IMPOUNDING HEARING

APPLICATION BY CAPITAL DRIVEWAYS LTD

IN RESPECT OF VEHICLES FF58MHF, DK08JXU AND MX04CXP ON 12 NOVEMBER 2018

Background

1. On 18 September 2018 the DVSA impounded 5 vehicles that they believed were being, or had been, used on the road by Capital Driveways Ltd in contravention of section 2 of the Goods Vehicles (Licensing of Operators) Act 1995. This hearing relates to applications by Capital Driveways Ltd for the return of 3 of the 5 vehicles. This hearing was to be heard on 6 November 2018 and was conjoined with an impounding hearing in respect of applications by Ashley Ratcliffe for the return of the other 2 vehicles. Capital Driveways Ltd asked for, and were granted, an adjournment to 12 November 2018 because they required more time to consider the papers, some of which had only been received by them the day before the hearing.

The Impounding Hearing

2. John McLeod, a director of Capital Driveways Ltd, attended the hearing along with Iain Cahill, solicitor of Levy & Macrae Solicitors LLP, and a witness -David McGinnigle. The DVSA were represented by Senior Traffic Examiner Alexander Davidson, accompanied by Traffic Examiner Beverley Stoner.

The applications for return of the vehicles

3. Mr Cahill advised me at the beginning of the hearing that Capital Driveways Ltd were withdrawing their applications for FF58MHF and DK08JXU. I allowed Mr Cahill to withdraw the applications. So far as the remaining application for MX04CXP was concerned there was no dispute about the impounding being lawful.

4. The application stated:-

(1) The vehicle was a volumetric concrete mixer.
(2) Before 1 September 2018 volumetric concrete mixers were not subject to the operator licencing regime. The vehicle was impounded 17 days after the law changed.
(3) When the vehicle was impounded Capital Driveways Ltd did not know the law had changed.
(4) The previous owner had told Capital Driveways Ltd that a goods vehicle operator licence was not required for the vehicle as it was a special vehicle and was exempt from the requirement for an operator licence and the need for an annual test.
(5) Capital Driveways Ltd had taxed the vehicle as a special vehicle and had declared the vehicle as exempt from MOT testing.
(6) "On or around 6 June 2018, officers from DVSA attended at the yard used by Capital [Driveways Ltd]. The DVSA officers saw the volumetric mixer and discussed with John McLeod and David McGinnigle, that the vehicle was not subject to the operator license regime."

The DVSA resisted the application. I have had regard to Statutory Document No. 7 – Impounding, in determining the application.

The DVSA evidence

5. STE Davidson explained that the DVSA's position was that they were uncertain about the ownership of the vehicle.

6. STE Davidson gave evidence that the exemption of volumetric mixers from the licensing system has been a longstanding issue. Removing the exemption had been discussed by the DVSA with the industry from 2014 and there had been a DVSA consultation in 2017. The result of the consultation had been a formal notification in December 2017 that the exemption would be removed. From May 2018 volumetric mixer would require an annual test. From 1 September 2018 volumetric mixers would require an operator's licence.

7. The DVSA had begun a publicity campaign from December 2017. Press releases had been reported in the trade press.

8. In cross-examination STE Davidson stated that in addition to the trade press one only had to type "volumetric mixers licences" into Google to see articles discussing the imminent changes.

9. STE Davidson was asked in cross examination about what, if anything, the DVSA had said about the volumetric concrete mixer to Capital Driveways Ltd.

10. On page 58 of the Brief there was typewritten transcript of an interview of John McLeod carried out on 6th June 2018 by Traffic Examiner Aiton in the presence of Traffic Examiner McEwan. Most of the interview was concerned with another vehicle FF58MHF that had been stopped by the DVSA on 16 February 2018. FF58MHF was being used in breach of s.2 of the 1995 Act. The driver,

Derek Nicholls, had given false information to the DVSA that he was driving for Capital Haulage Scotland Ltd, a company that had an operator's licence. At the end of the interview TE Aiton said:-

"Q: I attended the Operating centre of Capital Driveways Ltd on Thursday 31st May 2018 and observed 2 heavy goods vehicles on site. These were FF58 MHF and MX04 CXP. FF58 MHF was parked up in the yard. However MX04 CXP was being used by an operator on site and was positioned facing out of the yard entrance. Is this vehicle currently being operated by Capital Driveway Ltd?
A: No vehicles have been used. We are getting all vehicles serviced and made to road standard right now."

11. Mr Cahill suggested to STE Davidson that Mr McLeod had not been talking about MX04CXP when he had given his reply. STE Davidson pointed out that the question had mentioned MX04CXP.

Capital Driveways Ltd's evidence

12. Mr Cahill began by leading evidence from John McLeod. Mr McLeod was the sole director of the company. He had been a director for about 8 months. He explained that the company laid driveways for private properties. He was an accountant and his role was purely to look after the financial side of the business. If someone wanted a driveway they would speak to Robert Kelbie "an outside consultant." There was an administrator in the office as well.

13. The company had applied for an operator's licence in March 2018. Mr McLeod had signed the application on 29 March 2018. He had instructed OLMC transport consultants, to handle the application and had signed a letter of authority on 23 March 2018. For some reason the application had not been submitted by OLMC until 8 May 2018. The application was for 4 vehicles. MX04CXP was not one of the vehicles that was going to be specified on the licence.

14. Mr McLeod had employed health and safety consultants – The Focus Group. He had asked them to act on his behalf with dealing with OLMC about getting the operator's licence. The Focus Group were the company's agents dealing with OLMC. Everything had been put in their hands from March or April 2018 for them to deal with.

15. Mr McLeod had told The Focus Group that the company would be using MX04CXP, a volumetric concrete mixer. The Focus Group had not told him that it would need to be covered by an operator's licence.

16. Mr McLeod had not been aware that MX04CXP required to be on an operator's licence. He had never been told by The Focus Group that it needed to be specified on an operator's licence.

17. MX04CXP had only been used on one day 17 September 2018 – the day before it had been impounded.

18. Mr McLeod had believed from 23 August 2018 that the company had an operator’s licence. Mr Mcleod said Mr McGinnigle of The Focus Group had told by him that OLMC said the company would have an operator’s licence within a week. The operator’s licence would not have included MX04CXP because he did not know that it needed to be specified on the licence.

19. When Mr McLeod spoke to Mr McGinnigle he had not been told that the law was going to change in just over a week and that MX04CXP would have to be specified on the operator’s licence.

20. On 6 June 2018 when Mr McLeod had been interviewed by the DVSA the interview had been mostly about FF58MHF. When he gave the answer he had not been referring to MX04CXP. MX04CXP had not been used until 17 September 2018. He had not been told by the DVSA that the law was going to change on 1 September 2018.

21. Mr McLeod spoke to a receipt that had been lodged by Capital Driveways Ltd. This showed that MX04CXP had been purchased from Concrete Taxi Ltd on 31 March 2018 for £34,800 including VAT. The company still owned the vehicle. The company was the registered keeper of the vehicle. The company had insured the vehicle since 9 May 2018.

22. I asked Mr McLeod what the company’s position was in relation to the other 4 vehicles that had been impounded for being used by the company in breach of s.2 of the 1995 Act. He said that the company accepted that it did not have any grounds for seeking the return of the other vehicles. The company thought it could recover MX04CXP because it had not been aware that it needed an operator’s licence to use a volumetric concrete mixer.

23. Mr Cahill then led Mr David McGinnigle. Mr McGinnigle was a consultancy adviser for the Focus Group. Their usual remit was health and safety advice. They had become involved with Capital Driveways Ltd at the end of February or the beginning of March 2018. They had agreed to look after the application for the vehicle operator’s licence to help Mr McLeod out.

24. Mr McGinnigle had not known about the change in the law about volumetric mixers. He had asked OLMC if the volumetric mixer needed to be put on the vehicle operator’s licence and they had told him that it did not need to be on the licence. He had not checked if the advice was correct and he took responsibility for that.

25. Mr McGinnigle had spoken to OLMC and had been told by them that the company would have an interim licence within a week. He had chased OLMC ten days later and he had been told that OLMC would chase it up with the case worker.

26. In cross-examination by STE Davidson Mr McGinnigle said that his colleague had spoken to the RHA and that one person at the RHA had said that there was a grace period for volumetric mixers and another had said that there was no grace period. This had occurred in July or August 2018. Later in response to

questions from me Mr McGinnigle said the conversations had been in the first two weeks of September 2018. He had spoken to Mr McLeod at the time and had told him that one person had told him one thing and another person had said another and that they needed to make sure that they had accurate information going forward.

27. Mr McGinnigle said that his company had submitted invoices for the work that they had done but Capital Driveways Ltd had not paid any of the invoices.

Decision on ownership

28. Capital Driveways Ltd produced evidence of ownership. I accept the evidence and find that Capital Driveways Ltd are the owners of MX04CXP.

Decision on knowledge

29. Regulation 4(3)(c) of The Goods Vehicles (Enforcement Powers) Regulations 2001 No. 3981 states that the grounds for return of a detained vehicle include:-

> "that, although at the time the vehicle was detained it was being, or had been, used in contravention of s.2 of the 1995 Act, the owner did not know that it was being, or had been, so used;"

30. Mr Cahill invited me to believe the evidence of Mr McLeod and Mr McGinnigle and to accept that Mr McLeod, and therefore the company of which he was a director, did not know that MX04CXP needed to be specified on a vehicle operator's licence from 1 September 2018. Mr Cahill submitted that I should ignore the other evidence in the Brief about the unlawful operation of 4 vehicles by the company. His position was that whatever the reason for the unlawful operation of 4 other vehicles the use of MX04CXP was because of ignorance of the law and that this demonstrated a low degree of fault on the part of the company. Mr McLeod had used OLMC and the Focus Group and he had been let down by them. The company had never been told by the DVSA or anyone else about the change in the law. It follows from Mr Cahill's position that the fact that OLMC knew that there was no operator's licence was irrelevant.

31. I remind myself of the terms of Statutory Document No. 7 and in particular paragraphs 48 onwards.

33. The onus of proof regarding knowledge remains on the applicant seeking return of the vehicle. The starting point is to ask "*Is there any evidence before me on the basis of which I could be satisfied that the claimant probably did not know that the vehicle was being or had been used in contravention of the Act?*

34. Mr Cahill offers the evidence of Mr McLeod, that he did not know that the law had changed on 1 September 2018 and his ignorance of the law excuses the company's unlawful use of the vehicle. I agree that Mr McLeod's evidence could satisfy me that the company probably did not know that the vehicle was being or had been used in contravention of the Act. I have, therefore to go on to consider the evidence and to assess it. Turning to the five categories of knowledge set out in the Statutory Document and, in particular, the first three:-

(i) Actual knowledge

Do I believe Mr McLeod and accept that he did not know that the law had changed on 1 September 2018? I regret to say that I did not believe Mr McLeod. First, Mr McLeod is in an odd position. He is the only director of the company. He is an accountant with, he said, over 40 clients. He has only been a director from 1 February 2018. He said he only deals with the financial affairs of the company, however he also gave evidence that it was his decision and his initiative that resulted in the company applying for a vehicle operator's licence. It was not Mr Kelbie's decision, and Mr Kelbie seemed from Mr McLeod's evidence to be dealing with the business of the company (he was a director until 17 January 2017). I do not understand why the need for an operator's licence would fall within Mr McLeod's remit. Second, I did not accept Mr McLeod's evidence in relation to the interview on 6 June 2018. Mr McLeod stated that when he was asked about whether MX04CXP was being operated by the company when he said: "No vehicles have been used, We are getting all vehicles serviced and made to road standard right now", he was not referring to MX04CXP but to two other vehicles. I did not believe his answer. Mr McLeod did not challenge the record of the interview. It seems to me that it is absolutely clear that the questioner was asking about MX04CXP and that Mr McLeod's answer, although it dealt with 'vehicles' in the plural covered MX04CXP. Third, Mr McLeod was firm in his evidence that he had no knowledge that the status of volumetric mixers was going to change, or had changed from 1 September 2018. Mr McGinnigle, however, gave evidence that in the first two weeks of September he made inquiries of the RHA about whether volumetric mixers needed to be on an operator's licence, that he had received contradictory information and that he had told Mr McLeod about the uncertainty about the position. If Mr McGinnigle was right then Mr McLeod may not have known what the precise state of the law was, but he was certainly on notice that there was doubt about what the law was. I accept Mr McGinnigle's evidence about this matter. Mr McGinnigle had no reason to lie about this matter. It was not suggested to him by Mr Cahill that he was lying or mistaken. I do not believe that he would have been mistaken about this matter. As a result I find that Mr McLeod's evidence about his state of knowledge was less than candid. My overall impression from the way in which Mr McLeod gave his evidence that he was not telling the truth when he said that he did not know that the law changed on 1 September 2018.

Even if I had believed Mr McLeod, I would not have accepted that the company did not have actual knowledge. The onus is on the company to rebut the presumption that everyone is taken to know the law. I did not have the benefit of hearing from Mr Kelbie. The impression I took from Mr McLeod's evidence was that Mr Kelbie may be a shadow director of Capital Driveways Ltd. In the circumstances of this case where there was unlawful operation of a number of vehicles I would have needed to hear from Mr Kelbie about whether he, too, did not know that the law changed on 1 September 2018.

(ii) *Knowledge that would have acquired if he had not wilfully shut his eyes to the obvious*
If I am wrong about (i) I find that Mr McLeod, as director, wilfully shut his eyes to the obvious. Mr McGinnigle told him that he had spoken to the RHA and had received conflicting advice on whether or not volumetric mixers were covered by the vehicle operator's licence scheme. It was obvious, or should have been obvious to Mr McLeod that he needed to make further inquiries to find out what the true legal position was. Mr McLeod wilfully ignored the conflicting advice and did not investigate further so that the company could operate MX04CXP.

(iii) *Knowledge that would have acquired if he had not wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make*
If I am wrong in finding that Mr McLeod wilfully shut his eyes to the obvious, then Mr McLeod wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make. An honest and reasonable person would have taken steps to find out what the true position was by, for example, taking legal advice or contacting the DVSA. I find that the failure to make such inquiries demonstrates a high degree of fault on part of Mr McLeod and therefore of the company. This was not a simple mistake. Mr McLeod knew that at best the operation of MX04CXP without an operator's licence was of doubtful legality. He should have made further investigations.

35. For these reasons I find that:-
(1) Capital Driveways Ltd is the owner of MX04CXP;
(2) Capital Driveways Ltd do not satisfy the grounds set out in Regulation 4(3)(c) of the Goods Vehicle (Enforcement Powers) Regulations 2001 No. 3981 as amended.
The application for the return of MXO4CXP is refused.

Hugh J. Olson
Deputy Traffic Commissioner
27 November 2018