

**Under the Goods Vehicles (Licensing of Operators) Act 1995 (as amended)
("the Act")**

And

**The Goods Vehicles (Enforcement Powers) Regulations 2001
("the Regulations")**

DECISION

BY

**RICHARD HAMILTON McFARLANE
DEPUTY TRAFFIC COMMISSIONER FOR THE SCOTTISH TRAFFIC AREA**

IN THE APPLICATIONS

BY

**DAVIDSON & WILSON BV
Marconistraat 14, 2181AK
Hillegon, Netherlands**

For the return

of

(a) Detained vehicles Reg Nos: BN DV 86, BN RX 45, BP HD 95

and

(b) Detained semi -Trailer: SMRR3ACX6N024077,

EVERGREEN LEASING LIMITED

Suite 10, Hesslewood Hall

Ferriby Road

Hessle, East Riding of Yorkshire

For the return

of

Detained semi - trailer: C135846

and

CLYDESDALE BANK ASSET FINANCE LIMITED

30, St Vincent Place

Glasgow

For the return

of

Detained semi - trailer SMRR3ACX6N024077

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BACKGROUND

1. Davidson & Wilson BV (“BV”) is a company incorporated under Dutch law. It is the equivalent of a private limited company incorporated in terms of the companies legislation in the United Kingdom.
2. BV has an office at Marconistraat 14, 2181AK Hillegom, Netherlands. It is authorised to operate 15 vehicles.
3. During 2006 the Vehicle & Operator Services Agency (“VOSA”) received intelligence suggesting that BV was allegedly operating in contravention of the cabotage rules and regulations.
4. VOSA instigated investigations. In light of their findings on 19th December 2006 VOSA detained two tractive units with semi-trailers attached which were being used by BV.
5. Written notification of the detention of tractive unit Reg No BN DV 86 and attached semi trailer (Identification No C135846) was received at the Scottish Traffic Area Office (“STAO”) on 21st December 2006.
6. Notice of the detention of the vehicles detailed in paragraph 5 above was published in the Edinburgh Gazette on 22nd December 2006.
7. A GV500 application form completed on behalf of BV requesting the return of vehicle Reg No BN DV 86 was received at STAO on 21st December 2006.
8. A GV500 application form completed on behalf of Evergreen Leasing Ltd (“Evergreen”) requesting the return of semi trailer (Identification No C135846) was received at STAO on 2nd January 2007.
9. Written notification of the detention of tractive unit Reg No BN RX 45 and attached semi trailer (Identification No C119780) was received at STAO on 22nd December 2006.
10. Notice of the detention of the vehicles detailed in the paragraph 9 above was published in the Edinburgh Gazette on 29th December 2006.
11. A GV500 application form completed on behalf of BV requesting the return of vehicle Reg No BN RX 45 and semi trailer C119780 was received at STAO on 21st December 2006.

12. On 5th January 2007 VOSA detained another tractive unit with semi trailer attached, which was also being used by BV.
13. Written notification of the detention of tractive unit Reg No BP HD 95 and attached semi trailer (Identification No SMRR3ACX6N024077) was received at STAO on 9th January 2007.
14. Notice of the detention of the vehicles detailed in paragraph 13 above was published in the Edinburgh Gazette on 12th January 2007.
15. A GV500 form completed on behalf of BV requesting the return of vehicle Reg No BN DV 86 was received at STAO on 31st January 2007.
16. A GV500 application form completed on behalf of Clydesdale Bank Asset Finance Limited (“Clydesdale”) requesting the return of semi trailer SMRR3ACX6N024077 was received at STAO on 6th February 2007.
17. The basis upon which BV sought the return of the three tractive units and one semi trailer was that at the material time each of the said vehicles was not being used, and had not been used in contravention of section 2 of the Act.
18. Each of Evergreen and Clydesdale sought the return of their respective semi trailers on the basis that they did not know that they were being or had been used in contravention of section 2 of the Act.
19. BV requested that their various applications be considered at a hearing.
20. Evergreen and Clydesdale indicated that neither of them required their respective applications to be considered at a hearing.

The Hearing

21. The hearing was scheduled to begin on 18th January 2007. For a number of reasons this date turned out to be unsuitable for, in particular, VOSA. The hearing was rescheduled and began in the Office of the Traffic Commissioner, Edinburgh, on Thursday 18th February 2007.
22. In attendance for BV were its two directors Mr Grant Davidson (“Mr Davidson”) and Mr Ian Wilson (“Mr Wilson”). Mr Neil R Kelly, (“Mr Kelly”) solicitor, Glasgow and Mr Van Vallenduuk, (“Mr Vallenduuk”) Advocaten, Holland, represented BV.

23. In attendance for VOSA were Traffic Examiners Ms Virginia McKenna (“Ms McKenna”), Ms Susan Barratt (“Ms Barratt”) and Ms Anusia Bainbridge (“Ms Bainbridge”). Mr Christopher Hallsworth (“Mr Hallsworth”) of Woodfines LLP, solicitors, Milton Keynes represented the interests of VOSA
24. Notification of the hearing had been given to Evergreen and to Clydesdale.
25. Advices had been received at STAO from Evergreen that they were unable to send a representative to the hearing.
26. Clydesdale informed STAO that they would not be attending or represented at the hearing and requested the Traffic Commissioner to determine the matter with reference to their GV500 application form and the documentation attached to it.
27. At the outset of the hearing I introduced myself and gave an insight into my understanding of the background to the applications for the return of the various detained vehicles. I then set about satisfying myself that I, Mr Kelly and Mr Hallsworth had complete copies of the Brief and attendant documentation. I indicated that I had read the documentation that had been thus far submitted. I explained that I had not read it in great detail but had read it to the extent that I believed I had an understanding of the likely issues and that I continued to have an open mind. Thereafter I discussed with the solicitors the ordering of and the procedure to be followed at the hearing. I also enquired whether Mr Kelly or Mr Hallsworth had any preliminary issues they required to raise with me.
28. Mr Hallsworth intimated that he intended to submit “the VOSA Report”. He required to know if BV accepted the report as presented. If not he wanted to know what parts of the report were to be disputed by them. He briefly went through specific items in the report viz: what was said to the Traffic Examiners at the time of detention of the vehicles and the statement from VOSA Intelligence Officer, Mr Richard Loftus (“Mr Loftus”), which identified apparent discrepancies between entries on tachograph charts (“the charts”) and an associated timesheet.
29. Mr Hallsworth had further documentation to tender to the hearing, a copy of which had already been given to Mr Kelly.
30. Mr Kelly intimated that the report was to be challenged. Whilst he understood that at the time that each of the vehicles had been detained “the authorised person” had a reasonable belief that the vehicles had been used in contravention of the Act, he was concerned that VOSA were endeavouring to develop that belief retrospectively. He submitted that for the detention to be lawful, the authorised person detaining the vehicles had to have a reasonable belief that the vehicles were being used unlawfully. There must have been evidence available to VOSA upon which that belief was based. Any evidence gathered subsequent to the detention to substantiate that belief, he submitted, was irrelevant and should not be admitted in evidence.

31. Mr Hallsworth countered this submission to the effect that evidence is admissible if it is relevant to the issues. The position of VOSA was that they were entirely satisfied that their belief at the times of detention was correct.
32. I took the view that I could not make a determination without hearing the evidence and once I had considered the evidence only then could I rule on what was competent and relevant to the issues.
33. However, it was clear to me that both Mr Kelly and Mr Hallsworth required time to consider the further productions that had been brought to the hearing. It was also represented to me that further informal discussion between them was necessary to try to identify any areas of agreement and any controversial areas. They were in agreement that the hearing be adjourned to a later date.
34. Before adjourning I was persuaded to allow Mr Vallenduuk to make a statement. I did point out that any statement or submission he made should be after evidence had been led but because of the distance he had travelled I entertained his submission. I return to what he had to say later in this decision. I then adjourned the hearing.
35. The hearing reconvened on 21st February 2007. The same personnel were in attendance together with Mr Smiley of Evergreen.
36. Due to his business commitments I entertained issues Mr Smiley wished to raise with me to do with his company's semi trailer C135846. At the conclusion of his evidence and prior to his departure he undertook to send to STAO the lease or contract that Evergreen had entered into with Inchcape Transport Limited ("Inchcape").
37. Thereafter there was some sundry discussion. Mr Kelly stated that there would be no challenge to the detention of the two tractive units on 19th December 2006. With regard to the semi trailer (which was also detained on 19th December 2006) and the tractive unit detained on 5th January 2007 he continued to reserve the position of BV
38. After further discussion with his clients Mr Kelly was able to inform me that there was to be no challenge to the detention of the three tractive units and one semi trailer. BV accepted that these items had been lawfully detained.
39. Thereafter, on behalf of VOSA, evidence was lead from Ms McKenna and Ms Barratt. Then Mr Davidson and Mr Wilson gave evidence on behalf of BV. The hearing was adjourned to the following day when I was treated to submissions from Mr Hallsworth, Mr Vallenduuk and Mr Kelly. At the conclusion of the submissions I adjourned the hearing. I did so to enable a transcript of the evidence

to be prepared, to consider the position with regard to Evergreen and Clydesdale and to give my decision in writing.

Findings in Fact

Having resumed consideration of the VOSA brief, all the productions and the evidence, I find the following facts to be admitted or proved: -

- [1] Davidson & Wilson Limited (“D&W”) is a company incorporated under the Companies’ Acts of the United Kingdom. It has its Registered Office at Investment House, 6, Union Row, Aberdeen. It has a place of business at Sclattie Quarry Industrial Estate, Bankhead Road, Bucksburn, Aberdeen (“Sclattie Quarry”).
- [2] On 12th March 1991 the then Licensing Authority granted a Standard International Licence to D&W authorising the use of 10 vehicles and 10 trailers with a margin of 5 vehicles and 6 trailers. At a public inquiry held on 20th September 1991 the licence was curtailed to 8 vehicles and 10 trailers.
- [3] On 21st April 1995 the Traffic Commissioner revoked the Standard International licence previously issued to D&W. The decision to revoke the licence was appealed. The Transport Tribunal dismissed the appeal.
- [4] On 3rd October 2005 vehicle reg no BP SB 39 operated by BV was checked at the Sawtry Weighbridge, Cambridgeshire. The driver, Mr Ian Greenwood, informed the enforcement officers that (a) he was driving a load of fruit to Carlisle and (b) he was employed by Davidson & Wilson, Sclattie Quarry, Bankhead Road, Bucksburn, Aberdeen.
- [5] On 8th December 2005 Senior Traffic Examiner, Mr Mark Dunnery and Traffic examiner Miss Margaret Munro, called at Sclattie Quarry. On arrival, as Miss Munro was exiting the car, Mr Wilson passed by. She called him and explained why she and Mr Dunnery were there (to discuss the matters detailed in paragraph [4] above). Mr Wilson became defensive. He said the matter concerned BV and had nothing to do with Davidson & Wilson, Aberdeen. He refused to discuss the matter. Concerning why driver Mackie had given his name as a contact, Mr Wilson explained that the driver was a friend and often ‘phoned him to discuss matters. He produced letter-headed notepaper for BV and gave the name of Gert van Schie as the person who ran the Dutch office.
- [6] On 13th June 2006 vehicle reg no BL ZN 20, operated by BV was checked at the Test Centre Wrexham. The driver, Mr Alistair Mackie, informed the enforcement officers that Davidson & Wilson, Sclattie Quarry, Bankhead Road, Bucksburn, Aberdeen employed him. An analysis of the charts produced by driver Mackie revealed 4 odometer reading discrepancies, 12 ‘V’ trace discrepancies, 3 instances

where the start/finish locations could not be reconciled with his movements and 1 apparent false record.

- [7] On 21st September 2006 Traffic Examiner, James Marshall, called at Sclattie Quarry to discuss, in the event, with Mr Wilson the apparent discrepancies on driver Mackie's charts. Mr Wilson stated (a) vehicle reg no BL ZN 20 was operated by BV and had nothing to do with D&W and (b) driver Mackie was employed and paid by BV and had nothing to do with the "Dutch" operation. He also told Mr Marshall that all documents concerning BV were in Holland.
- [8] On 2nd October 1996 the Traffic Commissioner granted a Standard International Operator's Licence to D&W authorising the use of 16 vehicles with an operating centre at Sclattie Quarry, Bankhead, Bucksburn, Aberdeen,
- [9] At a public inquiry held on 23rd June 1998 to review the conviction history of D&W, I took no action against the licence. D&W was given a final warning with regard to future convictions.
- [10] On 30th November 1999 Davidson & Wilson BV ("BV") was incorporated under the Companies' legislation of the Netherlands. The Initial Registration in the Business register is dated 8th December 1999. The Registered Office is at Oosterhout, North Brabant, Netherlands. It has a place of business at Marconistraat 14, 2181 AK, Hillegom, Netherlands.
- [11] BV is authorised to operate 15 vehicles. In an e-mail from NIWO, the Dutch equivalent of the United Kingdom licensing system for large goods vehicles, dated 14th August 2006, 35 Dutch registration marks of vehicles were detailed as having been "found" at Marconistraat 134, 2181 AK Hillegom (the office of BV).
- [12] On 30th November 1999 Mr Grant Alexander Reid Davidson ("Mr Davidson"), 13, Willow Wynd, Portlethen, Aberdeen assumed office as a general director of BV.
- [13] On 23rd March 2000 Mr Ian George Wilson ("Mr Wilson") 74, Curistie (Carnoustie) Crescent, Stonehaven assumed office as a general director of BV.
- [14] BV has an account with The Royal Bank of Scotland, Dyce Branch, Burnside Road, Farburn Industrial Estate, Dyce, Aberdeen account no 00206196.
- [15] BV has an account with Rabobank, Postbus 24, 21800 AA Hillegom. The account holder is designated as "Davidson & Wilson B.V. Bankhead Road, Bucksburn Aberdeen (The 3 bank statements lodged by BV refer).
- [16] BV presently employs 12 drivers. 10 drivers live in Scotland, 2 in Slovenia.
- [17] Mr Wilson has the leading role in organising the drivers with their duties.

- [18] All drivers are paid “off the time sheet”. They are paid by bank transfer (BACS) to their own bank accounts net of United Kingdom tax.
- [19] BV makes deliveries to about 150 locations within the United Kingdom on a regular basis including deliveries from the continent to regional distribution centres.
- [20] BV has no Dutch delivery contracts.
- [21] Mr Wilson is also known as “Paddy” Wilson. He holds a Standard International Operator’s Licence OM1011959 and trades as Paddy Wilson Transport (“PWT”) from Sclattie Quarry. The licence authorises the use of 3 vehicles and 3 trailers. 3 vehicles are specified on the licence.
- [22] On 27th April 2000 vehicle reg no BH RF 97, registered in the name of BV was stopped and checked by VOSA officers. The driver, David Wilson, informed them that he was employed by D&W.
- [23] On 23rd May 2000 Mr Davidson and Mr Wilson were appointed directors to D&W.
- [24] At a public inquiry held on 8th January 2001, I (a) suspended the Standard International licence held by D&W for 3 weeks and (b) curtailed the licence to 10 vehicles and 17 trailers.
- [25] Following on from the suspension all vehicles previously specified on the licence were removed from it.
- [26] The licence has continued. It was renewed in September 2006. The licence remained dormant until vehicle reg no S73 JRS was specified on it as detailed in Finding in Fact [46] below.
- [27] Between April 2002 and January 2004 NIWO carried out an investigation into the licence held by BV. On 2nd April 2002 NIWO revoked the licence. BV appealed this decision.
- [28] BV uses fuel cards. On 27th May 2002 D&W opened a fuel account with AS 24 Fuel Cards Ltd, 77/79 High Street, Watford. 19 Dutch registered vehicles operated by BV, 2 United Kingdom registered vehicles, one of which was registered to PWT, were authorised to use cards on this account. The account was closed in March 2003.
- [29] During 2003 Mr Davidson became a Dutch citizen. He has held a Dutch driving licence since 20th April 2005.

- [30] On 5th December 2003 NIWO decided that BV was legally established in the Netherlands. On 24th January 2004 NIWO decided that the licence was no longer revoked and allowed it to continue.
- [31] On 8th November 2004 D&W opened another fuel account with AS 24 Fuel Cards Ltd. This account continues. 26 cards have been issued with a "DW" prefix for use on this account. Only 1 card has been issued and is specified to vehicle BS HR 64.
- [32] D&W has 2 fuel accounts with Euroshell Cards. One account is a CRT International account. 51 cards have been issued authorising 8 United Kingdom registered vehicles, 2 of which are registered to PWT, and 43 Dutch registered vehicles to use the account. The other account is a CRT United Kingdom account. 86 cards have been issued on this account, 28 for Dutch registered vehicles and 4 for United Kingdom registered vehicles, 3 of which are registered to PWT.
- [33] All fuel accounts are paid by direct debit from the D&W account held at The Royal Bank of Scotland, Dyce, Aberdeen. The fuel costs are then charged to BV.
- [34] During 2006 VOSA investigated the movement of vehicles operated by BV.
- [35] On 10th October 2006 Ms McKenna and Ms Barratt obtained information from Lidl that for the period 5th May 2006 to 16th September 2006, BV vehicles made not less than 64 deliveries to their Regional Distribution Centre at Livingston for Nicholas Smyth & Co Ltd, Banana Ripeners, St Helens, Merseyside.
- [36] On 11th October 2006 vehicle reg no BN RX 45 operated by BV was checked at the Sawtry Weighbridge, Cambridgeshire. The driver informed the enforcement officers that he was delivering foodstuffs from Mack Multiples, Paddock Wood to Sainsbury's at East Kilbride. The vehicle was overloaded by 1030 kgs or 5.72%.
- [37] On 30th October 2006 the driver of vehicle reg no BR DH 02 operated by BV informed a police officer of Dumfries and Galloway Constabulary that he was driving a load of fruit and vegetables from Gist in Spalding to Marks & Spencer in Cumbernauld.
- [38] On 7th November 2006 Ms McKenna and Ms Barratt obtained information from Sainsbury's that for the period from 1st May 2006 to 16th September 2006 BV vehicles made 105 deliveries, almost on a daily basis, to their Regional Distribution Centre at East Kilbride for Profresh Solutions Ltd, Fordham Road, Newmarket, Suffolk ("Profresh").
- [39] On 8th November 2006 Ms McKenna and Ms Barratt obtained information from Marks & Spencer that for the period from 1st May 2006 to 16th September 2006 BV vehicles made 38 deliveries to their Regional Centre at Cumbernauld for Gist, Warden Tree Lane Industrial Estate, Spalding.

- [40] On 9th November 2006 Ms McKenna received further information from Marks & Spencer to the effect that for the period 1st May 2006 to 30th September 2006 BV vehicles had made a total of 92 deliveries carrying produce from Gist in Spalding to their Regional Distribution Centres at Cumbernauld and Faversham.
- [41] On 22nd November 2006 Ms McKenna, Ms Barratt and Mr Loftus attended the premises of Gist in Spalding. Information was obtained from their National Planning Officer, Mr Seamus McNamara to the effect that (a) the contact address for BV was Sclattie Quarry, (b) they had never dealt with the Dutch office of BV, (c) payment for services is made by bank transfer to an account at The Royal Bank Of Scotland, Dyce, Aberdeen and (d) they have used BV for about a year and would consider them for work in the Cumbernauld area as they are based in Aberdeen.
- [42] Mr McNamara's colleague and depot/logistics manager, Mr John Montgomery, produced to the said enforcement officers, 19 purchase order forms in name of Davidson & Wilson, a copy of the D&W insurance certificate, a copy of the BV Dutch Operator's licence and a copy of the statement of account for vendor 7648 Davidson & Wilson. The copy insurance certificate and copy operator's licence had been transmitted to Gist by fax. The fax cover sheet dated 22nd November 2006 is from D&W and is "signed" by the Company secretary – Tracy Singer. The insurance certificate is dated 29th August 2006 and is "headed up" in name of D&W and gives "General Details Applying To All Insurances" with the policyholders being Davidson & Wilson Ltd &/or Davidson & Wilson BV. On 1st December 2006 Ms McKenna received an e-mail from Mr McNamara detailing some 95 transactions for the period 5th May 2006 to 30th September 2006 between Gist and D&W.
- [43] In light of the information VOSA had ingathered during the course of the investigation, VOSA was satisfied that BV was carrying out work in the United Kingdom in breach of the cabotage regulations and section 2 of the Act. VOSA had also identified close links between BV and D&W.
- [44] On 28th November 2006 VOSA wrote to the Dutch office of BV and gave notice that VOSA, on the information available to it, had concluded that BV was operating in contravention of the cabotage Council Regulation (EEC) 3118/93 and the Act. On 29th November 2006 a letter in the same terms was sent to D&W at Sclattie Quarry.
- [45] On 3rd December 2006 vehicle reg no BN DV 86 operated by BV and driven by Mr Graham Brothunston was checked at the Boston Spa Weighbridge. He informed the enforcement officers that he was driving a load of fruit from Mack Multiples, Paddock Wood to Sainsbury's at East Kilbride.

- [46] On 7th December 2006 vehicle reg no S73 JRS was specified on the Standard International licence held by D&W. Subsequent enquiries disclosed that the change of registered keeper of this vehicle to D&W took effect on 15th January 2007, the same day it was taxed. The DVLA database disclosed that prior to 15th January 2007 this vehicle did not have a current keeper.
- [47] On 11th December 2006 Mr Kelly telephoned Mr Loftus and enquired if the “Dutch” vehicles could be specified on the Standard International licence held by D&W.
- [48] On 19th December 2006 Mr Graham Brothunston (as designated on the charts) was driving vehicle reg no BN DV 86. Attached to the tractive unit was semi-trailer C135846. It was in course of making a delivery of bananas on behalf of Nicholas Smyth & Co, St Helens to Lidl’s Regional Distribution Centre, Livingston where it (the tractive unit and semi trailer) was detained in terms of Regulation 3 by Ms McKenna.
- [49] At the time of detention of the vehicle, driver Brothunston produced to Ms McKenna charts for 4th, 8th, 9th, 11th, 12th, 13th, 16th, 17th, and 19th December 2006. An analysis of these charts by Ms McKenna did not disclose any breach of the drivers’ hours rules and regulations.
- [50] The Intake Control Sheet in name of haulier Davidson & Wilson maintained by Sainsbury’s at their Regional Distribution Centre, East Kilbride disclosed that a delivery was made to that depot on 15th December 2006 by vehicle reg no BN DV 85. The driver’s name on the gate pass is Brotherston (aka Brothunston), timed in at 14.42 hours. Departure is recorded at 16.10 hours. This journey was not recorded on any of the charts produced by driver Brothunston to Ms McKenna. The time sheet records that he was on duty from 05.00 hours to 00.00 hours (midnight).
- [51] On 19th December 2006 Mr Loftus and Senior Traffic Examiner Mr Alexander Davidson *inter alia* examined detained vehicle reg no BN DV 86. Underneath a bunk in the cab of the vehicle they found a timesheet “headed up” in the name of “Grum Brothunston”. They also found a laminated document “headed up” Davidson & Wilson BV, Sclattie Quarry Industrial Estate, Bankhead, Bucksburn, Aberdeen AB21 9EG together with Aberdeen telephone and fax numbers. The document contained lists of vehicle registration numbers (7 Dutch –3 United Kingdom), telephone numbers and drivers names.
- [52] The examination of the cab also revealed that there were no retaining clips on the rear of the mode switches, which makes it possible to access the odometer tumblers.
- [53] On 5th February 2007 Ms McKenna carried out an analysis/comparison of the charts and the time sheet. She detected a number of discrepancies in the start and

finish times and the start and finish locations. The time sheet recorded more hours worked than disclosed on the charts some of which were missing. The time sheet recorded that on 2 occasions driver Brothunston had been on duty for periods of 27 hours 30 minutes and 34 hours without having a recognised daily rest period. There is no record on the time sheet of a weekly rest after 6 daily driving periods when he had been on duty for 7 consecutive days. From the charts it would appear that driver Brothunston had taken sufficient rest for the week as there is no chart for 15th December 2006 and no missing mileage between 14th and 16th December 2006.

[54] Taking the time sheet and the charts together it appears that driver Brothunston has been on duty from 8th to 17th December 2006 – 10 consecutive days. On this time sheet he claims to have worked 97 hours 30 minutes.

[55] Also on 19th December 2006 driver Brothunston was interviewed under caution by Ms Barratt. In answer to Question 34 “Do you have to submit time sheets in order to be paid? - he said “*No, just a salary. Same amount in the bank no matter what hours. I get paid weekly*”.

[56] Enforcement officers have not spoken to Mr Brothunston about the apparent discrepancies between the charts and the time sheet.

[57] Semi trailer C135846 is owned by Evergreen. Part 6 of Form GV500 has been completed thus: - “*The trailer in question has been owned by this company from new. The trailer is on a long term rental agreement to a haulier in Scotland.*”

[58] Evergreen hired the semi- trailer to Inchcape Transport Ltd, 45, Hayshed Road, Arbroath, Angus for 4 years with an option to extend.

1. The hire-purchase documentation comprises a Schedule dated 21st August 2003. It is signed on behalf of both parties. The Schedule is deemed to form part of The Hire Agreement and is subject to the same terms and conditions. The only other document produced is “headed up” – “Evergreen Leasing Limited – Terms and Conditions”. This document is not signed. It is stapled to the Schedule. An impression of the signature on behalf of Inchcape appears to be imprinted on it. No hire-purchase agreement as such has been produced. Paragraphs 3 and 4 of the Evergreen terms and conditions relative to the possession of the semi-trailer are as follows-

3. *The hirer (Inchcape) will not sell or offer for sale, part with possession of, assign, mortgage, pledge or otherwise deal with the said equipment.*

4. *The hirer shall at no time sub-let, re-hire, loan or otherwise cause the said equipment to be used by any other party.....The equipment is supplied for the exclusive use of the hirer and must at all times remain in his possession and control.*

[59] Evergreen had no knowledge of BV using the semi-trailer C135846.

[60] On 19th December 2006 Mr Alistair Mackie was driving vehicle reg No BN RX 45. Attached to the vehicle was semi trailer C119780. The semi trailer carried the name of Davidson & Wilson Ltd., Sclattie Quarry, Bankhead Road, Bucksburn, Aberdeen together with Aberdeen telephone and fax numbers and identification number DW41. It was in course of making a delivery of fresh fruit on behalf of Mack Multiples Division, Paddock Wood, Kent to Sainsbury's Regional Distribution Centre, East Kilbride where it (vehicle and semi trailer) was detained in terms of Regulation 3 by Ms Bainbridge.

[61] Ms Bainbridge examined the 22 charts handed to her by Mr Mackie. The chart dated 12th December 2006 did not disclose the journey from Bothwell to Sainsbury's Regional Distribution centre ie the last 16 miles of the journey had not been recorded. The chart disclosed an apparent rest trace from 20.25 hours to its removal at 22.35hours. Ms Bainbridge concluded that Mr Mackie had been on duty for 16 hours and had less than the required 8 hours rest. The chart, dated 12th/13th December 2006 in name of Mr Grant Davidson has a commencement time of 21.25 hours ie 1hour 10minutes before the previous chart was removed at 22.35 hours. The distance traces on these 2 charts do not match up. On the latter chart the end mileage is 616291 kms. The sum of the given mileage is 1073 kms. The distance trace has recorded only 768 kms. The chart dated 14th December 2006 in name of Mr Mackie has a start mileage of 615991 kms and an end mileage of 616291 ie the same as the start mileage on chart 12th/13th December 2006. She concluded that these 3 charts were false records.

[62] Mr Mackie was interviewed under caution. In answer to Question 4 "Are you paid cash or into a bank account?" he replied "*Into a bank account, my bank, Bank of Scotland in Aberdeen. I telephone my hours to the office and then I am paid weekly.*" The interview terminated at Question 12 when Mr Mackie became unwell.

[63] On 5th January 2007 Mr Allan Slater was driving vehicle reg no BP HD 95. Attached to the vehicle was semi trailer SMRR3ACX6N024077. Emblazoned on each side of the semi trailer were the words "DAVIDSON & WILSON B.V. UK & EUROPEAN TRANSPORT SERVICES". At the front of the nearside of the semi trailer appear the words "Davidson & Wilson Ltd, Sclattie Quarry, Bankhead Road, Bucksburn, Aberdeen AB12 9EG and identification number DW51. It was in the course of making a delivery of fresh fruit on behalf of Mack Multiples Division, Paddock Wood, Kent to Sainsbury's' Regional Distribution Centre, East Kilbride where it (vehicle and semi trailer) was detained in terms of Regulation 3 by Ms Bainbridge.

[64] Mr Slater was interviewed under caution. In answer to Question 1 "Who are you employed by today? (confirm BV or Ltd) he said "*No comment.*" In answer to

Question 34 “Do you have to submit time sheets in order to be paid?” *inter alia* he said “No. I’m paid off the job I do (not the charts).”

- [65] Clydesdale owns semi-trailer SMRR3ACX6N024077. On or about 7th September 2006 Clydesdale entered into a Hire Purchase Agreement with D&W whereby the semi-trailer was hired to D&W for a period of 57 months from 6th September 2006. Mr Wilson is a signatory to the agreement. The delivery address for this semi-trailer as disclosed on the Sales Invoice is “Davidson & Wilson Transport Ltd, Bankhead Road, Bucksburn, Aberdeen AB21 9EG. Clydesdale has an annual review of the D&W banking facility. The last review took place on 6th September 2006 at which time a copy of the Standard International Operator’s licence held by D&W was taken. *Clydesdale permit the sub-hire of trailers providing there is adequate insurance and a suitable operator’s licence in place.*
- [66] At the time of the detention of all vehicles, including the semi trailers, detailed in Finding in Fact [48], [60] and [63], the authorised persons, namely Ms McKenna and Ms Bainbridge had reason to believe that BV were using same in breach of cabotage and in contravention of section 2 of the Act. The detention in all cases was lawful.
- [67] At the time of detention of vehicle reg no BN DV 86 driver Brothunston identified Mr Wilson as the contact person to Ms McKenna. As Ms Bainbridge was going through the paperwork associated with the detention of vehicle reg no BN RX 45 driver Mackie handed his mobile ‘phone to her and informed her that Mr Wilson was “on the line”. During the course of the detention of vehicle reg no BP HD 95 driver Slater’s mobile ‘phone was handed to Ms Bainbridge. Again it was Mr Wilson “on the line”.
- [68] Each of the telephone calls which took place between Mr Wilson and Ms McKenna and/or Ms Bainbridge, at the time the said vehicles were being detained, *inter alia* he stated that they were wrong to “impound” the vehicles, that he would take out injunctions against them personally, and that they could be sued personally. He denied giving the drivers instructions. He denied there was any connection between BV and D&W. The manner in which Mr Wilson spoke during the course of these telephone calls was intimidating and threatening.
- [69] On 4th January 2007 Ms McKenna and Ms Barratt attended at the premises of Profresh and noted a statement from their Chief Executive, Mr Graham Doe.
- [70] Profresh have subcontracted work to D&W since 2004. The Profresh Haulier Information Form dated 11th October 2004 has been completed in the name of Davidson & Wilson Ltd and has been signed by Mr Wilson in his capacity as director. The subcontractor’s self-bill agreement with D&W has been renewed annually. It was signed on behalf of D&W by the company secretary on 11th October 2004, 4th July 2005 and 5th June 2006. The principal daily delivery is for fruit to be transported from Mack Multiples Ltd to Sainsbury warehouses. Work

on a day-to-day basis is arranged through their Crayford depot with Mr Wilson at Sc lattie Quarry. The day before delivery Mr Wilson would confirm vehicle availability to Profresh and provide them with a vehicle registration and cab number. Mr Wilson was responsible for contacting the driver to pick up the load. Profresh make payment by bank transfer to the account at The Royal Bank of Scotland, Dyce, Aberdeen in the name of Davidson & Wilson Ltd account number 00209802 (the Profresh supplier Details form refers). Evidence of insurance cover as required by Profresh is confirmed in a “To Whom it May Concern” letter from Joseph W Burley & Partners (UK) Ltd dated 21st July 2004. It details the insurances that are in place for D&W.

[71] On 5th January 2007 and 7th February 2007 Ms Barratt telephoned Norscot Truck & Van Rental Ltd (“Norscott”), The Parkway, Bridge of Don, Aberdeen regarding the sale of 4 DAF tractive units. She was advised that 4 such units had been sold to D&W. She was given the chassis number for each and the Dutch registration number assigned to each vehicle Viz: E735459 – registered BS FV 35, E740772 – registered BS HR 64, E692360 –registered BR HV 76 and E692349- registered BR HV 38.

[72] The “mechanics” of the purchase of these vehicles was that Norscott purchased them from the manufacturers, namely, DAF. DAF then delivered the vehicles to the Dutch truck dealer, Truck Services Breda BV, who tested and MOT’d the vehicles before they were registered and used on the road, all as required by the Dutch authorities. Thereafter the vehicles are transported back to Norscott and supplied by them to the customer. D&W have always been good customers of Norscott for some 27 years and have a good working relationship with their salesman.

[73] Ms Barratt was advised by Volvo Truck & Bus, Aberdeen that they had sold 2 tractive units to D&W both of which have Dutch registrations. The relative sales invoices disclose that each such invoice was to be sent to Clydesdale and the vehicle delivered to D&W. The invoices are dated 31st August 2005 x 2, 14th September 2006 and 15th November 2006 respectively. These vehicles were purchased by D&W with financial assistance from Clydesdale.

[74] All vehicles operated by BV are right hand drive. They are maintained in Scotland. Ingosur BV insurance brokers for BV confirm in their letter of 24th November 2006 that there is insurance in place for vehicles for the period 27th November 2006 to 27th November 2007. The invoice for the insurance premium dated 2nd November 2006 was sent to “Davidson & Wilson BV T.a.v. mw T Singer Sc lattie Quarry Industrial Estate ABERDEEN AB21 9EG Groot-Brittannie” (T Singer is the company secretary of D&W).

[75] On 8th January 2007 vehicles reg nos SV 56 FMA and SV 56 FMG were specified on the D&W Standard International licence. Both vehicles were previously registered in Holland as BS HR 64 and BS FV 35 respectively. They have now

- been registered in the United Kingdom. D&W have booked in at the Goods Vehicle Testing Centre, Aberdeen 11 “first test” vehicles. D&W are in process of registering the Dutch registered vehicles in the United Kingdom.
- [76] On 9th February 2007 Ms McKenna returned to Lidl’s Regional Distribution Centre at Livingston. She ascertained from delivery notes for the period from 1st November 2006 to 7th February 2007 BV vehicles with Dutch registrations had made 19 deliveries on behalf of Nicholas Smyth & Co Ltd. There have been no deliveries subsequent to 19th December 2006 (the date vehicle reg no BN DV 86 was detained there). In December 2006 and February 2007 3 deliveries were made to this depot by PWT.
- [77] On 9th February 2007 Ms McKenna also attended at the Marks & Spencer Regional Distribution Centre, Cumbernauld. She ascertained from the Supplier Drivers Booking In & Cab/Trailer Search Register sheets for the period 1st November 2006 to 7th February 2007 that BV vehicles had made 19 deliveries. In December 2006 and February 2007 3 deliveries were made to this depot by PWT. For the period 4th October 2006 to 9th December 2006 there had been 36 such deliveries.
- [78] On 9th February 2007 Ms Barratt and Ms Bainbridge attended at Sainsbury’s Regional Distribution Centre, East Kilbride. They ascertained from the Intake Control Sheets that in November 2006 BV had made 17 deliveries and PWT had made 11 deliveries. In December 2006 they had made 18 deliveries, PWT had made 5 deliveries and in January 2007 they had made 3 deliveries. (Vehicle reg no BP HD 95 was detained on 5th January 2007). PWT had made 13 deliveries and D&W had made 10 deliveries. BV had made 4 deliveries in February 2007 and PWT had made 2 deliveries to the date of preparation of the Brief.
- [79] Vehicle reg no S73 JRS made deliveries to Sainsbury’s’ Regional Distribution Centre at East Kilbride on 8th, 11th, and 12th January 2007 when it was not taxed (Finding in Fact [46] refers).
- [80] Vehicle reg no BP HB 49 was first registered in the United Kingdom on 12th January 2007. The United Kingdom number assigned to it is SV 04 LRX. On 25th and 28th January 2007 this vehicle made deliveries to the Marks & Spencer and Sainsbury Regional Distribution Centres at Cumbernauld and East Kilbride respectively as vehicle reg no BP HB 49 despite being registered in the United Kingdom.
- [81] Vehicle reg no BS HR 64 was first registered in the United Kingdom on 8th January 2007. The United Kingdom number assigned to it is SV 56 FMA. On 2nd February 2007 this vehicle made a delivery to the Marks & Spencer Regional Distribution Centre, East Kilbride as vehicle reg no BS HR 64 despite being registered in the United Kingdom.

- [82] On 26th January 2007 the tax in respect of vehicles reg nos SV 56 FMA, SV 56 FMG and SV 04 LRX was refunded.
- [83] On 1st February 2007 vehicles SV 65 FMA and SV 56 FMG were permanently exported.
- [84] On 2nd February 2007 vehicle reg no SV 56 FMA (BS HR 64) made a delivery to East Kilbride (Finding in Fact [72]).
- [85] The monthly daily movements of BV vehicles from May 2006 to February 2007 have been: - May 2006 to Lidl – 15, to Sainsbury’s – 31, to Marks & Spencer – 3; June 2006 to Lidl – 16, to Sainsbury – 27, to Marks & Spencer – 8; July 2006 to Lidl – 12, to Sainsbury – 23, to Marks & Spencer – 10; August 2006 to Lidl – 19, to Sainsbury – 24, to Marks & Spencer – 11; September 2006 to Lidl – 19, to Sainsbury – 24, to Marks & Spencer – 11; October 2006 to Lidl – 9, to Sainsbury – 10, Marks & Spencer – 8; November 2006 to Lidl – 12, to Sainsbury – 17, to Marks & Spencer – 7; December 2006 to Lidl – 7, to Sainsbury – 18, to Marks & Spencer – 1; January 2007 to Lidl – 0, to Sainsbury – 3, to Marks & Spencer – 10; and February 2007 (8 days) to Lidl – 0, to Sainsbury – 4, to Marks & Spencer – 5.
- [86] Between 2nd August 2006 and 17th December 2006 vehicle reg no BN DV 86 undertook 19 journeys, which involved work outwith the United Kingdom.
- [87] Between 10th August 2006 and 17th December 2006 vehicle reg no BN RX 45 undertook 16 journeys which involved work outwith the United Kingdom.
- [88] Between 2nd August 2006 and 22nd December 2006 vehicle reg no BP HD 95 undertook 24 journeys which involved work outwith the United Kingdom.
- [89] Vehicle reg no BN DV 86 undertook work which involved journeys outwith the United Kingdom on 1st/2nd, 8th/9th and 5th/16th December 2006.
- [90] Vehicle reg no BN RX 45 undertook work which involved journeys outwith the United Kingdom on 6th, 9th/11th and 16th December 2006.
- [91] Vehicle reg no BP HD 95 undertook work which involved journeys outwith the United Kingdom on 4th/5th, 7th/8th, 11th, 18th/19th and 21st/22nd December 2006.
- [92] Mr Davidson believed that to comply with the cabotage regulations vehicles had to leave the United Kingdom at least once a year. They also had to go to Holland for annual testing.
- [93] The number of drivers’ hours offences in respect of vehicles operated by BV which have been detected by VOSA are: - 2003 – 3, 2004 – 1, 2005 – 5 and 2006 (year to date) – 7.

[94] The number of overloaded vehicles operated by BV detected by VOSA are: - 2003 – 1, 2004 – 2, 2005 – 5 and 2006 (year to date) – 5.

[95] 1 prohibition notice was issued by VOSA in 2006 in respect of a vehicle operated by BV.

[96] The number of prohibition notices issued by VOSA to trailers used by BV are: - 2003 – 1, 2004 – 3, 2005 – 3 and 2006 (year to date) – 3.

The Evidence led for VOSA

1. Mr Hallsworth led evidence from Ms McKenna and Ms Barratt. They were both cross examined by Mr Kelly and re-examined by Mr Hallsworth. Ms Bainbridge was in attendance but was not called to give evidence.
2. The evidence of both Ms McKenna and Ms Barratt was formal in nature. They confirmed that the reports they had prepared were, so far as they were aware, true and accurate. In any event BV had accepted the reports.

The Evidence led for the Applicants

1. Mr Kelly led evidence from Mr Davidson and Mr Wilson. Mr Hallsworth then cross-examined them and they were re-examined by Mr Kelly. They also dealt with a few issues I raised with them.
2. Mr Davidson gave evidence to the effect that he had two places of residence, one in Scotland and the other in Holland. He described himself as being a director in both BV and D&W.
3. He had become a Dutch national in 2003 and holds a Dutch driving licence.
4. He explained that BV was set up at a time when the government had substantially increased the cost of road tax. It was thought that costs could be saved and it would be more efficient to trade through a company incorporated in the Netherlands. The only facility that BV has in Holland is an office.
5. He explained that the tractive units are owned by one part of the company and the trailers by another part.
6. With regard to the purchase of vehicles Mr Davidson said that quotes were obtained from dealers in Holland and Scotland. A better deal can be obtained from the Scottish dealer who also gives a three-year warranty, which is not available in Holland.

7. He confirmed that the drivers (a) are employed by BV, (b) are paid in United Kingdom currency and (c) BV has an account with the Royal Bank of Scotland plc.
8. He understood that to comply with the cabotage regulations the vehicle must leave the country at least once a year for MOT testing. He believed this to be sufficient. He thought the company was operating legally.
9. Mr Davidson accepted that the D&W operator's licence had had a chequered history. He did not think that the Dutch licence had been revoked at any stage
10. He was emphatic that the two businesses were different, and described them as "two separate identities". D&W subcontracted work to BV. He was unable to explain the movement of monies as disclosed in the bank statements and the BV Sales and Purchase ledgers (as contained in BV's productions).
11. He accepted that for the work undertaken by BV the contacts for that work were through Aberdeen because it had always been done from Aberdeen. This, he acknowledged, was why Mr Wilson directs the vehicles from Aberdeen.
12. Mr Wilson confirmed that he too was a director in BV and D&W.
13. Mr Wilson explained that BV employs Mr Van Schie as the transport coordinator in Holland. He gives instructions to the drivers in Holland. In Scotland Mr Wilson instructs the drivers.
14. He confirmed that BV (a) employs 12 drivers, 10 Scottish, 2 from Slovenia and (b) they are paid net of tax and National Insurance Contributions in the United Kingdom from the bank account held in Aberdeen.
15. With regard to the acquisition of vehicles Mr Wilson said that he would look around for the best deal. There had been a service agreement with Norscott for 27 years.
16. With regard to the purchase of fuel for vehicles Mr Wilson estimated that on a weekly basis 15,000 litres would be acquired on the continent and about 9,000 litres in the United Kingdom.
17. He understood that BV as a foreign based operator is entitled to undertake cabotage on a temporary basis. He believed that BV had been working in the United Kingdom on a temporary basis and had been operating lawfully.
18. After the VOSA letter of 28th November 2006 had been received Mr Wilson had taken advice from Mr Kelly in connection with BV's position and had left the

matter with him. At that time Mr Wilson did not know which route(s) and/or vehicles were giving VOSA any concerns.

19. Steps were taken to register Dutch-registered vehicles in the United Kingdom. He explained there had been problems in obtaining operator licence discs.
20. He stated that BV had no contracts for deliveries in Holland.
21. He agreed that after vehicles had been detained deliveries continued to be made to Lidl's, Marks & Spencer and Sainsbury's.
22. He also gave evidence with regard to the frequency of journeys made to the continent by the three vehicles prior to their detention.
23. Mr Wilson did not agree that at, or about, the time vehicles were detained he was threatening or intimidating to the enforcement officers. He explained that if his behaviour appeared to be as described by the enforcement officers it was because of concern he had about the value of the detained vehicles and concerns he had for the drivers
24. Mr Wilson was adamant that BV and D&W were two separate and distinct legal and trading entities and there were no links between them. BV is a freight forwarder and/or subcontractor for D&W.
25. Mr Smiley gave evidence on behalf of Evergreen.

Submissions for VOSA

1. In the first part of his submission Mr Hallsworth concentrated on the written Legal Submissions, which he had prepared and had circulated prior to the commencement of the hearing. These (written) Submissions had been compiled, not because VOSA had any doubts about the law but because this is a complicated matter and he wished everyone to have as much information about the law as was possible.
2. He pointed out that this case involved the national carriage, not international carriage of goods. He referred to Regulation 3118/93, which allows a haulier who holds a Community Authorisation to operate, on a temporary basis, national road services for hire or reward in another Member State.
3. He had included reference to Article 8 to address one of the issues raised by Mr Vallenduuk in his letter dated 29th November 2006 where he complains that the impounding of vehicles by VOSA was premature, unlawful and contrary to BV's

- Human Rights. Consideration should have been given to the alternative of prosecution.
4. Mr Hallsworth submitted that the “impounding regulations” are clear. They are part of United Kingdom law and apply to United Kingdom operators and anyone else who carries out national operations. If those operations are carried out unlawfully then the regulations apply.
 5. He then addressed the concept of an impounded vehicle with particular reference to trailers. He submitted that unless a record was kept at a regional distribution centre not only of the tractor unit but also the trailer there was an argument that an articulated vehicle, tractor unit and trailer are one vehicle. He recognised that because of the regulations, as often as not, they are not both owned by the same person. Trailers have to be treated separately. He accepted that VOSA is unable to say how often a trailer is used but in so submitting he argued that a tractor unit and trailer can be one vehicle and also capable of being two vehicles.
 6. Mr Hallsworth then focused on the concept of cabotage. He referred to the Commission Interpretative Communication (“CIC”) and highlighted Paragraph 1.1 thereof which states *“Based on Article 71(1)(b) of the EC Treaty, the Community Regulations give the following definition: Any non-resident carrier who is a holder of the Community authorisation is entitled to operate, on a temporary basis and without quantitative restrictions, national road haulage services in another Member State, without having a registered office or other establishment in that State. One of the two essential characteristics of cabotage transport, therefore, is that this type of service can only be performed on a temporary basis.”*
 7. He identified that an essential element of cabotage transport is that it can only be performed on a temporary basis. He also acknowledged that there is a lack of definition as to what “temporary” means. He referred to Paragraph 2.1 of CIC, which deals with the volume of cabotage and in particular to the first paragraph on page 4.
 8. He submitted that the distinction between the freedom to be established in a Member State and the freedom to provide a service is one of the key principles in VOSA’s case. He recognised that a distinction required to be drawn between an activity associated with freedom to provide a service because it is exercised on a temporary basis and an activity associated with a right of establishment when it is exercised on a permanent basis. It therefore follows that one can only provide services on a temporary basis unless one chose to become established which then gives the right to provide services on a permanent basis. The problem that arises is that it is difficult to demonstrate when an activity ceases to be temporary and becomes permanent.

9. Mr Hallsworth referred to the cases of *Gebhard, Schnitzer and Hoves*. He also referred to the Department for Transport letter dated 2nd September 2002, which attempted to define the concept of “temporary”. Drawing on these sources he submitted that for cabotage to be temporary four criteria required to be satisfied namely, Duration, Frequency, Periodicity and Continuity. These criteria should be used as a point of reference as they are not exhaustive and each situation had to be looked at on its own merits.
10. With these considerations in mind he submitted that I required to look at the operation of BV and not the specific vehicles. He referred to Paragraph 3.1.2 of the CIC and to final sentence of the second paragraph thereof which states “*The conclusion is self-evident: this one man undertaking is clearly engaged in permanent activities on the territory of that State, whereas merely to have examined the use of the two lorries would have led to a different conclusion.*”
11. In concluding this part of his submission Mr Hallsworth referred to paragraph 18 of his written submission in the context of the evidence and the letter from Mr Vallenduuk dated 29th November 2006.
12. In the second part of his submission Mr Hallsworth tied together the evidence and the law from VOSA’s perspective.
13. He submitted that there had been many misleading things said about the law and how it should be applied both at the hearing and in correspondence prior to the hearing.
14. The VOSA case was very simple and straightforward. The vehicles are in breach of Section 2 of the Act. They had not been carrying out cabotage operations on a temporary basis and “impounding” can apply.
15. He addressed matters raised by Mr Vallenduuk in his said letters and first submission and anticipated what Mr Kelly was likely to say in his submission.
16. He considered the evidence. He invited me to consider the number of regional distribution centres BV were making deliveries to. The frequency of those deliveries with particular reference to the number of days per month to the premises of Lidl, Sainsbury and Marks & Spencer. He submitted that the service, the operation, was frequent and regular and that it was not temporary. Again he urged me to look at the operation and not the individual vehicles.
17. He considered whether the operation was permanent and constant.
18. He wondered why Smyth & Co would not cooperate with VOSA following from the impounding of the BV vehicle on 19th December 2006 and the fact they had been unable to find another haulier. He suggested it was because the contact with BV had been so regular and frequent.

19. With regard to the arrangement with Profresh he recalled that (a) there was a written billing agreement in place which was renewed annually, (b) the vast majority of the haulage is undertaken by BV, (c) there were daily deliveries from Profresh to Sainsburys and (d) there is no contact between Profresh and BV. This he submitted was not an operation on a temporary basis. It was not lawful cabotage.
20. On behalf of D&W Mr Wilson is the Profresh contact point. He contacts the drivers re collection and delivery and assigns the vehicle to the job. The deliveries continue after the vehicle has been impounded. Again Mr Hallsworth submitted that this was evidence that the service was not temporary.
21. With regard to the relationship with Marks & Spencer Mr Hallsworth recalled that if there was a requirement for transport they would contact D&W in Aberdeen, not Holland.
22. Additionally Mr Wilson said that he would 'phone around on a daily basis to drum up work. Mr Hallsworth queried where the business was established. Where is the centre of gravity?
23. In an attempt to answer this question he considered that Mr Davidson is a director of the BV. He goes to Holland once a month. The person manning the office in Holland is never mentioned by any of the drivers. Drivers say the company in Aberdeen at the Sclattie Quarry address employs them. After vehicles have been impounded drivers, when asked, then say the Dutch company employs them.
24. Mr Hallsworth recognised that there are other factors to be considered over and above continuity, periodicity, frequency and duration such as the number of days a vehicle is present in the territory of a Member State. Again he submitted I should look at the operation as a whole and not just the vehicles. He argued that if the vehicles leave the country 5 or 6 times per month and come straight back and indulge in cabotage then that was not temporary so it was unlawful.
25. With regard to the movements of the 3 tractive units for December 2006 the percentage figures for national operations are BP HD 95 – 37.5%, BN RX 45 – 60%, and BN DV 86 – 62.5% respectively. Mr Hallsworth submitted even if these figures, and they were BV's figures, were correct the operation is still not temporary.
26. He believed that when the vehicles were in the United Kingdom they were organised by Mr Wilson. That is what the drivers say.
27. In answer to his question "Where is the centre of the operation?" he asked "Isn't the centre of operations in Aberdeen?"

28. He then considered the number of vehicles used by BV. 18 vehicles were identified on the charts produced. There were 18 vehicles over 239 days. He submitted that it is easy for the unlawful operator to confuse the issue by using a number of vehicles. That is why the CIC gives the example of one operator with 2 vehicles. With 18 vehicles he suggested, "all sorts of things can happen."
29. In these circumstances he submitted that vehicle records are irrelevant. It is the whole picture that counts. If one looks at individual vehicles one gets the wrong impression.
30. It was against this background that VOSA say that these vehicles were being operated unlawfully. The operation did not comply with the CIC definition of temporary. He refuted Mr Vallenduuk's contention that this was a technical dispute. VOSA had no doubt about what was going on. That is why it was appropriate to impound the vehicles.
31. Mr Hallsworth invited me to take other factors into account namely (a) the previous history of the operator, (b) problems with excess weight and drivers' hours, (c) the United Kingdom operator's licence with no vehicles specified on it between 2001 and 2006, (d) Mr Wilson's attitude to enforcement staff requiring information about Dutch registered vehicles and drivers who have given his name as the person from whom they take their orders and (e) why if BV is a legitimate operation does Mr Wilson tell lies about it and continually emphasise that BV and D&W are separate and distinct operations.
32. Mr Hallsworth invited me conclude that Mr Wilson was aware that something was going on that should not have been.
33. When impounding was pending he queried why an attempt was made to have the Dutch vehicles specified on the United Kingdom licence and they carried on the business. He suggested it was because of the contracts and a fear of losing that business.
34. He could not understand why a *bona fide* Dutch operation wanted to maintain 8 vehicles in Aberdeen. He was curious why 2 former Dutch vehicles had been registered on the United Kingdom licence and 11 vehicles booked in for test prior to being registered in the United Kingdom. He was concerned about possible reasons information on drivers' timesheets did not correspond to the information on the charts.
35. In concluding this part of his submission Mr Hallsworth submitted that BV is not temporary. It is not a *bona fide* operation. It has been set up to circumvent United Kingdom law. They had a licence they chose not to use for reasons which he suggested might be obvious to me.

36. In the third and final part of his submission Mr Hallsworth addressed the issues raised by Mr Vallenduuk. He refuted any suggestion that VOSA were confused or in doubt because of the CIC and the authorities.
37. He was critical of Mr Vallenduuk for not timeously lodging further documents by the deadline I had put in place when I adjourned the hearing on 8th February 2007. He was very concerned that the further document produced by Mr Vallenduuk was tendered at the end of the evidence on 21st February 2007. That document took the form of further written submissions. It referred to 17 authorities. Copies of those authorities had not been made available. Overnight Mr Hallsworth had been able to source 14 of those authorities, which he produced to the hearing.
38. Mr Hallsworth referred to an e-mail from the Dutch authorities, which Mr Vallenduuk had produced and had spoken to on the first day of the hearing. He had understood Mr Vallenduuk to be saying that the larger companies in Europe had got together to impose their wishes on cabotage. He suggested that they simply cannot say that, because we do not like it and we are Dutch operators we will not follow the law. He pointed out that the CIC defined “temporary”. He submitted that a United Kingdom operator may not want cabotage operations and competition from abroad but such an operator is stuck with it as is a Dutch operator.
39. Mr Hallsworth referred to paragraph 6 on pages 2 and 3 of Mr Vallenduuk’s submission to do with “Anschlusskabotage” (“consecutive cabotage”). He submitted that where consecutive cabotage occurs it is a secondary activity and in the circumstances of this case cannot apply to the operation of BV.
40. He commented on some of the other paragraphs in the submission and then went through the various cases to which reference had been made in footnotes to the submission. Having achieved that I then discussed with him articulated vehicles, tractor units and trailers. He recalled a case where the tractor unit and trailer are regarded as one vehicle.

Submissions for BV

1. **Mr Kelly** began his submission by pointing out that this was not a public inquiry, nor a prosecution under section 2 of the Act. It was an application by BV for the return of impounded vehicles.
2. He recalled that towards the end of 2006 BV had received warning letters to the effect that they were in breach of the cabotage rules and that they would have to obtain a United Kingdom operator’s licence. He described this as “slightly disingenuous” as BV was entitled to operate cabotage in the United Kingdom if the criteria are met.

3. He complained that BV were in the dark because VOSA had not given any detail as to why they believed BV to be in breach of the cabotage rules.
4. BV had taken legal advice about their operation and had been advised it was legal.
5. In correspondence and in an attempt to have the issue determined he had invited VOSA to prosecute BV for a contravention of Section 2 of the Act. This had been refused. An invitation to meet with representatives of VOSA to discuss the situation had also been refused.
6. Mr Kelly confirmed the basis upon which BV sought the return of the vehicles was that at the time of their detention they were not being and had not been used in contravention of Section 2 of the Act.
7. He submitted that if I held that one or more of the grounds set out in Regulation 10(4) had been established, I would have no discretion in the matter. I would require to order an authorised person to return the vehicles to the owner, namely to BV. He identified the word “vehicle” as the key word.
8. He observed that the Regulations make reference to the vehicle whereas Section 2 of the Act imposes an obligation on a person or haulier to hold an operator’s licence. That section has exemptions. He argued that if “impounding” pertains to specific vehicles, but the obligation to hold an operator’s licence rests on the operators of vehicles then BV’s position is that an operator’s licence was not required because it was involved in legal cabotage.
9. In his first submission **Mr Vallenduuk** addressed the concept of “temporary” and that there had been no change in the legislation since the introduction of Council Regulation 3118/93. He referred to the CIC, a nine-page document, as a point of reference for interpretation of “temporary” and its origins. He quoted from the preamble of the Regulation *“This provision implies the removal of all restrictions against the person providing the services in question on the grounds of his nationality or the fact that he is established in a different Member State from the one in which the service is provided.”*
10. He submitted that this Regulation was to remove all restrictions. He referred to the *Hoves* case. He also referred to the 2002 letter from the Department for Transport from which *inter alia* he noted that a foreign vehicle must leave the country at least once a month
11. In light of what he had heard and read during the first day of the hearing he considered that that the requirement for vehicles to leave the country once a month had been met. He believed that “the month criteria” violates the Regulation. He also believed that the CIC in the United Kingdom and France are wrong in their interpretations of “temporary”.

12. Mr Vallenduuk then referred to Article 8 of the Regulation, which dealt with penalties, which can be imposed on non-resident carriers who have contravened the Regulation. He observed that this had not happened in this case. He now understood that the enforcement authorities in the United Kingdom had no powers to impose financial penalties for illegal cabotage.
13. He informed me that in Holland there were remedies other than impounding vehicles for breach of the cabotage regulations. He submitted that impounding of vehicles was a disproportionate measure.
14. At the outset of his second and concluding submission he commented on the evidence. He recalled reference had been made as to where vehicles were bought, who repaired them, the location of the bank, where wages are paid and in what currency. He believed that the thinking behind these questions could lead to discrimination. He pointed out that now there is freedom of providing services and labour.
15. He understood where Mr Wilson based his belief that “temporary” is for one year and that a vehicle should leave the country at least once a year. The information was contained in a letter from the Department of Transport dated 24th May 1999.
16. Mr Vallenduuk then referred me to his written submission, which he agreed I should treat “as read”.
17. In that submission he considers “*Was there illegal cabotage? Were the measures (penalties) allowed under the circumstances? And were the measures proportionate?*” In addressing these topics he refers to a considerable number of authorities.
18. He submits that this case is not unlike the *Hoves* case. He notes that the Advocate-General in the *Hoves* case expresses the view that “temporary” does not exclude the possibility that vehicles have their base in the country where they carry out cabotage. He emphasises the principle of freedom of providing services. He maintains that BV did not commit illegal cabotage.
19. He notes in the Department for Transport letter of 6th September 2002 that *inter alia* it states “*Where breaches are discovered the UK will report these immediately to the competent authority in the haulier’s Member-State of establishment.*”
20. He was concerned that this had not happened in this case especially as there was so much uncertainty about illegal cabotage. He suggested VOSA had such doubts. Reference was again made to the *Hoves* case.

21. When compared with what could happen in Holland by way of penalty for illegal cabotage Mr Vallenduuk describes the penalty of impounding as “outrageous.

Considerations of the Evidence

Witnesses

1. Each of Ms McKenna and Ms Barratt gave their evidence in a very straightforward manner. In many respects their evidence was formal. They answered all questions in a positive and thoughtful manner. If they were not sure about the answer to a question they sought clarification before giving the answer.
2. They were well informed and conversant with the material before the hearing. That material was principally the Brief, the appendices to the Brief and the various addenda to the Brief. My only criticism is the numbering/ordering of the papers, which has been a difficulty in making reference to specific productions during the course of this decision. In any case this would not have been easy. It is easy to understand how the situation has arisen given the constraints on time and the sequence in which the material was obtained prior to it being incorporated in the addenda to the Brief.
3. I found the evidence of Ms McKenna and Ms Barratt to be entirely credible and reliable. I accept their evidence.
4. Mr Davidson has hardly featured in these proceedings other than to sign the 2005 Abbreviated Accounts for D&W, to drive vehicle reg no BN RX 45 on 12th/13th December 2006 and to give evidence.
5. I do not know the full extent of what Mr Davidson does. He is a director in both companies. He has places of residence in Scotland and Holland. He has Dutch nationality and holds a Dutch driving licence. Undoubtedly he is involved in the operation of both companies He is knowledgeable about what is going on.
6. To assess the evidence of Mr Davidson I have due regard to the manner in which he answered the questions.
7. In examination in chief, which was short, he answered the questions in an apparently straightforward manner.
8. During cross-examination the manner in which he answered to the questions changed. He became defensive. On occasion he did not answer a question or he answered it by asking a question, which did not seek clarification of the

question being asked. There were a number of questions where he simply did not know the answer.

9. In fairness to Mr Davidson, I believe that, notwithstanding his position as a director in both companies he does not appear to have a detailed knowledge of all ongoing matters. He has a working and general knowledge.
10. On the other hand Mr Wilson is very much to the fore. He is a director in both companies. On behalf of D&W *inter alia* he has entered into contracts for the hire purchase of tractive units and 1 trailer at least. He is the contact person for all suppliers/customers He is the contact person for all drivers. He is identified on the 3 GV500 forms as the contact person in BV.
11. He has denied that there are any links between BV and D&W. On the many occasions when he has been spoken to by enforcement officers who have been referred to him he has been unhelpful and has refused to cooperate with them on the pretext that their enquiries should have been directed to BV. As a director in both companies he knew what was going on and was therefore in a position to deal with all inquiries. He could have been more helpful.
12. When challenged by enforcement officers why drivers referred to him as the point of contact he has been evasive and, on occasion, less than complimentary about a driver or drivers.
13. At the time of the detention of the various vehicles he was threatening and intimidating over the telephone to the enforcement officers.
14. At the time of detention of vehicle reg no BP HD 95 on 5th January 2007 Mr Wilson, in his capacity as director of BV, told Ms Bainbridge over the telephone that he did not give drivers their instructions.
15. Towards the end of his cross examination and in answer to the question "*You are the person who would seem to play at least an important, if not a leading role, in allocating drivers when they're working in the UK?*" Mr Wilson replied, "*Yes.*"
16. When questioned, again in cross examination, why Mr Wilson alleged that one company had nothing to do with the other when the Dutch company was giving the United Kingdom company a lot of work, Mr Wilson eventually said "*There is no answer.*"
17. Throughout Mr Wilson has been deliberately obstructive and unhelpful with the enforcement officers. He has been devious.
18. During his evidence I had to warn him about how his way of answering the questions. He did not give straightforward answers. Some of his answers did

not rest easily with the VOSA evidence. Mr Hallsworth had to remind him on several occasions that the VOSA evidence had been accepted by BV and therefore by himself.

19. I find Mr Wilson to be unreliable and not a credible witness.
20. I found Mr Smiley to be a credible and reliable witness. He was handicapped in his evidence, as he did not have the entire contract between Evergreen and Inchcape with him. As requested the contract was subsequently received at STAO.

Assessment of the Evidence

21. I accept the evidence of VOSA. Where there is controversy or conflict between the evidence of BV and the evidence of VOSA I prefer the evidence of VOSA.
22. I am satisfied that BV was brought into being to circumvent the United Kingdom Operator Licensing system. One only has to look at the “O” licence history – 2 revocations, a final warning, a suspension and a curtailment. I appreciate that there were different incorporated entities associated with these licences but it always came back to Davidson & Wilson Ltd after changes of company name.
23. BV was incorporated between the final warning and the suspension/curtailment of the D&W operator’s licence. After this event the United Kingdom licence continued in force with no vehicles specified on it until shortly before the hearing in this case. All tractive units have been associated with the BV licence. Mr Wilson said one company was to do with the tractive units and the other (semi) trailers. The evidence shows that D&W purchase vehicles and semi-trailers. Yet BV is applying for the return of 3 tractive units and 1 semi-trailer.
24. The BV set up in Holland seems to comprise an office with one, possibly two members of staff. No garage. No maintenance facilities. No Dutch contracts.
25. The only Dutch member of staff who was identified by name was Mr Van Schie, but he has not featured significantly during these proceedings and was not referred to by any of the drivers.
26. The explanation I was given by Mr Davidson for setting up BV was to avoid increased costs in road tax. It was also suggested by both Mr Davidson and Mr Wilson that it was commercially more advantageous to purchase vehicles through Holland. I was not provided with any vouched information that this was so.

27. The acquisition of vehicles, in the main, has been from Norscott where there has been an established trading relationship for some 27 years and a good working relationship with the Sales Staff is in place. Vehicles are still sourced from Norscott.
28. In the absence of vouching, I do not accept there is any financial benefit in acquiring vehicles from Scottish suppliers, then sending them to a Dutch dealer, having them registered in Holland and thereafter returned to the United Kingdom. In addition no 3-year guarantee is available in Holland.
29. I note that there is vouching for the recent acquisition of 2 DAF tractive units. The purchaser in each transaction is Clydesdale and the delivery of same is to D&W, not BV, at Sclattie Quarry.
30. This does not make commercial sense to me. Avoiding increases in United Kingdom road tax and purportedly cheaper vehicles is not the reason BV was set up.
31. The issue of prohibition notices can only deal with offences associated with the use of large goods vehicles detected at the roadside in the United Kingdom. BV is not a United Kingdom operator and accordingly VOSA does not have jurisdiction over it. This is why BV was set up.
32. If BV was a *bona fide* Dutch operation I would have expected (a) the centre of operations to have been in Holland, (b) vehicles to be acquired and maintained in Holland, (c) the vehicles to be left hand drive, (d) Dutch drivers employed (over and above Mr Davidson), and Dutch contracts.
33. In reality the operation is based at Sclattie Quarry. Vehicles including semi trailers are originally sourced by D&W from suppliers in Scotland. All are right hand drive. They are maintained in Scotland. They are driven by, predominantly, Scottish drivers.
34. On behalf of D&W Mr Wilson obtains the work and instructs the drivers. The drivers are paid by D&W net of United Kingdom tax. Fuel accounts are in name of D&W.
35. All the work obtained by Mr Wilson is from organisations based and working in the United Kingdom. Payment for the transport services is made to the D&W Royal Bank of Scotland account in Aberdeen.
36. There is no difference in the *modus operandi* of Davidson & Wilson at large since BV was incorporated.

37. The only changes are (a) there is an office in Holland, (b) a bank account has been set up with The Royal Bank of Scotland in Aberdeen, (c) a bank account has also been set up with Rabobank in Holland with the address of the account holder (BV) at Sclattie Quarry, (d) the tractive units have Dutch registrations (e) the livery of these vehicles carries information associated with BV, (f) insurance for BV and/or D&W has been effected by a Dutch insurance broker, and (g) funds are transferred from the D&W account to the BV account in respect of wages and fuel costs.
38. Whilst it was suggested D&W subcontracted work to BV no evidence was produced or spoken about by either Mr Davidson or Mr Wilson as to the contractual niceties of any such subcontracted-for relationship. I am not satisfied that there is a *bona fide* subcontract relationship between these two companies
39. The most telling piece of evidence as to the true position came from Mr Davidson when he explained his understanding of cabotage. To comply, he understood that vehicles had to go to the Netherlands once a year for the equivalent of MOT testing. I took from this that the vehicles were principally operating in the United Kingdom as opposed to the Netherlands with the occasional outing to Holland in an attempt to conform to the requirements of cabotage.
40. I am entirely satisfied that BV is a front for D&W. The reality of the situation is that the United Kingdom enforcement agencies, quite understandably, believe that BV is outwith the jurisdiction of the operator licensing system for large goods vehicles in the United Kingdom.

Consideration of the Legal Issues

41. I require to consider whether BV has operated consistent with or in breach of the cabotage regulations.
42. The issue is whether at the time the vehicles namely, the 3 tractive units with semi trailers attached, were detained, as a matter of law, based on the evidence, were they being or had they been used in contravention of section 2 of the Act?
43. Section 2 of the Act is in the following terms:-

Section 2(1) Subject to subsection (2) and section 4, no person shall use a goods vehicle on a road for the carriage of goods-
(a) for hire or reward, or

(b) for or in connection with any trade or business carried on by him, except under a licence issued under this Act; and in this Act such a licence is referred to as an “operator’s licence”.

44. The relevant exception in subsection (2) is in the following terms:-

(2) [inter alia] Subsection (1) does not apply to-

© The use of a goods vehicle for international carriage by a haulier established in a member State other than the United Kingdom and not established in the United Kingdom;.....

(3) In subsection “2(b) and (c) “established”, “haulier” and “international carriage” have the same meaning as in Community Regulation (ECC) No. 881/92 dated 26 March 1992 concerning access to the market in the carriage of goods by road within the Community to or from the territory of a member State or passing across the territory of one or more Member States.

45. Reference also requires to be made to The Goods Vehicles (Licensing of Operators) Regulations 1995 Part 1 of Schedule 3 which details a list of “Classes Of Vehicles For Which A Licence Is Not Required” and specifically Paragraph 23 which is in the following terms:-

“23. A vehicle permitted to carry out cabotage in the United Kingdom under Community Council Regulation (EEC) No. 3118/93 dated 25 October 1993 laying down conditions under which non-resident carriers may operate national road haulage services within a Member State.”

46. The relevant Articles of Community Council Regulation (ECC) 881/92 are as follows:-

Article 1.1 – This Regulation shall apply to the international carriage of goods by road for hire or reward for journeys carried out within the territory of the Community.

Article 2 – “international carriage” shall mean:-

- a journey undertaken by a vehicle the point of departure and the point of arrival of which are in two different Member States, with or without transit through one or more Member States or non member countries*

- *a journey undertaken by a vehicle from a Member State to a non-member country or vice versa, with or without transit through one or more Member States or non-member countries*
- *a journey undertaken between non member countries, with transit through the territory of one or more Member States*
- *An unladen journey in connection with such carriage*

Article 3-1 International carriage shall be carried out subject to Community Authorisation. .

Article 3-2 Community Authorisations shall be issued by a Member State in accordance with Articles 5 and 7 to any haulier carrying goods by road for hire or reward who:-

- *is established in a Member State, hereinafter referred to as the “Member State of establishment” in accordance with the legislation of that Member State*
- *is entitled in that Member State, in accordance with the legislation of the Community and of that State concerning admission to the occupation of road haulage operator, to carry out the international carriage of goods by road.*

47. The Applicants maintain that their operations are lawful as they believe that they have complied with the provisions of Community Council Regulation (ECC) 3118/93 (also known as the “Cabotage (Road Haulage) Regulation) the relevant parts of which are in the following terms:-

Article 1- 1 any road haulage carrier for hire or reward who is the holder of the Community authorisation provided for in Regulation (EEC) No. 881/92) shall be entitled, under the conditions laid down in this Regulation, to operate on a temporary basis national road haulage services for hire and reward in another Member State, hereinafter referred to respectively as “cabotage” and as the “host Member State” without having a registered office or other establishment therein.

48. On the other hand VOSA believe BV has not been operating lawfully and they have invoked powers available to them in terms of the Regulations and in particular Regulation 3 which is in the following terms:-

3.-(1) Where an authorised person has reason to believe that a vehicle is being used, or has been used in contravention of section 2 of the 1995 Act, he may detain the vehicle and its contents.”

49. There is no dispute that the authorised persons, Ms McKenna and Ms Bainbridge, had reason to believe that at the time the vehicles were detained BV was using them in contravention of Section 2 of the Act.
50. What Mr Kelly is inviting me to do is to concentrate on the vehicles that were detained rather than on BV as the operator and user of them at the time of detention. He accepts that the onus is on BV to establish the lawful use of these vehicles.
51. At the outset of the hearing Mr Kelly had been concerned and critical of the steps taken by VOSA after the detention of the vehicles. He argued that any further information obtained post detention was not relevant and should not be admitted in evidence. I did not agree with him. After further consideration he withdrew the submission.
52. I adopted this stance with reference to Regulation 4. This regulation empowers an authorised person to return a detained vehicle to the owner if, at the time of detention, the owner was the holder of an operator's licence or at the time of detention the vehicle was not being used or had not been used in contravention of Section 2 of the Act.
53. The thinking behind this must surely be to allow an authorised person to make investigations after the vehicle has been detained. In the event that those investigations do not support the basis, the belief, upon which the vehicle was detained then it is only right and proper that there is a mechanism for the vehicle to be returned to the owner. It is not unlike a police enquiry. Where the post detention investigations support or confirm the belief then the authorised person is entitled to continue with the detention of the vehicle.

Tractive Units and Semi-Trailers

54. As stated, in terms of Regulation 3 an authorised person is empowered to detain a vehicle.
55. Regulation 2 defines a vehicle, as a "goods vehicle", with reference to Section 58(1) of the Act which is in the following terms:-

"goods vehicle" means a motor vehicle constructed or adapted for use for the carriage of goods, or (my underlining) a trailer so constructed or adapted, but does not include a tramcar or trolley vehicle within the meaning of the Road Traffic Act 1988;"

56. The distinction between a motor vehicle and a trailer is not helpful. A trailer is not separately defined in the Act. Section 185(1) of the Road Traffic Act 1988 defines a trailer as a vehicle drawn by another vehicle. Section 95-(2)(b) of the Transport Act 1968 states “*goods vehicles, that is to say – (i) heavy locomotives, motor tractors and any motor vehicle so constructed that a trailer may by partial superimposition (my underlining) be attached to the vehicle in such a manner as to cause a substantial part of the weight of the trailer to be borne by the vehicle;,,,,,*” (to all intents and purposes this definition is incorporated in Section 186(2) of the Road Traffic Act 1988).
57. Section 58(1) of the Act also states an “*”articulated combination” means a combination made up of – (a) a motor vehicle which is so constructed that a trailer may by partial superimposition be attached to the vehicle in such a manner as to cause a substantial part of the weight of the trailer to be borne by the vehicle, and (b) a trailer attached to it as described in paragraph (a);*”
58. In Article 2 of Community Council Regulation 881/92 “*vehicle” shall mean a motor vehicle registered in a Member State or a coupled combination of vehicles the motor vehicle of which at least is registered in a Member State and which are used exclusively for the carriage of goods.*”
59. Throughout this decision, where the context admits, I have deliberately referred to a semi-trailer. I appreciate in the legislation this terminology does not appear. The closest it gets is in the definition in Section 95 of the Transport Act 1968 and Section 186(2) of the Road Traffic Act 1988 with reference to superimposition. It appears that the concept of a goods vehicle has a variety of definitions
60. The reality of the situation is that a tractive unit on its own cannot carry goods. The use of a tractive unit on a road, on the face of it, would not require an operator’s licence. It is only when it is used in conjunction with a (semi) trailer and therefore capable of carrying goods is such a licence required in terms of Section 2 of the Act.
61. In this case VOSA have detained 6 vehicles consistent with the definition in the Regulations and the Act namely the 3 tractive units and 3 semi-trailers. All these vehicles are the subject of applications by their respective owners seeking the return of them. VOSA believes that in terms of the legislation tractive units and (semi) trailers are each to be regarded as goods vehicles. VOSA however is unable to keep a check on any (semi) trailer because unlike the tractive units there is no identification mark such as a registration number. Similarly, in the context of this case, an operator is only required to specify tractive units on the operator’s licence.
62. Mr Hallsworth and Mr Kelly left it to me to resolve the issues to do with semi-trailers. Although I was not referred to it I note the terms of part of Article 3

of Council Regulation 3118/93 which states:- *“In the case of hiring, the vehicle shall be hired by the carrier in the Member State of Establishment to carry out cabotage operations. However, the non-resident carrier may, in order to complete a cabotage operation interrupted because of breakdown or an accident, hire a vehicle in the host Member State under the same conditions as resident carriers.”* The terms of this part of said Article are mandatory.

63. For Mr Kelly to pray in aid of BV that they are entitled to rely on the exception provided for in Section 2 (2)(b) of the Act there requires to be evidence that BV is an “established” haulier as referred to in subsection (3) which in turn refers to Community Council Regulation (ECC) No 881/92. If BV is not established in the Netherlands then that is the end of the matter because it does not hold an operator’s licence in terms of the Act.
64. I therefore require to consider whether BV is established in the Netherlands as envisaged/required by the legislation.
65. I recognise that the question of “establishment” was not a primary consideration in the submissions made by Mr Hallsworth or Mr Kelly.
66. Mr Kelly did however acknowledge that the concept of establishment was an essential part of his client’s case as their starting point was the exception provided for in section 2(3) of the Act. He addressed this issue. I did not invite Mr Hallsworth to develop any detailed argument on behalf of VOSA on this topic although it was considered by him during the course of his submission. Mr Hallsworth believed that the centre of the BV operation was Aberdeen.
67. *Inter alia* Mr Kelly had not anticipated that he would have to consider establishment but then went on to explain how, in his opinion, BV was established as a haulier in Holland. He submitted that (a) BV is a company registered in Holland, (b) it has property and/or an office there with a designated employee, (c) Mr Davidson has a Dutch residence, (d) it owns vehicles and (e) it employs and pays drivers. He also submitted that any “connection” between BV and D&W is not a relevant consideration as to where BV is established.
68. “Established” is referred to in Community Council Regulation (ECC) No. 881/92 at Article 3 as detailed in paragraph 47 above. If this is the definition of “established” it is not particularly comprehensive. It appears that if a haulier can demonstrate that its trading entity is established in accordance with the legislation of a Member State then it is established in that (Member) State for the purposes of this legislation. That would be a matter of fact and law.

69. It maybe as a matter of law that BV is established in the Netherlands. NIWO accept that the company is established in thr Netherlands (Finding in Fact [30] refers. As a matter of fact I do not think that it is. It appears that VOSA and Mr Hallsworth have accepted that BV is indeed established in the Netherlands but has been operating in breach of cabotage. For the purposes of this decision BV is not established in the United Kingdom. I develop this decision on that basis.

Reasons for the Decision

1. BV has applied for the return of vehicles BN DV 86, BN RX 45, BP HD 95 and trailer C119780. The ground upon which the return of each of these detained vehicles is sought is that at the time of detention they were not being, and had not been used in contravention of Section 2 of the Act.
2. All the detained vehicles have been lawfully detained.
3. At the time of detention, all vehicles were in course of delivering foodstuffs to regional distribution centres for established customers of D&W.
4. Each delivery was made in the course of a journey within the United Kingdom.
5. At the time of detention the various tractive units were registered in the Netherlands.
6. It was because of the frequency of similar journeys previously undertaken by BV vehicles that the authorised persons, namely Ms Barratt and Ms McKenna, had reason to believe that BV vehicles were being operated in contravention of Section 2 of the Act.
7. VOSA, as a matter of law was entitled to detain these vehicles. This is a separate power. It is a matter for VOSA whether a vehicle should be detained or whether the owner be prosecuted.
8. Mr Kelly argues that at the time of detention the vehicles were engaged in legal cabotage. He relies on the exception in Section 2(2)(b).
9. To satisfy the exception criteria BV has to satisfy me that it was a haulier established in the Netherlands and that it was engaged in international carriage.
10. As stated for the purposes of this decision BV is a haulier and is established in the Netherlands.

11. As Mr Hallsworth pointed on a number of occasions the journeys in which the vehicles were involved at the time of detention were national, not international.
12. Mr Kelly invites me to concentrate on the vehicles that were detained in terms of Regulation 3. He also invites me to distinguish this Regulation from requirement for a person to hold an operator's licence in terms of section 2 of the Act.
13. In my opinion the hoped for distinction is not there to be made. Section 2 of the Act makes it clear that "...no person shall use a goods vehicle." Subsection (2) provides the exception to a *haulier*. The person making use of the goods vehicle as contemplated in Section 2 must hold the required licence unless the exception applies. Accordingly if use is made of a goods vehicle without the required licence and the exception does not apply then that use is unlawful and the goods vehicle is a legitimate target for detention.
14. In developing this submission Mr Kelly is urging me to concentrate on the individual vehicles rather than looking at the operation of BV at large.
15. The prelude to the detention of these vehicles was the VOSA investigation. The upshot of that investigation which began in or about May 2006 was that VOSA was satisfied that BV were hauling goods on a very regular basis within the United Kingdom. They did not concentrate on specific vehicles used by BV. They were satisfied that BV, using Dutch registered vehicles, was engaged in unlawful cabotage.
16. VOSA was entitled to arrive at the conclusions they did. The information regarding deliveries made by BV to Lidl, Sainsbury and Marks & Spencer disclosed a regular and established pattern of trading.
17. If there was doubt about the trading relationship prior to the detention of the vehicles then any such doubt was eliminated with the results of the post detention inquiries. An example of this is evidence of the contracted for relationship between D&W and Profresh and the established trading with Gist, and Smyth & Co. I do not lose sight of the fact that BV and/or PWT continued to make the deliveries post-detention.
18. There was the very telling evidence of Mr Wilson when he told me that Profresh 'phoned him every day "*to see if a truck is available.*" He also described sourcing business on an *ad hoc* basis. There were no Dutch contracts. Mr Wilson did talk about deliveries coming from the continent to the regional distribution centres. The overall impression I am left with is that the whole operation of BV is orchestrated and enacted in the United Kingdom. I am in no doubt about that.
19. The key issue is the movement of BV vehicles. These, as determined by VOSA, are detailed in Finding in Fact [84], as set out in the various VOSA spreadsheets.

On behalf of VOSA Mr Hallsworth says that these movements are not consistent with legal cabotage.

20. With regard to the 3 detained tractive units Mr Kelly produced schedules of the dates these vehicles were out of the United Kingdom for the period from August 2006 to December 2006. Findings in Fact [86] to [91] refer. He also produced schedules detailing the journeys undertaken by these vehicles for December 2006. Findings in Fact [91] to [93] refer.
21. Mr Kelly says these schedules disclose movements of these vehicles consistent with lawful cabotage.
22. Mr Kelly did not refer me to any authorities. He did comment on some of the cases that Mr Hallsworth produced and spoke about which was understandable given the sequence of the submissions.
23. I have considered the many cases produced by Mr Hallsworth. The most significant and relevant case is the *Everett* case, which is a Transport Tribunal decision. It is a cabotage case. At paragraph 26 the Tribunal makes this comment “.....and it is with regard to the UK’s submission mentioned in the Commission Interpretative Communication (CIC) that if a vehicle leaves the country at least once a month this is likely to be decisive in concluding that the use of the vehicle in the country is “temporary”.....all criteria have to be taken into account (duration, frequency, periodicity and continuity) and that a journey out of GB once a month over a period may well be insufficient to prevent a breach of the rules. We emphasise that each case must turn on its own facts.”
24. I note that the BV licence authorises the use of 15 vehicles. 35 Dutch registration marks were found at the office in the Netherlands (Finding in Fact [11]). I do not know the movement of all vehicles used by BV during the period May 2006 to December 2006. The BV schedule detailing the vehicles which were out of the country for the period August 2006 to December 2006 identifies only 6 vehicles. What were the other 9 vehicles doing during that period? – The question was never asked. Given the view I have formed with regard to the BV evidence I infer that these other vehicles did not leave the United Kingdom during that 5 month period. I am fortified in that view because the 3 detained vehicles were not engaged in dedicated work. The schedule of the work undertaken by them in December 2006 confirms this.
25. Even if I am wrong in this it will have taken a considerable number of vehicles to effect the deliveries as identified by VOSA in their pre-detention investigations not to mention all the other contracted for or *ad hoc* work, as spoken about by Mr Wilson bearing in mind there was no evidence of regular continental work.
26. Taking these factors into account the work in question, undertaken by BV, was national, not international, carriage of goods within the United Kingdom.

27. BV used these vehicles on roads in the United Kingdom in circumstances where an operator's licence was required. That use is not a use which exempts BV from the requirement to hold such a licence.
28. The understanding that Messrs Davidson and Wilson had of the term "temporary" is wrong as a matter of law. The work was not "temporary" as envisaged in Article 2 of the 3118/93 Regulation. The criteria referred to in the *Everitt* case have been met.
29. As stated VOSA were lawfully entitled to detain these vehicles. I agree that the detentions were lawful. The law is quite clear in this regard. If detention was lawful then there is no discretion vested in the Traffic Commissioner and the vehicle continues to be detained. If it was not then the Traffic Commissioner must order an authorised person to return the vehicle to the owner.
30. I have no difficulty in determining the applications for the return of the tractive units. The position of the semi-trailers has made me pause. Both Mr Kelly and Mr Hallsworth recognise that the Regulations, with reference to Section 58(1) of the Act, make a distinction between a motor vehicle (tractive unit) and a trailer. The owners namely BV, Evergreen and Clydesdale have lodged applications for the return of these semi-trailers.
31. VOSA has detained the tractive units because the semi-trailers were attached to them and they were carrying goods. Semi-trailers do not require to be licensed. Only the tractive unit requires to display a disc (paragraph 23 of the Goods Vehicles (Licensing of Operators) Regulations 1995 refers). Without the semi-trailer I doubt if the tractive units on their own would have been detained.
32. BV owns semi-trailer C119780. The basis upon which its return is sought is that at the time of detention it was not being and had not been used in contravention of the Act.
33. I apply the same approach to that semi-trailer which I have taken to the tractive units.
34. Semi-trailer C135846 is owned by Evergreen who has hired it to Inchcape. The basis upon which its return is sought is that at the time of detention Evergreen did not know that it was being or had been used in contravention of Section 2 of the Act.
35. Mr Smiley understood that the hirer (Inchcape) was operating the semi-trailer. At the time of detention BV was operating it without the knowledge let alone consent of Evergreen. I have no information as to the arrangement between BV and Evergreen. This is a breach of the hire contract.

36. Mr Smiley was aware that if a trailer was operated by a party without an operator's licence it could be detained. On a perusal of the hire purchase documentation there was no reference to operator licensing. Evergreen have taken no steps to ensure that the hirer must comply with operator licensing.
37. The Regulations came into force on 4th January 2002. The hire document between Evergreen and Inchcape is dated 21st August 2003. The Transport Tribunal heard the Close Asset Finance case on 28th February 2003. Evergreen has taken no contractual steps to ensure that Inchcape operates the semi-trailer in accordance with Section 2 of the Act. At the time of detention it was being used in contravention of the Act.
38. In these circumstances as Evergreen have failed to take appropriate steps to safeguard their interest in this semi-trailer they are exposed and vulnerable. Additionally this semi-trailer was not hired in the Member State of Establishment as required by said Article 3 it is not "protected" even if the cabotage had lawfully undertaken.
39. Clydesdale owns semi-trailer SMRR3ACX6N024077. The basis upon which its return is sought is that at the time of detention Clydesdale did not know that it was being or had been used in contravention of section 2 of the Act.
40. It was leased to D&W. The hire purchase document is dated 7th September 2006. Clydesdale has systems in place to ensure that the hirer and user of such equipment is the holder of an operator's licence. They take a copy of the licence. Clydesdale permits the sub-hire of such equipment providing that there is adequate insurance and a suitable operator's licence in place as confirmed in their letter to STAO dated 30th April 2007. BV is the holders of a Dutch operator's licence. It appears that all contractual niceties are in place. I am prepared to accept, with regard to this semi-trailer that Clydesdale did not know that at the time of detention that it was being, or had been used in contravention of the Act. However the semi-trailer, as in the case of the Evergreen semi-trailer, had not been hired in the Member State of Establishment. It too does not have the protection of the cabotage rules and regulations.

Decision

1. I refuse the applications by BV for the return of tractive units reg nos BN DV 86, BN RX 45, BP HD 95 and semi-trailer C119780.
2. I refuse the application by Evergreen for the return of semi-trailer C135846.
3. I refuse the application by Clydesdale for the return of semi-trailer SMRRACX6N024077.

Edinburgh: 23rd May 2007 Deputy Traffic Commissioner for the Scottish Traffic Area

Richard Hamilton McFarlane

Footnote

1. I am very conscious of the length of time it has taken me to finalise this decision. I regret this. I explain, not excuse the delay on the grounds that (a) there was a vast amount of material for me to consider, (b) it took some time to obtain further information from Evergreen and Clydesdale and (c) I was on leave for a two week period.
2. I recommend that drivers Brothunston and Mackie be called to a drivers' hearing.

