



E W GARDNER & GRANDSON LTD

**OH1027686
OG1053724**

TRANSPORT MANAGERS:

**ALEXANDER HUCKER
CRAIG HUCKER**

PUBLIC INQUIRY IN BRISTOL

13 MAY 2019

DECISION

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

Pursuant to findings under Sections 26(1)(c), 26(1)(f) and 27(1)(a), professional competence and good repute licences OH10287686 and OG1053724 are revoked. To allow for an orderly closedown of the business, revocation will take effect from 23:59 hours, 3 August 2019.

Following a finding of loss of good repute as transport manager, Craig Hucker is disqualified from acting as such in any member state for a period of three years.

Following a finding of loss of good repute as transport manager, Alexander Hucker is disqualified from acting as such in any member state for a period of one year.

BACKGROUND

1. E W Gardner & Grandson Ltd is the holder of two standard national operator’s licences. OH1027686 authorises the use of thirty vehicles and thirty trailers from an operating centre in Avonmouth with twenty-four recorded as in

possession. OG1053724 authorises twenty vehicle and twenty trailers from Alexandra Docks in Newport; three are recorded. The Avonmouth licence came in to force on 2 January 2004 with the Newport operation authorised two years later. The sole director is Alexander (Alex) Hucker. He and Craig Hucker are the transport managers. Alex and Craig Hucker also hold a partnership licence, OH1010754.

2. The operator was called to a public inquiry in 2012 following concerns in relation to unauthorised parking and poor maintenance. The licence was suspended for two days with undertakings for a transport manager refresher course and operator licence awareness training. In 2016, the company attended a preliminary hearing in relation to maintenance and was issued a formal warning.
3. The operator has since had a number of Traffic Examiner encounters with DVSA. On 23 November 2017, a 2-axle vehicle towing a trailer with an overall maximum permitted weight of 11,000 kg was driven by a Mr Paul Brown. Mr Brown held a C1+E entitlement with a 107 restriction which places an overall weight limit of 8,250 kg. On 21 December 2017, vehicle EX58UPF was encountered at DVSA's Exeter facility. The driver was Lee Cooper. Analysis of Mr Cooper's tachograph records identified a large number of offences.
4. On 28 December 2018, Traffic Examiner Amy Comer was on a mobile check with Avon & Somerset Police when she encountered KY08FBC. Analysis of the records of driver Mr Petkov identified that he was not recording daily walk-round checks and had a historic weekly rest offence. On 4 January 2018, Traffic Examiner Comer encountered vehicle DU12BUO and found it to be 620 kgs over its train weight. The trailer was allowing the load of rubbish to spill out over the M4. It was prohibited with immediate effect. The driver, Mr Scott Baird, was found to have large scale drivers hours offences. This final check caused Ms Comer to request from the company all tachograph and related records. The operator was unable to comply but did arrange for vehicles to be provided to Ms Comer for her to download herself at her convenience.
5. Ms Comer also reported apparent unauthorised operating centres and other matters.
6. Vehicle KY08FKE was encountered at a DVSA check at Tormarton (J18, M4, near Bath) on 8 February 2018. The AdBlue tank was full but the gauge was showing half-full. This led to greater scrutiny and the finding of a device thought to be designed to trick the vehicle's engine management system in to believing that the emissions control system was working properly when it is not. A delayed prohibition was issued to the vehicle along with specific instructions for clearance which involves a main dealer certifying the system as fit.
7. A follow-up investigation took place on 23 February 2018, led by Vehicle Examiner Ken Rozier supported by Vehicle Examiner Paul Crowley who undertook a general maintenance investigation. A number of vehicles were checked and no further devices were found. Review of the records for KY08FKE identified defect reports relating to the emissions control system up until the end of September 2017 when they stopped.

8. On 19 March 2018, KY08FKE was presented for MOT and the prohibition was cleared. It appears this happened without the vehicle having been taken to Volvo for re-certification.

9. This caused me to call the operator to public inquiry in the following terms:

Section 26(1)(a) of the Act, that the operator was operating from an unauthorised operating centre;

Section 26(1)(c)(i) and (ii) of the Act, that the operator or its drivers had incurred relevant convictions in the past five years;

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

Section 26(1)(ca) of the Act, that the operator or its drivers had been issued with fixed penalty notices;

Section 26(1)(e) of the Act, that the following statements made when applying for the licence were either false or have not been fulfilled:

- that vehicles would be inspected at 4-weekly intervals
- that vehicles would normally be kept when not in use at the nominated operating centres
- that relevant changes would be notified within 28 days

Section 26(1)(f) of the Act, that the following undertakings made when applying for the licence have not been honoured:

- that vehicles would be kept fit and serviceable
- that vehicles and trailers would not be overloaded
- that the rules on drivers hours and tachographs would be observed
- that relevant maintenance records would be kept for 15 months and made available on request
- that drivers would report defects effectively

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), that the operator may not have a stable establishment, be of good repute, of the appropriate financial standing or meet the requirements of professional competence;

under Section 27(1)(b), that the operator may not have a transport manager who is professionally competent and of good repute.

10. Mr Craig Hucker and Mr Alexander Hucker were called separately to consider their repute as Transport Managers under Schedule 3 of the Act. Whilst they also hold a partnership licence, there were no significant concerns with that operation and I did not call it to inquiry. A number of drivers were also called to conjoined driver conduct hearings.

THE PUBLIC INQUIRY

11. Mr Alex Hucker, Mr Craig Hucker and Ms Deanna Morgan attended for the operator represented by Scott Bell of Backhouse Jones. Also in attendance for the operator were Jack Evans and Gordon Humphries of Foster Tachographs. DVSA Traffic Examiner Amy Comer and Vehicle Examiner Kenneth Rozier attended as witnesses.
12. 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.
13. Finance was dealt with in private. Whilst not met for the current authorisation, there were viable options.

Driver Conduct Hearings

14. Mr Bell observed the driver conduct hearings which were heard first. Those decisions are given elsewhere. I record here only those matters which are relevant to the public inquiry.

Driver Robert Sheehan

15. Mr Sheehan was convicted of five false record offences and fined £220 per offence with costs of £363. Mr Sheehan had significant valid and evidenced mitigation for driving over hours but not for pulling the card to hide those offences. The offences were in the range of 22 to 53 minutes of driving without card. The most serious was one of 10 hours 59 minutes driving. There was no indication that the company had contributed to the offending.

Driver Leon Pope

16. Mr Pope was convicted of fourteen falsification offences and was fined £142 for each offence. Mr Pope told me he believed he could remove his driver card when the tractor unit was running solo. He had been in the habit, when working in the south west, of leaving the trailer in Taunton and driving home for the evening rather than staying out. The offences spanned June to December 2017 and generally hid something over an hour's driving which hid similar offences mostly in reduced daily rest. In one case, it was driving the truck whilst at a truck show. He had parked the tractor unit on a significant number of occasions on a quiet lane near his home. Sometimes he took the combination home with the card still in place. The operator was aware of those instances. He had never received any infringement reports from the operator at the time. Mr Pope initially indicated that Craig Hucker had condoned driving the truck without a card in the tachograph but, following a clarifying intervention from Mr Bell, withdrew that statement.

Driver Daniel Hoskings

17. Mr Hoskings was fined £267 for each of two falsifications. Each hid a break in a rest period. Mr Hoskings made allegations that Alex and Craig Hucker bullied him whilst he worked there and since he left. It was that pressure that caused him to offend. The offences were not the most serious; had the card not been removed they would have been fixed penalty offences.

Public Inquiry Submissions

18. Mr Bell submitted that it was over a year since a device had been found on one of the operator's vehicles. No-one knew what the device was doing. An audit by the Road Haulage Association in November 2018 had found no significant concerns. An audit by Foster Tachographs more recently had dug deeper and identified some concerns.

The evidence of DVSA Vehicle Examiner Kenneth Rozier

19. Mr Rozier adopted his public inquiry statement. He told me that there was a prohibition in October 2018 for a cut tyre but no other more recent encounters. Having reviewed the most recent records, there was an issue on some records with work done but no indication of a defect. Brake test was mostly reported as "static OK". Two inspections were late, one by one week, one by two. Drivers appeared to be missing, or failing to record, some defects. Some sheets were not signed off as roadworthy.
20. The operator had a roller brake tester but it wasn't being used on most inspections. Where roller brake tests were done, the brake tester was recording "insufficient weight on axles 2 and 3".
21. In response to Mr Bell, Mr Rozier accepted that, where driver defects appeared on a PMI on the same day that the driver had signed-off as nil defects, it was possible that the PMI had occurred first.
22. It was Mr Rozier who had issued the prohibition KY08FBE for a device fitted apparently to defeat the emission control system. The AdBlue emulator had been plugged in to the OBD2 socket of the vehicle. I referred to the defect sheets in the bundle that referred to faults with the emissions systems. Mr Rozier was of the view that a maintenance contractor attempting to diagnose those faults would have used the OBD2 port, unless the vehicle had a second such port. He was not aware of vehicles that had second ports but it was possible.
23. Mr Rozier had formed the view that the device was operational because two of the LEDs on it lit up with the vehicle's ignition. He had been alerted to the vehicle because a colleague had noticed that the AdBlue gauge said half-full but the tank was full. The device had not been removed from the vehicle in case that caused further damage. I summarised the apparent position. The operator had the vehicle in possession since 2014. In late 2017, the records indicated repeated emissions system faults. In February 2018, the vehicle was encountered with the device fitted and the emissions faults had ceased.

24. Mr Bell asked Mr Rozier what the emulator was actually doing when he encountered it. Mr Rozier said that the emulator was “fooling” the vehicle ECUs that the AdBlue device was working but it wasn’t. Mr Bell asked whether any investigation had been undertaken to confirm whether the device was actually doing that. Mr Rozier said that he had noted that fuse 10 had been removed and that the characteristic “puff of air” sound on that make of vehicle that indicated that the AdBlue dosing pump was operational was absent. A photo of the removed fuse could be made available (and was later in proceedings).
25. In relation to the prohibition removal, Mr Rozier would have expected the Vehicle Standards Assessor to see the manufacturer’s certificate of conformity prior to removing the prohibition. He could not remember how many of the operator’s vehicles he had checked for further devices, probably three or four, and nothing was found. The certificate of conformity had since been provided.

The evidence of Traffic Examiner Amy Comer

26. Ms Comer set out the background to her investigation. Following her first adverse encounter in December 2017, she had spoken with Craig Hucker in relation to the driver’s weekly rest offences and failure to record walk-round checks. She had sent the tachograph data to the company so that they could investigate.
27. On 4 January 2018, DVSA encountered DU12BUO driven by Mr Baird. His records were “appalling”. There were vast amounts of falsifications and drivers hours offences. Mr Baird was an inexperienced driver and was reliant upon his employer for advice. The vehicle was stopped because waste was blowing from the rear of it due to the gates not being properly shut. DVSA had a previous adverse encounter with Mr Baird.
28. Ms Comer referred to an occasion where a load, or partial load, of scrap bales at Avonmouth Dock, or just within the dock, fell off a trailer. Mr Bell submitted that this was within the docks and on private roads as part of a shunting operation.
29. Mr Bell asked Miss Comer about the failure to provide records in relation to two vehicles. Ms Comer felt she had been misled by the company who said that vehicles EU55ENO and SN53BPE had been used mainly for shunting. Ms Comer wished to refer to ANPR data which was only available on her laptop. (That was later done and it was accepted that there were 23 “hits” on 18 days on which the vehicles were in use on the M4 and for which tachograph records had not been provided.
30. In terms of the scale of the investigation, Ms Comer said that she had looked at more than 3 months of records and concentrated on the missing mileage. She did not look at every record for every driver for every day.
31. Ms Comer explained that the normal Traffic Examiner Visit Report had not been produced because the operator had given “no comment” responses in interviews. Mr Bell questioned why all the offences hadn’t been put to the operator. Ms Comer explained that a decision had already been made by her

line manager to refer the offences to the traffic commissioner rather than to prosecute so there was no need to put every offence to the operator.

32. Ms Comer agreed that her position would be that the operator had been negligent rather than deliberately fraudulent but also that the operator had gained a commercial advantage. She further accepted that there had been no triggers, prior to her 2017 encounter, for DVSA to be concerned at the drivers' hours compliance.

The evidence of Alexander Hucker, Director and Transport Manager

33. Mr Bell said that the operator acknowledged that management systems had fallen down in 2017/18. It appeared that the issues were resolved by the time of the RHA audit in November 2018. Fosters did have some criticisms but their approach was always more forensic.
34. Alexander Hucker told me that his transport manager qualification was by acquired rights. The business had been started by his father-in-law Mr Gardner. Mr Hucker had been involved for about 45 years. The business mainly bulk waste. There were two operator licences, one in Avonmouth and one in South Wales. The yard in Newport was parking only. Forty-five people are employed working twenty-seven vehicles, all artic tractor units and trailers.
35. In the office, he is supported by his son Craig. Two admin staff had left and had been replaced. Pauline and Chrissy, now gone, used to do the tachographs. Mr Hucker oversaw the activities. Chrissy was there at the time of the DVSA investigation, Pauline had already left. Mr Hucker thought Chrissy had been running missing mileage reports. She had been instructed to do it but he hadn't checked. It now appeared that she hadn't been producing the reports. Chrissy left the business two months ago following ill health.
36. It had become apparent there was a problem around the time of the DVSA investigation. There had been family issues and staff members had health concerns. He hadn't realised it was as it was.
37. In relation to Mr Pope, if he went to Cornwall he was meant to stay in the truck and be out all week. It was his decision to drop the trailer and travel home. He had no idea that drivers were parking their vehicles at home. He didn't know how many vehicles were tracked at that time.
38. Mr Baird had been dismissed. He had been stealing the trucks at night, either his own or someone else's by taking the keys from the workshop to drive home. He had even been seen in a breakdown van.
39. The workshop has eight technicians including fitters, body-shop, trailer boys and tyre fitters. They had their own brake tester since around 2017. The garage is managed by himself and Adam Stowell, foreman. But he and Craig both got involved. Maintenance records were checked by he and Craig, and Ms Morgan and Matt Loughman.

40. In relation to the driver not with the right category of licence, that was a private 7500kg truck taken by his handyman. He thought he could drive it. But he had put a little 2-tonne mini-digger on a trailer. It wasn't used as part of the business.
41. The loss of the bales of waste happened on road going in to the docks. It took about twenty minutes or half an hour to get it cleared. That operation was moving bales of waste, which looked like harvest bales, which were loaded on a flatbed. They were being moved from across the road in to the docks. The trailer now had a tailboard fitted.
42. When Miss Comer asked for the data and it could not be downloaded, ten vehicles were provided to her. Nine were downloaded immediately, one after a technical issue.
43. Mr Hucker apologised for the drivers hours matters. They now had Mark Loughman as an additional qualified transport manager and Ms Morgan was also assisting. A new laptop had been acquired to plug in to the vehicles. Infringement reports were being identified. Fosters had done a good job. A couple of staff were to attend a three-day refresher course. Having recognised that he was not sufficiently hands-on, future transport management would include Mr Loughman and Ms Morgan.
44. The emulator was not known to him. He had heard that people put things on vehicles. The vehicle came from a small guy in Avonmouth, Knowle Transport. Usually they are bought new from Scania. He had found out since that the truck had belonged to someone who had a licence revoked for an emulator. He had no idea the emulator was present. He knew nothing about emulators. Avonmouth Auto Electrics and PJM did electrical work for them. Having investigated, he thought that someone had tried to eliminate something wrong. The device must have been under the dashboard and someone must have plugged it back in. He wouldn't allow anyone to fit a device. DVSA had checked seven vehicles and all were clear. No other devices had been found since.
45. Mr Murphy (PJM) put the vehicle through MOT and then took it to Volvo later. He wasn't aware that it needed to go to a dealership before clearance. As soon as they found out that it had to go to a dealership, they took it.
46. The work involved a number of contracts such as Sims, Suez. There were no written contracts. A suspension of the licence would cause customers to go elsewhere and not return. Finances weren't as healthy as they needed to be because they had just bought new trucks and they bought them outright. A new metered AdBlue pump had been installed. Further training was booked with RHA for Craig and Ms Morgan. Mr Loughman had just passed his CPC. They were looking at auto-downloading of tachograph vehicle units. The failings were due to family issues and the loss of two key staff.
47. I took Mr Hucker back to the emulator device which he had said must have been on the vehicle when he bought it. I reminded him that the vehicle was first specified on the licence in 2014, four years before the device was found. I took Mr Hucker through the list of occasions on which the emissions system had been investigated and warning lamps reset. I pointed out to him that the method of reset would generally involve plugging a scan tool in to the OBD2 socket which would surely mean that the device would be seen. Mr Hucker told me

that the device must have been behind the dash and one of his maintenance contractors must have plugged it back in at some point. I thought it odd that a contractor would do that rather than look to charge for a proper repair. Mr Hucker had no comment.

48. Some of the driver reports referred to lack of pulling power. This was drivers not realising they had a full load on and that the Volvo wasn't one of the newest vehicles.
49. I returned to the proposition that everything had been fine until 2017 and then collapsed. Mr Hucker told me that there had been issues in the staff health and that his son's wife had walked out on him and he had been badly affected by it.
50. I took Mr Hucker to the "schedule of defects and fixed penalty notices" at page 302 and asked him whether he thought it normal that there would be seven pages of defects and fixed penalties for a business of his size. Even discounting the tyre defects given the conditions in which the vehicles operated, the list was extremely long. What action had been taken?
51. I asked why the roller brake tester appeared not to be being used with the PMIs noting only a "static test" of brake performance. Mr Hucker assured me it was being used and told me that the fitters must not be attaching the print-out to the PMI. They also used Scania for roller brake testing.
52. The incident involving waste blowing on to the M4 related to household waste. The trailer was twelve feet tall and had two nets. Some paper waste must have been lodged in the outside of the nets and this was what the DVSA examiner saw blowing out. The drivers could not have inspected the top of the trailer for "health and safety" reasons. They had spoken to Suez and told them to keep the load below the trailers and make sure there is nothing loose. We reviewed further prohibitions. A tyre with tread below the legal limit could have been done on the scrapyard in the morning or missed by a driver. Mr Bell cautioned me against looking at prohibitions prior to a warning issued by TC Miss Bell as a judicial decision had been made. I declined to accept his point of view, seeing the earlier prohibitions as an ongoing pattern of poor roadworthiness. We reviewed also drivers hours fixed penalties which had been incurred by drivers whilst the DVSA investigation was ongoing.
53. The RHA report indicated that all equipment was fitted with on-board weighing yet there were two overweight prohibitions. Mr Hucker told me that only the tippers had on-board weighing, not the "injector trailers".

The evidence of Craig Alex Hucker, Transport Manager

54. Mr Hucker could not remember when he had taken his original examination but had taken refresher training in 2016. The split between he and his father was that they worked "both together to be honest". Drivers hours analysis had been delegated to two members of staff. He did not check on the staff as often as he should. He had not been seeing infringement reports prior to the DVSA investigation. He and his father were now really involved with tachographs and had learnt a lot. Tracking was now on all the vehicles and tells him where they

are. It includes start and finish times, and how long the vehicles are stopped. There should be no further daily or weekly rest issues.

55. In relation to the emulator, the statement by Mr Hooper was not true. He (Craig Hucker) did not know why Mr Hooper would say that. The vehicle had been submitted to the maintenance provider for the issue to be fixed. He did not know whether the vehicle was using AdBlue. He didn't remember Mr Hooper raising the issue of AdBlue; he had reported "a few little lights on".
56. I asked Craig Hucker about the driver taking his vehicle home and asked why he didn't know. He told me that he didn't check at night where every vehicle was. He didn't know where the trailer was being left in Taunton. I asked why he didn't investigate where it had been kept: "I could have had but I didn't" was the response.
57. Driver Baird was "not a very nice person". He was employed for about 3 months. I asked how he could be "stealing" vehicles. Mr Hucker told me that the yard was locked but drivers and fitters had keys. The main gate was just pulled closed. There was a security man who came and went. They had identified that a vehicle had been taken on half a dozen occasions but there were bound to be more.
58. I asked why Fosters had been engaged and why so late. The engagement was on advice from the solicitor. Mr Hucker told me that he thought "the Road Haulage" was doing a perfectly good job. I noted that the actions all appeared to be recent developments. Mr Bell submitted that the operator should be given credit for engaging Fosters.

The evidence of Gordon Humphries, Foster Tachographs

59. Mr Humphries told me that he had spent many years undertaking drivers hours audits. The 6.8% starting point would not be the comparator with the DVSA Earned Recognition scheme. He drew a differentiation between drivers hours offences and tachograph offences (eg mode switch).
60. Mr Humphries saw a number of operators with a starting infringement rate of 6.8% such as when a driver had been in the habit of leaving a card in overnight.
61. Analysis of the infringements of Mr Pope identified that he would stop in the Taunton area from tracking and the missing mileage would be consistent with the journey from there to home. He was adding mileage by then driving from there to his home.

The evidence of Deanna Morgan

62. Ms Morgan had been employed by Gardners since May last year. She was a transport manager on two other licences. One was her husband which was authorised for three vehicles and operated two. The second was a seven vehicle authorisation where two were operated. She would relinquish the second licence if specified on Gardners. She took her CPC in 2012.

63. In the early days, Chrissie had made it very hard for her, withholding information. Ms Morgan now debriefed the drivers working with Craig Hucker. She attended a refresher course shortly after starting with the operator and had RHA attend to show her how to use their system properly. She was glad that Fosters had pointed out the shortcomings so that she could improve in the future.
64. The drivers saw her as “a dragon” and “scary”. She was now getting the operation to where she wanted it to be. Her husband had worked for Alex Hucker many years ago and she saw the job advertised on Indeed. It was full-time. She was employed as transport administrator. She started looking at defect sheets and the role had progressed. She now knew a lot about who the customers were
65. I invited Mr Bell to provide written closing submissions, given the many strands of the case and the evidence heard on the day. I also invited Vehicle Examiner Rozier to provide any further information relating to OBD2 ports on the vehicle in question.

Evidence following the hearing and closing submissions

66. Vehicle Examiner Rozier provided an email from Simon Tripp, Workshop Controller at Wales & West Truck & Bus, the Volvo main dealer in Avonmouth. It reads:
- “Hi Ken*
- I can confirm that the vehicle type in question, has 1 OBD socket (located close to steering column blue connector) and 1 diagnostic socket (located by pedals yellow connector).*
- When carrying out diagnostic work on this aged vehicle, we would only ever connect to the plug by the pedals (yellow connector)”*
67. Mr Rozier also supplied diagrams for the vehicle showing the locations of the two ports along with a wiring diagram which identifies fuse 10 as powering “NOx sensor, Road toll system”.
68. My office received an email from Deanna Morgan of the company. It reads:
- “I have been advised to forward you the attached photographs for information purposes, as recently at a public inquiry the DVSA officer was not aware that a Volvo truck does actually have two OBD plug in sockets. I have also included a attachment of the copy of the log book showing the previous owner and a attachment of the report from the Commercial Motor regarding Knowle Transport.”*
69. Mr Bell provided written submissions which I consider in making my findings.

CONSIDERATION AND FINDINGS OF FACT

The AdBlue Emulator

70. The first question I consider is whether an emissions cheat device was actually fitted to KY08FBE on 8 February 2018. It is accepted that a device of some description was indeed fitted to the vehicle. Vehicle Examiner Rozier describes the device as follows (page 253) *“On further investigation, I came across an “Ad Blue” emulator that had been fitted to the vehicle, behind the driver footwell lower dash cover. This by-passes the “Ad Blue” system and fools the other ECU in the vehicle in to thinking that the “Ad Blue” system is working, when in fact it’s not working at all”.*
71. So what evidence is there that the device was actually connected and doing anything at all to the emissions system? VE Rozier was alerted to the possibility of a cheat device by a colleague who noted that the AdBlue gauge was reading just over half full when the tank was completely full. VE Rozier produced at the inquiry a photograph of the vehicle’s dash showing the gauge at around half and a photograph of the AdBlue tank where fluid can be clearly seen in the filler neck itself. So there is a clear lack of correlation between the gauge and the reality.
72. Vehicle Examiner Rozier also produced a photograph showing that fuse 10 was missing from the fuse box. In his post-inquiry submission, he provides evidence from Volvo that identifies Fuse 10 as powering the NOx sensor. Where a NOx sensor fails, a warning lamp will illuminate on the dashboard and, after time, the vehicle will de-rate, or enter a “limp-home” mode. KY08FBE exhibited no such behaviour.
73. The driver on the day was Gavin Mark Hooper. He was subsequently interviewed under caution by Traffic Examiner Comer (page 257). The interview was primarily in relation to drivers hours and tachograph matters. Ms Comer then moves on to the device as follows (page 262):

Q. *Did you report to the operator that there was an ad blue issue?*

A. *Yes*

Q. *Who did you report this to, Alec or Craig?*

A. *Craig. I was away on holiday from 3rd to 16th July, on return from holiday Craig said that there was an issue with the vehicle’s Ad Blue that is going to be fixed and would be fixed as soon as possible. It was then fixed at some point and after 2 – 3 weeks of driving the vehicle I hadn’t added any Ad Blue and there was no warning lights on the vehicle dash and it was saying that Ad Blue on the gauge that it was 2/3 full and when looking in the Ad Blue tank was full to the brim. I raised this with Craig and he said that it had been legally switched off and that he was OK to run/drive the vehicle*

Q *Were you ever putting Ad Blue in to vehicle KY08FBE before you went on holiday?*

A *Yes likely to be every other day*

Q *Were you ever putting Ad Blue in to vehicle KY08FBE after you came back from holiday until the time you were stopped on 8 Feb 18?*

A *Never once, it was full the whole time*

74. Mr Bell submits that Mr Rozier undertook no investigation to establish whether the device was working at the roadside. Mr Rozier told me that two lights on the device illuminated when the ignition was switched on. He further told me that the vehicle did not produce the characteristic “puff of air” sound when the ignition was switched on, the sound indicating that the Ad Blue system was live.

75. In summary, there is a device fitted to a diagnostic port on the vehicle. It illuminates with the ignition. A tell-tale sound is not emitted as would be expected. The NOx sensor appears to be inoperative because a fuse has been removed yet there is no warning on the dash. That fuse would appear to have been deliberately removed. The driver’s evidence in interview under caution is that the vehicle ceased using Ad Blue at some point after July 2017. Mr Bell puts forward no evidence to support any contention that the device fitted to KY08FBE was an emulation device designed, as VE Rozier put it to “*fool the other ECU in the vehicle in to thinking that the “Ad Blue” system is working, when in fact it’s not working at all*”. I find as a fact that the device fitted to KY08FBE was deliberately fitted, was intended to defeat the emissions control systems required by law to be fitted to vehicles to protect public health, and was actively doing so.

76. The next question I pose myself relates to the state of knowledge of the operator and the transport managers. The evidence of driver Hooper appears damning. Mr Bell submits that it is unfair to use it without him having had the opportunity to cross-examine the driver, and that he had expected the driver to be present at a conduct hearing as indicated in the operator’s call-up letter. There is something in that latter point. Mr Hooper was originally to be called in relation to the drivers hours matters. However, he had surrendered his vocational entitlement for other reasons so no call-up was issued. Mr Bell may well have been expecting to see him at the inquiry however, as Mr Bell reminded me, he had no part in the driver conduct proceedings. He was invited to witness them should any driver raise any points that were detrimental to his clients and, indeed, I allowed him to clarify a point with driver Pope. Absent live evidence from Mr Hooper, I do apportion less weight than had he been present.

77. The evidence of Mr Hooper should be seen in the context of the analysis of maintenance records undertaken by VE Rozier (page 255). Driver “Gav”, presumably Gavin Hooper, reports emissions-related defects on 19, 20 and 21 July 2017, 11, 21, 22 and 23 August. A “regen fault” is repaired at PMI on 22 July. On 12 September, the PMI identifies “Ad Blue fault” with rectification as “Volvo”. No evidence of that rectification was ever provided despite a specific request to do so both orally and in writing (page 274). On 25 September 2017, the vehicle had a used NOx sensor fitted by PMG Fleet Services. No further

emissions issues were identified thereafter. Set in that context, the evidence provided by Mr Hooper in interview under caution carries more weight.

78. Alex Hucker contended that the device must have been hidden behind the trim panel unconnected and then someone connected it. Unusually, this vehicle had been one of two Volvo units bought second-hand from a local dealer. They had then heard that the previous owner had a licence revoked at public inquiry for use of an emulator and that supported his assertion that the previous owner/operator had fitted the device. Deanna Morgan sent further supporting evidence of this after the inquiry and Mr Bell repeats the allegation at paragraph 12 of his submissions, though kindly without wishing to criticise me for having identified the wrong operator.
79. I did try to deal with the vehicle's history during the inquiry. The previous keeper, even on the V5 provided by Ms Morgan, is "Knowles Transport Ltd, New Road, Wimblington, March, PE15 0RG". Knowles Transport Ltd is also identified as the previous operator on the VOL system. It would appear to be named after its founders and its current directors are shown on Companies House as Pamela, Anthony and Alexander Knowles. It is the holder of licence OF0065355 which is valid. Ms Morgan included a Commercial Motor article dated 15 February 2018 entitled "*Knowle Transport loses o-licence for multiple counts of AdBlue evasion*". Closer inspection of the article more specifically identifies the operator as Denise Maxwell, trading as Knowle Transport, who held OD1102524 based in Knowle, Birmingham. There is no connection with Knowles Transport Ltd of Cambridgeshire. That line of argument on behalf of the operator is devoid of merit.
80. I asked VE Rozier whether the device would be seen by anyone seeking to diagnose an emissions defect. His view was yes, unless the vehicle had a second OBD port. The evidence of Simon Tripp, workshop controller at the Volvo dealer concerned was that they "*would only ever connect to the plug by the pedals (yellow connector)*". Unfortunately, whilst the device was definitely fitted to the plug by the pedals, the photograph provided by VE Rozier show the pedal plug also to be blue. This may be simply because it was changed at some point but the lack of agreement between the two sets of evidence diminishes to a degree the weight that I can apply to this line of logic.
81. As transport managers, Craig Hucker and Alex Hucker are between them expected to have scrutinised the PMI reports. The report dated 12 September 2017 identifies an AdBlue fault with rectification as Volvo. That rectification work is not signed-off as having been completed although someone does sign the roadworthiness declaration. Messrs Hucker should have been on notice at that point that a defect existed and should have seen to it that the vehicle was actually rectified. In fact, it appears that the vehicle did not go to Volvo at all; at least there is no evidence from any party that it did. The next recorded happening is an invoice from PGM Fleet Services Ltd for a second-hand NOx sensor.
82. There is clear motivation for the operator not to have submitted the vehicle to a main dealer for repair. It was an older vehicle. Main dealer repairs to emissions systems regularly cost in the thousands of pounds. A cheap fix would be very attractive and that is supported by the apparent fitment of a used NOx sensor rather than a new one.

83. The various states of knowledge are helpfully set out most recently by the Upper Tribunal in the case of *Nolan Transport v VOSA & Secretary of State for Transport T/2011/60* as follows (para 110 *et seq*):

- (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.

84. The arguments for Craig Hucker having actual evidence stem from the statement of driver Hooper, whose evidence is lessened in weight by his absence from the proceedings but strengthened by the supporting documentation in the form of his driver defect reports. Both transport managers were on notice of the emissions defect from driver defect reports and the preventative maintenance inspections. Both had motivation to find a low-cost solution to a vehicle with a defect that had been recurring over many weeks. I find it significantly more likely than not that Craig Hucker had actual knowledge of the device being fitted to the vehicle to defeat its emission control systems. There is no evidence that Alex Hucker had actual knowledge, but his role as statutory director means that he should have had an inquiring mind. I find that he had, or was required to have, knowledge of circumstances that would indicate the facts to an honest and reasonable person. Further, given his evidence about his son's personal circumstances at the time, he should have been more involved. Not doing so amounts in my finding to wilfully and recklessly failing to make such inquiries as an honest and reasonable person should make.

Arrangements for maintaining the vehicles in a fit and serviceable condition

85. The maintenance investigation was led by DVSA Vehicle Examiner Paul Crowley. I am aware that Mr Crowley has since retired. The evidence for this section is Mr Crowley's report dated 19 March 2018, Mr Rozier's analysis of records brought to the public inquiry, audit reports provided by the operator produced by RHA and Foster Tachographs, the roadside compliance history and the oral evidence of the transport managers.

86. Mr Crowley identified an MOT failure rate over the two year period leading up to his investigation of 41% against a national average which, for the period 2016/17 was 17.2%¹. The roadside prohibition rate was 14 out of 26 encounters, or 54%. The relevant comparator here is DVSA's random fleet compliance survey. The latest figures available² identify prohibition rates of 11% for motor vehicles and 11.7% for heavy trailers.

¹ Source: gov.uk "Summary of annual tests for lorries, buses and trailers", published 29 March 2019

² Source gov.uk "Fleet compliance check summary report, 2016 to 2017", published 7 November 2017

87. Mr Crowley noted that a roller brake tester had been installed. RHA found that arrangements for brake testing “comply with the current Guide to Maintaining Roadworthiness 2018”. That Guide states the following:

“As per the annual test, every safety inspection must assess the braking performance of the vehicle or trailer. It is strongly advised that a calibrated roller brake tester (RBT) is used at each safety inspection to measure individual brake performance and overall braking efficiencies for the vehicle or trailer to the annual test standards. However, it is also acceptable to use an approved and calibrated decelerometer to measure overall brake efficiency values for vehicles without trailers.”

88. The evidence seen by Mr Rozier at the inquiry was that it was not being used with brakes on almost all inspections being signed off with a “static test”. Where it was being used, the vehicle was unladen clearly indicated by a warning to that effect on the printout. Foster Tachographs (para 2.31) inspected 30 vehicle PMI records and found 16 were accompanied by a roller brake test, or 53%. For trailers, there were 18 tests out of 24 inspections, or 75%. That means that approximately one in three inspections is non-compliant with the industry guidance, and that assumes that Fosters included only laden roller brake tests and there is no indication that they did so.

89. The Guide to Maintaining Roadworthiness is the industry standard for maintenance. Alternative arrangements can be accepted provided that the outcome is safe vehicles. Mr Bell submits that I must restrict myself to an analysis of prohibitions since the last preliminary hearing in July 2016. He argues that I can take in to account the warning issued but not the deficiencies which caused it. I do not agree with that, but the volume of prohibitions to be considered means that I am content to restrict my analysis to the last three years on this occasion. In doing so, I note that the prohibition rate for the last five years is 31% and rises to 39% when constrained as Mr Bell proposes it should be. Since the last hearing, the operator has been issued with two prohibitions for low service brake performance, five for defective brake components and a further three for ABS faults (note, in this final assessment, I note two prohibitions are recorded as issued on 22 May 2018, one to a trailer ID C241310 and the other to C243130. In all likelihood these are one and the same and I have treated them that way). The operator cannot argue that its alternative arrangements, the static test, are in any way satisfactory.

90. I accept Mr Bell’s submission that the vehicles are on arduous work and tyre defects, in particular, are to be expected. At least, I accept it insofar as tyre damage is hard to avoid. But, in the same three-year period, there have been two tyres prohibited for being below the legal wear limit. Of the twenty one prohibitions in total in three years, only five are for damaged tyres. None of the others appear to be for the sort of damage to be expected from landfill sites and tips. The root causes appear to be poor maintenance standards and poor driver checks. I therefore find that the arrangements for keeping vehicles fit and serviceable have failed.

Drivers hours and tachograph matters

91. Drivers have been convicted of falsifications. In the cases of drivers Pope and Baird, offending was habitual and serious. The operator accepts that there was a lack of proper analysis and gives an explanation in the personal circumstances of the staff involved, including Craig Hucker. I find that TE Comer was deliberately misled in relation to the missing analogue charts for vehicles EU55ENO and SN53BPE by “Chrissy” on behalf of the operator. Given the operator’s otherwise good cooperation with DVSA, on the drivers hours matters at least, it seems to me more likely than not that Chrissy was acting on her own in this regard and was not under instruction from either transport manager to mislead the examiner. That still leaves the point that the vehicles were used on at least eighteen days for which tachograph records have failed to have been produced.
92. The lack of drivers hours management systems is a serious failing. There appears to have been no meaningful analysis whatsoever in relation to the driving of vehicles with no driver card. In the positive, prior to December 2017, there appears to be no issue of drivers hours offending detected by DVSA at the roadside. However, the operator was on notice from that point onwards that there was an issue with drivers hours and tachographs and what is lamentable is that the Fosters audit in April 2019 still identifies a non-compliance rate of 6.8%. Mr Humphreys, the reports co-author, argued that 6.8% is not the worst offending rate and can be seen where, for example, a driver is in the habit of leaving a card in the tachograph head erroneously recording other work. It is not argued that those circumstances exist here.
93. Driver Pope initially stated that Craig Hucker was aware that he was driving the tractor unit solo without a tachograph card in the head to go home. He amended that position. I cannot make a finding of whether or not Craig Hucker knew Mr Pope was driving off-card but there appears to be nothing for the company to have gained by him doing so.
94. I was offered an explanation in relation to driver Baird that he was “stealing” vehicles at night to travel from Avonmouth to Fishponds in Bristol to visit his partner and that the company was not aware of that. That is an alarming explanation. I would expect any operator to know when vehicles are being taken from its yard. All operators should ensure they are kept safe and only used when authorised. The use of vehicles as a weapon is a serious issue. There is no suggestion that the operator colluded with Mr Baird, nor that it had actual knowledge. But the extent of his offending over a prolonged period is something of which the operator should have been aware. Ms Comer’s statement identifies twenty-two breaches, many serious, between 20 November 2017 and 16 January 2018. One in particular is of special note. On 25 November 2017, Mr Baird was on duty for a period of 25 hours 48 minutes. The longest period where the vehicle was not driven was 1 hour 39 minutes which Mr Baird attributed to other work. How can any transport manager allow such dangerous activity to occur?
95. There are positives. I accept the submission of Mr Bell, supported by an acceptance from TE Comer, that the operator did not cause drivers to falsify records. Drivers alleged that pressure was put on them to make deliveries but there is nothing to suggest that was any more than in any other commercial operator. There are systems now in place, albeit yet to yield anything like full compliance and, as the Foster’s audit clearly identifies, much still to do. The

RHA audit in autumn November 2018 did not pick up the shortcomings identified by Fosters.

Unauthorised operating centres

96. Driver Pope appears to have taken his tractor unit and, on occasion, full combination home more than once a week. I was not satisfied that the parking arrangements were appropriate. However, it does not support a finding that his home was the place where the vehicle was normally kept when not in use. I can find no other evidence that supports an allegation of unauthorised use of an operating centre.

Other matters in the call-up

97. DVSA included a reference to a crash and an allegation the vehicle was speeding at the time. I do not have sufficient evidence to make any finding. Neither can I make any finding in relation to an allegation just ahead of the hearing that one of the operator's vehicles had been observed speeding. I heard an explanation for waste being blown on to the M4. The lost load of bales of waste appears to have happened not on the public road.

98. It is alleged that the vehicle KY08FBE was used whilst under prohibition because the emissions prohibition was not cleared in the proper way. I have considered carefully how that may have happened. On 8 February 2018, two prohibitable defects were identified on the vehicle. Most unusually, two separate prohibitions were issued by two separate Vehicle Examiners, one by Mr Rozier for the emulator and one by a colleague for an ABS fault. So the operator was then in possession of two documents each prohibiting the same vehicle but for different reasons. It seems to me that, for whatever reason, when presented for clearance the DVSA Vehicle Standards Assessor saw only the ABS prohibition so was not alerted to the need for the franchised dealer certification. I make no assessment of why that happened. In any case, once the Assessor declared the vehicle as once again fit and serviceable, it was no longer under prohibition and, as far as I can see, no offence was committed by the operator in using it. The failure appears to be within DVSA's procedures albeit the circumstances were highly unusual.

Summary of findings against the Section 26 call-up legislation

99. I have found no evidence that the operator has been using an unauthorised operating centre. Section 26(1)(a) is not made out.

100. Drivers have been convicted of drivers hours offences including falsifications. Most of the offending is at a low to medium level however, in relation to two drivers, it is at the most persistent and serious level. It should have been identified by the operator at an earlier stage and stopped. Section 26(1)(c)(i) is made out. I attach significant weight to this finding.

101. The prohibition history is quite simply appalling. Serious defects are being found which appear to be due to poor maintenance and a lack of driver

diligence. Section 26(1)(c)(iii) is made out and I attach significant weight to this finding.

102. Fixed penalty notices have been issued. Section 26(1)(ca) is made out.
103. Vehicles have, in the round, been inspected at the specified intervals albeit but there has been a small degree of slippage. Some inspections are deficient in that there is no meaningful assessment of brake performance. Vehicles have normally been kept at the specified operating centre. I am not aware of any failure to notify relevant changes. Section 26(1)(e) is made out but I attach no significant weight.
104. The prohibition and annual test history clearly demonstrate that vehicles have not been kept fit and serviceable. Penalties have been issued for overloading. The rules on drivers hours and tachographs have not been met as demonstrated by the convictions on seven drivers. Records have been kept of driver defect reports and maintenance inspections. The nature of defects on prohibitions such as tyres worn beyond the legal limit indicates deficiencies with driver defect reporting. Section 26(1)(f) is made out. I attach significant weight.
105. No specific material change was alleged in the call-up letter. I make no finding whether or not that concern is made out.

Financial Standing

106. The operator accepts that financial standing cannot be shown for the current authorisation. A voluntary reduction is proposed. This is not a case where there is no finance. The fleet is mainly owned outright. Whilst I have found that the decision to fit an emulator was financially driven, that was a value for money not affordability decision. The operator has options. I make no adverse finding in relation to financial standing.

Professional competence and the transport managers

107. I find that Craig Hucker was responsible for causing the emissions cheat device to be fitted; Alexander Hucker did less than enough to involve himself when, on his own evidence, his son was under duress from personal issues. Both transport managers allowed drivers hours management to be wholly ineffective and that resulted in serious offending being allowed to continue. Maintenance has not been to the standard set out in the Guide to Maintaining Roadworthiness and the result has been unsafe vehicles in operation and a very poor MOT history. Whilst I was told Craig Hucker was responsible for planning, I was also told that duties were largely shared. I find that both transport managers have failed to deliver against their duties with serious consequences and each has therefore lost his good repute to act as such. The position with Craig Hucker is more serious given his involvement with the cheat device. These findings leave the company without professional competence and Section 27 is made out in that regard.

Good repute of the operator

108. Having found that both transport managers, one of whom is the sole director, have lost their good repute, a finding that the operator has forfeit its good repute must be considered. I look to the guidance to which I must have regard³ and the directions I must follow. Annex 4 provides a starting point.
109. I categorise the fitting of the emissions cheat device as a reckless and deliberate act which points towards a categorisation of “severe”, augmented by the fact that the operator has been far from transparent about the device since it was detected. Further, there has been a persistent failure to analyse tachograph records such that the falsifications and drivers hours breaches, which saw a driver on duty for twenty-five hours, were allowed to occur. The maintenance issues, quantified in the MOT and prohibition history also indicate persistent and serious failures which, even at the day of the inquiry, have not been addressed. Maintenance has been the subject of a previous public inquiry and a previous preliminary hearing.
110. The operator is not entirely devoid of positive features. The maintenance records and driver defect reports were such that VE Rozier could trace the history of the emissions issues with KY08FBE. VE Crowley noted that the operator had made some improvements since his previous visit. There has been transparency with the provision of the RHA and Fosters audit reports. Action has been taken. However, these do not offset the serious failings and I find that the categorisation remains “severe”.
111. Mr Bell in his submissions refers to an authority of (*Marion Urban vs Vames Penzugyorseg Eszak-alfoldi Reginalis Parancsnoksaga (C-210/10)*). He did not provide a copy but I have found one from an internet search. It relates to an appeal to the ECJ following a Hungarian case where a driver was found HUF 100,000 (£277 approximately) for a single offence of failing to enter a finish odometer reading on just one of a number of tachograph charts. In making its decision, the Court notes the following:
- 57As regards, first, the condition that the repressive measure must not go beyond what is necessary for the attainment of the objectives legitimately pursued by the legislation at issue in the main proceedings, it is necessary to that it would be possible for the competent national authorities to achieve the objectives also by means of less restrictive measures, **since in reality the infringement did not undermine the objectives of road safety and the conditions of drivers**, provided for in Regulations Nos 3821/85 and 561/2006.
- 58On the other hand, as regards the condition that the repressive measure must not be excessive in relation to those objectives, it must be held that, as is apparent from the order for reference, the amount of that fine is almost equivalent the average monthly net income of a salaried worker in Hungary. Consequently, the intensity of the sanction appears, in the main proceedings, disproportionate to the infringement committed. (emphasis added)
112. It is central that this was a situation that the Court held not to be road safety relevant. It was simply a driver failing to complete a centre-field correctly

³ Senior Traffic Commissioner Statutory Document No. 10 “The principles of decision making and the concept of proportionality”, December 2016

and who was fined the equivalent of one month's wages which was found to be disproportionate. I am surprised that Mr Bell equates that with an operator that has allowed a driver to be on duty for 25 hours, that has repeatedly operated vehicles with defective brakes, that has deliberately sought to subvert European Community public health measures and that has failed to improve maintenance despite two previous hearings. I fail to find that authority in any way relevant here.

113. I note the financial analysis provided by the operator which identifies break-even as being the operation of twenty vehicles and the operator's evidence that any suspension would mean the end of the business. The operator's position is that only regulatory action short of an overall curtailment to twenty is survivable. Twenty-seven vehicles are specified across both licences now so that, rather than the overall authority of fifty, is the starting point for any meaningful action.

114. In balancing the positives with the negatives, I am assisted by the helpful questions posed by the Upper Tribunal to assist traffic commissioners in determining whether a licence should continue or whether some other, non-terminal, intervention is appropriate. The lack of honesty with me in relation to the fitting of the cheat device and the persistent failure to deal with the ongoing maintenance matters over three hearings means to me that the answer to the "Priority Freight"⁴ question of how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime, is "very unlikely".

115. 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 understand that this is a moderately sizeable operation and many people will be affected. However, the work is regular and relatively local. There is a significant shortage of drivers in the industry generally and in Avonmouth in particular. However, the seriousness of the non-compliance is such that, even if that were not the case, I would still conclude that this is a business that needs to be brought to an end.

116. In relation to disqualification, I turn again to the statutory guidance and directions⁵. It reminds me, at paragraph 54, that, whilst there need not be an additional feature before a disqualification order is made, it is not automatic. In this case, I hold back from making any order for disqualification due to the positive features I have identified at paragraph 109 above.

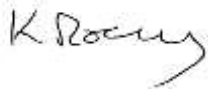
DECISION

117. Pursuant to findings under Sections 26(1)(c), 26(1)(f) and 27(1)(a), professional competence and good repute licences OH10287686 and OG1053724 are revoked. To allow for an orderly closedown of the business, revocation will take effect from 23:59 hours, 3 August 2019.

⁴ Appeal 2009/225 to the Transport Tribunal

⁵ Senior Traffic Commissioner Statutory Document No. 10 "The principles of decision making and the concept of proportionality", December 2016

118. Following a finding of loss of good repute as transport manager, Craig Hucker is disqualified from acting as such in any member state for a period of three years.
119. Following a finding of loss of good repute as transport manager, Alexander Hucker is disqualified from acting as such in any member state for a period of one year.
120. I propose to revoke licence OH1010754 on grounds of loss of professional competence and loss of good repute.



Kevin Rooney

**Traffic Commissioner
2 July 2019**