Neutral Citation Number: [2016] UKUT 0398 (AAC) **Appeal No.** T/2016/28

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 19 May 2016

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
Leslie Milliken, Member of the Upper Tribunal
John Robinson, Member of the Upper Tribunal

Appellant:

Bolle Materieel BV

Appellant

and

Driver and Vehicle Standards Agency

Respondent

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

For the Respondent Tim Nesbitt of Counsel instructed by the Driving and Vehicle Standards Agency.

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 23 August 2016
Date of decision: 5 September 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED

SUBJECT MATTER: Impounding; whether the vehicle was undertaking international carriage; whether a discretion should be read into the Goods Vehicles (Enforcement Powers) Regulations 2001

CASES REFERRED TO: T/2011/60 Nolan Transport v Vehicle & Operator Services Agency & Secretary of State for Transport (2012 UKUT 221 (AAC); The Commissioners of Customs and Excise v Newbury (2003) 1 WLR 2131; T/2011/25 Asset 2 Asset Limited (2011 UKUT 290 (AAC); Commissioners of Customs v Ian Newbury (2003) EWHC 702 (Admin).

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 19 May 2016 when he refused to order the return of a vehicle to Bolle Materieel BV ("BM") 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 the United Kingdom ("UK") 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 (EC) No. 1072/2009 ("the 2009 Regulation") as being "*a laden 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 the UK will not be operating unlawfully. We have underlined "laden" in the above passage as in the Tribunal's lead case on this issue *T/2011/60 Nolan Transport v Vehicle & Operator Services Agency & Secretary of State for Transport (2012 UKUT 221 (AAC)* ("Nolan"), "laden" was omitted from the definition in paragraph 14 of that decision as the Tribunal had erroneously quoted from a previous Regulation which has since been superseded by the 2009 Regulation. By virtue of Article 2 of the 2009 Regulation,

"vehicle" means "*a motor vehicle registered in a Member State, or a coupled combination of vehicles the motor vehicle of which at least is registered in a Member State, used exclusively for the carriage of goods".*

4. By virtue of the 2009 Regulation, any haulier for hire or reward from another Member State whose vehicle has entered the UK whilst delivering an incoming international load and who then complies with the conditions set out in Article 8 of the 2009 Regulation, may also take advantage of a further exemption which is known as "cabotage". Article 8(2) provides:

"*Once the goods carried in the course of an incoming international carriage have been delivered hauliers referred to in paragraph 1 shall be permitted to carry out, with the same vehicle, or in the case of a coupled combination, the motor vehicle of that same vehicle, up to three cabotage operations following the international carriage from another Member State .."*

This clearly permits an incoming vehicle, after the last unloading of its international carriage, to undertake three further collections and deliveries, known as "cabotage operations" within the UK 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 known 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 documentation required to be produced by the driver. Such evidence must be kept in the vehicle and must be available for inspection at any roadside check (see paragraph 53 of the Nolan decision).

6. It follows that once a vehicle undertaking international carriage has unloaded the incoming load, then unless the vehicle can be shown to be operating in accordance with the "three in seven" cabotage 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. The Nolan case is the lead authority on the issues of international carriage and the cabotage and impounding regimes. Its status is enhanced by the constitution of the Tribunal which was made up of two judicial members and a single specialist member to reflect the legal importance of the issues it was required to determine. As was recognised in the Nolan case (paragraph 233) that this Tribunal is not strictly bound by its earlier decisions, it is recognised that on rare

occasions, where there are compelling reasons for doing so, it can depart from previously settled principles.

8. Background circumstances to the impounding

Bolle Transport BV is a Dutch registered transport company with a Dutch operator's licence and a European authorisation permitting Bolle Transport to engage in the international carriage of goods. The company is part of a group controlled by Cees Bolle, the majority shareholder of the holding company, Bolle Holding BV. BM is the entity within the group which owns the tractor units and trailers operated by Bolle Transport.

9. In the period 13 December 2011 to 24 July 2015, vehicles which were being operated by Bolle Transport were stopped by VOSA or its successor, the Driver and Vehicle Standards Agency ("DVSA") on seventeen occasions and found to have been operating otherwise than in the course of international carriage or within the strict confines of the cabotage regime. On each occasion, prohibition notices were issued to Bolle Transport and the vehicles were directed out of the country. In addition, fixed penalty notices were issued to Bolle Transport on ten occasions arising out of prohibitions issued; two were later withdrawn upon Bolle Transport producing the documentation that should have been carried by the drivers under Article 8(3) of the 2009 Regulation. The prohibition notices in those two instances were nevertheless validly issued. This was confirmed to "John" of Bolle Transport in an email sent by Mark Horton, Traffic Enforcement Policy and Scheme Manager on 15 January 2015, in response to "John's" enquiry.

10. On 20 March 2014, Bolle Transport was sent a letter by the DVSA Operational Support Team explaining that as the company's vehicles had been repeatedly found to be in breach of the cabotage regime, that as at 3 April 2014 any further vehicles found to be operating in contravention of s.2 of 1995 Act would be detained indefinitely. As a consequence of this enforcement history, Bolle Transport was one of the operators on the DVSA "watch list" of repeat offenders against the cabotage regime. In addition, Traffic Examiner ("TE") Berriman had spoken to Mr Bolle on more than one occasion about his vehicles being found to be in breach of the cabotage regime.

11. On 24 July 2015, a Volvo tractor unit registration BZ-TV-19 ("the vehicle") and semi trailer bearing the registration OH-84-RX was escorted into the DVSA check site in Immingham for a roadside inspection. The driver, Andrew Richards, a British national, told TE Berriman that he was on his way from the Humber Sea Terminal at Killinghome with the semi trailer OH-84-RX laden with flowers on a journey to Motherwell via Bradford. He had collected the trailer from the Humber Sea Terminal on behalf of his employer, Bolle Transport. Mr Richards produced the documentation for the semi trailer OH-84-RX

but was unable to produce the documentation for the loaded trailer he had brought into the UK. Mr Richards refused to be interviewed without first taking legal advice. TE Berriman came to the conclusion that as the driver could not produce the documentation required under Article 8(3) of the 2009 Regulations (evidence of the incoming international carriage), the vehicle was being operated illegally within the UK. Having taken advice from within VOSA he was then authorised to impound the tractor unit by Intelligence Officer Vosper.

12. The original application for return of the vehicle was submitted on behalf of Bolle Transport. That application had not been included within the appeal papers. At a hearing before Deputy Traffic Commissioner Harrington on 14 September 2015, it became apparent to her, that the application had been made by the wrong legal entity, although at that stage, this was disputed by Mr Clarke of Counsel who represented Bolle Transport. Further, as his skeleton argument raised two issues which were not within the original application, namely, whether firstly, Bolle Transport's name should have been on the DVSA watch list at all and secondly, whether the vehicle had been impounded in accordance with the DVSA policy, the application was adjourned to allow BM to make an application and for the DVSA to be legally represented so that the legal issues arising out of Mr Clarke's skeleton argument could be addressed.

13. A renewed application was submitted by Mr Bolle on behalf of BM on 25 September 2015. The application was made under paragraph 10 of the 2001 Regulations, relying on paragraph 4(3)(b) of those regulations:

"*that (the vehicle) was not being, and had not been, used in contravention of section 2 of the 1995 Act".*

The relevant details of the application were as follows:

".. The vehicle is in fact operated under a lawful Dutch Operators Licence .. by Bolle Transport BV Netherlands .. and with a valid European Permit to so operate in EEC Member States.

It is contended that at the material time the vehicle with a trailer on the morning of the stop had just dis-embarked from the ferry at the Port of Immingham on an overnight sailing from the Hoek van Holland. It thus could not possibly have been in breach of the said cabotage regulations and thus did not at the material time require a valid UK Operators' Licence to lawfully operate haulage operations within the UK .."

14. The hearing of the application was listed for 3 December 2015. On 13 October 2015, Mr Tinkler, solicitor instructed by Mr Bolle, sent an email to the DVSA stating that an additional limb to the application was to be relied upon, namely:

"(i) *Should the DVSA policy have been applied against the Applicant in any event in view of the fact that two previous allegations of cabotage cited earlier in 2015 (sic) against the Applicant were subsequently withdrawn by the DVSA and*

(ii) Was the DVSA policy applied lawfully as against the Applicant at the time of the stoppage in the light of (i) above and should Bolle Transport have been included on a DVSA "list" kept by them of what the DVSA claim to be previous cabotage "operator offenders"?".

15. On 2 December 2015, Mr Nesbitt, who was instructed on behalf of the DVSA, signed off his skeleton argument in preparation for the hearing listed for 3 December 2015. Whilst his skeleton dealt with Mr Bolle's contention that the vehicle had not been operating in breach of s.2 of the 1995 Act, it would appear that he had not been made aware of the additional limb to the application as Mr Nesbitt's skeleton argument did not address the additional points. In any event, when Mr Clarke's "Speaking Note" dated 1 December 2015 was served, it became apparent that the application now included a third, alternative limb, namely, that if the TC found that the vehicle was being used in contravention of s.2 of the 1995 Act, that Mr Bolle was not aware of that fact. As a result, the hearing was adjourned so that the DVSA could obtain further witness evidence in relation to that additional limb. The hearing was re-listed for 20 April 2016 (there may have been some correspondence and even a short hearing prior to this date but there is no evidence of such in the appeal bundle).

16. On 10 March 2016, Mr Tinkler notified the DVSA that the additional limb of the application as set out in paragraph 13 above was no longer relied upon and that:

"*the only challenge from the Appellant goes to the issue of the lawfulness of the stop itself namely whether or not the Applicant was or was not conducting a cabotage operation and whether the Applicant was engaged in international transport".*

17. <u>The Public Inquiry 20 April 2016</u>

At the hearing of the application, Mr Clarke represented BM with Mr Bolle in attendance and Mr Nesbitt represented the DVSA with TE Berriman in attendance. The hearing proceeded upon the following Statement of Agreed Facts:

"*1. At approximately 10.30am on the 24th July 2015, the Applicant's Dutch-registered and owned tractor unit BZ-TV-19 was encountered by an officer of DVSA (sic) at Manby Road, Immingham.*

2. The vehicle was pulling the Applicant's Dutch-registered and owned trailer OH-84-RX, loaded with flowers from Holland.

3. In answer to questions by the DVSA officer, the driver of the vehicle stated following (sic):

i. He was working for the Applicant. He had arrived that morning on the Stena Line ferry from Hoek van Holland.
ii. He produced his Stena Line ferry ticket to the officer.
iii. He was working for the Applicant. He had recently left the Humber Sea Terminal at Killingholme bound for Bradford and Motherwell. He had boarded the ferry pulling trailer number 552970.
iv. Trailer K41206 was disembarked from the ferry and into the unaccompanied trailer park by a port-employee utilising a port-owned shunter, or tug, vehicle (sic).
v. Two trailers operated by the Applicant also boarded the ferry:
  i. 552970/89-BDB-6 and
  ii. K41206/OH-84-RX.
vi. Upon docking at the Humber Sea Terminal, Killingholme on the morning of the 24th July, that being the day of this encounter, BZ-TV-19 disembarked from the ferry at 08.10am.
vii. Trailer K41206/OH-84-RX was disembarked from the ferry at 07.00am.
viii. The contents of the trailer 552970/89-BDB-6 were delivered to an address in Falkirk, Scotland on the 26th July.
ix. The contents of trailer K41206/OH-84-RX were delivered to an address in Bradford on the 24th July.
x. He had then collected trailer K41206 from the unaccompanied trailer park at the Humber Sea Terminal and left the Humber Sea Terminal at Killingholme bound for Bradford and Motherwell.
xi. The only documentation held by him was that related to the load contained within his present trailer, OH-84-RX (K41206).
xii. By reason of the driver's responses, the DVSA officer concluded that BZ-TV-19 was in breach of s.2 of the (1995 Act) and did not fall within the exemptions provided by (the 2009 Regulations)....

7. The Traffic Officer could not say who had made the decision to seize and impound the vehicle, although he understood it was a Senior Officer within the DVSA. It had not been him; the decision had been relayed to him and he had carried it into effect."

18. Mr Clarke began by formally withdrawing the limb of the application based upon whether the DVSA policy had been complied with in the process leading up to the impounding and also the alternative limb asserting lack of knowledge of unlawful use on the part of Mr Bolle. The sole remaining basis of his application was that the vehicle was undertaking international carriage at the time it was stopped. It was accepted that the vehicle could not be said to be performing cabotage

although if the driver had been carrying the paperwork for the vehicle's entrance into the UK with trailer 89-BDB-6, it was unlikely that the vehicle would have been impounded. Mr Clarke then proceeded to give evidence. Bolle Transport had directed Mr Richards to take a trailer to the UK and at the same time, accompany a second trailer which he was responsible for "into the United Kingdom". The "original idea" was that once in the UK, the driver would take one trailer on to its destination whilst the other trailer would be collected by a driver already in the UK. For operational reasons, once disembarked, Mr Richards was told that he should uncouple from the trailer he had taken off the ferry and proceed to take the second trailer to its destination. It followed that at the time the vehicle was stopped it was hauling the "unaccompanied trailer" which had been taken off the ferry by a port employee. The issue was therefore whether a driver who brings in two trailers on a ferry and then moves one onto its end destination, is engaging in international carriage or cabotage. It was Mr Clarke's submission that it was the former. The spirit of the 2009 Regulations was to protect the domestic market from unfair competition. However, in this case, the domestic market was "enhanced" by the driver bringing two trailers into the country with one vehicle because he was providing work for a vehicle already in the UK.

19. Mr Clarke took the TC to Article 8(2) of the 2009 Regulations. He highlighted the following passages:

"*Once the goods carried in the course of an incoming international carriage have been delivered ...*
The last unloading in the course of a cabotage operation before leaving the host Member State shall take place within 7 days from the last unloading in the host Member State in the course of the incoming international carriage".

Mr Clarke submitted that the above passages provided a working definition of "delivered" in that the draftsman clearly meant that "delivered" meant "unloaded". It followed that unless and until the trailer which had been brought into the UK by way of the initial international carriage had been delivered to its destination, the international journey of the tractor unit had not come to an end. In this case, all that happened was that the trailer was parked up following disembarkation. It followed that the vehicle was in fact undertaking international carriage in coupling up with the second trailer for onward delivery. Mr Clarke took the TC to paragraph 21 of the Nolan which reads:

"....First, it is a pre-condition to the right to carry out cabotage operations that there has been an "incoming international carriage". However for the purpose of triggering the right to conduct cabotage operations the definition of "incoming international carriage" is narrower than that set out.. above. The reason is that the right to conduct

cabotage operations only commences once "the goods carried" on the incoming international carriage "have been delivered".

Mr Clarke submitted that "for those reasons", the journey being undertaken by the vehicle when it was stopped could never have been a cabotage operation because the incoming goods had not been delivered. Rather it was a journey which fell into the definition of "international carriage of goods".

20. In response, Mr Nesbitt submitted that the position in this case was straightforward. He reminded the TC of the definition of "international carriage" set out in Article 2(a) of the 2009 Regulation as set out in paragraph 3 above. The international journey undertaken by the impounded vehicle whilst coupled to trailer 89-BDB-6 commenced in Holland and its point of arrival was the port at Killingholme. It was at that stage that its load was detached from the tractor unit and left in the port for another vehicle to haul to its delivery destination or destinations in the case of groupage. The process of uncoupling from its load and then proceeding out of the port with a different trailer, resulted in the vehicle's international carriage coming to an end. In paragraph 15 of Nolan decision, the Tribunal had made it clear that the transportation of unaccompanied trailers from a port could not constitute international carriage. The submissions made on behalf of BM ran contrary to the language of the 2009 Regulation and to the decision in Nolan and to accede to the application would drive a "coach and horses" through the system that the EU had established in order to give permission for vehicles registered in one Member State to carry out work in another Member State. The system balanced the need for the regulation of the use of goods vehicles in road safety terms with the need of some hauliers to undertake road transport work in other Member States. If BM's submissions were correct, then a tractor unit could arrive in a port coupled to one trailer with any number of other uncoupled trailers operated by the same haulier on the same ferry. Once de-coupled from the trailer it had brought into the country, the tractor unit could do innumerable shunting type activities coupled to the other trailers and still be classified as undertaking international carriage until such time as the trailer it had been attached to was delivered. Indeed another tractor unit could take the trailer which the tractor unit had brought into the country and that tractor unit would also be performing international carriage because the goods had not been "delivered".

21. Mr Clarke disagreed that his interpretation of the 2009 Regulation could lead to that conclusion. Unaccompanied trailers arrive in the UK every day and they are then removed from unaccompanied trailer parks by either domestic hauliers or by overseas hauliers undertaking lawful cabotage. It could not have been conceived by the draftsman of the 2009 Regulation that the point of arrival would be the port rather than the true and final point of delivery as set out in the paperwork and when the goods were finally unloaded. He denied that the second trailer on the ferry could be categorised as "unaccompanied" as it was

travelling with Mr Richards. Mr Clarke took the TC to paragraph 69 of Nolan which is entitled "Unaccompanied Trailers". The Tribunal in that paragraph set out three ways in which unaccompanied trailers could be moved without a breach of s.2 of the 1995 Act which were firstly by a domestic haulier, secondly by those entitled to conduct cabotage and thirdly, by way of combined transport. The Tribunal went on:

"*Whether there is any other way in which a loaded trailer can be moved was not the subject of argument. If it ever arises the point must be decided in another appeal ..*"

Mr Clarke submitted that the Tribunal was indicating in that passage that it was not "closing the door" to other ways in which an unaccompanied trailer could be moved from a port and as a result, it was open to the TC to find in favour of BM and order the return of the vehicle.

22. The TC's determination

The TC's starting point was the definitions of "vehicle" and "international carriage" both set out in paragraph 3 above. He then considered paragraph 15 of Nolan which determined:

"*Initially the view taken by NT was that the definition of international carriage was either wide enough to apply to an unaccompanied trailers, or if that was wrong, it should be extended to cover such trailers. As we understand the position it is now accepted that the interpretation is wrong. In our view NT are right to make that concession. International carriage involves a journey by a "vehicle". In the case of articulated vehicles the definition of vehicle requires that a trailer can only take part in international carriage if coupled to a tractor unit. To make the point crystal clear a journey undertaken by an unaccompanied trailer from, for example, a port in Ireland to a port in Wales, cannot amount to international carriage".*

The TC concluded that the language was clear and as a result, he found that the trailer that was coupled to the vehicle at the time of the DVSA encounter had not taken part in international carriage.

23. The TC could not find anything in the 2009 Regulation that referred to the need for the incoming load to be delivered to its final destination before the vehicle ceased to be undertaking international carriage. He took a "very pragmatic and simple view". The vehicle had been un-coupled from the trailer it brought into the UK whilst in the port. It then travelled within the port to couple up with another trailer. The vehicle had therefore travelled unladen whilst in the port. The first trailer was destined for Bradford. The goods contained in the trailer itself may have had further distances to travel before they could be said to be "delivered" in the true sense. For the 2009 Regulation to have any

meaningful sense and to be enforceable, it could only mean to refer to the first delivery point where the load had been completely removed. In this case, the load was the trailer and its contents and they were completely delivered to the quayside at Killingholme. The vehicle's journey with the second trailer commenced at Killingholme and was a domestic journey. It followed that the only legal way in which that journey could take place was by way of legal cabotage. It was however accepted by BM that the cabotage regime could not be relied upon in this case as Mr Richards did not carry the required paperwork with him. The TC therefore concluded that when the vehicle was stopped it was operating in contravention of s.2 of the 1995 Act and he refused the application for the return of the vehicle.

24. The TC considered the delays in the proceedings to be "deeply regrettable" and avoidable. The parties" should have "stuck" to the simple grounds of the application for the return of the vehicle. Issues of whether the DVSA had applied and followed its own internal policy were of no interest or relevance to the determination a TC had to come to when considering whether a vehicle should be returned. Had the application been argued on simple, narrow grounds, the application could have been determined six months earlier.

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

At the hearing of this appeal, Mr Clarke of Counsel appeared on behalf of BM and Mr Nesbitt of Counsel appeared on behalf of the DVSA. Both produced skeleton arguments for which we were grateful.

26. As a preliminary point, Mr Clarke abandoned a ground of appeal based upon the TC's "obiter" comments in which he determined the he should not be concerned about whether the DVSA had applied and followed its own internal policy relating to the impounding of vehicles when deciding whether a vehicle should be returned. Mr Clarke was correct to make this concession as the issue had no direct bearing upon the TC's decision making process.

27. Mr Clarke then outlined the basis of the appeal. There were two main points. The first was whether the vehicle, when it was stopped, was undertaking an international or a domestic journey. If the TC's determination that the vehicle was undertaking a domestic journey was correct, the second point was whether the regulations should be interpreted in such a way as to provide the TC with a residual discretion to order the return of the vehicle. Mr Clarke appreciated that the law appeared to be settled on this point by virtue of the Nolan decision but he wished to re-address it as he could not see how, in the absence of such a residual discretion being read into the regulations, the impounding regime could be consistent with s.3 of the Human Rights Act 1998 ("the 1998 Act").

28. So, dealing first with the issue of the correct categorisation of the journey being undertaken by the vehicle when it was stopped, Mr Clarke appreciated that the weight of the authorities on this issue tended to favour the TC's findings because the definition of "vehicle" within Article 8(2) of the 2009 Regulation referred to a "coupled combination" and that was how the vehicle entered the UK although coupled to trailer 89-BDB-6. However, in this case, Mr Richards was not just responsible for that trailer but also for trailer OH-84-RX for which he held the paperwork. That second trailer could not therefore be described as "unaccompanied". In those circumstances, the process of de-coupling from 89-BDB-6 whilst in the confines of the port area and the coupling up to OH-84-RX could not and should not cause the original international journey to come to an end. Mr Richards was entitled to undertake that process whilst holding the paperwork for both trailers. Further, as the activity was so confined in physical terms, being within the port area, it was not proportionate to find that the vehicle's international carriage had come to an end. Mr Clarke repeated the submissions he made before the TC in relation to Article 8(2) of the 2009 Regulation and went on to submit that by virtue of the wording of that Article, international carriage was only deemed to have come to an end once the goods were actually delivered (see paragraph 19 above). In finding that the delivery of the vehicle's goods (in this case the laden trailer 89-BB-6) had taken place as soon as the trailer had been un-coupled from the tractor unit at the port, the TC had strained the definition of "delivery". Mr Clarke highlighted that Article 8(2) used the words "delivery" and "unloaded" interchangeably and that as a result, delivery meant "unloaded". In the circumstances, it could not possibly be that the goods brought into the UK by the vehicle in the circumstances agreed in this case, had been delivered. Whilst the trailer remained at the port, the goods remained "in transit".

29. Mr Clarke then turned to the issue of discretion and proportionality. He submitted that first of all, the regulations should be read and interpreted with a purposive approach being taken. That would ensure that the regulations were not interpreted too narrowly so as to defeat the object of the regulations. The proper approach of a TC should be for the TC to ask "does the Applicant's conduct offend the purpose of the regulations?" The purposive approach had previously been approved and indeed taken by the Tribunal in the appeal of *T/2011/25 Asset 2 Asset Limited (2011 UKUT 290 (AAC)* (see paragraph 21 where the purposive approach was adopted in the context of identifying the correct approach to the concept of "knowledge" in impounding cases). Mr Clarke referred to the preamble of the 2009 Regulation and submitted that it was clear that the purpose of the Regulation was to protect the domestic market from unfettered and unfair competition from non-domestic hauliers until such time as the EU wide market is harmonised. The process undertaken by the vehicle in this case had no bearing or impact upon the domestic market as it did not pose a threat in the sense of collection or delivery within that market because the vehicle was not engaged in point to point internal haulage within

the UK and in any event, an international haulier is entitled to deliver his own load and is not compelled to contract with the domestic market for the delivery of goods once they have arrived at a domestic port.

30. Turning to the issue of proportionality, Mr Clarke referred the Tribunal to the TC's statement at the conclusion of his decision, made in the context of whether he was required to consider whether the DVSA had followed its own policy when impounding a vehicle. It reads: "*I am simply able to look to see whether any one of the four grounds of return can be made out*". Mr Clarke submitted that this approach was too narrow and restrictive and failed to take proper account of the Human Rights Act 1998 and in particular ss.3, 6 and 7 and Article 1 of Protocol 1 of the European Convention of Human Rights. In short, the TC should have interpreted the regulations so as to allow for a residual discretion to be exercised in appropriate cases so as to satisfy the concept of proportionality. Without such an approach, the 2001 Regulations offended the principle of proportionality because the TC was prevented from measuring the breach against the penalty to be suffered by the party concerned.

31. In support of his submissions, Mr Clarke referred the Tribunal to the Administrative Court decision of *Commissioners of Customs v Ian Newbury (2003) EWHC 702 (Admin).* Mr Clarke referred the Tribunal to paragraph 8 of that judgment which described the regime of seizure and forfeiture of goods imported without payment of duty under s.141 and paragraph 6 of Schedule 3 to the Customs and Excise Management Act 1979 (the subject matter of the decision). He submitted the regime described was similar to that of the impounding regime, not least as a result of the unremitting nature of the penalty. In that case, the Administrative Court held that by virtue of Article 1 of Protocol 1 to the European Convention on Human rights, a discretion must be read into the powers of the VAT Tribunal when conducting reviews of decisions of VAT Commissioners who themselves had a discretion under s.152(a) of the 1979 Act. Mr Clarke accepted that at paragraph 270 of Nolan, this Tribunal had previously considered this point (including the case of Newbury) and had concluded that the impounding regime struck a fair balance between the rights of the individual vehicle owner and the interests of the State, on behalf of the public generally, in securing compliance with the system of operator's licensing in order to promote road safety and fair competition and that in the circumstances, there was no need to read down the provisions of the impounding regime in order to include an element of discretion. Mr Clarke submitted that the difficulty with that determination was that by virtue of s.3(1) of the 1998 Act, subordinate legislation must be read and given effect in a way which was compatible with Convention rights and that was mandatory. Further, in the same paragraph, the Tribunal found that it was difficult to envisage any circumstances in which after the failure of a claim for the return of a vehicle it would, nevertheless, be appropriate to exercise a discretion to return the vehicle. That finding itself was in stark contrast to the "entire casting" of the 1998 Act

which was directed towards the proposition that there were "no fixed rules" and that a single decision covering all cases would always be disproportionate and unfair. Mr Clarke contended that it cannot be right for an owner who swaps two trailers at a port to be subject to the same penalty as an owner who is found to be repeatedly in breach of the cabotage regime. There were degrees of culpability and if the impounding regime does not allow the TC to measure the degree of culpability and to assess the value of the vehicle which is important in assessing the proportionality of the penalty, then it is a disproportionate regime. The breach in this case, if there was one, was highly technical and it should not have resulted in the impounding of the vehicle.

32. Discussion

We have chosen not to summarise Mr Nesbitt's submissions made on behalf of the DVSA as we agree with them and as such they are reflected in the discussion below.

33. It is BM's case that the vehicle was undertaking international carriage when it was stopped by TE Berriman. It is agreed by both parties that in the event that we uphold the TC's determination that the vehicle could not have been undertaking international carriage, then it was operating in breach of s.2 of the 1995 Act and it is not now suggested that Mr Bolle did not know that it was being so operated.

34. International carriage can only be performed by a laden vehicle which starts its laden journey in one Member State and finishes that same laden journey in another Member State (see paragraph 4 above for the precise definition). The definition of vehicle "shall" mean a motor vehicle registered in a Member State or a coupled combination of vehicles (see paragraph 4 above for the precise definition). An uncoupled trailer cannot fall within the definition of "vehicle" because it is not a motor vehicle. It follows that a trailer can only take part in international carriage if, it is part of a coupled combination with a tractor unit and that was the conclusion of the Tribunal in Nolan (see paragraph 15). We find that the suggestion that trailer OH-84-RX was not an unaccompanied trailer because Mr Richards was on board the ferry with the relevant paperwork for it and that therefore the trailer in some way fell within the definition of international carriage to be misconceived. The use of the term "unaccompanied" is one that is commonly used within the haulage industry (which is why ports have areas designated for "unaccompanied trailers" which are removed from ferries by port staff and taken to the designated area). The concept of accompaniment does not involve the presence or absence of a representative of a haulier on board a ferry. Rather, the term "unaccompanied" means that the trailer is not attached or coupled to a tractor unit which embarked with the trailer onto the ferry and then disembarked with the trailer still attached to it, It is only a coupled combination which can be said to be engaged on international carriage.

The combination of the vehicle comprising tractor unit BZ-TV-19 coupled to trailer OH-84-RX which was stopped by TE Berriman was constituted at the port in Killingholme. It cannot therefore be said to be a vehicle which was on a journey, the point of departure and the point of arrival of which are in two different Member States. It was not therefore engaged in international carriage.

35. The Tribunal has been urged to adopt a purposive approach to the interpretation of the Regulation so as to find that unaccompanied trailers could fall within the definition of international carriage. There is nothing in the pre-amble to the Regulation which could possibly be interpreted as envisaging the inclusion of unaccompanied trailers in the definition of either "vehicle" or "international carriage" and the definitions are themselves clear. There is no ambiguity of language or purpose in the Regulation and we can see no compelling reason why we should do anything other adopt and endorse paragraph 15 of Nolan.

36. Turning then to Mr Clarke's submissions that an international carriage journey only comes to an end when the goods which were carried into the country by the vehicle are finally delivered to their end destination and that in the absence of such delivery, the tractor unit continues to perform international carriage, we are satisfied that the TC's decision was correct although for different reasons. Article 8(2) of the 2009 Regulation deems that the incoming international carriage comes to an end when the goods are delivered by the vehicle combination and it is at that stage that hauliers, using the same tractor unit or vehicle, are then permitted to perform cabotage. It is clear from the wording of Article 8(2) and (3) that incoming international carriage must be completed by the same tractor unit without the un-coupling of the tractor unit and trailer (see paragraph 5 above). It does not envisage a situation where the tractor unit, having "parked" the trailer, then performs other work and in particular, the carriage of another trailer using the protection of the inward international carriage journey which has not yet been completed. Neither does it envisage or allow for the de-coupling of the tractor unit from the trailer and the delivery of the trailer and its contents using another tractor unit (as took place in this case). At the moment when the tractor unit and the trailer were separated and the tractor unit performed other work then the protection given by performing international carriage came to an end without delivery having been achieved by that vehicle. As a result, neither the tractor unit nor the trailer could be said to be engaged in international carriage from that point. The vehicle could not be performing cabotage because the vehicle had not delivered its incoming load and it could not comply with Article 8(3) because it could not provide evidence of having delivered its incoming load. The vehicle combination when stopped must therefore have been undertaking a domestic journey for which a UK operator's licence was required

37. As for Mr Clarke's separate point about the use of the word "unloading" in Article 8(2) in the context of cabotage operations, we do not consider there to be anything in the point. The Tribunal has already noted that "delivery" is used in the context of the incoming international carriage and it is anticipated by Article 8(2) and (3) that it is the incoming vehicle combination that effects delivery of the goods. That did not take place in this case because the motor vehicle was diverted to other work. The international carriage came to an end at that stage.

38. Turning then to proportionality and whether it is necessary to read into the 2001 Regulations a residual discretion for the TC to exercise in appropriate cases, this matter was fully argued before the Tribunal in Nolan including consideration being given to the case of Newbury. Many statutory regimes may at first blush appear to be similar and it is only when the regimes are considered in detail that a proper analysis of them can take place. In Nolan, this was achieved with the benefit of detailed submissions made by Mr Nesbitt on behalf of Nolan Transport, Mr Nardell QC on behalf of the Ministry of Transport and Mr Hallsworth on behalf of VOSA. The Tribunal considered its previous decisions on the point (*2004/152 Frank Meager and 2007/172 Romantiek Transport BVBA and others)* and in addition to Newbury, the authorities of *Air Canada v UK (1995) 20 EHRR 150, Lindsay v Commissioners of Customs & Excise (2002) EWCA Civ 267, O'Leary International Ltd v The Chief Constable of North Wales and Crown Prosecution Service (2012) EWHC 1516 (Admin)* were considered. We can do no better than to replicate the relevant section of Nolan in this decision for ease of reference:

"254. In our view the starting point for deciding whether or not the impounding regime strikes a fair balance ought to be an explanation of the reason why the impounding regime was introduced and its importance to enforcing the regulatory regime for HGV's (and now, in addition, Public Service Vehicles). All operators holding GB operator's licences come within the jurisdiction of Traffic Commissioners. Under s. 26 of the 1995 Act Traffic Commissioners have a discretionary power to 'revoke, curtail or suspend' an operator's licence on a number of grounds. Those grounds include, for example, the fact that the operator's vehicles have incurred safety related prohibition notices or that the operator has breached any undertaking recorded on the licence. A standard undertaking is that the operator will make proper arrangements so that the rules on driver's hours and tachographs are observed and proper records are kept, which are to be made available on request. In more serious cases a Traffic Commissioner is required, by s. 27 of the 1995 Act, to revoke an operator's licence if satisfied that the operator no longer meets the requirement to be of good repute or of appropriate financial standing or professionally competent. In other words operators within the system who operate in a way which puts public safety or fair competition at risk can be put out of business by the revocation of their licence.

255. By contrast, until the impounding regime was introduced, those whose licences had been revoked or those who had simply not bothered to apply for a

licence or foreign operators, operating outside the exemptions we have described, risked a maximum fine of £5,000 for use of a vehicle in contravention of s. 2 of the 1995 Act, (see paragraph 7). In practice fines were frequently set at a level well below the maximum. The result was that many of those who were operating outside the system simply treated the fines as a form of business expense and continued to operate unlawfully, competing unfairly with those who were compliant and putting public safety at risk.

256. Mr Hallsworth annexed two documents to his most recent submission, (we suggest that for future reference both are filed in the Authorities Bundle at tab 7, which contains other material relevant to impounding). The first of these documents is the Regulatory Impact Assessment, prepared as part of the process during which the impounding regime was created. The second is the Explanatory Memorandum, which was put forward when the 2001 Regulations were amended by the 2009 Regulations and Public Service Vehicles became liable to impounding for the first time. Since this was the first time these documents featured in the case we gave Mr Nesbitt and Mr Nardell QC the opportunity to make further submissions before we decided what weight to attach to them. Mr Nardell QC indicated that there was no need for the Secretary of State to make further submissions

257. Mr Nesbitt provided us with a further skeleton argument dated 26 June 2012. He submitted that it was for us, and not a Minister or a Department, to decide how these provisions are to be construed. He went on to indicate that he was not submitting that the impounding regime is incompatible with the Protocol merely that it is possible to read it and that it should be read in a way which renders it compatible. Next he submitted that the thrust of the documents is that the problem lies with domestic rather than foreign operators operating outside the system. Finally he submitted that any assessment of the fairness of the impounding regime goes deeper than the superficial assessment in the second of the passages quoted at paragraph 259 below and that it can only be achieved by the inclusion of a power to return vehicles where it would be disproportionate not to do so.

258. We agree that it is our responsibility to construe these provisions and that extra-judicial comments as to what they mean cannot bind us. We cannot accept that the thrust of the documents is solely directed to domestic hauliers. In our view the impounding regime is directed at those who operate, unlawfully, outside the operator's licensing regime. The purpose of allowing exemptions for foreign hauliers, on a temporary basis, is to achieve a balance between the interests of the haulier, in operating efficiently, and the interests of the public in the safe operation of HGVs. In our view foreign hauliers, who operate outside the permitted exemptions, increase the risk to the public, either because their vehicles are not properly maintained or because they are lax in their observance of drivers' hours and tachograph regulations or for both and possibly other reasons. In this respect the figures relating to NT, at paragraph 156 above are instructive. We agree with Mr Nesbitt that we must make our own assessment of the overall fairness of the balance struck by the impounding regime. In this respect the quotations from the two documents, which we have set out in the next two paragraphs, provide useful background information about the nature of the problem with which the regime is intended to deal. We would simply add two points. First, the comments about illegal

operators in the second half of the second quotation in paragraph 259 apply with just as much force to foreign hauliers as they do to domestic hauliers. Second, one only has to consider the number of GFPs incurred by NT, to see that the need for the deterrent effect of the impounding regime is just as important in relation to foreign hauliers as it is in relation to domestic hauliers.

259. In the Regulatory Impact Assessment the following appears under the heading 'Risk Assessment':-

> *"A roadside survey of HGVs carried out by the Vehicle Inspectorate (VI) in October 1995 found that 1.9% of the vehicles stopped were found to be operating illegally. As a proportion of the present HGV fleet of about 420,000 vehicles, this represents some 8,000 HGV's. The VI survey also found that illegally operated HGVs are twice as likely to have dangerous roadworthiness defects as legally operated HGVs. Illegally operated HGVs are therefore a significant danger to the safety of other road users. HGV's have a lower involvement rate in accidents per 100 million vehicle kilometres travelled than cars (46 compared to 90) reflecting their greater use of motorways and lower use of urban roads. However, their fatality rate in these accidents is twice that of cars because they cause much more damage to the pedestrians or vehicles with which they collide. When involved in accidents with pedestrians, HGVs are up to six times more likely to kill a pedestrian than cars"*.

A little later the following appears under the heading 'Issues of equity and fairness':-

> *"The detention of HGVs would deprive a person of his private property and means of livelihood and would be justified if it were in the public interest. But by ignoring the operator licensing system, illegal operators cut costs and undermine fair competition amongst the law-abiding majority of the road haulage industry. Illegal operators also avoid the vetting and review of their operating centres by Traffic Commissioners, which in turn removes the statutory and democratic rights of local authorities and local residents to object or make representations against an operator's licence being granted on grounds of road safety, local suitability or the environment. There has therefore been considerable pressure for some time, particularly by road safety groups and road hauliers, for action to be taken against illegal operators"*.

260. The second document put forward by Mr Hallsworth is the 'Explanatory Memorandum', which was put forward when the 2001 Regulations were amended by the 2009 Regulations and, at the same time, an impounding regime was introduced in relation to Public Service Vehicles. Under the heading 'Successful Use of Impounding with HGVs' in a document described as the 'Evidence Base' the following appears at paragraphs 11 and 12:-

> *"In 2002 a scheme for the seizure and impounding of illegally operated HGVs was established*" (under the 1995 Act) … . *Since the implementation of this scheme the proportion of HGVs used on GB roads without the appropriate Operator Licence has dropped from 1.7%, (in 2001), to 0.6%, (in 2006), as measured by the VOSA roadside*

compliance survey. At the same time the number of applications for HGV Operator Licences increased.

This seems to show that the HGV impounding scheme has been an effective deterrent to illegal operation. As was anticipated when the scheme was planned, the volume of vehicles impounded has been low (fewer than 250 per year) – but significant benefit has been achieved through the deterrent effect. Results from the HGV scheme have also shown that the vehicles used by those operators who choose persistently to remain outside the Operator Licensing system (and hence are subject to being impounded) tend to be vehicles which are not maintained to safe standards – therefore there is a wider safety benefit from this enforcement activity".

261. In our view these documents serve to reinforce the common sense position that the State has a strong and legitimate interest, on behalf of the public generally, in ensuring that HGVs are properly maintained and safely operated by operators who comply with the operator's licensing system and compete fairly with other hauliers. The quotations we have set out show the benefit achieved by the deterrent effect of the targeted impounding of a relatively small number of vehicles. In our view the impounding regime makes an important contribution to the enforcement of the operator's licensing regime and to road safety generally.

262. It is convenient, at this stage, to return to the point made by Mr Nardell QC that the impounding regime represents a well-balanced and carefully crafted scheme set out by Parliament itself. The bald statement, at paragraph 81 above, as to the way in which the 2000 Act amended the 1995 Act, does not do justice to the attention which Parliament gave to the impounding regime. Parliament did not merely provide for a wide and general discretion to enable the Secretary of State to make regulations to bring the impounding regime into effect. Instead it gave the matter detailed consideration. Schedule 1A to the 2000 Act, which was added to the 1995 Act by s.262(2) of the 2000 Act, started life as Schedule 30 to the 2000 Act. Although framed in discretionary terms, "*regulations may provide …*", it nevertheless set out a detailed framework, which was carefully followed when the 2001 Regulations were drafted. In particular paragraph 9(4) of Schedule 1A, as set out in Schedule 30, provides that the grounds on which the return of a vehicle can be ordered "*may include the following grounds*". The three grounds set out in paragraph 9(4) were included, word for word, in the 2001 Regulations. They do not, of course, include any general discretion to return a vehicle on any other ground. The amendment of the 2001 Regulations by the 2009 Regulations was effected by using the regulation making powers granted by Schedule 1A to the 2000 Act but subject, of course, to Parliamentary approval before the amended regulations came into force. The amendments benefitted owners in two ways. First, a new Regulation 4 was substituted for the old one, which provided for a requirement that a detained vehicle should be returned, without the need for an application to a Traffic Commissioner, if the authorised person was satisfied that one of the grounds on which a Traffic Commissioner could order the return of the vehicle was made out. In other words, in a clear case, it enabled the owner to secure the return of a vehicle more quickly. Second, a fourth ground for return was added to the three

already set out in Regulation 10(4). While this is not, in our view, a decisive point it is an important point which needs to be borne in mind in making an overall assessment of the balance achieved by the impounding regime.

263. We have already described the impounding regime, and the consequences which follow when a vehicle is impounded, in paragraphs 81-90 above. In the course of the hearing we were provided with a document setting out VOSA'a approach when deciding whether a vehicle should be impounded, (it is Section 48 from a larger document, with the heading 'Deciding who to Impound', it should have been filed at tab 7 in the authorities bundle). In our view this provides important background material in assessing whether or not there is any need to give Traffic Commissioners an element of discretion over the return of impounded vehicles. The first step in the process which may lead to a decision to impound is for a VOSA area, which considers that an operator's vehicle ought to be impounded, to submit a case to a local meeting. Seven criteria are given which justify the submission of a case. NT probably met two of them. They would have come within (d) as an operator using a foreign registered vehicle, not on a licence in the UK, engaged in a UK operation not within the scope of cabotage and they probably came within (e) as an operator who had received numerous recorded warnings regarding illegal operation but had chosen to ignore the advice. The case papers to be submitted to the meeting must include, amongst other things, the enforcement history. If there is agreement at the meeting that the operator should be targeted for impounding there is then a requirement that further evidence should be gathered under a number of headings. The next step, following a decision to target an operator for impounding, is that VOSA must send a letter to all parties with an interest in the vehicle or vehicles in question. An example, from the present case, is the letter of 28 January 2011, quoted at paragraph 160. In other words if VOSA's approach is followed there is no question of a vehicle being impounded 'out of the blue' because the operator and owner, (if different and ascertained) will have been warned and given 14 days in which to change their ways. It is only when this letter is sent that a 'marker' is put on the roadside system so that if the vehicle is stopped the person stopping it knows that impounding should be considered. The marker also ensures, if a vehicle is stopped before the period specified in the letter has expired, that the stopping officer knows that while prosecution may be appropriate impounding is premature. If those receiving a letter, such as that of 28 January 2011, satisfy the appropriate VOSA officer that they have taken steps which will result in the vehicle ceasing to be used in contravention of s. 2 of the 1995 Act then the marker can be removed from the system. In other words if this procedure is followed it will only be those operators who have chosen to ignore the written warning that they are operating in contravention of s. 2 whose vehicles are at risk of being impounded.

264. In our view if the impounding regime is properly applied it provides significant protection to any operator who is not persistently and deliberately operating in contravention of s. 2 of the 1995 Act. We believe that it is important, when assessing whether or not a fair balance has been struck, to take into account how the regime operates.

265. We have considered what the position would be if VOSA failed to follow their policy, (described at paragraph 259), and did impound a vehicle at

random. We have explained at paragraph 90 that it is for VOSA to show, on the balance of probability, that they had the right to detain the vehicle. Without expressing any final view on the point it seems to us that it would be open to an owner to put VOSA to proof that they had the right to impound and, in doing so, to raise the question of whether or not VOSA had followed their policy. Even if this point failed, in the absence of a warning letter, VOSA would be very well aware that they might find it difficult to resist a claim for the return of the vehicle on, for example, the 'lack of knowledge' ground. It follows, in our view, that it is very much in VOSA's interests to ensure that their policy is followed.

266. Next it is open to an owner, whose vehicle has been impounded, to seek to persuade VOSA to return it under regulation 4 of the 2001 Regulations as amended, (see paragraph 83). This is an informal procedure, which does not require a hearing. It was probably the basis on which the vehicle impounded on 13 April 2011 was returned to NT. Operators who believe that they have a good case for the return of a vehicle would be well-advised to seek to persuade VOSA of its merits, at this stage, in order to secure the early return of the vehicle.

267. One of the matters advanced by Mr Nesbitt to justify the incorporation of an element of discretion into the impounding regime was the possibility that a vehicle could be impounded because of a minor defect or series of defects in the paperwork. In our view there is no need for this situation to be dealt with as a matter of discretion because it can be raised in the course of an impounding hearing. If, for example, the clear evidence required by Article 8.3 is provided by the driver, at the roadside, and it presents a picture of a vehicle which has been conducting lawful cabotage operations, then it seems to us that VOSA would not 'have reason to believe' that the vehicle was being or had been used in contravention of s. 2 of the 1995 Act simply because some of the 'Is' on the documents were not dotted or 'Ts' were not crossed. In that situation the owner would be entitled to explore the position when the relevant evidence was taken and would also be entitled to request the Traffic Commissioner to rule on the point, which could then, if necessary be appealed. A ruling that VOSA had failed to establish a right to impound the vehicle would result in the return of the vehicle to the owner.

268. Once VOSA have established that they did have the right to impound the vehicle it is then open to the owner to apply for the return of the vehicle on any one or more of the four grounds set out in paragraph 10(4) of the 2001 Regulations as amended, (see paragraph 86). It is true that the burden of establishing each of these grounds falls on the owner but this is hardly surprising when the matters giving rise to these grounds are peculiarly within the owner's own knowledge. In our view these grounds enable an owner who was, for example, merely negligent or was unaware of the use in contravention of s. 2 of the 1995 Act to obtain the return of their property. In other words it reinforces the position that impounding is directed at a small number of operators who knowingly and persistently operate in contravention of s. 2 of the 1995 Act and are undeterred from so doing by the other means available to the enforcement authorities.

269. While the 2001 Regulations, as amended, do not, expressly, require that the value of the vehicle is taken into account on any decision as to whether or not a vehicle is to be returned, they do ensure that it is taken into account indirectly. This is because of the provision in regulation 18, (see paragraph 88), that requires any surplus, after payment of the charges for the detention and storage of the vehicle to be paid to the owner. The greater the value of the vehicle and the more quickly the matter is resolved the better the chance that there will be something left for the owner. Indeed owners who recognise that the prospects of success on an application for the return of the vehicle are poor would be well-advised to make a timely concession, in order to keep the charges to a minimum.

270. Taking all these factors into account we are quite satisfied that, properly applied, the impounding regime strikes a fair balance between the rights of the individual vehicle owner and the interests of the State, on behalf of the public generally, in securing compliance with the system of operator's licencing in order to promote road safety and fair competition. For these reasons we can see no need to read down the provisions of the impounding regime in order to include an element of discretion. Indeed we find it difficult to envisage any circumstances in which after the failure of a claim for the return of a vehicle it would, nevertheless, be appropriate to exercise a discretion to return the vehicle."

39. The Nolan determination upon the issue of proportionality dealt with the reasons for the impounding regime being introduced and the impact of illegal operation prior to its implementation. It dealt with the Regulatory Impact Assessments and concluded that the documents produced to the Tribunal demonstrated a strong public interest in the enforcement of s.2 of the 1995 Act. The case law was considered in detail. It determined rightly that the regime was well balanced and carefully crafted and it recognised that it was a regime that needed "teeth". Whilst the regime did not allow for a residual discretion it was one that provided four grounds for making an application for return of a vehicle and critically one of them (paragraph 10(4)(a)) was that the operator did not know that the vehicle was being operated unlawfully. That means that if that ground is not relied upon then an operator is accepting that he did know that his vehicle was being operated in breach of s.2 of the 1995 Act. We would add that the fourth ground set out in paragraph 10(4)(d) of the 2001 Regulations allows for the return of a vehicle when an operator accepts that he knew that his vehicle was or had been used in contravention of s.2 of the 1995 Act but had taken steps with a view to preventing that use and had taken steps with a view to preventing any further such use. That ground along with the ground contained in paragraph 10(4)(a) represented substantial safeguards to the wrongful impounding of a vehicle. In short, we agree with the reasoning in Nolan as set out above and we are satisfied that BM have not established any compelling reason why this Tribunal should come to a different view to that in Nolan. Further, we do not agree that the final sentence of paragraph 270 in Nolan is contrary to European Convention principles. The impounding regime contains many checks and balances throughout its process and we repeat, once

the point has come when a decision is made not to return a vehicle to an operator, findings of fact will have been made that the operator knew that the vehicle was being operated in breach of s.2 of the 1995 Act and had failed to satisfy a TC and/or the Tribunal that it satisfied the ground contained in paragraph 10(4)(d) of the 2001 Regulations justifying the return of the vehicle (if that ground is relied upon).

40. Even if we are wrong in refusing to include an element of discretion in the impounding regime, by reason of the very poor enforcement history of Bolle Transport and Mr Bolle's own knowledge of the cabotage breaches identified by VOSA and/or the DVSA as set out in paragraphs 4 and 5 above, we are satisfied that this is not a case where it would be appropriate to exercise a residual discretion in any event. The enforcement history of Bolle Transport is quite frankly, appalling. We have asked ourselves the question: what steps could or should have been taken short of impounding a vehicle which might have caused Bolle Transport to realise that it could not continue to blatantly flout the cabotage regime? VOSA and/or the DVSA have acted with extraordinary restraint in not invoking the impounding procedure before 24 July 2015 and in the circumstances it would be wrong to return a vehicle based upon an assertion that the vehicle was impounded upon a "technical breach" only. It is for Bolle Transport to organise the logistics of its transport operations and to ensure that a tractor unit is attached to the correct trailer when it embarks on an international journey.

41. The Tribunal's decision on the appeal

In all of the circumstances we are satisfied that neither the law nor the facts of this case impel us to come to a different view to that of the TC as per the test in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695.*

42. In the result, the appeal is dismissed.

Her Honour Judge J Beech
5 September 2016