NCN: [2022] UKUT 00019 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. T/2021/36**
ADMINISTRATIVE APPEALS CHAMBER

Appellant:

FERNDOWN COMMERCIALS LIMITED

Appellant

and

DRIVER VEHICLE STANDARDS AGENCY

Respondent

DECISION OF THE UPPER TRIBUNAL

Her Honour Judge Beech, Judge of the Upper Tribunal
Andrew Guest, Specialist Member
David Rawsthorn, Specialist Member

Decision date: 17th January 2022

ON APPEAL FROM:

Tribunal:	**Kevin Rooney, Traffic Commissioner for the West of England**
Appeal Tribunal Venue:	**Field House, 15-25 Bream's Buildings, London, EC4A 1DZ**
Date:	**11th January 2022**

This front sheet is for the convenience of the parties and does not form part of the decision

IN THE UPPER TRIBUNAL **Appeal No. T/2021/36**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Decision of Kevin Rooney, Traffic Commissioner for the West of England dated 28th April 2021

Ferndown Commercials Limited

Appellant

and

Driver and Vehicle Standards Agency

Respondent

Before: **Upper Tribunal Judge Her Honour Judge Beech**
Specialist Member of the Upper Tribunal Andrew Guest
Specialist Member of the Upper Tribunal David Rawsthorn

Hearing date: 11th January 2022

Representation:
Appellant: Request to hear the appeal in the Appellant's absence granted
Respondent: Stephen Thomas, solicitor for the DVSA

DECISION

The appeal is DISMISSED

Subject Matter: Impounding; Procedural fairness

a) **Cases referred to:** 2016/008 Van Der Gaag Transport De Lier BV v DVSA; T/2013/21 Societe Generale Equipment Finance Ltd); Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the West of England ("TC") dated 28th April 2021 (and confirmed in writing on 29th April 2021) when he refused to return impounded vehicle HY08BJJ to the Appellant ("Ferndown") under regulation 4(3)(d) of the Goods Vehicles (Enforcement Powers) Regulations 2001 (as amended) ("the Regulations").

2. The background to this appeal can be found in the appeal bundle and the written decision dated 29th April 2021 and is helpfully summarised by the TC in this way:

    - Bumbles Recycling Ltd held licence OH1136473 until it was revoked in December 2019 following the company entering liquidation;
    - BRL Southern Ltd ("BRL"), a company linked by office-holders to Bumbles Recycling Ltd, made application OH2023426 which was withdrawn in June 2019. A further application OH2033477 was made by the company in July 2020. As part of process TE Young had been asked to undertake an environmental assessment of the proposed operating centre. During that visit (in November 2020), TE Young became aware that the operator was already operating vehicles. In fact, the applicant (BRL) confirmed that they had continued to operate throughout following the revocation of the Bumbles licence since 2019;
    - Application OH2033477 was refused in December 2020. Following that refusal and the concern of TE Young relating to unauthorised use, DVSA Enforcement Services wrote to BRL in December 2020 putting them on notice of the likelihood of vehicles being detained indefinitely if found operating unlawfully. This is what is referred to as the "pre-impound letter";
    - On 18th February 2021, TE Young was on duty at the DVSA enforcement site at Chilcomb in Hampshire. At approximately 11.36, he encountered HY08BJJ, a three axle Iveco rigid fitted with a crane and bearing the livery of Elliotts. The driver indicated that he was working that day under instruction of BRL on a journey from Fleet to Winchester. The driver provided his running sheet for the day which showed he had just dropped a load of stone. The driver was on his way to a location in Winchester to pick up his next load;
    - The vehicle was displaying an operator's licence disc in the name of Elliotts but was not currently recorded as being specified on any licence. TE Young sought and obtained the necessary clearances and permissions and exercised his powers to detain the vehicle under regulation 3(1) of the Regulations.

3. By an application dated 1st March 2021, Ian Flay, director of Ferndown, the owner of the vehicle, applied for its return under regulation 4(3)(d) of the regulations:

d) That although knowing that 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; and

(ii) Has taken steps with a view to preventing any further such use.

In section 6 of the application form, Mr Flay explained his case:

"*When I contacted the operator of the vehicle about the licence I was told a new licence was applied for & also an interim licence applied for under the name of Test Valley Transport.*

I accepted this confirmation from the operator & trusted all was being done to be legal to operate.

I took no further action".

4. The hearing of Ferndown's application took place on 28th April 2021. Mr Flay and Carol Bond, Financial Director, attended on behalf of Ferndown. It was immediately apparent that some administrative errors had resulted in TE Young not having been invited to attend the hearing and Ferndown had not been provided with a hearing bundle. Fortunately, Andrew Dean, Traffic Enforcement Manager and TE Young's line manager was able to attend but he too was without a bundle. He did have knowledge of the circumstances of the impounding. The hearing was adjourned for bundles to be provided. It is unclear how long the adjournment was for as the transcript provided by D.A. Languages Limited does not even indicate that an adjournment took place! It is however clear that there was a break in the hearing and that bundles were provided. Upon the hearing being resumed, the TC apologised and indicated to Mr Flay that the bundle in fact mostly related to BRL (and we observe, to the facts of the impounding itself which was not something that Mr Flay could go behind).

5. At the outset, the TC accepted that Ferndown was the owner of the vehicle and following a summary of TE Young's evidence provided by Mr Dean, Mr Flay indicated that he did not have any questions of him. The TC then turned to the substance of the application by Ferndown. Mr Flay told the TC that the vehicle was originally hired to Bumbles and that at the time of the hiring, Bumbles held an operator's licence (in fact Ferndown hired at least two vehicles to Bumbles). He then became aware that Bumbles had become *"BRL Limited*". He had then been informed by Bumbles that someone was going to invest in the company and that the name was to change. He did not question the change as he thought that this was how companies operated. Then in November 2020, one of his supervisors had alerted him to the fact that BRL did not have an operator's licence, there being no licence disc displayed in the windscreen (the TC did not explore the contradiction in evidence between this statement and that of TE Young who noted that when stopped, the vehicle was displaying a disc in the name of Elliots). Mr Flay contacted the company and was assured that the company was using a specialist to apply for a licence and that it was all in hand. The application included an application for an interim licence. Mr Flay left it at that. He contacted the company again on 15th December 2020 for an update. He was informed that the licence application had been refused and that there would be a name

change to Test Valley Transport and a further application for an operator's licence was to be made in that name. He was told that the application would take two to three weeks. As Christmas and New Year were approaching, Mr Flay thought it likely that he would not hear any more about the application until the end of January 2021. He had been told that the vehicles were being parked at Romsey Reclamation which was going to be the customer's new operating centre and he knew that the location was secure and safe. He told BRL that the vehicles were not to be used. He did not ask for the return of the vehicles because Ferndown operated nearly 100 vehicles on hire and over the Christmas and New Year period, the company was very busy with limited space in its own yard. Leaving the vehicle with the customer in a safe place meant that Ferndown had a little more room in its own yard. So, it was a convenient place to keep the vehicle and he was not being charged for rent. What he did not expect was that the customer would then continue to use the "*vehicles*" without his knowledge.

6. During the Christmas and New Year period, Ferndown's office suffered three outbreaks of COVID-19 and the telephone call Ferndown should have made to its customer for an update was missed. The next contact was a telephone call from BRL to inform him that the vehicle had been impounded. Mr Flay felt that he was the victim because Bumbles did have an operator's licence and he had assumed that the licence had been transferred to BRL. Moreover, he had chased the customer up.

7. As for the steps he had taken to prevent future use of the vehicle without a licence, he had been assured by one of the directors of BRL that the "*vehicles*" were not going to be used and he had taken her at her word. BRL had also applied for a licence and was using a company to help in that regard. He was also aware that BRL had received letters from the DVSA instructing them not to operate vehicles. He thought he had done everything correctly. He had 100 vehicles on the hire fleet; he had a workshop that he had to supervise; he had cranes and an awful lot going on. But in the middle of this was COVID-19.

8. Mr Flay accepted that he did not check the on-line system to check the status of the BRL's licence application and that he probably should have collected the *"vehicles*" from them. He had fallen victim to their misconduct and the customer should be prosecuted. He did not believe that he should lose HY08BJJ because of what had happened.

<u>The TC's decision</u>

9. The TC set out paragraph 65 of the Senior Traffic Commissioner's Statutory Document No. 7 on Impounding in full and in doing so correctly identified that the evidential burden was on Ferndown to establish that the company satisfied the requirements of regulation 4(3)(d) of the regulations. The paragraph refers to this Tribunal's decision of *<u>2006/008 Van Der Gaag Transport De Lier BV v DVSA</u>* and in particular, paragraph 37:

"*.. The Tribunal went onto explore the interpretation of "steps" which means "all reasonable steps available to the owner" or "all those steps that a reasonable owner would take in the circumstances they find themselves in, not only in the context of preventing past unlawful use but future unlawful use". The Tribunal went further to state "the hurdle is a high one" and owners "should be able to demonstrate robust systems and procedures that they have*

put in place which would constitute reasonable steps .. along with adequate explanations as to why those steps did not work in the instant case." In making an application under paragraph 4(3)(d) the owner will be accepting that criminal offending has taken place as a pre-condition to the sub-paragraph and may be leaving themselves open to prosecution".

The TC then referred to the latter part of paragraph 37 of the quoted decision which he found to be of assistance:

"In making an application under paragraph 4(3)(d) the owner is accepting that criminal offences have been committed. We do not accept that in those circumstances owners should be allowed some "latitude" in how they approach the steps they should take to prevent criminal offending from taking place ..".

10. The TC determined that Ferndown knew it was dealing with an operator who, by its own admission, did not have an operator's licence. The most basic steps would have been to require the vehicle to be returned to its custody or otherwise rendered it unusable such as by requiring return of the keys. Merely making two phone calls was a very long way from taking all reasonable steps. The TC concluded that the ground applied for had not been made out and return of the vehicle was refused.

<u>The appeal</u>

11. By way of an Appellant's Notice dated 27th May 2021, Mr Flay submitted grounds of appeal in which the first five paragraphs simply repeated the evidence that Mr Flay had given before the TC. By an email dated 5th January 2022, Mr Flay requested that the appeal be heard in his absence and made further submissions in support of the appeal. The combined substance of the grounds of appeal and the email can be summarised in the following way:

    (i) The failure of the centralised impounding team in Eastbourne to send the impounding bundle to Ferndown combined with an adjournment of only ten minutes to enable Mr Flay and Ms Bond to consider its contents, put the company at a disadvantage. If the correct procedure had been followed, legal advice could have been sought along with legal representation at the hearing. In his email, Mr Flay described the application for return of the vehicle as a "*prosecution*" and that there had not been a notice to "*prosecute*". He described the impounding papers as the "*prosecution case*";

    (ii) It was only during the hearing that Mr Flay learnt that "*DVSA Enforcement Officers"* had visited BRL regarding the use of the vehicle without a licence. As the legal owner, Ferndown should have been informed and could then have acted accordingly to prevent any further use of the vehicle on the road;

    (iii) Ferndown was not informed of the pre-impounding correspondence sent to BRL. This should have been sent to Ferndown as the legal owner of the vehicle. It was unfair that this did not take place and Ferndown had suffered because the customer disregarded the rules;

(iv) The verbal assurance by the operator that the vehicle would be locked in a secure compound amounted to a legally binding contract that the operator had breached.

12. At the hearing of this appeal, Mr Thomas appeared on behalf of the DVSA and filed a helpful skeleton argument for which we were grateful. We agreed with his submissions.

Discussion

13. By virtue of s.2 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act"), it is a criminal offence to use a goods vehicle on a road for the carriage of goods, either for hire or reward or for or in connection with any trade or business carried on by the user of the vehicle without holding an operator's licence.

14. The purpose of the impounding regime is to protect the public, improve road safety standards and ensure that operators compete fairly with other hauliers (see paragraph 261 of *T/2011/060 Nolan Transport)*.

15. Everyone is taken to know the law, namely:

b) that the use of vehicle in breach of section 2 is unlawful;

c) that to do so renders it liable to being impounded;

d) that the grounds for the return of an impounded vehicle are limited to those set out in regulation 4(3) of the Regulations (see paragraph 16 of *T/2013/21 Societe Generale Equipment Finance Ltd)*.

16. Paragraph 9 above sets out the relevant considerations when determining an application for an impounded vehicle under regulation 4(3)(d).

17. Dealing first then with the failure of the OTC to provide Ferndown with a copy of the impounding bundle until the morning of the hearing and Mr Flay's contention that the hearing should have been adjourned for Ferndown to take legal advice: first of all, the letter inviting Ferndown to the hearing of its application dated 12th April 2021 made it clear that it was open to the company to take legal advice and be legally represented at the hearing. It would seem that Mr Flay did not consider that to be necessary. Secondly, whilst it was regrettable that the bundle had not been provided to Ferndown prior to the hearing, the only documents in the bundle which were of relevance to Ferndown as the applicant/owner was the application itself; TE Young's witness statement; screenshots confirming that Ferndown was the registered keeper and the sales invoice for the purchase of the vehicle by Ferndown from Elliotts, which Mr Flay had provided. The remainder of the bundle related solely to Bumbles Recycling Limited and BRL. There was nothing within the bundle which could have justified an adjournment to another day in order for Mr Flay to take legal advice, particularly as the recourse to legal advice was something that had been flagged up in the hearing notice. Moreover, Mr Flay did not complain that he was disadvantaged in making his application or that he needed an adjournment. The only issue in the hearing was whether Ferndown had taken adequate steps as required by regulation 4(3)(d) to prevent the unlawful use of the vehicle and that was within the peculiar

knowledge of Ferndown with the burden of proof being upon the company. Mr Flay would have been well aware of the hurdles Ferndown had to clear having made the application in the terms set out in paragraph 3 above and the documents in the bundle could not have assisted one way or the other. Finally, the company's application for the return of the vehicle is a civil process which cannot be characterised as a criminal prosecution, although at the heart of the impounding procedure is the commission of a criminal offence by the operators of the vehicle. Ground (i) does not succeed.

18. Turning then to Mr Flay's points set out in paragraph 11(ii) and (iii) above, first of all DVSA Enforcement Officers did not visit the operating centre of BRL. Rather, TE Young attended on an environmental visit to assess the suitability of the proposed operating centre further to BRL's second licence application. When he attended, he did not know or have cause to believe that any vehicles were being operated by BRL, let alone HY08BJJ. Even when he was told by BRL that vehicles were being operated, the details of HY08BJJ were not given to TE Young and they did not appear on the list of vehicles to be specified on the licence within the licence application. The pre-impound letter which was general in its terms could not have been sent to Ferndown in the absence of the requisite knowledge that the vehicle was being operated. It was only by chance, when the vehicle was stopped on 18th February 2021, that TE Young became aware that BRL was operating the vehicle. In any event, Mr Flay averred when giving evidence to the TC that he was aware that the pre-impound letter had been sent. The following extracts from page 4 of the transcript are relevant:

"*I'd like to say that I thought I did everything correctly. I did phone her in November and December. And I was assured that the vehicles were parked up and they weren't going to be used. And I trusted the company not to do that. Knowing that they'd also had letters from yourself not to use the lorries either* (our emphasis)"

"*Okay, sir … I knew they had .. I was a .. they'd had letters from DVSA not to operate the vehicles and they still used the vehicles. So how can I … you've asked them not to drive the vehicles, I've asked them not to drive the vehicles. And they still carried on and drove the vehicles …* (our emphasis)".

In the circumstances, it is difficult for Mr Flay to successfully argue that Ferndown should have been sent a pre-impound letter and that Ferndown was disadvantaged by that failure. Grounds (ii) and (iii) do not succeed.

19. In coming to the determination that he did, the TC applied the correct legal principles. Ferndown had failed to demonstrate that it had any systems let alone robust systems and procedures which would constitute reasonable steps within the meaning of regulation 4(3)(d)(i)-(ii) to prevent past and future unlawful use of a vehicle. No steps were taken when Bumbles was replaced by BRL to ascertain whether the latter had an operator's licence; Ferndown then failed to prevent continuing unlawful use once it was apparent that BRL did not have a licence in November 2020 and had been operating vehicles unlawfully whilst hoping to be granted an operator's licence. The simplest of steps would have been to require the return of the vehicle or to seize the vehicle's keys. When in December 2020, Mr Flay was told that the licence application had failed, the only step he took to prevent continued unlawful use

was to accept a verbal assurance that the vehicle would not be used and would be locked in a secure compound. That does not constitute "*all reasonable steps"*, whether or not the assurance could be described as a mandatory contract. Ground (iv) fails. Against the background of BRL, with the unlawful operation of vehicles from the outset in 2019; with one licence application withdrawn and another refused and with unlawful use of vehicles continuing, no verbal assurance should have been accepted by Ferndown and BRL should have been prevented from operating the vehicle until such time as an operator's licence was in place. Even if it was more convenient to Ferndown to keep the vehicle at BRL's proposed operating centre, the vehicle should have been disabled.

20. In all the circumstances all grounds of appeal are rejected as we are not satisfied that there was procedural unfairness in this case or that the TC's decision was plainly wrong in any respect and neither the facts nor the law applicable in this case should impel the Tribunal to allow this appeal as per the test in *Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695.* The appeal is dismissed.

Her Honour Judge Beech

Judge of the Upper Tribunal

17th January 2022