Neutral Citation Number: [2016] UKUT 0345 (AAC) **Appeal No.** T/2016/08

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of
Kevin Rooney, Traffic Commissioner
for the North East of England dated 26 January 2016

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
Stuart James, Member of the Upper Tribunal
David Rawsthorn, Member of the Upper Tribunal

Appellant:

Van Der Gaag Transport De Lier BV

Appellant

and

Driver and Vehicle Standards Agency

Respondent

Attendances:
For the Appellant Simon Clarke of Counsel, instructed by Tinkler Solicitors

For the Respondent Stephen Thomas, Solicitor instructed by the Driving and Vehicle Standards Agency.

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 12 July 2016
Date of decision: 20 July 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED

SUBJECT MATTER: Impounding; cabotage; the interpretation of regulation 4(3)(d)(i)&(ii) of the Goods Vehicle (Enforcement Powers) Regulations 2001 (as amended).

CASES REFERRED TO: T/2011/60 Nolan Transport v Vehicle & Operator Services Agency & Secretary of State for Transport (20120 UKUT 221 (AAC)

REASONS FOR DECISION

1. Introduction

   This is an appeal against the decision of the Traffic Commissioner for the North East of England ("the TC") made on 26 January 2016 when he refused to order the return of a vehicle to Van Der Gaag De Lier Transport BV ("VDG") which had been detained under reg.3 of the Goods Vehicles (Enforcement Powers) Regulations 2001 (as amended) ("the 2001 Regulations").

2. Unless permitted to do so under an exemption, it is unlawful in Great Britain ("GB") to use a goods vehicle on a road, for the carriage of goods, either for hire or reward or for or in connection with any trade or business carried on by the user of the vehicle, without holding an operator's licence issued under s.2 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act"). Use of a goods vehicle in contravention of s.2 of the 1995 Act is a criminal offence punishable by a fine not exceeding £5,000.

3. One of the exemptions referred to in paragraph 2 above, is the use of a vehicle for international carriage by a haulier established in another member state (see s.2(2)(b) of the 1995 Act). International carriage is defined by Council Regulation (EEC) No. 881/92 as being "*a journey undertaken by a vehicle the point of departure and the point of arrival of which are in two different Member States, with or without transit through one or more Member States or non-member countries"*. It follows that the use of a vehicle from another Member State with the appropriate authorisation to bring an incoming international load into GB will not be operating unlawfully.

4. By virtue of Regulation (EC) No. 1072/2009 ("the 2009 Regulation"), any haulier for hire or reward from another Member State who has entered GB whilst delivering an incoming international load and who complies with conditions set out in Article 8 of the 2009 Regulation, may also take advantage of a further exemption which is known as "cabotage". This permits an incoming vehicle, after the last unloading of its international carriage, to undertake three further collections and deliveries, known as "cabotage operations" within GB before the vehicle leaves the country. The three cabotage operations must take place within seven days from the last unloading of the incoming

international carriage (if there is more than one). This is referred to in this decision as the "three in seven rule".

5. Cabotage operations will only be deemed to conform to the 2009 Regulation if the haulier can produce clear evidence of the incoming international carriage and of each consecutive cabotage operation carried out. Article 8(3) sets out the precise nature of the evidence required to be produced. Such evidence must be kept in the vehicle and must be available for inspection at any roadside check (see paragraph 53 of the Tribunal decision *T/2011/60 Nolan Transport v Vehicle & Operator Services Agency & Secretary of State for Transport (20120 UKUT 221 (AAC))* ("Nolan Transport"). The Nolan Transport decision represents a comprehensive determination on the interpretation and practical application of the impounding and cabotage regimes.

6. It follows that once a vehicle has entered GB undertaking international carriage and then proceeds to operate for hire or reward following the final unloading of that international carriage, then unless the vehicle can be shown to be operating in accordance with the "three in seven" rule and is carrying all of the necessary evidence set out in Article 8(3) of the 2009 Regulation, the vehicle will be operating in contravention of section 2 of the 1995 Act.

7. Background circumstances to the impounding

VDG is a Dutch registered transport company with a Dutch operator's licence and a European authorisation permitting VDG to engage in the international carriage of goods. The company was established in 1994 and is domiciled in the Netherlands. Its core business is refrigerated transport.

8. In the period 2011 to 2012, VDG received three letters sent by the Vehicle Operators and Standards Agency ("VOSA") warning of the consequences of operating illegal cabotage in Great Britain and further warning of the possibility of having vehicles impounded if such activity continued. In the period 2012 to 2013, five such letters were sent; in the period 2014 to 7 October 2015, five such letters were sent. It follows that within the period 2011 and 7 October 2015, on thirteen occasions, vehicles being operated by VDG had been stopped by VOSA or its successor, the Driver and Vehicle Standards Agency ("DVSA") and found to have been operating illegally in GB resulting in the warning letters being issued. As a consequence, VDG was one of the operators on the DVSA "watch list". It had not however, rather surprisingly we find, ever had a vehicle impounded.

9. On 7 October 2015, a two axle DAF tractor unit and semi-trailer bearing the registration BZFZ27 was escorted into the DVSA check site in Immingham for a roadside inspection. The driver, Gregorius Kester,

a Dutch national, told Traffic Examiner ("TE") Berriman that he was on his way from Doncaster to Immingham Port laden with crates. His employer was VDG. Analysis of his tachographs revealed that the vehicle had entered GB on 1 October 2015 and had travelled 2,696kms prior to being stopped. The only documentation the driver could produce related to the load on the trailer then attached to his tractor unit. He was unable to produce any documentation relating to the trailer that he had entered GB with or any subsequent trailers/loads. Mr Kester was interviewed under caution but declined to make any comment. TE Berriman came to the conclusion that the vehicle was being operated illegally within GB and Senior Traffic Examiner Paul Watkins was then contacted and he authorised the impounding of the tractor unit.

10. On 9 October 2015, TE Freeman observed a Dutch registered tractor unit, registration 02BBD3 and semi-trailer being escorted into the Immingham check site. The vehicle was in the livery of VDG and was being driven by a Lithuanian national, Danius Balnanosis. The trailer was loaded with frozen food which was being carried from Immingham to Hull. Tachograph analysis revealed that the vehicle had entered GB on 14 September 2015 and had then been driven on a daily basis since its entry. Mr Balnanosis said that he had taken the vehicle over at Spalding on 4 October 2015 and did not know when the vehicle had entered GB. The only documentation he was able to produce was for the previous day which showed that he had delivered to Widnes (170kms from Immingham) and Hinckley (143kms from Immingham). TE Freeman concluded that by reason of the vehicle having been used for hire or reward within GB since 14 September 2015 and that the driver was unable to produce the necessary evidence required by Article 8(3) of the 2009 Regulations, the vehicle was being operated illegally within GB and issued a cabotage prohibition notice pending enquiries. STE Watkins then authorised the impounding of the vehicle. That vehicle was in fact owned by Paccar Financial Limited whose application for the return of the impounded vehicle was heard in a conjoined hearing with VDG's application in respect of BZFZ27. Paccar's application was successful and is therefore not the subject of appeal. The impounding is however relevant when considering the merits of this appeal.

11. On 28 October 2015, Simone Hoog-Bekker, Finance Director of VDG applied for the return of BZFZ27 under paragraph 10 of the 2001 Regulation, relying on paragraph 4(3)(d) of the 2001 Regulations:

"*that although knowing that at the time the vehicle was detained that it was being, or had been, used in contravention of section 2 of the 1995 Act, the owner –*

(i) Had taken steps with a view to preventing that use; and
(ii) Has taken steps with a view to preventing any further such use."

The relevant parts of her detailed application can be summarised as follows:

a) VDG is part of a complex corporate structure with Gatrans Holdings BV being its holding company. It was that entity that provided a guarantee in relation to a credit sale agreement for the purchase of BZFZ27 by VDG;
b) On 17 February 2015, HZ Logistics UK Limited ("HZ UK") was incorporated and subsequently granted a standard international operator's licence on the 2 June 2015, authorising 15 vehicles and 15 trailers. The company was incorporated with a view to complimenting VDG's core business of refrigerated transport into the UK and to reduce the number of VDG vehicles engaging in international transport operations in the UK;
c) The majority shareholding in HZ UK was held by HZ UK Beheer BV (70%) which in turn is owned by four other Dutch corporate entities, all forming part of the VDG group;
d) The plan was for HZ UK to receive two Dutch tractor units every two months beginning in June 2015, for their conversion to UK specifications ("re-plating") to build up a UK fleet. VDG would then ship loaded unmanned trailers to the UK for collection by HZ UK's vehicles so that "*a greater confidence of compliance would be achieved with both the cabotage regulations and drivers hours regulations";*
e) As a result of "*undue delays"* on the part of the DVLA and the HMRC in converting the vehicles, the intention of HZ UK was "*severely thwarted*" and no conversions had taken place by the time the application for the return of BZFZ27 had been submitted, causing financial loss to the VDG group;
f) In consequence of the delay and "*unforeseen pressure"* placed upon VDG to continue with its international transport operations, VDG had been "*straining to be compliant with both the cabotage regulations and the drivers hours regulations"*;
g) BZFZ27 entered the UK on 30 September 2015 with the intention of returning to the Netherlands via Killinghome on the evening of 7 October 2015 but was stopped making that return journey. The driver was *"unable to satisfy the DVSA officer by producing documents compliant with Article 8 of the cabotage regulations or was generally in breach of the same*";
h) It was regretted by VDG that *"in hindsight its vehicle and driver were in breach of the cabotage regulations by undertaking* ***in excess of three UK deliveries within the seven day period*** *whilst the vehicle remained in the UK commencing from 30 September 2015"* (our emphasis as this is a concession that the three in seven rule had been breached by VDG). These infringements were the consequence of the excessive delays of the UK authorities in converting the Dutch tractor units. HZ UK had since ordered 15 new MAN tractor units with UK specifications which would commence operations from 1 January 2016.

12. A witness statement prepared by Matthew Fidler in support of the application stated as follows:

a) He was the Director of HZ UK which was incorporated with the intention of being part of the corporate enterprise of VDG. The objective of the company was to compliment and assist VDG in its core business of haulage into the UK and that would involve abandoning on a gradual basis the use of Dutch registered vehicles to accompany trailers to the UK for onward distribution.
b) He repeated the plan set out in the application for conversion of two Dutch vehicles per month to UK specification and how that plan was thwarted by delays encountered during the process which included longer than expected delays and the failure on the part of HZ UK to provide the correct supporting documentation. Mr Fidler described HMRC, DVLA and DVSA as "*not being helpful*". The first two Dutch vehicles were parked up in the operating centre for four months as a consequence and the plan was abandoned in favour of the purchase of 15 new vehicles. But for the delays caused by the Government agencies, it would have been more likely that the DVSA impounding would not have taken place.

13. <u>The Public Inquiry</u>

At the hearing of the application which took place on 10 December 2015, Simon Clarke of Counsel represented VDG. Ms Hoog-Bekker attended on behalf of the company and was accompanied by Mr Fidler. TE Berriman appeared on behalf of the DVSA.

14. At the outset of the hearing, Mr Clarke accepted on behalf of VDG that both vehicles were being or had been used in contravention of s.2 of the 1995 Act but that VDG had taken steps with a view to preventing such use and has taken steps with a view to preventing any further such use in accordance with paragraph 4(3)(d) of the 2001 Regulations. He then called his witnesses.

15. Ms Hoog-Bekker told the TC that she was involved with HZ Transport which was a large international operating company. That company was asked to assist VDG because it was in financial difficulties as a result of VDG sending 60% of its trailers to the UK accompanied by a tractor unit and driver. This meant that there was no operational profit. Ms Hoog-Bekker's company then bought a 51% share of VDG but when changes were attempted, they were met with resistance from the minority share holders and ultimately, VDG was fully bought out by HZ Transport. She became the Financial Director and a shareholder of VDG. Since 2013, the financial difficulties with the company have been resolved. To address the operational difficulties it was decided to set up HZ UK with Mr Fidler and to re-plate the Dutch vehicles for English operations although that plan had encountered delays and they had been forced to rent vehicles. In the Netherlands, the members of the

planning department were instructed and educated that they must accept and obey the law of every country. A new Head Planner was employed in 2015 with UK work experience because VDG was planning to increase its international carriage into the UK and they started to contract with UK hauliers whilst waiting for the UK fleet to be effective. Despite these steps, the two vehicles were impounded. The delays in the re-plating of the Dutch vehicles came at a time when VDG had been awarded a Tesco contract which was worth "*many million Euro of turnover coming from traffic from the Netherlands to the UK"* and that as a result there was a lot of pressure on the planning department. There was one particular planner who had made the mistakes resulting in the two vehicles being impounded and he had been warned about his conduct and had been retrained. She accepted that the company had been warned about unlawful operation in GB and that a simple solution would have been to hire vehicles in GB earlier than they did until matters were sorted out. However, the decision to re-plate Dutch vehicles was a cheaper option in the first instance as the margins were "*tiny*" and it was only when matters were delayed that they started to rent vehicles. As for the absence of paperwork on the impounded vehicles, the planners had given an instruction to the drivers to place the paperwork into empty trailers being returned to the Netherlands.

16. Matthew Fidler told the TC, in addition to the contents of his witness statement, that HZ UK had first hired vehicles in September 2015 despite the cost of doing so, because of the delays in re-plating. The decision was made in August 2015 followed by the decision to buy new vehicles. Having made the decision to hire, it was in fact difficult to do so because HZ UK did not know what to rent because he did not know the detail of VDG's operating requirements and as a new company it was difficult to get credit even with a financial letter from Holland. Vehicle rental companies required six months rental up front or big deposits. HZ UK was only able to purchase fifteen new trucks because its parent company, HZ Transport, decided to purchase them in August or September 2015.

17. Ms Hoog-Bekker was then recalled. She said that the decision to abort the plan to re-plate the Dutch vehicles for HZ UK in August 2015 was in combination with the large Tesco contract which was due to start on 1 October 2015. Prior to that, HZ UK started with a few trucks but with the Tesco contract, "*it exploded*". To address this requirement and its other pan European resource needs, the group had ordered 45 vehicles and 60 trailers at a cost of 6 million euro with a delivery time of two months.

18. The TC noted the following: the first vehicle to be specified on the HZ UK licence was on 28 September 2015; the vehicles that were then specified were not new and so there was no company policy to say that older vehicles could not be utilised; two of the three vehicles which

were eventually specified were two axle tractor units which would not have been of any use for the Tesco contract.

19. Mr Fidler was then recalled to go through the list of vehicles specified on the HZ UK licence (this list was not included in the appeal bundle). The first vehicle to be specified on 28 September 2015 was hired from Truck Rent and three others were then specified which were hired from the same company. On 25 November 2015, the two Dutch re-plated vehicles were specified (so six in total if the Tribunal's interpretation of Mr Fidler's evidence is correct). Truck Rent was the only company that was prepared to rent vehicles to HZ UK because the owner was a family friend and even then, vehicles were released to HZ UK as and when they became available. Whilst two of the vehicles were two axle, the bulk of the Tesco's work was flowers and plants which did not require three axle vehicles.

20. In his closing submissions, Mr Clarke accepted that both vehicles had been "*in blatant breach*" of the cabotage regulations although the senior management of VDG did not have specific knowledge that the vehicles were being operated unlawfully. He did however accept, that VDG knew in general terms that the vehicles were or had been operated in breach of the cabotage regulations once HZ Transport took VDG over and as a consequence, the management had knowledge of past use of vehicles in contravention of s.2 of the 1995 Act. VDG had however, taken steps with a view to preventing such use and has taken steps with a view to preventing any further such use. Mr Clarke summarised Ms Hoog-Bekker's evidence about the history of the VDG take over, the steps taken by the new management and the difficulties encountered by HZ UK with vehicle re-plating. Having allowed one month for the set up of HZ UK and then, upon realising that the re-plating was going to take longer than envisaged, a decision was taken in mid-August to hire vehicles which they then did.

21. At this point, as a result of a technical issue, the recording of the public inquiry hearing came to an end. However it is clear from the TC's decision, that Mr Clarke went onto submit that whilst there might have been some delay in the decision to hire, HZ Transport was a large operation and governance took time. They did not want to throw away the original plan to re-plate vehicles and the obvious short-term solution of renting vehicles was beset with difficulties because HZ UK did not have an operational track record. The alternative plan was to provide new vehicles but that also took time. Mr Clarke asserted that there had not been any reported cabotage infringements following the take over of VDG by HZ Transport until October 2015.

22. <u>The TC's determination</u>

The TC determined that at "*first blush*", Mr Clarke's submissions had merit. The establishment of a UK operation to conduct the majority of the haulage within the UK was a positive and potentially effective

response to the cabotage issues. Indeed, whilst it was not possible to be certain that this step would be effective, it was difficult to see what more could be done. The TC therefore accepted that paragraph 4(3)(d)(ii) was made out. He then went onto consider paragraph 4(3)(d)(i) and accepted that steps had been taken, which to a degree, had addressed the cabotage issues and minimised the risk of breaches through staff training and action taken against staff who were not performing adequately. The TC's concern was that those steps had proved ineffective and that VDG made a clear choice to continue an operation that was, at the very least, at high risk of contravening the cabotage regulations and VDG had identified that high risk. The TC found that he had not heard any explanation for why the planning staff required drivers to return the necessary documentation back to the Netherlands when it was required to be held by the driver. That instruction made any cabotage operation immediately non-compliant with the cabotage regulations and the TC referred to paragraph 53 of the Nolan Transport decision in support of his conclusions.

23. The TC noted that paragraph 4(3)(d) was added to the Regulations by the Goods Vehicle (Enforcement Powers) (Amendment) Regulations 2009/1965. Paragraph 6 of the consultation document produced by VOSA at the time, was helpful in setting out the context in which the new ground for ordering the return of an impounded vehicle was introduced:

"Arrangements would be in place to ensure that any impounded vehicle that proved to be owned by a third party (e.g. under a hiring arrangement) unaware of its unlawful use or ***unable to prevent it once aware*** *were returned to their rightful owners"* (the emphasis was added by the TC).

The TC noted that ground (d) did not refer to "all reasonable steps" nor did it apply any other descriptor to the level or type of steps that an owner should take. However, it was clear that the ground was to apply where an owner was not able, for whatever reason, to prevent illegal use. This typically arose in a scenario where a finance house had a number of vehicles with an illegal operator. They were able to apply for the return of a first detained vehicle under the original un-amended regulations upon the basis that they were not aware of the illegal use but thereafter, they would have been unable to do so without the introduction of ground (d).

24. The TC concluded that VDG did not face any such difficulties. They could at any time have declined work that put them at risk of breaching cabotage regulations. The group of companies could have furnished the UK company with tractor units at a much earlier stage and there was nothing to stop the group from buying used vehicles as a temporary fix pending delivery of the new vehicles. Ms Hoog-Bekker had been frank that the decisions taken were driven by commercial factors. Whilst the legislation did not apply a descriptor of the type of

steps to be taken, it was *"unthinkable"* that parliament considered that any step, no matter how small or ineffective, would be adequate to secure the release of a detained vehicle. The TC determined that the intention was for steps to be taken that had "*a probability of securing compliance insofar as that was within the owner's control*". Whilst it was more difficult for a finance company to ensure compliance when the vehicle was not in their possession, no such difficulties arose when the owner is the operator. The owner is in a very straightforward position where they can simply choose to stop the illegal operation. That simple step was not taken by VDG. The TC concluded that regardless of whether or not the number of journeys within the UK was excessive (we note that in the application, VDG accepted that they were), the operation was always going to be in breach of the regulations by reason of the company policy to return documentation to the planning team once a load had been delivered. There was no evidence of any step taken to address this fundamental non-compliance with the regulations. It followed that VDG had not taken the most basic step of stopping the vehicle operating in contravention of the regulations nor of equipping vehicles with the appropriate documentation, when to do so was fully within its control and consequently, the application for return of the vehicle was refused.

25. <u>The appeal to the Upper Tribunal</u>

At the hearing of this appeal, Mr Clarke of Counsel appeared on behalf of VDG and Mr Thomas, solicitor, appeared on behalf of the DVSA. Both requested that clarification be provided as to the interpretation of paragraph 4(3)(d) of the 2001 Regulations. Both produced skeleton arguments for which we were grateful.

26. Mr Clarke's first point was that when considering the purpose of sub-paragraph (3)(d), the TC had erred in placing "*excess*" reliance upon the consultation document issued prior to the sub-paragraph being included into paragraph 4 by way of amendment in 2009. Whilst the consultation document referred to the need to protect third party owners who had taken steps to prevent use of their vehicles in contravention of s.2 of the 1995 Act, neither the wording of the sub-paragraph, nor the Explanatory Notes attached to the amending regulation qualified the ground in any way. Further, paragraph 6 of the Secretary of State's document entitled Summary, Impact Assessment and Evidence Base provided a different construction. It reads:

"Arrangements would be in place to ensure that any impounded vehicles that proved to be owned by a third party (e.g. under a hiring arrangement) were returned to their rightful owners".

(We should state at this stage that it is clear that the above paragraph is nothing more than a summary of the wording of paragraph 6 of the consultation document and cannot be relied upon as demonstrating

that a different construction to sub-paragraph (3)(d) had been proposed).

27. Mr Clarke submitted that it was clear that it was Parliament's intention to provide for the return of a vehicle regardless of the knowledge of the owner, so long as he had taken steps to both prevent unlawful use and to prevent any future unlawful use. Had Parliament intended there to be a distinction between a third party owner and an owner/operator in this regard, then it would have qualified the sub-paragraph so that it had that effect.

28. The issue in the appeal was in relation to paragraph 4(d)(i) as the TC had accepted that VDG had taken steps with a view to preventing any future unlawful use by setting up a UK based operation and in doing so had satisfied sub-paragraph (d)(ii). It was conceded that Parliament would not have considered that any step, no matter how small or ineffective would be adequate to secure the release of an impounded vehicle, however, VDG did not accept that it had been Parliament's intention for steps to be taken that had a "*probability of securing compliance insofar as that was within the owner's control"* as found by the TC. That would mean that only meaningful steps, directed towards curing the mischief would be sufficient to discharge the test. Mr Clarke submitted that the Tribunal should read "steps" to mean "reasonable steps" and that this should not mean that the reasonable steps taken must always cure the mischief but only that such an outcome must be intended and that such an outcome was more likely than not.

29. If the Tribunal were to read the TC's words in that way, then it should be satisfied that that VDG had taken steps to deal with the mischief of unlawful use of its Dutch vehicles in GB in contravention of s.2 of 1995 Act and that the desired outcome was more likely than not and consequently, the TC's findings to the contrary were plainly wrong. Not only did VDG take expensive and extensive steps but they were clearly intended to address the mischief. Mr Clarke could not see what else VDG could have done. That was sufficient for the vehicle to be returned to the company. Mr Clarke pointed to:

a) The history of involvement of HZ Transport with VDG which resulted in HZ Transport buying the entirety of the shareholding in VDG by February 2015;
b) The decision of HZ Transport to set up a UK based operation;
c) Giving instructions to the planners at VDG that they obey the "rules of the country" in which they were operating;
d) Engaging a new CPC qualified Head planner with experience of UK operations;
e) Disciplining and educating the "*rogue planner*" who was responsible for the cabotage offences;
f) The evidence that once delays had occurred in the re-plating of vehicles in GB, UK based hauliers had been used to avoid cabotage infringements;

g) The difficulties of hiring vehicles encountered by HZ UK because of a lack of trading history;
h) The change of business plan to the purchasing of 15 new vehicles once delays in re-plating became intolerable.

The Tribunal did query whether Mr Clarke had missed a very simple step which could have been taken to avoid unlawful operation in GB, namely, to ensure that the vehicles were scheduled lawfully. We suggested the design of a spreadsheet for the planners to use (whether on a computer programme or otherwise) with boxes for the date that the vehicle was to unload its incoming carriage into GB; the dates of three cabotage operations; the date by which vehicle was required to leave GB to comply with the three in seven rule along with a cross reference to the date of the last cabotage operation. Whilst Mr Clarke agreed that this was a simple step, he submitted that a degree of latitude should be allowed to operators in deciding which steps were reasonable to take but which may then prove to be ineffective. A Dutch haulier was entitled to find a solution to the problem of unlawful operation in a free market. Further, the TC considered that the establishment of a UK based operation was sufficiently meaningful to meet the test in paragraph 4(3)(d)(ii), however fraught with difficulty that proved to be but the steps involved in that plan could be properly described as "dual purpose" steps in order to meet the criteria in both paragraphs 4(3)(d)(i) and (ii), being steps that fell within the TC's interpretation of the sub-paragraph as having "*a probability of securing compliance insofar as that was within the owner's control".* The steps which were strong, required an expenditure in excess of 1.2 million euros.

30. Mr Clarke was asked to address the failure of VDG to ensure compliance with Article 8(3) of the 2009 Regulation. He submitted that the instruction to place documentation in returning trailers had been given prior to HZ Transport taking VDG over and that instruction had been superseded by the instruction to the planners to "follow the law" and the appointment of a new head planner. He accepted that VDG failed to arrange for anyone from VDG to attend the public inquiry who could deal with operational issues. However, there was always someone in any organisation (i.e. the "rogue planner") who would do wrong. He accepted that the absence of all necessary and relevant documents which must necessarily be carried on BZFZ27 meant that the vehicle was operating unlawfully in GB when it was stopped.

31. Mr Clarke's skeleton argument also took issue with TC's findings as follows:

a) The finding that VDG could have, at any stage, declined work that put the company at risk of breaching the cabotage regulations assumed that VDG knew of the specific use to which the vehicle was being put. Whilst VDG knew as a "*general proposition"* that VDG was "*disposed to cabotage infringements and took steps to*

prevent that general tendency – there was no evidence that, prior to its commission, the Appellant knew of this specific infringement". The suggestion that an operator should cease operations despite meaningful steps having been taken to cure what he knew to be a general mischief was an unrealistic and unreasonable suggestion. In any event, a "*rogue planner"* was responsible and he had been disciplined;

b) The suggestion that the group of companies could have furnished HZ UK with tractor units at an earlier date flew in the face of the evidence;
c) The finding that there was nothing preventing HZ UK from purchasing used vehicles as an interim measure was not something that had been expressly canvassed by the TC at the public inquiry and the evidence suggested that this was not a step that could have been taken. In any event, a decision to rent vehicles was made at a relatively early stage;
d) The evidence did not support the TC's finding that Ms Hoog-Bekker had been "*frank that the decisions taken were driven by commercial factors";*
e) The TC's finding that the operation was always going to fail to meet the requirements of lawful cabotage because of the company's policy to return documentation to the planning team once the load had been delivered was not supported by the evidence of Ms Hoog-Bekker that a new head planner had been appointed and all of the planners trained to abide by the laws of each country the vehicles operated in.

32. On behalf of the DVSA, Mr Thomas did not seek to argue that paragraph 4(3)(d) was not a ground upon which owner/operators could rely in order to make a claim for the return of an impounded vehicle despite paragraph 6 of the consultation document referred to by the TC. We are of the view that this implied concession must be right as the wording of the ground does not restrict reliance upon it to third party owners alone. It may very well be that this was the intention of Parliament but the drafting of the amendment has not made the necessary distinction between the two categories of owner and in the circumstances, it seems to us that both third party owners and owner/operators are entitled to make an application for the return of a vehicle in reliance upon it.

33. In relation to the the correct interpretation of "*steps"* in paragraph 4(3)(d), Mr Thomas submitted that "*steps"* should be read to mean that the owner had and has taken "*all steps within their control as the owner"* and acts of employees are within the control of the owner. The DVSA contend for this interpretation because a breach of s.2 of the 1995 Act is a criminal offence which undermines fair competition and puts public safety at risk. Mr Thomas reminded the Tribunal that it has previously recognised that foreign operators are prepared to operate in breach of s.2 for financial reward and risk the imposition of a fine which was considered to be a justifiable business expense as incidental to

the unlawful use (see paragraph 255 of Nolan Transport). Mr Thomas submitted that Parliament had never intended that sub-paragraph (d) could be used by an owner/operator in those circumstances. Yet, this was the approach of VDG. Ms Hoog-Bekker acknowledged that VDG's approach to the steps it should take to comply with the law of GB was motivated by financial considerations. It was no coincidence that the Tesco contract commenced on 1 October 2015 and that the two vehicles were impounded on 7 and 9 October 2015.

34. Mr Thomas did not support the TC's conclusion that the incorporation of a UK company in this case could amount to a step which could satisfy sub-paragraph (d)(ii) or indeed (d)(i). The company was incorporated in February 2015 and HZ UK had had four months to put systems in place and to hire and train employees before the operator's licence was granted in June 2015. No vehicle was available to the company until 28 September 2015 and only two were available by the time of the first impounding. There was no explanation as to why those two vehicles were not used to avoid the offences which were committed by the vehicles which were impounded on 7 and 9 October 2015. For the incorporation of the company to be viewed as a "step" taken by VDG to ensure compliance with s.2 of the 1995 Act, finance should have been provided to HZ GB to enable it to operate vehicles which could have been utilised in VDG's planning schedules. This was not done.

35. VDG knew that vehicles it was operating in GB were in breach of s.2 of the 1995 Act. It had not taken the most basic of steps as set out by the TC to prevent the commission of criminal offences.

36. Discussion

As the Tribunal has already observed, whilst it was the intention of VOSA and the Department of Transport at the time the consultation document was drafted in 2008, that sub-paragraph 4(3)(d)(i) and (ii) was to provide third party owners with an additional ground for claiming the return of an impounded vehicle, the drafting of the sub-paragraph does not restrict its applicability to third party owners only. It follows that owner/operators may rely upon the ground in an application for a vehicle to be returned.

37. Of course, an applicant must satisfy both sub-paragraphs 4(3)(d)(i) and (ii) and when considering how "steps" should be interpreted, the Tribunal is entitled to take a purposive approach. In making an application under paragraph 4(3)(d) the owner is accepting that criminal offences have been committed. We do not accept that in those circumstances, owners should be allowed some "latitude" in how they approach the steps that they should take to prevent criminal offending from taking place, whether in the context of a free market or in the context of a large organisation with governance issues as was suggested by Mr Clarke. In view of the pre-condition in the sub-

paragraph that owners accept that criminal offending has taken place, we are satisfied that "steps" means all reasonable steps available to the owner. To put it another way, all those steps that a reasonable owner would take in the circumstances they find themselves in, not only in the context of preventing past unlawful use but future unlawful use. Each case will turn upon its own facts but we should make it clear, that the hurdle is a high one in cases where the applicant is an owner/operator because they must demonstrate the steps they have taken to prevent themselves from committing criminal offences. "Users" of vehicles control the vehicles, they are responsible for the scheduling of the journeys the vehicles undertake and they manage and control the staff who plan or schedule those journeys. Ultimately, it is within the power and control of owner/operators to stop unlawful operation if they so wish and those who do so wish, should be able to demonstrate robust systems and procedures that they have put in place which would constitute reasonable steps within the meaning of sub-paragraphs (d) (i) and (ii) along with adequate explanations as to why those steps did not work in the instant case.

38. We remind ourselves that once the DVSA have demonstrated that there was reason to believe that a vehicle was being or had been used in contravention of s.2 of 1995 Act (and it is not contended in this case that the DVSA did not so demonstrate), the evidential burden shifts to the operator to demonstrate that they have taken all reasonable steps available to them to prevent unlawful use. In the ordinary course of events, the owner/operator should be able to produce documentary evidence (translated if necessary):

a) to demonstrate they had the necessary systems in place to ensure that the planning of journeys of vehicles into GB would, in the ordinary course of events, be compliant with s.2 of 1995 Act. We would expect the owner/operator to be able to produce planning guidance and instructions which will have been given to those responsible for scheduling vehicles and their journeys;

b) of the training provided to those responsible for scheduling journeys;

c) of the scheduling in the instant case which had resulted in the impounding;

d) of the investigations undertaken by the management of an owner/operator as to what went wrong in the instant case and insofar as there have been more than one warning letter sent to the owner/operator about unlawful operation in GB, the investigations following each warning letter and the additional steps taken to prevent the commission of criminal offences in GB;

e) of the disciplining, retraining or dismissal of staff who were responsible for scheduling a vehicle which resulted in the commission of a criminal offence in GB;

f) to demonstrate the instructions and procedures which were in place to ensure that the driver of a vehicle undertaking cabotage had with him the necessary documents for inspection during roadside checks so that Article 8(3) of the 2009 Regulation is complied with;

g) to demonstrate the disciplining, retraining and dismissal of staff, including drivers who have failed to ensure that Article 8(3) of the 2009 Regulation was complied with.

This list is not intended to be an exhaustive list but is provided as some guidance not only to owner/operators but to TC's as to the type of evidence they should expect to see when an application is made under paragraph 4(3)(d) of the 2001 Regulations by an owner/operator. In view of the fact that the impounding provisions are designed to prevent criminal offending, we are not satisfied that in the case of a company, oral evidence alone (however credible the TC may find it to be) will be sufficient under paragraph 4(3)(d) because one of the tasks of the TC will be to consider the efficacy of the steps relied upon by the applicant. For example, it may be accepted by the TC that training was given to the planning team of the owner/operator but perusal of the training documents themselves may reveal that the training was in fact inadequate. It may be accepted that an instruction had been given to planners and drivers about the documents which the driver must carry with him to claim lawful cabotage but perusal of that written instruction may reveal that the instruction was incorrect or in some other way inadequate. We would expect that at a hearing for the return of a vehicle that a member of the management team of an owner/operator who is in a position to give evidence about operational matters should be called in order to do so.

39. We are satisfied that to accept Mr Clarke's submissions on how "steps" should be interpreted would result in an unacceptable watering down of the impounding provisions which would be counter to the intention of Parliament.

40. <u>The Tribunal's decision on the appeal</u>

This appeal concerns the failure of VDG to prevent unlawful cabotage occurring whilst HZ Transport was setting up an alternative business venture in GB to ensure that VDG did not continue to commit criminal offences in GB. We have already described the hurdle created by

paragraph 4(3)(d) as being a high one and that is more so in a case where there have been thirteen warning letters sent to a foreign haulier by the DVSA and its predecessor. The TC and the Tribunal were effectively being asked to consider the application for the return of the vehicle from the perspective of HZ Transport which has taken over VDG rather than VDG itself. That approach loses sight of the fact that VDG is a corporate entity separate to HZ Transport and that its track record in relation to unlawful operation in GB is, quite frankly, appalling. It has not been suggested that the management team of HZ Transport was unaware, by reason of a failure to undertake a due diligence exercise, of the significant criminal offending of VDG prior to taking the company over, indeed they were assisting VDG from 2013 and were majority shareholders thereafter prior to acquiring all of the shareholding at the beginning of 2015. We would have expected to see documentation demonstrating as a result of the new management structure, a thorough overhaul of VDG's international operations along with significant management oversight and compliance checks, whether or not those steps were complimented with the plan for HZ UK to take over VDG's haulage operations within GB. The only evidence produced by VDG was oral evidence concerning the setting up of HZ UK along with bare assertions that instructions, training and disciplinary procedures were in place in Holland.

41. We are satisfied that whilst the plan to send unaccompanied trailers to GB for collection by HZ UK was a good one, it could not be relied upon until that company was operational. We are satisfied that inadequate steps were taken to provide HZ UK with an operational fleet and unless and until that was done, the existence of that company could not assist VDG which continued to operate Dutch vehicles in GB in breach of s.2 of the 1995 Act. We do not accept that a British haulier with the backing of such a large corporate structure in the Netherlands which was able to purchase forty five vehicles and sixty trailers for its entire pan-European operations could not provide the financial backing or guarantees necessary to enable the rental of vehicles or the purchase of second hand vehicles as meaningful steps to ensure overall compliance of the operations of the companies which were within its fold. Further, against the background of its offending history, we would have expected every reasonable step to have been taken to ensure that the Dutch vehicles were compliant whilst addressing the delays encountered with HZ UK. The burden of proof was on VDG and it failed to discharge it, not only in relation to steps taken to ensure compliance with the three in seven rule but also compliance with Article 8(3) of the 2009 Regulation. It is clear from the evidence of Ms Hoog-Beeker that commercial considerations were given priority over compliance. Her description of VDG as "*straining to be compliant"* speaks for itself. The Tesco contract which was in fact with HZ Transport was given a higher priority than compliance with the law. Further, because of the low margins, the alternative steps of vehicle rental for HZ UK or sub-contracting to British hauliers were not given a high priority because of the cost implications. The bottom line is that whilst the alternative solution of HZ UK was "work

in progress" VDG had an obligation to ensure that its vehicles were compliant which it did not fulfil by taking all reasonable steps available to it.

42. In the circumstances, we do not consider that the TC's final determination is either wrong in law or plainly wrong on the facts. We are surprised that upon the evidence he heard, the TC came to the conclusion that VDG had satisfied sub-paragraph 4(3)(d)(ii) as even at the time of the public inquiry, the company was not fully operational but his assessment in relation to sub-paragraph 4(3)(d)(i) cannot be faulted and in the circumstances, the application for return of the vehicle was bound to fail irrespective of his finding under sub-paragraph 4(3)(d)(ii).

43. In the result, the appeal is dismissed.

Her Honour Judge J Beech
20 July 2016