IN THE MATTER OF DETAINED VEHICLE

B 2234 BP

M.J.L. LIMITED EEOD

(Applicant)

-v-

DRIVER AND VEHICLE STANDARDS AGENCY

(Respondent)

GOODS VEHICLES (LICENSING OF OPERATORS) ACT 1995 (AS AMENDED) ('the Act')

GOODS VEHICLES (ENFORCEMENT POWERS) REGULATIONS 2001 (AS AMENDED) ('the Regulations')

REGULATION (EC) NO 1072/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF THE EUROPEAN UNION ('the EU Regulation')

Decision

On a finding that the Applicant has NOT satisfied me to the civil standard of proof that either of the following grounds claimed by it is made out on the evidence, namely that at the time of detention of this vehicle :

-the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle), (Regulation 4(3)(a)of the Regulations); or

-although the vehicle was being, or had been, used in contravention of section 2 of the Act, the owner did not know that it was being, or had been, used in contravention of section 2 of the Act, (Regulation 4 (3) (c)of the Regulations);

the application made by the Applicant for release of vehicle B 2234 BP is REFUSED.

Reasons

Background

1. On Monday 30 July 2018, vehicle B 2234 BP, a Scania 3-axle articulated tractor unit, marked up with the name 'Lyons' to the front of the cab and painted with 'MJL' on the sides of the unit, was subject to a routine Driver and Vehicle Standards Agency (DVSA) compliance examination at the DVSA weighbridge and check site located at Junction 45 of the A1, Boston Spa, Yorkshire. The vehicle was hauling a Montracon trailer laden with aggregates (lime) at the time of its encounter.

2. After various enquiries, including interview of the driver of the vehicle Mr. Kenneth Dickinson, examination of vehicle, load and analogue tachograph records, interrogation of operator licence records and communications with Mr Mark Lyons the director of the Applicant, the DVSA Traffic Examiner (TE) and his line manager Senior TE Paul Berriman determined that there was reason to believe that the vehicle was being used in breach of section 2 of the Act. DVSA records showed that after previous encounters with the Applicant's vehicles in 2017 the Applicant had been sent two separate letters warning it of the risk of impounding if the relevant rules on cabotage were not complied with in future and, thereupon, the Operator had been placed on the DVSA potential 'impounding list'. DVSA duly impounded vehicle B 2234 BP ('the impounded vehicle') at 12.30 on 30 July 2018.

3. An application for return of the impounded vehicle has been made by the Applicant.

4. The Traffic Commissioner for the North-East of England determined that a hearing should be held to consider the application. This hearing of the Applicant's application for return of the impounded vehicle took place at the Office of the Traffic Commissioner, Leeds on Tuesday, 11 September 2018. The Office of the Traffic Commissioner had prepared an indexed bundle of documents, including the GV500 application form completed by the Applicant, for this hearing ('the Bundle'), which was also provided to the Applicant and the Respondent.

5. The Applicant attended the hearing acting by its director Mr Jonathan Mark Lyons (known as Mr Mark Jonathan Lyons), represented by Mr Christopher Powell, Solicitor of Clarke Tinkler LLP t/a Smith Bowyer Clarke.

6. TE Dean Minter, based at Beverley HGVTS, attended to give and produce evidence on behalf of the Respondent. The Respondent was represented by Ms. Laura Newton, Solicitor of Rothera Sharp Solicitors.

7. DVSA produced some additional papers in support of its case and for the purposes of cross-examination shortly before the hearing, including the exhibits referred to in TE Minter's statement in the Bundle and two letters sent to addresses of the Applicant in Bulgaria on 16 June 2017 and 24 November 2017 alleging breaches by the company of the cabotage rules operating in Great Britain, contrary to section 2 of the Act. An application to exclude this evidence due to its late service was made for the Applicant, which was refused by me. The Applicant declined my invitation to apply for an adjournment to enable it to consider and respond to this evidence.

8. At the conclusion of the hearing on 11 September 2018, I reserved my decision in relation to the application for return of the impounded vehicle.

Ownership

9. An applicant must prove ownership of the impounded vehicle before their ground(s) of application can be considered. I need to be satisfied, on the balance of probability, that the Applicant is the 'owner' of the vehicle for the purposes of the Regulations. I remind myself that the burden of proof is on the Applicant. "Owner" is defined in Regulation 2 of the Regulations.

10. Mr Lyons gave oral evidence to me that the vehicle was purchased by, and remains lawfully owned by, the Applicant and to support this Mr Lyons produced a copy of a 'USED CAR INVOICE' no. F 0442 issued by Bob Kerr Sales , 160 Crevenagh Road, Omagh, Co. Tyrone, Northern Ireland, dated '12-10-17'.

11. The copy invoice is completed by hand and is made out to the Applicant. The vehicle is referred to by its registration mark YJ55 EOH, first registered in the UK on 17-10-2005. A chassis no is also given – XLER6X20005131783.

The invoice is annotated “EXPORT’. The purchase price is given as GBP 10,368.00.

12. Mr Lyons also produced a copy of a bank record of a customer credit transfer carried out on 16 January 2018 between ‘Raiffeisenbank’ Bulgaria and Barclays Bank London for an amount of GBP 10,368.00. The ordering customer is shown on this record as the Applicant and the beneficiary of the payment as “BOB KERR, OMAGH’, with a remittance reference given of ‘INVOICE 442’.

13. The Applicant also produced a copy of the impounded vehicle’s registration certificate issued by the Bulgarian authorities, registration B 2234 BP. This was issued on 13 October 2017. It gives the same chassis number for vehicle B 2234 BP as on the copy invoice for vehicle registration mark YJ55 EOH.

14. At page 19 of the Bundle is a copy of the insurance certificate produced to DVSA for the impounded vehicle. This shows the Applicant as the insurer with effect from 13 October 2017, which is the day after the date given on the invoice and the date of registration of the vehicle in Bulgaria.

15. In order to clarify the documentation supplied I asked Mr. Lyons to explain why the invoice, insurance and registration documents are dated 12/13 October 2017 but the banking record provided is for a payment made on 16 January 2018. Mr. Lyons’ response was, I find, unclear.

16. It is submitted to me that the foregoing evidence is sufficient to satisfy me that on the balance of probability the Applicant was the purchaser of the impounded vehicle, now registered in Bulgaria, and remained its lawful owner at the time it was detained by DVSA.

17. In assessing the evidence before me, I note that the documentary evidence produced by the Applicant is all copy documentation, with no original or officially certified copies produced at the hearing. It carries less evidential weight accordingly.

18. Further, the copy invoice produced is not signed by the Applicant to acknowledge delivery of the vehicle or by the seller to acknowledge payment and transfer of ownership.

19. A payment in the same amount as the purchase price and referencing the invoice number is evidenced by the copy banking records but at a later date without any credible explanation for the time difference so that there is a disconnection between the invoice and payment.

20. Notwithstanding the reduced probative value of the evidence as considered above, I find from the evidence viewed as a whole that the Applicant has discharged the onus on it to satisfy me, on the balance of probability, that the Applicant is the 'owner' of the vehicle at the time of its detention for the purposes of the Regulations.

The Impounding

21. The starting position in considering an impounding application by an owner is the power to detain contained in Regulation 3(1) of the Regulations. This arises if "an authorised person has reason to believe that a vehicle is being, or has been, used on a road in contravention of s.2 of the 1995 Act". Under Regulation 4, a vehicle detained under Regulation 3 shall be returned to the owner if either the person using it held a licence or if there had been no contravention of Section 2 of the Act. So, if an authorised person did have "reason to believe" as in Regulation 3, then they may detain; but they must return the vehicle if that belief is no longer sustainable, *per* Regulation 4. No concessions have been made by DVSA in relation to the impounding that there has been no contravention of Section 2 of the Act.

22. It is therefore necessary for DVSA to satisfy me that they had reason to believe that the impounded vehicle was being or had been used, on a road, in contravention of s.2 of the Act. The standard of proof required is the balance of probability.

23. I accept and adopt the following evidence given and produced by DVSA TE Dean Minter informed by the documented DVSA investigation, as well as the background set out above consistent with this evidence :

(i) his Statement dated 2 August 2018 and attachments contained in the Bundle at pages 11 to 26; and

(ii) Exhibits DRM/1, DRM/2 and DRM/3 referred to in the statement at (i) above, produced by DVSA on 11 September 2018 before the hearing;

(iii) The two 'pre-impounding' letters sent by DVSA to addresses of the Applicant in Bulgaria on 16 June and 24 November 2017 respectively alleging breaches by the company of the cabotage rules operating in Great Britain, contrary to section 2 of the Act, produced by DVSA on 11 September 2018 before the hearing;

(iv) the TE's responses to questions during the course of the hearing in examination in chief and cross examination, which are a matter of record as the hearing was recorded.

I found the evidence of the TE to be measured, objective and credible, consistent with and corroborated by the documents produced by him.

24. Unless permitted to do so under an exemption, it is unlawful in Great Britain 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 Act. Use of a goods vehicle in contravention of s.2 of the 1995 Act is a criminal offence.

25. I find from the evidence adopted above that DVSA had reason to believe that the impounded vehicle was being used for hire and reward and that (i) the user was the Applicant, a company registered in Bulgaria; (ii) the Applicant did not hold an 'operator's licence' in Great Britain, in other words a licence, issued by a Traffic Commissioner under the provisions of the Act; and (iii) the detained vehicle was not specified on any goods vehicle operator's licence in Great Britain on 30 July 2018.

26. I find that DVSA also properly considered if the vehicle was being operated within the 'cabotage' (or any other) exemptions to the general requirement to hold an operator's licence whilst operating in Great Britain.

27. One of the exemptions referred to in paragraph 26 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 Act). International carriage is defined by the EU 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 to carry a load from another Member State with the appropriate authorisation to bring an incoming international load into the United Kingdom will not be operating unlawfully.

28. By virtue of the EU Regulation, any haulier for hire or reward from another Member State whose vehicle has entered the United Kingdom whilst delivering an incoming international load and who then complies with the conditions set out in Article 8 of the EU Regulation, may also take advantage of a further exemption which is known as 'cabotage'. Article 8(2) of the EU Regulation 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 United Kingdom before the vehicle leaves the country. The EU regulation provides that 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 generally known as the 'three in seven rule'.

29. I have reminded myself of the Upper Tribunal's helpful guidance including detailed consideration of the foregoing rules on lawful cabotage operations set out in its written decision in Nolan Transport Appeal No. T/2011/060. The Nolan decision remains a lead authority for the Traffic Commissioners in Great Britain on the issues of international carriage and cabotage operations and the impounding regime. 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.

30. By Article 8 (3) of the EU Regulation national road haulage services carried out in the host Member State by a non-resident haulier shall only be deemed to conform with the EU Regulation if the haulier can produce clear evidence of the incoming international carriage and of each consecutive cabotage operation carried out comprising the following details of each operation:

> *(a) the name, address and signature of the sender;*

(b) the name, address and signature of the haulier;

(c) the name and address of the consignee as well as his signature and the date of delivery once the goods have been delivered;

(d) the place and date of taking over of the goods and the place designated for delivery;

(e) the description in common use of the nature of the goods and the method of packing, and in the case of dangerous goods their generally recognised description, as well as the number of packages and their special marks and number;

(f) the gross mass of the goods or their quantity otherwise expressed;

(g) the number plates of the motor vehicle and trailer.

31. In the Nolan decision the Upper Tribunal expressed its view that it is for the haulier to produce the clear evidence. The clear evidence must satisfy each and every requirement in the foregoing list set out at the end of Article 8.3. Unless and until the haulier has produced the clear evidence, (including evidence of the incoming international carriage), to satisfy all the requirements of Article 8.3 the haulier will be unable to show that journeys made after delivery of the goods carried on the incoming international carriage amount to lawful cabotage operations. It follows that unless and until the haulier produces the clear evidence so that the journeys are deemed to be lawful cabotage operations they must be considered to be national road haulage journeys in contravention of s.2 of the Act. It follows, in the judgment of the Upper Tribunal (see paragraph 48 of the Nolan decision), that if a vehicle, which is claimed to be conducting cabotage operations, is stopped and the clear evidence, which must be produced in accordance with Article 8.3 is not immediately available, that the authorised person who has stopped the vehicle will have reason to believe that the vehicle is being or has been used on a road in contravention of s. 2 of the Act.

32. Paragraph 53 of the Nolan decision makes it clear that the documentation must be made available at the roadside check and not at a later stage. The clear evidence required by Article 8.3 must be kept in the vehicle and must be made available for inspection at any roadside check.

33. I find that when requested by DVSA at the roadside check Mr Dickinson, the driver, failed to produce the documentary evidence of the incoming

international carriage or of any further journeys carried out as cabotage operations as required by Article 8.3 of the EU Regulation for lawful operation under the international carriage and cabotage operation rules.

34. I find that DVSA have demonstrated to my satisfaction that, on the balance of probability, vehicle **B 2234 BP** was lawfully detained by DVSA using the legal authority to impound vehicles under Regulation 3 because the DVSA officers had reason to believe that the impounded vehicle was being used on the road in contravention of section 2 of the Act.

The Application

35. For its application to succeed, it is for the Applicant to show, on the balance of probability, that one of the grounds set out in regulation 4 (3) of the Regulations has been established.

36. The ground for return of the impounded vehicle claimed by the Applicant, set out in the GV500 application form dated 20/07/2018 (*sic*) contained in the Bundle at pages 6 to 9, is that, at the time the vehicle was detained:

-the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle), (Regulation 4 (3) (a)).

37. Mr Christopher Powell applied on behalf of the Applicant to amend the application at the hearing to include a further ground for return of the vehicle, namely:

-although the vehicle was being, or had been, used in contravention of section 2 of the Act, the owner did not know that it was being, or had been, used in contravention of section 2 of the Act, (Regulation 4 (3) (c))

Mr Powell advised me that the original ground for the return of the vehicle was not withdrawn. DVSA did not object to the application to add the additional ground for return.

38. Dealing firstly with the application for the return of the impounded vehicle under Regulation 4 (3) (a), I find that a licence for the purpose of this ground is as defined in Regulation 2 of the Regulations, that is:

'licence' means an operator's licence (whether standard or restricted) as defined in section 2(1) of the 1995 Act.

I find that Section 2 (1) of the Act refers to a licence issued under the Act.

39. I find that the Applicant has failed to produce any evidence to satisfy me that on 30 July 2018 the user of the detained vehicle, the Applicant, held an operator's licence issued by the Traffic Commissioner under the Act. There is no record in operator licensing records that the Traffic Commissioner has issued a goods vehicle operator's licence to the user of the vehicle, the Applicant, under the Act. The application for the return of the vehicle under this ground is dismissed accordingly.

40. I then turn to the second ground now pleaded for the return of the impounded vehicle:

-although the vehicle was being, or had been, used in contravention of section 2 of the Act, the owner did not know that it was being, or had been, used in contravention of section 2 of the Act, (Regulation 4 (3) (c))

I find as follows.

41. The Applicant is a company based in Bulgaria, controlled by Mr Mark Jonathan Lyons. He is its sole statutory director. The Traffic Commissioners have in the past deprecated the practice of 'flagging out' haulage operations from Great Britain or Northern Ireland to another EU Member State where it is used as a device to avoid their jurisdiction in Great Britain or of the Transport Regulatory Unit in Northern Ireland. The 'flagging out' of haulage operations from Great Britain or Northern Ireland to Bulgaria is not however of itself unlawful provided the relevant EU Rules are observed, including the requirement to have an effective and stable establishment in the Member State in which the business is licensed.

42. Mr Mark Lyons confirmed to me that he was the Appellant in the appeal heard by the Upper Tribunal Mark Lyons t/a Lyons Haulage NT/2015/32. From this, I am aware that Mr Mark Lyons, and businesses carried on under the name of his wife, trading as Lyons Haulage have an extended history of non-

compliance in operator licensing in Northern Ireland. The decision on the foregoing appeal re-iterates much of that history to 2015.

43. In addition, Mr Mark Lyons confirmed to me at the hearing that the newspaper report, produced by DVSA and contained at page 23 of the Bundle, relates to him. This report was posted on Saturday September 24, 2016. It reports that Omagh lorry driver Mr Mark Lyons was fined at Belfast Magistrates Court on Tuesday (20 September 2016) for use of his company's Bulgarian registered commercial goods vehicle to transport animal feed in Northern Ireland on 3 March 2016 without the appropriate operator's licence for national operations in Northern Ireland and in contravention of the cabotage rules that would make such use lawful.

44. Mr Mark Lyons advises me that he runs some 10 goods vehicles under the authority of the Bulgarian operator's licence held by the Applicant and visits Bulgaria each month for 2-3 days. He spends time on these visits going over the company's accounts, invoices and ensuring the appropriate tax returns are completed, what he described as 'normal director's duties'. He explained that he is also in daily telephone and digital contact with his in-country transport manager who, he states, manages the day to day haulage activities of the Bulgarian company and had not made him aware of any problems.

45. Mr Lyons submits to me that he takes compliance with the rules on international haulage including cabotage operations 'very seriously'. His evidence to me is that he had no reason to believe that the company was not operating in compliance with the international carriage and cabotage rules prior to the impounding of 30 July 2018. He gave evidence to me that he had never seen the two letters sent by DVSA in 2017 produced by DVSA shortly before the hearing. He accepts that the letters were addressed to addresses of the company. He stated his belief that if such letters had been received his transport manager would have advised him of them, but he had not seen these before. He said that he had now read the letters and questioned how they would be read as 'warning letters', submitting that they merely re-iterated the rules the company has to follow.

46. I find, from reading the letters produced by DVSA that the sender is clearly shown as the DVSA 'Enforcement Compliance Team' in the United Kingdom. Each letter reiterates the EU Rules on lawful cabotage and includes the statement:

'It is apparent that your operation is in breach of the Regulation by not adhering to the cabotage rules set out above. The use of such vehicles in Great Britain is contrary to section 2 of the Goods Vehicle Licensing of Operators Act 1995.'

and concludes:

'You are hereby formerly (sic) notified that as of [30 June 2017 and 8 December 2017 respectively] any vehicles that our examiners have reason to believe are being operated by you in contravention of section 2 of the Goods Vehicle Licensing of Operators Act 1995 may be detained indefinitely.'

I have accepted the evidence of DVSA TE Minter that DVSA records show these letters were sent by DVSA. I do not find it credible that both of these letters were not received or were received but not drawn to the attention of Mr Lyons. They are clearly 'warning letters'.

47. Mr Lyons states in support of the ground pleaded by the Applicant company that he was not involved in the route planning or the paperwork associated with the related carriage carried out by the impounded vehicle - that was, he says, undertaken by his transport manager. He states that upon being notified of the impounding he contacted her and she sent him the CMR note and the letter from the Bulgarian driver by 'WhatsApp'. (WhatsApp is a messenger service owned by Facebook. The application allows the sending of text messages and voice calls, as well as video calls, images and other media, documents, and user location). He then forwarded these documents to TE Minter. He was unable to provide any further information or explanations when questioned at the hearing on these documents or the movements of the vehicle. He maintains that his understanding gained from speaking to his Transport Manager is that the vehicle travelled from the Republic of Ireland to Great Britain on Thursday, 26 July 2018 driven by driver Mr Veselin Georgiev Stoykov, who delivered the incoming load of 28,000 kgs of lime to the customer at Darlington the following day, Friday 27 July 2018. Mr Stoykov then drove the vehicle to Bradford and parked it up there for the weekend, leaving the CMR note in the vehicle. The vehicle was picked up on Monday 30 July 2018, in Bradford, by driver Mr Kenneth Dickinson. Mr Lyons stated that Mr Dickinson is a self employed driver who is no longer used by the company.

48. Whilst not fully completed with starting mileages and end journey destinations, the analogue tachograph records produced by DVSA, attached as exhibits to the statement of TE Minter, and adopted by me above show Mr Dickinson to be the driver of the impounded vehicle on 26 and 27 July 2018, not the Bulgarian driver. The journey on Thursday 26 July 2018 is recorded on the tachograph chart (DRM/3) as starting from 'Belfast', Northern Ireland, not the Republic of Ireland. The chart commences close to midday. An ANPR sighting of the vehicle was made at A1 Boston Spa, South Bound at 18:07:00 that day. The following day, Friday 27 July 2018, the vehicle's journey is recorded on the tachograph chart (DRM/2) as starting from 'Bakewell' Derbyshire. At 12:04:30 that day the vehicle was sighted by ANPR equipment at the M20 Ashford, Kent, East Bound. The following day, Saturday 28 July 2018, the journey is recorded on the tachograph chart (DRM/1) as starting from 'Colchester', Essex. At 07:32: 24 that day the vehicle was sighted by ANPR equipment at the A14 (M) Elmswell west bound. This site is sited near Bury St Edmunds, Suffolk. Between the starting destinations given on the charts of 26 and 27 July 2018 the vehicle is shown to have travelled some 684 kms (486,413 - 487,097). Between the starting destinations given on the charts of 27 and 28 July 2018 the vehicle is shown to have travelled some 566 kms (487,097 – 487,663).

49. Mr Lyons suggests to me that, from his recollection of previous charts seen by him completed by this driver, the handwriting on the tachograph charts is not that of Mr Kenneth Dickinson. I do not accept that the charts produced by DVSA are not those completed by the driver Kenneth Dickinson. I have accepted and adopted the evidence of TE Minter above, which includes his account of the interview of Mr Kenneth Dickinson, also witnessed by Senior TE Berriman. I prefer the evidence of TE Minter concerning the charts and his interview of the driver concerning these which I find is wholly consistent with the charts being genuine, those of the driver and completed by him.

50. DVSA submit to me that the CMR emailed to them on 30 July 2018 is incomplete and that, in any event, the evidence summarised in paragraph 48 shows this document and the letter accompanying this from driver Stoykov to be untrue. I am drawn to conclude to this effect. The CMR document and the account that an incoming delivery was made by driver Stoykov from the Republic of Ireland on 26 July 2018 who then made the delivery on 27 July 2018 in Darlington and then drove and parked the vehicle in Bradford, leaving the incoming CMR ref 69221 in the truck, does not hold true against the

remaining body of evidence considered and adopted above which includes objective ANPR sightings that are not inconsistent with the tachograph records also produced, which the driver on 30 July 2018 sought to conceal. Mr Lyons could not explain on questioning by DVSA how the CMR ref number 69221 could be produced on 30 July 2018 if it had been left in the truck as claimed or the inconsistency of his account of driver and vehicle movements with the tachograph records and ANPR sightings record produced by DVSA.

51. Mr Lyons reiterated that he had relied wholly on his transport manager who had been responsible for the routing of the vehicle and who had provided the records produced and that he did not know of any use in contravention of the relevant rules.

52. I have reminded myself of Senior Traffic Commissioner Statutory Document No. 7 on Impounding dated December 2016 and the guidance offered by the Upper Tribunal (and its predecessor jurisdiction, the Transport Tribunal) in determining appeals of Traffic Commissioner decisions in previous impounding cases made relying upon this same ground, particularly in determining the appeal of Nolan Transport cited above.

53. The burden of establishing the lack of knowledge is upon the Applicant. It is necessary for me to consider what is meant by the word 'know' in Regulation (4) (c) of the Regulations. The concept of knowledge for legal purposes is not confined to actual knowledge in its simplest sense and, in certain circumstances, it is possible to find knowledge even if the pertinent information was not in fact known by a person at the relevant time. In its decision on Appeal No: T/2003/3, Close Asset Finance Limited the Transport Tribunal found that it could not be limited to actual knowledge because Parliament could not have intended that an owner could be permitted to shut his eyes to the obvious. The purpose of the Regulations, I find, is to prevent owners knowingly (in the sense considered further below) permitting or facilitating the unlawful use of their vehicles and a purposive approach to the interpretation of the word 'know' in Regulation 4 (3)(c) is appropriate.

54. The Transport Tribunal and its successor body, the Upper Tribunal, has at various times considered the various states of knowledge that may be involved, that were analysed by Millett J in *Agip (Africa) Ltd v Jackson [1992] 4All ER 385* at 405, following the graduated scale suggested in the judgment of Peter Gibson J in: *Baden v Société Générale pour Favoriser le Dévelopement du*

Commerce et de l' Industrie en France SA [1992] 4 All ER 161. These were considered again in careful detail by the Upper Tribunal in determining the appeal by Nolan Transport (cited above) and the following amended categories of knowledge were found to be appropriate and have been applied by me in considering the Applicant's knowledge for the purposes of Regulation 4 (3) (c) of the Regulations:

(i) *Actual knowledge;*
(ii) *Knowledge that the person would have acquired if he had not wilfully shut his eyes to the obvious;*
(iii) *Knowledge that the person would have acquired if he had not wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make;*
(iv) *Knowledge of circumstances that would indicate the facts to an honest and reasonable person; and*
(v) *Knowledge of circumstances that would put an honest and reasonable person on inquiry.*

These principles on the issue of knowledge were followed by the Upper Tribunal in their decision upon the appeal Societe Generale Equipment Finance Limited v VOSA T/2013/021, with further helpful guidance given in that decision to Traffic Commissioners on approaching the issue of knowledge for the purposes of an application made under the ground set out in Regulation 4(3) (c), which I have followed.

55. Mr Lyons has given evidence at the hearing with a view to demonstrating to my satisfaction that he, the sole director of the Applicant and so the Applicant, probably did not know that the impounded vehicle was being or had been used in contravention of the Act. I therefore must assess that evidence.

56. The Applicant has the difficult task of proving a negative that is that the company did not know, in any of the 5 connotations considered above, that the impounded vehicle had been or was being used in breach of section 2 of the Act when it was detained on 30 July 2018.

57. In this case the Applicant is a company. From the evidence before me two individuals are implicated in the management of the transport activities of the company - Mr Lyons as the company's sole director as well as the company's transport manager who Mr Lyons states manages the transport activities of the

company from her base in Bulgaria. He submits that he leaves the arrangements to ensure the company's operations are lawful to her as she holds the appropriate transport manager qualification (Certificate of Professional Competence) and it is her job to do this. Whilst the statutory directors are generally viewed as the hands and mind of a limited company I find that this may not be exclusively so in all cases.

58. I found Mr Lyons to be a less than compelling witness. He is linked to an extended history of non-compliance with the rules relating to the lawful operation of goods vehicles as referred to above. In effect, the Applicant company of which he is its sole statutory director is his '*alter ego*'. In the context of the history of previous non-compliance, involving both him and the company, Mr Lyons would reasonably be expected to take a very firm and active grip on managing and checking the company's compliance with the relevant laws on international carriage and cabotage to avoid further breaches of the rules concerning national operations in another Member State, including Great Britain and Northern Ireland. Despite stating to me in his evidence that he takes the rules on international carriage and cabotage very seriously, his evidence to me is that he was unaware of the impounded vehicle's movements, relies wholly on his transport manager to route the vehicles and to manage the related paperwork to comply with the rules and took the CMR and letter she provided to him on 30 July 2018 at face value, without further checks at the time or apparently since.

59. The CMR provided by Mr Lyons to DVSA is incomplete and is discredited by the DVSA evidence as found by me above. The statement of TE Minter, even without sight of the related tachograph exhibits, refers to tachograph charts bearing driver Dickinson's name and the registration number for the impounded vehicle, which the driver accepts on interview are his charts for journeys undertaken in the impounded vehicle on 26, 27 and 28 July 2018. It is immediately apparent that this conflicts with the CMR documentation and letter from the Bulgarian driver forwarded by Mr Lyons to DVSA. Despite this, Mr Lyons was unable to explain this when cross-examined by DVSA at the hearing and thereby implies that he had failed to make further enquiries of his transport manager prior to the hearing concerning the apparent discrepancies and the actual movements of the vehicle on these 3 days, which I find incredible given the seriousness of the alleged breaches. His evidence that he was not involved in the activities of the impounded vehicle is also contradicted by the

response given by driver Dickinson in the DVSA interview on 30 July 2018 to the question 'How do you get your work' of "Mark Lyons just rings me up if they are short, sometimes I have to drive to meet the driver'. Put simply, I do not find the evidence given by Mr Lyons considered as a whole, uncorroborated in any way, to be credible.

60. I find that Mr Lyons has failed to satisfy me that, on the balance of probability, he did not actually know the impounded vehicle had been or was being used in breach of section 2 of the Act (Category (i) knowledge under the categories of knowledge followed in the Nolan and Societe Generale decisions, cited above).

61. Further or alternatively, I find that Mr Lyons has failed to satisfy me that, on the balance of probability, he did not have imputed knowledge that the impounded vehicle had been or was being used in breach of section 2 of the Act (Category (ii) or Category (iii) knowledge under the categories of knowledge followed in the Nolan and Societe Generale decisions, cited above), in this case category (iii) knowledge, that is:

(iii) Knowledge that the person would have acquired if he had not wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make.

I do not find it credible that neither of the two pre-impounding letters were received by the company and seen by him, as found above. I find that the company and Mr Lyons were thereby put on notice of further apparent breaches of the relevant rules by these letters. I find that an honest and reasonable person in his circumstances would make inquiries of DVSA concerning the allegations as well as of the transport manager and the company's drivers, concerning the routing of journeys and paperwork to be kept with vehicle and would oversee this with a view to ensuring compliance. The evidence of driver Dickinson to DVSA on 30 July 2018 was that on taking over the vehicle the other drivers always take paperwork and delivery notes with them. Mr Lyons' initial response to DVSA was that the inbound CMR was with the Bulgarian driver. (It was only later that he stated the driver had left a copy in the impounded vehicles cab - and then that the truck must have been broken into and the CMR stolen when it could not be found). In the absence of such paperwork the vehicle could not be deemed to conform with the requirements to rely on the exemption afforded by the rules on cabotage operations considered above, even if there had been a relevant incoming

international carriage and the 3 in 7 rule on lawful cabotage could otherwise then be claimed. I find that Mr Lyons wilfully, that is deliberately and intentionally failed to make such enquiries, and failed to do so recklessly, that is with a lack of caution, not caring about the consequences of failing to make such inquiries. I find that such failings are with a high degree of fault given the poor compliance history of the company with the rules of lawful cabotage operations. I find the failings to be inherently dishonest.

62. Further or alternatively, I am advised by Mr Lyons that the day to day management of the transport activities of the company is carried out by the company's transport manager in Bulgaria. That is where the company has its effective and stable establishment for the purposes of the EU rules on operator licensing (EU Regulation 1071/2009). I find that the knowledge of the company under consideration which requires me to look behind its veil of incorporation would also include her knowledge in managing the transport operations for the company. No evidence has been provided by the Applicant to DVSA or for the purposes of this application directly from her. I find that the Applicant has failed to satisfy me that the transport manager did not know that the impounded vehicle was being or had been used in contravention of section 2 of the Act.

63. The application by the Applicant for the return of the impounded vehicle under the ground set out in Regulation 4 (3) (c) is dismissed accordingly.

Miss Fiona A Harrington, LL.B (Hons.), Solicitor
Deputy Traffic Commissioner (North-East of England)
17 September 2018