

Neutral Citation Number: [2018] UKUT 0283 (AAC)

Appeal No. T/2018/25

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

**IN AN APPEAL FROM THE DECISION OF
Richard Turfitt, Traffic Commissioner for
the East of England dated 9 April 2018**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
George Inch, Specialist Member of the Upper Tribunal**

Appellant:

SHAUN STARK

In attendance: Shaun Stark assisted by Angela Cook, transport manager

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 21 August 2018

Date of decision: 28 August 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED

SUBJECT MATTER:- Impounding. Whether the Appellant had established ownership and an entitlement to the return of the vehicle.

CASES REFERRED TO:- 2011/25 Asset 2 Asset; T/2011/60 Nolan Transport v VOSA & the Secretary of State for Transport; T/2016/28 Bolle Materieel BV v DVSA

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the East of England (“the TC”) made on 9 April 2018, concerning an impounded vehicle and an application for its return by the Appellant (“Mr Stark”). The TC found that Mr Stark had failed to satisfy him that at the time the vehicle was detained, he was the owner of the vehicle and had further failed to satisfy him that at the time the vehicle was detained, it was not being, and had not been, used in contravention of section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”).

The Background

2. Vehicle OK51 ARK is a 3 axle flat-bed DAF with a gross plated weight of 21 tonnes, in the livery of “Starkys”, the name of Mr Stark’s recovery business. The vehicle is fitted with a crane to assist in the recovery of vehicles.
3. On 20 March 2018, the vehicle was stopped on the A52 near Folkington, Lincolnshire. It was being driven by Mr Stark who confirmed that the vehicle was carrying machinery which he had collected from Frithville, Boston to be delivered to Allutrade Recycling Centre in Oldbury, near Birmingham. It was noted during DVSA checks that Mr Stark and Lloyd Stark were the registered keepers of the vehicle at Victoria House, Marsh Lane, Boston. Mr Stark explained that Lloyd no longer lived at that address and gave the Traffic Examiner an alternative address for him. The vehicle was then impounded with relevant documentation being read to Mr Stark as he is dyslexic and has considerable difficulty with reading. The property notice signed by Mr Stark to confirm that his personal property had been removed from the vehicle is annotated “*I would like to have the crane back which is attached to vehicle*”.
4. The application for return of the vehicle was completed by Mr Powell, solicitor of Smith Bowyer Clarke who requested a hearing (contrary to the TC’s comments in his decision that no such request was made). The basis of the application was that at the time of the vehicle’s detention it was not being, and had not been, used in contravention of s.2 of the 1995 Act.
5. The hearing of the application took place on 18 April 2018. Traffic Examiner (“TE”) Payne attended on behalf of the DVSA. Mr Stark was represented by Mr Powell who provided a skeleton argument prior to the hearing which identified two separate aspects to the application. The first related to the crane, which, Mr Powell contended, should be returned to Mr Stark under regulation 16(2) of the Goods Vehicles (Enforcement Powers) Regulations 2001 as it fell within the definition of “contents”. This was a wholly unsustainable and misconceived submission bearing in mind the detailed evidence that Mr Stark gave as to the vehicle adaptations that were required in order to fit the crane onto the vehicle (more detail below) and in view of the Upper Tribunal decision of 2007/75 Matthew John Cooney trading as MC Blasting. There could be no doubt that the crane had become part of the vehicle following the adaptations undertaken by a specialist firm.

6. The second aspect of the application was that whilst it was now accepted by Mr Powell that the vehicle was in fact being used in breach of s.2 of the 1995 Act, it should nevertheless be returned on the grounds of proportionality. This too, was a wholly unsustainable submission bearing in mind the Upper Tribunal decisions on the point, namely, 2011/25 Asset 2 Asset; T/2011/60 Nolan Transport v VOSA & the Secretary of State for Transport and T/2016/28 Bolle Materieel BV v DVSA the last case being one in which his own firm acted for the Appellant.
7. At the hearing, Mr Stark gave evidence and submitted documentation in support of his case that he was the lawful owner of the vehicle. He explained that he had purchased the vehicle in 2013 from Peter and David Cosby when at that stage, the vehicle was fitted with a box on the back and a white day cab and displayed the registration number SK07 BSM. He produced a photograph of the vehicle in that state which he had taken. The Cosbys were specialist retailers and manufacturers of recovery vehicles. He agreed to pay the Cosbys £12,500 for the vehicle along with a crane which was to be fitted to the vehicle at a later date and it was further agreed that payment for the vehicle and the crane would only become due when the crane was fitted to the vehicle.
8. The Cosbys then permitted Mr Stark to take the vehicle away and undertake some of the improvement and adaptation work on it himself as a cost saving measure. He removed the box from the rear of the vehicle along with the cab, replacing the latter with a sleeper cab liveried in the name of "Starkys". There was a delay in returning the vehicle to the Cosbys because money was short for Mr Stark but he did so in about June 2014 and the crane was then fitted, a job which took approximately seven days. Mr Stark described the work that had been required: the chassis had to be strengthened to take the weight of the crane; the diesel and AdBlue tanks had to be moved; stabilisers were fitted to the chassis and pipework which ran off the PTO pump had to be fitted to operate the crane.
9. The invoice which Mr Stark produced from the Cosbys was dated 18 June 2014 and Mr Stark explained that the difference in the date between his agreement to buy the vehicle and the invoice reflected the delay caused by him undertaking work of his own on the vehicle. The invoice itself is made out to Starky's Transport, Victoria House, Marsh Lane, Boston, which is the address that the Office of the Traffic Commissioner has on record for Mr Stark when he had previously held a restricted operator's licence. The invoice is for a DAF LF 250 6 x 2 Chassis Cab with crane. The registration number of the vehicle was SK07 BWM. Mr Stark also produced a letter written by David Cosby and dated 17 April 2018 which states:

"With regards to the DAF truck SK07 BWM we sold this truck to Starky's Transport as a box van.

He removed the box body and sent it back to us for fitment of the crane sold to him at the same time as the truck".

10. Mr Stark produced the V5 log book of the vehicle which is in the name of Starky's Recovery, Shaun and Lloyd Stark with the same address as set out in paragraph 9 above. Mr Powell did not ask Mr Stark to explain why Lloyd Stark's name appeared on the log book and neither did the TC. Mr Stark also relied upon an Experian Auto Check which confirmed the registration plate change of the vehicle to OK51 ARK.
11. At the conclusion of the evidence concerning ownership, TE Payne confirmed that she was content with the documentation going to ownership and the TC then ran through the documentation again. At the conclusion of his summary he states: "*Alright. Well done.*" There was no indication at all that the TC might have any concerns that Mr Stark had not established that he was the owner of the vehicle.
12. As we have already indicated, it was inevitable that the application for return of the vehicle was going to fail and the TC confirmed the position in his written decision. In relation to ownership, the TC made the following findings:
 - a) The vehicle was shown to be registered to "Shaun Derek Stark and Lloyd Stark" and whilst Mr Stark had informed the Traffic Examiner that Lloyd Stark no longer lived at the address notified to the DVLA, the TC had not heard any evidence as to why Lloyd Stark's name appears on the V5;
 - b) The correct test is whether Mr Stark can produce sufficient evidence to satisfy the TC upon the balance of probabilities that he is the owner, not whether there is credible evidence that the vehicle is owned by anyone other than Mr Stark. Enquiries at the time of the detention confirmed that the vehicle was registered to two people, including Mr Stark;
 - c) The TC found that the date on the invoice showing purchase of the vehicle and a crane to be confusing. Mr Stark appeared to have anticipated the limited weight which could be attached to the invoice and produced the additional letter from D Cosby;
 - d) Mr Stark's evidence at the hearing indicated that he had fitted a replacement cab himself but the invoice suggested that the Cosbys charged for that work;
 - e) On the basis of the above, Mr Stark had failed to satisfy the TC to the civil standard of proof that he was the legal owner of the vehicle.

The Appeal

13. At the hearing of his appeal, Mr Stark attended and was assisted by Angela Cook. She explained that Mr Stark had now applied for an operator's licence and that she was assisting him in that regard and was his proposed transport manager. She impressed the Tribunal with the way that she had prepared for the appeal hearing and the grasp she had of the appeal bundle. Mr Stark repeated the difficulties he had with reading.
14. Mr Stark's letter of appeal and the submissions made to the Tribunal can be summarised as follows: Mr Stark had previously held a restricted operator's licence which had been revoked as a result of his failure to respond to a "propose to revoke letter". He had been unable to read the letter and had not

asked for assistance in time. In any event, he had been told that he did not need an operator's licence for recovery work. He had been foolish in accepting the load he was carrying on 20 March 2018 but it was during a quiet period in his recovery work. He accepted that he needed an operator's licence to undertake such work.

15. He repeated the evidence he had given to the TC about how he came to acquire the vehicle and its adaptation. Lloyd Stark is Mr Stark's eldest son and he is involved in "banger racing" as a hobby. As he wished to utilise the vehicle to transport his vehicles to races, he contributed money towards the running of the vehicle and as a result, Mr Stark decided that it was only right that he be included in the registered keepers' details.
16. It was his partner who found the details of Smith Bowyer Clarke who held themselves out as experts in transport law and Mr Powell was engaged for a fee of £1800 (which Mr Stark had borrowed from his father). Mr Stark was unhappy with his representation. First of all, he did not meet Mr Powell until the morning of the hearing. Secondly, he was not advised as to the poor prospects of his application succeeding and that his money would have been better spent in paying the storage charges (which have continued to accumulate whilst this appeal has been on-going) and buying the vehicle back from the DVSA. Thirdly, Mr Stark accepted that the crane was part of the vehicle and that was obvious and he further accepted that the use of the vehicle was in breach of s.2 of the 1995 Act on the day it was impounded. Mr Powell just "*babbled on about old cases*" and it made Mr Stark nervous and confused about the position he was in. Thirdly, by the date of the hearing, Mr Stark had engaged Mrs Cook as proposed transport manager and had applied for an operator's licence. Mr Stark had provided documentation to Mr Powell demonstrating the steps he had taken in relation to the application but Mr Powell failed to mention this to the TC. Mr Powell had said that all that would happen was that Mr Stark would be liable to a fine of £3,000 to £5,000 (which we take to be a reference to the storage charges as the TC does not have a power to fine) and wanted a fee of £7,000 for representing him on the appeal. Mr Stark believed that his application should in fact have been under regulation 4(3)(d) of the 2001 Regulations:

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

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

17. Mrs Cook was also concerned about the TC's finding that Mr Stark had failed to establish ownership of the vehicle. She could not understand the basis of that conclusion in view of the evidence before the TC.

Discussion

18. We advised Mr Stark at the outset of the hearing, that his appeal was bound to fail as he had accepted that the vehicle was being operated in breach of s.2 of the 1995 Act and that he knew that to be the case at the material time. We

were able to come to that conclusion because Mr Stark had told us that prior to accepting the load on 20 March 2018, he had in fact told the owners of the load, that he could not take it because he did not have an operator's licence. Further, the TC did not have a discretion as to whether the vehicle could or should be returned to Mr Stark irrespective of the breach. As for Mr Stark's wish to pursue the return of the vehicle before us on a different ground to that relied upon before the TC, we informed him that we could only consider his appeal upon the basis of the application before the TC. In any event, Mr Stark could not establish limb (i) of exemption (d).

19. We then turned to the issue of ownership. Having read the transcript and considered the documentation produced by Mr Stark in order to establish ownership, we are (with the greatest of respect to the TC) mystified as to why he failed to find in Mr Stark's favour. Dealing first with the V5 log book, the full registration details are "*Starky's Recovery Shaun & Lloyd Stark*". Starky's Recovery is Mr Stark's trading name. Whilst Lloyd Stark's name appears on that document, that was not the subject of any questions from Mr Powell or enquiries from the TC. Indeed, the impression given by the TC in stating "*well done*" at the end of his summary of the documentation, was that the documents satisfied him upon the issue of ownership. Whilst traffic commissioners can take a step back in impounding hearings which are adversarial in nature, particularly if the applicant is legally represented, it must have been clear in this case that Mr Powell's representation of Mr Stark was lacking (as we regrettably find) and that if the TC had any continuing concerns arising from the registration of the vehicle, he should have said so. That at the very least would have ensured that the TC was given the explanation that Mr Stark has now given the Tribunal and if that did not satisfy the TC, Mr Stark could or should have been given an opportunity to obtain a statement from his son in support of his application within a specified period of time. We remind ourselves that the 2001 Regulations make clear that a person can satisfy an authorised person that they are the lawful owner of a vehicle irrespective of the identity of the registered keepers.
20. As for the TC's confusion about the date of the invoice produced by Mr Stark, we are satisfied that the combination of the letter signed by David Cosby and the detailed evidence of Mr Stark as to the time line for the purchase agreement, the adaptation work and the payment for the vehicle and crane should have addressed any confusion in the TC's mind. Mr Stark's evidence was clear and sufficiently detailed and it was not suggested by the TC that his evidence or the documentation was either untruthful, incredible or in some other way, unreliable.
21. Turning then to the TC's concerns about the evidence as to who fitted a replacement cab to the vehicle, the TC did not ask Mr Stark questions about it. In any event, we do not interpret the invoice and the subsequent letter from David Cosby in the same way as the TC. We are satisfied that the letter makes it clear that it was Mr Stark who removed "the box body" and it was they who fitted the crane.

22. In the result, we are satisfied that the TC was plainly wrong in determining that Mr Stark had failed to establish upon the civil standard, that he was the owner of the vehicle. That of course does not affect the overall result of this appeal because Mr Stark was and is unable to argue that the any of the grounds for returning the vehicle apply in his case.
23. It follows that whilst we are satisfied that the TC's approach to the issue of ownership was in error, his approach to the issue of whether the vehicle should be returned to Mr Stark was plainly right and in the circumstances, the appeal is dismissed.

A handwritten signature in black ink, appearing to read 'Judge Beech', with a stylized flourish at the end.

Her Honour Judge Beech
28 August 2018