



Appeal No.: T/2018/69
NCN: [2019] UKUT 237 (AAC)

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

**IN AN APPEAL FROM THE DECISION OF:
MR. JAMES ASTLE, DEPUTY TRAFFIC COMMISSIONER FOR THE
EASTERN TRAFFIC AREA
DATED 12th SEPTEMBER 2018**

Before:

**Elizabeth Ovey, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper Tribunal**

**Appellants: (1) TRANS EURO GROUP LIMITED
(2) KAPUR NANDRA**

Attendance: Mr. Tim Nesbitt Q.C. appeared for the Appellants, instructed by Fieldfisher

**Heard at: Field House, 15-25 Breems Buildings, London EC4A 1DZ
Date of hearing: 21st May 2019
Date of decision: 29th July 2019**

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED.

SUBJECT MATTER: Failure to have transport manager in place; revocation and disqualification; whether representation at inquiry so incompetent as to render process and decision unfair; conduct of balancing exercise; whether significant misunderstanding of evidence; proportionality

CASES REFERRED TO: *Ladd v. Marshall* [1954] 1 W.L.R. 1489; *Thomas Muir (Haulage) Limited v. Secretary of State for the Environment, Transport and the Regions* [1998] S.L.T. 666; *2002/40 Thames Materials Limited*; *2002/217 Bryan Haulage*

Limited (No. 2); R. v Day [2003] EWCA Crim 1060; *David Crompton Haulage v. Department of Transport* [2003] EWCA Civ 64; *R. (On the application of Aston) v. Nursing & Midwifery Council* [2004] EWHC 2368; *Muck It Limited v. Merritt* [2005] EWCA Civ 1124; *2009/225 Priority Freight Limited; T/2010/52 and 53, Taylor and Taylor*, [2010] UKUT 397 (AAC); *Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13; *T/2012/46 Shearer Transport Limited and James Shearer* [2013] UKUT 489 (AAC); *T/2014/72 Nicholas t/a Wigan Container Services*, [2015] UKUT 0148 (AAC); *T/2015/36 W. Martin Oliver Partnership*, [2016] UKUT 0070 (AAC); *T/2015/39 Firstline International and William Lambie Limited*, [2016] UKUT 291 (AAC); *T/2017/33 Paul Andrew Nimmo t/a P&N Travel*, [2017] UKUT 0479 (AAC)

REASONS FOR DECISION

Introduction

1. This is an appeal by two appellants (together “the Appellants”), Trans Euro Group Limited (“Trans Euro”) and Mr. Kapur Nandra (“Mr. Nandra”), against the decision of the Deputy Traffic Commissioner for the Eastern Traffic Area (“the TC”) given on 12th September 2018, following a public inquiry held on 10th August 2018. Mr. Nandra is the sole director of Trans Euro. By his decision the TC decided that:

- (1) Trans Euro, the holder of licence OF1147792, lost its repute;
- (2) licence OF1147792 was revoked with effect from midnight on 28th September 2018;
- (3) Trans Euro and Mr. Nandra were disqualified from holding or obtaining a licence until midnight on 27th September 2020;
- (4) any licence associated by company or partnership with Trans Euro or Mr. Nandra was liable to revocation, suspension or curtailment until midnight on 27th September 2020.

2. The public inquiry was a conjoined hearing to which Mr. Simon Porte (“Mr. Porte”) was also called. Mr. Porte was the nominated transport manager for Trans Euro. He also held as a sole trader his own operator’s licence, OF1123766, and was his own transport manager. In relation to Mr. Porte the TC decided that:

- (1) Mr. Porte lost his repute as transport manager but retained his repute as operator;
- (2) Mr. Porte was disqualified from holding a position as a transport manager from the date of the decision until midnight on 13th September 2019 or until he obtained a new certificate of professional competence, whichever was the later;

- (3) licence OF1123766 was suspended for 14 days from midnight on 21st September 2018;
- (4) licence OF1123766 was curtailed from three vehicles to one vehicle.

3. The grounds on which Trans Euro was called to the inquiry included the issue whether Mr. Porte as transport manager was exercising continuous and effective management of Trans Euro's transport activities. As is explained further below, as a matter of fact Mr. Porte had done virtually nothing as transport manager, a state of affairs which, broadly speaking, Mr. Porte attributed to Mr. Nandra. In very general terms, Trans Euro and Mr. Nandra complain, among other matters, that the TC too readily accepted what Mr. Porte said and did not pay sufficient attention to Mr. Porte's own failings.

4. Mr. Porte was represented at the inquiry by Ms. Claire McCarthy of CE Transport Law Limited. At the outset of the hearing the clerk stated that Mr. Nandra was present but not represented. He was, however, accompanied by Mr. Paul Webster, a transport consultant. In response to a question from the TC, Mr. Webster said that he represented Trans Euro as advocate in the proceedings. This state of affairs also features in the grounds of appeal.

5. In those circumstances, although Mr. Porte has not appealed against the TC's decision, he plays a substantial part in the history of the matter.

The facts

6. Trans Euro was incorporated on 15th October 2001. It is a logistics company which offers services including freight forwarding, customs clearance, air cargo, warehouse services and inland trucking services. For much of its trading history it has carried out its activities using light goods vehicles and has not required a heavy goods vehicle operator's licence. In August 2016, however, it decided to apply for a licence for one heavy goods vehicle. Mr. Porte was named as the transport manager on the application form, which is dated 31st August 2016, and it was stated that safety inspections would be carried out at six week intervals. The form TM1, by which Mr. Porte was nominated as transport manager, stated that he would spend four hours a week on his transport manager duties.

7. Licence OF1147792 took effect from 8th December 2016. It authorised the use of one vehicle, the specified vehicle being EU54NXP, and of course contained the standard undertakings, including the undertaking to observe the rules on drivers' hours and tachographs. Mr. Nandra says that he went on the training course for new operators.

8. On 25th January 2018 a traffic examiner, Mr Christopher Lowe, stopped vehicle EU54NXP at the Thurrock weighbridge. The driver produced tachograph charts going back to January 2017 for different drivers and was himself not familiar with the requirement to return charts to the operator within 42 days. On 27th March 2018 Mr. Lowe made an appointment to see Mr. Nandra on 6th April 2018 to complete a traffic examiner operator report. Mr. Porte was not present when the meeting took place.

9. On making his inspection, Mr. Lowe found that in six respects Trans Euro had no working system or procedure in place. These failures suggested to Mr. Lowe that Mr. Porte was not exercising continuous and effective management on a day-to-day basis. Further, vehicle EU54NXP was being inspected at intervals of 12 weeks rather than six weeks. Although it was concluded that Trans Euro had good systems in place in many areas, the position was summarised in a report by Mr. Lowe dated 30th May 2018 as follows:

“Many of the operator’s systems in relation to the training and monitoring of drivers and their working hours were either absent or not working correctly. Drivers’ duties were not being recorded correctly on tachograph charts and no accurate analysis of these charts was being carried out. The operator had no facility to download drivers’ digital cards to ensure drivers had not been working elsewhere and therefore had had the required legal rest periods. No checks had been carried out on the drivers’ entitlements to drive since 2013. With no working time directive records being generated it was not possible to ascertain if drivers were adhering to the legal requirements of the working time directive.”

10. A call-up letter dated 2nd July 2018 was sent to Mr. Nandra informing him of the decision to hold a public inquiry and warning him that Trans Euro should identify competent legal or professional help and representation quickly unless it was confident it did not need it. It was stated that the matters raised were serious and the licence was at stake. The letter identified as the issues to be considered at the inquiry that it appeared that there was:

- (1) failure to comply with the statement that vehicles would be inspected at six-weekly intervals;
- (2) failure to comply with the undertaking to observe the rules on drivers’ hours and tachographs and keep proper records;
- (3) a material change in the circumstances of the holder of the licence, namely, that the finances were not satisfactory, the operator was no longer of good repute and the operator’s compliance standards were subject to the repute of the transport manager.

It was said that as a result the TC was concerned that Trans Euro might not have a stable establishment in the United Kingdom, be of good repute, be of the appropriate financial standing or meet the requirements of professional competence. If it did not meet those requirements, the licence was at risk.

11. The call-up letter went on to say that the TC was concerned that Mr. Porte might not be exercising continuous and effective management of Trans Euro’s transport activities and that he had been called separately to the inquiry, which would consider his competence and repute. The letter warned that the licence was also at risk if Trans Euro did not have a transport manager who was professionally competent and of good repute.

12. Finally, the Appellants were informed that the report dated 30th May 2018 from

Mr. Lowe would form the basis of the inquiry, although the TC would also consider operator information and performance reports. It was pointed out that the TC's powers extended to revoking the licence and that if he did so, he might also disqualify the company or any of its directors from holding a licence and from being a director of a company which held a licence.

13. It is to be noted that in addition to identifying the failures already mentioned, Mr. Lowe's report included statements that Mr. Nandra was completing the tachograph analysis "despite having no qualifications or apparent knowledge to do so" and that Mr. Nandra had stated that Mr. Porte worked full time for Trans Euro. The report includes as Appendix D, and draws heavily upon, the report completed at the time of the visit on 6th April 2018, which is signed by Mr. Nandra and a copy of which was given to him. It includes a requirement to submit a written explanation for "the circumstances giving rise to the noted shortcomings" within 14 days. The report dated 30th May 2018 states that no such explanation was provided.

The inquiry

14. By the time of the inquiry, the Appellants and Mr. Porte had both taken steps to respond to their respective call-up letters. Mr. Porte had nominated a new transport manager, Mr. Hattle, in relation to his sole trader licence in case he should no longer be able to act as transport manager and written representations had been sent in on his behalf on 3rd August 2018, although it appears they did not reach the TC in advance of the hearing and they do not appear in our bundle. Trans Euro had nominated a new transport manager, Mr. Webster, who was also acting as a consultant to enable Trans Euro and Mr. Nandra to get up to date as respects policies, procedures and legislation. Whatever the outcome as respects Mr. Porte, he was not intended to continue as transport manager for Trans Euro. Two lever arch files of documents were handed to the TC on behalf of Trans Euro just before the inquiry began, although again we have not seen them.

15. A number of points were dealt with at the outset of the hearing. The first of those was the identification of Mr. Webster as representing Trans Euro, to which we return below. Secondly, the TC referred to information he had about financial standing and accepted that the financial standing requirement was satisfied. Thirdly, it became apparent that although the TC had expected Mr. Lowe to be in attendance, he was not there. The TC therefore summarised what had led to the public inquiry and asked for submissions from the parties about Mr. Lowe's absence. On behalf of Mr. Porte, Ms. McCarthy said that Mr. Lowe's evidence was accepted. The TC asked both Mr. Nandra and Mr. Webster whether they accepted the evidence, and specifically asked Mr. Nandra whether there was anything factual which he would dispute. Mr. Nandra answered "No" and Mr. Webster also said they accepted the evidence.

16. The TC then proceeded to deal first with Mr. Porte's case. At the outset Ms. McCarthy conceded on behalf of Mr. Porte that he had not shown continuous and effective management of the Trans Euro licence. His case was that Mr. Nandra had not co-operated with setting up a good transport operation and that he was never informed of Mr. Lowe's investigation, although he found out about it later. There was a friendship and business relationship between him and Mr. Nandra which predated by some 10 years the application for the licence.

17. Mr. Porte then gave oral evidence. It included the following points:
- (1) when he agreed with Mr. Nandra to become Trans Euro's transport manager he had said he would need some office space where he could work and somewhere to keep documents. When the job began and he wanted to come in to check tachographs, defect sheets and maintenance records, there was no space and nothing set up. He raised it with Mr. Nandra and was told it would be sorted out and much the same conversation was repeated about a month later;
 - (2) he formed the view nothing was going to change and suggested to Mr. Nandra he find someone else, but was aware that in fact no one else was doing the job. He did not tell the Office of the Traffic Commissioner out of friendship and the business relationship;
 - (3) he was not told in advance about Mr. Lowe's visit. When he heard about it and asked Mr. Nandra how it went, he was told there were basically no problems. It was put to him by Mr. Webster that there had been a telephone conversation with Mr. Nandra in which he was informed of the impending visit of Mr. Lowe and he denied it;
 - (4) the work he did for Mr. Nandra through his own business was (in summary) about 15% to 20% of his monthly turnover;
 - (5) Mr. Nandra had agreed to pay him £100 per month for acting as transport manager but he never had a contract for services with Mr. Nandra;
 - (6) he knew that the systems required for compliance were not in place and a road haulage business was being operated without those systems.
18. Mr. Hattle, Mr. Porte's new nominated transport manager, then gave evidence and was followed by Mr. Nandra. Mr. Nandra's evidence included the following points:
- (1) the inspection interval was changed from six weeks to 12 weeks on the advice of the service engineers. The Office of the Traffic Commissioner ("the OTC") was informed shortly after Mr. Lowe's visit. In response to Mr. Webster, he said that he told Mr. Porte what he was doing, but in cross-examination he said he had not understood the question and Mr. Porte did not know;
 - (2) he accepted there were failings on drivers' hours rules;
 - (3) he had told Mr. Porte he could have whatever space and items he needed and Mr. Porte had never said he was unhappy. Cross-examined by Ms. McCarthy, he said originally that he would say that Mr. Porte was an active transport manager and that he had overseen him as transport manager because he was on the premises at least once or twice a week. Pressed on the point, he said that Mr. Porte came in to do transport work but did not come in to do transport manager duties. He later confirmed

to the TC that it was evident to him from the start of the arrangement that Mr. Porte was not carrying out his duties as transport manager;

- (4) he had never paid Mr. Porte for acting as transport manager. Cross-examined by Ms. McCarthy as to how he could believe someone would do a job for no money, he said probably kindness of heart. To pay him they would have requested an invoice, which he never received, and he did not think a figure was actually agreed. If he and Mr. Porte had agreed something he would have actually actioned it. There was never a contract in place. He allowed a situation in which the transport manager was not performing the duties of a transport manager. He understood it was his duty as operator to employ a competent transport manager;
- (5) he informed Mr. Porte by telephone of the date of Mr. Lowe's visit. Mr. Porte said he could not manage it and Mr. Nandra tried to change the date but Mr. Lowe said it would have to go ahead.

19. Mr. Webster made closing submissions on behalf of the Appellants. He referred to the three numbered issues identified in paragraph 10 above, treating the third as an issue about the repute of Mr. Porte as transport manager. He then drew attention to the changes which had been made since he was instructed, which was on 3rd August 2018, and submitted that a great deal of work had been done and they would not be returning to the old ways. In terms of consequences which would flow from the loss of the licence, he said that there would be an adverse effect on the business and they would have to get another three vehicles in and employ additional staff. He asked the TC to take no action against the business or to keep any regulatory action to a minimum.

20. In his decision the TC set out his findings as follows:

“44. [Licence OF1147792] was seriously non-compliant. This was not significantly disputed in the PI. I have set out the details in paragraph 5 of my Introduction above so there is no need to repeat them here.¹

45. [Mr. Porte] made efforts at the outset of his tenure as TM1 [i.e., for Trans Euro] to put himself in a position where he could fulfil his responsibilities as transport manager but was faced with obstruction and failure to provide resources by [Mr. Nandra]. I accept [Mr. Porte's] evidence in this respect. He was generally a straightforward and consistent witness who, from the outset, acknowledged that he had failed to carry out his responsibilities when faced with the refusal of [Mr. Nandra] to make facilities available. He acknowledged that this was so serious that he would inevitably lose his repute as a transport manager. In short he was contrite and, as far as I could tell, sincerely so. [Mr. Nandra] by contrast was an unconvincing witness who changed his position several times on matters of fact during the course of his evidence and indeed at one point was compelled under cross-examination to accept that he had failed to tell me the truth in examination-in-chief.

¹ Paragraph 5 explains what was found at the Thurrock weighbridge and summarises the unfavourable findings of Mr. Lowe's investigation.

46. Notwithstanding this [Mr. Porte] had over a significant time failed to resign and failed to report the non-compliant circumstances to the Traffic Commissioner. He knew that it was his duty to do so. This in itself is so serious that I must inevitably give consideration to loss of repute.

47. [Mr. Nandra] persisted over the same significant time in operating the seriously non-compliant [Trans Euro licence] without an effective transport manager and he was well aware of this. He showed no acceptance of the seriousness of this in giving evidence and indeed in answer to my questions and those of [Ms. McCarthy] sought to minimise the seriousness of the non-compliances.

48. [Mr. Porte] had not been called to the PI by virtue of evidence of non-compliance in his role as TM2 [i.e., for his own business] or by virtue of evidence of non-compliance as [the operator in relation to licence OF1123766]. His own evidence in the form of [Mr. Hattle's] audit report volunteered that there had been some non-compliances, e.g. there was limited evidence of tachograph infringements, but these were not such as would have been likely to cause me to consider findings of loss of repute or lack of competence and I do not believe they would have resulted in themselves in [the operator] or [Mr. Porte] as TM2 being called into PI.

49. [Mr. Hattle] had produced evidence of a thorough audit and recommendations for improvements to eradicate such non-compliances as he had uncovered. He has made application to become transport manager of [licence OF1123766] and is prepared to implement those planned improvements in that role.

50. [Mr. Nandra] too had at last shown the appearance of taking steps to appoint an effective transport manager and I take [Mr. Webster] at his word that he had spent 26 hours in considering the enormity of the task he faced after nearly 2 years without an effective transport manager. However it was all too apparent that any steps taken by [Mr. Nandra] had been taken at the last minute and only because [Trans Euro] had been called into PI and threatened with revocation of [licence OF1147792]. [Mr. Webster] had been instructed only on 3 August 2018 with a view to being presented as a potential transport manager at the PI on 10 August 2018. All the steps taken and prayed in aid by [Mr. Webster] had been taken indecently close to the PI: letters to drivers were sent on 8 August 2018 reminding them of their duties to do walk round checks etc; notice of arrangement of driver training on 16 August 2018 had been given only on 9 August 2018; an agreement for Mr. Webster to serve as an external transport manager was dated 2 August 2018; disciplinary letters to drivers following drivers' hours infringements were sent on 3 August; policies and a drivers' handbook were dated 5 August 2018. It was all too late to show any settled intention to be compliant and to give any confidence of the likelihood of sustained compliance."

21. Having made those findings, the TC set out his reasons for his decision in relation to the Appellants as follows:

“59. [Trans Euro] loses its repute because:-

- a. [Mr Nandra], who was the sole director and the guiding mind of the operator company, operated the business without an effective transport manager more or less from the grant of a licence in December 2016 until the introduction of [Mr. Webster] to the business on 3 August 2018 under threat of imminent PI;
- b. [Mr. Nandra] knew throughout this time that the transport undertaking was seriously non-compliant; that non-compliance is exemplified by the conduct of his driver and the disclosures he made at the Thurrock weighbridge on 25 January 2018 and was confirmed by [Mr. Lowe’s] findings of 6 April 2018;
- c. [Mr. Nandra] failed to do anything to remedy this until he was under the pressure of his call-in to the PI and then not just at the 11th hour but after 11 hours 59 minutes, i.e. from 3 August with a view to arguing a case at the PI on 10 August 2018;
- d. in giving evidence before me he showed no sign of understanding the seriousness of his misconduct and he showed no contrition, notwithstanding the undoubted hard labour put in by [Mr. Webster] in the days preceding the PI;
- e. moreover in evidence he clearly told untruths and adjusted his position in accordance with what he seemed to think would be to his best advantage, regardless of factual accuracy;
- f. the steps taken to put things right in the operation of [licence OF1147792] were, despite [Mr. Webster’s] hard work in a very short time, insufficiently reliable evidence that there was a substantial prospect of sustained compliance in the future when set against the history of failure to provide [Mr. Porte] with the resources necessary to do the transport manager job effectively between December 2016 and August 2018; taking that history into account I have considered granting a period of grace or a suspension but rejected the possibility as having no substantial foundation upon which to base a belief that either device would result in compliance;
- g. [Mr. Nandra’s] position is therefore radically different from the position of [Mr. Porte] who acknowledged his misconduct, displayed contrition, has by and large over more than ten years a history of compliance as an operator and produced evidence that he was alive to what inadequacies there were in his operation and was doing something to remedy them by employing [Mr. Hattle].

(paras 1-5 Schedule 3 1995 Act).

60. For all these reasons I do not consider that a direction for the loss of the repute of [Trans Euro] would be disproportionate. The misconduct was serious and sustained and cannot in the case of [Trans Euro] be set against a frank admission, contrition, a history of general compliance and a convincing awareness of what needs to be done to set things right as was the case with [Mr. Porte] (Article 6 2009 Regulation).
61. My answer to the Priority Freight question² is that were [licence OF 1147792] to be allowed to continue it is not at all likely that it would be run in a compliant fashion. Moreover my answer to the Bryan Haulage question³ is without a shadow of a doubt that [Trans Euro] deserves to be put out of business as a large goods vehicle operator.
62. Having directed the loss of repute of [Trans Euro], I am compelled by the law to revoke [licence OF1147792] and I do so (sections 27(1)(a) & 13A(2)(b) 1995 Act).
63. [Trans Euro] is no longer professionally competent because it has no transport manager with good repute and professional competence (paras 8-13 Schedule 3 1995 Act).
64. [Trans Euro] being no longer deemed to be professionally competent, on this ground also I am required to revoke [licence OF1147792] and I do so (sections 27(1)(a) & 13A(2)(d) and paras 8-13 Schedule 3 1995 Act).
65. Having revoked [licence OF1147792], I have considered whether an order disqualifying [Trans Euro] and/or [Mr. Nandra] from holding or obtaining an operator licence in the future would be disproportionate. It would not, because of the seriousness of the non-compliance, the length of time over which it endured and the lack of any convincing evidence that [Trans Euro] would comply in the future if in possession of a licence. I have considered what length of disqualification would be proportionate in order to enable [Trans Euro] to take rehabilitative steps which might in the future persuade a traffic commissioner on his fitness to hold a licence. I consider that a period of two years from the date of this decision is appropriate because this would enable him to undergo appropriate training and to run his business, which will henceforth operate with vehicles which are not large goods vehicles, in a way which inspires confidence that he would operate a licence in a compliant fashion in the future (section 28(1) & (5) 1995 Act).
66. I further direct that if [Trans Euro] or [Mr. Nandra] at any time until midnight on 27 September 2020 should be a director of or hold a controlling interest in a company which holds an operator's licence or a company of which such a company is a subsidiary or operates any goods vehicles in partnership with a person who holds such a licence, that

² Previously identified by the TC as "How likely is it that this operator will, in future, operate in compliance with the operator's licensing regime?" See *2009/225 Priority Freight Limited*.

³ Previously identified by the TC as "Is the conduct such that the operator ought to be put out of business?" See *2002/217 Bryan Haulage (No. 2)*.

licence of that company, or, as the case may be, that person, shall be liable to revocation, suspension or curtailment (section 28(1) & (4) 1995 Act).”

The appeal

Preliminary

22. After receiving the decision letter, the Appellants consulted their present solicitors and decided to appeal. The Notice of Appeal was received in time, but the grounds of appeal were not received until 19th October 2018 and so the appeal as originally received was not properly constituted. On 22nd October 2018 Judge Levenson directed that the appeal be admitted out of time.

23. The Appellants then applied for a stay by letter dated 1st November 2018, submitting that there were reasonable prospects of success, Mr. Nandra had already suffered significant prejudice and sought to continue to operate his business until the determination of the appeal, and the systems put in place by Mr. Webster were still in place and Mr. Webster could begin to act as transport manager. The application was refused by the TC by a decision dated 6th November 2018 and by Judge Levenson on 26th November 2018 when the application was renewed to him. We note that in refusing to grant a stay, the TC said, at paragraph 11(ii), that underlying all his considerations at the inquiry and the reasons he gave in paragraph 59 of his decision was the issue of whether or not Mr. Nandra could be trusted.

24. The grounds of appeal as originally formulated were that:

- (1) the TC misunderstood significant facts of the case and/or some important facts were not properly considered by him (Ground 1);
- (2) the decision did not correctly apply the law and was plainly disproportionate when considering the TC’s findings (Ground 2);
- (3) the decision was unduly oppressive and the TC did not strike a fair balance between the right of the operator to continue operating his business and the promotion of the principles of the licensing regime, which involve the promotion of road safety and fair competition (Ground 3).

25. In relation to Ground 1, it is said that although there was no written contract with Mr. Porte, Mr. Nandra frequently asked him to provide invoices so that he could be remunerated; that it is not accepted that Mr. Porte only agreed to act as transport manager on condition of appropriate facilities being in place and in any event there were appropriate facilities; that Mr. Porte frequently attended the premises and it was therefore assumed by Mr. Nandra that he was performing his duties; it was Mr. Porte’s failures which led to the issues identified by the TC; Mr. Nandra had relied on Mr. Porte to notify the TC of the change in inspection intervals; the Appellants had taken a number of corrective actions before the public inquiry, together with Mr. Webster; in reaching his decision the TC took the most severe regulatory action and accordingly the Appellants believe that he either misunderstood the facts just mentioned or did not

properly consider them. It is further said that it cannot naturally follow that significant failings by the transport manager upon whom the Appellants relied plus the remedial steps they had taken would lead to such a decision and the TC therefore failed to satisfy himself on the balance of probabilities of all the relevant facts. Reference is made to *Muck It Limited v. Merritt* [2005] EWCA Civ 1124.

26. In relation to Ground 2, it is said that there were no relevant convictions; in relation to previous conduct, the Appellants had relied on their transport manager and had taken remedial steps; those matters were very relevant to repute but did not appear to have been considered; the correct answer to the *Bryan Haulage* question was that the conduct was not such as to warrant Trans Euro being put out of business; the correct answer to the *Priority Freight* question was that the Appellants would in future operate in compliance with the licensing regime; the remedial steps taken were genuine; as a result of the remedial steps the loss of good repute was disproportionate and findings on repute should not have been made which led to automatic revocation; a period of grace would have been particularly appropriate; Mr. Nandra's evidence was not "evasive" and under pressure of losing his livelihood he tried to answer the questions to the best of his ability when not legally represented.

27. In relation to Ground 3, it is said in particular that two years' disqualification was too long and failed to take account of the rehabilitative steps which had already been implemented; the decision had had a significant effect on the Appellants' business; Mr. Nandra was gravely concerned that by the end of two years the business would have suffered irreparable harm; the TC had sought to punish the Appellants rather than to promote the principles of the licensing system. Reference is made to *T/2012/46 Shearer Transport Limited and James Shearer* [2013] UKUT 489 (AAC).

28. The appeal was originally listed to be heard on 12th February 2019. A helpful chronology and skeleton argument were provided in advance, the latter of which largely covers the same ground as the grounds of appeal but in a different format. Notably, however, it is asserted that it was agreed between the parties that Mr. Nandra would pay Mr. Porte £100 a month. It is also said that the cross-examination of Mr. Nandra by Ms. McCarthy was "particularly bruising" and that "some of his answers may not have reflected the true position", the example given being his evidence that Mr. Porte was not undertaking transport manager work when he attended the premises. It is submitted that Mr. Nandra was prejudiced by not having legal representation.

29. The hearing duly began on 12th February 2019, Trans Euro and Mr. Nandra being then represented by Mr. Sanderson of Fieldfisher. Mr. Sanderson submitted on instructions that Mr. Nandra was not in fact involved in the checking of tachograph records. It was suggested that there might have been some confusion with Mr. Lowe and that Mr. Nandra had been referring to what he learnt about tachograph records as a director when attending the new operator's course. Part way through the hearing, it transpired that for unrelated reasons Mr. Sanderson was professionally embarrassed and the hearing was adjourned for Trans Euro and Mr. Nandra to consider whether to pursue the appeal.

30. Having considered the matter, the Appellants decided they did wish to pursue their appeal, and when the hearing was resumed on 21st May 2019 they were represented by Mr. Nesbitt Q.C.

31. Shortly before the resumed hearing, by a letter from Fieldfisher dated 14th May 2019, the Appellants made applications:

- (1) for permission to adduce further evidence in the form of a witness statement by Mr. Nandra dated 13th May 2019;
- (2) to add a further ground of appeal.

Those applications were dealt with at the outset of the resumed hearing, with the benefit of a supplementary skeleton argument from Mr. Nesbitt. We adjourned briefly to consider our decision, which was then communicated to Mr. Nesbitt and his clients, and the hearing proceeded. We now set out our decision on the applications and the reasons for it.

Application for permission to adduce further evidence

32. Mr. Nesbitt accepted in his skeleton argument that the practice of the Upper Tribunal, following the practice of its predecessor, the Transport Tribunal, is to apply the principles of *Ladd v. Marshall* [1954] 1 W.L.R. 1489. This approach was recently restated in *T/2015/36 W. Martin Oliver Partnership*, [2016] UKUT 0070 (AAC), and that approach was approved by Flaux L.J. in refusing permission to appeal, as set out in *T/2017/33 Paul Andrew Nimmo t/a P&N Travel*, [2017] UKUT 0479 (AAC), at paragraph 23.

33. The *Ladd v. Marshall* principles are set out in the judgment of Denning L.J. as follows:

“To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

In the context of appeals to the Upper Tribunal, it is common to add as an initial condition that the evidence must be admissible: see *2002/40 Thames Materials Limited*.

34. In his skeleton argument Mr. Nesbitt said that Mr. Nandra’s statement:

“seeks to address two matters that it is believed the Tribunal may be assisted to hear from him in relation to: those being matters which it is suggested were not adequately covered by evidence at the Public Inquiry (including the extent to which Mr. Nandra knew that Mr. Porte was not doing his job properly), and also the matter which was the subject of an exchange before the Tribunal on the last occasion.”

He also rightly recognised that it might be difficult to satisfy the requirement that the evidence could not have been obtained with reasonable diligence for use at the inquiry.

In his oral submissions he effectively confined himself to arguing that we should admit paragraphs 14 and 15 and paragraphs 36 to 38. It was realistic of Mr. Nesbitt to take that approach; almost all of the rest of the statement, other than some introductory material, consists of evidence which plainly Mr. Nandra could have given at the public inquiry but did not. We need say no more about it.

35. As to paragraphs 14 and 15, Mr. Nesbitt referred us to *Thames Materials* and in particular to paragraph 9, which gives the tribunal's reasons for admitting one piece of further evidence. He submitted that where evidence, or the need for evidence, on a point was not on the radar, it may be possible for the court or tribunal to take the view that it could not with reasonable diligence have been obtained. The context in *Thames Materials* was that the Deputy Commissioner in that case relied on an 'S' marked prohibition said to have been imposed in October 2000, but inquiries indicated that no such prohibition was imposed on that occasion. In the circumstances set out, it was said that "this particular threat was 'hull down on the horizon' and quite possibly obscured by other more immediate dangers".

36. The context of paragraphs 14 and 15 is very different. They relate to what Mr. Nesbitt described as the matter which was the subject of an exchange before the Tribunal and contain an assertion, prefigured in the original skeleton argument as mentioned in paragraph 28 above, that Mr. Porte and Mr. Nandra agreed that Mr. Nandra would pay Mr. Porte £100 a month for his transport manager duties. Whether or not this point was on Mr. Nandra's radar before the inquiry, he would have become aware of it when he heard Mr. Porte give evidence to exactly that effect. He had every opportunity to give similar evidence when he was asked what had been agreed with Mr. Porte, but instead gave the evidence summarised at paragraph 18(4) above. We concluded that these paragraphs plainly fail the reasonable diligence test. Further, no direct explanation is given of why they are apparently credible as opposed to Mr. Nandra's evidence to the inquiry, although we recognise that they are of course consistent with the evidence of a witness found by the TC to be credible. In those circumstances, we did not admit paragraphs 14 and 15.

37. Paragraphs 36 to 38 are three short paragraphs concerned with the public inquiry itself and in particular, in paragraph 36, with how Mr. Webster came to act as representative for Trans Euro and Mr. Nandra. To that extent, they are connected with the proposed additional ground of appeal and contain material which one would not have expected to be the subject of evidence at the inquiry. What is said on that topic is also entirely consistent with the transcript. Paragraph 37 is more debatable, since its primary focus is to explain what Mr. Nandra recognises was conflicting evidence. Paragraph 38 records his regret at not having instructed a lawyer to represent him. On balance, and perhaps rather over-generously to the Appellants as respects paragraphs 37 and 38, we admitted this short passage of additional evidence.

Application to add a further ground of appeal

38. The proposed further ground of appeal is formulated as follows in the draft amended grounds of appeal enclosed with Fieldfisher's letter of 14th May 2019:

"37. Further or alternatively to the above, the Appellants were inadequately represented at the Public Inquiry, and as a consequence of that and/or the way

that the hearing was conducted, information and evidence that was critical to the issues which the Traffic Commissioner had to consider was not before him, and makes the overall process and decision taken at the conclusion of the process unsafe or unfair.

38. On the authorities of cases such as *R (On the application of Aston) v. Nursing & Midwifery Council* [2004] EWHC 2368 (in the regulatory context) and *R v Day* [2003] EWCA Crim 1060 (in the criminal context) where representation is incompetent or inadequate and that has rendered the process unfair or unsafe, an appellate court or Tribunal will intervene to correct the substantive injustice that otherwise results. That, it will be submitted, is the situation in this case.”

39. This takes further a point which was foreshadowed to some extent in the original skeleton argument and was developed by Mr. Sanderson at the original hearing before he withdrew. Mr. Webster’s abilities in his own field are not challenged, but he was not a legal representative and it is argued that in many respects he did not do what a competent legal representative would have done.

40. We accepted the legal proposition, derived from *R. (On the application of Aston) v. Nursing & Midwifery Council*, that an appellate court or tribunal will intervene where incompetent or inadequate representation has led to irregularities which rendered the process unfair. We consider that case further below. The immediate question was whether the Appellants should be permitted to argue that this is such a case.

41. It is clear, as already explained in paragraph 4, that when the inquiry opened the clerk thought that Mr. Nandra, and presumably Trans Euro, were unrepresented. Neither Mr. Nandra nor Mr. Webster demurred from that statement at the time. In the course of identifying who was before him, the TC asked if Mr. Webster was there as a witness, received the answer that he was there as a consultant and then put to him the question whether he was representing Trans Euro, to which Mr. Webster said that he was. Mr. Nandra did not demur from that either. The TC inquired about Mr. Webster’s experience as an advocate, which appears to have been limited at best and certainly did not extend to representation at a public inquiry. The inquiry then proceeded on the footing that Mr. Webster was Trans Euro’s representative.

42. As to that, Mr. Nandra says in his witness statement that it was not intended that Mr. Webster would act as representative, as he did not have any legal experience, but he was put on the spot by the TC and did the best he could in the circumstances. Although he does not in so many words explain why he did not disagree with Mr. Webster, he says that he was very nervous while giving his evidence. We accepted the evidence in his statement that the original intention was not that Mr. Webster should act as representative, which is entirely consistent with the transcript, and we infer that, as Mr. Nesbitt submits, Mr. Nandra was himself taken by surprise and in all the circumstances, including an understandable degree of nervousness, did not feel able, and probably did not have time to consider whether, to disagree.

43. We also accepted that there are several respects in which a competent legal representative would arguably have acted differently. In all the circumstances, we concluded that the Appellants should be able to argue their further ground of appeal.

Inadequate representation

45. We turn now to the grounds of appeal themselves. The further ground of appeal, once permitted, became the central plank of Mr. Nesbitt's submissions. He identified the following failings in representation:

- (1) the absence of any meaningful attempt to cross-examine Mr. Porte or to put Trans Euro's case on responsibility for any failings to him;
- (2) the absence of any attempt to challenge what was said about compliance;
- (3) the absence of any attempt to clarify with Mr. Nandra what were described as his "curious" answers;
- (4) the failure to elicit anything about the maintenance system which was in place;
- (5) the failure to draw out that there was no substantive problem about drivers' hours;
- (6) the failure to draw out the remedial steps taken and the Appellants' commitment to getting matters right;
- (7) the failure to deal with any of those matters in closing submissions.

46. In support of those submissions, Mr. Nesbitt pointed out that the transport manager should have been dealing with one vehicle doing light local work. Substantial facilities such as an office were not required. It was Mr. Porte's job to set up the systems for a new operation. He ought to have been robustly challenged on his attempt to pass responsibility for the breakdown in the relationship to Mr. Nandra. Instead, the cross-examination is recorded in a single page of the transcript.

47. As respects Mr. Nandra's own evidence, Mr. Nesbitt submitted that there was a failure to cover in chief matters such as the allocation of responsibility and fault as between the Appellants and Mr. Porte, the positive features of Mr. Lowe's report, the remedial steps which had been taken, the impact of revocation and the Appellants' commitment to future compliance. There was no re-examination, so there was necessarily no attempt to clarify answers which Mr. Nesbitt himself described as very difficult. Nor did Mr. Webster himself give evidence of the extensive remedial steps which had been undertaken at his instigation.

48. By way of illustration of the positive features of Mr. Lowe's report, Mr. Nesbitt, while accepting that in six respects the systems and procedures were wholly inadequate, pointed out that in 10 respects there were good systems in place which were working satisfactorily. Those respects included the scheduling and planning of drivers' journeys and duties, so there were no substantive drivers' hours offences. The problems related to the failure to hand in and analyse tachograph charts. There were no recorded roadworthiness encounters and Mr. Lowe expressly stated that there were good systems

in place to ensure that the vehicle was maintained and on the road.

49. We note that the two lever arch files of documents produced to the TC by Trans Euro appear from the transcript to have contained documents relating to maintenance and substantial evidence of the new procedures and policies introduced by Mr. Webster, but Mr. Webster did not take the TC through them.

50. As to closing submissions, Mr. Nesbitt pointed to the page of the transcript which they occupy (by contrast with the more than six pages of Ms. McCarthy's submissions) and submitted that one would have expected a competent advocate:

- (1) to talk through the files of documents which were before the TC;
- (2) to make the argument that the failings in compliance were the responsibility of Mr. Porte;
- (3) to make submissions about the effective systems for proper maintenance;
- (4) to point out that no substantive infringements of drivers' hours had been identified.

51. Turning to the law, Mr. Nesbitt referred us to paragraphs 6 to 12 of the *Nursing & Midwifery* case. Having cited two cases in the Court of Appeal Criminal Division, Moses J. continued:

“10. In the context of Part 52, rule 11 [of the Civil Procedure Rules], the test is not safety.⁴ The appellant need not show that the decision was wrong, but he must show that the decision was unjust. The decision will only be unjust if the incompetence led to irregularities which rendered the process of the trial unfair or the conclusion unsafe.

11. However, in the case before me both sides agree that the court should not allow the appeal unless the incompetence was of such a degree as to be described as *Wednesbury* unreasonable. That concept is not easily applied to the question of the incompetence of an advocate, but I take the Vice President's reference to *Wednesbury* unreasonable to mean that the conduct of the advocate must be such that he or she took such decisions and acted [in] a way in which no reasonable advocate might reasonably have been expected to act.

12. But that by itself, as I have said, is not enough. It must further be shown that that wholly inadequate conduct did affect the fairness of the process. Only then could the conclusion of the committee [hearing the case against the appellant] be shown to be unjust.”

52. Part 52, rule 11 as it stood in 2004 is now Part 52, rule 21, but the relevant passage remains the same. Sub-rule (3) reads:

⁴ In the criminal context, the test is whether the conviction is safe. (Tribunal's footnote)

“(3) The appeal court will allow an appeal where the decision of the lower court was-

- (a) wrong; or
- (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.”

That, of course, explains why in paragraph 10 of his judgment Moses J. said that the appellants need not show that the decision was wrong but must show that it was unjust.

53. This presents an initial difficulty, because it is well established that the general approach in the traffic jurisdiction is that the appellant assumes the burden of showing that the decision appealed against is wrong, in the sense that the process of reasoning and the application of the law require the Tribunal to take a different view from that taken below, as explained by the Court of Appeal in *Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13. The question is whether the TC was plainly wrong, not what decision the Upper Tribunal would have made if it had been in the TC’s place.

54. We invited Mr. Nesbitt to address the apparent discrepancy between the adoption of a test of injustice in the *Nursing & Midwifery* case, pursuant to Part 52, rule 11(3), and the *Bradley Fold* approach. In response, he submitted that even applying the *Bradley Fold* approach, if we concluded that the TC’s decision was unfair, it ought to be set aside, and that, at least for this purpose, there was no material difference between the two. We gave Mr. Nesbitt a window of seven days within which to put in further submissions on the point if he wished, but in the event he did not do so.

55. Having considered the matter, we conclude that although there is an apparent difference between *Bradley Fold* and Part 52, rule 21(3) (as the relevant provision now is), a decision would be “wrong” for the purposes of *Bradley Fold* if it were made following a serious irregularity at the public inquiry which could be shown to have had the consequence that the decision was made in ignorance of or without regard to material facts to a degree which rendered the decision unfair. We accept that a serious irregularity for this purpose might include grossly incompetent representation. We therefore turn to consider whether this ground is made out.

56. It is to be noted at the outset that Mr. Nandra had chosen not to have representation at the inquiry, although he says in retrospect that he now regrets that decision. This point was put to Mr. Nesbitt, whose response was that a competent advocate could possibly have helped. In our view, it is appropriate in assessing fairness to consider what the Appellants’ position would have been if they had been unrepresented, as Mr. Nandra intended, rather than what their position would have been if he had in fact sought and obtained legal representation. Given the choice he had made, the decision would not be unfair as a result of incompetent representation unless Mr. Webster’s representation had in fact worsened the Appellants’ position. The background to the case is very different from that in the *Nursing & Midwifery* case, in which the appellant was provided by the Council itself with an unqualified representative whose conduct of the case “was so incompetent that it fell far below that to which the appellant was entitled” (paragraph 59).

57. It is also to be noted that despite having had representation which was found to be incompetent to such a degree, the appellant in that case was not successful in his appeal. The case was one which turned on the question which of the witnesses the committee believed. Its members believed the care assistants who gave evidence against the appellant rather than the appellant himself. The issues were “simple and clear issues of fact” and the failures in representation did not render the process of reaching a decision unfair.

58. The present case is, if anything, even further removed from the criminal cases referred to in the *Nursing Midwifery* decision, which involved very serious criminal charges in relation to which the appellant was represented by counsel and was entitled to expect (and in fact received) a proper standard of professional competence.

59. We understand the criticisms made by Mr. Nesbitt and they would have considerable force if made of a legally qualified representative who had had a proper opportunity to prepare the case. There are, however, considerations here which redress the balance at least to some extent. They are:

- (1) Mr. Nandra himself said that he did not want to dispute anything in Mr. Lowe’s report, and said so at the outset of the hearing and before Mr. Webster expressed a similar view. There is nothing unfair in the TC’s having proceeded on that basis;
- (2) Mr. Webster was sufficiently alert to ask for a short adjournment before beginning his cross-examination of Mr. Porte, pointing out that there was a lot of new material. We infer that he took the opportunity of discussing with Mr. Nandra the points to be raised;
- (3) he brought out in his cross-examination the fact that Mr. Porte had remained on the licence throughout, although he knew there were shortcomings and there was not continual compliance with the licence. He also put to Mr. Porte, with some assistance from the TC, Mr. Nandra’s case that there was a telephone conversation in which Mr. Porte was informed of Mr. Lowe’s impending visit;
- (4) he sought when examining Mr. Nandra in chief to address the three specific issues identified in the call-up letter, and in particular obtained from Mr. Nandra evidence that he had told Mr. Porte he could have whatever he needed, that Mr. Porte did not say he was unhappy and that he had informed Mr. Porte of Mr. Lowe’s visit, asked him to be present and sought to change the date when that was not possible;
- (5) in his closing submissions he returned to the three issues in the call-up letter and did draw attention to the documents before the TC, the new processes, policies and procedures, the amount of work which had been done, the seriousness with which the inquiry was regarded, the consequences of regulatory action and the intention to be compliant in the future.

60. We accept that an experienced advocate who had prepared the case, and in particular a legally qualified advocate, would no doubt have cross-examined Mr. Porte at greater length and have addressed the TC at greater length on the more positive aspects of Mr. Lowe's report, the extent of the remedial steps taken and the adverse consequences of revocation of the licence. Clearly, however, Mr. Webster made efforts to put the Appellants' case in cross-examination and to elicit it in chief and to address the material issues. He did not commit egregious errors of the sort identified in the *Nursing & Midwifery* case. Inevitably Mr. Webster's level of performance suffered from a comparison with that of Ms. McCarthy, but it does not follow that in the circumstances it reached a *Wednesbury* level of incompetence. If tested by reference to what was reasonably to be expected of a transport consultant who had agreed to attend the public inquiry to support an unrepresented Trans Euro and Mr. Nandra and who found himself unexpectedly acting as a representative, we do not think it did. We shall, however, assume that the threshold *Wednesbury* issue is to be determined by reference to the standard to be expected of a person holding himself out as a representative and engaged to act as such and shall consider the issue of fairness on the footing that the threshold condition is to be determined in the Appellants' favour.

61. It is to be recalled that traffic commissioners approach a public inquiry in an inquisitorial manner, the procedure is often informal, and parties are often unrepresented. These features contrast particularly with the approach at a criminal trial which is adversarial and procedurally strict. The court is then very much dependent on the decisions taken by a party's representative as to the case to be advanced and the tactics to be adopted. The traffic commissioner at a public inquiry has much greater freedom of action and can be expected to be alert to the difficulties faced by an unrepresented party or by one whose representative is not qualified as an advocate. In the present case the TC intervened on a number of occasions for the purpose of clarification. He also asked Mr. Nandra a number of questions of his own which were evidently based on the maintenance records in the files we have not seen. Moreover, the findings in paragraph 50 of the decision contain details which make clear that he had observed the nature of the new procedures and policies in those files.

62. The biggest difficulty facing the Appellants, however, lies in Mr. Nandra's own answers in giving evidence. By way of example, using the internal page numbering of the transcript, we draw attention to the following exchanges:

(1) Q is your evidence today is that Mr. Porte was an active Transport Manager throughout?

A. As far as I would say, yes.

...

Q. So did you oversee Mr. Porte as you say he was an active Transport Manager?

A. (*pause*) I, I would say yes cos he's in our premises at least once/twice a week, basically.

Q. Mr. Porte comes into your premises in order to do transport for you, is that correct?

A. That's right.

Q. But Mr. Porte does not come into your premises to do Transport Manager work?

A. *(pause)* I can't comment on that.

Q. Pardon?

A. I can't comment on that.

Q. You can't comment on that. Well, sir, I am going to ask you to comment on it because you are the Operator and you are saying in your evidence to the tribunal that Mr. Porte comes in and does Transport Manager duties. He either does or he doesn't?

A. He doesn't, no.

Q. He doesn't?

A. He didn't, no.

THE DEPUTY TRAFFIC COMMISSIONER: He doesn't?

A. He doesn't, no.

Q. So he did not come in and do Transport Manager duties?

A. No.

(p.32E to 33C)

(2) Q. Have you ever paid Mr. Porte any money in his role as Transport Manager?

A. No.

Q. No. Well, sir, how can you believe that somebody is going to do a job for no money?

A. Well, probably kindness of his heart, basically, in that sense. Yeah, if there's a salary that needed to be done then there would have been a salary put, put forward on that side.

...

Q. So –

A. For us to pay Simon Porte we would have requested an invoice which I never received in that sense.

Q. So what was the figure that you agreed with him for his work?

A. I don't think we actually agreed a figure at all on that side.

Q. So how could Mr. Porte invoice you?

A. That would have been in discussion between myself and him on that side and if we had agreed something then would have actually actioned it.

(p.33E to 34A)

(3) Q. ... My question is did Mr. Porte inspect those safety inspection sheets, did he look at the –

A. No, no, he didn't, no.

Q. At all?

A. At all.

Q. So therefore he did not perform the duties of a Transport Manager?

A. Duties of a Transport Manager, that's correct.

Q. And you allowed this to happen?

A. (*pause*) It should have been addressed at the time and obviously it's gone past that stage on that side.

Q. Why did you not fire him?

A. I think I should have actually done that at the time and –

Q. That is not my question, sir.

A. That's down to friendship again, basically, in a sense.

(p.34D to 34G)

(4) THE DEPUTY TRAFFIC COMMISSIONER: No. The question, Mr. Nandra, was you indicated in your evidence-in-chief that Mr. Porte knew of the change from six weekly inspections to twelve weekly inspections, that you had told him.

A. Could have been a conversation –

Q. And you now appear to be saying that that was a conversation between you and the person who did the inspections.

A. Inspections, yes.

Q. Yes. What was put to you was Mr. Porte could not have known of that change because you have just acknowledged that he was not doing the job, he was not acting as TM.

A. Mmm.

Q. So what do you have to say? Did he know of the change from six to twelve or did he not?

A. No he didn't know, no.

(p.35B to 35D)

(5) THE DEPUTY TRAFFIC COMMISSIONER

Q. ...It was evident to you from the start of the arrangement that Mr. Porte was not carrying out his duties as Transport Manager?

A. Correct.

...

Q. Right. So you allowed your Operator's Licence to, as it were, subsist to persist from 8th December 2016 until very recently, when you (*inaudible*) in Mr. Webster, without a Transport Manager, without an effective Transport Manager?

A. Without an effective Transport Manager, yes.

Q. Why did you do that? Did you not realise, well, let me put the question rather differently, perhaps rather more productively. You understood that it was your duty as the Operator to employ a Transport Manager?

A. Competent Transport Manager.

Q. Yes.

A. That's correct, yes.

Q. And you did not?

A. That's correct.

(p.36E to 37A)

63. In those answers Mr. Nandra was giving clear evidence, not only in cross-examination but in answer to the TC, that he knew it was his duty to employ a competent transport manager and that he knew that Mr. Porte was not carrying out transport manager duties. It is true that Mr. Webster did not re-examine him to try to "clarify" those answers, but it is unrealistic to suppose that he could have done so in a way which produced a different answer which would have suited the Appellants' case, at least without giving rise to further issues in relation to Mr. Nandra's credibility.

64. This is a case in which a major feature was that from December 2016 to August 2018 Trans Euro had been operating under licence OF1147792 with no one carrying out the duties of a transport manager, to the knowledge of Trans Euro through Mr. Nandra, as he accepted in his evidence after an initial denial, and of Mr. Porte. The absence of an effective transport manager is the principal subject matter of the TC's findings, set out in paragraph 20 above, and also of the reasons for the TC's decision in relation to the Appellants, set out in paragraph 21 above. There was a conflict of evidence over whether the absence was because Mr. Nandra did not make available the resources which Mr. Porte requested or whether it was because Mr. Porte, without expressing any unhappiness with the position, simply did nothing. The TC, having heard the evidence of Mr. Porte and Mr. Nandra, accepted Mr. Porte's account for the reasons given in the decision.

65. As is illustrated by the quotations from the evidence in paragraph 62 above, the TC did not proceed on the basis of one or two answers from Mr. Nandra in finding that to his knowledge Trans Euro was operating without a transport manager in any practical sense from the start of the licence. It was something Mr. Nandra said repeatedly at different times in his evidence. If Mr. Webster had not represented Trans Euro, Mr. Nandra would still have had to give evidence if the case were not to proceed on the

basis of Mr. Porte's evidence alone and he would still have been cross-examined by Ms. McCarthy and asked questions by the TC. (Indeed, that would have been the case if he had had legal representation, and we have commented in paragraph 63 above on the likelihood that the position would have been assisted by re-examination.) Mr. Nandra would also have been responsible for the cross-examination of Mr. Porte and we see no reason to believe that his cross-examination would have been more effective than Mr. Webster's. The utmost which can be said is that a competent legal representative could be expected to have pushed Mr. Porte harder on matters such as what resources he required which were not provided, whether he seriously intended to carry out the duties of a transport manager at all given the very small remuneration which he says was agreed (and which Mr. Nandra said at the inquiry was not agreed) and why, even in the absence of some sort of office provision, he did absolutely nothing. Even if, contrary to the view we have expressed in paragraph 56 above, it is relevant in relation to fairness to consider what might have been achieved by a competent legal representative as opposed to what might have been achieved if Trans Euro had been unrepresented as intended, such cross-examination would have gone only to the question whose fault it was that Mr. Porte did not carry out any duties and would not have addressed the fundamental point of Mr. Nandra's knowledge that the duties were not being performed. It was entirely within his power to remedy the situation by dismissing Mr. Porte and engaging someone such as Mr. Webster, as he himself recognised in cross-examination, but he did not do so.

66. For those reasons, our prima facie conclusion is that even assuming in the Appellants' favour that Mr. Webster's conduct as a representative fell foul of the *Wednesbury* principle, it did not render the process and the decision unfair. Before expressing our final conclusion on the point, however, we go on to consider the other grounds of appeal, bearing in mind that they raise alleged significant misunderstandings of the facts and lack of proportionality and that such matters might have resulted from a lack of competent representation. These were addressed by Mr. Nesbitt in his supplementary skeleton argument under somewhat different headings from those used in the grounds of appeal and we shall use the headings in that skeleton. It is our understanding that the skeleton sets out the points now relied on in the appeal.

Failure to undertake a proper balancing exercise

67. In the original skeleton argument this point was raised as part of Ground 2 under the heading "Loss of repute was unjustified when taking into account the statutory factors". The reference to the statutory factors is a reference to paragraph 1(2) of Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1995, which provides that in determining whether a company is of good repute a traffic commissioner shall have regard to all the material evidence, including in particular evidence of any relevant convictions and any other information in his possession as to the previous conduct of the company's directors, officers, servants and agents if that material appears to him relevant to the company's fitness to hold a licence.

68. It is not suggested that there were any relevant convictions. What Mr. Nesbitt says is that the TC was required to conduct a balancing exercise, weighing the positive matters going to the credit of Trans Euro against the negative ones, and that the TC did not do so. In this connection he referred us to *T/2010/52 and 53, Taylor and Taylor*, [2010] UKUT 397 (AAC), at paragraphs 6 to 9 and to *T/2014/72 Nicholas t/a Wigan*

Container Services, [2015] UKUT 0148 (AAC), at paragraph 40.

69. Before considering that submission in detail, we set out the legislative background against which the TC was proceeding, as he did himself in paragraphs 24 to 43 of his decision.

70. S.26 of the 1995 Act gives a traffic commissioner power *inter alia* to revoke a licence on any of a number of specified grounds. The three specific issues raised in the call-up letter, as set out in paragraph 10, were matters which, if established, would fall within s.26.

71. S.27 of the Act requires a traffic commissioner to revoke a licence if it appears to him, having followed the procedural steps specified in the section, that the holder of the licence no longer satisfies the requirements set out in s.13A(2) or that the nominated transport manager no longer satisfies the requirements set out in s.13A(3). The requirements in subs. (2) include the requirements that the operator is of good repute and professionally competent. The requirements in subs. (3) include the requirements that the transport manager is of good repute and professionally competent. Under paragraph 8 of Schedule 3 a company which is an operator satisfies the requirement of professional competence if it has a transport manager who is of good repute and professionally competent. In the present case, the possible loss of Trans Euro's good repute and professional competence were specified in the call-up letter as possible material changes of circumstances bringing s.26 into play, but they were also identified as matters falling within s.27.

73. It will be appreciated that because Trans Euro's professional competence was dependent upon the good repute and professional competence of its transport manager, it had a direct interest in the outcome of the inquiry in relation to Mr. Porte, who remained its nominated transport manager at the time of the inquiry.

74. It will also be appreciated that under the scheme of the Act, the loss of good repute or professional competence is a more serious matter for the operator than falling within any of the grounds specified in s.26 which are not also within s.27, because revocation is then mandatory rather than discretionary. This proposition, however, is subject to the caveat that the Act is the means by which the United Kingdom gives effect to Regulation (EC) No. 2009/1071, having been amended by the Road Transport Operator Regulations 2011, S.I. 2011 No. 2632 to do so. Art. 6 of the Regulation requires that in considering whether good repute is lost, the competent authority must consider whether such a finding would be disproportionate. If it makes such a finding and accordingly decides that good repute is not lost, it must be duly reasoned and justified and the reasons must be recorded. Further, under art. 13, which is reflected in s.27(3A), if an operator loses professional competence because its transport manager loses good repute or professional competence, the competent authority may allow a period of grace for the operator to rectify the situation.

75. It was in fact a concern with proportionality which gave rise to what is known as the *Bryan Haulage* question. In that case, the Tribunal considered the decision of the Court of Appeal in *David Crompton Haulage v. Department of Transport* [2003] EWCA Civ 64, in which the court had held that a licence was a possession which, under the European Convention on Human Rights, attracted the protection of Article 1 of the

First Protocol and, following the coming into force of the Human Rights Act 1998, could be revoked only if revocation was a proportionate action. It concluded that to reflect that state of the law against the background that loss of repute leads to mandatory revocation, the TC should only find loss of repute established if the conduct was such that the operator should be put out of business (i.e., by having the licence revoked).

76. It follows that when the *Bryan Haulage* question is asked the proportionality of the sanction of revocation is being considered, as required by Art. 6 of the 2009 Regulation. A traffic commissioner will, however, frequently also refer expressly to proportionality, as noted by the Upper Tribunal in *T/2015/39 Firstline International and William Lambie Limited*, [2016] UKUT 0291 (AAC), and that is obviously wise, having regard to the requirement to record reasons where a finding that revocation is disproportionate is made.

77. The *Priority Freight* question about the likelihood that the operator will in future comply with the licensing regime is a preliminary question designed to assist in answering the *Bryan Haulage* question. As explained in the decision, it is based on the proposition that if the operator is unlikely to comply, that goes to support loss of repute and revocation, whereas if the operator is likely to comply, that may be an indication that it ought not to be put out of business.

78. In the present case, the TC's approach was clearly, and understandably, to ask himself first whether, on the facts he had found, which included a finding of serious non-compliance, Trans Euro had lost its repute. If so, it would not be necessary to address further the s.26 grounds, since revocation would be mandatory under s.27. Such a question inevitably involves an exercise of judgment, taking into account both the positive factors capable of influencing the decision and the negative ones. Those factors need to be set out and weighed, with an explanation of the weight given and the reasons for the decision reached. We agree that, as was said in *Taylor*, this is necessary so that the operator can understand why the decision was reached and the Upper Tribunal is also able to understand the reasoning if there is an appeal.

79. The position is somewhat different as respects the question whether Trans Euro had lost its professional competence, since that depended upon whether Mr. Porte retained his good repute. Once the TC had decided that he had not, revocation would follow unless a period of grace was granted. Such a course would obviously be pointless if the licence was already revoked on the ground of loss of repute.

80. It is certainly the case that there is no part of the decision expressly setting out factors for and against revocation. The question is whether the Appellants have shown that in the circumstances of this case the TC simply did not take into account positive factors which he ought to have taken into account, or, if he did take them into account, weighed them in a way which is insufficiently explained. We note at the outset that he began his statement of the law by reminding himself of the decision of the Court of Appeal in *Muck it Limited v. Secretary of State for Transport* [2005] EWCA Civ 1124 that when revocation is in issue it is for the traffic commissioner to satisfy himself that the grounds for revocation exist, rather than for the operator to persuade him that they do not.

81. In his skeleton argument Mr. Nesbitt identifies the following positive factors

which he submits ought to have been taken into account:

- (1) Mr. Lowe's statement in his report that Trans Euro had good systems in place "to ensure its vehicle was maintained and on the road" and "for many areas of the business";
- (2) the score of 1 given in respect of 10 out of the 19 areas considered by Mr. Lowe;
- (3) the absence of a prior enforcement history;
- (4) the absence of previous convictions of Trans Euro and its officers;
- (5) the wide-ranging remedial steps which had been taken.

He says there was no reference at all to most of those features of the case and no proper balancing exercise.

82. As to these matters, (1) and (2) are in substance the same point; Mr. Lowe found there were some good systems in place. The difficulty for the Appellants here is that his references to good systems were immediately qualified by reference to the many unsatisfactory features which meant that the overall result of the inspection was sufficiently unsatisfactory to require to be reported to the OTC. Nevertheless we accept that there were some positive features, including the maintenance arrangements, although that feature is in itself associated with the Appellants' failure to notify the changed maintenance intervals. We also note that there was good compliance as respects the scheduling of drivers' journeys. As against that is Mr. Lowe's statement that it was not possible to ascertain whether drivers were in fact adhering to the requirements of the Working Time Directive.

83. We accept that there was no prior enforcement history and there were no previous convictions, although we note the comparatively brief period for which the licence had been in force. Inevitably, however, the fact remains that Trans Euro was unable to show any period of compliance as an operator, because it had never had in place a transport manager who was performing the relevant duties and no other person was performing them either.

84. In those circumstances, although it might have been preferable if the TC had expressly referred to matters (1) to (4), he clearly had in mind the overall impact of Mr. Lowe's report and the absence of a positive history of compliance. In our view, the weight which could reasonably be attached to those matters is sufficiently limited to mean that the absence of such express references does not demonstrate that a proper balancing exercise was not carried out.

85. The position is different as respects matter (5), the remedial steps which had been taken. In paragraph 50 of the decision the TC accepted Mr. Webster's evidence of the time he had spent trying to set matters right and referred to numerous elements of the activities undertaken. He referred to the remedial steps again in paragraph 59(f). Unfortunately for the Appellants, he made clear that the very late stage at which those steps were taken meant that he did not regard them as sufficient evidence, in all the

circumstances, of likely future compliance. That was against the background of what he found was Mr. Nandra's failure to give Mr. Porte the necessary resources and of the unfavourable view he formed of Mr. Nandra not only on the basis of the sustained lack of compliance but also as a witness. It follows that the TC took into account the remedial steps but gave them comparatively little weight, for reasons he explained. In our view, the TC was entitled to do so.

86. Accordingly, looking at the various matters both individually and cumulatively, as Mr. Nesbitt urges us to do, we are not persuaded that the TC was wrong in his conduct of the balancing exercise.

Failing adequately to consider or to attach appropriate weight to certain aspects of the case

87. This heading covers Ground 1 of the grounds of appeal. As explained in both the original skeleton argument and Mr. Nesbitt's supplementary skeleton, the substance of the complaint is that the TC:

- (1) failed to place sufficient emphasis on Mr. Porte's failings as a transport manager, as opposed to those of Trans Euro;
- (2) failed to take sufficient account of the remedial steps taken.

88. In the original skeleton argument, the submissions on the first point, at paragraphs 13 to 17, suffered from the defect that they contained assertions of fact which were contrary to Mr. Nandra's own evidence at the inquiry, namely, that there was an agreement to pay Mr. Porte £100 a month and that Mr. Nandra assumed that Mr. Porte was performing his duties of continuous and effective management. The latter assertion was of course also contrary to the TC's findings of fact. Mr. Nesbitt, implicitly recognising that defect, acknowledges that some of the evidence was "unhelpful", but submits that a key question was the proper overall allocation of responsibility for what had gone wrong and that the primary responsibility lay with Mr. Porte. Even in this formulation, the point fails in the light of the TC's finding that Mr. Porte's efforts to put himself in a position where he could fulfil his responsibilities was met with obstruction and failure to provide resources by Mr. Nandra. This finding was based on the evidence given at the hearing and was clearly open to the TC. We note further that Mr. Porte lost his repute as a transport manager on the grounds that:

"This was not a case of non-compliance over a short period of time but rather over a sustained time when [Mr. Porte] was fully aware of it and indeed light was only shone upon it by virtue of the discovery of infringements on 25 January 2018 and [Mr. Lowe's] visit to the operating centre on 6 April 2018. [Mr. Porte] had still failed to resign and report by the time this fortuitous visit took place." (paragraph 53)

The TC was certainly alive to Mr. Porte's failings.

89. As Mr. Nesbitt recognises, there is a close connection between the second point relating to the remedial steps and the submission just considered as to the balancing exercise undertaken by the TC. He submits, however, that in the TC's reasoning the

only reference to the remedial steps is at paragraph 59(f) and a fuller description of them or reference to them was required. Although it is of course the case that paragraph 50, in which the TC gave details of the steps, was in his findings of fact rather than his reasoning, we think it is sufficiently clear that the TC had in mind that extensive remedial steps had been or were in the process of being taken. This point therefore does not affect the conclusion we reached in paragraph 85 above. The remedial steps were adequately considered and appropriate weight was attached to them.

Certain findings involved a misunderstanding of the evidence

90. The findings to which Mr. Nesbitt draws attention in this submission are the findings that:

- (1) Mr. Nandra did not tell the TC the truth in giving evidence;
- (2) Mr. Nandra at first claimed that the maintenance intervals had been changed to 12 weekly on the advice of Mr. Lowe after the meeting on 6th April;
- (3) Mr. Nandra said that Mr. Porte had indicated he was quite happy with the arrangements for transport management.

91. As to the first point, which Mr. Nesbitt categorises as probably the most serious, he submits that the starting point appears to be the TC's finding in paragraph 45 that Mr. Nandra was compelled under cross-examination to accept that he failed to tell the truth in examination in chief. This is described as the basis of the general statement in paragraph 59(e) that Mr. Nandra clearly told untruths and adjusted his position in accordance with what he seemed to think would be to his best advantage. Mr. Nesbitt submits that the findings do not involve a fair reading of Mr. Nandra's evidence and draws attention to the cross-examination as a whole.

92. The full finding at paragraph 45 reads:

“[Mr. Nandra] by contrast was an unconvincing witness who changed his position several times on matters of fact during the course of his evidence and indeed at one point was compelled under cross-examination to accept that he had failed to tell me the truth in examination-in-chief.”

93. In our view, that finding was amply borne out by:

- (1) the changes in evidence revealed in the extract set out at paragraph 62(1) above;
- (2) the change revealed in the extract set out at paragraph 62(4) above, which was followed by an express acknowledgement that the evidence given in chief was incorrect, albeit that Mr. Nandra also said he had not understood the relevant question;
- (3) the evidence as to Mr. Porte's remuneration contained in the extract set out at paragraph 62(2) above;

- (4) the evidence Mr. Nandra gave on maintenance matters at pages 37B to 38G of the transcript, which the TC described as “extraordinarily evasive”.

94. Against that background, the TC cannot be criticised for having preferred Mr. Porte’s evidence about the reason why he never undertook the duties of a transport manager, about his knowledge of Mr. Lowe’s impending visit and about his remuneration. The corollary of that preference was that Mr. Nandra was to be taken as having told untruths about those matters. We agree that Mr. Nandra did not accept in cross-examination that he had deliberately failed to tell the truth in his evidence in chief, but on our reading of the transcript there was a clear contradiction under cross-examination of earlier evidence at page 30H to 31A, in relation to which Mr. Nandra does not appear to have been at all confused.

95. We think it is possible there was some degree of misunderstanding of Mr. Nandra’s evidence about the maintenance intervals. The transcript shows at pages 30D to 31G that the TC had some uncertainty about what he was being told. With the benefit of the transcript, we think that Mr. Nandra was giving evidence that the service engineers said that 12 weekly inspections would be sufficient; that was said in December 2017; notification was not sent to the OTC until after Mr. Lowe’s visit on 6th April 2018; Mr. Porte was the transport manager at both points in time and Mr. Nandra told him what was being done. The point was to explain why the OTC was not immediately notified, i.e., because the transport manager was expected to do it. On that footing, the TC did misunderstand to the extent that he thought that Mr. Nandra’s original evidence was that the interval had been changed on Mr. Lowe’s advice and that the change took place in April 2018 rather than December 2017. It remains the case, of course, that there was a significant delay in notification and that Mr. Nandra’s later evidence was that Mr. Porte was not aware of the change.

96. We do not think there was any real misunderstanding of Mr. Nandra’s evidence about Mr. Porte’s happiness or otherwise about the arrangements for transport management. In his evidence in chief he said that initially he told Mr. Porte he could have whatever space he needed and whatever items he required to get everything in place; Mr. Porte did not at any time say to him that he was unhappy; and Mr. Porte did not put anything in writing. The TC put the middle of those statements in the more positive form that Mr. Porte indicated he was quite happy with arrangements. Clearly this is something of a gloss on what Mr. Nandra actually said. In substance, however, Mr. Nandra was disagreeing with Mr. Porte’s version of events that Mr. Nandra had not provided him with the resources he needed. The TC clearly understood that and preferred Mr. Porte’s evidence.

97. We understand Mr. Nesbitt’s point that the misunderstanding referred to in paragraph 95 ultimately contributed to the negative impression the TC formed of Mr. Nandra. In our view, however, in the light of the rest of the evidence it is not reasonably arguable that the TC would have taken a different view if he had correctly understood that piece of evidence. Overall, we conclude that the TC’s findings as to untruthfulness were clearly open to him and no error of law is shown.

Decision to revoke was disproportionate

98. There is a risk at this point of not seeing the wood for the trees. As is clear from the reasons he gave, when he came to consider whether the decision to revoke was disproportionate, the TC proceeded on the basis that:

- (1) the Appellants had operated the licence without a transport manager effectively since its inception;
- (2) Mr. Nandra knew that he was required to have an effective transport manager in place;
- (3) there was no effective transport manager in place because he had not provided the resources he was requested to provide;
- (4) even after Mr. Lowe's visit on 6th April 2018 it was almost three months before Mr. Nandra took any steps to correct matters, by which time the public inquiry was only a week away;
- (5) Mr. Nandra did not appear to understand the seriousness of his misconduct and showed no contrition;
- (6) his evidence to the TC had been untruthful;
- (7) bearing the above matters in mind, the remedial steps, taken at the eleventh hour as they were, did not constitute sufficiently reliable evidence that there was a substantial prospect of sustained compliance in future to found the grant of a period of grace or a suspension.

99. As against these matters, Mr. Nesbitt points out that Trans Euro was a new operator and accordingly unable to show a good compliance history, the vehicle was properly maintained and there were no substantive offences relating to drivers' hours. He submits that there had been one serious failing in relation to the transport manager but the Appellants now understand the position. He argues that they needed a firm rap over the knuckles but revocation goes further than is necessary and is disproportionate.

100. This is very largely retreading the ground we have already considered in relation to the submission that the TC failed to carry out a proper balancing exercise and we do not repeat what we said under that head. We add, however, that the fact that Trans Euro was a new operator cuts both ways. Mr. Nandra says he had been on the new operator's course. He ought therefore to have had well in mind the importance of employing, under a contract, an effective transport manager. If he had started by doing so, he would have been able to draw the TC's attention to the fact that he originally intended to comply with the statutory requirements (and, in consequence, with the drivers' hours undertaking). On the evidence accepted by the TC he chose not to do so but instead chose to operate in what he knew to be a non-compliant manner from the outset.

101. There can be no doubt that it is serious misconduct for the holder of a licence knowingly to operate it for more than 18 months without a transport manager. The seriousness of the situation is aggravated when there has never been an effective transport manager or any person performing the duties of a transport manager and the

reason for that is that the holder has not made the requested resources available. The only possible ground for not revoking the licence in those circumstances would be that in spite of what has gone before the traffic commissioner comes to the conclusion that there is likely to be sustained compliance in future. That demands a sufficient level of trust in the good intentions of the holder. In this case, although the TC accepted that Mr. Webster had put considerable hard work into establishing a compliant state of affairs, he was not satisfied that there was a substantial prospect of sustained compliance. We accept that a public inquiry does often serve as a wake-up call, but the TC was entitled to note Trans Euro's failure to take any steps in the period between 6th April and 3rd August 2018 despite the terms of Mr. Lowe's report and to view with some scepticism the likelihood that what Mr. Webster put in place would remain. Mr. Nandra's failure to appreciate the seriousness of the misconduct, his lack of genuine contrition, his inability to point to a history of compliance and the untruthfulness of parts of his evidence were taken into account by the TC in support of his assessment. He had the advantage of seeing and hearing Mr. Nandra and we certainly cannot say that that assessment was wrong.

100. That being the case, far from the decision to revoke being disproportionate, we think it was clearly a proportionate decision. The TC rightly asked himself the *Priority Freight* and *Bryan Haulage* questions. His decision was not plainly wrong.

Decision to disqualify was disproportionate

101. The power to disqualify the holder of a licence is given by s.28(1) of the 1995 Act, which permits a traffic commissioner to disqualify a holder from holding another licence if the existing licence is revoked. S.29(5) provides that the power is also exercisable in relation to a director of the holder if the holder is a company.

102. It is well established that the power to disqualify is to be exercised to promote the objectives of the licensing system, which are the protection of the public and fairness to other operators: see *Thomas Muir (Haulage) Limited v. Secretary of State for the Environment, Transport and the Regions* [1998] S.L.T. 666 and *T/2013/46 Shearer Transport Limited and James Shearer*, [2013] UKUT 489 (AAC), the latter of which, as we have said, is referred to in the original skeleton argument. If an operator and its director cannot be trusted to comply with the requirements of the system and the consequence of failure to do so would be to put the public at risk and to give rise to unfair competition, a period of disqualification which gives the operator and director time to show that they can be trusted is a proper exercise of the power.

103. In the present case the fact that it was not possible to tell whether the requirements of the Working Time Directive were being complied with means that it is not possible to say whether the working practices employed by the Appellants and their drivers had in the past given rise to infringements, thus pointing to a possible future risk if those practices were not changed. We recognise that there were no substantive offences identified during the period of operation, which does go to the credit of the Appellants in this connection, but that is not a complete answer, especially since it is evident from Mr. Lowe's report that tachograph charts were not always correctly completed and it was not possible to tell whether drivers undertook work outside their employment with Trans Euro, albeit that that would involve a breach of contract. There was clearly unfair past competition, since Trans Euro had not had to bear the costs of

employing a transport manager and any further costs which might result from the performance of the transport manager's duties.

104. In those circumstances, if the TC formed the view that the Appellants could not be trusted in future to comply with the requirements of the licensing system, a period of disqualification would not be disproportionate. The TC gave as his reasons for deciding that disqualification would not be disproportionate the seriousness of the non-compliance, the length of time for which it lasted and the lack of convincing evidence of future compliance. In fixing the period of disqualification at two years he explained that that would give Mr. Nandra time to undergo appropriate training and to run his business in a way which inspires confidence that he would operate a licence in a compliant fashion in the future. The period of two years is in the middle of the range of one to three years suggested as a starting point for a first public inquiry in the Senior Traffic Commissioner's Statutory Document no. 10 at paragraph 100.

105. We note that the TC clearly had in mind the evidence he had been given about the effect of revocation on Trans Euro's business. Mr. Nandra accepted in evidence that the business would continue, although there would be a cost. It was clear from Mr. Webster's closing submissions that Mr. Nandra had considered the possible consequences and expected to have to get in another three smaller vehicles and to employ additional staff. There was no suggestion that the business would fail.

106. Having regard to the foregoing, we cannot say that the TC's decision on disqualification was plainly wrong. On the contrary, it is readily understandable that in the light of his findings and his decision on revocation he did not wish to leave it open to the Appellants to apply immediately for a new licence. In our view the decision was well within the range of decisions open to him.

107. We add that if we had concluded otherwise and had been making a decision of our own, the concerns expressed by the TC as to the Appellants' trustworthiness would have been reinforced by the attempts Mr. Nandra has made on the appeal to go behind the evidence before the TC. We refer to:

- (1) his belated challenge to the statement in Mr. Lowe's report that he did such tachograph checking as was done. This is clearly a point which should have been raised at the inquiry if it was to be raised at all, but instead Mr. Nandra accepted Mr. Lowe's report. Incidentally, although less obviously he thereby accepted Mr. Lowe's statement that Mr. Nandra had told him that Mr. Porte worked full time for Trans Euro;
- (2) his assertion on the appeal that he had agreed a payment of £100 a month with Mr. Porte, contrary to his clear evidence;
- (3) his contentions as advanced on his behalf in the original skeleton that he was relying on Mr. Porte to exercise continuous and effective management. This is also contrary to his clear, and repeated, evidence.

His evidence at the inquiry in those respects cannot credibly be attributed to any failings on Mr. Webster's part as his representative. There continues to be no real recognition by the Appellants that their troubles are of their own making, since Mr. Nandra,

knowing that he was obliged to have an effective transport manager in place, did nothing to achieve that until 3rd August 2018. The emphasis is always on Mr. Porte's failings. Serious though they undoubtedly were, it has to be remembered that Mr. Nandra had the advantage of being able to terminate such arrangement as he had with Mr. Porte whenever he chose and without any adverse consequences, except that Trans Euro would then have to employ an effective transport manager. Mr. Porte by contrast was in the position of owing a significant proportion of his turnover to his work for Trans Euro entirely separately from his work as a transport manager and some reluctance on his part to rock the boat would therefore be understandable. The balance of power was in Mr. Nandra's favour and he chose not to put matters right.

108. For the sake of completeness, we deal briefly also with the TC's final direction that if Trans Euro or Mr. Nandra at any time until midnight on 27th September 2020 should be a director of or hold a controlling interest in a company which holds an operator's licence or a company of which such a company is a subsidiary or operates any goods vehicles in partnership with a person who holds such a licence, that licence is liable to revocation, suspension or curtailment. The power to give such a direction is contained in s.28(4) of the 1995 Act. The direction itself is mentioned briefly in the grounds of appeal, although it does not feature in Mr. Nesbitt's skeleton or his oral arguments.

109. Although the TC did not expressly give his reasons for making the direction, the reasons for which he disqualified the Appellants would naturally encompass a direction that they should not be involved indirectly with a licence through the medium of another company or a partnership. The potential for evading the consequences of disqualification in the absence of a direction under s.28(4) is obvious. In our view the TC did not fall into error in giving the direction.

Inadequate representation revisited

110. In paragraph 66 above we expressed our prima facie conclusion that any deficiencies in Mr. Webster's representation did not render the process and the decision unfair, but said that we would return to that issue after having considered the other arguments addressed to us. Having done so, we have noted that in our view the TC misunderstood Mr. Nandra's original evidence about when it was decided to change the maintenance interval and on whose advice that decision was made. We accept that with different representation that misunderstanding might not have occurred. For the reasons already given, however, we do not think that that misunderstanding had a material effect on the overall view the TC formed of Mr. Nandra as a witness.

111. We found no other ground which would cause us to change our prima facie conclusion in relation to representation. It follows that the additional ground of appeal does not succeed.

Conclusion

112. We are grateful to Mr. Nesbitt for his careful and helpful submissions, but at the end of the day we are not persuaded by them. For the reasons we have given, the appeals are dismissed.

(signed on the original)

E. Ovey
Judge of the Upper Tribunal
29th July 2019