Neutral Citation No: [2024] UKUT 22 (AAC)
Appeals Nos. UA-2023-000628-T
and
UA-2023-000602-T

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of the DEPUTY TRAFFIC COMMISSIONER FOR THE SCOTTISH TRAFFIC AREA (Mr A R Seculer)

Dated: 24 April 2023

Before:

Marion Caldwell KC	Judge of the Upper Tribunal
Mr David Rawsthorn	Member of the Upper Tribunal
Mr Gary Roantree	Member of the Upper Tribunal

Appellants:	**(1) Central Haulage Limited** **(2) Mrs Johanna Dunne** **(3) Mr Gordon Dunne, and** **(4) Mr Aaron Harrison**

Attendances:

For the 1st to 3rd Appellants	Mr David Adams, Advocate
For the 4th Appellant	Mr Neil R Kelly, Solicitor
For the Respondent	Mr Neale Tosh, Advocate

Heard at: Employment Appeal Tribunal Building, 52 Melville Street, Edinburgh EH3 7HF

Date of Hearing: 12 December 2023
Date of Decision: 23 January 2024

DECISION OF THE UPPER TRIBUNAL

The appeals are dismissed. The orders made by the Deputy Traffic Commissioner were originally to take effect from 31 May 2023 at 23.59 but subsequently the Deputy Traffic Commissioner stayed the implementation of his orders pending our decision. We now direct that they are to take effect from 23.59h on 26 February 2024.

Subject Matter

Representation, rules 7(2)(a) and 9(2) of the Tribunal Procedure (Upper Tribunal) Rules, 2008; natural justice; fair proceedings; bias; fronting; loss of good repute of operator, director, *de facto* director and transport manager; revocation; disqualification.

Cases referred to:

AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWCA Civ 1418
NT/2013/82 *Arnold Transport & Sons Ltd v DOENI*
Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695
Brogan v O'Rourke Ltd 2005 SLT 29
Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hashim Al Refai [2014] EWHC 1055 (Comm)
2003/094 Dawlish Coaches Ltd
Denton v White [2014] EWCA Civ 906
NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI
Gerovska Popčevska v Macedonia (2018) 66 EHRR 12
HCA International Ltd v Competition and Markets Authority [2015] 1 WLR 4341
Helow v. Secretary of State for the Home Department 2009 SC (HL) 1
Hughes v HMA 2023 JC 40
In re B [2008] 35

Johnson v Johnson (2000) 201 CLR 488 at para 53)
Joseph Formby t/a G&G Transport [2012] UKUT 239 (AAC)
JSC BTA Bank v Ablyazov (No 9) [2013] 1 WLR 1845
Liliana Manole [2022] UKUT 002277(AAC)
Luminar Lava Ignite Ltd v Mama Group plc 2010 SC 310
Melvin Murray t/a Melvin Murray Transport [2015] UKUT 0441 (AAC)
Mitchell v News Group Newspapers 2005 SLT 29
P Elsagood Transport Service Ltd, Appellant [2019] UKUT 0117 (AAC)
Porter v Magill [2002] 2 AC 357
R v A (Harold) [1999] Crim LR 420
R (Al-Le Logistics Ltd) v Traffic Commissioner for South Eastern & Metropolitan Traffic Area [2010] EWHC 134 (Admin)
R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 16633
Re H & Ors (Minors) [1996] AC 563
Secretary of State for the Home Department v. Rehman [2003] 1AC 153
SN v Secretary of State for the Home Department [2015] UKUT 00227 (IAC)

Introduction

1. This is an appeal from the decision of the Deputy Traffic Commissioner ("DTC") for the Scottish Traffic Area given on 24 April 2023. The decision of the DTC is summarised as follows:

   (i) *On a loss of good repute of the operator company, as required under section 13A of the Act, the operator's licence is revoked under section 27(1)(a) of the Act with effect from 31st May 2023 at 23.59.*

   (ii) The application to increase authorisation of vehicles on the licence must fail as a result.

   (iii) I consider it appropriate and proportionate to disqualify the operator company, the named director, Johanna Dunne, and the de facto director, Gordon Dunne, for a period of 12 months from holding or obtaining an operator's licence under section 28 of the Act, with effect from 31st May 2023 at 23.59.

   (iv) *On a loss of good repute, as transport manager, Aaron Harrison is disqualified for a period of 12 months, with effect from 31st May 2023, under paragraph 16 (2) of schedule 3 of the Act.*

2. The appeals were considered at an oral hearing at which the appellants were in attendance and legally represented, as noted above. There are two bundles of papers for this appeal. The bundle relating to the first three appellants comprises 2462 pages ("the CHL bundle"). The bundle for the 4th appellant has 2349 pages. The latter bundle is referred to the "Master" bundle. Unless otherwise stated, any page numbers referred to will be in the Master bundle.

Legal Framework

3. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 provides that no person shall use a goods vehicle on a road for the carriage of goods, for hire or reward, or in connection with any trade or business carried on by him, except under a licence issued under the Act.

4. There is a requirement that the holder of a standard licence must be of good repute. This is set out in mandatory terms in Article 3 of EU Regulation 1071/2009 and sections 13 and 13A of the 1995 Act. "Good repute" is determined in accordance with paragraphs 1 to 5 of Schedule 3 to the 1995 Act.

5. Section13A(2)(d) sets out the requirement to be professionally competent. Section 13A(3) makes provision for appointment of a transport manager. The transport manager must be of good repute and professionally competent[1].

6. In determining whether a transport manager ("TM") is of good repute, the traffic commissioner ("TC") may take into account any matter[2]. If the TC finds that a TM has lost his repute, disqualification from acting as a TM is mandatory[3].

7. Once a licence has been granted the requirements of sections 13 and 13A, among other conditions, are continuing obligations that require to be met throughout the lifetime of the licence[4].

[1] Paragraph 14A(1) of Schedule 3 to the 1995 Act.

[2] Paragraph 1 of schedule 3 to the 1995 Act.

[3] Paragraph 16(2) of Schedule 3 to the 1995 Act.

[4] *Arnold Transport & Sons Ltd v DOENI*, NT/2013/82, at paragraph 11.

8. Section 27 provides that a TC must direct revocation of a standard licence if it appears to him that the licence holder no longer satisfies one or more of the requirements of section 13A. This would include loss of good repute.

Background

9. The factual background to this appeal appears from the documents and the decision of the DTC and may be summarised as follows:-

(i) James Strathearn was the holder of a standard national goods vehicle operator licence. He had traded as JS Haulage. The licence was revoked on 31 October 2018 on the grounds of loss of repute, loss of professional competence, material change, breach of the licence undertakings and false declaration. He was disqualified for five years from applying for or holding an operator's licence, being a director or holding a controlling interest in a company or subsidiary which holds a licence and from operating any goods vehicles in partnership with a person who holds such a licence[5].

(ii) Forth Valley Commercials Limited ("FVC") was incorporated on 4 July 2018. The initial director was Rebecca Strathearn, the sister of James Strathearn. She was later replaced by Eileen Strathearn, James Strathearn's mother. FVC was a drivers agency.

(iii) Central Haulage Ltd ("CHL") was incorporated on 7 February 2019. The sole director on incorporation was Hana Simpson. The shareholders in the company were Hana Simpson and Johan Thorburn George Dunne, otherwise known as Johanna Dunne.

(iv) As director of CHL, Hana Simpson applied for a standard national licence. The nominated transport manager ("TM") was David Honeyman. CHL's application was granted on 17 June 2019 with authorisation for 2 vehicles and 2 trailers.

(v) On 27 August 2019 Johanna Dunne (under the name Johan Thorburn George Dunne) was appointed a director of CHL. Johanna Dunne is married to Gordon Dunne. Gordon Dunne is titled the Managing Director

[5] Page 58.

of CHL albeit he is not registered in Companies House as a director of CHL. The operator conceded that Gordon Dunne was a "*de facto*" director of the company.

(vi) On 10 March 2020, during a routine enforcement check, a DVSA Traffic Examiner ("TE"), Barry Wardrop, encountered one of the operator company's vehicles being driven by James Strathearn.

(vii) TE Wardrop saw what he believed to be the operator company's tachograph card in Mr Strathearn's wallet. Mr Strathearn declined to show TE Wardrop the card, unless police were in attendance.

(viii) This encounter prompted DVSA Traffic Examiner investigations, which were complex and substantial. The investigations resulted in a public inquiry (PI) over 2 days on 30th September 2021 and 1st October 2021. DTC A R Seculer presided over the public inquiry ("the 2021 PI").

(ix) The call-up letter for the 2021 PI alleged breaches of the undertaking to comply with the rules on drivers' hours and tachographs. Eight drivers were called to conjoined driver conduct hearings.

(x) The call-up letter also raised the issue of the role of James Strathearn in the set up and operation of the operator company, and posed the question whether Hana Simpson, as named director, was a "front" for James Strathearn. There were suggestions that Hana Simpson was the partner of James Strathearn, the driver/ disqualified operator.

(xi) The DTC issued a written decision[6]. In paragraph 17 of the 2021 decision, he stated, "that the suggestion of "fronting" was the most serious issue facing the operator as this would suggest that the licence had been granted on the basis of deceit and would almost inevitably lead to loss of repute and revocation". The DTC stated (at paragraph 27) that he had significant doubts over the role of Hana Simpson and the account given by Mr and Mrs Dunne as to how she came to be named as sole director of a haulage company when:

- She had not invested any money into the business,
- She had no background in haulage,
- She was allegedly just a friend of Johanna Dunne,

[6] The decision is at page 97 ff.

- She was alternately described as an “investor” or “the person who would run the logistics”. Notwithstanding the above points,
- She continued as a director until August 2020 despite, according to the evidence of Mr and Mrs Dunne, contributing nothing to the business in terms of finance or management.

(xii) The standing of the named directors was further put into question by Hana Simpson then being replaced by Mrs Dunne as director. Mrs Dunne had no background in transport herself, was unable to answer any operational questions in 2020 and Gordon Dunne was clearly the operational mind of the business. He was not named as a director and despite assurances that he would be “within weeks” of the inquiry in October 2021, he had still not been added by the date of the PI in November 2022 and February 2023 (“the 22/23 PI”).

(xiii) During the DVSA investigations in March 2020, and at the 2021 PI, Mr and Mrs Dunne both stated that they had no knowledge of a relationship between James Strathearn and Hana Simpson.

(xiv) Johanna Dunne described Hana Simpson as a gym/mindfulness class friend she met independently of her husband or James Strathearn. She later found out about her (Hana Simpson’s) family background in Scotland and business aspirations.

(xv) Johanna Dunne stated to DVSA during the 2020 investigation that she had no knowledge of James Strathearn.

(xvi) Gordon Dunne described Hana Simpson as an acquaintance of his wife who he had no involvement with initially, but then he became involved in the business proposition.

(xvii) He knew of James Strathearn through a brief conversation at a Falkirk football match.

(xviii) When asked by his advocate at the 2021 inquiry, “And as far as James Strathearn was concerned what involvement did you have with him?”, he replied, “I had none” (page 128, transcript of 2021 PI).

(xix) When asked by the DTC about the set up being a “front” for James Strathearn, Gordon Dunne stated, “I totally refute it and my wife, and I have worked very hard to start this business invested substantial sums of money and I’m talking over 1.2 million pound, and I wouldn’t want to have

anyone else involved and if I'd known now, then I should have done more due diligence. But it's., I totally refute that James Strathearn……"

(xx) As for James Strathearn, to the suggestion that Hana Simpson was a "front" for his involvement, this was emphatically denied by him. Not only did he deny any personal/romantic relationship, he denied even knowing Hana Simpson. He stated in interview on 28th October 2020, when asked "Who is Hana Simpson?", "Don't know. Don't know".

(xxi) At the 2021 PI, there was the following exchange between the DTC and James Strathearn (page 146)-

DTC "And coming back to the suggestion that's made in the paper, papers in terms of the company and your possible role in that company. You know Hana Simpson?

JS "No".

DTC "So, you refute any suggestion that in some way she was related to you and that she…."

JS "She's not related to me"

DTC "…she was in any way acting on your behalf, and she was the director?"

JS "No".

(xxii) On the issue of fronting, in his decision after the 2021 PI the DTC stated:

1) "James Strathearn was believed to be in possession of the company tachograph card. My findings on the disputed evidence give solid grounds for the DVSA's concerns.
2) The explanation of the involvement of Hana Simpson and the reasons behind her being the sole director are unconvincing. She invested no money (but took out sums in expenses) and had no apparent background or expertise in logistics. She was alternately named as an investor and the person who would run the logistics and, despite Mr and Mrs Dunne stating she had no input to the business, one driver stated he took work instructions from "Hana" and, she was not removed from Companies House records until 1st August 2020.
3) The fact that Mr Dunne and Mr Honeyman each stated the other downloaded the vehicle units, yet they were done soon after Mr Strathearn's driving.
4) The role of Forth Valley Commercials in the appointment of David Honeyman and the engagement of drivers.

5) The links between Transport Manager David Honeyman and James Strathearn. David Honeyman was an offending driver on James Strathearn's licence and was employed through Forth Valley Commercials."

(xxiii) The DTC determined the following: "Mrs Johanna Dunne and Mr Gordon Dunne appeared as experienced, respectable businesspeople. I could see no reason why their involvement in the licence needed to be concealed and indeed, Johanna Dunne was named (incorrectly) as a co-director on the application submitted by Hana Simpson on 3rd April 2019".

(xxiv) The question was asked by Mr and Mrs Dunne's advocate in closing representations; "Now I pose the question sir, having heard the evidence, what could Gordon Dunne, a man who has operated very large and complex businesses in the past, a man who is clearly intelligent, articulate and capable possibly want or need from James Strathearn?"

(xxv) The DTC stated that on the information available to him, he could see no reason why Mr and Mrs Dunne would need Hana Simpson to "front" for them.

(xxvi) With regard to the DTC's doubts and the burden and standard of proof, he stated at paragraph 29 of his 2021 decision; "Case-law is quite clear that the more serious the allegation the more cogent the evidence needs to be, although proof remains on the "balance of probabilities". Mrs Dunne and Mr Dunne were adamant in their denial of fronting and there is little doubt that since the early days of the licence Mr Dunne has been in operational control. Whilst there was a woeful lack of due diligence in the appointment of Hana Simpson as a sole director and David Honeyman as a transport manager, I do not find the suggestion of fronting made out to the required standard."

(xxvii) The DTC stated that, crucial to that finding was the absence of a proven link between Hana Simpson and James Strathearn. At the 2021 hearing, the question of a relationship between Hana Simpson and James Strathearn was merely an assertion or suggestion. I took that to be outweighed by the categorical statements of Mr and Mrs Dunne and James Strathearn.

(xxviii) On 6 October 2021, the DTC approved the nomination of Aaron Harrison as TM, replacing David Honeyman.

(xxix) Hana Simpson had not given evidence or attended the 2021 PI.

(xxx) Following the 2021 PI, on 11 February 2022, James Strathearn contacted DVSA TE Beverly Stoner. On 25 February 2022 he had a meeting with TE Stoner. He told her that he and Mr and Mrs Dunne had lied at the public inquiry in 2021. He said that he was in a relationship with Hana Simpson, that he had been involved financially in the set-up of CHL and that he was significantly involved in the operations. He said that the drivers had lied at the 2021 PI at the behest of Gordon Dunne. This led to a further PI to re-consider the repute and fitness of the operator company and the approved transport manager, Aaron Harrison.

(xxxi) The PI was convened on 15 November 2022. The appellants were in attendance and represented. The PI was presided over by DTC Seculer. Counsel for CHL and Johanna and Gordon Dunne made a preliminary submission that the DTC should recuse himself. The DTC declined to recuse himself and issued a written decision[7].

(xxxii) The PI then proceeded before DTC Seculer with evidence and submissions being heard. The PI was heard over a total of 3 days, namely, 15 November 2022, 20 and 21 February 2023.

(xxxiii) The DTC issued his decision on 24 April 2023. The DTC's findings on the evidence are at paragraphs 228 to 311 of his decision.

The decision of the DTC

10. The DTC's considerations and conclusions are at paragraphs 312 to 372 of the decision. He concluded that there had never been a genuine business plan between Johanna Dunne and Hana Simpson to establish a haulage company; that the enterprise was always a business arrangement between Gordon Dunne and James Strathearn to provide the former with an investment opportunity, and to provide the latter with a route back into the industry, whilst both, for different reasons, stayed under the radar. To that extent, the obtaining of the licence, he concluded, was based on deceit. Hana Simpson was a front for Gordon Dunne

and James Strathearn. He found that Gordon Dunne knew, when the venture was first discussed, that James Strathearn was a disqualified operator. He found that James Strathearn had contributed £6250 to the set-up of the business being a half share in the financial standing requirement and had a role in the management of the transport operations of the business.

11. The DTC accepted the evidence of Hana Simpson that Aaron Harrison had been present at meetings in 2019 when Johanna Dunne, Gordon Dunne and James Strathearn were discussing the creation of the operation (paragraph 248). He found that Aaron Harrison knew that James Strathearn was a disqualified operator and that he was engaged in a management role in the business. He worked alongside James Strathearn in a management role with that knowledge. Aaron Harrison attended an interview by DVSA TE Beverly Stoner of Gordon Dunne and said nothing while Gordon Dunne gave evidence that he, Aaron Harrison, knew to be false, about the role of James Strathearn. He did the same at the 2021 PI. The DTC concluded therefore that Aaron Harrison helped to mislead the DVSA and the TC. The DTC found that Aaron Harrison knew that Hana Simpson was a director in name only, and why. He had therefore lost his good repute as required by paragraph 14A(1)(b) of Schedule 3 to the 1995 Act.

Grounds of Appeal

12. The grounds of appeal for the first three appellants are at pages 2383 to 2397 of the CHL bundle. The grounds of appeal for the 4th appellant are at pages 2303 to 2311. In addition, the parties submitted skeleton arguments, and lists of authorities with hyperlinks, for which we are grateful.

Grounds for 1st to 3rd appellants

13. The first ground of appeal is the apparent bias of the DTC. The DTC had presided over the 2021 PI and while he did not hold fronting proved, he had been critical of the 2nd and 3rd appellants and of James Strathearn. The DTC had been asked to recuse himself on the grounds of apparent bias. By declining to do so, he had erred in law.

[7] Page 1093.

14. The second ground of appeal concerns the status of James Strathearn at the PI. It is submitted that he had variously been treated by the OTC as a witness, party and potential shadow director of CHL. The first three appellants understood that James Strathearn had been sent copies of the briefs and other documents produced by the OTC, productions lodged by the appellants and the statements of Johanna Dunne and Gordon Dunne. It was submitted that James Strathearn was, in fact, a witness. It is submitted that the DTC's inconsistent treatment of James Strathearn was unfair and contravened the rules of natural justice and the appellants' rights under Article 6(1) of the European Convention on Human Rights. ("the ECHR"). By treating James Strathearn as a party and allowing him sight of the brief, productions and statements, he had an opportunity to tailor his evidence. His partner, Hana Simpson, also had such an opportunity. This resulted in the appellants receiving an unfair hearing contrary to the principles of natural justice and contravening their rights under Article 6(1) of the ECHR.

Grounds of appeal for the 4th appellant

15. Ground 1: The DTC found that the 4th appellant had been involved in the set-up of CHL and, as such, implicated and thus "he failed in his duty to decline the involvement and inform the TC" (paragraph 370 of the decision). It is submitted that the DTC was plainly wrong and misdirected himself on the evidence and/or the law in concluding (1) that the fourth appellant was involved in the set up and (2) he failed in his duty to the Traffic Commissioner. There was insufficient evidence for this finding. It was incorrect to state that Hana Simpson had no motive (paragraph 348) given the evidence of Mr Strathearn.

16. Ground 2: The DTC concluded that the 4th appellant had been deceitful throughout from 2019. The 4th appellant's evidence was that James Strathearn had not breached the conditions of his disqualification. The DTC had failed to state when the 4th appellant failed in his duty; the 4th appellant not being the nominated transport manager until October 2021. Furthermore, it was submitted that the test for the transport manager and the assessment of the duty to the traffic commissioner has to be subjective. The question of whether the evidence given by Gordon Dunne and Johanna Dunne was false, was only determined by an experienced DTC after three days of evidence (paragraph 369). Whilst it is accepted, that transport managers are the eyes and ears of traffic commissioners,

transport managers are not expected to act as de facto traffic commissioners, and make findings of fact, and as such the DTC erred in law.

17. Ground 3: It is submitted that the DTC was in error of law, and plainly wrong, in concluding that the fourth appellant's position at the PI, that he was sufficiently remote from management and administration of the company should a finding of fronting be made out, was not arguable, given that the fourth appellant was involved in the set up (paragraph 367). There is no suggestion that the fourth appellant was a de facto or shadow director of the operator. It is submitted that the expectations on a transport manager are not clear in such a situation (paragraph 371). Having arrived at the conclusion there was fronting, the DTC had to assess how remote, or otherwise, the appellant was from the purported fronting. This he failed to do.

18. Ground 4: Further, it is submitted that the DTC erred in disqualifying the 4th appellant for 12 months which is disproportionate and excessive. The DTC failed to draw a distinction between disposal of the operator's case and the 4th appellant's case.

Upper Tribunal Hearing

Preliminary Issue

19. At the commencement of the appeal hearing, we heard an application made on behalf of the Secretary of State for Transport to be added as a respondent to the appeals by the first three appellants only. The Secretary of State had no submissions to make in respect of the 4th appellant.

20. Following the DTC's decision, the appellants had intimated their intention to appeal to the OTC and sought a stay of the decision. This was duly granted. The DTC advised the case worker that the decision and the appellants' intention to appeal should be intimated to the Senior Traffic Commissioner. Notices of Appeal were timeously lodged with the Upper Tribunal and the case was set down for hearing on 12 December 2023.

21. On 6 December, correspondence was received in the office of the Administrative Appeals Chamber of the Upper Tribunal from the Office of the Advocate General for Scotland stating that an application was being prepared on behalf of the Secretary of State for Transport to be added, albeit late, as a respondent to the

appeal. The application, together with a skeleton argument on the merits of the appeals, was received on Friday 8 December.

22. Paragraph 5 of the Schedule to the Tribunal Procedure (Upper Tribunal) Rules 2008, provides that the appropriate national authority, and any other person to whom the Upper Tribunal has sent a copy of the notice of appeal may apply for a direction under rule 9(2) to be added as a respondent. The application under paragraph 5 must be sent or delivered to the Upper Tribunal so that it is received within 14 days of the date that the Upper Tribunal sent a copy of the notice of appeal to the person making the application[8]. Paragraph 7 provides that if a person makes an application in accordance with paragraph 5 and 6, then the Upper Tribunal must give a direction under rule 9(2) adding that person as a respondent.

23. Mr Tosh informed the tribunal that a copy of the notice of appeal had been sent to the Secretary of State for Transport, the "appropriate national authority" in the present case, on 13 June 2023. No application under rule 9(2) had been made within the period provided in paragraph 6. He therefore sought an extension of time to lodge the application under rule 5(3) or, if that was inapt, then waiver under rule 7.

24. Mr Tosh explained that the Secretary of State for Transport did not ordinarily participate in appeals against decisions of traffic commissioners, unless some issue of principle or of other significance (such as an allegation of bias) was raised. In that event, there was a protocol in place between the offices of the Secretary of State for Transport, and the Office of the Traffic Commissioner, that the latter will notify the former of the significance of the appeal in order that the applicant may apply to be a party to the appeal. In this case, that protocol had not been followed. He explained that there had been recent changes in staff in the OTC and pressure on resources which appear to have caused or contributed to the failure to follow the normal protocol. As a result, the significance of the issues raised by the present appeal were not appreciated until recently.

25. Regarding the addition of the Secretary of State for Transport as a respondent, Mr Tosh submitted that the tribunal would have had no discretion and would have been required to give a direction under rule 9(2) adding the Secretary of State for

[8] Paragraph 6 of Schedule 1.

Transport as a respondent had the application been made timeously. The appeal makes allegations of bias and unfairness. If sustained, the decision on the appeal might have a wider impact on the conduct of proceedings before TCs generally. In those circumstances, it was appropriate that a contradictor was available to ensure that the issues were fully argued and ventilated before being determined. That would be consistent with the overriding objective in rule 2(1) to enable the tribunal to deal with cases fairly and justly. He submitted that it should be a rare case where the door of the tribunal should be closed to a party with title and interest. Mr. Tosh referred to the case of *Melvin Murray t/a Melvin Murray Transport*[9] in which the Upper Tribunal had exercised its discretion under rule 7(2)(a) to waive the requirement to comply with the time-limit under paragraph 6. Finally, Mr Tosh stated that he did not seek an adjournment if the application were granted.

26. The application was opposed by Mr Adams. He submitted that the tribunal should only exercise its discretion under rule 7(2)(a) if it was satisfied that it was just in the circumstances to do so. Mr Adams submitted that the DTC had put the caseworker on notice that this case should be intimated to the STC on 17 May 2023, that was a week before the notices of appeal were lodged. Thereafter nothing was done for 6 months. No good reason had been given for the failure. Even in the absence of a contradictor, the appellants still had to persuade the tribunal of the merits of the appeal. To some extent, the tribunal was the contradictor. Therefore, the lack of a contradictor was not a persuasive factor. The late submission of the application and skeleton argument for the Secretary of State for Transport had required additional work to be done by the 1st to 3rd appellants' legal team in the day prior to the hearing. That had caused additional expense.

27. Mr Adams submitted that the courts often give considerable leeway to public bodies. However, there is authority that public and private litigants should be treated equally. *SN v Secretary of State for the Home Department*[10] which considered the principles to be applied when an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court

[9] [2015] UKUT 0441 (AAC).

[10] [2015] UKUT 00227 (IAC).

order. The case concerned an application for strike out under rule 8 of the 2008 rules following a number of egregious failures by the appellant's solicitors. Reference was made in that case to the principles set out in the cases of *R (Hysaj) v Secretary of State for the Home Department*[11] and *Mitchell v News Group Newspapers*[12]. The court in *R (Hysaj)* said all the circumstances of the case should be considered as listed in the Civil Procedure Rules 1998 ("CPR") rule 3.9 and have regard to the *Mitchell* principles. The *Mitchell* principles state:-

> *(i) If the failure to comply with the relevant rule, practice direction or court order can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly.*
> *(ii) If the failure is not trivial, the burden is on the defaulting party to persuade the Court to grant relief.*
> *(iii) The reasons why the default occurred should be considered. Where good reason is demonstrated, the prospects of the court granting relief will be favourable. Merely overlooking a deadline is unlikely to be considered a good reason.*
> *(iv) While all the circumstances of the case must be considered, particular weight is to be given to the factors listed in rule 3.9.*
> *Notably, the Court of Appeal emphasised that greater weight should be given to the twin considerations that it is necessary for litigation to be conducted efficiently and at appropriate cost and for compliance with the rules to be enforced. While a debilitating accident or illness might provide a good reason for a default, excessive pressure of work, much less mere oversight, would not.*

28. The court in *SN* also referred to *Denton v White* [2014] EWCA Civ 906, which concerned an application to extend time in the wake of a failure to file a notice of appeal within the time prescribed by CPR 52.4(2). In its judgment the Court stated, at [24]:

[11] [2014] EWCA Civ 16633.

[12] [2013] EWCA Civ 1537.

> *A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.*
>
> *The second stage is to consider why the default occurred.*
>
> *The third stage is to evaluate 'all the circumstances of the case', so as to enable the court to deal justly with the application including [factors (a) and (b)]*.

29. Mr Adams referred to *Brogan v O'Rourke Ltd*[13] for an example of the court refusing to exercise the dispensing power in rule 2.1 of the Rules of the Court of Session. In that case, a pursuer's solicitor had failed to have a summons in a personal injuries action called within three months and a day after the date of signeting. Rule 43.3(23) provides that where the summons is not called within that period then "the instance shall fall". The court commented that the rules of court were "… designed to serve the interests of justice, by ensuring, *inter alia*, that cases are dealt with expeditiously, without undue expense, and without undue demands on the resources of the court. The interests of justice are not well served by an approach which too readily excuses failure to comply with those rules."[14]

Decision on the preliminary issue

30. In the case of *Murray* because of the working procedures adopted by the respondent in that case, a practice had arisen whereby applications under rule 9(2) were routinely being made late. The Upper Tribunal was highly critical of that system and stated that it was imperative that it be changed and improved. Nevertheless, the Upper Tribunal exercised its discretion under rule 7(2)(a) and waived the requirement to comply with the time limit. In *Brogan* the pursuer's solicitor was in ignorance of the special rule for the shortened period in which a

[13] 2005 SLT 29.

summons in a personal injury action must be called. This was a circumstance the judge at first instance considered inexcusable. However, the motion that the court exercise its discretion under rule 2.1 was, in any event, incompetent because the summons had fallen and was no longer in existence. The comments quoted above are therefore *obiter*, but nonetheless relevant to efficient administration of justice.

31. We have had regard to the guidance referred to in the authorities cited to us. Unlike in *Murray*, in the present case, we were assured that there was a protocol in place to ensure timeous applications to be added as a respondent. It was unfortunate that, due to recent staff changes and resourcing problems, the. significance of this particular case was missed until late in the day. This resulted in a late application along with late submission of a skeleton argument.
32. The only prejudice cited by counsel for the first three appellants was the additional expense of the work required to consider the late application and skeleton argument.
33. We accepted the respondent's submission that, potentially, more turned on the outcome of this appeal than its consequences for these appellants. We accepted that the decision on the appeal might have a wider impact on the future conduct of proceedings before TCs generally. Looking at the skeleton arguments and other material available, we considered it likely that the appeal proceedings would be concluded in the time already allocated.
34. In all the circumstances, we considered it fair and just to exercise our discretion under rule 7(2)(a) and to waive the time requirement in paragraph 6 of Schedule 1. Having done that, therefore, in terms of paragraph 7 we are obliged to add the Secretary of State for Transport as a respondent to this appeal.

Appeal submissions on behalf of the 1st to 3rd appellants

35. Mr Adams adopted the terms of the Notice of Appeal to the Upper Tribunal and his written skeleton argument.
36. He submitted that there had been a general failure by the DTC to apply the rules of natural justice and follow fair procedure. The DTC had considered the issue of

[14] Per Lord Hamilton delivering the opinion of the court, at [33].

fronting at the 2021 PI. While he determined that CHL was not a front for James Strathearn and that the second and third appellants retained their good repute, he had criticised them and James Strathearn. He suspended James Strathearn from occupational driving for a period for a driver conduct issue.

37. Thereafter, James Strathearn went to DVSA and made allegations of, essentially it was submitted, a criminal conspiracy to pervert the course of justice. In presiding over the second PI the DTC was acting as a repeat fact finder on the same facts; and, if he concluded that the appellants had lied at the 2021 PI, then he was a witness to crime. As a witness to a crime, this put him in an onerous position.

38. Mr Adams submitted that by failing to recuse himself, the DTC had tainted the proceedings with apparent bias. It was inappropriate for him to sit in the 22/23 PI which caused him to revisit the findings of fact and law he had made after the 2021 PI. He was in effect, judging his own cause. The risk of appearing to have formed views was too great (*R v A (Harold)* [1999] Crim LR 420, *Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hashim Al Refai* [2014] EWHC 1055 (Comm), [32] to [37]).

39. The DTC erred when he concluded that there were not “real grounds for doubt” about the risk of perceived bias. There was a real risk that the fair-minded and informed observer, having considered the facts, would have concluded that there was a real possibility that the DTC was biased given his previous involvement in assessing the same witnesses about the same matters on which he had already made findings in fact and law, including adverse comments about the appellants (*Porter v Magill* [2002] 2 AC 357, [102] – [103], *HCA International Ltd v Competition and Markets Authority* [2015] 1 WLR 4341, [62], [64], [68] to [71]). The DTC ought to have taken a cautious approach in such circumstances (*P Elsagood Transport Service Ltd, Appellant* [2019] UKUT 0117 (AAC), [17]).

40. By failing to take such a cautious approach and electing to preside over the second PI, there was a violation of the appellants’ rights under Article 6(1) as the DTC lacked the requisite impartiality and independence given that he had reached final findings in fact and law in relation to the same matters at the 2021 PI (*Gerovska Popčevska v Macedonia* (2018) 66 EHRR 12, [43] – [56]).

41. Furthermore, the gravamen of Mr Strathearn's allegations amounted to a crime that the Commissioner was a witness to. It was inappropriate for him to assess the same witnesses and the same body of facts anew in those circumstances.

42. The DTC erred by giving undue weight to the concession made by the appellants' counsel on 15 November 2022 that the assessment of a witness' credibility is about more than what a witness says. That was a trite acceptance of known judicial practice. It did not amount to a suggestion that, the DTC having previously seen and heard the second and third appellants and Mr Strathearn give evidence, that overrode the undermining of the principles of fairness and natural justice caused by apparent bias.

43. Regarding the second ground of appeal and the inconsistent treatment of James Strathearn before the second PI, this was unfair and contravened the rules of natural justice. The procedure adopted contravened the appellant's rights under Article 6(1) of the ECHR.

44. The appellants had a reasonable expectation that the procedure adopted by the Commissioner at the second PI would constitute a fair hearing conform to the rules of natural justice (*2003/094 Dawlish Coaches Ltd*, [4]). Similarly, the appellants had a reasonable expectation that the procedure adopted by the DTC at the second PI would comply with section 6 of the Human Rights Act 1988 and Article 6(1) of the ECHR (*R (Al-Le Logistics Ltd) v Traffic Commissioner for South Eastern & Metropolitan Traffic Area* [2010] EWHC 134 (Admin), [92]).

45. Standing (i) the approach taken by the DTC at the second PI, and (ii) the terms of his decision of 23 April 2023, Mr Strathearn's status was properly that of a witness, he was not, for the purposes of paragraphs 3 and 5 to schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 ("the Regulations"), a "person entitled to appear" at the second PI. Therefore, he had no entitlement to sight of the briefs produced by the OTC and the documentation and statements lodged by the appellants. The same applied to his partner, Hana Simpson.

46. While public inquiry proceedings are inquisitorial in nature, they perform a regulatory function. The determination made by a commissioner has regulatory consequences that, such as in the instant case, may put an operator out of business. They are not, therefore, akin to proceedings under the Inquiries Act 2005 or the Inquiries into Fatal Accidents and Sudden Death etc. (Scotland) Act 2016.

47. In that context, parties to a public inquiry have separate, and competing, interests. A party has the right to cross examine witnesses and make submissions to the commissioner at the conclusion of the evidence (paragraph 5(2) to schedule 4 of the Regulations). Disclosure of evidence is also made to a party to the proceedings. Those rights do not extend to witnesses. Indicating that Mr Strathearn was a witness, but providing him with materials lodged on behalf of the appellants to the inquiry, the Commissioner (or the OTC acting under his direction) acted inappropriately and inconsistently. Mr Strathearn and Ms Simpson were able to gain access to material that, as witnesses, they should not have had access to. They were thus able to tailor their evidence and prepare for cross-examination in a manner which a witness would ordinarily be unable to do. Moreover, they were able to do so without fear of regulatory sanction.

48. As Mr Strathearn and Ms Simpson have (i) had sight of all the material lodged on behalf of the appellants, including their statements, and (ii) been cross-examined by counsel for the appellants and the DTC it is submitted that, where either ground of appeal is upheld, the appellants cannot receive a fair re-hearing before an alternative commissioner. That is because both Mr Strathearn and Ms Simpson had access to all the materials put to them at the second PI and an awareness of the likely lines of examination that would be put to them. Thus, they could be aware of the likely future line of cross-examination they would face at any re-hearing and tailor their evidence accordingly.

49. Through his inconsistent treatment of Mr Strathearn's status, the DTC has erred. In so doing, the appellants received an unfair hearing which went against the principles of natural justice and contravened their rights under Article 6(1) of the ECHR.

The response on behalf of the Secretary of State for Transport

Ground 1

50. The circumstances relied upon by the 1st to 3rd appellants are not sufficient to give rise to a complaint of apparent bias. Accordingly, it was submitted, the 1st to 3rd appellants' contention has no merit.

51. Where apparent bias is alleged, the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased. Bias is an attitude of mind

which prevents the decision-maker from making an objective determination of the issues he has to resolve. The mere fact that the decision-maker has previously decided an issue or commented adversely on any party or witness, or found the evidence of a party or witness to be unreliable, does not, without more, justify a conclusion of apparent bias: *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418 at [16]-[21].

52. In *AMEC* the same person had been appointed as arbitrator to deal with the same issue twice. On the first occasion he had no jurisdiction to decide the issue, although he had done so. The Court of Appeal decided that there was no possibility of bias when he decided the same issue again, this time with jurisdiction. Mr Tosh referred to the *dictum* of Lord Dyson at [20] and [21], where he stated that the vice which the law must guard against is that the tribunal may approach the hearing with a closed mind. The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear.

53. The findings of the first public inquiry were evidence before the second public inquiry. They would have fallen to be taken into account by the DTC or any other commissioner appointed to preside at the second inquiry. There is no suggestion that the DTC made any judicial error at the first inquiry. That being so, the fair-minded and informed observer would not think that the DTC was in any different position (other than, perhaps, a marginally better one by reason of his experience of the earlier proceedings) than any other commissioner who may have been appointed to conduct the second public inquiry: *JSC BTA Bank v Ablyazov (No 9)* [2013] 1 WLR 1845 at [69].

54. There may be a risk of apparent or confirmation bias in circumstances where a decision-maker has made a decision, which is overturned on review or appeal, and the matter is remitted to or otherwise comes before the same decision-maker to determine exactly the same issue, on the same evidence and arguments, a second time. In that scenario, the risk is that the decision-maker may be inclined to reach the same decision a second time because it is plain from the earlier decision that his mind is made up and it will be difficult, if not impossible, to change it, or at least that there may be a human desire to reach the same result if

only to be able to say “I told you so”. That is the risk of allowing a decision-maker a second bite at the cherry discussed in *HCA International Ltd* at [62].

55. The DTC was asked to determine broadly the same issue, but on new and different evidence and arguments, and he reached a different conclusion. The fact some of that evidence came from the same witnesses is irrelevant. The DTC was not having a second bite at the (same) cherry.

56. In any event, absent special circumstances, a readiness to change one’s mind upon some issue, whether upon new information or further reflection, and to change it from a previously declared position, may be taken to be a capacity possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis: *Sengupta v Holmes* [2002] EWCA Civ 1104 at [31]-[37].

57. There are no special circumstances or other grounds to reasonably doubt that the DTC approached the second inquiry with anything other than an open mind or to reasonably suspect that the DTC approached the second inquiry with a closed mind or pre-judged the issue before him at the second inquiry. That is confirmed by the fact that the DTC reached a different conclusion. Any confirmation bias favoured the appellants.

58. In those circumstances, the complaint of apparent or confirmation bias has no merit. The DTC did not act unfairly, damage public confidence in the decision-making process or act contrary to the principles of natural justice.

Ground 2 – status of James Strathearn

59. The appellants complain that two witnesses (James Strathearn and Hana Simpson) had access to material (documents and witness statements) which put them in a position to tailor their evidence and prepare for cross-examination in a manner not ordinarily available to such witnesses with the result that the public inquiry was conducted unfairly contrary to the principles of natural justice and article 6(1) of the European Convention on Human Rights. There is no substance to that complaint. There was nothing about the evidence of Strathearn and Simpson that rendered the conduct of the public inquiry unfair.

60. There is no rule against witnesses being given access to case materials before they come to give their evidence or discussing the evidence with other witnesses:

Evidence (Scotland) Act 1840, s 3; *Hughes v HM Advocate* 2023 JC 40, 44 at [19]-[20].

61. The modern trend towards use of witness statements or affidavits as evidence-in-chief in civil proceedings specifically contemplates that witnesses will have access to the written evidence of other witnesses before they give their own oral evidence. It is a move away from "trial by ambush" and allows a witness to give a considered response to points which may be made against him and the evidence given by others: *Luminar Lava Ignite Ltd v Mama Group plc* 2010 SC 310, 327 at [72]. Consistent with that aim, in the guidance issued by the Commercial Judges of the Court of Session on the use of signed witness statements or affidavits (March 2012), it is explained that: "The statements of a party's other witnesses or of another party's witnesses may be disclosed to a witness after the exchange of statements between the parties."

62. James Strathearn gave a statement at interview on 21 March 2022. In those circumstances, it was perfectly appropriate for him to be given access to, among other things, the statements of other witnesses. It does not matter whether that was done because he was treated or described as a participating party or a witness. The DTC bears no responsibility for the fact that Strathearn may have shared that material with Simpson.

63. In any event, the appellants were aware that Strathearn and Simpson had had access to such material before they came to give oral evidence. The matter was the subject of specific discussion in the early part of Simpson's evidence [see the transcript in the bundle of documents for the appeal at p 1270] and before Strathearn came to give oral evidence. Despite that, there was no objection to those witnesses being allowed to give evidence on the basis of the complaint now made and, more importantly, the appellants had the opportunity to cross-examine Strathearn and Simpson and to invite the DTC to reject their evidence on the grounds that it had been tailored by reference to material which they had had available to them.

64. For all the foregoing reasons, Mr Tosh submitted that the appeal should be dismissed.

Appeal Submissions for 4th appellant

65. The 4th appellant appeals against his loss of good repute and disqualification for a period of 12 months. Mr Kelly accepted that if a TM is found to have acted deceitfully then that is very serious. He submitted that because it was so serious the evidence relied upon to arrive at that conclusion should be incontrovertible and any contrary explanation should be capable of being discounted or ignored. In considering how likely it was that Aaron Harrison was involved in the set-up of the operator as a front for James Strathearn, the Upper Tribunal had to consider not only the good repute of the 4th appellant but also how inherently probable or improbable it was that he would be so involved[15]. Nevertheless, it was accepted that the standard of proof remained the balance of probabilities and it was acknowledged that the hurdle before the 4th appellant was a high one.

66. Ground 1: Given the email evidence produced by James Strathearn to support the allegations or fronting, Mr Kelly submitted that it is striking the lack of emails either referring to Aaron Harrison or including Mr Harrison as a recipient. Had he been involved from the outset and acting as *de facto* Transport Manager, Mr Kelly submitted, there would have been such correspondence. He referred to document X3 [1462] as an example. Of the email evidence produced (listed at page 67) there was nothing showing that Aaron Harrison was involved in the setting up of Central Haulage.

67. Mr Kelly submitted that the finding that Aaron Harrison's evidence about the setting up of CHL and the involvement of Hana Simpson was implausible [para 334 p2289] was not supported by the evidence. There was no documentary evidence about the setting up of CHL. Aaron Harrison's evidence was that he did not know at the start that Hana Simpson was a director. The motive that Mr Harrison identified was as a consequence of the dispute that was ongoing [p1402 at 41:30] between James Strathearn and Johanna and Gordon Dunne. On the specific question of Hana Simpson's role as director of Central Haulage Ltd Mr Harrison's evidence was he did not know [p1404 at 51]. It was submitted that, in light of the evidence, to find that Aaron Harrison's evidence was implausible was plainly wrong.

[15] Statutory Document No. 10; *Re H & Ors (Minors)* [1996] AC 563 at 586; *Secretary of State for the Home Department v. Rehman* [2003] 1AC 153 (at paragraph 55); *In re CD* [2008] 33 (at paragraphs 42 and 46); and *In re B* [2008] 35 (at paragraph 70).

68. Ground 2: The Deputy Traffic Commissioner arrived at a conclusion that Mr Harrison failed in his duty to the Traffic Commissioner. The DTC has not stated when this duty arose. Aaron Harrison was not appointed TM until October 2021 which was 2 years after the start of the CHL operation. The DTC refers to the decision in *Liliana Manole* [2022] UKUT 002277(AAC) and the role of the Transport Manager to be the eyes and ears of the Traffic Commissioner. In his decision, the DTC found that this had not been a typical fronting operation. In those circumstances, what was Aaron Harrison to do and when?

69. The evidence of Aaron Harrison was that Central Haulage was the business of Johanna and Gordon Dunne. It is possible for the DTC to find there was a fronting arrangement and that Aaron Harrison was remote from that. The DTC rejected Aaron Harrison's argument finding as he was at the start up meetings {which was denied} and at the DVSA interview in March 2020 Mr Harrison's evidence was he was impartial at that meeting [p1396]. It is speculation by the DTC as to what Mr Harrison took from that interview Given the DTC never asked Mr Harrison this question it is was not open for him to speculate why.

70. Ground 3: Following from Ground 1, that having found Mr Harrison was involved in the set-up of CHL he is implicated in the arrangements that followed. The DTC did not consider even if Mr Harrison was at the start up meetings, to what extent he was implicated in what followed.

71. Clearly from the evidence Mr Harrison was not acting as a director. He performed Transport Manager duties from October 2020 (accepting Mr Strathearn and Ms Simpson say he was acting as Transport Manager earlier). The evidence is he was performing the duties of Transport Manager pertinent to drivers hours, and administration and vehicle maintenance, well. (It is accepted Mr Strathearn stated that this was in part due to him [p1311 at 07:00]). However, the issue of Mr Strathearn being disqualified cannot be overlooked.

72. Even if there was something amiss with the company, Aaron Harrison was sufficiently remote from this to justify retaining his repute. The DTC should have made an assessment of his culpability. Aaron Harrison’s position is

distinguishable from that of the TM in the *Manole* case. The TM in that case had been very involved in the fronting operation.

73. Mr Kelly submitted that, If Transport Managers are to be the eyes and ears of Traffic Commissioners the test for each Transport Manager must be subjective; for the professionally competent person to assess each given situation. Mr Harrison believed that he acted appropriately. The DTC after having had voluminous evidence (the Compliance Team Leader never had a case with such a volume of material in 16 years [p009]) arrived at his determination; much of which had not been seen by Mr Harrison before the Inquiry. The DTC's conclusion on the evidence is therefore wrong.

74. Ground 4: The length of disqualification is excessive. The DTC acknowledged that Aaron Harrison had been put into an invidious position (paragraph 370). Regard is given to paragraph 323 [page 2287] of the DTC's decision. Whilst each case is considered on its merits, that the Transport Manager, who has no familial relationship with Mr & Mrs Dunne, and has no shareholding in Central Haulage Ltd, be disqualified for the same length of time as the operator is perverse. Having regard to Aaron Harrison's particular circumstances his period of disqualification should be shorter.

Discussion and decision

75. The following principles (extracted from the Digest of Traffic Commissioner Appeals) as to the proper approach to an appeal in the Upper Tribunal can be found in the decision of the Court of Appeal in the case of *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695*:

> *(1) The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.*
>
> *(2) The Appellant 'assumes the burden' of showing that the decision appealed from is wrong.*
>
> *(3) In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; the Appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view.*

The Tribunal sometimes uses the phrase "plainly wrong" as a shorthand description of this test. (*NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, paragraph 8).

76. Operator licensing is based on trust, as has long been recognised by courts and tribunals.

> "*Traffic Commissioners must be able to trust those to whom they grant operator's licences to operate in compliance with the regulatory regime. The public and other operators must also be able to trust operators to comply with the regulatory regime*"[16].

77. In NT/2013/82 *Arnold Transport & Sons Ltd v DOENI,* the Tribunal said:

[16] *Joseph Formby t/a G&G Transport* [2012] UKUT 239 (AAC), at paragraph 17.

> *11. "The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.*
>
> *12. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute.*

First ground of appeal for 1st the 3rd appellants--- apparent bias

78. It is not in dispute that the appellants have a right to an unbiased tribunal and to a fair hearing compliant with Article 6 of the ECHR.

79. The appellants are not alleging actual bias but apparent bias. There was no dispute between the parties that the test for apparent bias is as set out in *Porter*, namely whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased (para 103). The answer in any particular case will be dependent on the facts and circumstances of that case.

80. The question then arises, what is a "fair-minded and informed observer"? The fair-minded and informed observer is "neither complacent nor unduly sensitive or suspicious" *(Johnson v Johnson* (2000) 201 CLR 488 at para 53). In *Helow v. Secretary of State for the Home Department 2009 SC (HL) 1*, Lord Hope stated:-

> *1 …… the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village*

> *and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair- minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.*
>
> *2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.*
>
> *3 Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.*

81. Therefore, the *Porter* test must be applied while knowing what the fair-minded person would think were one looking at it objectively and considering reasons why the judge might be biased. It must also be kept in mind that what we are concerned with is a real possibility of bias, not a fanciful one.

82. *Locabail* was not directly cited to the Upper Tribunal however, it is discussed in *AMEC.* The passages already referred to by Lord Dyson are worth quoting at length:-

> *20. In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case*

> *with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact rerun of the first.*
>
> *21.The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear. As was said in Locabail the mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection. On the other hand, if the tribunal had made an extremely hostile remark about a party, the position might well be different. Thus, in Ealing London Borough Council v Jan [2002] EWCA Civ 329 , this court decided that the judge should not hear the retrial of proceedings where he had twice said of the respondent in preliminary proceedings that he could not trust him "further than he could throw him". So too in Timmins v Gormley , which was heard with Locabail , it was held that there was a sufficient danger where a personal injuries case in which insurers were the real defendants was heard by a recorder who had published articles in which he had expressed "pronounced pro-claimant anti-insurer views".*

83. In the present case, the DTC is a specialist adjudicator in a regulatory regime which requires to be able to trust operators to comply with that regime in order to maintain public safety and fair competition. The DTC is a professional adjudicator who can be assumed to be trustworthy and to approach the issues he had to decide with an open mind and who would bring objective judgment to bear on the issues (*AMEC* and see *AM Richardson v BETR 2000/65)*. With regard to the DTC in this case, there is nothing to suggest he would be anything other than open minded and would bring objective judgment to bear.

84. At the 2021 PI, he had heard evidence from Johanna Dunne, Gordon Dunne, James Strathearn and Aaron Harrison, among others. He determined the issue of fronting based on the evidence available to him at that time. He accepted the evidence of Johanna and Gordon Dunne. He referred to them as "experienced, respectable businesspeople" (see paragraph 9(xxiii) above). There is no suggestion of any improper, hostile or extreme comments made by him at the 2021 PI or even that he had erred in law, that would give rise to an apprehension of bias.

85. Counsel for the first three appellants submitted that the DTC had criticised Johanna and Gordon Dunne by commenting that there had been a woeful lack of due diligence in the appointment of Mr Honeyman as transport manager; that he did not find the suggestion of fronting made out to the required standard, rather than positively exonerating them. However, that has to be taken along with his finding that there was an absence of a proven link between Hana Simpson and James Strathearn. He found the suggestion of such a link was outweighed by the categorical statements of Mr and Mrs Dunne and James Strathearn (see paragraph 9(xxvii) above), which he accepted. Any comments he did make fall far short of suggesting that he might be biased against them and would approach the second PI with a closed mind. To suggest otherwise, is unduly sensitive and suspicious.

86. As regards, the 22/23 PI, the DTC had to determine broadly the same issue again. He heard evidence from Johanna Dunne, Gordon Dunne, James Strathearn and Aaron Harrison again. Judges often have to hear cases involving parties who have previously given evidence before them. Without more, that will not give rise to a real possibility of bias. In the 22/23 PI, much of the oral and documentary evidence was different. In addition, he heard evidence from Hana Simpson. The DTC had a rational basis for reaching a different conclusion. He made different findings and reached a different conclusion on different evidence. He has given cogent reasons why he was able to accept some evidence and reject other evidence. There is no suggestion that the evidence was insufficient to underpin the conclusions or that the findings were in some way perverse or irrational.

87. As regards a lack of evidence at the 2021 PI of a link between Hana Simpson and James Strathearn, counsel for the first three appellants submitted that when that evidence was provided in the 22/23 PI, this allowed the DTC to confirm his previous suspicions, thus leading to confirmation bias. We do not accept that submission. As explained in the previous paragraph, that was simply the DTC reaching a different conclusion on different evidence which he found acceptable. Nor could it be described as the DTC having "a second bite at the cherry". Further, we agree with the submission for the respondent that, based on his findings at the 2021 PI, any risk of confirmation bias would have favoured the first three appellants.

88. We do not accept that the DTC gave undue weight to the concession made by counsel for the first three appellants that the credibility of a witness is about more than what a witness said. There was nothing unusual about such an observation. In any event, it is clear the DTC's preliminary decision did not turn on that and that he had regard to many other factors.

89. Bearing in mind the guidance from the authorities cited, we do not agree that the facts and circumstances of this case give rise to a real possibility that the DTC was biased. We agree with the submissions made on behalf of the respondent that the test for apparent bias is not satisfied. Nor is the case for confirmation bias made out. For the same reasons, we find that the DTC did not err in law and was not "plainly wrong" by declining to recuse himself. We therefore reject the first three appellants' submissions.

90. Counsel referred to other authorities which we considered did not add anything of significance to the principles and guidance found in the authorities we have referred to. In saying that, we mean no disrespect to the carefully researched arguments presented to us.

Second ground of appeal for 1st to 3rd appellants --- status of James Strathearn

91. James Strathearn and Hana Simpson were not parties to the 22/23 PI but witnesses. They appear to have been provided with some, if not all, of the documents in the PI brief, including statements by the second and third

appellants and, possibly, the fourth appellant. For the purposes of this appeal, we shall assume that they were provided with all the documents in the brief and all of the appellants' statements.

92. We reject the submissions made on behalf of the first three appellants' that disclosure of this material to these witnesses resulted in unfairness, a breach of natural justice and a contravention of the first three appellant's rights under Article 6(1) of the ECHR.

93. The PI before the DTC was an inquisitorial process. However, even in an adversarial process, the presence of a witness in court while an opposing party gives evidence, or access by a party to an opposing party's witness statements and productions before giving evidence, does not necessarily lead to unfairness. Indeed, it may promote a fairer outcome. This is recognised by the court approved or imposed practices of exchange of witness statements and the lodging of documents or productions to be founded upon in advance of a proof or trial[17]. What is prohibited is the coaching of a witness with a view to influencing or altering the witness's evidence.

94. Both James Strathearn and Hana Simpson provided statements before those given by Johanna Dunne and Gordon Dunne (see pages 71 and 1683) and before either James Strathearn and Hana Simpson had sight of those statements. Those statements therefore could not have been influenced by the statements given by Johanna Dunne and Gordon Dunne.

95. In any event, it is clear from the transcript of the PI, that James Strathearn and Hana Simpson had had access to the statements and documents before they gave their evidence (page 1270, transcript of Hana Simpson's evidence) and that this was known to the appellants. If the first three appellants had concerns that oral evidence of James Strathearn and Hana Simpson might be influenced by what they had read, then a submission could have been made to have their evidence ruled inadmissible. That was not done. Further, counsel for the first three appellants had the opportunity to cross examine James Strathearn and Hana Simpson on the question of tailoring their evidence. Finally, counsel for the first three appellants could have submitted to the DTC that Hana Simpson and James Strathearn's evidence had been tailored and that it should be

rejected for that reason. That does not appear to have been done as such a submission is not contained in the written submission to the DTC (pages 2201-2214), nor is such an argument referred to by the DTC in his decision.

96. We accept and agree with the submissions made for the respondent. There is no merit in this ground of appeal.

Discussion of 4th appellant's grounds of appeal----

97. The standard of proof is the balance of probabilities. In other words, what is more likely than not. This is succinctly explained in the STC's Statutory Document 10:-

> *There is only one civil standard of proof, which applies to all proceedings before the traffic commissioner, namely that the fact in issue more probably occurred, than not Re D [2008] UKHL 33 and Re B [2008] UKHL 35. The House of Lords has clarified that "the civil standard of proof always means more likely than not. The only higher degree of probability required by law is the criminal standard. But, as Lord Nicholls explained in Re H, some things are inherently more likely than others…cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not." Secretary of State For The Home Department v. Rehman [2001] UKHL 47.*

98. If the DTC has before him cogent and cohesive evidence, which he accepts, then he can find a fact proved, on the balance of probabilities. He can then draw inferences from found primary facts.

99. The DTC did not simplistically make a binary choice to accept the evidence of James Strathearn and Hana Simpson on the one hand and, on the other hand, to reject the evidence of Johanna Dunne, Gordon Dunne and Aaron Harrison. He carefully considered and weighed all evidence together, both

[17] See, for example, Chapters 42A and 47 of the Rules of the Court of Session.

oral and documentary. His consideration of the evidence and his reasoning are set out in detail in paragraphs 232 to 311 of his decision. Given Hana Simpson's clear evidence, which was accepted by the DTC, about the setting up of CHL and Aaron Harrison's involvement in that, the fact that there was no documentary evidence produced does not undermine that finding.

100. Reference was made by Mr Kelly to Document X3 as an example of Aaron Harrison being omitted from set up arrangements. This was an email from Lilian Wallace, an Executive Assistant and PA at DWS Building and Civil Engineering. Document X3 was among a string of emails about the setting up of CHL email addresses for James Strathearn, Gordon Dunne and Lilian Wallace. We do not consider this anything other than neutral. It does not undermine the acceptance of Hana Simpson's evidence on the setting up of CHL and why the DTC reasoned he could accept that evidence.

101. Mr Kelly suggests that Hana Simpson had a motive to lie about the involvement of Aaron Harrison in the set-up of CHL. In his oral evidence he said the only explanation was the argument between James Strathearn and the Dunnes. However, if the argument was between them that does not explain why Hana Simpson would tarnish Aaron Harrison by falsely saying he was present at a set-up meeting. The DTC found Hana Simpson to be a credible witness, that her evidence was consistent with that of James Strathearn that he had worked with Aaron Harrison in the management of the transport activities of CHL from its inception, and that the documentation supported that assertion. He considered that Aaron Harrison had a motive for lying about his knowledge of the set-up of CHL. If he knew the arrangement was a front for a disqualified operator (James Strathearn) then he would risk losing his good repute as a TM.

102. We therefore reject the submission that the DTC was plainly wrong to reject Mr Harrison's evidence on this issue as implausible.

103. As regards grounds 2 and 3, Aaron Harrison had worked for Gordon Dunne since 2007 (pages 199 and 170). Gordon Dunne described him as a trusted lieutenant (page 155 at 00:35:30). The DTC found that he had taken on the role of TM in CHL at the outset, It was accepted by Gordon Dunne that Aaron

Harrison had assumed the role of TM by February/March 2020 (page 129). TE Stoner's evidence was that in March 2020, she had made it clear to Johanna Dunne and Gordon Dunne that James Strathearn was a disqualified operator and should not be involved in the management of CHL (paragraph 290). Aaron Harrison sat in on the interview of Gordon Dunne by TE Stoner in March 2020 when the management of CHL was questioned. Given the background, the DTC was entitled to find that it was unbelievable that Gordon Dunne would not have made Aaron Harrison aware of the reason why James Strathearn's role was being investigated. His reasoning is set out in paragraph 350 to 353 of his decision.

104. In considering whether the TM has lost his good repute, the DTC can take into account any matter. That includes conduct prior to the individual becoming the nominated transport manager that points to deceit and untrustworthiness. The DTC found that Aaron Harrison had been aware from the inception of CHL that it was a front for James Strathearn, a disqualified operator, and that Aaron Harrison was acting in the role of transport manager together with James Strathearn from the outset. Given those findings, Aaron Harrison was central to the operation. While it might go too far to suggest that he should have reported the situation to the OTC, given that he was working within a regulated industry, as soon as his role as *de facto* TM or nominated TM, and thus the eyes and ears of the OTC, coincided with his knowledge that a disqualified operator was concerned in the management of the operator, it was his duty either not to get involved at all or to withdraw from his role as TM. By continuing in post as TM, *de facto* or nominated, he was facilitating a fronting operation. We reject the 2nd and 3rd grounds of appeal.

105. Fronting is a form of deceit. It undermines the pillars of trust and fair competition on which the regulatory regime rests. TMs have to be aware that they cannot turn a blind eye to fronting operations. We did not understand that it was being argued that loss of repute was a disproportionate finding. Given the DTC's findings of what was serious misconduct, a finding of loss of repute was not a disproportionate response. The DTC was therefore entitled to find that the 4th appellant had lost his good repute as required by paragraph

14A(1)(b) of Schedule 3 to the 1995 Act. Disqualification was therefore mandatory[18].

106. Given the level of deception by the 2nd and 3rd appellants found by the DTC, it might be argued that the penalties imposed on the first three appellants were lenient[19]. However, each case has to be considered on its own particular merits and circumstances. Aaron Harrison had a long association with Gordon Dunne and was regarded by him as a trusted lieutenant. Notwithstanding that the DTC acknowledged that Aaron Harrison had been in an invidious position, he is a transport manager and should be aware of his responsibilities within the regulatory regime. There is no finding that he was misled or deceived by Johanna Dunne or Gordon Dunne. Given the seriousness of the DTC's findings regarding fronting, Aaron Harrison's involvement in that and the finding that he had lied at two PIs, conduct which strikes at the very heart of the regulatory system, disqualification for a period of 12 months was not disproportionate.

Decision

107. The decision of the DTC dated of 24 April 2023 is confirmed in all respects. The appeals of the first three appellants and the appeal of the 4th appellant are dismissed.

108. A stay has been granted in this case. The revocation of the operator's licence, and the disqualifications of all four appellants will come into effect from 23.59h on 6 March 2024.

Authorised for issue
On 23 January 2024

Marion Caldwell KC

Judge of the Upper Tribunal

[18] Paragraph 16(2) of Schedule 3 to the 1995 Act.

[19] See, for example. the guidance in paragraph 8 of the Senior Traffic Commissioner, Statutory Document No. 10, at paragraph 108.