



D K BARNSELY & SONS LTD

OH1135048

PUBLIC INQUIRY IN BRISTOL

28 MARCH 2018

DECISION

The Goods Vehicles (Licensing of Operators) Act 1995 (the “Act”)

Pursuant to a finding under Section 27(1)(a) of the Act, licence OH1135048 is revoked with effect from 23:59 hrs on 30 June 2018.

On a failure to satisfy me that the statutory requirements of good repute and continuous and effective management are met, the variation application is refused pursuant to Sections 13A(2)(b) of the Act and Article 4.1(a) of EU Regulation 1071/2009.

I make no adverse finding in relation to the good repute of Aaron Barnsley as transport manager

BACKGROUND

1. D K Barnsley & Sons Ltd is the holder of a Standard International operator's licence granted on 29 January 2015 authorising the use of ten vehicles and fifteen trailers. The statutory directors are Daren Barnsley and Callum Barnsley. Ten vehicles are recorded as in possession. The company submitted a variation application on 16 October 2017 to increase overall authorisation to fifteen vehicles and twenty trailers.
2. It appears from the public inquiry brief that the operator has raised compliance concerns previously as it is recorded as having been subject to a DVSA remote desk-based assessment in February 2016 in connection with an increase from four to ten vehicles. The increase was granted with an undertaking for an independent audit which was subsequently completed and

the undertaking satisfied. It would appear then that previous compliance concerns had been adequately addressed.

3. On 18 September 2017, vehicle WX60AXS was directed in to a DVSA check-site at Doxey (near Stafford) on the M6. The inspection identified an emissions cheat device and the vehicle was issued with a delayed “s-marked” prohibition. The “s-mark” denotes that, in the opinion of the issuing examiner, the defect arose as a result of failed compliance systems.
4. DVSA Vehicle Examiner Kenneth Rozier conducted a pre-arranged follow-up maintenance investigation on 11 December 2017. The following shortcomings were found
 - Inspection sheets were not completely filled out, with some mileage missing, details of repairs not being initialled by the repairer and brake wear not recorded
 - no brake performance tests were being conducted on trailers apart from at the annual test
 - the forward planner only covered the period to January 2018 and not six months ahead
5. In relation to the emissions cheat device, VE Rozier commented as follows

“When questioned regarding the AdBlue device they informed me that it was a rental truck and they didn’t know that an AdBlue emulator had ever been fitted, they were filling up the AdBlue tank just as much as they do the other vehicles fitted with AdBlue.

They informed me that when they went to get the AdBlue system checked by the main dealer it was all working as it should and the AdBlue emulator wasn’t even connected resulting in a compliance certificate being issued with no work carried out to the vehicle. This has been confirmed with an email from the main dealer.”

6. I was concerned to understand how the emulator could have been detected at the roadside had it not been functioning. For that reason, I asked my office to contact the issuing examiner, Mr Adrian Seadon, for a statement. That statement described the factors that led Mr Seadon to find the device. Mr Seadon also noted that he had checked the operator licensing system at the roadside, having been told that the vehicle was a newly-acquired hire vehicle. Mr Seadon found that the vehicle had been specified on the operator’s licence since November 2015.
7. The two DVSA reports caused me to call the licence to public inquiry on the following grounds:

Section 26(1)(c)(iii) of the Act, that vehicles or drivers had been issued with prohibition notices;

Section 26(1)(f) of the Act, that any undertaking recorded in the licence had not been fulfilled relating to keeping vehicles fit and serviceable;

under Section 26(1)(h) of the Act, that there had been a material change in the circumstances of the licence holder;

under Section 27(1)(a) of the Act, that the operator may not be of good repute, of the appropriate financial standing or meet the requirements of professional competence;

under Article 4.1(a) of EU Regulation 1071/2009, that the transport manager is not exercising continuous and effective control; and

Section 27(1)(b) of the Act, that the transport manager is not of good repute or not professionally competent.

8. I called the variation application to public inquiry on the following grounds:

Section 13A of the Act, that the transport manager can continue to exercise continuous and effective control of the enlarged fleet; and

Section 13C(4) of the Act, that there are satisfactory facilities and arrangements for maintaining the vehicles in a fit and serviceable condition;

9. Mr Aaron Barnsley was called separately to consider his repute as Transport Managers under Schedule 3 of the Act. Driver Gary England was called to consider his conduct following the roadside encounter to answer for his role, if any, in the s-marked prohibition.

THE EVIDENCE

10. Mr Daren Barnsley and Mr Aaron Barnsley attended the public inquiry for the company represented by Philip Brown, solicitor, who also represented Gary England. Mr Brown provided submissions in advance for which I was grateful. They raised questions relating to the evidence of Vehicle Examiner Seadon so I called Mr Seadon to the inquiry at short notice. He was unable to travel to Bristol and arrangements were made for him to attend the relevant part of the hearing via Skype. I am grateful to Mr Brown for his positive approach to this novel approach.

11. Proceedings were recorded and a transcript can be produced as required. I do not record all the evidence here, only that which is necessary to come to a decision. I have produced a separate decision for the driver.

12. Finances were satisfied as a preliminary matter both for the existing authority and the application.

The evidence of Vehicle Examiner Adrian Seadon

13. Mr Seadon adopted his statement. He told me that his suspicions were first aroused when he noticed that the filler neck of the AdBlue tank was full of dirt all the way down the inside of the neck and around the edge. There was dirt in

the filter at the entrance to the neck. It therefore appeared to him that no AdBlue had been added to the vehicle for some very considerable time. He asked the driver when the vehicle had last been filled with AdBlue and was told it had been filled the previous Thursday (the encounter took place the following Monday). Mr Seadon then took the inquiry through the photographs attached to his statement. These clearly showed a device that had been spliced in to the vehicle wiring system, specifically in to the emission control system.

14. Mr Seadon confirmed that he had explained to the driver the purpose of the device that had been found. He had also explained the procedure for the removal of the prohibition. He confirmed that he had told the driver that the prohibition was s-marked. He was of the view that the device was functioning because the emissions light on the dash was not working as well as because of the dirt around the filler neck. The driver had handed him his phone and he had spoken to somebody from the company but did not note the name. The person he spoke to also said he did not know what an AdBlue emulator was, that the vehicle was on hire and that it had been acquired recently. Mr Seadon agreed that it is likely he told the driver the vehicle would be subject to a £300 fixed penalty should it be stopped again with the device still in place. It was agreed that the device itself would not normally be seen during routine maintenance. Mr Seadon could not recall whether or not the panel behind which it was fitted had a notice to the effect that removal was by authorised personnel only.

The evidence of driver Gary England

15. Mr England told me that he had been a driver for about twenty years mostly working in general haulage. He started working for this operator around two years ago carrying all sorts of materials in bulk tippers. He had never been stopped in a roadcheck before. On 18 September 2017, he had been on a journey from Littlehampton to Liverpool. He was generally out all week. He recalled having filled the vehicle up with AdBlue the previous Thursday, but could not remember whether it had been in the yard or whether he had bought some AdBlue whilst on the road. He was the only driver of that vehicle. It had never broken down, bar the odd puncture, and there were no warning lights on the dash. He put quarter to half a tank of AdBlue in once a week or fortnight. The vehicle didn't use that much AdBlue and uses the same amount now. The Vehicle Examiner had explained what he'd found and then put the vehicle back together again.

The evidence of Daren Barnsley, Director

16. Daren Barnsley confirmed that he wished to increase authority from 10 to 15 vehicles and from 15 to 20 trailers. I asked where the second statutory director, Callum Barnsley, was given that he had been involved with the vehicle examiner's visit. Darren Barnsley told me that Callum Barnsley was just an employee of the company and had only been made a director so that he could sign cheques.

17. He had acquired the vehicle WX60AXS in 2015. It was hired from LGS Logistics. There had been no breakdowns and no warning lights. The vehicle examiner had told him on the phone what he'd found but Daren Barnsley knew nothing about it and had nothing to do with fitting it. He stocked AdBlue in the yard. Drivers would go out Monday with a full tank. Older vehicles used less AdBlue than the newer ones. The subject vehicle doesn't use much AdBlue.
18. Mr Barnsley hadn't been told the purpose of Mr Rozier's visit and assumed it related to the application to increase authority. He hadn't been told of the severity of what had been found at the time the prohibition was issued. He had cut out the device straightaway. Volvo were happy with it and produced a certificate.
19. Mr Barnsley told me that he had been caught in the middle and it was not his fault. His was a compliant company that made plenty of profit. He didn't need to mess about. Another vehicle, EA08CMA had been stopped on the M62 a week earlier. The vehicle examiner had seen the dirty AdBlue filler and jumped to the same conclusion. No device had been found.
20. The device was in a position that would not be accessed during normal maintenance. I was referred to a photograph taken by the operator that appeared to show a cover in a similar position to where the emulator had been found. The cover carried a warning against its removal. This contradicted the wording on the s-marked prohibition which said "poor workmanship should have been apparent to repairer".
21. I was shown a large number of photographs. Two showed another device fitted to a vehicle which I was told was a tracker. I was shown photographs of the wiring and told by the operator that he had no idea what each wire did. I was shown where the emulator had been cut out. I was told that the wire that the vehicle examiner thought may have been the power supply to the device was just hanging there now and made no difference to the vehicle.
22. I was shown photographs of AdBlue filler necks on other vehicles which the operator said showed dirt similar to that on the subject vehicle. I noted that one of the photographs appeared to show the filler neck damp unlike the subject vehicle. I was told this photograph was taken after the vehicle had been filled with AdBlue. I was shown photographs of the vehicles at work in a dirty environment. Daren Barnsley told me that, if he'd known how serious it was or if it ever happened again, he would take the vehicle straight to a local Volvo dealer.
23. I asked Mr Barnsley about the hiring arrangement. He told me that LGS Logistics had acquired the vehicle for a job which subsequently fell through; he didn't think they'd ever run the vehicle. He had hired it because it had tipping equipment. I asked whether he'd spoken with the vehicle's owner following the issue of the prohibition and the finding of the device. He told me that it was a woman, Linda Stock, who owned the vehicle and he'd not spoken to her about it. I asked about the vehicle being fully sign-written and noted this seemed strange for a hire vehicle. Mr Barnsley told me it was a requirement

of his customers that his vehicles were sign written; even his sub-contractors had to have their vehicles in his livery so that customers would know who they were dealing with.

24. I suggested to Mr Barnsley that, in relation to the actions he took on receiving the vehicle back in the yard after the prohibition had been issued, there were inconsistencies between the position as noted by Vehicle Examiner Rozier, that which was in an email response from Callum Barnsley to VE Rozier and Darren Barnsley's statement for the public inquiry. VE Rozier records being told that the vehicle was taken to Volvo in the same state that it was detected at the roadside, that Volvo found the emulator not to be connected and the vehicle was cleared with no work done. The email said that the vehicle was taken to Volvo and no new parts were fitted "a previous owner of this vehicle must of (sic) fitted this box and must of (sic) disconnected it". The operator's public inquiry submissions record that "when the vehicle returned to the operating centre following the incident on 18 September 2017, Daren Barnsley cut the wires on the black box and he removed the box from vehicle". Daren Barnsley confirmed that he would have seen the email drafted and sent by his son Callum, and that there was no inconsistency.

The evidence of Aaron Barnsley, Transport Manager

25. Mr Aaron Barnsley told me that he had been transport manager since January 2016. His role was to check tachograph records, PMI's, check driver licenses and conduct eyesight checks. He assisted with planning and answering the phone. He worked full time. In relation to the prohibition incident last September, the vehicle never had any reported defects either on periodic safety inspection or from drivers. The company had been buying AdBlue. Everyone got it. He had checked a number of filler caps and found them to be equally dirty. Again I was referred to a significant number of photographs.

26. Aaron Barnsley told me that mechanical side was nothing to do with him. He checked the PMI sheets to see that faults were signed off as roadworthy. The subject vehicle had had no electrical faults such that they had to interfere with the wiring system. In the future, he would ask drivers to record when AdBlue was added to the vehicle.

27. In relation to the email to vehicle examiner Rozier, the email address used was generic for the business. Everyone used the same email address. The subject vehicle was a hire vehicle and there was no need to fit an emulator. Another vehicle had been stopped the previous week. The examiner had seen the dirty cap and jumped to the same conclusion. The examiner had gone on to satisfy himself that the AdBlue was working satisfactorily.

28. I asked why, as transport manager, he had not responded personally to the vehicle examiner. Aaron Barnsley said he had left it to Callum to respond. I enquired upon his role within the business. Mr Barnsley struggled to tell me about the customer base and did not seem as though he was engaged upon the commercial aspects of the business. He told me that he would speak to customers on the phone. They would generally say what they would pay for a

job. They employed thirteen drivers. The latest recruit was a friend of another driver. His father dealt with recruitment.

29. Aaron Barnsley was able to describe to me in depth how he managed drivers hours using relevant software packages. He told drivers to keep a diary. He described an appropriate system for identifying vehicle movements without an appropriate card in place and for investigating those movements. I asked about the need for the increase to fifteen vehicles. He told me that the company was at capacity with the ten vehicles and needed flexibility. In relation to the shortcoming of brake testing of trailers, he told me that in future trailers and units would be roller brake test together.

Closing Submissions

30. Mr Brown submitted that this was not a straightforward case. The vehicle examiner had described the device as an emulator but there was no evidence that it would function as such. The driver had said he had filled the vehicle with AdBlue the previous Thursday and, whilst he was vague today on how that happened, I should prefer his evidence at the roadside.
31. The operator was entirely ignorant of the function of the black box. There was no evidence of its use. The operator had always cooperated with DVSA. He had not been told that the roadside prohibition was s-marked. He had cut out the device to ensure he did not receive a fixed penalty notice. All vehicles in the fleet continued to operate with AdBlue functioning. The operator's evidence balanced that of Vehicle Examiner Seadon. The other shortcomings in the maintenance investigation identified by vehicle examiner Rozier had been addressed.
32. It went against logic that the operator would fit such a device. There was no available advice against use of blackbox devices. There was no evidence of functioning. The driver was in the middle and should not be found to be unfit; he had an otherwise clean record. I should make no adverse finding in relation to the directors and transport manager. The variation application had been made in good faith. In closing I was provided with further evidence of the operator having spent £465 on an AdBlue dosing valve on one of its own vehicles. I indicated that I would need to reflect carefully upon the evidence and reserved my decision. I further indicated that there may be some unavoidable delay as I had annual leave booked for the following week.

POST PUBLIC-INQUIRY SUBMISSIONS

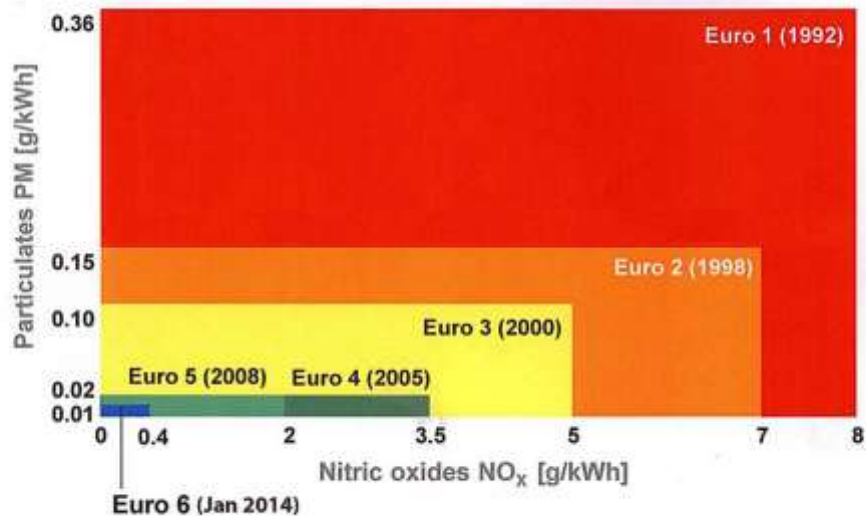
33. Mr Brown emailed my office on 11 April with a copy of a "hire agreement" between "LGS Logistics" and the operator. He also forwarded a further email trail between Callum Barnsley and a Volvo dealer.

FINDINGS OF FACT

34. The first question I consider is whether an emissions cheat device was actually fitted to WX60AXS on 18 September 2017. It is accepted that a device of some description was indeed fitted to the vehicle. The evidence of Vehicle Examiner Seadon points to that device being a cheat device. The operator appeared, through the photographic evidence, to suggest that it may have been something else such as a tracking device. Mr Seadon describes how the device was wired in to the emissions control system. It is readily apparent from the photographic evidence of both VE Seadon and the operator that the wires to which it was connected are from a yellow connector which is clearly marked "SCR". It is within my knowledge that SCR is a shortening of "Selective Catalytic Reduction". That is the name given to the technology whereby the exhaust gases are injected with a fluid comprising 32.5% urea and 67.5% deionized water in order to reduce emissions of oxides of nitrogen. That fluid is known as AdBlue. I therefore find that the device was connected to the vehicle's emission control system.
35. That a device is fitted is not in itself a contravention of Regulation 61 of the Road Vehicles (Construction and Use) Regulations 1981. The offence occurs when the limit values in the relevant Community Directives are exceeded. Given that the purpose of the SCR system is to achieve the requirements of the relevant Community Directives in relation to oxides of nitrogen and that the entire emissions control equipment is designed to ensure overall compliance with all regulated emissions, it is far more likely than not that any interference with those control systems will cause the emissions to exceed the limit values in the relevant Community Directive. Because of its age, the vehicle was required to meet Euro 5 requirements. Deliberately interfering with vehicles' NOx management systems so as to make a vehicle non-compliant with the applicable emissions limits is to undermine the whole purpose of vehicle emissions legislation determined upon by the EU Council of Ministers. This is progressively over time to reduce NOx emissions from the EU's vehicle parc and therefore to reduce NOx levels in the air. The graph below illustrates the large reductions in NOx achieved by the progressive Euro standards since 1992 and gives an idea of the potential consequences of interfering with an engine's ability to meet such standards (the dates are those for Type Approval, dates for entry in to service are generally 1 – 3 years later).

EU Emissions Standards

Exhaust emissions Euro 1–6



36. It follows that the next question I must consider is whether or not the device was functioning as an emulator. These devices have become known colloquially as “AdBlue emulators”. That is because they are generally fitted to vehicles that use AdBlue to mask a defect that is causing the vehicle to de-rate, or enter a “limp-home” mode. A side-effect is that they can also allow the vehicle to operate without AdBlue being injected in to the exhaust system which provides an ongoing modest saving. Vehicle Examiner Seadon told me how the device, once fitted to the vehicle, is connected to a laptop computer and configured. He includes a photograph of the port that is used for that connection. Once connected to the vehicle and the laptop, the device is programmed to “emulate” the signal from whichever component is faulty and so make the vehicle’s electronic control unit believe all is well.
37. Mr Seadon is an experienced examiner. Mr Seadon told me that the condition of the AdBlue tank filler neck was such that it was clear to him that there was a device on the vehicle. He told me in oral evidence, though it is not in his written statement, that he was also alerted by the behaviour of the warning lights on the vehicle dashboard. As this was not recorded in writing at the time, I afford this piece of evidence less weight but do not discount it completely because it is in line with the training that these specialist Vehicle Examiners have received.
38. The operator counters these arguments by showing me photographs of filler necks with similar amounts of dirt present. The problem I have is that I know nothing of how those photographs were taken and whether or not they were staged in some way. I can afford them no weight in evidence. Driver Gary England told the examiner specifically that the vehicle had been filled with AdBlue the previous Thursday but he could not remember where. It is odd, at least, to have such a clear recollection of an activity having taken place but not be able to remember whether it was done in the yard filling from an IBC or from a roadside filling station using a 10 or 20 litre container. It is the evidence

of Daren Barnsley that all vehicles are filled with AdBlue before they leave on a Monday morning and Mr England told me the vehicle needed only half a tank or so of AdBlue a week or fortnight. The operator confirmed this by saying that the subject vehicle used relatively low amounts of AdBlue then and now. I am offered no evidence either of the vehicle being back in the yard on Thursday 14 August 2017 when Mr England was so certain he had filled with AdBlue nor, in the alternative, am I offered any evidence of a roadside AdBlue purchase. Quite simply, the operator's argument does not stack up against the evidence of the vehicle examiner.

39. Another limb of the operator's evidence is that the device was simply cut-out and the vehicle continued to operate exactly as it was. The problem with that argument arises from the operator's own photographic evidence. Pages 53 to 57 of my brief contain the images taken by Vehicle Examiner Seadon at the roadside. It is clear that the device was not simply cut-out. It appears to have been extracted with some care, as would be reasonable. The purple and blue wires into which the device was spliced have been repaired. One wire appears simply to be cut. That is the red and white wire. This is addressed in the email exchange provided following the public inquiry which I reproduce here:

From: Callum Barnsley <dkbarnsleytd@gmail.com>
Date: 11 April 2018 at 14:28:30 CEST
To: <PHILIPBROWN@AMDSOLICITORS.COM>
Subject: FW: WX60AXS
Hi Phillip

We have sent our vehicle wx60 axs into a main volvo dealer to investigate why there is no power to the wires that the black box was connected to. There is no power to these wires as the pin in the plug is broken and has been bypassed so that the wire that the black box was connected to had no power going to it and could have not been operational, obviously with it being bypassed before the plug it would mean the adblue system would still work perfectly fine with the box in place. Please find below Gary Edwards email.

Many thanks

Daren Barnsley

From: Gary Edwards <Gary.Edwards@wwtruckandbus.co.uk>
Sent: 11 April 2018 12:50
To: DKBARNSLEYLTD@GMAIL.COM
Subject: WX60AXS

Hi

ref WX60AXS adblue plug in bulkhead

I have looked at the plug and 1 wire/pin has been bypassed due to the pin broken in the plug

Thanks

Gary

Gary Edwards
Workshop Supervisor
DDI: 01793838831

Email: Gary.Edwards@wwtruckandbus.co.uk
Website: www.wwtruckandbus.co.uk

40. The red and white wire is connected to the broken pin in the plug. There is nothing in any of this to suggest when that pin became broken. It is highly unlikely that it was broken when the vehicle left the factory. The emulator was fitted by splicing in to existing wires and it would seem that the plug would not

have needed to have been disconnected so would not have been damaged. It may have been damaged when Daren Barnsley removed the device. In the worst case, it may have been intentionally damaged to provide evidence on behalf of the operator that the device was not functioning. I simply do not know. It is not evidence that supports a contention that the device was not operational on 18 September 2017.

41. I look now at the various descriptions of the turn of events following the vehicle returning to base. First, Daren Barnsley said he was not aware of the seriousness of the situation and was not told by VE Seadon that the prohibition was s-marked. VE Seadon is clear that he told Mr England that the prohibition was s-marked but cannot say with certainty whether he said the same to Daren Barnsley when he spoke to him on Mr England's phone. The prohibition itself is clearly annotated with the words "This prohibition indicates a significant failure of roadworthiness compliance". Those words **are** the "s-mark". Daren Barnsley was aware that the vehicle could incur a £300 fixed penalty if found again with the device fitted which should have also alerted him to the seriousness. Had he not seen the prohibition from the roadside, DVSA's process is that a copy is mailed to the operator overnight and that would include the separate prohibition assessment which says why the prohibition is s-marked. Mr Barnsley certainly did see that because he took exception to the wording which stated "Poor workmanship. Defect should have been apparent to repairer". Mr Barnsley has sought to challenge this by saying that the device would not be apparent on PMI. That is not what it says. What it says is that the person dealing with whatever fault must have existed in the emission control system at some point in time should have been aware that fitting a cheat device was not an appropriate repair. In that way, the defect was apparent to them.

42. Vehicle Examiner Rozier, on completing his maintenance investigation report, records the following:

"When questioned regarding the ad blue device they informed me that it was a rental truck and they didn't know that an ad blue emulator had ever been fitted, they were filling up the ad blue tank just as much as they do the other vehicles fitted with ad blue.

They informed that when they went to get the ad blue system checked by the main dealer it was all working as it should and the ad blue emulator wasn't even connected resulting in a compliance certificate being issued with no work carried out to the vehicle. This has been confirmed with an email from the main dealer."

43. VE Rozier appears to have been unaware that the vehicle had been specified on the licence since November 2015. It was not a short term rental truck as it would seem he may have thought, nor would it seem was the rental company responsible for maintenance as VE Rozier may reasonably have inferred from the operator's statements.

44. The operator addresses this again in the response to Vehicle Examiner Rozier. The relevant paragraph of an email signed in the name of Callum Barnsley dated 2 January 2018 states the following:

Also the vehicle that was stopped and found with some sort of box in the front of the truck was not fitted by ourselves we have been using the vehicle since the end of 2015 and its always used add blue and never had any add blue faults. Obviously as you are aware shortly after the vehicle was stopped we took it to a Volvo dealer and it had a full add blue test and everything was working ok and no new parts were fitted. Obviously a previous owner of this vehicle must of fitted this box and must of disconnected it as the add blue has always worked okay since we have had the vehicle.

45. The operator here appears to suggest that the vehicle was taken to the franchised dealer exactly as it was found at the roadside. The operator's public inquiry submissions provide a different series of events:

When the vehicle returned to the operating centre following the incident on 18 September 2017, Daren Barnsley cut the wires on the black box and he removed the box from the vehicle. This process had no effect whatsoever on the vehicle and it continued to operate just as before. The vehicle was **then** taken to a Volvo main dealer and tested. (Emphasis added)

46. I have dealt with the contention that the device was simply "cut out" at paragraphs 38 and 39 above. The device was sensitively removed. This was done before presentation to the Volvo dealership. The vehicle was, therefore, not in the same condition as it was when encountered at the roadside. It is therefore impossible to say that the device was not functional. At least equally likely is that Daren Barnsley removed the device, corrected whatever was the underlying emissions fault and then presented it to Volvo for clearance. It is the operators own evidence that they are fully competent to fit components such as AdBlue dosing pumps (this finding arising from the invoices presented by the operator at the end of the inquiry relating to a dosing valve and another emissions control component relating to vehicles F3DKB and NX60GKC).
47. Balancing the evidence of Vehicle Examiner Seadon with that of the operator and of the driver, I find it more likely than not that the device was functioning as an emulator when encountered at the roadside. Thus Regulation 61 of the Road Vehicles (Construction and Use) Regulation 1986 was breached meaning that the prohibition was properly issued and Section 26(1)(c)(iii) is made out.
48. The operator's position is that the vehicle was a hire vehicle and so they had no motivation to fit a device. Yet Daren Barnsley told me that he had not spoken with the vehicle's owner about the device. Given that the device led to a call to public inquiry, that assertion seems unlikely at best. He told me that the owner, Linda Stock/LGS Logistics Ltd had bought the vehicle to fulfil a contract that never came through.
49. LGS Logistics is a company number 09457563 and is shown as active at Companies House. It lists its business as "freight transport by road". It filed accounts on 29 November 2017 made up to 28 February 2017. Those accounts show trading. Neither Linda Scott nor LGS Logistics appears anywhere on the operator licensing database either now or ever. There are no

related applications. If LGS Logistics Ltd ever intended to put WX60AXS to work, it had not put in place processes to do so legally.

50. Mr Brown told me that it defied logic for the operator to fit an emulator to a hire vehicle. However, if this vehicle was hired from LGS, it was not the sort of hire agreement that one might expect with a car or van. The operator appears to have assumed responsibility for the vehicle's maintenance; it is included in the operator's maintenance schedule and that maintenance is undertaken in-house. It has been liveried with the operator's name. The operator, not the hirer, has been dealing with the Volvo agent. Daren Barnsley told me that he would have had the vehicle taken to a Volvo dealer in Stoke had he understood the seriousness of the matter. So it would seem that, had the vehicle developed an emissions fault, the operator would have been responsible for fixing it. That provides the motive for the operator to go for a quick and cheap fix of the sort afforded by an emulator rather than spending money to fix a potentially expensive defect. It is entirely logical not to invest in a third party's vehicle. It is entirely logical that the operator fitted the device.
51. Mr Brown provided an email scan of a rental agreement purporting to be between the operator and LGS Logistics. No original was supplied. That which was supplied appeared to be a mixture of manual amendments to another party's form and a rework of the same. The hirer is shown simply as LGS Logistics. The hirer has not signed the agreement. It is labelled a "spot hire agreement" but covers a period 3 July 2017 to 3 July 2018. A spot hire is a term used within the industry to refer to a short term arrangement usually to cover a breakdown or seasonal demand. It does not refer to a hire which is now over two years.
52. The agreement shows a monthly charge of £1600. That is in line with a short-term spot hire being slightly less than £100 per working day which appears to be an industry rule of thumb for a 44 tonne tractor unit. But this vehicle was first specified on the operator's licence in November 2015. By now the operator will have accrued rental costs of £43,200. When the prohibition was issued in September 2017, the vehicle had recorded 894252km. A review of the "Commercial Motor" truck sales website puts the value of a similar vehicle at between £14,750 and £15,750. WX60AXS is fitted with tipping gear but it is unimaginable that the extra equipment would almost treble the value of the vehicle. On the evidence in front of me, I was concerned that the rental agreement was a sham. Given that the rental agreement was not available at the inquiry, I found it reasonable to give the operator an opportunity to comment upon my concerns. I had my office write to Mr Brown and the operator on 27 April in the following terms:

Before finalising his decision, the traffic commissioner has concerns arising out of the hiring agreement which was received after the hearing. He would like to give the operator the opportunity to comment on the following:

- The document is not signed by the hiring company – please provide the original
- The hiring company does not have an operator's licence which appears contrary to the explanation given at the inquiry that they had acquired the vehicle for a contract that had not materialised

- The hiring agreement states a rate of £1600 per month. This equates to £19,200 over the agreement period and £43,200 since the rental began. The retail value of the vehicle with reference to similar vehicles on the Commercial Motor sales site appears to be around £15,000 to £16,000. Why has the operator continued the rental at this price?
- Is there any evidence that can be provided that these hire payments have actually been made, for example, from bank statements?

53. I allowed until close of business on Wednesday 2 May for a response. The response was received on 1 May and the main text is copied at Appendix 1. I was told that there was no legal requirement to sign a hire agreement on the part of the owner and Mr Brown included a copy of a similar agreement with MC Rental Ltd. Unfortunately that document raises further questions. It would appear to be an original from which the LGS agreement has been constructed. The layout and type-face is identical. Errors in type setting within the box marked "Attention Hirer" are identical. The LGS Logistics document shows evidence of manual amendments having been made with LGS written in manuscript where the MC Rental name appears on their form. This response has done nothing to satisfy my concerns at the authenticity of the LGS document. In fact, it does the opposite. The original document is not provided to me, despite my request for it.

54. Mr Brown's response asserts that Mr Barnsley assumed that LGS Logistics held an operator's licence but provides no further explanation. Mr Barnsley has had a relationship with LGS for over two years. He has paid them £43,200 for the hire of a £15,000 vehicle. He told me the owner was Linda Scott. In all that time, he has never inquired of what the business does. I find that simply unbelievable.

55. I am told that the value of a vehicle is not relevant when considering its hire cost. The operator paid the market rate at the date of the hire. I note that the hire rate for the MC Rental vehicle is £1906.66 per months for a 6 month period. The vehicle is a 2015 Scania tractor unit. I note that the Commercial Motor website has similar vehicles for sale at a price of around £60,000.

56. Mr Brown did supply electronic bank statement extracts which appear to show payments of £1920 to a description LGS on or around the first day of August 2017 to March 2018.

57. On review of this new evidence, I find on the balance of probabilities that there are payments made from the operator to LGS. However, the rental agreement appears to be home-made based on a photocopy of an original from MC Rental Ltd. The original has not been made available to me.

58. Daren Barnsley is a successful businessman. The company is solvent. I am unpersuaded that he could not find the capital investment necessary to buy tractor unit WX60AXS, or similar, outright. It beggars belief that he would pay £43,200 in hire fees whilst apparently assuming all liability for a £15,000 vehicle. Interest rates remain low should the operator wish to borrow to fund the purchase although I note from the current account statements that it could comfortably fund the purchase outright.

59. The operator has at no time gone back to the hirer despite the trouble that the vehicle has put him in. Instead, the operator has removed the cheat device, liaised with the Volvo dealer to establish the vehicle's condition and continued to operate it. Most reasonable people who had been found in this situation would return the vehicle to the hirer, demand an explanation and that the situation be rectified. It is clear from the bank evidence that there is an ongoing transaction between the operator and LGS. The hire documentation that has been provided does not support that it is genuinely in relation to the rental of WX60AXS. The behaviour of the operator is not that of someone who has genuinely hired a vehicle on normal commercial terms. For all these reasons, I find the hire agreement to be a sham.

60. I find it is more likely than not that Daren Barnsley knew full well the seriousness of the defect that resulted in the prohibition issued on 18 September 2017. His driver was told at the roadside. It was a regular driver who had driven that vehicle for nearly two years. It was that driver's first ever stop by DVSA, an encounter that I'm sure will have caused him concern. Daren Barnsley received copies of the documentation that clearly showed the s-marking. He was told that further use would incur a fixed penalty. Any reasonable person would conclude that the offence was serious. Against this background, he now tells me that he cut out the device to avoid any potential for a fixed penalty, and he threw it away. A reasonable person would have taken the vehicle **as it was** either to the hirer or to the main dealer to investigate. That, of course, is the position that Daren Barnsley sought to have DVSA believe was the case. It was only after the call to public inquiry and the evidence of the issuing vehicle examiner that led him to come clean about the sequence of events.

61. Daren Barnsley further sought to distract the DVSA officers by citing the vehicle as a hire vehicle and suggesting that it was a recent acquisition. The evidence of Vehicle Examiner Seadon is unequivocal on that point and is supported by the fact that he went to the bother of checking when the vehicle was specified on the operator's licence.

62. To summarise the position in relation to the emissions prohibition, I find that:

- The vehicle was fitted with an emissions cheat device
- That device was operational on 18 September 2017
- The operator was fully aware of the seriousness of the situation
- The operator deliberately removed and disposed of the device before presenting the vehicle for inspection at the Volvo dealer
- If there was an underlying emissions fault, the operator repaired it before presenting the vehicle for inspection by Volvo
- The hire agreement with which I have been presented is economically a nonsense and is a sham

63. The failure to brake test trailers is accepted by the operator and is a serious breach of the licence undertakings and the given statement of intent that vehicles and trailers would be inspected every six weeks. The extent of that inspection is described in DVSA's Guide to Maintaining Roadworthiness as to

cover all the items in the statutory annual inspection. Items 71, 72 and 73 of that inspection are the performance of the service braking system, secondary braking system and parking brake system respectively. The Guide was amended in 2014 to allow roller brake testing quarterly with a meaningful performance assessment at intermediate inspections. In the positive, the operator has incurred no trailer brake-related prohibitions. I do not have access to the operator's annual test results.

64. Daren Barnsley clearly runs this business. He told me Callum Barnsley was listed as a director at Companies House simply so that he could sign cheques. He was only an employee of the company. This position shows that Daren Barnsley is quite happy to abuse statutory processes for personal gain. The listing of Callum Barnsley as a director is a fraudulent act of convenience. In doing so, the operator has sought to mislead, Companies House, any parties dealing with his business commercially and to mislead me.

65. Aaron Barnsley was accepted as an additional transport manager on the licence. He subsequently became the sole transport manager following the resignation of Wayne Evans. Aaron Barnsley has some notable strengths. He appears in control of drivers hours matters and performs an audit function on roadworthiness issues. He is not solely in complete control of the transport operation. His father performs a significant element of the transport manager role. He has been party to the operator's response to this inquiry, some of which I have found to be a sham. Aaron Barnsley is a young transport manager. I have considered carefully whether my decision is affected by his age alone and I am content that it is not.

66. Aaron Barnsley works in a family business that is focussed on the operation of large trucks. It is clear from the operator's photographic evidence of the fleet that there is great pride in its public presentation and I suspect great pressure to keep the business operational. I make no adverse finding in relation to Aaron Barnsley's repute as a transport manager, however I find that he is not meeting the requirement to have continuous and effective management of the transport operation. I make that finding because he told me that he did not control the mechanical side of the business, he lacks understanding of the wider business context and Daren Barnsley undertakes significant parts of the transport manager role such as driver management and vehicle acquisition. Article 4.1(a) of EU Regulation 1071/2009 fails to be satisfied by the current transport management arrangements at the current fleet size.

CONSIDERATION

67. I refer to the guidance to which I must have regard¹. Annex 3 sets out starting points for consideration of regulatory action. In terms of positive features, there are management systems and the outcome of the vehicle examiner's report was generally positive and the shortcomings identified have been addressed.

¹ Senior Traffic Commissioner Statutory Document No. 10 "The principles of decision making and the concept of proportionality", December 2016

68. In the negative, the operator had knowledge of the AdBlue device, a device that led to a commercial advantage and put public health at risk. Tampering with emission control systems is directly akin to tampering with tachograph systems – both are likely to kill, one just does it more suddenly and brutally than the other. The operator sought to mislead DVSA in relation to the vehicle's status. The evidence that is the emulator has been disposed of. The hire agreement provided to me is a sham. The listing of Callum Barnsley as a director is a fraudulent act.
69. From these indicators, I find that the conduct was deliberate and reckless acts which gave the operator a clear commercial advantage, endangered public health and was attempted to be concealed at every turn. That aligns with the category of severe. The starting point from the statutory guidance is between revocation and lengthy disqualification to a significant indefinite curtailment of the working fleet.
70. I turn now to the helpful questions posed by the Upper Tribunal to assist Traffic Commissioners in determining whether a licence should continue. The first of those is the "Priority Freight"² question of how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime? Having found that evidence such as the hire agreement was manufactured and that attempts were made to mislead DVSA examiners, I find the answer to that question to be "very unlikely".
71. If the evidence demonstrates that future compliance is unlikely then that will, of course, tend to support an affirmative answer to the "Bryan Haulage" question: is the conduct such that the operator ought to be put out of business? I refer to my assessment at paragraphs 43 to 44 above. I also refer to the public health effects of NOx emissions which the European legislation seeks to address. Defra³ has made an estimate that nitrogen dioxide contributes to shortening lives by 5 months and that the overall population burden is estimated at 23,500 deaths in the UK per year. That is why emissions cheat devices have to be dealt with effectively. Users put all our lives in jeopardy. That taken with the lack of candour within this operator means that this is a business that must come to an end. The operator's good repute is forfeit. Section 27(1)(a) of the Act is made out.
72. The statutory guidance reminds me that disqualification is not automatic. Despite the lack of candour, I do not believe that disqualification is necessary nor proportionate in this case. Any application to re-enter the industry will clearly be subject to significant scrutiny.

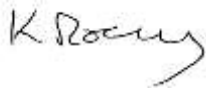
DECISION

73. Pursuant to a finding under Section 27(1)(a) of the Act, licence OH1135048 is revoked with effect from 23:59 hrs on 30 June 2018.

² Appeal 2009/225 to the Transport Tribunal

³ Air Quality: A Briefing for Directors of Public Health, Local Government Association, March 2017

74. On a failure to satisfy me that the statutory requirements of good repute and continuous and effective management are met, the variation application is refused pursuant to Sections 13A(2)(b) of the Act and Article 4.1(a) of EU Regulation 1071/2009.

A handwritten signature in black ink, appearing to read 'K. Rooney', written in a cursive style.

Kevin Rooney
Traffic Commissioner

2 May 2018

APPENDIX 1 – RESPONSE AMD SOLICITORS 1 MAY 2018

Mrs Zoe Coade
Office of the Traffic Commissioner
West of England
Jubilee House
Croydon Street
BRISTOL BS5 0GB

1 May 2018

Our Ref: PKB/CJB
Your Ref: OH1135048

Dear Zoe

D K BARNESLEY & SONS LTD – OH1135048

We are in receipt of your email dated 27 April 2018 concerning the above named operator.

Our client has instructed us to respond to the queries raised by the Traffic Commissioner as follows:-

1. Hire Agreement – There is no legal requirement for the hiring company to sign the hire agreement. The Traffic Commissioner will note that the agreement itself is a Spot Hire Agreement which is used by many businesses which hire out vehicles to operators. In particular, our client has hired vehicles from a major Volvo dealer, M C Rental Ltd and only the person hiring the vehicle has been required to sign the agreement to signify their acceptance of the terms and conditions of hire. The document supplied to you was a copy of the current hire agreement with LGS Logistics which is renewed on an annual basis. A copy of our client's similar agreement with M C Rental Ltd is attached.
2. Hiring Company's Lack of Operator's Licence – When D K Barnsley & Sons Ltd agreed to hire a vehicle from LGS Logistics, it was mentioned to our client by LGS Logistics that they had intended to purchase the lorry to use for a particular job which never transpired. Mr Barnsley, therefore, assumed that LGS Logistics held an operator's licence. As it happened, the vehicle was hired out to D K Barnsley & Sons Ltd a couple of years ago and as mentioned above has been renewed on an annual basis.
3. Vehicle Value – The value of a vehicle which is hired out is not a relevant factor when calculating the cost of hiring a vehicle. For example, we are instructed that Iveco vehicles with a value of £10,000 are hired out for £475 per week. A company in Somerset which hires out Renault premium vehicles with a sale value of £5,000 from which our client has hired vehicles in the past, charge £1,720 per month. Our client rented vehicle registration mark WX60 AXS to avoid spending capital and it has paid the market rate as at the date of the Spot Hire Agreement.

4. Evidence of Hire Payments – Please see attached bank statements which evidence monthly payments for the hire of the vehicle in question from 1 August 2017 to 28 February 2018. An up to date bank statement is also contained in the attachment which includes the Spot Rental Agreement with M C Rental Ltd referred to in paragraph 1 above. For clarity, the sum paid to LGS Logistics comprises payments of £1,600 per month plus VAT, which totals the £1,920 payments set out in the bank statements.

We trust that the above information answers all the questions raised by the Traffic Commissioner. If any further information is required, please do not hesitate to contact us.

Kind regards.

Yours sincerely

Philip Brown
AMD SOLICITORS
Email: philipbrown@amdsolicitors.com

Encs.