Appeal No. T/2016/38

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of Simon Evans DEPUTY TRAFFIC COMMISSIONER for the North West of England
Dated 9 June 2016

Before:

Kenneth Mullan	**Judge of the Upper Tribunal**
Mr S. James	**Member of the Upper Tribunal**
Mr A. Guest	**Member of the Upper Tribunal**

Appellant:

Graeme Robertson

Attendances:

For the Appellant:	Mr Neill Davies
For the Respondent:	Mr Stephen Thomas

Heard at:	George House, 126 George Street, Edinburgh, EH2 4HH
Date of hearing:	16 January 2017
Date of decision:	3 March 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED

SUBJECT MATTER:- Impounding; imputed knowledge; 'high degree of fault'

CASES REFERRED TO:- *Societe Generale Equipment Finance Limited* ([2013] UKUT 423 (AAC)); *Nolan Transport v VOSA & Secretary of State for Transport* ([2013] UKUT 423 (AAC), T/2011/60); NT/2013/52 & 53 *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*

REASONS FOR DECISION

The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the North West of England dated 9 June 2016.

2. The factual background to this appeal appears from the documents and the Traffic Commissioner's decision and is as follows:-

   (i) On 11 May 2016 a Renault three-axle heavy goods vehicle, registration number YY52 HSN ('the relevant vehicle') was subject to a check at M6Todhills, near Carlisle. Traffic Examiner (TE) Healy spoke to the driver when the vehicle was brought into the check site by the authorised stopping officer.

   (ii) The vehicle was not displaying an operator's licence identity disc.

   (iii) The vehicle was on an EC regulated journey from Preston to Glasgow.

   (iv) A delayed prohibition was issued in respect of the vehicle by Vehicle Examiner (VE) Sefton as a suspension anchor pin was insecure in its bracket.

   (v) The driver of the vehicle was a Lithuanian national who stated that he took his instructions from an individual called Ian.

   (vi) TE Healy spoke by telephone with Ian (Eion) Robertson who informed him that the vehicle was being operated by William Meikle, trading as MBS Transport, who was described as the driver's employer.

   (vii) Senior Traffic Examiner (STE) Parish, who was also present, spoke to the driver. STE Parish asked the driver for the name of his 'boss' and the driver, by way of a response, pointed to the name 'Billy Meikle' in the list of contacts in the memory of his mobile telephone.

   (viii) A standard international goods vehicle operator's licence in the name of the sole trader William Meikle (OM 1002865) had been revoked by the Traffic Commissioner for Scotland on 23 December 2015 with effect from 8 January 2016. The decision to revoke the licence had been made following the appearance of the operator at a Public Inquiry (PI) held in Edinburgh on 9 December 2015.

   (ix) No notice of appeal was forthcoming from the operator, Mr Meikle, prior to the date (8 January 2016) on which the revocation took effect. It is important to note that a late appeal was accepted by the Upper Tribunal on 15 March 2016. On 15 August 2016 Mr Meikle's appeal to the Upper Tribunal was dismissed.

   (x) TE Healy concluded that the use of the vehicle on that day was in contravention of section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 and that, as a consequence, he was authorised to impound it. The vehicle was impounded at 13.10 on 11 May 2016.

   (xi) It is important to note that at 15.38 on 11 May 2016 an application for a stay of the revocation decision of the Traffic Commissioner for Scotland dated 23 December 2015 was received in the office of the Traffic Commissioner. On 13 May 2016 the Traffic Commissioner decided that the application for a stay should be refused.

(xii) It is also important to note by way of a decision dated 15 August 2016 the Upper Tribunal dismissed the appeal by the operator Mr Meikle against the revocation decision of the Traffic Commissioner for Scotland dated 23 December 2015.

(xiii) Statutory advertisements were placed in the London Gazette relating to the vehicle indicating the steps which might be taken by those wishing to establish a claim for the return of it.

(xiv) A single application for the return of the vehicle was made within the permitted timescale. The application was made by the Appellant using the relevant form which was dated 17 May 2016 and was received on 19 May 2016. The Appellant set out the following in his application:

> 'The vehicle was leased to the operator and at the time of lease the licence was checked. We were not told or aware the licence had been revoked as he told us it was under appeal and he still had authority to be operating. I have enclosed a copy of the lease agreement.

(xv) The Deputy Traffic Commissioner (DTC) directed that the application should be subject to a hearing and he issued directions in respect of the hearing.

(xvi) The hearing took place at the office of the DTC on 6 June 2016.

3. On 9 June 2016 the DTC made a decision to the following effect:

> 'The claimant not having satisfied me in accordance with Ground (c) under paragraph 4(3) of the Regulations that he probably did not know that the vehicle had been used in contravention of the Act: I direct that DVSA dispose of the vehicle once the period for any appeal has expired.'

4. The Appellant was notified of the decision of 9 June 2016 by way of correspondence dated 13 June 2016.

The hearing before the Deputy Traffic Commissioner

5. The hearing took place on 6 June 2016. The Appellant was present and was represented. TE Healy and STE Parish were present.

6. Having looked at certain documents, having heard oral evidence from and having questioned the Appellant the DTC indicated that he was satisfied that the Appellant was the owner of the relevant vehicle.

7. Oral evidence was given by TE Healy who adopted two statements in connection with enquiries made about vehicles purported to be operated under the goods vehicle operator's licence in the name of Mr Meikle after that licence had been revoked. Having heard that evidence and considered the statements, the DTC indicated that he had reached the conclusion that he believed on the balance of probabilities that DVSA had satisfied him that that there were grounds for the detention of the vehicle on 11 May 2016.

8. The Appellant gave further evidence in connection with a document which had been provided at the outset of the proceedings and which was submitted to be a lease in connection with the relevant vehicle. The Appellant agreed that his signature was on the document but stated that he did not recognise another signature on it. He stated that his brother had read through the document. He indicated that he had known Mr Meikle for 30 plus years and had worked with him. Mr Meikle had needed to produce an identity disc to demonstrate that he held a goods vehicles operator's licence. The Appellant, through his

representative, made reference to various clauses in the lease which imposed requirements and obligations on Mr Meikle.

9. When he was asked by his representative whether there had been any issues which had come to his attention in connection with the operator's licence from the commencement of the lease, the Appellant referred to one prohibition notice in connection with one vehicle. Apart from that there were no other issues. He had heard through 'other customers' that there had been a '… Public Inquiry about his licence and he had applied for a stay.' He was told that '… everything was fine … he applied for a stay and was allowed to work.' He had spoken to Mr Meikle about what he had heard from other customers and stated 'It's up for an appeal.' He had not asked him for further details. He had asked him about the appeal and Mr Meikle had stated that he was dealing with that. He had not mentioned a stay and the Appellant asserted that he would not have understood what was meant by that.

10. In response to further questions from his representative, the Appellant stated that he had never held an operator's licence and that he had limited knowledge about procedures attached to such licences. When he had heard about the Public Inquiry he had not made further enquiries as he had been told that the licence was still 'active. He had not asked to see any paperwork.

11. In response to questions from the DTC the Appellant stated that he had obtained the vehicle lease document from a friend and that it was his friend's idea to have it. The purpose of the lease was protection for the vehicle. He stated, initially, that he could not remember who had provided the second signature on the document but then that he had witnessed Mr Meikle signing it.

12. The Appellant asserted that the document had been read to him. The DTC put it to the Appellant that the document was 'unfinished' in the sense that clauses with alternative purposes had been left in it. The Appellant stated that he had assumed the document was correct when he had been given it and that Mr Meikle had read it and signed it.

13. The DTC pointed out that the section concerning payments had been left blank. The Appellant indicated that payments were made through what was an 'offset agreement'. The number of the operator's licence which was on the lease had been inserted by his brother. The Appellant agreed that he had thought that the provision of an operator's licence identity disc was sufficient to prove that he had an operator's licence.

14. The Appellant stated that he wanted to make sure that Mr Meikle had '… enough licences to cover what he was wanting to operate.' The Appellant agreed that he had never seen the actual operator's licence itself, just the identity disc.

15. The Appellant stated that he saw Mr Meikle every six weeks or so, sometimes more, sometimes less. He stated that Mr Meikle's usual driver was David Paterson and agreed that he also used Mr Paterson as a driver on a casual basis.

16. The Appellant stated that he had first heard about possible problems with Mr Meikle's licence when he had spoken to someone in February 2016. He had been asked what was happening with Mr Meikle's licence and had been informed that Mr Meikle was '… at a Public Inquiry.' The person to whom he had spoken had not given any indication as to what had happened as a consequence. He stated that his understanding of being called to a Public Inquiry that it would mean that '… you were getting taken in, somebody to

answer questions about your maintenance or whatever…' He had heard about operators losing their licences or having them suspended.

17. The Appellant stated that having heard about the potential problems with Mr Meikle's licence he had endeavoured to speak with him by telephone but could not obtain an answer. When he did speak to him he had been informed that Mr Meikle had been to a Public Inquiry and that he was appealing against the 'decision'. The 'decision' was that his licence was going to be revoked. The message which he had been given was that Mr Meikle's licence was going to be revoked. Nonetheless, he was under the impression that he'd lodged an appeal and that there was no way to check that.

18. When it was put to the Appellant by the DTC that he could have checked with DVSA, or the office of the Traffic Commissioner or by contacting Mr Meikle directly, about the Public Inquiry, the outcome decision and a potential appeal and/or stay, the Appellant agreed that he could '… possibly have gone down that road.' He had not done so, however, due to other business commitments. He had taken Mr Meikle's word at '… face value and I treated people like I would like to be treated myself. You tell somebody something, you would expect them to tell you the truth and to, and to be believed.' He had not asked for additional evidence as he had '… worked with him for two and a bit years … and I'd gained trust in the man.'

19. The Appellant asserted that he had not found out that Mr Meikle had been to a hearing in Edinburgh in December 2015, that the Traffic Commissioner for Scotland had subsequently issued a decision in connection with Mr Meikle and that the revocation of Mr Meikle's licence was due to take effect from 8 January 2016.

20. Under questioning from the DTC, the Appellant confirmed that he had also been given details of potential problems with Mr Meikle's licence from another source, and individual to whom he had spoken some 4-5 days after the first person in February 2016. When asked whether the confirmation of the potential problems from a second source had alerted the Appellant to the requirement to do something, he had replied 'possibly'.

21. The Appellant stated that it was barely seldom' that he saw his brother as he (the Appellant) worked in the 'yard' and his brother was driving a lorry for a living. The Appellant stated that he had only heard about the stopping of the second vehicle on 11 January 2016, which was being driven by his brother, and displaying Mr Meikle's operator's licence identity disc, on the day of the hearing. He had not heard about the stopping of the vehicle at the time because of a 'big fall out' which he had with his brother at Christmas. He agreed that his brother worked with Mr Meikle and that his brother had helped with the vehicle lease document. The Appellant stated that he and his brother used to be close but that '… now it works on a needs to know basis.'

22. The Appellant was shown a copy of one of the pre-impounding letters and stated that he had not received or seen the letter until it was in the paperwork associated with the hearing. He asserted that he had problems with his postal services and that other documentation had not been received. He was referred by the DTC to other items of correspondence which had been forwarded to different businesses at the same address and which had been returned as 'unopened' and 'not called for' by the Royal Mail. The Appellant confirmed that the businesses continued to operate from the same address.

23. Under final questioning from the DTC, the Appellant asserted that the 'offset' agreement which he had with Mr Meikle did not mean that money never

changed hands but that certain payments were made. He did not have to meet Mr Meikle in connection with those payments as they were made by bank transfer or cheque. The Appellant stated that he had not taken any action in relation to the vehicle lease agreement with Mr Meikle that the lease agreement had not been terminated even though Mr Meikle had been in breach of it.

24. The DTC gave the Appellant the opportunity to comment on certain aspects of the decision of the Traffic Commissioner in the case of Mr Meikle.

25. The DTC concluded the hearing by allowing the Appellant's representative to make submissions on the issues arising.

The Traffic Commissioner's findings

26. The findings of the DTC were set out at paragraphs 74 to 82 of his decision, as follows:

> 'First, that DVSA has established a right to detain the vehicle: this was not in contention as far as the claimant was concerned.
>
> I find that Graeme Robertson has satisfied me that on balance he was the owner of the vehicle. Having heard representations, I had concluded that the claimant was the owner of the vehicle, despite the discrepancies in his V5C document, the fact that the insurance policy was in the name Eion Robertson and William Meikle and that William Meikle had told the Traffic Commissioner for Scotland that he had owned each of the large goods vehicles nominated under the licence.
>
> Turning to the ground for the return of the vehicle, I have considered whether the claimant has satisfied me that on the balance of probabilities that Ground: (c) has been made out.
>
> This has been a case for the owner of the vehicle, Graeme Robertson has sought to argue that at the material time when the vehicle was detained that he did not know that the operator's license under which it was purported to be used was no longer in force.
>
> He refers to the vehicle lease agreement with William Meikle dated 23 June 2014 which he asks me to accept regulates the relationship regarding the impounded vehicle in this case. Schedule 2, which typically provides for usually critical terms related to the amounts payable by the lessee and the dates upon which such payments are to be made, is blank. It did however place responsibilities on Mr Meikle in respect of compliance with the requirements for the use the view of the carriage of goods I find that with these discrepancies is unlikely that the parties regard themselves as bind by the agreement because of the way it has been drawn. I find that the fact that the agreement remains in effect, and has not been terminated, despite the manifest and obvious breaches by the lessee supports that view of matters.
>
> He maintains that he did not become aware of the loss of the licence as a result either of the receipt of pre-impounding letters issued after the revocation took effect, since they were never effectively delivered. Nor as a result of his brother, Eion Robertson telling him of the circumstances of him being stopped in another vehicle of William Meikle on 11 January 2016 at Carlisle, despite the fact that he admitted he still retained a business relationship by way of partnership with his brother. He maintains that even though his brother would then have become aware (had not done so already) of the revocation of

> that license that he was not told about it because of a strained relationship that existed between the two of them since Christmas 2015.
>
> I find that each of the five pre-impounding letters dispatched to the variety of Robertson business formats at Old Station Yard, Station Road, Armadale, Bathgate. EH48 3LJ were not successfully delivered because special delivery arrangements required for a signatory. I find it however are more likely than not that the non-delivery cards which would have been left by the Post Office would at the least have put on notice either Graeme or Eion Robertson, or a member of their staff that important correspondence was waiting to be collected by them.
>
> I find on the evidence including the admission made to me by Graeme Robertson that he still retained a business partnership with his brother, Eion at the time of the impounding. I note that the decision of the Traffic Commissioner for Scotland refers to a range of businesses been run from the operating centre at Old Station Yard in which Graeme Robertson had involvement, some with his brother and others not. Whilst I accept that their relationship may have become strained as a result of other matters, I do not find it credible that within their relationship as brothers and/or business partners engaged in activities for their mutual profit that there would not have been conversation between them following the events of 11 January 2016,when Eion was stopped in another vehicle of William Meikle's near Carlisle. It stretches credulity from me not to find that such a state of affairs in which Eion Robertson was involved, would not then have come to the attention of Graeme Robertson. It was the case that the public in the locality and his brother had been aware of adverse developments for Mr Meikle for some four months by the date of the impounding. I am satisfied that he would have had at least some knowledge of the outcome of the public enquiry and its aftermath.'

The Deputy Traffic Commissioner's reasoning

27. The reasoning of the DTC is set out in paragraphs 83 to 111 of his decision under the heading 'Consideration'. As will be noted below, Mr Davies seeks to challenge the conclusions of the Deputy Traffic Commissioner in one, albeit, significant respect. To set the context for that respect, and the challenge to it, the remainder of the reasoning of the DTC is summarised as follows.

28. The DTC began by stating that he had considered the circumstances of the case alongside the need to answer the following question:

> 'Has the claimant satisfied me that he, she or it did not know that the vehicle was being or had been used in contravention of the Act?'

29. That question is taken from paragraph 7 of the decision of the Upper Tribunal in *Societe Generale Equipment Finance Limited* ([2013] UKUT 423 (AAC)) ('*Societe Generale*') – hence the referral to 'she' or 'it'. In reality the DTC was following the guidance given by the Upper Tribunal in *Societe Generale* on the proper approach to claims for the return of a vehicle in which reliance is placed on Regulation 4(3)(c) of the Goods vehicles (Enforcement of Powers) Regulations 2001, as amended ('the 2001 Regulations').

30. Continuing with the application of the Upper Tribunal guidance in paragraph 9 of *Societe Generale*, the DTC posed to himself the question:

> '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 section 2 of the Act?'

31. The answer was that there was some evidence, namely that of the Appellant that he was unaware of the revocation. The DTC did not regard the Appellant's own evidence to be so convincing that he could conclude the matter without looking at other proof of knowledge. The DTC reminded himself that he had to be careful to avoid the danger (noted by the Upper Tribunal in paragraph 11 of *Societe Generale*) of reversing the burden of proof. We note that the Upper Tribunal had stated:

> 'It is for the claimant to prove lack of knowledge not for VOSA or anyone else to satisfy the Traffic Commissioner that the claimant knew.'

32. The DTC then reminded himself that the Upper Tribunal in *Societe Generale*, having reviewed the relevant authorities, had set out five categories of knowledge. Although not specified by the DTC, these were set out by the Upper Tribunal in paragraph 13, as follows:

> (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.'

33. In respect of (i) the DTC found, there was no basis on the evidence before him which would demonstrate, on the balance of probabilities that the Appellant knew the use of the vehicle he owned on the day was unlawful.

34. The DTC noted that the Upper Tribunal had set out what it termed a 'route to decision' for category (iii). The 'route to decision' had been set out by the Upper Tribunal in paragraph 14 of its decision, as follows:

> (i) What inquiries would an honest and reasonable person have made in the circumstances faced by the person claiming the return of the vehicle, ("the claimant")?
>
> If the answer is "None" there can be no question of imputed actual knowledge under category (iii).
>
> If the answer is that an inquiry or some inquiries would have been made the questions that follow must be answered separately in relation to each inquiry that the honest and reasonable person would have made.
>
> (ii) Did the claimant make such inquiries?
>
> If the answer is "Yes" there can be no question of imputed actual knowledge under category (iii).
>
> If the answer is "No" the next question must be answered.

(iii) Did the claimant wilfully refrain from making such inquiries? For the purposes of this question 'wilfully' means 'deliberately and intentionally' as opposed to 'accidentally or inadvertently'.

If the answer is "No" there can be no question of imputed actual knowledge under category (iii).

If the answer is "Yes" the next question must be answered.

(iv) Did the claimant recklessly refrain from making such inquiries? For these purposes 'recklessly' means 'not caring about the consequences of failing to make such inquiries'.

If the answer is "No" there can be no question of imputed actual knowledge under category (iii).

If the answer is "Yes" the next question must be answered.

(v) Was a high degree of fault involved in wilfully failing to make such inquiries?

If the answer is "No" there can be no question of imputed actual knowledge under category (iii).

If the answer is "Yes" a finding that the vehicle owner had imputed actual knowledge under category (iii) is justified.'

35. In relation to (i) the DTC found that there were inquiries that an honest and reasonable person in the same position as the Appellant would have made. At paragraph 97, the DTC summarised the Appellant's lengthy experience '… in and around the use of large goods vehicles, albeit not holding an operator's licence himself' and his resultant knowledge and understanding of the licensing regime, although the DTC did acknowledge his limited literacy skills. The DTC noted, at paragraph 99, the concessions which had been made by the Appellant. At paragraph 100 he noted the information which had been given to the Appellant in February 2016 by two of his customers.

36. The enquiries which the DTC found that the Appellant could have made included seeking confirmation of what he had been told through the Office of the Traffic Commissioner, the DVSA or asking to see the relevant paperwork held by Mr Meikle. He noted that the Appellant should also have been motivated to inquire through the risk of loss of his vehicle.

37. In relation to (ii) the DTC found that the claimant did not make any such enquiries and simply accepted at face value what he had been told. That position was inconsistent with protections which he had purported to provide for himself under the terms of the vehicle lease agreement and the DTC noted that he did not seek further assistance from the individual who had, initially, assisted with the lease.

38. In relation to (iii) the DTC concluded from the Appellant's evidence that he had '… deliberately and intentionally failed to pursue enquiries which were clearly and obviously necessary to clarify the information he was in possession of.' The DTC did not accept the Appellant's explanation that the failure to make the relevant enquiries were accidental or inadvertent.

39. In relation to (iv) the DTC found that the failure to act on each or any of the enquiries he might have made was reckless. This was in the sense that not having been told, at the time of the revocation decision, by Mr Meikle that his licence was being revoked that '… there must have been something to hide and therefore something which he needed to follow up.' The DTC found that the explanations that he was too busy or had problems reading relevant

materials amounted to '… appreciating the existence of a risk of not finding out the truth, yet going on to take that risk' and that, in turn, this amounted to recklessness.

40. The conclusions of the DTC in respect of (v) are central to the appeal. Accordingly we set them out in full, as follows:

> 'I find that a high degree of fault has been demonstrated on the part of (the Appellant) in this case. The failure to make enquiries on each or any of the enquiries might made [*sic*], once put on notice was such as to allow the offset arrangements which were described in evidence whereby services were provided by Mr Meikle to (the Appellant) in what was effectively a payment of the rental charge for the vehicle was allowed to continue thereby, and was said to be continuing even at the date of this hearing. In short there was a financial incentive to the continued operation of that vehicle for (the Appellant). When faced with the clear implication that flows from being told of the revocation of a licence, indicating serious failures in terms of compliance, it was clearly beholden on a vehicle owner because vehicle was at risk of impounding, and one with an active role in the licence is a maintenance contractor, to have acted in direct proportion to the seriousness of events that unfolded.'

The appeal to the Upper Tribunal

41. On 11 July 2016 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.

42. Detailed grounds of appeal were set out on behalf of the Appellant. We have not replicated those grounds here as they were replicated in the Skeleton Argument submitted on behalf of the Appellant in advance of the oral hearing of the appeal and we deal below with the grounds in the Skeleton Argument.

43. Before the oral hearing in the Upper Tribunal, Mr Davies submitted a Skeleton Argument on behalf of the Appellant, for which we are grateful. In the Skeleton Argument, Mr Davies began by making the following concession in connection with the DTC's findings:

> 'In connection with this appeal the Appellant concedes the following facts:
>
> a. That he was the owner of vehicle at the material time on 11th May 2016;
>
> b. That the vehicle was operated on 11th May 2016 without an Operator's Licence, contrary to Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995; and
>
> c. That the DVSA was entitled to impound the vehicle on 11th May 2016, pursuant to its power to do so under Section 3 of the Goods Vehicles (Enforcement Powers) Regulations 2001;
>
> In connection with this appeal the Appellant acknowledges the findings of fact reached by the Northwest DTC, as set out within his judgement (p.192) and whilst not accepting all findings of fact and particularly those at paragraphs 79 and 80 (page 192) and paragraphs 81 and 82 (page 193), the Appellant concedes that it was open to the Northwest DTC to reach such findings on the evidence and therefore these are unchallenged.

4. In connection with this Appeal the Appellant accepts and commends the finding of the Northwest DTC that on the evidence and on a balance of probabilities that the Appellant did not have actual knowledge that the vehicle was used, or had been used, without an Operator's Licence (page 194).

It is accepted that the Northwest DTC has properly directed himself on matters of law, having regard to the cases of:

Nolan Transport v VOSA and the S of S for Transport (2011/60)

Asset to Asset v VOSA (2011) UKUT 290 (AAC)

Societe Generale Equipment Finance Ltd v VOSA (2013/21)'

44. Mr Davies then set out the following points of challenge to the DTC's decision:

'**Points of challenge**

The Appellant challenges as an error in the application of the law that he had imputed knowledge (or should have known) that the vehicle was being used on 11th May 2016 or had been used without an Operator's Licence.

Although not forming part of the Northwest DTC's written decision to make finding of imputed knowledge, it is averred on behalf of the Appellant that this decision has been improperly influenced by more general matters of dissatisfaction with respect to the relationship between the Operator, Mr Meikle (Operator's Licence OM1002865) and the Appellant, being matters which were addressed within the body of the Judgement and particularly the findings of fact by the Traffic Commissioner for Scotland in connection with a public inquiry conducted on 9th December 2015 (pages 56-66).

It is submitted that any broader dissatisfaction with any arrangement between Mr Meikle and the Appellant, should not have been reflected within the judgement of the Northwest DTC.

Imputed Knowledge

Having determined that on a balance of probabilities the Appellant did not have actual knowledge that the vehicle was being, or had been used without an Operator's Licence, the Northwest DTC has properly considered in accordance with case law (Baden v Societe Generale and Asset 2 Asset v VOSA) that there may be imputed knowledge.

In doing so proper consideration has been given to the two categories of imputed knowledge:

(ii) knowledge that the Appellant would have acquired had he not willfully shut his eyes to the obvious; and

(iii) knowledge that the claimant would have acquired if he had not willfully and recklessly failed to make such enquires a an honest and reasonable person would.

In considering the above categories, it is submitted on behalf of the Appellant that the Northwest DTC, has failed to give adequate weight to the unchallenged assertion by the Appellant that he had made enquiry with Mr Meikle, who had informed him that he had appealed the decision of the Traffic Commissioner for Scotland to revoke his Operator's Licence (OM10028655) and had been informed by Mr

Meikle that the revocation was subject to appeal, presenting him with reassurance that the licence remained effective.

This evidence was given by the Appellant at the impounding hearing conducted by the Northwest DTC on 21st July 2016, the Appellant giving the following evidence:

"I asked him outright one was (inaudible) to get his light fixed. I said, "What's the (inaudible) your Operator's Licence?" He says, "It's up for an appeal".

"… he told me it was still active, the licence" (page 149).

Whilst not addressed as a finding of fact within the written judgement of the Northwest DTC, it is implicit within his judgement that the above evidence was accepted by the Northwest DTC and the following passage of the judgement is relied upon:

"An honest and reasonable person would seek to obtain confirmation of what Mr Meikle was telling him…"

(Page 198 – Paragraph 102).

In accepting this fact, the Northwest DTC has accepted that the Appellant has been misled.

Against this background it is asserted on behalf of the Appellant that:

The Northwest DTC has erred in reaching the following conclusions:

a. That there were further enquiries which an honest and reasonable person have made in the circumstances faced by the Appellant;

b. That the Appellant was reckless in failing to make further enquiries; and

c. That there was a high degree of fault in willfully failing to make such further enquiries.

<u>That there were further enquiries which an honest and reasonable person have made in the circumstances faced by the Appellant:</u>

It is submitted on behalf of the Appellant that his enquiry with the vehicle's operator, Mr Meikle was reasonable and that having been misled by Mr Meikle in the assertion that the matter was subject to appeal, it was reasonable for a person in those circumstances to make no further enquiry.

<u>That the Appellant was reckless in failing to make further enquiries:</u>

It is submitted on behalf of the Appellant that a person who has been actively misled is not acting recklessly in being so misled, unless it is contended that a person is reckless in being trusting of another.

<u>That there was a high degree of fault in willfully failing to make such further enquiries:</u>

It is submitted on behalf of the Appellant that in the acceptance of the Appellant being misled by Mr Meikle that the revocation of the Operator's Licence was being appealed and that it remained effective, the Northwest DTC could not properly reach a conclusion that there was a "high degree of fault".

In reaching his determination on the question of fault the Northwest DTC has failed to give any or proper consideration to the fact that the Defendant has been misled, as evidenced within the judgement.

"I find that a high degree of fault has been demonstrated on the part of Graeme Robertson in this case. The failure to make enquiries on each or any of the enquiries might made, once put on notice was such as to allow the offset arrangements which were described in evidence whereby services were provided by Mr Meikle to Graeme Robertson in what was effectively a payment of the rental charge for the vehicle was allowed to continue thereby, and was said to be continuing even at the date of this hearing. In short there was a financial incentive to the continued operation of that vehicle for the Graeme Robertson. When faced with the clear implication that flows from being told of the revocation of the licence, indicating serious failures in terms of compliance, it was clearly beholden on the owner because vehicle was at risk of impounding, and one with an active role in the licence is a maintenance contractor, to have acted in direct proportion to the seriousness of events that unfolded."

It is submitted that when one considers whether or not a case falls to be one of "high culpability", one must consider that where a person's failure to make proper enquiry, even if determined to be reckless, is caused as a result of being misled by the actions of another person, that this must be a case in which there cannot be high culpability.

It is submitted that the case of the Appellant is one in which there was no such "high culpability".

Absence of Discretion:

It is submitted that as a matter of law, the Northwest DTC did not have a broader discretion to reflect any dissatisfaction with any relationship between the Appellant and the Operator Mr Meikle and that such dissatisfaction with the conduct of any Operator is properly and lawfully addressed by way of sanction against the Operator. In the present case it is noted as relevant that Mr Meikle's Operator's Licence has been revoked and his appeal refused.

Concluding:

For the above reasons it is submitted that the Northwest DTC was incorrect in his finding and that the Appellant's application for the return of his vehicle in pursuance of regulation 4(3) should be granted.'

45. Mr Thomas provided a Skeleton Argument on behalf of the Respondent, for which we are grateful. He submitted that everyone is assumed to know the legal position that to use a vehicle in breach of section 2 of the 1995 Act is unlawful; that to do so renders it likely that the vehicle will be impounded; and that the grounds for the return of an impounded vehicle are limited. He noted that the DTC had found that the Appellant had imputed knowledge in accordance with paragraph 14 of *Societe Generale*.

46. Mr Thomas submitted that it had emerged from the evidence that:

    (i) Mr Meikle had made a financial investment in the Appellant's garage, that there was a 'vague overlay' between the Appellant's and Mr Meikle's businesses, being described as 'one of mutual, interwoven support.'

(ii) The Appellant's business was involved in dishonest activities.

(iii) Despite the alleged unreliability of the post the Appellant was prepared to accept payments for his business activities by cheque.

(iv) The Appellant was in regular contact with the Operator.

(v) The Appellant placed a high value on the vehicle.

(vi) In January 2016 the Appellant's brother had been notified by the DVSA that the Operator's licence had been revoked. The Appellant's brother had given the instructions to the driver who had been stopped on 11 May 2016.

(vii) The Appellant and his brother were named on insurance documents which showed they were operating a business together.

(viii) The Appellant had been put on notice by two independent persons who had raised queries about Mr Meikle's licence. When the second of those persons had raised the issue with the Appellant, he (the Appellant) had chosen not to make further inquiries.

(ix) An honest and reasonable person would have made further inquiries and not rely on the word of an individual who had everything to gain by being misleading.

(x) The Appellant could have verified the situation with the office of the Traffic Commissioner, or with the DVSA or with the Operator and the Appellant accepted that he could have taken these actions.

(xi) On 3 June 2016, the day of the hearing, the Appellant had still not terminated the lease.

(xii) By permitting the Operator to continue to use the vehicle for at least three months after he had been alerted to the problem the Appellant was prepared to put the public at risk. The Appellant deliberately chose not to make any inquiries.

47. At the oral hearing of the appeal Mr Davies began by indicating that he wished to narrow the issues arising in the appeal. To this extent he resiled from the submission made in the Skeleton Argument that the DTC had erred in concluding that there were further enquiries which an honest and reasonable person would have made in the circumstances faced by the Appellant and that the Appellant was reckless in failing to make further enquiries. The focus was, therefore, on a challenge to the DTC's conclusion that there was a high degree of fault in the Appellant wilfully failing to make such further enquiries.

48. Mr Davies also acknowledged that although he would not agree with all of the DTC's findings of fact, he conceded that the DTC was entitled to arrive at those findings based on his assessment of the evidence.

49. Mr Davies stated that he fully accepted that the DTC had quite properly followed the guidance set out in the case law and had asked himself the correct questions that he should have asked when making a determination as to imputed knowledge. The Appellant's challenge related to the final limb of the test and the sequence of questions which the DTC had asked himself. He submitted on behalf of the Appellant that in reaching the conclusion that there was a high degree of fault the DTC had taken too broad an interpretation on that issue. The DTC had not limited his consideration to the question which must be applied. That was 'In failing to make honest and reasonable inquiries had the Appellant acted with a high degree of fault.'

50. Mr Davies submitted that this was not a case in which the DTC had made a finding that the Appellant had deliberately 'turned a blind eye.' He asserted that the Appellant was not like an individual who did not make any inquiry whatsoever. He accepted that individuals in these categories did demonstrate a high degree of fault. He noted that the Appellant had given evidence that the operator had told him that the licence was still active. The Appellant had been misled. Accordingly any failure by the Appellant to make further inquiries had been contributed to by Mr Meikle. In the case of an individual, such as the Appellant, who wrongly took information and relied upon it and who did make some inquiry, it could not be said that there was a high degree of fault but something falling short of that.

51. Mr Davies submitted that the DTC, in reaching his conclusion, had not confined himself to a consideration of the circumstances in which an honest and reasonable inquiry could be made. The DTC had taken a broader view of the circumstances including a broader concern of the context in which the vehicle was operated and the relationship between the Appellant and Mr Meikle. If the DTC had concerns about the operator's licence then the appropriate course of action was to instigate regulatory proceedings against the operator. In giving consideration to broader issues including the Appellant's relationship with Mr Meikle, the DTC had gone too far.

52. Mr Davies submitted that the DTC had misdirected himself as to the question to be asked. The question should have been 'When I consider the circumstances in which the Appellant failed to make inquiries which are honest and reasonable, do I consider that in failing to make inquiries there has been a high, medium or low degree of fault?'

53. Mr Davies asserted that there was an element of truth about the information which had been given to the Appellant by Mr Meikle. An appeal had been lodged against the decision to revoke the licence. The Appellant had been misled and this could not support a conclusion that there was a high degree of fault. Mr Davies submitted that the decision in *Nolan Transport v VOSA & Secretary of State for Transport* ([2013] UKUT 423 (AAC), T/2011/60) (*Nolan Transport*) could be distinguished in that that was a case of 'turning a blind eye'.

54. In response to questions from us, Mr Davies submitted that the test was 'there for a reason' and noted that the sanction which followed a finding of a high degree of fault was punitive. He agreed that no corroborating statements had been made in connection with the present proceedings by the Appellant's brother or by Mr Meikle. He also conceded that he could not say that the Appellant's experience of the transport industry should not play any part in the DTC's consideration but that the consideration of that factor had to be appropriate. He submitted that consideration had to be given to the Appellant's dyslexia. He agreed that it was the answer to one question from one individual in one point in time was the evidential basis on which he submitted that there could not be said to be a high degree of fault. Finally, he rejected the assertion made on behalf of the Respondent that public concern would automatically lead to a finding of a high degree of fault.

55. At the oral hearing Mr Thomas expanded on the written submissions made in the respondent's Skeleton Argument modified by the concessions made by Mr Davies.

The relevant legal principles

56. Under the provisions of section 2(1) of the Goods Vehicles (Licensing of Operators) Act 1995, (the 1995 Act) it is unlawful, in Great Britain 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 a licence, (known as 'an operator's licence), issued under the Act. By section 2(5) a person who uses a vehicle in contravention of this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

57. The Transport Act 2000, (the 2000 Act), amended the 1995 Act in two ways. First, by s.262(1) it added s.2A, which simply provides that Schedule 1A to the 1995 Act, 'shall have effect'. Second, by s.262(2) it added Schedule 1A, which contains detailed powers to make Regulations concerning the detention etc of goods vehicles used in contravention of s.2 of the 1995 Act and, in paragraph 9(4) of Schedule 1A, it sets out grounds for return which may be included in the Regulations.

58. The right to impound goods vehicles is set out in regulation 3(1) of the Goods Vehicles (Enforcement of Powers) Regulations 2001, (the 2001 Regulations), which came into force on 4 January 2002. Regulation 3(1) of the 2001 Regulations is in these terms:-

> "Where an authorised person has reason to believe that a vehicle is being, or has been, used on a road in contravention of s.2 of the 1995 Act, he may detain the vehicle and its contents".

59. Authorised person is defined in paragraph 1(1) of Schedule 1A to the 1995 Act. And means an "examiner appointed by the Secretary of State under s.66A of the Road Traffic Act 1988 or a person acting under the direction of such an examiner".

60. The provisions of Regulations 4,5, 6, 8 and 9 of the 2001 Regulations were summarised by the Upper Tribunal in paragraphs 84 and 85 of its decision in *Nolan Transport*. At paragraph 86 the Upper Tribunal stated:

> 'Regulation 10 of the Regulations provides for applications to a Traffic Commissioner for the return of a vehicle detained under the power set out in paragraph 3. The terms of Regulation 10 are important so we quote them in full:
>
> *"10(1) The owner of a vehicle detained in accordance with regulation 3 may, within the period specified in regulation 9(2), apply to the traffic commissioner for the area in which the vehicle was detained for the return of the vehicle.*
>
> *(2) An application under paragraph (1) shall be in writing and shall be accompanied by –*
>
> *(a) a statement of one or more of the grounds specified in paragraph (4) on which the application is declared to be based; and*
>
> *(b) a statement indicating whether the applicant wishes the traffic commissioner to hold a hearing.*
>
> *(3) An application under paragraph (1) shall be served before the expiry of the period specified in regulation 9(2).*
>
> *(4) An application under paragraph (1) may be made on any of the following grounds –*

> *(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);*
>
> *(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;*
>
> *(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;*
>
> *(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; and*
>
> *(ii) has taken steps with a view to preventing any further such use".*'

61. In paragraph 90 the Upper Tribunal summarised the scheme for the right to impound and claim for return, as follows:

> 'Three points need to be stressed at this stage. First, it is for VOSA to show that they had reason to believe that the detained vehicle was being or had been used, on a road, in contravention of s.2 of the 1995 Act. The standard of proof required is the balance of probability … Second, once VOSA have established they had the right to detain a vehicle it is for the owner to prove ownership of the vehicle or vehicles to which the claim relates. Again the standard of proof required is the balance of probability … Third, it is for the owner to show, on the balance of probability, that one of the grounds set out in regulation 10(4) of the 2001 Regulations, as amended, has been established.

62. In paragraph 7 of its decision in *Societe Generale* ([2013] UKUT 423 (AAC)) ('*Societe Generale*'), the Upper Tribunal stated the following:

> 'Every claim for the return of a vehicle in which reliance is placed on Regulation 4(3)(c) of the 2001 Regulations as amended raises a deceptively simple question, which the Traffic Commissioner must answer. The question is this: *"Has the claimant satisfied me that he, she or it probably did not know that the vehicle was being or had been used in contravention of s. 2 of the 1995 Act?"*

63. As was noted by the DTC in the instant case, the Upper Tribunal in *Societe Generale* went on to provide what it described as a 'structure or route leading to a final decision, so that the decision accords with the decided cases, and can be justified on the evidence put forward in the case in question.'

64. In paragraph 12 the Upper Tribunal made reference to the three important cases which had considered the law in relation to the meaning of 'knowledge' in impounding cases – *Nolan Transport*, *2003/3 Close Asset Finance Ltd v Secretary of State for Transport* and *Asset 2 Asset Ltd* ([2011] UKUT 290 (AAC), *T/2011/25*). In paragraph 13 it set out the five categories of knowledge '… which emerge from the authorities cited in these three decisions, with a view to setting out what needs to be proved if knowledge is to be established by one of these routes.'

65. As was noted above, the five categories were set out by the DTC in an accurate manner in his decision. We have noted that at paragraph 115 of its decision in *Nolan Transport* the Upper Tribunal added the word 'wilfully' to category (ii) but nothing turns on that in connection with the present appeal.

66. In paragraph 13 of its decision in *Societe Generale*, the Upper Tribunal said the following about categories (ii) and (iii):

> '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 category (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.'

67. Turning to category (iii), which was the category at issue in the present appeal, the Upper Tribunal set out its 'route to decision' in paragraph 14.

68. In paragraph 270 of its decision in *Nolan Transport*, and after undertaking a detailed consideration of all of the principles, the Upper Tribunal said the following:

> 'Taking all these factors into account we are quite satisfied that, properly applied, the impounding regime strikes a fair balance between the rights of the individual vehicle owner and the interests of the State, on behalf of the public generally, in securing compliance with the system of operator's licencing in order to promote road safety and fair competition. For these reasons we can see no need to read down the provisions of the impounding regime in order to include an element of discretion. Indeed we find it difficult to envisage any circumstances in which after the failure of a claim for the return of a vehicle it would, nevertheless, be appropriate to exercise a discretion to return the vehicle.'

69. In NT/2013/52 & 53 *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

> 'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for

> Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: *"the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view"*. The Tribunal sometimes uses the expression *"plainly wrong"* as a shorthand description of this test.'

70. The Upper Tribunal in NT/2013/52 & 53 *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI* was considering an appeal to the Upper Tribunal against a decision of the Head of the Traffic Regulation Unit under the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. There is no doubt, however, that the principles set out by the Upper Tribunal in paragraph 8, are derived from parallel appeals, such as the one in the instant case, where the appeal is against a decision of a Traffic Commissioner or DTC to refuse a claim for the return of an impounded vehicle – see paragraph 25 of *Societe Generale*.

Our analysis

71. Mr Davies has made cogent and articulate submissions on behalf of the Appellant. We have not been satisfied, however, that on the basis of the submissions which have been made that it could be said that the decision of the DTC in the instant case was 'plainly wrong'.

72. In this appeal we are concerned with a significant aspect of the regulatory scheme for goods vehicles - the impounding by the regulatory authority of a goods vehicle. The legislative scheme allowing for the impounding of a vehicle has been described in some detail above. It is unlawful 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. A person who uses a vehicle in contravention of the regulatory requirements is guilty of an offence. Significant purposes of the licensing scheme are the promotion of road safety and fair competition. It is axiomatic that the use of a goods vehicle on a road which does not have an operator's licence amounts to a significant risk to public safety.

73. Where a Traffic Examiner has reason to believe that a vehicle is so being, or has so been used on a road without an operator's licence, that Traffic Examiner may detain the vehicle and its contents. The Traffic Commissioner has to show that he or she has the right to detain the vehicle i.e. that its use on a road was in contravention of the regulatory requirements.

74. Detention does not equate to retention, however. The owner of the detained vehicle has the right to seek its return. The purpose of the impounding regime was succinctly summarised by the Upper Tribunal in paragraph 270 of its decision in *Nolan Transport* as striking '… a fair balance between the rights of the individual vehicle owner and the interests of the State, on behalf of the public generally, in securing compliance with the system of operator's licencing in order to promote road safety and fair competition.'

75. To have a detained vehicle returned it is for the owner to the vehicle to prove, on the balance of probability, ownership of the vehicle and that one of the grounds for return has been established. There are four such grounds.

76. In the instant case, the Traffic Examiner exercised his power to detain a vehicle having reason to believe that it was being used on a road without an operator's licence. The vehicle was stopped on 11 May 2016. The driver told the Traffic

Examiner that he took his instructions from a Mr Robertson. Mr Robertson told the Traffic Examiner that the vehicle was being operated by a Mr Meikle. Subsequent investigations revealed, however, that Mr Meikle's standard international goods vehicles operator's licence had been revoked with effect from 8 January 2016. Accordingly the Traffic Examiner was within his rights to detain the vehicle.

77. The Appellant is the owner of the vehicle which was detained on 11 May 2016. He has applied for its return. The DTC has refused the application and the Appellant has appealed to us.

78. As noted above, there are four grounds on which an owner of a detained vehicle may seek its return. It is for the owner to prove that one of the grounds is established. The ground on which the Appellant relied before the DTC was that he did not know that it was being or had been used in contravention of the regulatory requirements.

79. The DTC has set out in an accurate and comprehensive manner the detailed guidance on the proper approach to the issue of 'knowledge' outlined by the Upper Tribunal in *Societe Generale* for the purposes of the ground on which the Appellant relies. In that decision, Traffic Commissioners were guided as to the question to be answered when considering the relevant ground and exhorted to follow a 'structure or route leading to a final decision'. The DTC in the instant case has set out the structure or route. Mr Davies submits, of course, that the DTC has, just towards the end of the journey, veered off-route.

80. As was noted above, Mr Davies has conceded that while he would not agree with all of the DTC's findings of fact, he conceded that the DTC was entitled to arrive at those findings based on his assessment of the evidence. We are of the view that Mr Davies was correct to make that concession. It is clear that the DTC has undertaken a rigorous and rational assessment of all of the evidence before it. The DTC gave a sufficient explanation of his assessment of the evidence, explaining why he took the particular view of the evidence which he did. Any conflict in the evidence before the DTC has been clearly resolved and explained. The DTC made sufficient findings of fact, relevant to his decision, all of which are wholly sustainable on the evidence, and all of which are supported by relevant evidence. None of the DTC's findings are irrational, perverse or immaterial.

81. The acceptance by Mr Davies of the DTC's findings means that there can be no challenge to the findings made by the DTC in respect of the lease agreement (paragraph 79 of his decision). In addition the DTC found that either the Appellant or his brother would have been put on notice, by the provision by the Post Office of non-delivery cards in respect of five pre-impounding letters which the Post Office sought to deliver to common business addresses, that important correspondence was waiting for them.

82. Finally, the DTC concluded that he did not find it credible that within the Appellant's relationship with his brother and/or as a business partner engaged in activities for mutual profit that they would not have had a conversation between them following the events which took place on 11 January 2016. The DTC found that it stretched credulity for him not to find that the state of affairs in which his brother had become involved had not come to the Appellant's attention. He noted that others in the Appellant's locality, as well as the Appellant's brother had been aware for some time of adverse developments for Mr Meikle.

83. While the DTC was satisfied that there was some evidence (the Appellant's own) that he was unaware of the revocation of Mr Meikle's licence, he did not judge this to be sufficiently convincing to conclude the matter. He turned, therefore, to the 'route to decision' and concluded, firstly, that he could find no basis on the evidence which was before him that would demonstrate that the Appellant had actual knowledge that the use of the vehicle on 11 May 2016 was unlawful. It is, in our view, representative of the fair and objective manner in which the DTC has assessed the evidence that he has determined the issue of 'actual knowledge' in that manner.

84. Turning to the two categories of imputed knowledge, and without being specific about the matter, the DTC appears to have discounted that the Appellant had wilfully 'shut his eyes to the obvious' and, accordingly, could not have acquired the relevant knowledge by so doing. The DTC concentrated, rather on whether there was (imputed) knowledge which the Appellant would have acquired if he had not wilfully and recklessly failed to make such enquiries as an honest and reasonable person would have made.

85. By the time of the oral hearing, Mr Davies had conceded the DTC had not erred in concluding that (i) there were further enquiries which an honest and reasonable person would have made in the circumstances faced by the Appellant and that (ii) the Appellant was reckless in failing to make further enquiries.

86. It is important to note that the DTC, in arriving at his conclusions at (i) had noted that the Appellant had lengthy experience in the goods vehicle industry even though he did not hold an operator's licence himself and that the Appellant acknowledged an understanding of the licensing regime and the regulatory requirements. The DTC acknowledged the Appellant's literacy problems but noted that he was aware of the requirements to have protections for his vehicle. The Appellant was content to have business arrangements in place with Mr Meikle. The DTC noted the conversations that the Appellant had with two of his customers concerning potential problems with Mr Meikle's licence and the eventual conversation with Mr Meikle himself. The DTC observed that the Appellant did not challenge Mr Meikle as to why Mr Meikle had not informed him that his licence had been revoked. The DTC also set out, in a rational and cogent manner, the enquiries which might have been made. None of those aspects of the DTC's conclusions and reasoning are subject to challenge by the Appellant through Mr Davies.

87. In arriving at his conclusions with respect to (ii) in paragraph 85 above, the DTC concluded, once again rationally, that the Appellant did not make any such enquiries. There could be no other conclusion on the evidence which was before the DTC. Having assessed the Appellant's evidence as to why he did not make any such enquiries, the DTC concluded that the Appellant deliberately and intentionally failed to pursue enquiries which were clearly and obviously necessary and did not accept the Appellant's reasons for failing so to do. Further the DTC concluded, on the basis of the evidence which was before him, that the Appellant's failure to act on each or any of the enquiries he might have made was reckless and he did not accept the Appellant's evidence in that regard. None of these conclusions or reasoning was irrational, perverse or immaterial. Once again, none of those aspects of the DTC's conclusions and reasoning are subject to challenge by the Appellant through Mr Davies.

88. We turn to the submissions made by Mr Davies in respect of the final limb of the test, namely whether there was a high degree of fault in the Appellant wilfully failing to make such enquiries. In summary, Mr Davies submits that in

approaching the potential application of this limb of the test, the DTC had taken too broad an interpretation.

89. We agree with Mr Davies that this was not a case in which the Appellant had wilfully 'shut his eyes to the obvious' and could not, accordingly, have acquired the relevant knowledge by so doing. The DTC accepted that – see paragraph 84 above. We agree that if this had been such a case then a finding of a 'high degree of fault' would have been likely. We also agree that the sanction which is consequent on a finding is punitive, in that the decision to detain becomes a decision to retain. That is the nature of the impounding regime which has been established and, in such a case, the balance between the rights of the individual vehicle owner and the interests of the State, on behalf of the public generally, in securing compliance with the system of operator's licencing in order to promote road safety and fair competition falls on the side of the State.

90. Mr Davies submitted that the DTC was in error in the weight which was given to the evidence concerning the wider relationship which the Appellant had with both Mr Meikle and his brother. He did not demur that the DTC was entitled to give consideration to those wider circumstances but submitted that the starting point had to be the point at which the Appellant may have been put on notice of a requirement to make the enquiries which a reasonable and honest person might have made.

91. We have noted that in paragraph 100 of his decision, the DTC noted the *context* against which the Appellant was put on notice that there were issues in relation to the continued holding of an operator's licence by Mr Meikle. The emphasis here is our own. The evidence of that context was set out in paragraph 86 above. In that paragraph we noted that Mr Davies did not seek to challenge the DTC's conclusions and reasoning in that regard. We are of the view that the DTC was doing nothing more than providing the setting or background against which the Appellant was subsequently alerted to potential for further enquiries to be made.

92. In terms of the submission made by Mr Davies we are satisfied that when the DTC came to assess whether there had been a high degree of fault on the part of the Appellant in wilfully failing to make relevant enquiries he conducted such an assessment from the appropriate perspective of the Appellant. It is important to note that the DTC's findings that there were further enquiries which an honest and reasonable person would have made in the circumstances faced by the Appellant, that the Appellant deliberately and intentionally failed to pursue enquiries which were clearly and obviously necessary and that the Appellant's failure to act on each or any of the enquiries he might have made was reckless have not been challenged.

93. Mr Davies has submitted that the DTC had accepted that the Appellant had been misled by Mr Meikle after the Appellant had been proactive in seeking clarification of other evidence which had come to his attention in connection with potential problems with Mr Meikle's operator's licence. With respect to that submission we do not accept it. The DTC accepted that the Appellant had approached Mr Meikle and that a conversation had taken place. That was in the context of the DTC establishing whether in the particular circumstances there were further enquiries which an honest and reasonable person would have made in the circumstances of the case and whether the Appellant deliberately and intentionally failed to pursue enquiries and was reckless in refraining from make such enquiries.

94. Mr Davies submitted that the Appellant had been too trusting, that it was not inappropriate for him to rely on the information which had been given to him

and that his consequent failure to make further enquiries was not representative of a 'high' degree of fault but of something less than that. We cannot, with respect, accept that submission. Taking into account the Appellant's literacy difficulties, and in respect of which we have noted that he had assistance available to him in drawing up the lease and other matters, the evidence supports the DTC's conclusions that there was a high degree of fault. The Appellant had a valuable asset which he had sought to protect through the lease agreement with Mr Meikle. There was information available to the Appellant, through independent sources, that there were potential problems with Mr Meikle's licence. The clarification enquiry which was made of Mr Meikle was insufficiently rigorous to ascertain the precise position. There were underlying relationships between the Appellant, his brother and Mr Meikle which may have persuaded the Appellant that a more rigorous enquiry of the regulatory authorities may not have been to his advantage. The Appellant has sufficient knowledge and experience of the goods vehicle industry to be aware of the potential consequences of what regulatory action against Mr Meikle might have been. Given his knowledge that there was potential for his vehicle to be subject to unlawful operation and his failure, for other reasons, to pursue the proper enquiries is demonstrative of a high degree of fault. His failure cannot be excused by his lack of literacy skills or his unchallenged reliance on the word of the operator.

95. In these circumstances we cannot agree that the decision of the DTC was 'plainly wrong' and, accordingly in error.

Disposal

96. The decision of the Deputy Traffic Commissioner dated 9 June 2016 is confirmed in all respects.

Kenneth Mullan, Judge of the Upper Tribunal,
3 March 2017