IN THE UPPER TRIBUNAL **Appeal No. T/2020/09**
ADMINISTRATIVE APPEALS CHAMBER **NCN: [2020] UKUT 325 (AAC)**
(TRAFFIC COMMISSIONER APPEALS)

IN AN APPEAL FROM A DECISION OF THE TRAFFIC COMMISSIONER for WALES MADE ON 23 DECEMBER 2019

Before:	M R Hemingway: Judge of the Upper Tribunal D Rawsthorn: Member of the Upper Tribunal S James: Member of the Upper Tribunal
Appellant:	Paccar Financial Polska Sp. Zo.O
Respondent:	Driver Vehicle Standards Agency

Attendances:

For the Appellant:	Mr S Clarke (Counsel)
For the Respondent:	Mr S Thomas (Solicitor)

Heard at:	Field House in London
Date of Hearing:	29 September 2020
Date of Decision:	20 November 2020

DECISION OF THE UPPER TRIBUNAL

THIS APPEAL TO THE UPPER TRIBUNAL IS ALLOWED.
THE DECISION IS REMADE IN TERMS SET OUT BELOW.

Subject matter: Impounding

Cases referred to: *Société Générale Equipment Finance Ltd. v Vehicle Operator Services Agency* [2013] UKUT 0423 (AAC); *Bradley Fold Travel Ltd v Secretary of State for Transport* [2010] EWCA Civ 695.

REASONS FOR DECISION

Introduction

1. This is an appeal from a decision of the Traffic Commissioner for the Welsh Traffic Area ("the TC") made on 23 December 2019, refusing the appellant's application for the return to it of a Polish-registered goods vehicle WGM54585 which had been impounded by the respondent.

2. We held a traditional face-to-face oral hearing of the appeal at Field House in London. The appellant was represented by Mr S Clarke and the respondent by Mr S Thomas. We are very grateful to each of them for their helpful and well-focused submissions. We were also assisted by helpful skeleton arguments from each of them.

The Relevant Law

3. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act") lays down a general requirement that, in order to use a goods vehicle on a road for the carriage of goods for hire or reward, a person must hold an operator's licence. But that requirement does not apply to the use of a goods vehicle for international carriage by a haulier established in a Member State other than the United Kingdom and not established in the United Kingdom (section 2(2)(b)). Article 8(2) of Regulation (EC) No 1072/2009 sets out the extent to which non-resident carriers from other Member States are permitted to operate national road haulage services. Such activity is known as "cabotage". Since 14 May 2010 this has been limited to three such operations within seven days following entry to the relevant Member State. Regulation 3 of the Goods Vehicle (Enforcement Powers) Regulations 2001 permits the detention of a vehicle being used on a road in contravention of Section 2 of the 1995 Act. Regulation 4 permits the release of a detained vehicle to its owner without the need for an application. However, where a detained vehicle is not so released, regulation 10 permits the making of an application for return to a TC. Regulation 4 sets out the grounds for return which are:

> (a) 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);
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> (b) that, at the time the vehicle was detained, the vehicle was not being, and had not been, used in contravention of section 2 of the 1995 Act;
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> (c) that, although at the time the vehicle was detained it was being, or had been, used in contravention of section 2 of the 1995 Act, the owner did not know that it was being, or had been, so used;
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> (d) that, although knowing at the time the vehicle was detained that it was being, or had been, used in contravention of section 2 of the 1995 Act, the owner:
>
> (i) had taken steps with a view to preventing that use;
>
> (ii) Had taken steps with a view to preventing any further such use.

4. Regulation 4(c) has been the primary focus of much of the litigation concerning the impounding provisions. Issues surrounding the concept of knowledge were examined quite exhaustively by the Upper Tribunal in *Société Générale Equipment Finance Ltd v VOSA* [2013] UKUT 0423 (AAC). The Upper Tribunal, in that seminal decision, identified five potentially relevant categories of knowledge as being;

(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 enquiries as an honest and reasonable person would make;
(iv) Knowledge of circumstances that would indicate the facts to an honest and reasonable person;
(v) Knowledge that would put an honest and reasonable person on enquiry.

5. The Upper Tribunal went on to explain as follows:

> "Category (i) should present no difficulty, it will require evidence of actual knowledge of the use in contravention. Categories (ii) and (iii) involve findings which justify imputing actual knowledge to the claimant. For the reasons set out in paragraph 118 in Nolan Transport no separate finding of dishonesty is required in order to impute actual knowledge to the claimant because the conduct, which will have been proved, if the required findings are made, is conduct which is in itself inherently dishonest. It is important to note that while it does not expressly feature in the definitions of knowledge in categories (ii) or (iii) proof of both these categories requires proof of a high degree of fault on the part of the claimant. Given that these two categories involve conduct which is inherently dishonest a finding that category (ii) or (iii) knowledge has been made out can only be justified once findings of fact have been made which satisfy the Traffic Commissioner that each of the ingredients of the category in question has been established. Categories (iv) and (v) involve constructive as opposed to actual knowledge…"

The Background Circumstances

6. The appellant is a finance company based in Poland. It is one of a number of finance companies owned by a larger company based in the United States of America. But the appellant is a separate legal entity to those other finance companies. The respondent is an executive agency of the Department for Transport and which has a wide range of functions including enforcement with respect to compliance with the law on the part of operators.

7. The appellant, it is not disputed, is the lawful owner of vehicle WGM54585. But the vehicle had been leased to another Polish company called PDF Transport SP. ZO.O ("PDF"). In fact, at all material times, the appellant owned in excess of five thousand commercial vehicles which were utilised by some 432 different operators under various types of finance agreement. Its business relationship with PDF had commenced in February 2015. On 7 February 2018 and 25 April 2018 enforcement action had been taken by the respondent with respect to two separate vehicles operated by PDF, neither of which were owned by the appellant but both of which appeared to have been owned by one of the other finance companies owned by the large American company. The enforcement action had been taken as a result of breaches of the rules regarding cabotage. On 11 May 2018 the respondent sent a "pre-impounding warning letter" to PDF regarding cabotage breaches. A copy of that letter was not sent to the appellant. On 24 July 2018 the respondent impounded a commercial vehicle owned by the appellant and leased under a finance arrangement to a haulage company named Heisterkamp. That vehicle was, in fact, subsequently returned to the appellant. On 26 April 2019 some further enforcement action was taken with respect to PDF and, on 6 September 2019, vehicle WGM54585 was impounded. That action was taken on the basis of a breach (and the breach is not in dispute) of cabotage rules.

8. The appellant applied for the return of the vehicle to it, arguing that the ground for return under regulation 4(3)(c) was made out because it had not known of the illegal usage of the vehicle by PDF. The matter came before the TC at a public inquiry ("PI") held on 20 November 2019.

The Public Inquiry

9. The appellant was called to the PI so that the TC could consider the application it had made under regulation 4 of the Goods Vehicles (Enforcement Powers) Regulations 2001 for the return of the vehicle to it. The appellant, through its representatives, sought to persuade the TC that it could bring itself within the terms of regulation 4(3)(c). In this part of our decision, whilst we summarise what we regard as important aspects of what was said at the PI, we do not attempt to faithfully reproduce everything which was said.

10. The appellant and the respondent were represented before the TC, as it happens, by the very same representatives who came before us. Two witnesses were called on behalf of the appellant, both of whom had provided witness statements in advance of the PI. The first of those witnesses to give evidence was Mr M Dabrowski, a director of the appellant. Taking his written and oral evidence together, he described the appellant company as being an "entirely separate legal entity". He had been appointed as a director in September 2012. The appellant had had a business relationship with PDF, which was "one of its customers", since February 2015. Thorough background checks are carried out on all new customers at the outset and, again, when further credit is (presumably subject to the result of those checks) to be extended. Prior to the current difficulties the appellant did not have cause for concern with respect to the way PDF was going about its business. There is a clause in the standard lease agreements used by the appellant which prohibits the use of any of its vehicles for illegal purposes. The witness had not previously (that is to say before the impounding) had sight of the pre-impounding letter of 11 May 2018. PDF had not notified the appellant that vehicle WGM54585 had been stopped for breaches of the cabotage rules and the witness had known nothing of such events until the impounding and the consequent proceedings. The appellant does not (though we were told at the appeal that this has subsequently changed) require sight of a Polish operator's

licence prior to leasing a vehicle to such an operator. The law in Poland does not require that. As to the vehicle which had been impounded whilst being operated by Heisterkamp, the appellant had informed Heisterkamp that it was not permitted to break cabotage rules and that, if it were to happen again, further credit would be refused. Heisterkamp was also informed it should no longer operate vehicles subject to a lease agreement with the appellant, in the United Kingdom. But the lease concerning the relevant vehicle had not been terminated because termination is difficult to achieve under legislation in Poland. The appellant is not able to control what various hauliers are doing on a day-to-day basis but tries "to make pressure on them or push them to fulfil all the regulations". Further, under Polish law the appellant is required to return an impounded vehicle to its client company unless the contract or lease has been terminated. In cross examination, the witness said that the various companies owned by the large American company and which are situated in Europe, have an annual meeting. The Heisterkamp operated vehicle had been returned to that company. Further credit had been given to PDF in July of 2018 (described as "extension credit line") but the witness had not known about the earlier concerns regarding PDF's lack of compliance with cabotage rules at that time.

11. The second witness called on behalf of the appellant was one Miss J Kacprowicz. Again, in summarising what she had to say, we take her written evidence and her oral evidence together. She explained that she is employed by the appellant as its credit manager. She had been so employed since 2012. She said it was her task to "manage the day to day relationship with" the appellant's customers. At the time the appellant was contemplating doing business with PDF she had carried out "all the usual background checks" which included matters such as verification of the proper constitution and registration of PDF as a limited liability company in Poland, meeting with the owners and directors and obtaining details of their background and experience as well as the nature of the business, checking the criminal records of the directors, employing an external credit referencing agency and carrying out background checks on PDF's own customers. It was the thrust of her evidence that these various checks had not thrown up any concerns. Since February 2015 further credit lines had been granted at various times. Similar checks had been carried out by the witness on each occasion. The company had been contacted by the respondent in July of 2018 regarding the impounding of vehicle WGM10756 (the vehicle which had been operated by Heisterkamp) and that vehicle was returned by the respondent to the appellant. As to other historical matters, in February 2015 a vehicle owned by the appellant which was the subject of a lease/ finance agreement with a different Polish operator (not PDF) was seized in the UK in connection with smuggling offences. The appellant, through its lawyers, eventually secured the return of that vehicle to it. Contracts between the appellant and that particular company were terminated but it was relatively easy to do so, at that time because the company was, in any event, behind with its payments. The witness confirmed that vehicles with registration numbers WGM7KX5, WGM7KX6 and WGM54587, were owned by the appellant and were the subject of finance agreements with PDF but she said she had no knowledge of any cabotage infringements with respect to any of them. She had checked with colleagues and no such matters had been reported to the appellant by PDF. Further, she had not seen the "pre-impounding letter" of 11 May 2018 until the current proceedings.

12. Some brief oral evidence was given by Helen Meechan, a Traffic Examiner, but what she had to say was not a matter of dispute.

The Traffic Commissioner's Decision

13. The TC produced a written decision of 23 December 2019. In that decision he reminded himself of various authorities including Société Générale Equipment Finance Ltd. v VOSA [2013] UKUT 0423 (AAC) and Nolan Transport v VOSA and the Secretary of State for Transport [2012] UKUT 221. He rejected a contention (not resurrected before us) that there was a separate test to be applied with respect to the proportionality of a decision to impound a vehicle. He summarised the evidence he had heard. He then said this:

> "72. My 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?"*
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> 73. Evidence has been put forward to me to assess, I am conscious that the burden of proof is on the applicant.
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> 74. The applicant's processes involve questions being asked and investigations are conducted as to the general financial and criminal bona fides of the entities that are provided with assets by Paccar Polska. Many of the questions posed are related to legal entity; convictions, credit rating and so on. Most queries are addressed through checks with various Member State sources (Polish equivalent of Companies House etc) and credit rating agencies. It is of relevance that checks were made as to how long customers have had relationships with PDF Transport Ltd, similarly the applicant has found out the sort of goods that are carried. All relate to financial relationships and financial sustainability. The degree of financial checking is high.
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> 75. A feature that I find quite surprising is how little or no checking is made of anything other than finances. Although the terms of leases provided in bundles referred to complying with laws, the witnesses for the applicants claimed that they could not enforce them. When pressed on this it was clear that although it was far easier to terminate a lease on the basis of non-compliance with financial terms, it was still within the gift of the applicant to terminate on other general grounds.
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> 76. Whilst there is no explicit legal requirement that a finance company must make inquiries either before or after entering into any transaction, whether or not an honest and reasonable person (including a finance company) would or not have made an inquiry is a question of fact to be determined according to the circumstances proved by the evidence in each individual case. If the honest and reasonable person would have made an inquiry in a particular case, the nature and extent of the inquiry is also a question of fact to be determined on the evidence in that case.
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> 77. Here the applicant had known of instances of illegal activities and had allowed the return of vehicles to the perpetrator of the illegal actions. An honest and reasonable person in this case would have systems to do more than ensure

financial controls. I accept that in many EU countries an operator's licence is not required for the carriage of goods which are on its own account (not for hire and reward), but an honest and reasonable person dealing with financing of heavy commercial vehicles would ensure that as a minimum there were queries and controls as to how valuable assets were to be used.

78. The businesses who are given financial facilities are involved in international transport and this inevitably requires compliance with the interpretation of legislation in different countries. I was told more than once that the volume of companies provided with assets are in the hundreds and the number of assets are in the thousands. It was asserted that the number that are financed is such that it is impracticable to know about and have control over cabotage and other rules in different jurisdictions. I do not accept that this is anything other than burying one's head in the sand with the outcome of avoiding questions which an honest and reasonable person would ask. That is especially so following incidents where Paccar Polska returned a vehicle following seizure by the regulatory authorities. Furthermore, in this case if the vehicle is returned by me the owner will return it to PDF Transport with a warning.

79. I am told of the limited number of staff who undertake checks within Paccar Polska, but that is a commercial decision made by an entity that sets out to loan assets to companies. I accept that it is cheaper for a finance company to avoid asking such questions and to avoid carrying out reasonable checks.
An entity providing finances to another undertaking involved in international haulage, would reasonably wish to protect that asset from being seized by regulatory bodies and yet this applicant carried out few or no checks on compliance with cabotage laws.

80. Although Paccar Polska is a separate legal entity to the other legal entities mentioned at the hearing and in the papers, the owner ensures that it usually has a meeting about once a year to discuss finances and profits. It was made clear that there was no discussion at these meetings of various entities owned by a common owner about illegal activities such as cabotage. If the basis of the finance companies was financial support for commercial vehicles, which undertake international haulage, it would surely be reasonable to expect discussion of the commercial risks associated with compliance and enforcement by relevant regulatory bodies. The fact that there was no such discussion is an illustration of a lack of attention or care about non-compliance with laws; those are not the actions required of an honest and reasonable person.

81. It was claimed that other finance companies in Poland have a similar approach, but these were mere assertions, which were uncorroborated by independent evidence. I add that if it happened that other finance companies in Poland adopted similar

practices to Paccar Polska, then I would come to the same conclusion. An honest and reasonable person with knowledge that some clients have vehicles impounded by regulatory bodies, would pay far more attention to general compliance than has been the case with Paccar Polska.

82. It was suggested that if a client of Paccar Polska has a vehicle detained or impounded and it is returned to Paccar Polska, then the presumption is that the vehicle would be returned to the client. That is not the action of a reasonable and honest person; that amounts to turning their eyes from the obvious. An honest and reasonable person would surely demand an explanation from the operator prior to giving a vehicle back to them. The practice of Paccar Polska of providing a mere warning indicates knowledge on the part of that entity but it is certainly not what objectively one would expect from an honest and reasonable person.

83. It was suggested by one of the applicant's witnesses that the applicant could not be expected to know how the law was applied in different countries. A general principle of the law is that an individual (or company) is deemed to know the law. I accept that it may be financially advantageous to fail to make enquiries as there will be some cost in conducting prudent checks.

84. I accept that there is no legal requirement for a finance company to make general enquiries. However, the evidence in this specific case shows that Paccar Polska had taken a surprisingly lenient approach to instances where it has known that there has been any non-compliance with regulatory (other than on finance). I contrast that with what an honest and reasonable person would do.

85. There is a high degree of fault in this case. That is illustrated by the evidence that if I allowed the return of the vehicle, the applicant will simply allow PDF Transport to have the vehicle back.

86. The onus is on the applicant to satisfy me on the balance of probabilities that it did not have knowledge of vehicle WGM54585 on 6 September 2019 being operated illegally. Applying the test set out by higher courts:

(a) Was there actual knowledge? I answer: No
(b) Was there knowledge that the person (in this case Paccar Polska) would have acquired if it had not wilfully shut his eyes to the obvious? There is evidence for me to conclude in the affirmative.
(c) Was there knowledge that the person (company) would have acquired if it had not wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make? I have answered

> the second question in the affirmative, so I do not need to answer this question but have summarised the evidence above.
>
> **Decision**
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> 87. For reasons set out, the appellant has failed to satisfy me that it did not have knowledge that vehicle WGM54585 on 6 September 2019 was being operated contrary to section 2 of the Act".

14. So, the appellant's application failed.

The Approach of the Upper Tribunal

15. In light of the content of paragraph 17 of Schedule 4 to the Transport Act 1985 (as amended) the Upper Tribunal, in hearing an appeal from a decision of a TC, has full jurisdiction to determine all matters, whether of law or of fact, but may not, on any such appeal, take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. As was explained by the Court of Appeal in *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695, the Upper Tribunal is not required to re-hear all the evidence given to the TC. It must determine matters of fact and law on the basis of the material before the TC. The appellant assumes the burden of showing that the decision appealed from is wrong. It is not sufficient for an appellant to show that there are grounds for preferring a different view. Rather, it must be shown that there are objective grounds upon which the Upper Tribunal ought to conclude that the different view is the right one. Put another way, the appellant must show that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by the TC whose decision is under appeal before it.

The Grounds of Appeal in this Case

16. There were three grounds of appeal, two of which were quite wide ranging, but all had been expressed with succinctness. In the circumstances we shall simply set them out in full. Those grounds were as follows:

> "(i) The Traffic Commissioner erred in law when determining that the return of an impounded vehicle to an offending operator was a material consideration going to the test to be applied in respect of knowledge.
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> (ii) The Traffic Commissioner erred in law when he found as a fact that the appellant had not made those enquiries which an honest and reasonable person would have made.
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> (iii) The Traffic Commissioner failed to properly apply the principles set out in the Upper Tribunal decision in *Société Générale Equipment Finance Ltd. v VOSA* [2013] UKUT 0423 (AAC)".

17. Fortunately, Mr Clarke provided a skeleton argument which clarified more precisely

the thinking behind those grounds. Such was certainly required with respect to ground 2 and ground 3. Mr Clarke was able to assist further in that respect, in his oral submissions to us. Mr Thomas had had sight of the skeleton argument in advance and, indeed, had prepared his own helpful skeleton argument. He too made oral submissions to us in order to deal with the points made in the grounds.

Our Consideration of the Arguments and Our Reasoning on the Appeal

18. It is perhaps worth reminding ourselves at this stage that there was much in the way of common ground between the parties. It was agreed that the appellant has been, at all material times, the owner of the relevant vehicle. It was agreed that there had been a breach of cabotage rules. It was agreed that, accordingly, seizing the vehicle had been lawful. The key issue was that of the knowledge or otherwise of the appellant under regulation 4(c) of the Goods Vehicles (Enforcement Powers) Regulations 2001. We also remind ourselves of the various types of potentially relevant knowledge as set out in the case law referred to above. We further remind ourselves, as is evident from the part of the TC's decision which we have set out above, that he had concluded, whilst there was not actual knowledge, such knowledge could be imputed under the second of the five categories identified in the case law mentioned above, on the basis that the appellant should be taken to have had "knowledge that the person would have acquired if he had not wilfully shut his eyes to the obvious". We also note that, as was explained in the Société Générale decision cited above, for such a conclusion to be reached a "high degree of fault on the part of the person or body seeking return of a vehicle must be established".

19. As to ground 1, the argument here is a narrow one. The TC, at paragraph 82 of his decision, had noted that, given the way the appellant approached such matters, there would be a likelihood that any impounded vehicle which it owned and which was impounded and then given back to it would be returned to the offending operator. He thought that such would amount to unreasonable action and to the turning of the appellant's "eyes from the obvious". The TC added that an honest and reasonable person would, first of all, demand an explanation from any offending operator and that the appellant's practice of issuing "a mere warning" was less than what would be expected of an "honest and reasonable person". Mr Clarke, however, argues that the TC was wrong to take into account the appellant's intentions as to the disposition of that vehicle insofar as it informed about the state of knowledge. In support of that argument he points out that regulation 4(1)(c) talks of knowledge "at the time the vehicle was detained." Therefore, the argument runs, what an owner of such a vehicle elects to do with it after its seizure and return "cannot thus be a material consideration going to the owner's state of knowledge at the time of impounding". Mr Thomas, for the respondent, argued that it was perfectly permissible for the TC to take account of the evidence which had been given by Mr Dabrowski that the vehicle would be returned, if it informed as to the state of mind of the appellant as at the time of the impounding.

20. The TC did not quite express himself in this way but in our view, bearing in mind the context and the background circumstances, he was really saying that what he thought to be unreasonable conduct on the part of the appellant in having a policy of, at least, usually, returning impounded vehicles was capable of informing and did inform, as to the likely general attitude and state of mind of the appellant at the time the vehicle was seized. In our view, in principle, it can be said that if a company or individual has a policy which suggests a reckless or cavalier approach to the return of vehicles to offending clients then that is capable

of informing as to what the relevant state of mind might have been as at the time a vehicle was seized. It might, for example, be capable at least with other evidence of indicating the likelihood of wilfulness (with respect to shutting eyes to the obvious) or a high degree of fault. We conclude, therefore, that the TC was not precluded from taking into account his view as to the general approach of the appellant with respect to the return of vehicles, which is all he was really doing, as an indicator of the state of mind of the appellant as at the time of impounding. The TC did not, therefore, err in law by taking into account an irrelevant factor. We find ourselves in agreement with Mr Thomas on the point. Ground 1, therefore, is not made out.

21. As to ground 2, the argument is that the TC fell into error by concluding that the appellant had not made enquiries which an honest and reasonable person (or company) would have made. Mr Clarke says that sufficient enquiries were made in this case on the basis of the evidence before the TC which he did not seem to reject, and that the TC had been wrong in characterising the various checks and enquiries which had been made as ones which were essentially limited to matters of finance, and therefore, to the appellants' own narrow business interests. Mr Clarke characterises that as an error of law on the part of the TC through, we suppose, misunderstanding the nature of the evidence which was presented on behalf of the appellant with respect to that specific point.

22. We have summarised the evidence given by Mr Dabrowski and Ms Kaprowicz, above. The TC also summarised that evidence in his written decision of 23 December 2019. We do not detect anything in what was said which amounts to disbelief of the factual evidence given. The key issue is whether or not the TC erred in law or was plainly wrong in concluding that the checks which he appeared to accept had been made by the appellant in relation to PDF were wholly or primarily related to finance.

23. We can see that some of the checks carried out at the time of the coming into being of the initial business relationship with PDF, and subsequently, were geared towards establishing that it had the financial wherewithal to meet its commitments to the appellant. It is, of course, understandable that a finance company would carry out such checks for its own selfish business purposes. Mr Clarke suggests, in his skeleton argument, that the enquiries went some considerable distance beyond the scope of mere financial matters such that what the TC had to say at paragraph 74 to the effect that the checks all "relate to financial relationship and financial sustainability" representing a misconstruing of the evidence. Having very carefully considered that argument, we have found ourselves to be in agreement with it. As the TC himself noted at paragraph 50 of his written decision, the "due diligence" carried out by Ms Kaprowicz in relation to PDF when it first applied for finance, included verifying its proper constitution and its registration in Poland against the Polish National Court Register. Further, there was a meeting between Miss Kaprowicz and the directors and owners of PDF and then, it seems, a further meeting. She had obtained details of the director's background, experience, the nature of the business activity undertaken and the identity of its suppliers and customers. Criminal record checks were undertaken. Background checks with customers were undertaken (page 53 of the written reasons) which "showed relationships to be good, stable and longstanding". There was no evidence before the TC that any of these checks uncovered anything untoward. There was evidence, again not rejected, to the effect that further checks had been carried out when further credit had been extended. In our view those checks encompassed a range of issues which were not simply geared towards the ability of PDF to meet its financial commitments to the appellant as and when it was required to do so. Rather, those enquiries also encompassed the general stability and reputation of PDF, its compliance

with registration requirements in Poland and the honesty and integrity (through the criminal checks) of its directors. We do note the thrust of Mr Thomas's argument to us that the appellant could have done more. In particular, we would accept a failing on the part of the company in not carrying out what, on the face of it, would seem to be an obvious check as to whether PDF held a valid operator's licence (which in any event it did). We were not surprised to be informed that, since the seizure of the vehicle, it has now changed its procedures to do that. We take Mr Clarke's point that, had such a check been carried out, it would have revealed that there was such a licence in place. But, nevertheless, the failure to check upon such a basic matter as that does suggest, if we can put it this way, a degree of slackness albeit that we accept that was an isolated failing in an otherwise relatively comprehensive checking procedure. It follows, from what we have said already, that whilst we accept the appellant could have done more by way of checking than it actually did, the checking it did carry out was not limited to narrow financial matters and that, in concluding that it was, the TC misconstrued the evidence. We conclude, therefore, that ground 2 is made out.

24. We now move on to consider ground 3 in light of our conclusion with respect to ground 2. As to that, the TC concluded, as already noted, that whilst the appellant did not have actual knowledge of the breach of the cabotage rules, there was knowledge that the appellant would have acquired if it had not wilfully shut its eyes to the obvious. It was that conclusion which led to the TC finding that the appellant had imputed actual knowledge of the wrongdoing. But given what we have found about the nature of the checks and enquiries which had been made of PDF by the appellant, we conclude that the TC's finding that the appellant had wilfully shut its eyes to the obvious is unsustainable. It had, as we say, made enquiries which had not led to concerns. The "pre-impounding letter" referred to above had not been sent to it. There was no evidence to show that PDF had informed it of the receipt of that letter. We find suggestions that there might have been other factors capable of alerting it to the conduct which led to the seizing of the vehicle speculative and unpersuasive. We find, therefore, that not only was there no basis for the "wilfully shut his eyes to the obvious" conclusion but there would not have been any basis, had the TC gone on to ask himself this question, for a finding that there was knowledge that the appellant would have acquired if it had not wilfully and recklessly failed to make such enquiries as an honest and reasonable person would make.

25. So, we have concluded that the TC did err as contended in ground 2 and ground 3 of the grounds of appeal. We asked the parties, at the hearing, what view they wished to take about disposal in the event of our deciding (as we have) that the appeal should succeed. Mr Clark urged us to remake the decision ourselves given his view that there had been a long period of time since the seizure of the vehicle and there was sufficient material before us to enable us to properly do so. Mr Thomas, whilst not expressing a clear view at the hearing, subsequently provided us with a written note (a copy having been sent to the appellant's representatives) asking us to remake in the event of the appeal being allowed. It was helpful of him to do that.

26. On the evidence before us we are satisfied that the appellant did not have actual knowledge of the misuse and, indeed, such has not been argued. We are further satisfied that the evidence does not demonstrate a basis to show the existence of imputed actual knowledge nor constructive knowledge on the part of the appellant. Accordingly, rather than remitting,

we have accepted the view of both parties that we should remake the decision ourselves. Our decision is set out below.

27. Finally, though this is not essential to our decision, we were surprised to learn that a copy of the pre-impounding letter was not sent to the appellant in this case. That may have simply been an administrative oversight but we would, nevertheless, wish to express our view that in circumstances such as these obtaining in this case, it would be good practice to send copies of such letters to the owner of an impounded vehicle when writing to the operator, where the two are different. We would also observe that nothing in our decision should be taken as an indication that finance companies such as the one in this case should be anything less than stringent in making relevant checks concerning the way in which operators use their vehicles. The appellant in this case might, if problems recur, find itself subject to careful scrutiny if it has the need to make further applications for the return of any impounded vehicles which it owns and which has been used in a way which is unlawful.

The Decision

27. The appellant's appeal to the Upper Tribunal from the Traffic Commissioner's decision of 23 December 2019 is allowed and that decision is set aside. The Upper Tribunal remakes the decision in these terms: The appellant did not have knowledge that vehicle WGM54585 was, on 6 September 2019, being operated unlawfully. That being so, it follows that the application is allowed and that vehicle WGM54585 shall be returned to it.

M R Hemingway
Judge of the Upper Tribunal
20 November 2020