(1) Abbey Coaches (Darwen) Ltd; (2) Rigby's Executive Coaches Ltd
[2024] UKUT 16 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA/2023/001324-T**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the DEPUTY TRAFFIC COMMISSIONER for the North West of England Traffic Area.

Appellants:	(1) Abbey Coaches (Darwen) Ltd; (2) Rigby's Executive Coaches Ltd
Deputy Traffic Commissioner Decision dated:	11 September 2023 (Public Inquiry on 16 August 2023)
Appeal to Upper Tribunal dated:	22 September 2023
Reference no:	PC0004176
Date of Upper Tribunal Hearing:	5 January 2024
Form of Hearing:	In-person: Field House
Before:	Judge Rupert Jones: Judge of the Upper Tribunal Stuart James: Member of the Upper Tribunal David Rawsthorn: Member of the Upper Tribunal

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed. The decision to revoke the Appellants' operating licences is quashed. The matter is remitted to a different Traffic Commissioner to rehear and determine after issuing a calling in letter and holding a reconvened Public Inquiry in accordance with the Tribunal's directions.

SUBJECT MATTER

Financial standing – whether the Senior Traffic Commissioner's guidance is consistent with Article 7 of the relevant EU Regulation 1071/2009; Procedural fairness; Revocation of Operators' Licences.

REASONS FOR DECISION

1. This is the appeal of (1) Abbey Coaches (Darwen) Ltd; & (2) Rigby's Executive Coaches Ltd ("the Appellants") from a decision of a Deputy Traffic Commissioner (the 'DTC'), contained in a decision dated 11 September 2023, to revoke each of their standard public service vehicle operator's licences. The Deputy Traffic Commissioner revoked both the Appellants' operator's licences on the basis that he determined that neither operator satisfied the requirements of i) Good Repute, upon breaching undertakings, and ii) Financial standing. The full details are set out in the Deputy Traffic Commissioner's decision.

2. The Appellants appealed to the Upper Tribunal in a notice of appeal on 22 September 2023. Their representative subsequently provided four amended grounds of appeal dated 27 October 2023 which were as follows:

   Ground 1
   The Deputy Traffic Commissioner erred in finding that financial standing was not met in the operating companies, and further was plainly wrong on the evidence to find that the Appellants were at an unfair competitive advantage in view of those financial arrangements.

   Ground 2
   The Deputy Traffic Commissioner erred in deciding that the maintenance arrangements, at the date of the public inquiry were such that the operator must be put out of business.

   Ground 3
   The Deputy Traffic Commissioner erred in determining that the operating entity was not the Appellants in each case (paragraph 39 final bullet point of the decision), and as such this went to the repute of the Appellants.

   Ground 4
   The final ground is that the Deputy Traffic Commissioner's decision was procedurally flawed, in that, for the reasons set out in various grounds above (so not repeated here), the Deputy Traffic Commissioner made a significant part of his adverse determinations against both Appellants on issues which were not identified as an issue at all within the calling in letters and documentation. This is a fundamental procedural flaw and particularly significant when the Appellants, as here, were not represented.

3. On 9 October 2023 the Upper Tribunal granted the Appellants' application for a stay of the revocation decisions pending the outcome of their appeal.

4. The hearing of the appeal took place before the Upper Tribunal at Field House on 5 January 2024.

5. The Appellants were represented by Mr Backhouse of Backhouse Jones solicitors. His oral representations were in addition to his written skeleton argument dated 22 December 2023. We are grateful to him for the clear way in which he presented his case.

The background

Public Inquiry of 16 August 2023

6. Asif Mohammed Din is the sole director of both Abbey Coaches (Darwen) Ltd and Rigby's Executive Coaches Ltd (hereafter 'Abbey' and 'Rigby's') which have held Standard International Public Service vehicle operator's licences since 2003 and 1996 respectively. Abbey carries out school contract and private hire work. Rigby's concentrates on rail replacement work and private hire including tours.

7. Their licences presently authorise 4 and 9 vehicles respectively and run in the curtailed form that was directed following a 2021 Public Inquiry. Curtailment is a shorthand for the Traffic Commissioner's power to vary the condition on the licence by directing a reduction in the maximum number of vehicles which may be used on it at one time.

8. In the curtailment decision letter dated 21 September 2021, the TC had stated at paragraph 6*, 'The good repute of each of the three operators is marked as very badly tarnished but not lost."* At paragraph 8 he stated – *'this is the last chance that any of the three operators before me will be given.'*

9. Both companies subsequently sought upward fleet variations; applications made in early May 2023. In the case of Abbey from 4 vehicles to 10 vehicles, and for Rigby's from 9 vehicles to 15 vehicles.

10. On 29 June 2023 the Office of the Traffic Commissioner ('OTC') issued calling in letters to the director of both Appellants (Mr Asif Din) for the companies to attend a joint Public Inquiry (PI) in relation to their variation applications and new applications of Harris Travel Ltd and Farid Saad (transport manager). The OTC specifically identified the issues of concerns in relation to both Appellants:

    A) The following statement you made when applying for the licence were either false or have not been fulfilled:
        i) that you would abide by any conditions which may be imposed on the licence.
    B) You have not honoured the undertaking you signed up to when you applied for your licence, namely,
    …[matters relating to maintenance and roadworthiness of vehicles]
    C) You have breached the conditions on your licence namely you have failed to notify the traffic commissioner or events which could affect your good repute;

D) Since the licence was issued, there has been a material change in the circumstances of its holder, namely there has been a fixed penalty notice issued to a driver of the company.

11. On 16 August 2023 the DTC held a single, joint PI involving both companies on the applications that had arisen since Mr Din became their director.

12. The shared, nominated transport managers ('TMs') for both companies at the time of the Public Inquiry were Farid Saad and Martin Evans. The former attended and gave evidence on his own behalf and that of the Appellants.

13. Originally, the hearing had also been convened to consider the new application of Harris Travel Ltd for a Standard International Public Service vehicle operator's licence for 20 vehicles. That application was made on 1 February 2023 but was permitted to be withdrawn on 18 July 2023 (after the calling-in). It is also a company for which the sole director is Asif Din.

14. The hearing also concerned the new sole trader application of Farid Saad (acting as his own TM) for a Standard International Public Service vehicle operator's licence for 1 vehicle. This application was made on 22 May 2023.

The Decision dated 11 September 2023: revocation decisions in respect of the Appellants

15. The DTC made a number of decisions in his written ruling dated 11 September 2023 which followed the PI. The relevant decisions in respect of the Appellants were to revoke the licences on the basis that:

> 'Abbey Coaches (Darwen) Ltd
> On findings made in accordance with Section 17 (3) (a), (aa), (b) and (e) and Section 17 (1) (a) (in respect of lack of good repute and financial standing) of the Public Passenger Vehicles Act 1981 ('the Act'):
> This operator's licence is revoked with effect from 23:45 hours on 20 October 2023.
>
> Rigby's Executive Coaches Ltd
> On findings made in accordance with Section 17 (3) (a), (aa) and (c) and Section 17 (1) (a) (in respect of lack of good repute and financial standing) of the Act:
> This operator's licence is revoked with effect from 23:45 hours on 20 October 2023.'

The DTC's findings and reasons for the revocation decisions

16. In his ruling the DTC set out the previous history of the operators at [8]-[14] (references in square brackets are to paragraphs of the decision) including stating at [8]-[9]:

> '8. On 21 September 2021 at a conjoined Public Inquiry, it was found that both Abbey and Rigby's had been operating without a nominated TM for 9 months. There had been no period of grace and Deputy Traffic Commissioner (DTC) Dorrington described that as "extremely serious misconduct". Neither operator cooperated with the documentary requests for the Inquiry and during the hearing itself, one of the TMs was being

prompted by Asif Din. Concerns were expressed about driver detectable defects found during preventive maintenance inspections pointing to a questionable driver defect reporting regime. Financial standing was not met for either company, but a period of grace was granted to rectify the position. There were some positives and, in that light, both licences had been allowed to continue but subject to effective curtailments by 4 vehicles for each of them. In the case of Abbey from 9 vehicles to 5 vehicles, and for Rigby's 13 vehicles down to 9 vehicles. The DTC referred to leaving Asif Din with a total of 25 vehicles, which had then included the (subsequently revoked) licence of Harris Travel Ltd.

9.Specifically, the DTC set out that:
"This will be the last chance that any of the three operators before me will be given".
He set out that the good repute of each operator was *"very badly tarnished but not lost".*

Financial Standing

17. The DTC made findings on the financial standing of the Appellants as follows from [31] of the decision:

31. Evidence of financial standing was requested in advance of the hearing. Neither Abbey nor Rigby's provided the requested Companies' House evidence, but I was aware of it, raised it with Mr Din and took account of the following:

    - Abbey – The most recent accounts filed at Companies' House were for the financial year ended 26 May 2022. The accounts showed there had been a single employee in that financial year and total staff employment costs amounted to £852. For the preceding two years there were no employees recorded and no employment costs, even though the company had been operating vehicles at that time.

    - Bank statements produced appeared to meet the financial standing requirement, but I could not locate the payment of any monies to any driver employed, no sums in respect of PAYE or in respect of any expenditure on the maintenance of vehicles.

    - Rigby's – The most recent accounts filed at Companies' House were for the financial year ended 28 September 2020. A marker indicated that accounts were overdue for the financial year ended 28 September 2021, which ought to have been filed by 28 June 2022, (and presumably those for the 2022 financial year, which would have been due by June 2023).

    - There had been two employees referred to in the 2021 financial year end accounts but none in previous years, even though the company had been operating vehicles at that time.

    - Bank statements produced appeared to meet the financial standing requirement, but again, I could not locate the payment of any monies to any driver employed, for PAYE, or in respect of any expenditure on the maintenance of vehicles.

32. I had concerns that some other company, or person was operating vehicles under the licence, or/and that the bank statements (and therefore any calculation made) did not truly reflect the income and expenditure of the entities holding the licences. Subsequently, I raised these matters with the director.

33. …

Financial and Governance arrangements:

> Asif Din admitted to the failures to file accounts with Companies' House in timely fashion. The company's accountant was blamed for the situation. They were being chased to conclude matters. I was told that as soon as matters were up to date (within the next two weeks) a new firm would be instructed.
>
> Accounts for the financial years to 2021 and 2022 for Rigby's were said to exist in draft but were not produced. I did not ask for them to be produced. The Guidance suggests that draft accounts should not be relied on.
>
> 39. I made the following findings on the balance of probabilities, except where stated, the findings relate to both operators:
>
> …
>
> I was unable to conclude that Rigby's met the required financial standing requirements. Whilst the calculation carried out was (on the face of things) sufficient for the existing licence, it did not meet the sum due for the increase to the fleet if it were granted.
>
> In any event, I was not able to satisfy myself that either the bank evidence produced by both companies, or the profit and loss accounts filed for them reflected the whole of the income and expenditure of those businesses individually. I find that even where financial standing was met mathematically, there was a reliance on the finances of Coach Travel Solutions Ltd, a separate entity. Finances must be held exclusively in the name of the licence holder.
>
> I find that the Companies' House requirements for Rigby's have been breached by a failure to file evidence for the preceding two financial years. The absence of up-to-date profit and loss accounts and a balance sheet prevents any reliance being placed on them in contributing to a decision about financial standing. It also undermines any confidence I might have in the company's corporate governance arrangements.
>
> …

43. In the light of the findings set out in paragraph 39, I also find both the companies to be without financial standing.

Maintenance Arrangements

18. The DTC made findings on the Appellants' maintenance arrangements as follows from [26] of the decision:

The calling-in:

26. The calling-in to this Public Inquiry has its roots in the 'unsatisfactory' outcomes of Maintenance Investigation Visit Reports (MIVR) prepared by VE Wilson on 6 May 2022. His findings for both operators reflected a series of shortcomings in those businesses which (perhaps unsurprisingly) tended to mirror each other.

27. They referred to stretching of maintenance frequencies (27% of them in the case of Rigby's), some driver detectable defects found at PMI, a failure to show rectification of some defects picked up by drivers, that recent evidence of CPD for the TMs was absent, and that the MOT first time pass rate for both was much worse than the national average.

28. The findings of DVSA were not the subject of material dispute.

29. The MOT history for Rigby's showed a failure rate at first presentation of 78%: the national average is 12%. That for Abbey is not relied on, as for reasons that could not be identified, only a single vehicle appeared to have been presented for test in the last 2 years. Neither the director, nor I could believe this was accurate.

30. The prohibition history of the operators showed:

    Abbey - 4 prohibitions for one vehicle (Immediate (1) and Delayed (3)) at Glastonbury Festival on 23 June 2023.
    No other prohibitions since the last Public Inquiry.

    Rigby's - 6 prohibitions for three vehicles (Immediate (5) and Delayed (1)) again at Glastonbury Festival on 23 June 2023. One prohibition was "S" marked, albeit the principal criticism was of the driver, not the operator, the underlying issue remained the effectiveness of the walk round checks undertaken. I noted that the incident itself also led to a fixed penalty issued for the dangerous condition of the vehicle.
    There were 4 other prohibitions (Immediate (2) and Delayed (2)) since the last Public Inquiry.

    …

    33.Asif Din told me:

    Response to DVSA findings

    No explanation could be offered by him for the recorded lack of response to the MIVRs, other than that he claimed he had provided responses. No copy of it was previously provided, nor was one offered at the hearing and the evidence in the DVSA report was that there was none.
    Roller brake testing equipment had now been installed and the plan was to test all vehicles at each PMI, it was conceded this was not yet consistently achieved. Whilst PMI frequencies were set at 8 weeks, the aim was to carry them out in the 6th or 7th week. My dip sample suggested *current checks* were not late but were not completed early, as proposed.

    In-house maintenance fitters who had been in place had since been removed and replaced by a team led by Harvey Taylor, who also gave evidence.

    The appointment of Mr Campbell, a former DVSA employee had been part of the response to the last Public Inquiry. Mr Din was of the view this strategy did not work and that the appointee had made things worse and had been removed.
    …
    Prohibition and MOT history:

    The poor MOT history for vehicles being operated by Rigby's was put down to disappointment with the work done by Clive Campbell in their preparation. Asif Din accepted the record of MOT failure was "shocking". I had the strong impression however that it was his belief that as Mr Campbell had previously been a DVSA employee and that he had been appointed as a result of the last Public Inquiry that this somehow lessened the operator's responsibility.

    There was some degree of acceptance by Asif Din that the operator ought to be embarrassed about the circumstances of the multiple prohibitions at Glastonbury. The director however would not accept any responsibility for any of the prohibitions related to the *internal features* of the vehicles, putting these down to the misconduct of the passengers but did

appear to acknowledge that the efforts of those maintaining the vehicles had been inadequate.

39. I made the following findings on the balance of probabilities, except where stated, the findings relate to both operators:

I accepted the evidence of VE Wilson as a balanced account of what he found in May 2022, in relation to shortcomings in the maintenance systems in place.

I found the evidence of Asif Din, director, to display a lack of knowledge and understanding of the expectations of a licence holder and to minimise the responsibility of the operators for DVSA's findings. On occasion he did seek to prompt or answer for TM Saad, but he did cease to do so, once warned.

I found the evidence of Farid Saad to be somewhat superficial and that his continuing references to his relative inexperience to be hollow since he has been working in Asif Din's businesses now for over 30 months. I was able to detect very little from what he told me about his role for either Abbey or Rigby's as might have represented positive action *he had taken* or proposed to take. It seemed that throughout the hearing he was deferring to Asif Din. Having had earlier (other) opportunities to see and hear from TM Saad, also when he was supporting a driver at a separate hearing (when Mr Din was not present), I found his presentation out of character.

I find, as was admitted by Mr Din that TM Evans had not been carrying out the full role of TM in the businesses that had been promised when he took office. I found the failure to follow up his TM's absence in the period before the Public Inquiry is concerning and points to his appointment being little more than "window-dressing."

I found on balance that there had not been any response provided to the MIVRs then issued. I concluded that in this sense there had been a lack of cooperation with DVSA. Neither the operator (nor either of the TMs) had taken the opportunity to respond positively and proactively to the outcomes, as I might have expected bearing in mind the operators' previous regulatory history.

I found that the total of 10 prohibitions issued at Glastonbury Festival to four of the operators' vehicles on 22 June 2023 to amount to serious failures to secure the safety of passengers. Coming as those encounters did *after* the appointment of Harvey Taylor and other changes in the in-house maintenance facility, they did not reflect positive change in terms of compliance. There was no evidence of any formal investigation or analysis of what had gone wrong, despite the extent of the encounters and that within a week or so, call-in notices for this Public Inquiry were issued.

There was little evidence that MOT pass rates were improving. Since the beginning of 2023, three of five vehicles had failed at first presentation.

Good Repute

19. At [41] of the decision the DTC made findings about the good repute of the Appellant operators:

41. In making decisions about the good repute of the operators, I have balanced the positives and negatives:

Negatives:

The operators have both fallen well below expectations of them as operators, particularly when viewed in the context of the warning given by DTC Dorrington about the future jeopardy in which the licences would be placed, in the event of another appearance at Public Inquiry.

The issue of multiple prohibitions to vehicles in June 2023 including an "S" marked prohibition issued to a vehicle, was of significant concern.

The absence of any evidence of a detailed plan of action that would address the shortcomings which would be likely to lead to sustainable improvements being made.

That the operator was unable to account for one of his TMs and had not followed up his apparent absence.

Fundamental, long-term and unresolved issues raised about who or what was operating the vehicles, who or what employed and controlled the drivers and how the companies were governed and met their statutory responsibilities.

The operators had not appeared to take up the likely benefits of informed transport advice, or to obtain independent evidence of progress for the hearing or for the future.

Nothing the director offered within the hearing led me to conclude I can have the confidence in this director to resolve the structural issues of his businesses, or to take the steps required for the day-to-day operations to be on an even keel.

Positives:
Roller brake testing equipment had been installed and appeared to be in use. This will have represented a positive monetary investment in the business.

My review of records produced did not reveal stretching of maintenance frequencies.

Decisive action had been taken within the in-house maintenance facility, albeit whilst Mr Taylor did offer some level of confidence that he might be able to manage the unit more effectively, his own view of what he found when he arrived had been scathing. He had been employed for over 2 months when four vehicles which seemed to be in significantly poor condition were encountered at Glastonbury.

No specific concerns were raised by DVSA in relation to drivers' hours matters. Amongst the evidence produced however were examples of a Tru Tac report in the name Coach Travel Solutions Ltd with a list of unreconciled "missing mileage".

42. I find that the negatives substantially outweigh the positives so much so that I conclude that good repute has been lost. Trust has been undermined beyond immediate repair.

The operating entity

20. The DTC made findings on the relevant operating entity of the Appellants as follows from [32] of the decision:

32. I had concerns that some other company, or person was operating vehicles under the licence, or/and that the bank statements (and therefore any calculation made) did not entities holding the licences. Subsequently, I raised these matters with the director.

Evidence heard:

33.Asif Din told me:

Arrangements within the group of businesses:

Drivers were said to be a mixture of employees, agency drivers and others treated as self-employed. Pressed to explain how those treated as self-employed had that status, no convincing explanation could be offered. Drivers had been permitted to choose their status, rather than there being an application of the relevant rules.

Challenged to explain why financial evidence provided by both the companies for the hearing contained no entries for the payment of staff or drivers, Mr Din conceded that any staff with employment contracts were employees of, and paid by, Coach Travel Solutions Ltd.

He treated drivers as being interchangeable between the various businesses on the basis that there was common ownership in him.

He acknowledged there was no cross-invoicing between Abbey and Rigby's for example where for operational reasons a Rigby's vehicle was used to deliver one of Abbey's school contracts. Mr Din offered that this was simply a continuation of the longstanding way in which work had been carried out throughout the life of the licences.

Mr Din accepted that whilst TM Evans' appointment had been approved as an internal TM, he was treated as though he was an external TM. He agreed he had made an error.

Asked about the current status of TM Evans, who had been appointed as a second TM on the operator's licences in February 2022, in response to the indication given by DTC Dorrington at the last Public Inquiry, he admitted uncertainty. His TM had not been seen in the business for 6 weeks, and there was no clarity whether he was acting in the role or not. It was offered that his intention was to dismiss him 'that evening or the next day'. By way of explanation, he told me that TM Evans' role had been downgraded after the termination of Harris Travel Ltd licence but admitted that no notice of this material change was given to the Office of the Traffic Commissioner.

He claimed that TM Evans had been paid for 64 hours per month but none of the financial evidence showed payment to him.

…
39.I made the following findings on the balance of probabilities, except where stated, the findings relate to both operators:
…
It was admitted that some drivers were deployed on a self-employed basis when the operators were unable to justify such status. Such arrangements where staff are allowed to choose their employments is anti-competitive and unfairly prejudices those that comply with the guidance of HMRC supported by trade bodies.
…

I find I am unable to satisfy myself that vehicles are being operated by the individual company that holds each operator's licence. Section 81 (1) (b) of the Act defines the operator of a passenger carrying vehicle, as:
"[..] (i) the driver, if he owns the vehicle, and
(ii) in any other case, the person for whom the driver works (whether under a contract of employment or any other description of contract personally to do work)."

The evidence before me is to the effect that employed drivers are in the employment of, and paid by, Coach Travel Solutions Ltd, therefore the operator is neither Rigby's nor Abbey.

The Appellant's appeal to the Upper Tribunal

21. On 22 September 2023, the Appellants appealed to the Upper Tribunal against the DTC's revocation decisions.

22. The grounds of appeal were subsequently amended on 27 October 2023 and are set out above.

The Law

Revocation

23. Applications for the grant and variation of Public Service Vehicle (PSV) licences can be only granted by the TC if various conditions are satisfied under section 14ZA of the Public Passenger Vehicles Act 1981 ('the Act'). If these conditions are no longer satisfied, then the licence must be revoked (mandatory revocation) under section 17(1)(a) of the Act.

24. Sections 14ZA, 17(1) and 81 of the Act provide relevantly as follows:

14ZA Requirements for standard licences

(1) The requirements of this section are set out in subsections (2) and (3).

(2) The first requirement is that the traffic commissioner is satisfied that the applicant—

(a) has an effective and stable establishment in Great Britain (as determined in accordance with Article 5 of the 2009 Regulation),

(b) is of good repute (as determined in accordance with paragraph 1 of Schedule 3),

(c) has appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation), and

(d) is professionally competent (as determined in accordance with paragraphs 3, 4 and 6 of Schedule 3).

(3) The second requirement is that the traffic commissioner is satisfied that the applicant has designated a transport manager in accordance with Article 4 of the 2009 Regulation who—

(a) is of good repute (as determined in accordance with paragraph 1 of Schedule 3),

(b) is professionally competent (as determined in accordance with paragraph 6 of Schedule 3), and

(c) in the case of a transport manager designated under Article 4.2 of the 2009 Regulation—

(i) is not prohibited from being so designated by a traffic commissioner, and

(ii) is not designated to act as transport manager for a greater number of road transport operators or in respect of a greater number of vehicles than the traffic commissioner considers appropriate, having regard to the upper limits in Article 4.2(c) of the 2009 Regulation, or such smaller number as the commissioner considers appropriate (see Article 4.3 of the 2009 Regulation).

17 Revocation, suspension etc. of licences.

(1) A traffic commissioner must revoke a standard licence if it appears to the commissioner at any time that—

(a)the holder no longer satisfies the requirements of section 14ZA(2), or

(b)the transport manager designated in accordance with Article 4 of the 2009 Regulation no longer satisfies the requirements of section 14ZA(3).

…….

81.— Interpretation of references to the operator of a vehicle or service.
(1) For the purposes of this Act—
(a) regulations may make provision as to the person who is to be regarded as the operator of a vehicle which is made available by one holder of a PSV operator's licence to another under a hiring arrangement; and
(b) where regulations under paragraph (a) above do not apply, the operator of a vehicle is—
(i) the driver, if he owns the vehicle; and
(ii) in any other case, the person for whom the driver works (whether under a contract of employment or any other description of contract personally to do work).

Financial Standing

25. Section 14ZA (2) (c) of the Act provides that an applicant for a standard operator's licence (or a holder of such a licence) must be of appropriate financial standing "*as determined in accordance with Article 7 of Regulation 1071/2009*". Article 7(1) of Regulation 1071/2009 ('the Regulation') makes it clear that the obligation is a continuing one. The legislative provisions provide a formula by which the amount an operator must show to be available is based upon the number of vehicles used under the relevant licence. If at any time it appears to the TC that the licence holder no longer satisfies this requirement revocation of the licence is mandatory.

26. Article 7(1)-(3) of the Regulation provide relevantly as follows:

Article 7 Conditions relating to the requirement of financial standing
1.In order to satisfy the requirement laid down in Article 3(1)(c), an undertaking [that engages in the occupation of road passenger transport operator] 1 shall at all times be able to meet its financial obligations in the course of the annual accounting year. To this end, the undertaking shall demonstrate, on the basis of annual accounts certified by an auditor or a duly accredited person, that, every year, it has at its disposal capital and reserves totalling at least [£8,000] 2 when only one vehicle is used and [£4,500] 2 for each additional vehicle used. [...] 3

The accounting items referred to in the first subparagraph shall be understood as those defined in Fourth Council Directive78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies 4 .

2.By way of derogation from paragraph 1, the competent authority may agree or require that an undertaking demonstrate its financial standing by means of a certificate such as a bank guarantee or an insurance, including a professional liability insurance from one or more banks or other financial institutions, including insurance companies, providing a joint and several guarantee for the undertaking in respect of the amounts specified in the first subparagraph of paragraph 1.

3.The annual accounts referred to in paragraph 1, and the guarantee referred to in paragraph 2, which are to be verified, are those of the economic entity established in the [UK and not those of any entity established in any other country] 5 .
… [emphasis added]

27. Statutory Guidance issued by the Senior Traffic Commissioner under section 4C(1) of the Act for the purpose of providing information as to the way in which the Senior Traffic Commissioner believes that TCs should interpret the relevant law relating to the application of the Statutory Documents. The Guidance includes tables setting

out what documents would be sufficient to provide evidence of the financial standing requirement for a limited company as follows:

Limited companies and Limited Liability Partnerships (LLPs)

In the case of a limited company the funds must be held within the company.

Group and cross company guarantees must be referred to the traffic commissioner to consider the merits and will require evidence of the financial standing of the guarantor.

Original or certified copies of any bank or building society accounts statements must be supplied for the last 28 days. Electronic copies of original documents and internet statements can be uploaded in the case of digital applications. The average balance will be calculated, and added to any overdraft or credit facility demonstrated by a formal written commitment by the bank, etc.

If it is a new business and does not on application have statements for 28 days, an opening balance which meets the level required may be accepted and should be accompanied by an explanation regarding the source of funds upon which consideration can be given to a financial condition or undertaking.

Accounts shared by two or more companies must be referred to the traffic commissioner.

For goods applicants the traffic commissioner may allow a time limited interim, in appropriate cases, thereby allowing an averaging exercise to be completed, which demonstrates the availability of finance.

Traffic commissioners and staff acting on their behalf reserve the right to request the original documents to be sent.

If more than one account is offered, the amount available to demonstrate financial standing is the sum of the amounts calculated as above.

Invoice finance agreements are acceptable, but only if accompanied by confirmation of available balances not drawn down averaged over a three-month period. The complete agreement will need to be examined.

Audited annual accounts for operators with a turnover of more than £10.2M (subject to statutory uprating) (in respect of the financial year end, to a date not more than 18 months prior to the date of application) can be used as a substitute for bank statements.

Draft annual accounts to a date not more than 12 months prior to the date of application/licence check may be considered but should be referred to the traffic commissioner who may require further evidence.

Annual accounts or a statement of opening balance provided they are certified by a properly accredited person.

[Emphasis Added]

28. In *Thandi Coaches (Red) Ltd* [2021] UKUT 198 (AAC) T/2020/66 ('*Thandi*'), the Upper Tribunal addressed the apparent inconsistency between the more flexible requirements of the STC's guidance and the strict requirements of Article 7(1) & (2) as to the form in which evidence of financial standing must be provided. By way of

obiter observations, it rejected an argument that the guidance was therefore unlawful as it was irrational, unreasonable and did not correspond to or comply with Article 7:

17. That brings us on to the other contention contained in Ground 1. It is perhaps the most far reaching one. Again, because we have accepted Ground 1 is made out for other albeit more mundane reasons, we do not have to decide the point in a way which would be binding and, on that basis, we draw back from doing so. But it would be wrong, given that Mr Backhouse sought to argue the point with determination and eloquence, for us not to express a view. The argument is, we accept, a superficially attractive one. Paragraph 1 of Regulation 7 does, according to its wording, lay down a general rule that compliance with the requirement on the part of an undertaking (operator) to show that it is "*at all times able to meet its financial obligations in the course of the annual accounting year*" is to be demonstrated "*on the basis of annual accounts certified by an auditor or a duly accredited person*". Paragraph 2 permits derogation but only, says Mr Backhouse, to a limited and specific extent: "*By way of derogation from paragraph 1, the competent authority may agree or require that an undertaking demonstrate its financial standing by means of a certificate such as a bank guarantee or an insurance, including a professional liability insurance from one or more banks or other financial institutions, including insurance companies, providing a joint and several guarantee for the undertaking in respect of the amounts specified in the first sub-paragraph of paragraph 1*". On the face of it and on one reading, that seems to exclude reliance on other sorts of financial evidence such as the type most commonly relied upon at least in the UK, which is money in the bank and overdraft facilities. That is how Mr Backhouse urges us to read it and at the hearing, whilst he accepted there had been derogation via section 14ZA of the 1981 Act, he said the extent of the derogation permitted by Regulation 7(2) was limited to the reliance upon what he described as "*a very short exclusive list*" of evidence. The indication in the Chief Traffic Commissioners Statutory Document 2 to the effect that any evidence not in that list and in particular bank statements, overdraft facilities or credit card statements, may be taken into account is, suggested Mr Backhouse, irrational by which he means the approach suggested goes beyond what is lawfully permitted.

18. It is worth pondering on the implications if Mr Backhouse is correct. His approach would effectively amount to overturning the practice which has been taken by TC's and by the Upper Tribunal since the incorporation of the Regulation into UK law. It would require the taking of an inflexible approach. It would exclude any consideration of money in the bank which, as explained in the above Statutory Guidance in a passage with which we agree, is "*one of the most reliable indications of money being available*" to meet the financial standing requirement. It would mean, in this case, given the view we have reached about the interpretation of the word "*accredited*" that none of the financial evidence provided by the first appellant, either the unaudited accounts or the bank statements, could be considered such that its bid to show compliance with the financial standing test would be bound to fail. It would mean the Upper Tribunal's starting point in Michael Hazell No 2, to be the wrong one notwithstanding that that approach has also been taken by the Upper Tribunal in many other cases. It would, we think, leave entirely bemused a hypothetical operator who for whatever reason might not have the accounts required or any of the other items specifically referred to in Article 7(2) but who is, nevertheless, comfortably able to show compliance via the provision of genuine bank statements. In fairness, we do not think Mr Backhouse really disagrees with any of this. He simply says that is, in consequence of the wording of Article 7, the correct legal position whatever the consequences and that is so even if there has never been a decision to that effect before. Is that really the case?

19. We are, of course, as we have already explained, not actually deciding the matter in a way which would be binding because we do not have to. But again, we shall opine. The

wording as relied on by Mr Backhouse does cause problems in appearing to limit the range of evidence which might be relied on. But it is not appropriate to limit consideration of this issue solely to a consideration of the words used at Article 7. The legal authority for the Regulation is Title 5 of the Treaty on the Functioning of the European Union. Article 71 of the Treaty authorises "*measures to improve transport safety*". We have already set out what is said in Recital 10 to the Regulation and the wider import of those words as explained in NCF (Leicester) Ltd, cited above, with which we respectfully agree. And Recital 1 refers to the aims of the Regulation as including "*an improved quality of service, in the interests of road transport operators, their customers and the economy as a whole, together with improvements in road safety*". We do not see that a narrow construction of Article 7(2) such that the list contained is an exhaustive one, contributes to the interests of road safety as opposed to simply precluding operators who are, through the provision of wider evidence such as bank statements and overdraft facilities, able to show the financial wherewithal to keep their fleet of vehicles properly maintained. We do not see that the restrictive approach adopted by Mr Backhouse does anything to further and indeed runs contrary to the interests of the "*economy of a whole*" of any State. On that basis, we are of the view that, notwithstanding the words used, Regulation 7 is not to be read as setting out an inflexible and exhaustive list of items of evidence which a State is able to take into account when deciding whether the test for financial standing is met. That being so, had we been called upon to decide the point, we would have concluded that TC's, whilst of course not limited to considering bank statements, overdraft facilities and credit facilities, are able to take such into account alongside whatever other relevant evidence is advanced by an operator. But for other reasons already explained, we conclude that the first appellant succeeds under Ground 1.

Burden of proof at a PI

29. The burden of proof during a PI requires the Traffic Commissioner to be satisfied of the grounds for revocation as noted by Rix LJ in *Muck It Ltd and Others v. Secretary of State for Transport* (2005) EWCA Civ 1124:

> "69. Turning back to sections 26 and 27 of the 1995 Act, I would conclude that for revocation to be possible under the former or mandatory under the latter, it is the commissioner who must be satisfied of the ground of revocation, and not the licence holder who must satisfy him to the contrary. That seems to me to be the natural way to regard both the language of those sections, and the situations contemplated in them. The context is that of a licence holder and the possible revocation of his licence. Revocation can only be done on some specified ground (section 26) or because one or other of the three fundamental requirements is no longer satisfied (section 27). Under section 26(4), the commissioner can only act if "the existence of" a ground comes to his notice. It is counter-intuitive to think of a licence holder being required to negative the existence of a ground raised against him. So with section 27. The commissioner must revoke if "it appears to him" that the licence holder is no longer of good repute or of appropriate financial standing or professionally competent. That seems to me to mean that the commissioner must be satisfied that the requirements are no longer fulfilled. If it had been intended to place the same burden on the licence holder as had been placed on the original applicant, then the same language as that found in section 13 would have been used."

The Tribunal's jurisdiction on appeal

30. Paragraph 17 of Schedule 4 to the Transport Act 1985 provides:

(1) 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 any of their functions under an enactment relating to transport".
(2) On an appeal from any determination of a traffic commissioner other than an excluded determination, the Upper Tribunal is to have power-
(a) to make such order as it thinks fit; or

b) to remit the matter to—

(i) the traffic commissioner who made the decision against which the appeal is brought; or

(ii) as the case may be, such other traffic commissioner as may be required by the senior traffic commissioner to deal with the appeal,

for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate;

and any such order is binding on the commissioner.

(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

31. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 thus provides that "*the Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purposes of the exercise of any of their functions under an enactment relating to transport*".

32. Nonetheless, in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, the Court of Appeal explained that the then Transport Tribunal (now the Upper Tribunal) is not required to re-hear all of the evidence but, instead, has the duty to determine matters of fact and law on the basis of the material which was before the TC but without having the benefit of hearing and seeing from witnesses. The court applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56, where Woolf LJ held:

> "44….The first instance decision is taken to be correct until the contrary is shown…An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one…The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category."

33. The Court of Appeal therefore explained that an appellant assumes the burden of showing that the decision which is the subject of the appeal is 'wrong' (what used to be categorised as 'plainly wrong'), in order to succeed. An appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which it ought to be concluded that the different view is the right one. Put another way, an appellant, in order to succeed, must show that the process of reasoning and the application of the law requires the Upper Tribunal to take a different view.

34. The Upper Tribunal, in deciding an appeal such as this, is not permitted to take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal (see paragraph 17(3) of Schedule 4 to the Transport Act 1985). Therefore, we should not have regards to events that post-date the revocation decision of September 2023 in deciding whether the TC's decision is wrong.

The Appellants' submissions

35. Mr Backhouse made various arguments in support of the Appellants' four grounds of appeal which are addressed below.

Discussion and analysis

36. We are satisfied that the Appellants have demonstrated that the DTC's decision of 11 September 2023 to revoke their operator's licences was plainly wrong on each of the grounds upon which they rely.

Ground 1

37. We are satisfied that the DTC did err in deciding that the Appellants did not satisfy the test for financial standing. This is for the reasons that Mr Backhouse submitted in his skeleton argument and as set out below.

'Ground 1

1. The Deputy Traffic Commissioner erred in finding that financial standing was not met in the operating companies, and further was plainly wrong on the evidence to find that the Appellants were at an unfair competitive advantage in view of those financial arrangements.

2. The test for financial standing is contained in s 14ZA of the Public Passenger Vehicles Act 1981, which itself refers to Article 7 of the retained version of EU Regulation 1071/2009.

3. Any reading of this Article 7 is difficult to square with the established practice of the Office of the Traffic Commissioner, for non-Audited companies of relying on available cash calculations.

4. However, it is long established in the jurisdiction that this is how smaller companies can demonstrate financial standing and the Traffic Commissioner's call-in letter applies this methodology in both cases (see page 81). Note 'Certified' accounts are a reference to certification by an auditor and cannot be relied upon (other than as circumstantial evidence – per the UT decision in Thandi Coaches) to meet the statutory test.

5. In this appeal the deputy Traffic Commissioner accepts at the outset and in his decision that both companies meet the test based on the available cash methodology (see page 3118 penultimate paragraph, and page 19 sixth bullet point).'

38. The DTC did accept at [31] of the decision (second bullet point for Abbey and third bullet point for Rigby's) that the Appellants had satisfied the statutory guidance of the Senior Traffic Commissioner in relation to financial standing in that their bank statements met the financial standing requirements.

39. Therefore, it was wrong to seek to go behind it in the manner that it did in the ninth and tenth bullet points of [39] of the decision. The DTC had insufficient evidence or gave insufficient reasons in finding that the Appellants did not hold the sums that were demonstrated in their bank accounts to be sufficient. Further, there was simply no evidence that the Appellants were at unfair competitive advantage.

40. We have real sympathy with the DTC as to whether the sums in the Appellants' bank accounts did represent the true or fair financial standing in relation to the companies. He was entitled to have concerns as to the companies' true financial standing. However, there was insufficient evidence, in light of the material presented to him, to go behind the documents served at face value when they satisfied the statutory guidance.

41. Had the DTC wanted to, he could have undertaken a full and thorough investigation as to the true financial picture of the companies and whether they were simply keeping sufficient sums in a discrete bank account while holding liabilities, debts or the like elsewhere which undermined this position or whether the funds were in fact the assets of a different company. The danger of relying on the bank accounts alone is that a misleading picture can be presented as to the true financial standing of a company. That of course might go both to repute as well as financial standing.

42. However, the DTC specifically did not ask for draft or certified or audited accounts to be presented by the Appellants (and the related third party company) or for all financial information or documentation that might reveal their sources of income and expenditure, the beneficial ownership of assets and liabilities, whether funds were co-mingled or owned by others, and whether the Appellants held other accounts. This highlights further the merit in ground 4 – the DTC never called in the companies on the basis of financial standing and did not give them full notice that this was an issue nor conduct any serious investigation into the Appellants' and related companies' finances.

43. These are exactly the type of issues and concerns that could be addressed at a reconvened PI. We quash the decision on financial standing and order that it be remitted to a different TC to be reconsidered and reheard at a fresh PI. In its calling in letter the TC will need to identify what further financial material he or she wishes to see relating to the Appellants (and the related companies) in addition to the bank statements previously seen. These might include: all bank accounts for the relevant and related companies and relevant financial information over an extended period and draft and / or certified and / or audited company accounts in relation to each.

44. Notwithstanding the obiter observations in *Thandi*, there remains an interesting argument as to the lawfulness of the guidance and its compliance with Article 7 of the Regulation. We can see both the legal justification and practical benefit for the statutory guidance on financial standing being more flexible and less exhaustive than that contained in the Regulation. Further, both the DTC and Mr Backhouse relied on the guidance as constituting the requirement to demonstrate financial standing in this case and we see no reason to depart from this. Were the issue to have been determinative of an appeal, and given the significance of the point, procedural fairness would have required us to invite the Secretary of State to intervene and it to be fully argued on notice to all parties.

45. The appeal succeeds on Ground 1.

Ground 2

46. We are satisfied that the DTC was wrong to rely on maintenance arrangements in the way that he did to make findings of loss of good repute. This is mostly for the reasons set out by Mr Backhouse in his submissions:

'Ground 2

1. The Deputy Traffic Commissioner erred in deciding that the maintenance arrangements, at the date of the public inquiry were such that the operator must be put out of business.

2. The MIVR dated May 2022 for both appellants was well over 12 months old at the time of the public inquiry. (page124 et seq. for Rigbys and page 271 et seq. for Abbey) The reports were necessarily looking back at documents over the previous 15 months i.e. towards the beginning of 2021, and still well within the Covid Pandemic period.

3. In that context it is important to note that neither report was particularly critical. The Rigbys report identifies just three areas on unsatisfactory. Two of these are statistical – historic prohibitions and MoT failure rates, with the remaining one being a small number of stretched frequencies. These are identified on the SIPCAT analysis (see page 138 – 141). The SIPCAT erroneously uses 42 days as the relevant period rather than 56 which is the 8-week period actually used by both Appellants (page 3122 final paragraphs and page 3158).

4. This does make a difference to the calculations, but in any event by the time of the Public Inquiry there is no evidence in the recent past of any issues with timeliness of inspections as the deputy Traffic Commissioner himself observes (Page 15 paragraph 33 second bullet point).

5. The MIVR for Abbey is even better with only one area of unsatisfactory – namely test pass rate (page 271 and 276). This should not even have formed the basis of a call to public inquiry.

6. Both MIVR assessments involved vehicle inspections and of the 6 vehicles looked at from both companies there were no prohibitable defects found (see page 125 - Rigbys and 272 - Abbey) .

7. As at the date of the Public Inquiry there was simply no evidential basis for a finding that the Appellants respective maintenance systems were so poor that they should be found to not have good repute and the licences should be revoked.

8. An additional area of analysis by the Traffic Commissioner was the as he describes 10 prohibitions across 4 vehicles attending the Glastonbury event in June 2023. A prohibition is the issue of the document against the vehicle and on one occasion only one will be issued listing all concerning defects per vehicle.

9. In fact, therefore, there are 4 prohibitions detailing 10 defects, of which only one was determined by the Vehicle Examiner to be indicative of a significant failure in the compliance arrangements, and the Traffic Commissioner correctly identified that this was a criticism of the driver checks that day and not the Appellant's mechanics or Transport Manager (see pages 13 and 14).

10. Both Mr Din and Mr Saad (Transport Manager) were challenged on these prohibitions, and well as Mr Taylor the Engineer, all accepted that ultimately it was their collective responsibilities, however they each made the same valid points as regards the particular (Glastonbury) prohibitions, and this is supported by the point made at paragraph 17 above, namely the DVSA Vehicle Examiner was not critical of the Appellants' systems as regards the specific defects. (See pages 3152 – 3257 (Mr Din) pages 3164 bottom – 3166 (Mr Saad) and 3178 – 3180 (Mr Taylor))

11. The Traffic Commissioner's findings in relation to this were therefore simply not supported on the evidence before him:

    a. The Vehicle Examiner assessment;
    b. The conditions of the 6 vehicles examined on the MIVRs;
    c. The review of the Maintenance documentation conducted by the Traffic Commissioner; and
    d. The nature of the specific defects issues at Glastonbury.

12. Additionally, the Traffic Commissioner finds that the Appellants had not responded to the MIVRs. This is a factually incorrect finding, the responses are contained in the traffic Commissioner's own bundle and appear in the Appeal bundle (see pages 142 (Rigbys) and 289 (Abbey)). This supports the evidence of Mr Din on this point when challenged by the deputy Traffic Commissioner (see page 315) particularly the middle paragraph where Mr Din explains correctly that Mr Saad responded.

13. Given this position there is simply no evidential basis to support the adverse findings on maintenance compliance, and consequential impact on repute.'

47. We accept most of the above criticisms of the DTC's findings at [39] and reasons given for loss of repute at [41] of the decision. Mr Backhouse has identified a number of errors in the DTC's findings and reasons as set out above. We are satisfied that cumulatively they demonstrate errors which make the revocation decision wrong on the basis of maintenance arrangements / loss of good repute.

48. However, we do not agree with all the criticisms of the DTC's findings regarding the poor maintenance arrangements and record of the companies.

49. For instance, the DTC was plainly right to have very serious concern as to the MOT failure rate of Rigby's and the failure to present for MOT in the case of Abbey.

50. The DTC rightly identified that the operators were 'in the last chance saloon' having been given a final warning as a result of the PI in 2021.

51. The DTC was entitled to find serious concern about the lack of involvement of TM Evans.

52. Although Mr Backhouse was right to identify errors in the way the DTC approached the MIVRs, the fact is that the operators failed on 1-3 categories of roadworthiness and these were the most serious categories. It is only at MOT or roadside encounters that the vehicles are inspected independently rather than the operator 'marking their own homework' such as in PMIs.

53. The DTC was also entitled to have real concern about the gravity of the four prohibitions notices (10 prohibitable defects, specific faults or defects, in 4 prohibition notices)[1], resulting from the Glastonbury Festival inspections in June 2023. Even if the defects were caused by passengers during travel, could not have been identified by pre-inspection by the drivers and did not disclose a failure to maintain the vehicles by the operator prior to their journeys, they were still concerning as regards the roadworthiness of the vehicles and post-journey inspection regime of the drivers.

54. However, the DTC did not state that the Glastonbury prohibitions and MOT failures / absences were sufficient to find a loss of repute or breach of undertakings given by the operators. For that reason, we cannot find that it is inevitable that the DTC would have found a loss of repute on these bases alone.

55. Ground 2 succeeds and the revocation should be quashed on the basis that findings on maintenance arrangements, breach of undertaking and loss of repute were materially mistaken and wrong.

56. That is not to say that there are not real concerns regarding these issues as set out above. However, the issues should be remitted to a different TC to rehear and reconsider at a reconvened PI. The calling-in letter for that PI should again narrow the issues and determine with clarity what matters are relied upon in this regard. The maintenance, inspection and documentation of vehicles will form a central part of the issue of good repute on the remittal.

Ground 3

57. Again, there is merit in the Appellants' challenge to the DTC's findings on the companies' structures and method of engagement for their drivers at [39] and [41]. This is for the reasons relied on by Mr Backhouse.

'Ground 3

1. The Deputy Traffic Commissioner erred in determining that the operating entity was not the Appellants in each case (paragraph 39 final bullet point of the decision), and as such this went to the repute of the Appellants.

2. This ground is based on the fact that the drivers were engaged, normally through employment, by another associated company Coach Travel Solutions Ltd ("CLT") (page 20 final bullet of paragraph 39).

3. The deputy Traffic Commissioner errs in only looking at part of the statutory test under Section 81(1) of the Public Passenger Vehicles Act 1981.

[1] "Prohibition" is used as short hand and can have two related meanings (1) The prohibition notice issued to the Driver; (2) The specific defect or fault. The practice is to list all prohibitions (faults or defects) for one specific vehicle on one prohibition (notice).). Roadside vehicle checks for commercial drivers: Roadside prohibitions - GOV.UK (www.gov.uk) uses the word 'prohibition' in both senses.

4. The full test in s81(1)(b)(ii) is set out in the decision: "(ii) in any other case, the person for whom the driver works (whether under a contract of employment or any other description of contract personally to do work)."

5. The second part underlined for ease of reference, requires the Traffic Commissioner to consider on the evidence before him who the 'user' is and therefore who requires the operator's licence.

6. On the evidence before him it is clear that the drivers were supplied to the operating companies by CLT, and this is perfectly lawful provided the drivers understood they were contractually bound to work for the Appellant company.

7. This issue was not raised in the Calling In letter but, even so, this has been the situation over a long number of years (see page 3127) based on an established previous course of dealings, the drivers would be personally contractually bound to work for the Appellant companies.

8. The provision in s81(1)(b)(ii) also supports the lawful use of self-employed drivers. The deputy Traffic Commissioner's findings of illegality on this point that the Appellants 'admission' of sies of self-employed drivers is anti-competitive and unlawful (page 19 fifth bullet point) is simply far too simplistic a stance on the facts as presented here.'

58. Again, the DTC had insufficient evidence before him and gave insufficient reasons for the findings that there was something unlawful or worthy of a loss of repute in the driver engagement or in the co-mingled, or unclear company structures.

59. Section 81(1)(b)(ii) of the Act does not necessarily prohibit the use of self-employed drivers being engaged by an operator, albeit that this is harder to regulate and one would expect formal or written documentation that record the legal nature of the driver engagement. Of course, a lack of clarity or care taken in respect of the nature of driver engagement (whether employed, self-employed or otherwise) may reveal something about the repute of a company.

60. As for the findings that the operating entities were not the Appellants, this appears insufficiently reasoned and without evidential support. It also appears to be founded on the same mistake of law.

61. Likewise, the company structures and co-mingled use of companies may reveal something going to statutory compliance, financial standing or repute but the evidential position would need full investigation. The DTC was entitled to have concern as expressed:

    'Fundamental, long-term and unresolved issues raised about who or what was operating the vehicles, who or what employed and controlled the drivers and how the companies were governed and met their statutory responsibilities.'

62. The DTC was entitled to be able to see a clear model, with transparent paperwork, as to: how each company was operated and run; drivers engaged; and finances allocated. The DTC was entitled to have concern as to whether the Appellants were exercising continuous effective control of vehicles and drivers and whether there was supervision, control and compliance of vehicles and drivers. If borrowing,

exchanging or swapping drivers and vehicles was occurring between companies this would need a lawful basis and the transparent and formal documenting of the same.

63. However, (as Ground 4 addresses) – if the DTC had such concerns, then these needed to be identified in the calling-in letter in advance and procedural fairness would require a full evidential investigation and the Appellants being on notice of the specific issues they needed to address.

64. Ground 3 succeeds and the decision of the DTC that the Appellants were not the operators is quashed. The issues identified under this ground should be addressed in the calling-in letter, the Appellants required to provide relevant documentation identifying how the relevant and related companies are organised operationally and the drivers engaged so that a full evidential investigation can take place at the remitted PI.

Ground 4

65. We also agree with Mr Backhouse's fourth ground of appeal. For the reasons he submits, we are satisfied that the DTC's decision was based materially on grounds which were not identified in advance to the Appellants. Thus the decision is undermined by procedural unfairness. We are satisfied the decision was wrong for the same reasons:

'Ground 4

1. The final ground is that the Deputy Traffic Commissioner's decision was procedurally flawed, in that, for the reasons set out in various grounds above (so not repeated here), the Deputy Traffic Commissioner made a significant part of his adverse determinations against both Appellants on issues which were not identified as an issue at all within the calling in letters and documentation. This is a fundamental procedural flaw and particularly significant when the Appellants, as here, were not represented.

2. Finally, the deputy Traffic Commissioner in large measure relies on the company structure and the driver employment arrangements to establish his adverse view of the Appellants' (see pages 19 & 20).

3. It is established law in this jurisdiction that an operator is entitled to proper notice of the issues to be considered at a Public Inquiry and here there was no notice at all. The failure to so provide here is plainly procedurally unfair.

4. If as appears possible issue such as these are to be central the Appellants (who were representing themselves) should have been given (or at the minimum offered) and adjournment, a letter setting out the allegations, law and evidence relied upon by the Traffic Commissioner. Had this happened the points made in relation to ground three would have been made on their behalf.

5. In addition, if there was some regularisation to be made by the appellants this could have been in train before the hearing addressing the issues themselves.'

66. Mr Backhouse conceded, on our questioning during the hearing, that the consequence of each of his grounds of appeal, including that on procedural unfairness, should be that the matter be remitted for a fresh hearing of the PI at which

these issues can be highlighted in advance and addressed. He was right to make that concession for the reasons we have explained above.

Conclusion

67. We are satisfied that the TC's revocation decisions have been demonstrated to be wrong based on all four grounds of appeal.

68. Accordingly, the appeal is allowed. The revocation decisions are quashed. **The matter is remitted to a different Traffic Commissioner to rehear and determine after issuing clear calling in letters and holding a reconvened Public Inquiry in accordance with the Tribunal's directions.**

The continuation of the stay

69. On 9 October 2023, the UT granted the Appellants a stay of the revocation decisions pending appeal. That stay must be continued until the outcome of the further PI and the fresh decisions of the TC on whether to revoke the licences / grant the variation applications.

Judge Rupert Jones
Judge of the Upper Tribunal
Authorised for issue on 15 January 2024