to attend the Public Inquiry. He appeared to have overlooked the matters concerning his conduct as a vocational driver. The other two letters were apparently signed by Wendy Smith. One letter was said to be from the partnership trading as A & D Transport indicating that it had ceased trading due to the ill-health of Douglas Smith and that the partners would not attend the Public Inquiry. As Mrs Smith had already resigned as Transport Manager on 5th November 2019, I could attach limited weight to the content of this letter. The other letter purports to be sent on behalf of Highgate Transport Ltd and again refers to the ill-health of Douglas Smith. It also refers to the enquiries carried out by DVSA which Mrs Smith describes those as "*a form of intimidation*". Again, it states that the company will not be attending the Public Inquiry. I can see no basis for that allegation. The

enforcement body is responsible for the investigation of non-compliance and unlawful operations.

38. On 4th December 2019 the Office of the Traffic Commissioner wrote to Mr Johnson to remind him that I was still to make a decision in respect of his vocational entitlement. He was advised to attend and that a decision might be made in his absence. I have received no response.

39. The Office of the Traffic Commissioner emailed the partnership on the same date, to alert them that I was unable to accept correspondence from a former Transport Manager. My office requested both operators, partnership and company, to make any representations regarding the impact of regulatory action if, as the letters indicated, they were not going to attend the final hearing. On 9th December 2019, OTC received a letter purporting to come from the partnership, apparently signed by Douglas Smith. He confirms an intention to not renew the operator's licence and that the partnership will be dissolved. The letter apparently seeks permission to sell unnamed vehicles. It indicates that the partnership is no longer trading.

40. On 9th December 2019, the OTC received an undated letter, said to be from Douglas Smith acting as Director of Highgate Transport Ltd indicating his wish to retain this licence. He refers to financial problems, should I take action against the company licence, but did not give any further detail. He suggests that Mrs Smith is no longer acting as Transport Manager: *"I will be getting a new transport manager as I don't think I've been very fair to Wendy Smith. A new transport manager would have full control of the business and be in control of the day to day running as I am not in the best of health at the moment"*. He overlooks the fact that the ability of a sole Director is an essential element in determining the repute of the company. He indicated his willingness to give additional undertakings and acknowledges that he put Wendy Smith in a difficult position. He seeks to persuade me not to take action against her Certificate of Professional Competence.

41. On the basis of the evidence I was satisfied that the adverse findings proposed under section 26 were made out in respect of both operators. I therefore proceeded to consider the mandatory and continuing requirements required in order for any standard operator's licence. I was so concerned by the lack of compliance (and the future prospects), that

I adopted the approach described in *2018/045 Ian Francis Hayman* and proceeded to give my decision on the day:

The Balancing Exercise

42. Douglas Smith was convicted of one road traffic offence and, whilst Schedule 3, paragraph 2(b) would not apply to a single offence, repute was very much at issue.

43. In respect of the company, I am entitled to treat the conduct of a sole Director effectively as the conduct of the limited company and repute or fitness is determined accordingly, as per *2013/008 Vision Travel International Limited* and *2013/061 Alan Michael Knight* - as well as the operator licensing obligations, a company director must exercise his or her statutory duties of demonstrating independent judgement, skill, care and diligence, as per sections 173 and 174 Companies Act 2006. In his latest correspondence Douglas Smith suggests delegating away any responsibility in future.

44. The partners were at Public Inquiry which concluded on 14th July 2016, when I made adverse findings that a change in Transport Manager had not been notified, that there had been prohibition notices issued and a breach of undertakings to keep vehicles and trailers in a fit and serviceable condition, to have an effective written driver defect reporting system, complete records and to comply with the rules on drivers' hours and tachographs. The repute of the operators was found to be tarnished. I warned the partners as to their future compliance and took deterrent action by curtailing the licence by 1 vehicle. I allowed Mrs Smith's appointment as Transport Manager upon attendance at a two-day CPC refresher course. Following which there can be no claim that she did not know what was expected of her.

45. The suspicions, aired previously proved to be correct; the partnership proved to be a sham. On his representations at the first hearing, Andrew had no real involvement in its management. I refer to the findings made, as recorded in the letter of 30th June 2016. Andrew and Douglas Smith were fully on notice that Andrew Smith was required to take an active part in the running of the operation. He promptly excused himself from the second hearing. His engagement with Mr Reid during this current investigation indicates

that little has changed except that he did not continue with the employment with Highgate Transport Ltd but has continued to act as a mobile fitter for Guest Truck and Van.

46. I do acknowledge the improving 80% pass rate at annual test recorded by the partnership. The notices issued against the partnership are a matter of record and are included in my bundle at page 126. There have been six roadworthiness prohibitions issued to the partnerships' vehicles and trailers. Of these three were immediate, two were delayed and one variation. There was one Driver's Hours and Tachograph offence notice issued. Only two notices have been issued against the company (page 107) which resulted from driver failure and a lack of maintenance. The initial pass rate of 33.33% was apparently showing some signs of improvement. There was no explanation as to how it was permitted to deteriorate to that level.

47. I am particularly mindful of what was described by the Tribunal as my preventative jurisdiction in *2013/022 David James Roots t/a Orange Coach Travel*. Traffic Commissioners are not required to wait and then react after some serious event has occurred because they can, when the evidence justifies it, take action to prevent the serious event from occurring in the first place. Here, both entities share the same maintenance providers and the same transport manager. Even when Mr Reid visited Highgate Transport Ltd on 5th July 2018 it was found to be operating a vehicle out of annual test. I only have to refer to the chronology above to show that the entities are run in the same way: where untaxed vehicles are permitted to operate with little indication of supervision to the point where drivers commit offences, sometimes with the use of the transport manager's card, the Director has committed offences, where a vehicle has operated without insurance. The fact that a reply was sent in Mrs Smethurst's name on 10th July 2018 (page 105 company bundle) long after she had resigned as a Director is one of the clearest indications as to the way in which these connected operations have been run.

48. It is often repeated, but appeal cases such as *2006/277 Fenlon* have stressed: *that trust is one of the foundation stones of operator licensing. Traffic Commissioners must be able to trust operators to comply with all the relevant laws, rules and regulations because it would be a physical and financial impossibility to police every aspect of the licensing system all day and every day. In addition operators must be*

able to trust other operators to observe the relevant laws, rules and regulations. If trust between operators breaks down and some operators believe that others are obtaining an unfair commercial advantage by ignoring laws, rules or regulations then standards will inevitably slip and the public will suffer. In this case Andrew and Douglas Smith, and the transport manager, Wendy Smith, should have been particularly alert to the need for strict compliance given the history to which I have referred.

49. There are those cases where the facts speak for themselves. The investigation commenced with indications of serious non-compliance which emerged in 2017. The lack of cooperation with those enquiries continued. The approach of the operators was reflected in the response to correspondence from the OTC. This was further compounded by the obvious attempts to use these operator licences to continue in operation, regardless of the licence requirements. I am satisfied that the application by Mr Johnson was just another example; a contingency, in case of action being taken these two licences. He and these operators and transport manager sought to mislead me regarding his involvement. I am satisfied on the evidence that they cannot be trusted to work within the licensing regime.

50. Mrs Smith denies any knowledge of her card being used by a driver until the intervention by DVSA. Neither driver has been interviewed to date. There is no direct evidence to demonstrate intent on her part, but there is plenty of evidence that she should have been on notice of what was required of a transport manager. The events outlined above do not amount to continuous and effective management. It is not even close. She failed to meet the statutory duty across two operator licences even following recent CPC refresher training, upon which basis she was permitted to be appointed.

51. Her description during interview under caution: that *“at the weekend we would check the vehicles, get the drivers’ paperwork in, sort out and file away what needed to be filed away”* should be contrasted with the extensive duties described at paragraph 54 of Statutory Document No. 3 on Transport Managers. She refers to having no involvement with scheduling and would hear nothing from the drivers in the week. She and the operator were content to let *“LPS do the planning, they communicate and give them the jobs. They (the driver deals with the planner themselves and we don’t need to have any involvement”*. Her responses provide a

picture of where the responsibilities of transport manager and operator were simply given away. She also indicated that she had driven during 2017 with no Driver CPC.

52. I am entitled to be alarmed at her involvement in the above failings. I refer to her clear involvement with the attempts to circumvent the operator licensing system and her close involvement with the application by Mr Johnson including statements made in its support, which she would have known to be untrue. Douglas Smith seeks to persuade me that she was put upon, but all the evidence suggests that she had knowledge of the attempted manipulation. In reality it was Mrs Smith who enquired when I made the direction under section 26(6) against the partnership, *“can we sell the vehicles”* and she must have been aware of the continued use of vehicles under licences where she was named as Transport Manager. As per the Upper Tribunal decision in *2015/049 Matthew Reynolds*, I find that she has lost her repute as transport manager. It is clear, that simple attendance at another CPC refresher would not be sufficient rehabilitation in order to allow her to re-enter the industry as a transport manager. Her actions have abused the trust that I placed in her and, in her absence, I can identify no actions which might rehabilitate her by rebuilding that trust except by the expiry of time. She can seek to vary the disqualification by application under paragraph 17 of Schedule 3 but it is difficult to conceive how any such application might succeed in a period under 10 years from the date of this decision.

53. For the reasons summarised above, when I posed the initial question put by the Tribunal in *2009/225 Priority Freight*, I found as a result of the conduct of Douglas Smith, it to be highly unlikely that either operator would comply in future. At the risk of over-reliance on the Upper Tribunal, the decision in *2011/036 LWB Ltd* that *the persistent failure to comply with undertakings, more especially following the warning that the Appellant’s good repute was tarnished as a result of earlier breaches, the failure to monitor and supervise both staff and record keeping, the inability to exercise proper control... and the finding that the Deputy Traffic Commissioner could no longer trust this operator, provide compelling reasons for the conclusion that this Appellant had lost its good repute* should be sufficient warning for operators and transport managers. I adopt the same reasoning here. Andrew Smith left the running of the partnership *“down to Dad”*. Even if I were not obliged to revoke the licences on the basis of a material change in professional competence and financial standing and, in

the case of the partnership, the entity itself, I simply cannot trust these operators to comply in future. I have repeatedly been told that the partnership has or will cease operations. That must now happen. Mr Smith indicated that company may suffer financial distress if revoked. However, in the interests of all those operators who strive to comply with the requirements and of the operator licence system itself, I must remove both operators from the industry.

54. Responsible operators reading this decision will note the details of persons and vehicles involved. Any future applications will need to be referred to a traffic commissioner.

55. I reserved my decision in respect of disqualification but referred to the assistance to be drawn from *2010/29 David Finch Haulage* on the approach to be taken. The imposition of a period of disqualification following revocation is not a step to be taken routinely, but nor is it a step to be shirked, if the circumstances render disqualification necessary. No additional feature is required over and above the grounds leading up to revocation but here it is required to reassure responsible operators and interested parties that the operator licence system works. I am mindful of recent comments by the Upper Tribunal in *2018/072 St Mickalos Company Ltd & M Timinis* but the application of deterrent action is well understood and it was usefully restated in the recent case of *2019/025 John Stuart Strachan t/a Strachan Haulage*. I judge that necessary in all the circumstances outlined above. One of the aims of the regime is deterrence, both for those connected with this operation and for operators as a whole, who might be tempted to flout the system. This was a bad case. The operator licence regime cannot be stressed to the point of destruction by individuals who move between licences, ignore the basic requirements for tax and insurance through their control of vehicles; nor can I allow individuals to allow their names to continue to be used for licensing purposes when they have long since ceased to exercise oversight, if they ever did. In the circumstances of this case I can distinguish between the failures of Andrew Smith to act and the involvement of Douglas Smith with the adverse findings recorded against both entities above. It is appropriate for both individuals to be disqualified from holding or obtaining an operator's licence and also from being involved in management, administration or control of the transport operations of an entity that holds or obtain such a Licence in Great Britain. Andrew Smith will be

disqualified for a period of three years; Douglas Smith will be disqualified for a period of ten years.

56. I turn then to the 21 offences recorded against Mr Johnson as a driver. I note that he has sought to avoid responsibility by failing to attend this hearing. At one stage he even proposed that he be allowed responsibility for running a new transport operation. Even taking account of the age of the offences, there is no evidence to suggest that he has taken action to address the risk presented from his professional driving. I repeat the point often made by the Upper Tribunal that driver's hours compliance is fundamental to road safety. He committed a further CU80 offence after those matters. I refer to Statutory Document No 6 and find that the offences indicated persistent offending. In those circumstances I might impose a 4-week suspension per offence, aggravated by the non-attendance. However, this would go beyond the usual 6-month suspension and I must therefore disqualify Mr Johnson from relying on his vocational entitlement. Any future application will need to be referred to a traffic commissioner.

Richard Turfitt
Traffic Commissioner
13th December 2019

Addendum

57. This was a very thorough investigation by the DVSA Examiners. As a result of the non-attendance none of their evidence was challenged, but their efforts to follow reasonable lines of inquiry should be recognised.