Neutral Citation Number: **[2020] UKUT 0005 (AAC)**

Appeal Nos. T/2018/20 & T/2018/28

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

IN AN APPEAL FROM THE DECISIONS OF
Nick Denton, Traffic Commissioner for the West Midlands dated 22 March 2018
and Kevin Rooney, Traffic Commissioner for the West of England dated 2 May 2018

Before:

Her Hon. Judge J Beech, Judge of the Upper Tribunal
Leslie Milliken, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper Tribunal

Appellants:

MIDLAND CONTAINER LOGISTICS LIMITED & JAMES DONLON
D K BARNSLEY & SONS LIMITED

In attendance: Mr Laprell of Counsel instructed by Backhouse Jones solicitors on behalf of the First and Second Appellants and by Pellys solicitors on behalf of the Third Appellant and Mr Sadd of Counsel instructed by the Government Legal Department on behalf of the Secretary of State for Transport

Heard at: The Rolls Building, Fetter Lane, London, EC4A 1NL
Date of hearing: 17 to 19 September 2019
Date of decision: 6 January 2020

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeals be ALLOWED and that the matters be remitted for rehearing

SUBJECT MATTER:-

AdBlue emulators; whether the fitting of an emulator can be for any purpose other than to give the misleading impression that engine emission standards are not being met; whether such an act can/should be categorised as "*dishonest"* or "*deceitful";*

*w*hether the fitting of an emulator is in itself unlawful; whether a recording of excessive emissions is required before any adverse findings can be made arising out of the fitting of such a device; whether in principle, the fitting of an emulator can/ should be compared to the fitting of a magnet to a tachograph; call up letters; approach to evidence.

CASES REFERRED TO:- R (Client Earth) v The Secretary of State for the Environment, Food and Rural Affairs (2015) UKSC 28; R (Client Earth) (No.2) v Secretary of State for the Environment, Food and Rural Affairs (2016) EWHC 2740 (Admin); 4 All ER 724; Muck It Limited and others v The Secretary State for Transport (2005) EWCA Civ 1124; R (Client Earth) (No.3) v Secretary of State for the Environment, Food and Rural Affairs, the Secretary State for Transport and Welsh Ministers (2018 EWHC (Admin) 315; T/2013/21 Société Generale Equipment Finance Limited v Vehicle & Operator Services Agency; 2001/72 A R Brookes; T/ 2018/19 T.R. Benny Ltd & Thomas Benny; T/2019/32 & 33 CM Coaches Limited & Michael Hazell; Edward Coakley Bus Company Ltd and Central Bus Company Ltd (2) (2003) Scot SC 315; 2006/313 D Lloyd; T/2012/34 Martin Joseph Formby t/a G & G Transport; T/2013/38 Hobart Court Property Management Ltd v John Valerie Kent; T/2013/63 Balwant Singh Uppal t/a Professional Chauffering Services and PCS Limos Ltd; T/2017/55 Alistair Walter; 2009/225 Priority Freight & Paul Williams; 2002/217 Bryan Haulage No.2; Bradley Fold Travel Ltd v Secretary of State for Transport (2010) EWCA Civ 695

REASONS FOR DECISION

Introduction

1. These are appeals from the decisions of the Traffic Commissioners for the West Midlands and the West of England made on 22nd March and 2 May 2018 respectively. Each principally concerned issues arising out of the discovery of devices fitted to the selective catalytic reducers of vehicles operated by the Appellant companies during roadside checks, which the DVSA contended were AdBlue® ("AdBlue") emulators. In the case of Midland Container Logistics Limited ("MCL") in which it was accepted that an AdBlue emulator had been fitted to three vehicles, the outcome of the public inquiry was that it's operator's licence was curtailed from twenty-eight vehicles to five for a period of fourteen days and thereafter, to twenty-two vehicles for an indefinite period and Mr Donlon, the transport manager and sole director of MCL, lost his good repute as transport manager and was disqualified from acting as such until he had attended a two day transport manager CPC refresher course. In the case of D K Barnsley & Sons Limited ("DKB"), it's licence was revoked. The Appellants have the benefit of a stay.

2. There were originally five appeals listed for hearing on a conjoined basis as they were the first to be filed with the Upper Tribunal which predominantly concerned the discovery of emulators by the DVSA. It was determined that as a result, the appeals should be heard together and the Secretary of State

for Transport ("SofS") invited to be joined as a Respondent so that the generic issues could be determined in an informed manner. As it transpired, two companies withdrew their appeals and a third, T/2018/22 Sheppard Commercial Services Ltd, whilst heard with those of MCL and DKB, was sufficiently distinguishable on the facts that the appeal has been separately determined and the decision published.

3. For reasons which the Upper Tribunal need not set out, there has been a considerable delay in the appeals being heard. At an early stage, the Upper Tribunal was invited by the SofS to identify the issues raised in the Appellants' grounds of appeal and written submission which the SofS should specifically address. Five questions were posed:

    1. Whether the fitting of an emulator can be for any purpose other than to give the misleading impression that engine emission standards are not being met;
    2. Whether such an act can/should be categorised as "*dishonest"* or "*deceitful";*
    3. Whether the fitting of an emulator is in itself unlawful;
    4. Whether a recording of excessive emissions is required before any adverse findings can be made arising out of the fitting of such a device;
    5. Whether in principle, the fitting of an emulator can/should be compared to the fitting of a magnet to a tachograph.

4. The Tribunal has been greatly assisted by the detailed written and oral submissions of Mr Laprell on behalf of the Appellants and Mr Sadd on behalf of the SofS.

The Background Regulatory Framework

Air Quality Generally

5. The EU has long been concerned with ambient air quality, it's assessment and management (see for example, Directives Directive 88/77/EC and 96/62/EC) and has set limits for ambient polluting particulates (see Directives 80/779/EEC, 1999/30/EU and Directive 2000/69/EC). By Directive 2008/50/EC on "*Ambient Air Quality and Cleaner Air for Europe"* (the 2008 Directive), the EU set out objectives for ambient air quality and measures for assessment of air quality. The Directive required Member States to undertake air quality assessments and to devise an Air Quality Plan in order to meet the stated objectives.

6. The UK has endeavoured to comply with the 2008 Directive although it has faced considerable challenges in doing so. The UK's first Air Quality Plan was produced in 2011 and was found to be inadequate and therefore unlawful by the Supreme Court in the case of *R (Client Earth) v The Secretary of State for the Environment, Food and Rural Affairs (2015) UKSC 28, 4 All ER 724.* The second Air Quality Plan was produced in 2015 and that too was held to be inadequate and therefore unlawful in the case of *R (Client Earth) (No.2) v*

Secretary of State for the Environment, Food and Rural Affairs (2016) EWHC 2740 (Admin). The third Air Quality Plan produced in 2017 was found to require an additional schedule in order to comply with the Directive: see *R (Client Earth) (No.3) v Secretary of State for the Environment, Food and Rural Affairs, the Secretary State for Transport and Welsh Ministers (2018 EWHC (Admin) 315.* At paragraph 5 of his judgment, Garnham J stated:

"*Proper and timely compliance in this field matters. It matters, first, because the Government is as much subject of the law as any citizen or any other body in the UK. Accordingly, it is obliged to comply with the Directive and the Regulations and with the orders of the court. Second, it matters because, as it common ground between the parties to this litigation, a failure to comply with these legal requirements exposes the citizens of the UK to a real and persistent risk of significant harm. The 2017 Plan says that "poor air quality is the largest environmental risk to public health in the UK. It is known to have more severe effects on vulnerable groups, for example the elderly, children and people already suffering from pre-existing health conditions such as respiratory and cardiovascular conditions". As I pointed out in the November 2016 judgment, DEFRA's own analysis has suggested that exposure to nitrogen dioxide (NO2) has an effect on mortality "equivalent to 23,500 deaths" every year".*

Polluting particulates from Heavy Duty Vehicles

7. Nitrogen Oxides and specifically, nitrogen oxide and nitrogen dioxide ("NOx") are pollutants emitted by internal combustion engines. The level of NOx emissions rises with increasing engine temperatures and pressures during combustion and in oxygen-rich conditions such as those found with a diesel engine under load. It is uncontroversial that NOx emissions are associated with adverse effects on human health and that high concentrations can cause respiratory inflammation and disease. A study undertaken by the Committee on the Medical Effects of Air Pollutants in 2018 estimated that the annual mortality burden of human-made pollution was between 28,000 and 36,000 deaths per annum.

The EU's Regulatory Framework for Reducing Polluting Particulate Emissions from by Heavy Duty Vehicles

8. As part of it's clean air strategy, the EU has been regulating heavy-duty vehicle ("HDV") emissions since at least the 1970's (see by way of example: Directive 70/156/EEC and Directive 78/665 EEC).

9. By Directive 88/77/EC, a minimum standard of technical requirements was introduced as part of the EEC type-approval of engines to limit the emission of carbon monoxide, hydrocarbons and NOx. By paragraph 6.1.1.1 of Annex 1 of the Directive, the limiting of such emissions was to be achieved by the inclusion of emission control equipment within type approval requirements and by paragraph 6.1.2.1, manufacturers were forbidden from installing a

"*defeat device"* into their engines so as to defeat the purpose of the equipment.

10. Subsequent EU Directives extended emission standards to all types of vehicles and reduced the levels of permitted emissions. Euro I standards were introduced in 1992 for heavy duty vehicles and further reductions followed in 1995 (Euro II) and in 2000 by virtue of EU Directive 1999/96/EC (Euro III). Paragraph 11 of the preamble to that Directive, acknowledged that on-board diagnostics were not fully developed for heavy duty vehicles at that stage but were to be introduced from 2005 with a view to rapid detection of the failure of emission critical components and systems allowing a significant upgrading of the maintenance of initial emission performances on in-service vehicles through improved inspection and maintenance. The prohibition against manufacturers fitting a "*defeat device"* to emission control systems was repeated. Euro IV then followed in 2005 by virtue of Directive 2005/55/EC. Paragraph 8 of the pre-amble acknowledged the considerable work motor manufacturers had undertaken to reduce particulate pollutants but that it was necessary to press for further improvements. The Directive requires vehicles to be fitted with:

a) An exhaust aftertreatment system designed to concurrently reduce emissions of NOx and particulate pollutants known as a "combined deNOx particulate filter". That, along with the absorbers and the selective catalytic reducer system ("SCR") are known as the "deNOx system". The system works by applying a liquid reagent (which contains synthetic urea and is normally known as AdBlue) to the exhaust gases at the tail pipe of vehicle prior to emission, which converts NOx emissions to nitrogen and water vapour, which is less harmful to the environment and public health.

b) A tank for the separate storage of the reagent which is supplied to the exhaust aftertreatment system upon request of the emission control system;

c) An on-board diagnostic system ("OBD") for emission control which has the capability of detecting the occurrence of a malfunction in the emissions control system and the capability of identifying the likely area of malfunction by means of fault codes stored in the computer memory;

d) A visible indicator that clearly informs the driver of the vehicle in the event of a malfunction in the system (also known as the "*malfunction indicator"* abbreviated to "*MIL"* meaning "*Malfunction Indicator Light")*. The definition of malfunction includes a deterioration, or a failure, including electrical failure, of the emission control system, which results in emissions exceeding the OBD threshold limits. By paragraph 6.5.2.1 of Annex 1 of the Directive, upon informing the driver of a problem via the malfunction indicator, the engine "*shall"* consequently operate with reduced performance (i.e. limp mode). The term "*emission control system"* refers to the exhaust aftertreatment system, the electronic management

controller(s) of the engine system and any emission-related component of the engine system in the exhaust which supplies an input to or receives an output from the controllers and the communication interface between the engine system electronic control units and any other power train or vehicle control unit with respect to emissions management;

e) A torque limiter which temporarily limits the maximum torque of the engine ("limp mode"). The purpose of the torque limiter is to encourage the driver to take the necessary measures in order to ensure "*the correct functioning of NOx control measures within the engine system"* (see paragraph 6.1.62 of Annex 1). Under the heading "*Measures to discourage tampering of exhaust after treatment systems",* paragraph 6.5.5.1 emphasises that the purpose of the torque limiter is to alert the driver "*that the engine system is operating incorrectly or the vehicle is being operated in an incorrect manner";*

f) The incorrect operation of the engine system with respect to NOx emissions control shall be determined through monitoring of the NOx level by sensors positioned in the exhaust stream;

g) The emission control system shall be monitored for electrical failures and for removal or deactivation of any sensor that prevents it from diagnosing an emission increase. Examples of sensors that affect the diagnostic capability are those directly measuring NOx concentration, urea quality sensors and sensors used for monitoring reagent dosing activity, reagent level and reagent consumption.

11. In lay terms, the Directive applies to all vehicles manufactured after 2005 and operating within the EU (it does not apply to off road vehicles of any age). In order to comply with the Directive, manufacturers fit the relevant component parts referred to in the Directive, which are commonly referred to as the SCR. The SCR system communicates with the other component parts and if the OBD system receives data transmitted by the SCR system which indicates that the AdBlue tank is empty or there is a malfunction of the system which may include deliberate tampering, the malfunction indicator on the dashboard of the vehicle, warns the driver that either the AdBlue tank is empty or there is a malfunction. After a certain amount of driving time without the fault being rectified, the torque limiter places the vehicle into limp mode to ensure that a driver does not ignore the malfunction indicator. There is also a gauge or similar device which informs the driver of the amount of AdBlue in the AdBlue tank similar to a petrol gauge.

12. Euro V emission limits were introduced in 2008 and the present permitted emission levels (Euro VI) were introduced for new vehicle registrations in 2014 by EC Regulation 595/2009 (as amended).

13. The reduction in the permitted level of emissions is evidenced in the table that was included in the decisions of both Traffic Commissioners. It shows that between the Euro 1 (introduced in 1992) and Euro 6 standards (introduced in

2014 and presently applicable), the maximum permitted particulates emission levels have reduced from 0.36 to 0.01 g/kWh and the maximum permitted NOx emissions have reduced from 8 to 0.46 g/kWh.

14. The final piece of EU legislation which is of relevance is Directive 2014/47/EU on the technical roadside inspection of the roadworthiness of commercial vehicles. Whilst this Directive did not come into force until 20 May 2018, it informed the DVSA's approach to categorising defects before that date.

15. Article 1 of Chapter 1 sets out the purpose of the Directive: "*In order to improve road safety and the environment, this Directive establishes minimum requirements for a regime of technical roadside inspections of the roadworthiness of commercial vehicles circulating with the territory of the Member States".* Of note, Article 5 (1), requires Member States to inspect at least 5% of the total number of the following types of vehicle that are registered in the Member State:

a) motor vehicles designed and constructed primarily for the carriage of persons and their luggage comprising more than eight seating positions in addition to the driver's seating position;
b) motor vehicles designed and constructed primarily for the carriage of goods and having a maximum mass exceeding 3.5 tonnes;
c) trailers designed and constructed for the carriage of goods or persons, as well as for the accommodation of persons, having a maximum mass exceeding 3.5 tonnes; wheeled tractors of category T5, the use of which mainly takes place on public roads for commercial road haulage purposes, with a maximum design speed exceeding 40 km/h.

Article 12 of the Directive, provides for three categories of deficiencies:

- minor deficiencies having no significant effect on the safety of the vehicle or impact on the environment, and other minor non-compliances
- major deficiencies that may prejudice the safety of the vehicle or have an impact on the environment or put other road users at risk, or other more significant non-compliance
- dangerous deficiencies constituting a direct and immediate risk to road safety or having an impact on the environment.

In the table setting out the categorisation of individual deficiencies at pg 152 of the Directive and under the heading "*Exhaust emission control equipment"*, the method of assessment is by way of visual inspection and all four reasons for failure are assessed as "*major".* They include: "*emission control equipment fitted by the manufacturer absent or obviously defective"*; *"MIL does not follow correct sequence"* and *"insufficient reagent, if applicable".*

Article 14 of the Directive sets out a range of follow-up options in respect of major and dangerous deficiencies from prohibiting the vehicle from

further use on public roads until the deficiency has been rectified to allowing a reasonable timespan during which the vehicle may be used before the deficiencies are rectified.

The UK framework

16. The enforcement of the EU Directives within the UK can be achieved in one of two ways. The first is by bringing summary only criminal proceedings which if proved, are punishable by way of a level 4 fine. By virtue of regulation 61A of the Road Vehicles (Construction and Use) Regulations 1986/1078 (as amended) ("the 1986 Regulations") and s.42 of the Road Traffic Act 1988 ("the 1988 Act"), it is a criminal offence to use or cause or permit to be used, on a road a motor vehicle first used on or after 1 January 2001 which does not comply with the limit values for emissions applicable by virtue of any Community Directive specified in a table attached to the regulation unless the following conditions are satisfied:

(a) the failure to meet the limit values does not result from an alteration to the propulsion unit or exhaust system of the motor vehicle;
(b) neither would those limit values be met nor the emissions of gaseous and particulate pollutants and smoke and evaporative emissions be materially reduced if maintenance work of a kind which would fall within the scope of a normal periodic service of the vehicle were carried out on the motor vehicle; and
(c) the failure to meet those limit values does not result from any device designed to control the emission of gaseous and particulate pollutants and smoke and evaporative emissions which is fitted to the motor vehicle being other than in good and efficient working order".

For the purposes of these appeals, the two important elements of the offence which need to be established to achieve a conviction are: (a) that the vehicle does not comply with the relevant limit value applicable to it under the EU Directives and (c) is not met (although all three conditions need to be fulfilled to avoid a prosecution). Whilst it would not be difficult to establish that a deNOx/SCR system is not in good and efficient working order if a working device is attached to the wiring loom of the SCR or the OBD system, the more difficult element to establish is that the applicable emission limits have been exceeded. Roadside testing is unreliable because of the location and unless and until the DVSA has the resources to test vehicles in a controlled environment, the position is unlikely to change (although that may be changing).

17. The alternative criminal offence contended for by the SofS is an offence punishable with an unlimited fine under s.75 of the 1988 Act which prohibits the supply of a vehicle which is no longer in a roadworthy condition and the alteration of a vehicle with the same result. This submission was not fully set out in any of the three skeleton arguments submitted by the and was not further expanded upon during submissions. Neither was it addressed by the

Appellants. In the circumstances, we simply acknowledge that the submission was made and it may have to be revisited on some future occasion in another case.

18. Question 3: Whether the fitting of an emulator is in itself unlawful:

The above paragraphs answer this question. In short, an emulator can be fitted to an off-road vehicle and to a vehicle intended for export to a country outside the EC provided it is not operated on a public road within the UK in the interim in that condition. It is not unlawful for a non-working emulator to be fitted to a vehicle although the presence of a non-working emulator begs two questions: why was it fitted and why is it still fitted? For an offence to be made out under regulation 61A(2) of the 1986 Regulations either evidence of actual emissions levels of the vehicle need to be evidenced which are in excess of the permitted levels for the vehicle or evidence produced that the SCR system had been disabled supported by expert evidence that emissions limits would have been exceeded.

19. It is of note and for the sake of completeness, that the 2018 Clean Air Strategy consultation paper, included a proposal to make tampering with an emissions control system on a vehicle a specific criminal offence without evidence being required of the consequences. We were not advised of the outcome of that consultation.

The DVSA approach to enforcement

20. The alternative means of achieving enforcement which has been adopted by the SofS was introduced on 17 July 2017 following an investigation conducted by the SofS into the impact of *"AdBlue cheat devices"* in 2016. Those contributing to the consultation included the Freight Transport Association and the Road Haulage Association. In July 2017, the Department for the Environment, Food and Rural Affairs and the Department for Transport published a policy paper entitled *"Air Quality Plan for Nitrogen Dioxide (NO2) in UK 2017".* The policy comprised of a number of documents including one entitled "*UK plan for tackling roadside nitrogen dioxide concentrations – an overview"* and another entitled "*Detailed plan".* Paragraph 183 at Annex A of the overview document recorded:
"*Air pollution is a mixture of particles and gases emitted into the atmosphere that can have adverse effects on human health. Tackling poor air quality in all its forms is a UK government priority. The UK government has adopted ambitious, legally-binding targets to reduce significantly emissions of five damaging air pollutants for 2020 and 2030 – nitrogen oxides; particulate matter; sulphur dioxide; non-methane volatile organic compounds and ammonia. The focus of this plan is on the UK government's most immediate air quality challenge: to reduce concentrations of NO2 around roads".*

21. As a result of the investigation mentioned in paragraph 20 above and in furtherance of that policy, the DVSA published a revised Categorisation of Defects which included a new delayed "S" marked prohibition for emissions

interference. Under the heading "*Emissions Control Equipment",* the subheading reads "*Emissions Control equipment fitted by the manufacturer"* and the defects listed are: "*absent, modified or obviously defective"*. The note to the categorisation reads "*Prohibition action must be supported by positive evidence that the emission system has been affected".* Examples of positive evidence include the absence of reagent in the AdBlue tank which might have a rusty/dusty filler cap which would indicate that it had not been used for a time or evidence of the absence of reagent in the tank when the tank indicator on the dashboard is showing that AdBlue is present. The prohibitions are "S" marked to record that the fitting of a working emulator amounts to a significant failure of roadworthiness compliance. The reasons for the assessment are usually in the following terms:

"*Poor workmanship should have been apparent to repairer. Ad Blue emulator fitted ..".*

"*Repairer"* includes the person who fitted the emulator as it is obvious that to fit one amounts of a failure in the operator's maintenance systems.

22. The DVSA examiners are required to send a copy of all prohibitions to the operator and to the relevant traffic commissioner, thus ensuring that consideration can be given to regulatory action in respect of the operator's licence. Whilst an operator cannot appeal the imposition of a prohibition, there is a complaints procedure which is set out on the rear of each prohibition and that can be used to complain about the imposition of a prohibition (no complaints were made in these present appeals). It was submitted by Mr Laprell that in the absence of a specific appeal procedure, the message given to operators is that they cannot complain and the decision to impose a prohibition will not be changed. In this Tribunal's own experience, that is not the case as operators do complain and prohibitions are reconsidered by a Senior Vehicle Examiner.

23. It is this means of enforcement that was adopted by the SofS with roadside checks commencing on 1 August 2017.

<u>The revised Guide to Maintaining Roadworthiness</u>

24. For the sake of completeness, we note that the Guide to Maintaining Roadworthiness was revised in April 2018. Whilst the revision post-dated the decisions with which we are concerned, we consider it helpful to set out the present position. The guide contains the following advice in the section "*Safety inspection and repair facilities*":

"Emissions and air quality
For vehicles showing signs of visible exhaust smoke, a diesel smoke meter should be used to ensure that the level of smoke emission is within the legal requirements. Information on the levels of permitted exhaust smoke is contained in DVSA's annual test inspection manuals.

Vehicles fitted with emission control systems (ECS) need to be maintained in line with manufacturers' recommendations. Drivers and operators are required to monitor the ECS warning lamps, and ensure the diesel exhaust fluid level (AdBlue®) is maintained correctly.

Any emission control system faults need to be rectified as soon as possible and repaired in-line with manufacturer's standards".

In the same section, the list of safety inspection facilities which should be available to an operator includes:

"*access to emissions testing equipment".*

We consider that the effect of this revision is to place into sharp focus, the importance of maintaining and repairing emissions control systems although any practicably competent and reputable operator or transport manager should have appreciated the importance of maintaining and repairing the systems in any event.

Emulators

25. Emulators are small pieces of hardware that are wired or spliced into the electrical cables or wiring loom which connect the SCR system to the OBD system or are plugged directly into a port for the OBD system. An emulator mimics or imitates the data transmitted to the OBD system by a fully functioning SCR system and in doing so, prevents the OBD system from detecting the absence of AdBlue in the tank or any malfunction in the SCR system which would otherwise cause the MIL to activate and eventually the torque limiter or limp mode to activate if the absence of AdBlue or the malfunctions are not remedied. Once fitted, the emulators may operate in different ways, for example, they may immediately mimic or emulate the signals being fed into the OBD system thus preventing the vehicle going into limp mode in any circumstance or they may be fitted and only become operational when a switch or other similar device is activated by the driver (see the decision of TC Evans dated 18th December 2018: Jones Metcalf Ltd trading as Express Freight Solutions). There may be other ways in which emulators are fitted and become operational which have not been drawn to Tribunal's attention and we do not wish to be overly prescriptive.

26. Whatever the motivation behind the fitting of an emulator, it will normally result in the disabling of the SCR system with the result that the driver will no longer be warned of the absence of AdBlue in the tank and/or that the SCR system is not performing as it should and if either of those occur, the emissions of the particular vehicle will no longer be controlled and in all likelihood, exceeded as the purpose of the emissions control system is to limit otherwise excessive emissions.

27. Emulators are freely available for purchase on the internet and can be lawfully fitted to off road vehicles and those intended for export to countries outside

the EU, where the EU emission limits do not apply. The websites of the suppliers usually provide a warning to purchasers in the following or similar terms:

"***Attention!*** *AdBlue emulators are illegal in some countries. You should check your local laws of those countries that you might cross with your vehicle. AdBlue emulator alters SCR system thus makes the vehicle to produce higher exhaust gas emissions. EURO 6 and EURO 5 vehicles equipment with AdBlue emulator device will no longer match those EURO standards. Our AdBlue emulators designed for countries were environmental rules are less strict, and there are no requirements for vehicles to satisfy EURO 6 or EURO 5 regulations. By purchasing any AdBlue emulator, you assume full responsibility for the use of the device. It's your personal decision to use an emulator or not. We will not accept any liability for any consequences associated with usage of AdBlue emulator devices."*

This warning came from a prominent website which is in the public domain and quoted by Mr Sadd in written submissions. The warning now displayed on that website does not refer to "AdBlue emulators" but rather "SCR emulators". It is not suggested that MCL/Mr Donlon had seen such a warning prior to choosing to fit emulators to vehicles in the MCL fleet.

28. The Appellants consider that the term "AdBlue emulator" applied to the devices found on the Appellants' vehicles (and generally) is a misnomer because, first of all, the devices have the effect of preventing a vehicle from going into limp mode rather than directly interfering with the SCR or Adblue system. It follows that just because the limp mode facility within the OBD system has been interfered with, that should not lead to an automatic conclusion that there was a conscious decision on the part of the operator to have a vehicle operating without the use of AdBlue or to avoid repairing some defect in the SCR/AdBlue system which would otherwise be too difficult or too costly to remedy. Secondly, vehicle manufacturers have increasingly utilised the OBD system to identify various faults within a vehicle engine, quite apart from faults in the SCR system, for example, low oil pressure, which may result in a vehicle going into limp mode irrespective of the status of the SCR system and the presence or absence of AdBlue. It was submitted, that before a device would be categorised as an AdBlue emulator, it was incumbent upon the DVSA in each case to ascertain the specific purpose of the device fitted to a vehicle and to provide evidence that the emission levels of the vehicle were/ are in fact exceeded. This was not done in any of the five appeals.

29. Our starting point is Directive 2005/55/EC which sets out the essential component parts of emission control systems as set out in paragraph 10 above which include an OBD system and a torque limiter. Whilst it would appear that over the years, manufacturers have harnessed the OBD system to alert operators and drivers to possible defects in engine operation over and above those arising in the SCR system, we are satisfied that any interference with either the SCR wiring loom, the OBD system or the torque limiter is an interference with the emissions control system, whatever the operator's

motivation was for fitting the emulator in question. We note that in fact, in three of the five original linked appeals, the operators accepted that the devices fitted to their vehicles were AdBlue/SCR emulators. The fourth, DBS, denied knowledge of the existence of the device. The fifth, Sheppard Commercials was not directly concerned with the fitting of an emulator.

30. We are further satisfied that when an emulator is found either spliced into the SCR wiring loom or attached to the OBD system, there is an irresistible inference if not an overwhelming presumption that the device is an AdBlue/ SCR emulator, particularly when the DVSA is able to rely upon "positive evidence" that the SCR system has been affected by the emulator. We are not satisfied that the DVSA is required to provide positive evidence that the emission limit of the particular vehicle has in fact been exceeded before regulatory action can be taken although such evidence may well result in a prosecution under regulation 61 of the 1986 Regulations. At the very least, an active AdBlue/SCR emulator means that the vehicle emissions are not being controlled by the manufacturer's fitted emissions system and it is highly likely that if it is operational, a vehicle's emissions are higher than they otherwise would have been as the system by which NOx is converted has been disabled and will exceed permitted limits as the very purpose of the SCR system is to prevent emissions exceeding the permitted limits.

31. Question 1: Whether the fitting of an emulator can be for any purpose other than to give the misleading impression that engine emission standards are being met: We are satisfied that there are three reasons for fitting an active SCR/AdBlue emulator. The first is to disable the SCR system to avoid the need to use AdBlue at all; the second is to avoid the possibility of the vehicle going into limp mode if the vehicle runs out of AdBlue (both of which involve financial outlay); the third is to avoid the need to remedy an existing defect in the SCR system, or to prevent the vehicle going into limp mode if a defect develops, thus avoiding the cost of expensive repairs which other, reputable operators undertake as a matter of course. All of the identified reasons involve an element of financial gain and competitive advantage over other compliant operators.

32. The Appellants contended for a fourth reason about which there was no evidence in the five appeals, namely, that an emulator can be fitted to the OBD system to ensure that a vehicle does not enter limp mode for reasons unconnected to the use of AdBlue and/or the SCR system. As we have made clear in paragraph 25 above, the result of any functioning emulator being fitted to the OBD system is to actively interfere with the emissions control system and it is accepted on behalf of the Appellants that an unintended consequence of an emulator fitted for reasons unconnected to the use of AdBlue and/or the SCR system is that it will prevent the vehicle entering into limp mode if the AdBlue runs out and of course, if any of the component parts of the SCR system fails.

33. We find that in all four scenarios, a misleading impression is given that a vehicle's SCR system is functioning correctly when it is not and if there is

positive evidence that emissions are not being controlled then the misleading impression is that the SCR system is controlling emissions when it is not. The importance of this misleading impression should not be underestimated. The public reaction to the relatively recent disclosure (around September 2015) that Volkswagen (amongst others) were manipulating emissions tests to give the false impression that emission levels were being met by the motor cars they manufactured was significantly adverse to the relevant manufacturers and there is an increasing awareness and concern within the world community about emissions generally. The general public expect those who operate Euro IV+ vehicles to ensure that the emissions systems on their vehicles are operating correctly. Not to do so, is to mislead is to mislead the public. Further, as Mr Percival of IPL Haulage Limited, one of the withdrawn appeals, averred during his evidence, "*blue chip"* clients seek out hauliers who are operating Euro IV+ vehicles because of a legitimate expectation that they will be operating in compliance with type-approval legislation and that emissions are being controlled which in turn reflects upon positively upon the clients' "*green credentials"*. Not to do so, misleads the clients and represents a competitive advantage over other hauliers who are operating compliant vehicles.

34. Question 2: Whether such an act/should be categorised as "*dishonest"* or "*deceitful"*: It is contended by the Appellants that the fitting of an emulator would not be dishonest or deceitful if fitted for a purpose other than for avoiding the use of AdBlue or defeating the purpose of the SCR system. The Appellants submit that it is for the DVSA to establish the motive for fitting an emulator and in particular, that the purpose was to avoid the use of AdBlue or to otherwise disable the SCR system. It is only when the DVSA are able to establish the purpose of the emulator that a TC is then able to consider whether the use of an emulator was dishonest or deceitful and that it was for the purpose of gain. To find otherwise would reverse the burden of proof onto the operator. The case of *Muck It Limited and others v The Secretary State for Transport (2005) EWCA Civ 1124* is relied upon which concerned the issue of where the burden lay when determining issues which may lead to the revocation of an operator's licence.

35. The SofS agrees that the fitting of an emulator should not be automatically categorised as either dishonest or deceitful, such a conclusion being dependent upon the necessary findings of fact that the operator was aware that the emulator was fitted and that the purpose of it was to enable a vehicle to operate regardless of whether or not the SCR system was controlling NOx emissions and regardless of whether the vehicle complied with the emission standards relevant to that vehicle model. The test to be applied when determining this issue of knowledge is that summarised in paragraph 13 of *T/2013/21 Société Generale Equipment Finance Limited v Vehicle & Operator Services Agency*.

36. Dealing first with the burden of proof argument, we reject the Appellants' submissions that it is for the DVSA to establish the purpose or reason for the emulator being fitted and that the purpose involved a dishonest or deceitful

motive. We are satisfied that once it is established by the DVSA that an operator was aware that a working device had been fitted to the SCR wiring loom or the OBD system of a vehicle, the motivation for fitting such a device is peculiarly within the knowledge of the operator. The irresistible/overwhelming presumption is that an emulator will have been fitted for the purpose of defeating the SCR/emissions system, the torque limiter being an integral part of that system. It is not for the DVSA to establish an alternative motivation which in any event, is peculiarly within the knowledge of the operator. We are satisfied that in the event that the DVSA can satisfy the TC that a working emulator was fitted to a vehicle, then it will be for the operator to persuade the TC that it was not fitted to deliberately to defeat the emissions control system. We do not consider this to be a reversal of the burden of proof as envisaged by the Court of Appeal in ***Muck It*** (supra) and even if we are wrong about that, it is neither a disproportionate burden or unacceptable to place upon the operator, the burden of establishing an alternative motive to that which is overwhelming.

37. We agree with the SofS's submissions being satisfied as we are that the fitting of an emulator should be categorised as "*dishonest"* or "*deceitful"* provided the requisite findings of fact are made in relation to knowledge. The approach that TCs should take when considering knowledge was comprehensively set out in paragraphs 13 and 14 of ***Société Generale*** (supra) which concerned knowledge in the context of the impounding regime and are now set out:

"

13. In our view the more helpful course is merely to repeat 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. The five categories are these:-

(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.

Category (i) should present no difficulty, it will require evidence of actual knowledge of the use in contravention. Categories (ii) and (iii) involve findings which justify imputing actual knowledge to the claimant. For the reasons set out in paragraph 118 in Nolan Transport no separate finding of dishonesty is required in order to impute actual knowledge to the claimant because the conduct, which will have been proved, if the required findings are made, is conduct which is in itself inherently dishonest. It is important to note that while it does not expressly feature in the definitions of knowledge in categories (ii) or (iii) proof of both these categories requires proof of a high degree of fault on the part of the claimant. Given that these two categories involve conduct which is inherently dishonest a finding that category (ii) or 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. Categories (iv) and (v) involve constructive, as opposed to actual, knowledge. The findings required to establish category (iv) or (v) knowledge, on their own, are unlikely to amount to more than mere negligence. That is <u>not</u> sufficient to establish knowledge for the purposes of showing that a claim under Regulation 4(3)(c) must fail. In order for a finding of category (iv) or (v) knowledge to be used to defeat a claim under Regulation 4(3)(c) there <u>must</u> be an additional finding that the claimant was acting dishonestly or had a dishonest motive in either failing to recognise that the vehicle was being used in contravention of s. 2 of the 1995 Act or in failing to make the inquiries which an honest and reasonable person would have made.

14. *In the present case the Deputy Traffic Commissioner concluded that this was a case of category (iii) knowledge. Unfortunately, for reasons, which will appear in due course, he did not make all the findings required to justify that conclusion. With a view to avoiding such a situation in the future we suggest that Traffic Commissioners will find it helpful to assess the evidence in a way which seeks to answer these questions:*

    (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.

There are three reasons why it is important to follow this 'route to decision' carefully. First, it will ensure that nothing is left out. Second, it will ensure that a

finding of category (iii) knowledge, involving, as it does, inherent dishonesty, is properly justified on the evidence. Third, it will enable Traffic Commissioners to take into account and assess any innocent explanation advanced by the claimant. Such an explanation is most likely to arise in relation to questions (iii), (iv) and/or (v)."

Provided that a TC follows the suggested steps set out above, the findings of fact with regard to the knowledge of the operator about the existence of an emulator fitted to a vehicle and the reasons for fitting it and in particular, whether the motivation was "*dishonest"* or "*deceitful"* should be findings of fact that the TC will be able to determine.

38. Question 4: Whether a recording of excessive emissions is required before any adverse findings can be made arising out of a fitting of such a device

It is the Appellants' case that evidence is required that the SCR system had been affected by the fitting of an emulator and that the function of the devices was not simply to bypass "limp mode". Further, significant regulatory action would be disproportionate if emissions had not been affected to the point where there had been a breach of the legal emissions limits.

39. We have already dismissed the submission that the DVSA is required to establish the motive of the operator in fitting an emulator. We reject the submission that a breach of emissions limits must be established, finding as we do that the DVSA's approach to emulators set out in paragraphs 21 and 22 above is a reasonable and proportionate response to the issue and that the issuing of an "S" marked prohibition when an emulator has been found with positive evidence of the SCR system having been affected is sufficient for adverse findings to be made by a TC.

40. Question 5: Whether in principle, the fitting of an emulator can/should be compared to the fitting of a magnet to a tachograph

This question was posed because in at least two of the appeal decisions originally before us including the remaining two, the relevant TCs likened the fitting of an emulator to interfering with a tachograph. In BDK, the TC, at paragraph 65 of his decision stated:

"..*Tampering with emission control systems is directly akin to tampering with tachograph systems – both are likely to kill, one just does it more suddenly and brutally than the other…"*

In MCL, the TC, at paragraph 10 of his decision stated:

"*In a very similar case recently, my colleague, TC Rooney commented that he regarded the fitting of an emulator as equivalent, for example, to using a magnet to interrupt a tachograph. Each is an act of fraud and each can kill: one just does it more violently and quickly than the other…"*

It should be noted that in MCL, Counsel representing the company and Mr Donlon at the public inquiry accepted during the hearing that the comparison was in fact a legitimate one to make.

41. The Appellants contend that a comparison with a tachograph interference device is inappropriate because the sole purpose of such a device is to produce a false or forged document which is a document admissible as evidence in court. It is an either way offence punishable by imprisonment. It therefore bears no comparison with an emulator which at worst, amounts to a summary only offence punishable by a level 4 fine. Equally, the reference to killing people is unjustified as the contribution made to the ill-health of the population as a result of higher levels of emissions, even if that could be proved, cannot be compared to the injury/fatality caused by an overtired driver causing an accident. There are many lorries operating lawfully on public roads without any emission control systems being fitted to them (because they pre-date the introduction of the emissions limits) and they are even entitled to enter Low Emission Zones provided a charge is paid. There is no equivalent circumstance or exception in respect of falsifying a tachograph record.

42. We agree with the SofS's submissions on this point. A tachograph interference device is used to disrupt the function of a tachograph so that a driver having driven for the maximum permitted hours for that day, can continue to drive without creating a record of the unlawful driving. Driving excessive hours results in fatigue and that creates an immediate safety hazard endangering the driver and other road users. We consider the Appellants' submission as to the purpose of a tachograph interference device (to create a false record) is too restrictive. The mischief is the continued and unlawful driving which is concealed by the creation of a false record, endangering driver and public safety.

43. The use of a working emulator means that NOx emissions are not being controlled, which, in turn contributes to a recognised health risk and the harm created by NOx emissions is clear and established.

44. The use of an emulator and a tachograph interference device both result in the creation of a misleading impression. In the first instance, the impression is that a Euro IV+ vehicle is controlling its NOx emissions in line with the applicable standards when in fact the emission control system is redundant and in the second instance, the misleading impression is that the driver is or had been driving within permitted legal limits. However, whilst a legitimate comparison can be drawn as a result of a greater risk of harm through interference with vehicle equipment that is specifically designed to reduce those risks, the SofS has rightly conceded, that it is a matter of degree, there being a qualitative difference in the nature of the risks involved in the two courses of conduct and that a strict comparison is not a fair one. We agree.

Miscellaneous points

45. It was submitted by the Appellants that the whole approach of the TCs to the Appellants' cases resulted in an unfair hearing in each case:

a) The call up letters failed to raise allegations of dishonesty in the use of emulators. Section 27(3) of the Goods Vehicle (Licensing of Operators) Act 1995 and the Tribunal decision of *2001/72 A R Brookes* are relied upon;

b) In the event that a TC is considering a finding of dishonesty or a finding that excessive emissions had resulted from the fitting of an emulator, the TC is obliged to give that indication and to allow the Operator an opportunity to respond. *T/2018/19 T.R. Benny Ltd & Thomas Benny* and *T/2019/32 & 33 CM Coaches Limited & Michael Hazell* are relied upon. This was not done in either appeal;

c) Operators are entitled to know the evidence they face by the end of the public inquiry so that they can respond to it. In both of these appeals, material was incorporated into the TCs' decisions which had not been provided to the operators beforehand. At paragraph 10 of the TC's decision in MCL and paragraph 35 of the TC's decision in DKB, a graph was included entitled "*EU Emissions Standards. Exhaust emissions Euro 1-6"* which illustrated the significant reductions in NOx achieved by the progressively restrictive Euro standards since 1992 (referred to in paragraph 13 above). It was submitted by the Appellants that they were not given an opportunity to address the material that had been introduced. The Scottish case of *Edward Coakley Bus Company Ltd and Central Bus Company Ltd (2) (2003) Scot SC 315* was relied upon along with *T/2012/34 Martin Joseph Formby t/a G&G Transport; T/2013/38 Hobart Court Property Management Ltd v John Valerie Kent; T/2013/63 Balwant Singh Uppal t/a Professional Chauffering Services and PCS Limos Ltd.*

d) At the conclusion of the public inquiry in MCL, TC Denton informed the Appellants that prior to coming to his decision, he was going to "*have a word with my colleague in Bristol first of all because .. this is a relatively new type of offence .. of which there is little case law and the Traffic Commissioners, only in the last two or three months, have started to deal with it. .. And we are all anxious, or keen, that operators are treated consistently around the country … Mr Rooney has dealt with a case which is outwardly similar, in fact the same number of vehicles had AdBlue fitted. But there are some differences .. now I know more about this case I think I am better able to chat over with him the differences between the two cases".* Mr Dixey of Counsel, did not object to the TC's proposal. The Appellants asserted that nevertheless, any information that the TC obtained during such a discussion which had influenced his decision should have been conveyed to the operators to allow them to respond.

e) It was submitted by the Appellants that the comparison to tachograph interference devices suggested that a collective approach had been adopted by the TCs without it having been opened to consultation

beforehand or even publicised. This amounted to a breach of s.21(2) of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act") which and paragraphs 5 and 6 of the Regulators' Code which both apply to TCs.

f) Section 21(2) of the Act requires Regulators to exercise their functions in a way which is "*transparent, accountable, proportionate and consistent"* and that their regulatory activities should be *"targeted only at cases in which action is needed".* By paragraph 5 of the Code, Regulators are required to ensure that clear information, guidance and advice is available to help those they regulate meet their responsibility to comply and by paragraph 6 of the Code, Regulators should ensure that their approach to their regulatory activities is transparent. It was submitted that in failing to give fair warning of the stance that was to be taken by the TCs, the outcome for operators at public inquiry had been reduced to a "*lottery"*. Further, it was contended that such a collective approach was not supported by other TCs.

46. In response to these points, the SofS first of all accepted that the over-riding approach to be taken to the content of call up letters is that of fairness and reference is made to *2006/313 D Lloyd.* Whilst the call up letter sent to BKD did not make any reference to dishonesty, the call up letter in MCL did, as the emulator found to be fitted to the vehicle examined by the Vehicle Examiner was described in the letter as an "*AdBlue cheat emulator".*

47. As we have previously made clear in the Tribunal decision of *T/2019/32 & 33 CM Coaches Limited & Michael Hazell*, operators must be made aware of the possibility of a finding of dishonesty so that they can respond to it. The issue does not have to be raised in the call up letter but can be raised during the course of the public inquiry and that does not offend the principle of fairness if the operator is given an opportunity to respond. Whilst in the case of DKB, the TC informed Mr Barnsley that his evidence about the vehicle and the emulator "*did not stack up"* that was insufficient to put either Mr Barnsley or Mr Brown who represented the operator, on notice, that a finding of dishonesty was either a possibility or was likely. In the case of MCL, the TC accepted that the fitting of three emulators "*was carried out in ignorance rather than deliberate deceit".* However, in his written decision, the TC then went onto to describe the fitting of the emulators as "*three serious acts of deception".* In the result, we are satisfied that there was procedural unfairness in respect of both Appellants.

48. We agree with the SofS's submissions that the TC was not required to canvass with the operators the possibility of a finding that emissions were likely to be higher as a result of the fitting of an emulator. It is plain and obvious that:

a) The purpose of the SCR/emissions control system is to control emissions;
b) NOx emissions would not be controlled if the SCR system was disabled;

c) It was highly likely that NOx emissions would be higher in the absence of any control of those emissions (although the extent to which they may not have been controlled may not be quantifiable);
d) NOx emissions are harmful.

We are satisfied that any practically competent and compliant operator and/or Transport Manager, who had given a moment's thought to the practical consequences of interfering with the SCR system, would have concluded that the consequences of fitting an emulator would be that the emissions of a vehicle would not be controlled and that NOx emissions would be higher as a consequence and in all likelihood, exceed the permitted limits.

49. As for the complaint about the inclusion of the graph referred to in paragraph 45(c) above, whilst it may have been preferable to include it in the public inquiry papers, the graph itself and the information it conveys is all within the public domain and the Appellants could not have been taken by surprise by the information the graph conveys. Further, it has not been suggested that the graph is inaccurate or open to interpretation or contradiction. The SofS referred the Tribunal to the appeal decision of *T/2012/34 Martin Joseph Formby t/a G & G Transport* in this regard and we agree that the case is on point. We are satisfied, in the circumstances, that there is nothing in the Appellants' complaint.

50. Turning now to the criticism made of TC Denton's stated intention to consult with TC Rooney prior to coming to a final decision in the case of MCL and without informing MCL of the content of that discussion, we first of all repeat that this was not objected to when it was raised at the end of the public inquiry. But in any event, there is no procedural unfairness or lack of transparency in two or more judicial office holders considering together how to approach a particular issue so as to ensure consistency, particularly when, as in these cases, the issues to be determined are new ones (i,e the use of emulators). Neither are TCs required to inform operators of the content of such discussions. The real issue is whether the ultimate decisions were either wrong in law or on the facts or disproportionate or whether there has been some other procedural unfairness. The fact that the ultimate outcome of both decisions were different (revocation in one instance and curtailment in the other) is indicative of the fact that each case was determined on its own facts irrespective of the inclusion of the graph and the references to tachograph interference devices in both decisions.

51. As for the decisions being inconsistent with other decisions made by TCs on the issue of emulators, the Appellants are well aware that all cases are fact sensitive and very little, if anything, is achieved by attempting to compare TC decisions on the same issue or issues because there are so many variables to be taken into account, for example, in emulator cases, the operator's awareness that an emulator had been fitted to a vehicle, who was responsible for fitting the emulator, the motivation for doing so, how many emulators had been fitted to the fleet and other compliance issues. Further, as the SofS has rightly submitted, judicial or quasi-judicial decision making is an evolving

process honed and refined as judicial understanding of particular issues is added to as the case law evolves. It is not surprising in those circumstances, that there have been similar cases which have appeared to have resulted in different outcomes.

52. Finally, in relation to the Appellants' miscellaneous points, it is clear from Schedule 1 of the Legislative and Regulatory Reform (Regulatory Functions) Order 2007, that TCs are Regulators for the purpose of the 2006 Act. We agree with the SofS's submissions that TCs are compliant with the Regulator's Code by virtue of the following:

a) the Senior Traffic Commissioner 's statutory guidance documents which are regularly updated;
b) bulletins which have been regularly published since October 2017, covering a variety of topics and issues. The first bulletin relevant to this appeal (although post-dating the public inquiries) was published on 26th April 2018 and was entitled "*AdBlue: make sure you get the right advice";*
c) the Traffic Commissioners' Annual Report with specific reference being made to AdBlue emulators in the 2017/2018 report;
d) the decisions of the individual TCs.

Whilst the Appellants have criticised the TCs for failing to give advance warning of the "*stance"* to be taken with respect to emulators, and in particular, the failure to publish a bulletin addressing the issues arising out of the use of AdBlue emulators prior to April 2018, we are satisfied that the criticism is misconceived. The DVSA is a separate entity to the Office of Traffic Commissioners. The decision by the DVSA to pilot the roadside checks for emulators was made independently of the TCs. The suggestion that the TCs should have formulated a "*stance"* and publicised it before an operator had been referred to a TC as a result of an emulator having been found on a vehicle goes too far. Each TC discharges their judicial functions independently although they do receive training as to how to discharge their judicial functions on a regular basis. As we have observed in paragraph 51 above, their "*stance"* develops on an individual fact sensitive basis as their knowledge and understanding of a particular issue increases, with their decisions being published and often appearing in the trade press. There is no credible evidence that the TCs in these appeals had adopted a collective "*stance"* not least because in one appeal, the operator's licence was revoked but the good repute of the transport manager remained untarnished and in the other, the licence was curtailed and transport manager lost his good repute.

Public awareness of the DVSA policy decision to check for emulators during road side checks

53. When there were five appeals for the Tribunal to consider, the issue of public awareness and the lack of publicity of the DVSA's policy decision to check for emulators from 1 August 2017, was raised by at least two Appellants. As a result, at the first adjourned hearing of the appeals, the Tribunal required the

SofS to produce evidence of the advance warnings given by the DVSA to the industry about the pilot and other publications highlighting the DVSA's intended pilot, in order to enable the Tribunal to produce a fully informed decision.

54. By the date of the final hearing, only MCL continued to raise the issue (DKB did not do so as it was that operator's case that it was unaware that an emulator of any description was fitted to the subject vehicle and it was irrelevant to the issues in the Sheppard appeal).

55. The issue of public awareness was raised in the context of proportionality in paragraph 13 of MCL's grounds of appeal. During the course of the public inquiry, Vehicle Examiner ("VE") Brown had conceded that there appeared to have been little by way of publicity to warn the industry of the forthcoming DVSA campaign prior to the pilot commencing. It was submitted on behalf of MCL that the fitting of three emulators was conduct which appeared to be "*a one off incident where the Appellant was completely unaware of how serious it was until the DVSA intervention. Such a lack of understanding is a common occurrence when dealing with adblue* (sic) *emulators throughout the industry".*

56. This ground was materially expanded upon in the generic skeleton argument produced by Mr Laprell and in his oral submissions. In particular, on day two of the appeal hearing, (and for the first time), Mr Laprell submitted that in failing to give any adequate advance notice of the pilot, the DVSA had breached s.22 of the 2006 Act and paragraphs 5 and 6 of the Regulators Code. He suggested that had the DVSA sent an email to all operators advising them of the start of the pilot, then that would have sufficed to ensure compliance with the DVSA's duty under paragraph 5 of the Code.

57. When responding to the Appellants' submissions concerning the applicability of the 2006 Act and the Code to TCs, Mr Sadd conceded that both the Act and the Code applied to the DVSA as well as to TCs. For our part, we cannot identify the relevant provision to justify the concession as the DVSA does not appear in Schedule 1 of the 2007 Regulations contained within the Appellants' Materials Bundle. However, upon the assumption that the concession was rightly made, Mr Sadd informed us, on day three of the appeal hearing and in response to Mr Laprell's additional submissions, that the DVSA had in fact sent out approximately 73,000 emails to notify operators of the intended pilot prior to it commencing. We consider this to be an important piece of evidence and if such a communication had been sent to 73,000 operators (the approximate number of haulage operators in existence) that would answer MCL's complaint. As this additional information was only provided orally by Mr Sadd and with no explanation as to why the email was not included in the "timeline" referred to in paragraph 58 below (rather surprisingly), the Tribunal did not permit the SofS to submit further evidence upon the point. However, we anticipate that in the event that this continues to be an issue in the MCL case, the DVSA will provide documentary support to the TC of the email (for example, a copy of it along with confirmation that it was sent to MCL).

58. In any event, Mr Sadd filed with his skeleton argument, a "timeline" of ten articles, published "online" prior to MCL's vehicle having been stopped, which were posted on various websites including, Commercial Motor, Transport Operator, Fuel Oil News, Backhouse Jones solicitors and Ashtons Legal. The first article, dated 1 August 2016 (one year before the commencement of the pilot) appeared in Commercial Fleet Online, with the narrative "*Department of Transport (DfT) is investigating the impact of AdBlue cheat devices amid calls from manufacturers and trade associations for them to be banned".* Further, the DVSA also produced a press release on 25 June 2017 (with online access) with the narrative "*Emissions cheat devices to be included in roadside checks of lorries. From August 2017, roadside checks of lorries carried out by the … DVSA .. will include emissions cheat devices".* The Tribunal also provided to the parties a Daily Telegraph article dated 25 June 2017 entitled "*Lorries illegally polluting the atmosphere with emission "cheats" face crackdown".* Mr Laprell described the articles contained in the timeline as "*oblique references in obscure places".*

59. Our starting point (putting aside the issue of the DVSA email) is that by regulation 61A of the 1986 Regulations, it is a criminal offence to use or cause or permit to be used, on a road a motor vehicle first used on or after 1 January 2001 which does not comply with the limit values for emissions applicable to that vehicle (see paragraph 16 above). Inherent in the act of tampering with the SCR system of a vehicle is the significant risk of a breach of regulation 61A and the commission of a criminal offence. Any practically competent, compliant and reputable operator or transport manager, would or should have been aware of the risks that they were taking when fitting an emulator.

60. Our determination set out in paragraph 59 above is supported by the following:

a) Professionally competent transport managers are expected to fulfil a range of responsibilities. Within paragraph 51 on page 14 of the Senior Traffic Commissioner's Statutory Guidance on Transport Managers, there is a non-exhaustive list of the type of activity which might be expected of a transport manager and the list includes as a bullet point "*keep up to date with the relevant changes in standards and legislation".* In order to effectively discharge the above responsibility, we are satisfied that transport managers' should be keeping up to date by reading the relevant trade publications, attending refresher courses and they should also be ensuring that the operator is receiving bulletins and alerts from the DVSA and any trade association that the operator may subscribe to (for example the Freight Transport Association or the Road Haulage Association);

b) Whilst the articles listed in the timeline (save for the Telegraph article) were not published in printed newspapers or journals, they were nevertheless to be found on websites providing news and updates to operators and transport managers in the road haulage industry;

c) Further, EU Annex 1 to Article 8(1) of EU Regulation 1071/2009, (which is reproduced in the Statutory Guidance at page 33), sets out the range of competencies expected of a transport manager. Under the heading "G. *Technical standards and technical aspects of operation",* the annex continues:

"*The Applicant must, in particular in relation to road haulage … (4) understand what means must be taken to reduce noise and to combat air pollution by motor vehicle exhaust emissions"*.

This competency directly relates to the issues in this appeal and makes it clear that a transport manager should be taking a proactive role in ensuring that HDVs were complying with the relevant emissions limits. Fitting an emulator is inconsistent with this competency.

d) Further, the Tribunal can take judicial notice (and indeed referred to it during the course of the appeal hearing and at paragraph 33 above), that in the latter part of 2015, the "Volkswagen Emissions Scandal" (as it was characterised), received a large and sustained amount of media coverage and was met with public disapproval. This could not have escaped the attention of operators and transport managers and would or should have highlighted the concerns of the government and right-minded members of the public to the issue of emissions interference.

61. In light of the above, we do not consider that this point is as straightforward as the Appellants maintain. In the event that the DVSA are unable to produce the email referred to above, we are nevertheless satisfied that the publicity that resulted from the DVSA press release dated 25 June 2017 was sufficient to discharge any duty owed under regulation 5 of the Code and to make the practically competent, compliant and reputable operator and transport manager aware of the pilot that was to take place. It will be a question of fact in any given case as to why the operator and/or transport manager concerned was unaware of the pilot.

<u>Post August 2017</u>

62. We should also add this for the sake of completeness: following the pilot commencing, there were a further twelve articles or other media coverage of the emulator issue leading up to the first hearing of these appeals. In particular, there was coverage on the television programme, The One Show in December 2017 entitled "*JJ Chalmers tracks down the illegal lorries polluting our air".* In April 2018, there was a Dispatches television programme on Channel Four entitled "*Britain's diesel Scandal"*. The preview described the programme as "*An undercover investigation into how British hauliers are using hi-tech cheat devices and computer hacking to disable the emissions controls on their lorries saving them money but worsening air quality".* On 24 September 2018, an Inside Out, North West television programme on BBC1 was previewed as "*Investigating the lorry operators using devices to avoid cleaner emissions that lead to premature deaths from air pollution".* There

were of course, in addition, the reports of the five appeal cases following publication of the TCs' decisions in the trade press. We have included this paragraph to make it clear that, putting aside the issue of the DVSA email and the responsibilities of transport managers as set out in paragraph 60 above, that from April 2018 at the latest, no practically competent and compliant operator or transport manager could credibly argue that they were not aware of the action being taken by the DVSA to target emulators or the seriousness with which the fitting of one or more emulators would be taken if detected.

MCL

63. We allow this appeal and remit the matter for rehearing before the same TC for the following reasons:

a) We have found that it was unfair to strictly compare the fitting of an emulator with a tachograph interference device (see paragraph 44 above);

b) In this case, Mr Donlon accepted that the device found on one of MCL's vehicles was an AdBlue emulator and he had volunteered that he had fitted two others to vehicles in the fleet. He also accepted that he did so because of problems he was having with the SCR systems and it may be for that reason that the TC felt able to ultimately conclude that the fitting of three emulators amounted to *three serious acts of deception"*. However, the TC's ultimate conclusion is inconsistent with his comment during the public inquiry that Mr Donlon had fitted the emulators "*out of ignorance rather than deliberate deceit".* We have already found in paragraph 47 above that these were inconsistent determinations and they simply cannot sit together without further explanation;

c) Of course, the finding that there were "*three serious acts of deception"* clearly informed the TC's determination in relation to regulatory action as he made clear in paragraph 11 of his decision:

"*.. the generally compliant operation which Midland runs cannot counterbalance these three serious acts of deception and I conclude that regulatory action is necessary. While I conclude that it would be disproportionate, given Mr Donlon's otherwise good record, to put the company out of business, I am taking action designed to send a clear message to him and other operators and transport managers that the fitting of AdBlue cheat devices is illegal and will lead to serious consequences."*

d) The Appellants' challenge the proportionality of the curtailment (set out in paragraph 1 above) which was aggravated by Counsel's failure to properly inform the TC of the financial and commercial consequences of curtailment. Whilst it was submitted that Counsel's failure was in turn a failure of the TC because he should have "*side stepped"* Counsel and asked questions about the effect of curtailment directly to the operator, we disagree. The company and Mr Donlon were legally represented and it

was for Mr Donlon, who would or should have been aware of the possible regulatory action open to the TC as a result of the contents of the call up letter, to properly instruct Counsel. Be that as it may, bearing in mind that for the reasons set out in a) to c) above, this matter is to be reconsidered, along with the proportionality of any regulatory action being reconsidered, then it will be open for Mr Donlon to provide to the TC with the relevant commercial and financial information.

64. It was argued before us, that the TC had failed to give any reasons for his conclusion that he was able to compartmentalise Mr Donlon's good repute as a director and his good repute as a transport manager. Of course, if the two stand or fall together, then MCL should also have lost its good repute. The Tribunal was referred to *T/2019/32 & 33 CM Coaches Limited and Michael Hazell* and *T/2017/55 Alistair Walter.*

65. We are satisfied that paragraph 11 of the TC's decision when read along with paragraph 13, does set out the TC's reasoning for being able to distinguish between Mr Donlon as transport manager Mr Donlon and as director. Paragraph 13 reads:

"*By taking the advice of an electrician (not normally noted experts on EU emissions legislation or on UK Construction and Use regulations) and not taking the necessary legal advice, James Donlon has forfeited his good repute as transport manager …"*

It was clearly in the mind of the TC that it was disproportionate to put the company out of business (the Bryan Haulage question) and whilst the Priority Freight question is not referred to, the TC was clearly of the view that in the light of the company's generally compliant record and that of Mr Donlon (being effectively the company) the company could be trusted in the future subject to Mr Donlon attending a transport manager CPC refresher course. Whilst it is not stated in terms, we are satisfied that in all of the circumstances, the TC was throwing the company a life line. We are also satisfied that whilst brief, paragraphs 11 and 13 represent a balancing exercise. Not every positive aspect of a company's operation has to be specifically referred to when a TC considers the appropriate regulatory action.

DKB

66. The issues in this case were:

a) whether the device found by VE Seadon on 18 September 2017 on vehicle WX60AXS was fitted to the SCR system;

b) if so, whether it was an emulator;

c) if so, whether it was working at the time it was discovered;

d) whether DKB was aware of the existence of the emulator;

e) whether the vehicle was hired, it being the company's case that either the owner or previous keeper of the vehicle must have fitted the emulator;

f) the extent of any regulatory action which should flow from an adverse follow up maintenance investigation on 11 December 2017 which noted:

- that PMI sheets were being fully completed, with some missing mileage, details of repairs not being initialled by the repairer and brake wear not recorded;
- no brake performance tests were being conducted on trailers apart from at annual test;
- the forward planner only covered the period to January 2018;

g) whether a variation application to increase the overall authorisation of the licence from 10 vehicles and 15 trailers to 15 vehicles and 20 trailers should be granted.

67. The TC found that the device detected by VE Seadon was wired into the emissions control system of the vehicle. He was able to arrive at that determination because VE Seadon provided clear photographic evidence which showed that the wiring of the device was clearly spliced into five wires within the SCR wiring loom and in particular, that the wires into which the device was spliced, were connected to a connector marked "SCR". This evidence was not challenged by Mr Brown who represented the company. Indeed, he did not even request VE Seadon's presence at the public inquiry so that he could ask questions of him. In the event, it was the TC, having considered the written representations produced by Mr Brown on behalf of the company, who determined that VE Seadon should give evidence. As that was at a very late stage, VE Seadon was only able to give evidence over Skype. Happily, that did that not affect the quality of the evidence he was able to give. In coming to his determination on this issue, the TC rejected the evidence of Mr Daren Barnsley, director of the company, who was responsible for removing the emulator after the PG9 had been issued and then throwing it away without further investigation. It was his evidence that the wiring to which the device was connected was not connected to anything else in the system. This account was not put to VE Seadon by Mr Brown. The TC's conclusion was that Mr Daren Barnsley's evidence "*did not stack up"* and in view of the fact that VE Seadon's evidence was unchallenged and well supported by the photographic evidence, the TC was entitled to rely upon it, having clearly accepted that it was credible and reliable. The TC's finding is not open to criticism.

68. The TC then considered Regulation 61A of the 1981 Regulations and correctly analysed the position in relation to the commission of a criminal offence i.e. that it must be established that emission limits have been exceeded before a criminal offence can be proved. He nevertheless concluded that it was far more likely than not, that a device interfering with the SCR system, would cause emissions to exceed limit values and for the

reasons we have already set out, we are satisfied that this was a conclusion that he was entitled to come to.

69. The TC then considered whether the emulator was working at the time that it was detected. VE Seadon had explained why his suspicions were aroused. He had at first checked the filler neck of the AdBlue tank and found it to be full of dirt all the way down the inside of the neck and around the edge. Whilst the DVSA appreciated that dirt could get "*in at any point"*, this was "*all ground* (sic) *and it's all around the side; it's all around the top of the seal and it's even managed to get all the way down into the filter*". He had also checked the tank with a torch and could not see any AdBlue in the tank. Those findings pointed to the conclusion that it appeared that the tank had not been filled with AdBlue for some considerable time. Mr England, the driver had told VE Seadon that he had put AdBlue in the tank about four days before (the previous Thursday). This response did not collate to the evidence as far as the Vehicle Examiner was concerned and so he undertook a further examination and by removing the front cover of the electrics behind the grille at the front of the cab unit, he found the emulator. The cover had a warning on it prohibiting the removal of the cover save by authorised persons.

70. In answer to questions put by Mr Brown, VE Seadon stated for the first time that in addition to the other indications, he knew the emulator was working because when he checked the MIL light on the dashboard in the cab, which should illuminate and then extinguish after a self-check when the engine is switched on, it did not do so. If the light does not come on, there is something wrong because the system is not checking itself. VE Seadon accepted that without a full diagnostic check, he could not actually prove that the emulator was working but all of the evidence pointed to the SCR system not working. He told the TC that Vehicle Examiners could not start "*pulling these devices apart because if there is a fault, the vehicle will de-rate and you are stuck with a vehicle on site".* That is why the operator is told to take the vehicle to be checked out by the manufacturer for clearance of the PG9.

71. The TC analysed the evidence he had heard. He found that VE Seadon was an experienced examiner and that it was clear to him from the condition of the tank that a device was fitted to the vehicle (which there was). The TC reminded himself that the evidence about the MIL light on the dashboard had not been included in VE Seadon's witness statement and so he afforded that piece of evidence less weight, although he did not discount it completely because it was in line with VE Seadon's specialist training (and of course, it was not challenged). We are satisfied that this was the correct approach for the TC to take to the evidence. The TC then referred to the photographs that had been produced by the company of other AdBlue tank caps and filler necks which were also dirty, which the TC discounted as he did not know the circumstances in which the photographs were taken. He also referred to the evidence of Mr England, Mr Daren Barnsley and the other company witnesses to the effect that the vehicle continued to use AdBlue whilst operated by the company which he also discounted because of the absence of documentary support for the purchase of AdBlue by Mr England the Thursday before the

vehicle was stopped. The TC concluded "*Quite simply, the operator's argument does not stack up against the evidence of the vehicle examiner".* We are satisfied that there was sufficient evidence before the TC to justify the finding that he made. He had rejected the evidence given on behalf of the company and by Mr England which he was entitled to do when weighing up the evidence and the evidence of VE Seadon was such that the TC was more than justified into coming to the decision that he did.

72. In support of his determination, the TC also considered and rejected Mr Daren Barnsley's evidence that when the vehicle was returned to the operating centre, not realising the seriousness of the position and not being aware that an "S" marked prohibition had been issued, he simply cut the emulator out and "*chucked it in the bin"*. The TC found that the emulator had not "*simply"* been cut-out but rather, that it had been extracted with some care, as would be reasonable. In making this finding, the TC described the wiring to which the emulator was attached. Even on the company's own photographs it could be seen that the spliced wires in the SCR loom had been repaired. The TC acknowledged that there was one wire which did appear to have been simply cut without repair when the emulator was removed and that this wire was connected to a plug which contained a broken pin (as evidenced by an email from the Volvo dealership which examined the vehicle after the emulator had been removed). In the absence of any evidence that supported the contention that the broken pin and the loose wire meant that the emulator could not have been working at the time the vehicle was stopped, the TC could not accept that this supported the company's case that the emulator was not operational on that day. Again, we are satisfied that on the evidence before him, the TC was entitled to the make the findings he did and ultimately conclude that the emulator was a working device. In doing so, whilst not stating it in terms, he was clearly of the view that Mr Daren Barnsley's evidence about the simple act of cutting the emulator out was not worthy of belief. That conclusion cannot be considered to be plainly wrong.

73. The TC went onto analyse the inconsistent versions of events following the vehicle returning to the operating centre. It appeared to him that an email sent by Callum Barnsley (son of Daren and fellow director) to VE Rozier, the examiner who conducted the follow up maintenance investigation, clearly gave an incorrect impression that the vehicle was taken to a Volvo dealer very shortly after it had been stopped and in the same state that it was in when it was stopped. The email confirmed that the vehicle had a full AdBlue test and was found to be working with no new parts required and that the "*box"* must have been fitted and then disconnected by a previous owner. We agree that this email does convey a misleading impression. The account was in any event, inconsistent with the company's written submissions to the TC and with Mr Daren Barnsley's evidence that he had removed the emulator before the vehicle was presented to a Volvo dealer. We agree with the TC's analysis of this part of the evidence.

74. The reasons why we allow the appeal and remit the case back to the TC for further consideration are as follows:

a) The TC concluded, having analysed the evidence set out in paragraph 72 above, that as a result of the emulator having been removed and discarded before the vehicle was examined by a Volvo dealer, it was impossible to say whether the emulator was functioning at the time (we assume that the TC meant that it was technically impossible to confirm as he had already found upon the basis of VE Seadon's evidence that the emulator was working). However, he went on to find that it was equally likely that Mr Daren Barnsley removed the device, corrected the underlying emissions fault and then presented the vehicle to Volvo for clearance. We are satisfied that the likelihood of Mr Daren Barnsley or some member of staff of the company had corrected an underlying defect should have been put to him;

b) The question of whether the vehicle was hired took on an importance that was not anticipated prior to the public inquiry. It would have been simple for the company to have produced a hiring agreement to show that the vehicle was genuinely hired. They did not, although we are not surprised having seen a copy of what has been described as the original agreement. This was sent to the TC following the public inquiry. He subsequently asked to see the original. That has never been produced. However, what is clear even from the photocopy is that the document is no more than a hire agreement relating to another vehicle with various parts "*tippexed"* over and then over-written. It is a most unimpressive document and it is not surprising that the TC thought so too. The TC was rightly concerned about the evidence he had heard about the vehicle being hired. He was concerned by the evidence of Mr Daren Barnsley that the vehicle was owned by Linda Stock/LGS Logistics Limited and that it had been purchased to fulfil a contract that did not materialise. However, following the public inquiry, the TC researched LGS Logistics Limited and found that whilst the company was active, it did not have an operator's licence. He was sceptical about the explanation for the vehicle being surplus to the requirements of LGS Logistics Ltd. He was also suspicious of Mr Daren Barnsley's conduct in removing the emulator and liaising with the Volvo dealer without returning the vehicle to the hirer and demanding an explanation, which the TC found was what most reasonable operators in Mr Daren Barnsley's position would have done. He concluded that Mr Daren Barnsley knew full well of the seriousness of the position and rejected his assertion that he did not know that the PG9 was "S" marked. He was entitled to come to all of these inclusions upon the basis of the evidence that he had before him. He clearly did not find Mr Barnsley to be a compelling or credible witness.

c) As a result, the Office of the Traffic Commissioner wrote to Mr Brown prior to the TC finalising his decision stating that the TC had concerns arising out of the hiring agreement which was received after the hearing and invited Mr Brown to comment on the following:

- *The document is not signed by the hiring company – please provide the original*
- *The hiring company does not have an operator's licence which appears contrary to the explanation given at the inquiry that they had acquired the vehicle for a contract that had not materialised*
- *The hiring agreement states a rate of £1600 per month. This equates to £19,200 over the agreement period and £43,200 since the rental began. The retail value of the vehicle with reference to similar vehicles on the Commercial Motor sales site appears to be around £15,000 to £16,000. Why has the operator continued the rental at this price?*
- *Is there any evidence that can be provided that hire payments have actually been made, for example, from bank statements?*

d) In his response, Mr Brown averred that there is no legal requirement for the owner of a vehicle to sign a hire agreement. He produced a similar agreement in the name of MC Rental Limited and it was obvious that this was the original agreement which had then been altered. The TC found that this document did nothing to satisfy his concerns about the authenticity of the LGS hire agreement. In fact, it did the opposite.

e) Mr Brown's response informed the TC that LGS Logistics had informed Mr Daren Barnsley that they had intended to use the lorry for a particular job that had not materialised and that Mr Daren Barnsley had assumed that the company held an operator's licence. He further averred that the value of a vehicle on hire is not a relevant factor when calculating the cost of hiring a vehicle. Mr Brown gave examples of other agreements of relatively low value vehicles on hire and the hire out rates. Finally, Mr Brown produced bank statements which clearly showed that DBK, over the period 1 August 2017 to 28 February 2018, had paid out by direct debit the sum of £1,920 on a monthly basis to LGS Logistics Limited.

f) Whilst the TC accepted the evidence of payments to LGS Logistics Limited, he remained unconvinced that Mr Daren Barnsley, as a successful businessman would pay £43,000 in hire fees for a vehicle valued at £15,000. Indeed, the company could easily have funded the purchase of such a vehicle outright. He also took into account the evidence of VE Seadon concerning the conversation he had had with Mr Daren Barnsley on the day the vehicle was stopped, which gave the vehicle examiner the false impression that the vehicle had been only recently hired. In doing so, he again preferred the evidence of VE Seadon who had then ascertained that the vehicle had been specified on DKB's licence since 2015. Again, the TC was entitled to do so. The TC ultimately concluded that the hire agreement was a sham.

g) The criticism that is made about how the TC approached the issue of whether the hire agreement was genuine or not is made out. Whilst the TC was entitled to undertake the investigations that he did in b) above and in fairness, informed Mr Brown of his investigations and the outcome of

them, what he did not do, is make clear that he was considering finding that the hire agreement was a sham, which in all likelihood weighed heavily into the balance when considering the level of regulatory action appropriate in DKB's case. As he himself noted, the copy of the similar agreement, posed more questions than it answered and we are satisfied that at the very least, this should have been communicated to Mr Brown along with an invitation to submit further representations or request a further hearing or alternatively a further call up letter should have been issued.

h) During the course of the hearing, Mr Daren Barnsley explained the status of his son, Callum within the business. He was listed as a director, although it was clear to the TC, that it was Mr Daren Barnsley who ran the business. Mr Daren Barnsley explained that in effect, Callum was a mere employee of the company and only held the position of director so that he could sign cheques. The TC concluded that this arrangement demonstrated that Mr Daren Barnsley was "*quite happy to abuse statutory processes for personal gain. The listing of Callum Barnsley as a director is a fraudulent act of convenience. In doing so, the operator had sought to mislead, Companies House, any parties dealing with his business commercially and to mislead me".* This was a serous finding to make and there was no real indication that it was a finding that was likely to be made at the conclusion of the public inquiry. In the circumstances, we are satisfied that at the very least, this issue should have been mentioned in the email referred to in c) above with the TC's concerns clearly set out along with an invitation to submit further representations or request a further hearing, or alternatively a further call up letter should have been issued.

e) Finally, there is the strict comparison between fitting of an emulator with a tachograph interference device which we have determined is an unfair comparison (see paragraph 44 above).

75. On the first day that these appeals were listed, the Tribunal was invited to hear oral evidence from Linda Stock and a witness statement was submitted. We declined to do so as such evidence would in all likelihood, require Mr Daren Barnsley to give further evidence not least to explain why he had not given a full and frank account of how it came to be that DKB was hiring the vehicle and why he had held the belief, that Ms Stock or her company held an operator's licence.

Conclusion

76. For the reasons set out in paragraph 63 above (MCL) and paragraph 74 above (DKB), we are satisfied that the TC's decisions were procedurally unfair and as a result we are impelled to allow these appeals as per the test in *Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695.* The TCs' orders are set aside and the matters remitted for a further hearing and in the case of DKB, with a new call up letter.

Her Honour Judge Beech
6 January 2020