IN THE UPPER TRIBUNAL

Neutral Citation number: [2022] UKUT 00320 (AAC)

Appeal No. UA-2022-000083-T

ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the WEST MIDLANDS TRAFFIC AREA

Before:	M Hemingway:	Judge of the Upper Tribunal
	D Rawsthorn:	Member of the Upper Tribunal
	K Pepperell:	Member of the Upper Tribunal

Appellant: REL Haulage Limited

Reference No: OF2044513

Representation

For the appellant: Mr S Clarke (Counsel)

Heard at: London

Date of Hearing: 12 October 2022

Date of Decision: 25 November 2022

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is allowed. The decision of the Traffic Commissioner for the West Midlands Traffic Area, refusing the appellants application for a standard national goods vehicle operator's licence made on 7 January 2022, is set aside. The case is remitted for reconsideration at a public inquiry which shall take place before a different Traffic Commissioner to the one who decided the case on 7 January 2022.

Subject matter: Repute

Cases referred to:
Bradley Fold Travel Ltd and another v Secretary of State for Transport [2010] EWCA Civ 695
NT/2013/82 Arnold Transport and Sons Ltd v DOENI
T 2016/72 Catch 22 Bus Limited and Phillip Higgs v Secretary of State for Transport [2019] EWCA Civ 1022
Ladd v Marshall [1954] EWCA Civ 1
T/2015/36 W. Martin Oliver Partnership
2001/72 AR Brooks

2006/313 D Lloyd
2009/516 F Ahmed and H Ahmed
VTB Capital PLC v Nutritek International Corporation and others [2012] EWCA Civ 808
Vision Travel International Ltd [2013] UKUT 0411 (AAC)

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal has been brought by REL Haulage Limited ("the appellant company"). The appeal is directed towards a decision of the Traffic Commissioner ("the TC") explained in written reasons of 7 January 2022, to refuse its application for a standard national goods vehicle operator's licence.

2. We considered the appeal at an oral hearing which took place at Field House in London on 12 October 2022. The appellant company was represented, at that hearing, by Mr S Clarke of Counsel. We are grateful to Mr Clarke for his helpful and straightforward submissions and for the documentation which he prepared. As to that, at the substantive hearing of the appeal, we had an Upper Tribunal bundle consisting of 990 pages. That material was supplemented by a skeleton argument of 6 October 2022, signed statements of one Andrew Pervis Scott and one Adam Lewis (both of which are dated 7 July 2022) and some case law. We were not asked to and did not hear oral evidence from either Mr Scott or Mr Lewis. After the hearing we reserved our decision to enable us to consider the various arguments which Mr Clarke had raised before us.

Factual and procedural background

3. We shall refer, albeit briefly, to certain of the protagonists. Mr Ian Newman ("Mr Newman") was, at the time the appellant company applied for the above licence and at the time of the TC's decision under appeal, the appellant company's sole director. He was appointed as such on 13 April 2021, shortly prior to the licence application being made. As we understand it, he remains the appellant company's sole director. As to Andrew Pervis Scott ("Mr Scott") he describes himself, in his witness statement, as "*a British entrepreneur*" and he goes on to explain, as we understand him, that he specialises in "*investing in turnaround projects*". He adds "*as an offshore investor I own 25% of the company REL Haulage Limited ("hereafter "Haulage"), held through my investment vehicle REL Investment Management Limited, a company established and registered in Jersey*". He provides information about other of his business interests which we need not make reference to at this stage. He is not and as we understand has never been a director of the appellant company. He further indicates, again in his witness statement, that he has never been a director of a company called REL UK Holdings Limited (see below). Mr Scott did not attend the PI which considered the appellant company's licence application, and it appears he could not have been compelled to do so although we can see no reason as to why he could not have attended and given evidence if wished. But his position is that there was no signal sent to him to suggest that he should do so and no reason to think that he should do so. Adam Lewis ("Mr Lewis") also describes himself as a British entrepreneur who specialises in investing in turnaround projects. He was, at the material times, the sole director of a company called REL Storage and Logistics Limited. He was not, at the material times (and it seems to us he was not at any time) a director of the appellant company. At the PI which considered the appellant

company's licence application, the situation of REL Storage and Logistics Limited was also considered. That company had been called to the PI as a result of a Driver Vehicle Standards Agency (DVSA) maintenance investigation carried out in June 2021, the outcome of which was marked "*unsatisfactory*" in consequence of what the TC described as "*poorly completed safety inspection sheets and, ineffective driver defect reporting system, and inadequate (mobile) maintenance contractor and a prohibition issued to a trailer for a defective tyre*". Mr Lewis attended that PI with respect to his involvement with REL Storage and Logistics Limited. It is his position that he was not there and was not in a position to answer for any concerns concerning the appellant company. It is fair, we think, to describe Mr Scott and Mr Lewis as being business associates. In the skeleton argument referred to above, Mr Clarke described Mr Scott and Mr Lewis as "*persons with relevant interests in both the outcome of the public inquiry and of this appeal"*.

4. As to the corporate protagonists, it is intended the appellant company (if it gets a licence) will operate as a haulage company. At the time the licence was sought it was envisaged that it would take over the haulage activities of REL Storage and Logistics Limited. REL Storage and Logistics Limited had been operating in that field but was described at the hearing before us as now being "*a warehouse operation*". REL Investment Management Limited is a company Mr Scott has described as "*my investment vehicle*". That company, as Mr Clarke confirmed to us at the hearing, owns 25% of the appellant company. REL UK Holdings Limited was established by Mr Lewis and the "*REL Group Limited (of Malta)"* on 25 October 2018 as a UK based investment vehicle. According to the history of events given by Mr Scott in his witness statement, Mr Lewis held 10% of the allotted shares of REL UK Holdings Limited on incorporation. On 7 November 2018 REL Group Limited transferred its holding in REL UK Holdings Limited to Mr Scott who, on 10 July 2020, transferred his holding in REL UK Holdings Limited to REL Holdings Limited which he refers to as "*my Jersey based investment company*".

5. To complete the corporate history, there was a company called BB Transport Limited which held a goods vehicle operator's licence. Its director was Mr Lewis. Under the terms of its licence, it was authorised to operate 28 vehicles and 10 trailers. According to records held by the Office of the Traffic Commissioner ("OTC") 17 of its vehicles were removed from that licence and included in the licence of REL Storage and Logistics Limited. Again according to the OTC, liquidators were appointed, with respect to BB Transport Limited, on 2 November 2021.

6. On 23 November 2021 the OTC sent a call up letter to the appellant company informing it that its application, which was for authority to utilise 50 vehicles and 50 trailers, was to be considered at a PI. On 29 November 2021 a call up letter was sent to the appellant company informing it that the PI would take place on 10 December 2021.

7. Issues have arisen in this appeal as to the adequacy of information given in the call up letter of 23 November 2021, in the context of fairness. We shall, therefore, say something about the content of that letter. It explained that the PI would afford an opportunity for the TC to be shown how "*the company meets the requirements*", that being a reference, we are sure, to statutory requirements for the granting of a licence as contained within the Goods Vehicles (Licencing of Operators) Act 1995 ("the Act"). It was suggested in that letter that the company ought to "*identify competent legal or professional help and representation quickly*" unless those acting for the company were "*confident*" that such would not be needed. It was said, amongst other things, that the TC wished to be satisfied that the appellant company is

"*of good repute*". Reference was made to the financial situation of the appellant company and this was said:

> "The monies for the applicant company have been provided by REL Investment Management Limited a company run by Adam Lewis which is described as a Jersey based private equity company on its website".

8. The letter then referred to Mr Scott and noted that it had been indicated on behalf of the applicant company that he was the provider of the company finance. As indicated, REL Storage and Logistics Limited was also called to the same PI (a conjoined PI). Other documentation concerning the PI was subsequently sent to the appellant company prior to the PI taking place but we shall say more about that below.

9. The PI went ahead as scheduled. Mr Newman was in attendance on behalf of the appellant company. Mr Lewis, according to indications he has subsequently given, was in attendance solely in his capacity as director of REL Storage and Logistics Limited. Mr Scott, as we have made clear, was not in attendance. It is right to say that the call up letter did not invite Mr Scott to attend nor suggest that he should do so.

10. It appears that the TC had in his mind, at the outset of the PI and presumably before, certain concerns which might sometimes arise when one company effectively takes over part of the business of another company which then ceases to trade. Of course, in this context, the appellant company was proposing to take over the existing business of REL Storage and Logistics Limited, which had, itself, incorporated some elements of BB Transport Limited. The TC made these comments:

> "……. My worry when I see applications which are basically continuations of previous or existing licences, is I'm sure you can understand this, that it is all too prevalent in the road haulage world for company A to go bankrupt leaving creditors high and dry, HMRC normally inform us to one of them. The vehicles somehow magically appear on company B's licence from the same premises with the same directors and everything carries on. Often the merest of name changes, you know (inserted here or there) and everything goes on fine except for the poor people left high and dry owed hundreds of thousands of pounds. And that to me is qualitatively different from a company which goes bankrupt in 2021 and then in 2025 a licence is applied for well then that's obviously a different kettle of fish….".

11. Mr Clarke has taken us, in his skeleton argument and oral submissions, to other comments of the TC made during the course of the PI which he says, whilst he was careful to stress before us that he was not seeking to argue bias, suggest the TC had a negative general view of what Mr Clarke calls "*the "REL business model*". Amongst the comments of the TC which Mr Clarke has set out in his skeleton argument, are the following:

> "Right. I'm struggling. I'm struggling to see what kind of benefit to society there is from you purchasing bits that are viable and leaving everyone else with the debts. And then escaping to form a new company with the viable bit".

12. That observation was directed towards Mr Lewis. It is perhaps worth pointing out, though, that the transcript records Mr Lewis as having given a relatively lengthy response which the TC listened to without interruption. Another comment Mr Clarke highlights, was directed towards

other business interests and business involvement which Mr Scott and Mr Lewis have had. The TC said this:

> "….. I realise it is a long time since July to be considering this but there are reasons why it's taking this long and that is the seemingly chequered history that Mr Scott and you Mr Lewis have had with companies in the past. Every company that you both have been involved with seems to have gone bankrupt owing a lot of money to people"

And then:

> "well, do you have BB Transport and Storage and Logistics just recently, prior to that for Mr Scott there's been Oxford Hotel Management Limited, Dova Interiors Limited and Croft Hotel Bournemouth Limited, Woodcroft Tower Hotel Limited. So yeah. Oh, and Bison Transport and [Roadways] express have both gone out there as well".

And then:

> "….. What is Mr Scott's involvement he's just a kind of guy sitting in a chair with a white cat and jersey as he dispenses lots of money around".

And then, this being a remark which Mr Clarke suggests shows an inappropriate preference on the part of the TC to have before him unrepresented individuals:

> "Yes, it's always better to talk to the actual operator people rather than have it all sent through a highly paid barrister. Well, so yeah on the summary I mean as far I'm as I'm aware it's pretty well alright except maybe when one or two licences were refused that was prior to the involvement with your stroke with Mr Scott".

And then:

> "yeah, why does it have to be an offshore investor though……"

And then:

> "well, I suppose that at least its Jersey and not Cayman Islands."

13. The PI appears to have lasted for something in the region of 1 hour and 12 minutes. The transcript runs to 24 typed pages.

14. It is apparent that, prior to the PI, the OTC had conducted some research into the business interests of Mr Scott and Mr Lewis. Such was referred to by the TC in his written reasons of 7 January 2022 (see below). The OTC also made some post PI inquiries of Mr Newman, specifically as to whether he had paid for his 75% shareholding in the appellant company. He responded in writing by indicating that he had not done so. He explained "*the investment provided by Andy Scott is both an investment in the business and an investment in myself*".

Some relevant legislative provisions

15. Prior to setting out what the TC decided and why it was that he reached the outcome he did, it is worth setting out something of the relevant statutory framework.

16. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 provides, subject to certain limited exceptions which have no application here, that "*no person shall use a goods vehicle on a road for the carriage of goods for hire or reward, or for or in connection with any trade or business carried on by him, except under a licence issued under this act*…."

17. Section 13 of the Act provides that upon an application for a standard licence (and it is a standard licence which the appellant company was seeking) a TC must consider, amongst other things, "*whether the requirements of sections 13A and 13C are satisfied*". Section 13A relevantly provides:

> "(1) …..
> (2) the first requirement is that the traffic commissioner is satisfied that the applicant –
> (a) …..
> (b) is of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3)….".

18. Paragraph 1 to Schedule 3 relevantly provides:

> "**1.-**
> (1) In determining whether an individual is of good repute, a traffic commissioner may have regard to any matter but shall, in particular, have regard to –
> (a) any relevant conviction of the individual or of his servants or agents;
> (b) any other information in his possession which appears to him to relate to the individual's fitness to hold a licence.
> (2) in determining whether a company is of good repute, a traffic commissioner shall have regard to all the material evidence including, in particular-
> (a) any relevant convictions of the company or of any of its officers, servants or agents;
> (b) any other information in his possession as to the previous conduct of-
> (i) any of the company's officers, servants or agents, or
> (ii) any of its directors, in whatever capacity,
> if that conduct appears to him relate to the company's fitness to hold a licence……"

19. As to the scope of an evaluation concerning repute, in *NT/2013/82 Arnold Transport* and *Sons Limited v DOENI*, the Upper Tribunal commented that the breadth of the requirement to be of good repute meant "*for example, that an operator who cannot be trusted to comply with the operator's licencing regime is unlikely to be fit to hold an operator's licence*". In *T/2016/72 Catch 22 Bus Limited* and *Phillip Higgs v Secretary of State for Transport* it was said that a decision-maker may have regard to conduct which is not unlawful. In that case, the appellant's conduct which had involved following and filming the then Senior Traffic Commissioner in an attempt to obtain footage which might cause her reputational damage, was relevant to good repute. That decision of the Upper Tribunal was upheld in the Court of Appeal (*Catch 22 Bus Limited* and *Phillip Higgs v Secretary of State for Transport [2019] EWCA Civ 1022)* where it was said by Sharp LJ, giving the leading judgement, that the facts demonstrated that the conduct of Mr Higgs "*could properly be characterised as an afront to the regulatory system rather than (merely) an afront to the particular individual concerned*".

The TC's decision and his reasoning

20. The TC decided to refuse the licence application pursuant to Section 13A(2)(b) of the Act for the stated reason "*The applicant is not of good repute*". With respect to REL Storage and Logistics Limited it was decided to issue that company with "*a formal warning that it must notify material changes within 28 days of them occurring*". It also decided that the good repute of its transport manager was retained.

21. The TC's written reasons run to 5 pages. In seeking to set out the relevant background, the TC noted that the appellant company had been required to show the availability of financial resources, given the number of vehicles it was proposing to operate, amounting to the sum of £228,500, and that the sum of £229,000 had been deposited in its account prior to the application being made. The TC observed "*the source of the funds was REL Investment Management Limited, a Jersey based company controlled by an Andy Scott*". The TC noted that Mr Newman had indicated by letter that the intention was for the appellant company "*to take on some of the profitable work of BB Transport Limited... and REL Storage and Logistics Limited…,"* and that it was anticipated that the licences of the latter two companies would then be surrendered. The TC pointed out that the director of both of those companies was Adam Lewis and that Mr Newman had been the transport manager for BB Transport Limited.

22. As to the OTC's pre-PI hearing research, the TC recorded:

> "4. CLO's research discovered that Andy Scott (who had essentially provided the finance for the applicant company Haulage) had previously been a director of REL Limited, REL Coffee Limited, Dova Interiors Limited and Woodcraft Tower Hotel Limited, all of which companies had been dissolved following compulsory strike off. A further two companies of which he had been director, Oxford Hotel Management Limited and Woodcraft Hotel Bournemouth Limited had entered liquidation.
>
> 5. CLO also found that Adam Lewis, the director of BB and Storage, had also been a director of Bison Transport Limited (which entered liquidation in February 2020) and Roadways Express Limited (entered liquidation in October 2020).

23. The TC then went on to explain that:

> "6. Because of fears that the application by Haulage might be a device to sidestep liability for debts incurred by BB and Storage, and because the track record of both Andy Scott and Adam Lewis appeared to be littered with failed companies, the traffic commissioner for the East of England decided to call the application to a public inquiry.

24. We pause there to note that both Mr Lewis and Mr Scott have disputed a number of the findings of the TC including those relating to their past business records and have sought to vigorously defend their conduct and their business methodology. We are not making any findings of our own as to the business methodology of either of them. They are not on trial before us.

25. The TC observed, in his written reasons, that he had drawn Mr Lewis's attention to what he described as "*the significant criticisms of his conduct made in the Liquidators Report concerning Roadways Express Limited*" a company which had entered liquidation in September of 2020, seemingly with significant debts including a debt to HMRC. The TC also noted that Mr Lewis disagreed with those criticisms "*and was in the process of challenging them*". There then followed this:

> "20. I observe that the bank statements provided by Haulage in support of its application suggested that the company might already be operating HGV's. Regular vehicle tax payments to DVLA and salaries to drivers were being recorded. Mr Newman admitted that the company "might have jumped the gun a bit"."

26. The above seems to suggest the appellant company had or at the very least might have commenced operating in a way which required a licence without actually having one. We must confess to some surprise that more was not made of this. After referring to the post PI hearing research and Mr Newman's response (see above) the TC went on to set out his findings and reasoning. This is what he said:

> "**Considerations, findings and decisions**
>
> 24. In coming to a decision on the application by Haulage I have made the following findings:
>
> > "i. the company has in effect already started operating HGV's, despite Mr Newman's assurance in August 2021 that it would not do so in advance of authority being granted. The company accepted at the inquiry that it had "jumped the gun".
> >
> > ii. Ian Newman is not the sole controlling mind of Haulage. Andy Scott has put up all the money, while Adam Lewis continues to exercise an overseeing role.
> >
> > iii. Adam Lewis has been strongly criticised by the liquidator of one of his previous companies, Roadways Express Limited, for failing to cooperate with her investigations thus hampering her from being able to reach a view on whether the company traded improperly before entering liquidation.
> >
> > iv. Andy Scott and Adam Lewis have a long history of failed road haulage companies behind them - companies that enter liquidation owing large sums of money to HMRC and other creditors. They hive of the profitable parts into new companies, leaving creditors of the old companies high and dry.
> >
> > v. a similar intention lies behind the application from haulage: it is intended to be a vehicle for the profitable parts of Storage, leaving the rest of Storage to go into liquidation owing money.
> >
> > vi. showing me a letter, dated the very day of the inquiry, threatening staff with redundancy as a result of the traffic commissioner's decision, was a repugnant attempt to influence my decision and not the act of a reputable company. As it happens, I have neither revoked nor suspended the licence of Storage.

> vii. it follows from sub-paragraphs (i) to (vi) above that REL Storage Limited and the people behind it are not of good repute and are not a business or people in whom I could have any trust. It is just the latest domino in the series of failed companies overseen by Mr Scott and Mr Lewis. Mr Newman is a front man but has no skin of his own in the game".

27. Whatever view might be taken as to the soundness of the TC's findings and the fairness of the proceedings, it has to be said that he did not mince his words.

The lodging of the appeal to the Upper Tribunal and some preliminary matters

28. An appeal was lodged within time. The brief written grounds were as follows:

> "1. The Traffic Commissioner made erroneous findings of facts such that his decisions are thereby tainted with errors.
>
> 2. The Traffic Commissioner took into consideration matters which were not relevant to his decision-making exercise.
>
> 3. The decisions of the Traffic Commissioner unfairly damaged the reputation of the appellants, the group of companies of which the appellants are a part, and the individuals within that group".

29. At that stage the appeal was directed not only to the TC's decision to refuse a licence to the appellant company but also with respect to his decision to issue a formal warning to REL Storage and Logistics Limited. Thus, initially, there were two appellants albeit that they had the same representation.

30. On 6 March 2022 Upper Tribunal Judge Hemingway observed, in case management directions, that it did not appear that REL Storage and Logistics Limited had a right of appeal against the decision to issue it with a formal warning. Accordingly, Notice of intention, subject to written representations, to strike out the appeal of that company for want of jurisdiction, was sent. That company did not take issue with the preliminary view taken by the Upper Tribunal to the effect that there was no right of appeal and so, on 30 March 2022, the appeal against the warning was struck out. That left only the appeal of the appellant company. There followed an application made on behalf of REL Investment Management Limited, Mr Scott, and Mr Lewis, for them all to be joined as parties to the proceedings. In directions of 1 June 2022, the possibility of them providing evidence as witnesses rather than seeking joinder was raised. However, it was pointed out that to be admitted any such fresh evidence would have to meet the criteria set out in *Ladd v Marshall [1954] EWCA Civ 1*. Clarification as to the intentions of the appellant and other parties or potential parties was sought from the appellant company's legal representatives. That resulted in its being indicated that there was no longer a proposal to join additional parties but that, instead, an application for admission of fresh evidence was to be made. That application was in respect of information contained in draft witness statements provided by Mr Scott and Mr Lewis and documentation relating to their business activities and relating to companies they had had involvement with. The point of the application was to seek to refute the adverse findings and the adverse comments made by the TC concerning Mr Scott and Mr Lewis.

31. Following a hearing of 4 October 2022, which took place before a panel identically constituted to that which has heard and determined this appeal, it was decided to admit the fresh evidence. We considered the *Ladd v Marshall* criteria, having first reminded ourselves

of the valuable guidance as to how such is to be applied in the context of this jurisdiction as contained in *T/2015/36 W. Martin Oliver Partnership* with which we respectfully agree.

32. In deciding to admit the fresh evidence we reminded ourselves of the absolute prohibition upon us from taking into consideration any circumstances which did not exist at the time of the determination which was the subject of the appeal. However, the application was not in respect of evidence as to new circumstances. As to the *Ladd v Marshall* criteria, we hesitated over whether it could properly be said that the fresh evidence could not have been obtained, with reasonable diligence, for use at the PI. As to that, we considered that the call up letter had, if obliquely, raised some issues regarding the fitness of the company and the question of control but accepted, on balance, the concerns which had subsequently and quite obviously played a role in the TC's adverse conclusion with respect to the appellant company's repute (and the general repute of Mr Lewis and Mr Scott) had not been stated with sufficient specificity to adequately signal a need for the evidence now offered to us to be provided then. We hesitated over whether the evidence, had it been given at the PI, would probably have an important influence on the result of the case. But, given the way in which the TC had reasoned out his decision, we thought, having reminded ourselves that it would not be necessary to show that the fresh evidence if given at the earlier stage would have been decisive, that that part of the test was narrowly met. So, the fresh evidence was admitted. We shall say more about its significance, in the context of this appeal, below.

The hearing of the appeal

33. Mr Clarke attended before us to represent the appellant company. It is a quirk of this jurisdiction that, ordinarily, an appellant does not have a live opponent at the hearing of an appeal such as this. But, of course, that does not mean an appellant or the representative for an appellant, has any increased expectation that submissions or arguments advanced to the Upper Tribunal will be accepted.

34. Mr Clarke provided a helpful skeleton argument. As had been intimated in previous directions and/or comments of the Upper Tribunal, such was appropriate given the somewhat sparse nature of the original grounds of appeal. The skeleton argument built upon those grounds.

35. Essentially, it seemed to us, in putting together what was said in oral argument and what was said in the skeleton argument, that there were, essentially, three ways in which it was said that the TC had erred. The first of those (we shall call ground 1) amounted to a contention that there had been unfairness in the proceedings. That argument rested on a number of contentions being an alleged failure to set out the nature, substance, or breadth of the TC's concerns prior to the PI; a failure to otherwise give a proper opportunity for those concerns to be met; an inappropriate disapproval of the REL Groups business model; and an element of pre-judgement as indicated in the PI transcript. The second contention (which we shall call ground 2) amounted to a contention that, quite simply, the TC had made incorrect findings of fact with respect to aspects of the previous business activities of Mr Lewis and in particular we think, Mr Scott. The third contention (which we shall call ground 3) amounted to a contention that the TC had erred in law in seeking to pierce the corporate veil with respect to the appellant company, when considering the matter of its repute.

36. At the hearing Mr Clarke pursued all of the above arguments. The material which had been provided prior to the PI had been insufficient to warn the appellant company and Mr

Lewis and Mr Scott as to what was within his contemplation. The remarks the TC had made, as evidenced by the PI transcript, suggested a degree of pre-judgement based upon personal distaste for a particular business model. But there was nothing illegal or immoral about the relevant business practices. The TC had made incorrect findings regarding the various companies with which Mr Lewis and in particular Mr Scott had had involvement with, and such was shown to be the case by the new evidence. The application for a licence had been made by a company and it was not open to the TC to pierce the corporate veil in order to consider the conduct or repute of Mr Scott and Mr Lewis.

Our approach to the appeal

37. As to the approach we must take with respect to an appeal such as this, paragraphs 17 of Schedule 4 to the Transport Act 1985 (as amended) provides that the Upper Tribunal "are to have full jurisdiction to hear and determine all matters whether of law or of fact for the purpose of the exercise of their functions under an enactment relating to transport". However, it was explained by the Court of Appeal *in Bradley Fold Travel Ltd and Another v Secretary of State for Transport [2010] EWCA Civ 695*, that the Transport Tribunal (now the Upper Tribunal) will not be required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Rather, it has the duty to hear and determine matters of fact and law on the basis of the material before the TC but without having the benefit of seeing and hearing from witnesses. The appellant assumes the burden of showing that the decision appealed against was wrong. In order to succeed an appellant must show that the process of reasoning and the application of the relevant law requires the adopting of a different view to that taken by the TC. Further, paragraphs 17 (3) of the same Schedule provides that in deciding an appeal the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

38. As to disposal, the Upper Tribunal has power, if allowing an appeal, to make such order as it thinks fit or to refer the matter back to the TC for rehearing if it considers such a course to be appropriate.

Our reasoning on the appeal

39. Although Mr Clarke took things in a different order at the hearing, we have decided to consider ground 1 (the fairness ground) first of all. As to that, it is clear that the TC must have had in mind, when deciding to call the appellant company to a PI, that it might lack repute in consequence of the perceived "*track record*" of Mr Scott and Mr Lewis. We say that because of the TC's own explanation as to why it was decided to hold a PI, which appears at paragraph 6 of the written reason of 7 January 2022 (see above). Although that paragraph does not use the word repute it is difficult to see what other statutory requirement the TC could possibly have had in mind and which would have triggered his observation that both had a record which was "*littered with failed companies*". In any event, the TC did go on to refuse the application on the basis of lack of repute in light of the findings he made and the concerns he expressed with respect to Mr Scott and Mr Lewis. We have asked ourselves whether, in view of that, fairness demanded a signal as to those concerns to have been sent out to the appellant company and, if so, whether a sufficient one (to put the appellant company on notice and to give it a proper opportunity to meet the concerns) was sent.

40. The decision to call a PI was, of course, communicated by the call up letter of 23 November 2021.

41. One purpose, (perhaps the primary purpose) of a call up letter is to alert an operator to concerns which a TC may have, to alert the operator to the need to provide relevant evidence given the nature of the concerns, and to specify the areas which might be explored at the PI. But an omission in a call up letter will not, of itself, preclude subsequent reliance by a TC on new or overlooked material subject to the requirements of fairness (see *2001/72/ AR Brooks*). A call up letter is not to be regarded as or be equated to a pleading (see *2006/313 D Lloyd).* But the proceedings overall must be fair as indicated in*2009/516 F Ahmed and H Ahmed* in which it was said:

> "….. new points may arise during a hearing. It is not fatal that these have not been raised in the call up letter as long as those affected are given the opportunity, if present, of having time to consider them, with an adjournment if appropriate. But the situation must be viewed differently if those likely to be affected are not present. We do not say that an adjournment must be ordered in all such cases because it may be clear that those affected, be it operator, director or transport manager, have no intention of appearing or making representations in any event; but the need for notice of allegations to have been given must always be born in mind…."

42. We have already referred to the content of the call up letter (see above) and we do not need to repeat that now. We agree with previous authorities that a call up letter is not to be regarded as or required to be a pleading. It is not, in our view, required to specify with precision each and every particular matter which is likely to arise, or which may arise at a PI. Further, we think it inevitable that, in certain cases, issues will arise for the first time at a PI or issues thought to be insignificant will justifiably assume greater significance as a result of what might emerge at a PI. But, nevertheless, there will be cases where what is said in a call up letter is insufficient to demonstrate what is already in a TC's mind. Here, as we say, paragraph 6 of the written reasons makes it clear that repute, on the basis of the perceived conduct of Mr Scott and Mr Lewis, had been identified as an issue of importance and certainly one well worthy of exploration. Did the call up letter satisfactorily convey that? We do not think it did. Whilst it was indicated, in general terms, that the appellant would have to satisfy the good repute requirement, and whilst the source of the funds which had been used to demonstrate compliance with the financial standing requirement had been commented upon (with reference to both Mr Lewis and Mr Scott) nothing was directly said to indicate that there was any concern with respect to the repute of the appellant company stemming from the business practices or business history of either of those two individuals. Accordingly, we think there is something of a mismatch between what was said in the call up letter regarding the reason for the decision to hold a PI and what was said at paragraph 6 of the written reasons regarding that. Whilst, as we have said, a call up letter is not at all to be equated with a pleading, we think that in the circumstances of this particular case and given the concerns which had clearly been identified by the TC prior to the PI, a clearer signal of those concerns, sufficient to alert the appellant company to a possible need to provide further information regarding the business activities and history of Mr Lewis and Mr Scott, was, in all fairness, required.

43. The above is not, at least as yet, sufficient to enable us to allow the appeal on the grounds of fairness. We have also considered whether, irrespective of the content of the call up letter, sufficient signal was sent in a document we shall refer to as the "*case summary*" and documents which accompanied it in what has been referred to as the "*public inquiry brief*".

Mr Clarke was astute to that and addressed the matter in his skeleton argument and oral submissions.

44. The PI brief was sent on 30 November 2021 and, therefore, less than two weeks before the date of the PI. The Case Summary contains some similar material to that which had been included in the call up letter. It did specifically state that "*the traffic commissioner shall wish to be satisfied that Ian Allan Newman, as director named on Companies House, is the controlling factor of this company*" and it expressed some uncertainty as to the source of the funds referred to above. It also set out the information regarding what was understood to be Mr Scott's involvement with REL Capital Limited, REL Coffee Limited, Oxford Hotel Management Limited, Dover Interiors Limited, Woodcroft Hotel Bournemouth Limited, Woodcroft Tower Hotel Limited, and Jackson House Essex Limited, all of which it suggested had been dissolved or had gone into liquidation. The case summary did not explain the potential perceived relevance of that history to the application though we think it possible that an astute reader might have realised that there was an underlying concern regarding Mr Scott's perceived business history and the way in which that was thought to impact upon the repute of the company in the event of its being concluded that Mr Scott was a controlling mind behind that company.

45. We would accept that the concern regarding Mr Scott and indeed the concern regarding Mr Lewis, were not stated clearly in the case summary or elsewhere. We do think the nature of the concerns could possibly have been realised. But we have concluded that, in the circumstances of this case, an insufficient signal was sent within the case summary such that its content did not render immaterial, in this case, the concerns we have found regarding the lack of specificity contained within the call up letter. We accept Mr Clarke's argument that there has been unfairness in the way this application has been dealt with.

46. There is then the argument pursued by Mr Clarke regarding the nature of the comments made by the TC at the PI. Again, we repeat he was careful to make it plain that he was not seeking to allege bias on the part of the TC. Nonetheless he observed to us that the "*transcript speaks for itself*" and, as we understand it, argued that the comments of the TC suggested a pre-disposition towards the business model of the REL group of companies and, conceivably we suppose, to the way in which turnaround business practices are utilised at least within the transport industry. We agree that the transcript evidences a certain robustness in the way the TC chose to express his concerns. We suggested to Mr Clarke, at the hearing, that our focus should perhaps be upon the content of the written reasons rather than the content of the transcript. But Mr Clarke, as we understand it, contended that the two were to be taken together. Had Mr Clarke sought to argue bias it might have been necessary for us to consider whether certain of the comments recorded in the transcript might suggest perceived (though we absolutely stress not actual) bias. But such was not argued so we do not even need to ask ourselves about it. Indeed, we are not sure given that Mr Clarke did not argue any type of bias that this argument really had anywhere else to go. We do think that the way in which the TC expressed himself was a little unwise and, perhaps, somewhat unhelpful. We also think that whilst it is perfectly legitimate to raise concerns and ask questions of participants or attendees at a PI, significant caution ought to be exercised before making comments which might suggest some degree of pre-disposition. But since we have concluded, for other reasons, that there has been unfairness it is not necessary for us to say anything more about this aspect of the case.

47. Having decided that there has been unfairness it is necessary for us to consider whether such unfairness was material in the sense that it might have impacted upon the outcome. As part of that consideration, we have looked at the material which has been provided to us by way of fresh evidence. A key component of the package of fresh evidence is, in fact, the witness statement of Mr Scott. Of course, that evidence could have been received by the TC had a sufficient signal as to the TC's concerns been sent in the pre-PI documentation or, indeed, if (assuming the gravity of the concerns had only been realised at the PI) an adjournment with a direction for the appellant company to consider producing evidence from or about Mr Scott, had been made. But none of that was done.

48. We do not propose to set out, in full, Mr Scott's witness statement. But we are going to set out certain parts of it insofar as it relates to the business model utilised by the REL group of companies. As to that Mr Scott says, amongst other things;

> "17. As investors we are approached by insolvency practitioners, business sale agents with businesses in distress with requests that we invest in those businesses if we believe they can be turned around, or elements turned around by way of a restructure. As part of our investment practice we seek to identify the reasons causing the difficulties and to provide some remedy. This process involves identifying the loss-making aspects of the business and asking the questions whether those aspects might be remedied. We also identify the more successful assets of the business and seek to preserve those assets. Once we have completed our review of the business we move the positive assets, and those loss making assets which may be saved, into a new business vehicle so as to provide the overall business with a future. The remainder of the business, that is, those parts which cannot be rescued, are disposed of by liquidation of the rump business. These companies would have otherwise gone into liquidation".

49. Mr Scott goes on to say:

> "19. A number of important points should be considered here:
>
> > "i. Our investment model is one followed by many investors across the world, including in the United Kingdom. It is both lawful and beneficial to those business which can be saved. A large number of businesses now well known to the public have been saved by investment models not unlike our own.
> >
> > ii. Assets includes personnel- one of our primary aims is to preserve as much of a workforce as we are able, these almost always being the principle positive asset of a business. REL are very proud to have saved over 500 jobs over the last 3 years.
> >
> > iii. Loss of staff is sometimes inevitable. Distressed business are, in our experience, often overstaffed, or some personnel are underperforming and continue to do so.
> >
> > iv. Much good is achieved by the processes we adopt: businesses continue and prosper; jobs are retained; suppliers are retained; suppliers retain a customer; and the local community benefits from jobs, investment, and secondary expenditure.

> v. An investment model which involves the purchase and turnaround of distressed businesses is inevitably a high-risk enterprise. For these reasons failures occur.
>
> vi. We have been very successful in our turnaround projects, for example now investing in three of the larger London coach companies that suffered during the Covid pandemic."

50. Mr Scott then makes references to a number of the companies with which he had had involvement, and which were referred to by the TC in the pre-PI documentation and at paragraph 4 of the written reasons of 7 January 2022. He says that REL Capital Limited never traded and so left no debts. He says the same of REL Coffee Limited, Dover Interiors Limited and Woodcroft Tower Hotel Limited. He does acknowledge business failures with respect to what he describes as the "*Hotel Group*" though he says such "*is my only failure*". He provides some additional information regarding his business interests, but it is not necessary to set out any of that for the purposes of this appeal.

51. As indicated, we are not going to try to make some sort of judgement as to the rights and wrongs of the business model operated by Mr Scott and Mr Lewis and/or the REL Group of companies, but we would accept that both (in particular Mr Scott whose witness statement was significantly more lengthy than that of Mr Lewis) had something to say which might have, if it had been said to the TC, impacted upon certain of the conclusions and, perhaps in particular, the conclusion at paragraph 24(vi) to the effect that both were not of good repute and were not "*people in whom I could have any trust*". The additional information provided about the history of the companies which the TC had mentioned and the circumstances surrounding the trading history (or otherwise of some of them) was of clear relevance. The points as to the perceived (by Mr Scott) benefits of the business model were also of potential relevance (depending on what was made of them) with respect to repute.

52. In light of the above we have concluded that not only was the PI hearing and the consideration of this appeal unfair, in consequence of a failure to spell out in advance what the issues to be considered were to be and a consequent failure to allow a proper opportunity for those concerns to be met, but that the unfairness was material in that it could (we do not say would – and we do not have to) have impacted the outcome. That is sufficient, of itself, for us to set aside the TC's decision.

53. Ground 2 was to the effect that incorrect factual findings have been made. We do not, in fact, now have to determine ground 2. But we have already made it clear that there was material which could have been before the TC had an appropriate opportunity been given, and which might have led to different findings. We do not need to go beyond that. Given the outcome we have reached on this appeal and the method of disposal we have chosen, findings may in due course be made in light of fuller and more complete evidence than that which was before the TC, at a reconvened PI.

54. That leaves us with ground 3. Again, strictly speaking, we do not now have to decide ground 3. But we have concluded that we should address it in order to assist at the reconvened PI. We remind ourselves that ground 3 asserts that the TC had erred through wrongly piercing the corporate veil. It is clear from Mr Clarke's skeleton argument (see paragraph 28) that this ground is advanced by way of a challenge to the TC's conclusion at paragraph 24 (vii) of the written reasons of 7 January 2022. By way of reminder, the TC decided, in that sub-paragraph, that "*the people behind*" the appellant company "*are not of good repute and are*

not a business or people in whom I could have any trust" and that Mr Newman was simply "*a front man*". The suggestion advanced on behalf of the appellant is that the TC was only entitled, as a matter of law, to assess the repute of the company and was not entitled to go beyond that into the question of which individuals controlled or might have controlled the company and whether those individuals were themselves of good repute.

55. Mr Clarke commences his argument as to this by taking us to section 8 of the 1995 Act. As he points out, it relevantly provides:

> "**8. Applications for operators' licences**
> …….
>
> (4) a person applying for an operator's licence shall also give to the traffic commissioner any further information which the commissioner may reasonably require for the discharge of his duties in the relation to the application, and in particular shall, if required by the commissioner to do so, give to him any of the information specified in paragraph 1 of Schedule 2".

56. Mr Clarke then takes us to paragraph 1 which relevantly provides:

> "**1. Information to be given under section 8**
>
> 1. The information referred to in section 8 (4) is the following –
>
> (e) particulars of any relevant activities carried on, at any time before the making of the application, by any relevant person;…"

57. As Mr Clarke further points out, "*relevant person*" and "*relevant activities*" are defined terms. Paragraph 2 to schedule 2 relevantly provides:

> "2. In this Schedule "relevant person" means any of the following persons, namely –
>
> (a) the applicant;
> (b) any company of which the applicant is or has been a director;
> (c) where the applicant is a company, any person who is a director of the company;
> (d) where the applicant proposes to operate the vehicles referred to in the statement under section 8 (3) in partnership with other persons, any of those other persons;
> (e) any company of which any such person is mentioned in sub-paragraph (c) or (d) is or has been a director;
> (f) where the applicant is a company, any company of which the applicant is a subsidiary."

58. Paragraph 3 of the same Schedule provides:

> "3. In paragraph 1 (e) "relevant activities" means any of the following –
>
> (a) activities in carrying on any trade or business in the course of which vehicles of any description are operated;
> (b) activities as a person employed for the purposes of any such trade or business;
> (c) activities as a director of a company carrying on any such trade or business".

59. Mr Clarke then stresses that neither Mr Lewis nor Mr Scott nor REL Investment Management Limited fall within the definition of "*relevant person*" as set out above.

60. We do not see that the above legislation affords the appellant the assistance Mr Clarke seeks to persuade us that it does. Section 8 and the paragraphs we are taken to within Schedule 2 to the Act, are concerned with the rights of a TC to obtain information and the question of which persons are obliged, if such is required, to give it. It effectively requires further information to be given to a TC, in pursuant of that TC's duties, by certain individuals or companies. But it does not, of itself, prevent a TC from considering material which is before him emanating from someone other than a "*relevant person*" nor does it do anything to prevent a TC from enquiring into or making findings about who might be the controlling mind of an operator which is seeking or resisting revocation of a licence.

61. Mr Clarke next points to the fact that it is the appellant company rather than any individual which is the applicant for the licence sought. We agree that, in the circumstances of this case, the "*applicant*" as that word is used at section 13A(2) of the 1995 Act, is the applicant company (REL Haulage Limited). Mr Clarke goes on to ask whether, against the above legislative background, a TC is permitted to consider the repute of shareholders of an applicant which is, as here, a corporate entity. He says that such is not permitted. As we say, we do not see that he derives any support for that proposition from section 8 of the 1995 Act. But he also relies upon case law regarding circumstances in which a corporate veil can or cannot be pierced. In oral submissions he seemed to rely, in particular, upon the decision of the Court of Appeal in *VTB Capital PLC v Nutritek International Corporation and others* [2012] EWCA Civ 808 in which it was said:

> "78…. First, ownership and control of a company are not of themselves sufficient to justify piecing the veil. Second, the court cannot pierce the veil, even when no unconnected third parties involved, merely because it is perceived to do so is necessary in the interest in justice. Third, the corporate veil can only be pierced when there is some impropriety. Fourth, the company's involvement in an impropriety will not by itself justify a piercing of its veil: the impropriety "must be linked to use of the company's structure to avoid or conceal liability"….. .Fifth, it follows that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing. Sixth, a company can be a façade for such purposes even though not incorporated with deceptive intent".

62. Mr Clarke says that none of those exceptions apply here. He also asserts that the Upper Tribunal has reaffirmed the correctness of that approach in this jurisdiction. He has in mind as to that, the decision of the Upper Tribunal in *Vision Travel International Limited [2013] UKUT 0411 (AAC)*. It was said therein:

> "9. …. We agree that a Traffic Commissioner is required to respect the principle of the separate legal personality of an incorporated company. That principle has the result that there is a corporate veil between such a company and its directors and shareholders. Indeed, we accept that it is not enough *per se* that someone is the sole shareholder and the sole director of a company for a Traffic Commissioner to equate him with the company. Had the Traffic Commissioner adopted that approach she would have indeed erred in law. We refer to *Edward Coakley, T/A C.R.A., T/2011/63* paragraph 6 (ii) where this Tribunal fully accepted as submission by Counsel for the appellant in that case which was summarised as follows:

> "In the paragraph cited the Traffic Commissioner had effectively required the appellant to answer for the company. In so doing she was lifting or piercing the corporate veil. It was the directors of the company not the appellant who were responsible for its management and control. The principle of corporate personality meant that even a 100% shareholder cannot generally be equiparated (sic) with a company whose shares he wholly owns. Yet that was essentially the approach taken by the Traffic Commissioner. Such a shareholder can be regarded as effectively the alter-ego of the company whose shares he owns if it is held that he its controlling mind. However, crucially, the Traffic Commissioner made no such explicit finding."

63. We do not seek to depart from what has been said in the above case law. But we are mindful that paragraph 1(2) of Schedule 3 to the Act requires a TC to have regard, amongst other things, to the previous conduct of the company or any of its officers, servants or agents, so long as it relates to the fitness to hold a licence (see above). That alone may justify the piercing of the veil with respect to such specified persons as it may be essential for it to be done so that the TC can perform his/her statutory duties. Further, it is apparent that there is no blanket bar to piercing the corporate veil for the purposes of inquiring into who is or might be the controlling mind of an incorporated applicant in the event of certain wrongdoing or impropriety. Such is often done in this jurisdiction in order to deal with a practice known as "*fronting*" whereby an applicant with a clean record might make a licence application, but the intention is that business operations conducted under the licence will be controlled by another who might not, if the application had been made in that others name, be given a licence possibly due to a poor track record within the industry regarding compliance or possibly due to his serving a period of disqualification. We appreciate that is not the situation which obtains here but the point is that wrongdoing can potentially justify the piercing. Further, what is envisaged in *Vision Travel* is an inquiry as to who is or may be the controlling mind of the company. We say that because the submission of Counsel accepted in *Edward Coakely t/a CRA* and in turn in *Vision Travel* (see above) was to the effect that where an explicit finding that a particular individual or entity is the controlling mind has been made, that person or entity (even if say a shareholder rather than a director, officer or servant) might be regarded as, in effect, the alter-ego of the company.

64. We are inclined to agree with Mr Clarke that the conclusion at paragraph 26 (vii) of the written reasons was essentially unreasoned or was made without sufficient in the way of clear factual findings to underpin it. We are inclined to the view that repute, in any event, has to be considered not in the context of any general moral distaste a decision-maker might feel for a particular business model or business practice, but rather in the context of whether an operator can or cannot be trusted to comply with the applicable licencing regime (see *NT/2013/82 Arnold Transport and Sons Limited v DONI*). But whether the TC did or did not err through piercing the corporate vale without making sufficiently clear and sufficiently justified factual findings to justify doing so (and without having to decide the matter we are inclined to think he did) it will be open to the next TC to do so, if considered appropriate, in accordance with what was decided in the above case law, and, of course in particular, what was decided in a transport context in the *Vision Travel* case.

65. We have, as we have indicated, decided the TC erred through conducting what amounted to an unfair hearing and an unfair consideration of the application. Accordingly, the TC's decision is set aside.

Disposal

66. Mr Clarke did urge us, if allowing the appeal, to make an order which would result in the granting of a licence. But he realistically accepted that remission was the likely outcome. We have concluded that is the appropriate course. There are issues to be considered, perhaps in particular as to whether the business practices which the TC clearly disapproved of really are something to be disapproved of; whether even if they are, they are relevant to repute when viewed in the context of likely compliance with the statutory regime; and as to the identity of the controlling mind of the applicant company (if there is any need to look at that here). There are further facts to be found. We remit for matters to be reconsidered at a PI and we would anticipate that both Mr Lewis and Mr Scott will, on this occasion, wish to give evidence to it on behalf of the applicant company. Any necessary findings can then be made in light of what will probably be a much fuller picture than was before the original TC. We think it appropriate, in this case (which accords with usual practice) that a different TC conducts the new PI and makes the fresh decision on remittal regarding this licence application.

M Hemingway: Judge of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal
K Pepperell: Member of the Upper Tribunal

Authorised for issue on: 25 November 2022
Amended under the slip rule on 28 November 2022 to make clear that the decision was taken by the Traffic Commissioner for the West Midlands Traffic Area.