[2019] EWHC 718 (Admin)

IN THE CARDIFF ADMINISTRATIVE COURT
SITTING AT BRISTOL

Case No: CO/4326/2018

Courtroom No. 15

Bristol Civil Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

2.11pm – 2.47pm
Wednesday, 16th January 2019

Before:
THE HONOURABLE MRS JUSTICE JEFFORD DBE

B E T W E E N:

DRIVER AND VEHICLE STANDARDS AGENCY

and

CLASSIC RESTORATION AND SERVICES LTD

MR R PABARY appeared on behalf of the Applicant
THE RESPONDENT was not represented and did not appear

JUDGMENT
(Approved)

MRS JUSTICE JEFFORD:

1. This an appeal by way of case stated from a decision of the Guildford Magistrates on 4 July 2018.
2. At the outset, two issues were raised with me. The first was the absence of the defendant or respondent on this appeal, that is the company Classic Restoration and Services Ltd, who appeared below by their director, Mr Allan, acting in person.
3. Mr Allan and the respondent were notified of the hearing by the appellant's solicitors and provided with a copy the appeal bundle. Mr Allan sent an email to the Administrative Court office on 8 January this year.
4. It was a lengthy email of a little over a page, which set out his response to each of the questions in the case stated by the Magistrates. In the course of that lengthy email and at the end of a paragraph, he said, 'I am also unsure if I am required to attend court on the day of the hearing'. That was followed by a question mark. That may have been intended by Mr Allan to be a question posed to the Administrative Court Office as to whether or not he was required to attend. However, given where and how it appeared in the email, it is perhaps unsurprising that there was no response to it.
5. Mr Allan did not then pursue that question further, either with the court or with the appellant. In all the circumstances and given that I have, in effect, his submissions in that email, it seemed to me fair to proceed in his absence.
6. The second issue was potentially a jurisdictional one. Mr Pabary raised the question of whether this matter, as in effect an appeal from the Magistrates' Court, should be heard by a divisional court and not by a single judge. Section 66 of the Senior Courts Act 1981 provides that 'Divisional courts may be held for the transaction of any business in the High Court, which is, by or by virtue of rules of Court or any other statutory provisions, required to be heard by a divisional court'.
7. Mr Pabary was unable to direct me to any authority, whether statute or a rule of Court or a decision, that would require this matter to be heard by a Divisional Court. In addition, at the start of the hearing this afternoon, he helpfully told me that he had made, or undertaken, further research, which had disclosed that it was common for cases stated by the Guildford Magistrates to be heard by two judges, but that he could not identify, again, any statutory requirement or rule of court to that effect. Section 111 of the Magistrates' Court Act under which the case is stated, does not so provide.
8. The Civil Procedure Rules Part 3.1(2)(bb), provide that the Court may, as part of its general powers of case management, require that any proceedings in the High Court be heard by a Divisional Court of the High Court.
9. In this case, on 30 November 2018, Garnham J ordered that this matter, which had been issued in the Administrative Court in London, be transferred to the Administrative Court sitting in Cardiff for administration in Cardiff, but with a hearing in Bristol, and he gave his reasons for doing so. It seems to me that by making that order, he was ordering a hearing by a single judge of the Administrative Court and not making any case management direction under CPR 3.1(2)(bb) for a hearing by the Divisional Court. Against that background, Mr Pabary's query was not pursued further and I proceeded to hear this matter.
10. I turn now to the case stated itself. The defendant – a company which, from its title, is clearly involved in the restoration of classic cars - was charged with the offence of using on a road a goods vehicle for hire or reward, without an operator's licence, contrary to Section 2(5) of the Goods Vehicle (Licensing of Operators) Act 1995.
11. The basic facts which are uncontroversial, are set out in the case stated, and are these. At approximately 10.40am on 19 July 2017 at the A34 Marcham Interchange, a goods vehicle

– a MAN two axle rigid vehicle with a gross weight of 7,500kg, operated by the defendant/respondent – was subject to a roadside check. The vehicle was laden with an 8-litre Bentley chassis. It was being taken from Chichester to Telford and was being driven by Mr William Allan, a director of the defendant company. At the roadside and under caution, Mr Allan confirmed that the goods vehicle was being operated on behalf of the defendant company, and that no operator's licence was held.

12. The Magistrates, however, found the defendant not guilty of the offence, on the basis that the vehicle was exempt from the requirement to hold an operator's licence, as it was a recovery vehicle. That exemption is provided by Part 1 of Schedule 3 to the Act. Under Part 1 of the Goods Vehicles (Licensing of Operators) Regulations 1995, a recovery vehicle has the same meaning as in Part 5 of Schedule 1 to the Vehicle Excise and Registration Act 1994. It is that definition on which this matter turns.

13. That definition is as follows. Paragraph 5(1) sets the annual rate of vehicle excise duty applicable to recovery vehicles. Paragraph 5(2) provides this: 'In sub-paragraph 1, "recovery vehicle" means a vehicle which is constructed or permanently adapted primarily for any one or more of the purposes of lifting, towing and transporting a disabled vehicle'. Sub-paragraph 3 continues:

> 'A vehicle is not a recovery vehicle if, at any time, it is used for a purpose other than,
> (a) the recovery of a disabled vehicle,
> (b) the removal of a disabled vehicle from the place where it became disabled to premises at which it is to be repaired or scrapped,
> (c) the removal of a disabled vehicle from premises to which it was taken for repair to other premises at which it is to be repaired or scrapped,
> (d) carrying fuel or other liquids required for its propulsion and tools or other articles required for the operation of, or in connection with, apparatus designed to lift, tow or transport a disabled vehicle, and,
> (e) any purpose prescribed for the purposes of this sub-paragraph by regulations made by the Secretary of State'.

This appeal has focused on sub-paragraphs (a) and (b) of that paragraph.

14. The definition of 'recovery vehicle' in paragraph 5(2), does not require there to be any particular elements provided in the vehicle's construction or adaptation, for one or more of the purposes set out. However, any adaption must be permanent, and the definition requires that the vehicle has been constructed or adapted primarily for one or more of the purposes set out. Even if a vehicle falls within the definition of a recovery vehicle, it is not a recovery vehicle if it is being used for any purpose other than those set out in sub-paragraphs 3(a) to (d). I am not aware of there being any other purposes prescribed under sub-paragraph (e). In other words, the vehicle must be in use for one of those purposes.

15. The paragraph uses the term 'disabled vehicle'. It does not use the term broken down and I will return to that point in due course. It seems to me, therefore, that a disabled vehicle is not limited to one that has broken down in the common way in which that expression is used. There is, I should have thought, a good and practical reason for that. As I suggested to Mr Pabary in the course of his submissions, a car involved in a road traffic accident may be damaged and dented, its lights and mirrors damaged, and not safe to drive, although it may still be capable of being mechanically propelled and, thus, is not broken-down.

16. In such a case it will be safe and sensible for a recovery vehicle to be used to remove the car, and the car could properly to be described as disabled. It would be remarkable if, in

such an instance, a recovery vehicle was said not to be being used for the statutory purposes. Further, it is relatively easy to envisage circumstances where a car does not break down, in the sense that it is being driven and comes to a stop, but is damaged or suffers a mechanical failure when it is not in use. It would, then, similarly be disabled. Sub-paragraph 3 (b) is particularly apt to include that scenario – that is, 'removal of a disabled vehicle from the place where it became disabled, to a premises at which it is to be repaired'.

17. With that background, I turn to the facts as found by the Magistrates. The defendant contended that the truck was a recovery vehicle within the definition of paragraph 5(2), because it had been purchased by the defendant company specifically for the purpose of recovering disabled vehicles. The Magistrates found as a fact that it was constructed or adapted prior to the defendant purchasing it for one or more of the purposes of towing, lifting or transporting disabled vehicles. They accepted Mr Allan's description of the vehicle when it came into his possession, and the purpose to which he put it in the course of his business.

18. The appellant's evidence was that the truck was not suitable for recovery purposes, in particular, unlike most recovery vehicles, it had doors which would open outwards and, in a roadside scenario, cause a hazard. A particular issue was raised in relation to the winch which was part of the adaptations, and which was bolted into position rather than welded, so that it could conceivably be removed. A similar point was made about the ability to remove the ramps on the vehicle.

19. The Magistrates, however, accepted the evidence that the winch, and by implication the ramps, had not been removed in all the time that the vehicle had been in the defendant's possession. They concluded, and I quote from the case stated, 'We accepted that the bolted winch had never been removed by him [Mr Allan] during his ownership of the vehicle'. They continued:

> 'We accepted that it was more likely than not, that the presence of this winch, the retractable loading ramps, the gas compressor, generator and grounding anchors, were permanent adaptations, primarily for any one or more of the purposes of lifting, towing and transporting vehicles that needed recovery'.

20. In respect of the Bentley which was being transported, they found that it had come into the defendant's possession in 2015 for works to be carried out to it, mainly in terms of the trimming of the interior. It was, at the time, fully operative. While work was being carried out, a leak in the fuel tank was found and that, in turn, was found to have contaminated and softened the ash timber frame of the car. Mr Pabary has told me that the fuel tank was repaired (and that is reflected in the magistrates third question).

21. What the Magistrates, however, found, was that the fuel tank and the ash frame were both removed. The car, or the remaining chassis, then needed to be moved to have both refitted, and it was that that was happening on the day in question. The first question stated by the Magistrates for the opinion of the High Court is this:

> 'Were we entitled to find that a goods vehicle that has a bolted winch, retractable loading ramps, gas compressors, ground anchors and a generator, was one which has been permanently adapted primarily for any one or more of the purposes of lifting, towing and transporting a disabled vehicle?'.

22. In my view, the answer to that question is yes. It was essentially a question of fact for the

Magistrates. There is a requirement as a matter of law, that to fall within the regulations, a vehicle has to be constructed or adapted primarily for any one of the stated purposes, but there is no requirement that it has to be constructed or adapted in any particular way. It was open to the Magistrates to find that the adaptations they identified brought the truck within that definition.

23. It was also open to them to find on the evidence that the adaptations were permanent. That is a matter of fact and degree. The winch may have been bolted into position and be capable of removal, but the evidence they accepted was that it had not, at any time, been removed. Similarly, Mr Pabary submitted to me that the ramps could also have been removed. That was a factual argument that was before the Magistrates as well and does not appear to have found favour. A vehicle is, of course, made up of a number of component parts, any one of which may be removed. It does not mean it is not permanently a vehicle. The same, it seems to me, is true of adaptations. An adaptation may be capable of removal, but if the intention is to make it a permanent adaptation, that is what it is.

24. It was also open to the Magistrates to find that the primary purpose of the adaptations was for the statutory purposes. That is, again, an issue of fact and there was, in my view, no error of law in the Magistrates' decision.

25. The second and third questions are these, and I take them together.

> '(2) Were we entitled to find that the Bentley with its ash frame body and gas tank removed by the defendant, was suffering from a significant disability? (3) Were we entitled to find that the Bentley with its ash frame body removed and its gas tank removed and rebuilt on site, was broken down?'.

26. Whilst I shall endeavour to answer the questions that the Magistrates asked, they seem to me not to capture entirely the question that arose. The question that arose broadly was whether they were entitled, on the facts as found and as a matter of law, to decide that the vehicle was being used to remove a disabled vehicle, from a place where it became disabled, to premises at which it was to be repaired.

27. The Magistrates referred, and I was referred, to the decision of the Divisional Court in *Squires v Mitchell* [1983] RTR 400. In that case, the relevant regulations were the Road Vehicles (Registration and Licensing) Regulations 1971. Regulation 35(4) provided that:

> 'No person, being a motor-trader and the holder of a trade licence, shall use any mechanically propelled vehicle on a public road by virtue of that licence for a purpose other than a business purpose and other than one of the following purposes...

One such following purpose was, in the case of a recovery vehicle, "for carrying a disabled vehicle from the place where it had broken down or from such other place where it is subsequently for the time being situated to a place for repair or storage or breaking up".

28. I note that those regulations, therefore, specifically used the term 'broken down' which does not appear in the current regulations. The vehicle that was being transported in that case, and if one can call it that, was the chassis of an old Chevrolet. It had been bought by Mr Alexander whose hobby was restoring wartime vehicles. It was unroadworthy when he bought it. He had stripped it, removing the shell and engine, and the chassis and petrol tank had been taken away for shot blasting. At the time of the offence, the chassis was being taken to another location to be further worked on by Mr Alexander.

29. The Court held that a disabled vehicle was one which not only suffered from a significant

disability but had broken down because of it. Referring to the submissions of counsel, Ackner LJ said this: 'Thus, the carrying must be from the place where it breaks down, or from such other place where it, having broken down, is subsequently situated, to a place either to repair it, or for its storage, or for its breaking up'. He continued:

> 'To my mind, this is what the regulation says. The disabled vehicle is, in the context of the regulation, not only a vehicle which suffers from a significant disability but is a vehicle which has broken down because of that disability. It therefore requires to be moved either from where it has broken down, or from a place where, after breaking down, it has become situated in order to be moved to a place of repair, or storage, or for breaking up. Although this vehicle was being moved to a place for repair, it was not a vehicle which, having broken down, was being so removed'.

30. The Chevrolet chassis in that case, clearly did not meet that definition, because it had not broken down as a result of a disability, whether significant or otherwise. It was unroadworthy to start with and, thereafter, had been stripped down for the purposes of restoration. Mr Pabary submits that, although the wording of the current regulations is different, it is still the case that a vehicle must suffer from a significant disability in order to fall within the meaning of the statute.
31. I agree with that proposition. A vehicle is not disabled just because there is some minor thing wrong with it. Although it will be a question of fact and degree, it must, I think, be disabled to an extent that it requires recovery and/or transportation to a place of repair. That is consistent with the judgment of Ackner LJ in the *Squires* case.
32. It is further submitted, that the most obvious example of a disabled vehicle is one that has broken down, even if that wording is not used in the current legislation. However, Mr Pabary accepts that the definition must extend to a vehicle that cannot safely be driven. He has also drawn my attention to the decision of the European Court of Justice in *Hamilton v Whitelock* [1988] RTR 23. The case is not any authority on the issues in this case, but he has drawn my attention to the submissions of the UK government on the meaning of 'break down' and 'rescue', which he argues are consistent with the spirit of the current legislation.
33. On its facts, however, this case is rather different from *Squires*. The Bentley was a working vehicle. What happened was that while it was being worked on, with that work principally relating to its interior, a problem was identified that the Magistrates found rendered it disabled – that is the leaking fuel tank. Mr Pabary accepts that at that point the vehicle may be said to have become disabled, and to have suffered from a significant disability. However, he argues that the fuel tank was repaired, which I accept it was, and although this is not quite the way in which he put it, that at this point, the relevant repair had been undertaken and the vehicle could no longer be regarded as disabled.
34. However, the fuel tank was not reinstated because a decision was taken to have a new frame constructed, and for the fuel tank and new frame to be installed together. Mr Pabary further submits that, at that point, what was being undertaken is more properly characterised as restoration rather than repair, and that, even if the car could still be regarded as suffering from a significant disability, it was being transported for restoration and not repair. It could, he submits, have been repaired at the defendant's premises, if the timber frame had been transported there instead.
35. In this case, in my judgment, it was and is, as so often, a matter of fact and degree. It was certainly open to the Magistrates to find that the Bentley became a disabled vehicle when its fuel tank leaked. That necessitated repair not merely of the fuel tank but of the timber

frame, which had been affected by the leak. There is and was no particular evidence – or at least no finding – as to whether the car could have been driven, or safely driven, with the fuel tank replaced but not the frame replaced.

36. The consequences for the timber frame from the fuel tank leak and the extent of the resultant work may have been rather more extensive than one might have expected, but it was in my view, open to the Magistrates on the facts to find that they all formed part of the consequent repair, and that the removal of the vehicle to the place of repair, fell within the purposes of the Act and within paragraph 5 (2)(b).

37. As Mr Pabary, however, pointed out, the difficulty with this approach could be that if the car was a working vehicle which was then taken apart in the process of a planned restoration, or simply had a single component removed, it could be said to have become disabled on the defendant's premises, and if then taken elsewhere, it could be said to have been being taken there for repair. If that were right, it would enable any business of this nature: a garage, a classic car restoration business, or similar, to circumvent the legislation with ease. They could fit a few items of equipment to a goods vehicle and call it a recovery vehicle, then remove a part from any car being worked on and say it was disabled, and then transport it without the licence they would otherwise require. That clearly would not seem to me to fall within the spirit of the exemption, and those submissions, undoubtedly have given me pause for thought.

38. However, the answer to that conundrum, I think lies in a common-sense approach to interpretation. A vehicle which has been rendered disabled, as part of works on it, has not become disabled. It has been disabled or been made disabled. A vehicle which is in the process of restoration may well be being transported for restoration and not repair. I repeat that it is a question of fact and degree.

39. The question of what is a recovery vehicle requires the tests to be met that the vehicle is permanently adapted primarily for the prescribed purposes. Fitting a winch to lift what is not a disabled vehicle, would not render it a recovery vehicle, because it would not be an adaptation, primarily or at all, for the statutory purpose. On the contrary, it would be an adaption to circumvent a legal requirement. In other cases, there might be evidence on which a Court could readily conclude that the adaptions were not permanent, but that was not the case here.

40. Therefore, in my opinion, the Magistrates were entitled to make the findings that are referred to in the case stated at questions two and three, and come to the decisions that they did.

41. I should add, for the avoidance of doubt, that I emphasise that that is because they are essentially findings of fact. Whether I might have come to a different decision on the facts is immaterial, and my decision in respect of the Magistrates' entitlement to come to those findings of fact does not open the door to the circumvention of the legislation.

42. That leaves the fourth question in the case stated, which was this:

> 'Is a goods vehicle to be classed as removing a disabled vehicle from the place where it became disabled, to premises at which it is to be repaired, if it is only carrying a chassis to a site for an ash frame body and gas tank to be refitted?'.

In the circumstances, I do not propose to send that question back to the Magistrates for amendment, but it does not seem to me to be strictly the right question. The question cannot relate to goods vehicles, but only to recovery vehicles. Further, it has embedded within it, the assumptions that are challenged by the appellant, including that the vehicle was being taken to a place to be repaired. However, given that I have concluded that the

Magistrates were entitled to reach the decision in that respect that they did, it seems to me that the answer to the question is, in any event, yes, for the reasons that I have given.

End of Judgment

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This transcript has been approved by the judge.