PARKING APPEALS SERVICE

PAUL RICHARD DAVIS - and - THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

PAS CASE No. 1970198981

SAEED REZVANI -and- THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

PAS CASE No. 1970182813

BEAUDECOR LTD -and - THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

PAS CASE No. 1970161595

PATRAS MAHGARAM -and - THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

PAS CASE No. 1970213021

DECISION

Introduction

The Road Traffic Act 1991 ("the 1991 Act") provides a scheme which decriminalises the vast majority of contraventions of the regulation of parking. The scheme has been adopted throughout London, including The Royal Borough of Kensington and Chelsea, and it has recently been extended to some non-London boroughs.

The scheme takes the enforcement of parking regulation entirely outside the criminal justice system. Under the scheme, parking contraventions - such as parking on a single yellow line during restricted hours, or parking without payment of the initial charge in a pay and display bay - are no longer criminal offences. On the streets, enforcement has been taken out of the hands of the police, and put into the hands of the relevant local authority who employ parking attendants to assist them in enforcement. However, although the scheme is not criminal, it is penal. A contravention can result in a penalty being incurred: but such penalties are payable to the local authority responsible for enforcement. If liability for a penalty is contested, then the scheme takes that dispute outside the Court system. It is dealt with initially by the relevant local authority itself and then, if the dispute continues, by a tribunal (the Parking Adjudicator) set up specifically for the task. Once liability is determined, in the event of non-payment, a local authority can enforce payment, not as a criminal fine, but as a civil debt through the County Court. Proceedings for the recovery of penalty charges must be taken in the Northampton County Court Parking Enforcement Centre.

Therefore, in a number of respects, the scheme is novel. It is penal, but not criminal. It empowers local authorities not only to enforce the regulations, and also to keep the penalties recovered (although these are ring-fenced, so that they can only be used for transport purposes). A number of issues concerning this scheme have arisen since its inception which, whilst being well-settled in the criminal law system (which previously had exclusive jurisdiction over parking regulation enforcement), have had to be considered by Parking Adjudicators and the Courts afresh in the context of this new scheme: for example, the burden and standard of proof in proceedings before an Adjudicator (Ronald Kenrick Douglas v The London Borough of Brent (PAS Case No 1960031276, 4 July 1997)), and the ability of an Adjudicator to make rulings on collateral challenges to underlying regulations (R v The Parking Adjudicator ex parte The London Borough of Bexley (CO/1616/96, Unreported, 29 July 1997)).

Before me now are four cases concerning the effects of delay in proceedings under the scheme, which again require the consideration of familiar concepts in an entirely novel context. This has not been an easy task, and at the outset I would like to thank Julia Mann, Christopher Yates and Linda Wheeler of The London Borough of Kensington & Chelsea ("the Council"), and particularly Peter Harrison of Counsel (instructed by the Council), for their assistance at the hearing.

The four cases concern delay at various times during the statutory process. Therefore, before I come to the individual case themselves, I will deal with the relevant statutory provisions that cover this process.

The Statutory Background

Under Section 66(2) of the 1991 Act, a parking penalty charge becomes payable with respect to a vehicle, by the owner of the vehicle, in specified circumstances which contravene the statutory provisions relating to parking.

By Section 66(1), where a parking attendant employed by or on behalf of the enforcing local authority has reason to believe that a contravention of parking regulations has occurred such that a penalty charge is payable, he may issue a penalty charge notice (commonly referred to as a "parking ticket": I will refer to it as a "PCN"), which he must affix to the vehicle or give to the person appearing to him to be in charge of the vehicle. Section 66(3) sets out a number of matters which the PCN must specify: sub-section (d) provides that the PCN must state that, if the penalty is paid within 14 days of the issue of the PCN, then the amount will be reduced by a specified proportion. In Kensington & Chelsea, the penalty is £60, which is reduced by 50% (to £30) if paid within 14 days.

However, although a PCN is aimed at the driver (or person in charge of the vehicle), if the penalty referred to in the PCN is not paid, then he (as the driver or person in charge) cannot be pursued for it at all. The authority can only pursue the "owner" of the vehicle, generally defined (by Section 82(2) of the 1991 Act) in terms of the person by whom the vehicle is kept. There is a statutory rebuttable presumption that, for the purposes of enforcement, the "owner" of a vehicle is the person in whose name the vehicle is registered at the Driver and Vehicle Licensing

Authority ("DVLA") (Section 82(3)). Therefore, in the event of non-payment of a penalty for 28 days after the issue of a PCN, the authority *may* serve a notice on the person who appears to them to have been the owner of the vehicle when the alleged contravention occurred, i.e. a notice to owner ("NTO") (Paragraph 1(1) of Schedule 6 to the Act): and it can take the benefit of the statutory presumption and serve such notice on the person in whose name the vehicle is registered at the DVLA. I stress the word "may". There is a discretion in the authority as to whether to pursue an individual penalty by serving the owner with an NTO: and that is reflected in the instructions that accompany the PCN, which indicate that, in the event of non-payment, an NTO *may* be issued to the owner. Paragraph 1(2) of Schedule 6 sets out matters which the NTO must include. Sub-paragraph (a) requires the amount due to be specified: of course, this will be the full penalty, because the 14 day period when 50% would be acceptable has necessarily elapsed.

Paragraph 2 of Schedule 6 gives the recipient of an NTO the right to make representations to the relevant authority, who have the duty to consider them (Paragraph 2(7)). If they accept the representations, they cancel the penalty: if they reject them, then the recipient of the NTO can appeal to an independent Parking Adjudicator.

If the full penalty is not paid within 28 days of the final determination of liability, then the authority may serve the recipient of the NTO with a charge certificate, to the effect that the penalty charge is increased by 50% (i.e. to £90, in the case of Kensington & Chelsea) (Paragraph 6(1)): and if that increased charge is not paid within 14 days, then the authority may apply to the Parking Enforcement Centre at Northampton County Court for the recovery of the increased charge as if it were payable under a County Court order (Paragraph 7 of Schedule 6 to the 1991 Act: and Paragraph 8A of The High Court and County Courts Jurisdiction Order 1991 and Order 48B of The County Court Rules 1981 ("CCR")). Again, I stress the word "may". The authority has a discretion whether to serve a charge certificate: and a further discretion, having served such a certificate, whether to enforce it through the Court. It can, at either of these stages, decide not to proceed with enforcement.

CCR Order 48B applies the usual rules relating to enforcement of County Court money orders and judgments to County Court orders for the recovery of the increased parking penalties, by the various means available in the County Court (e.g. attachment of earnings, garnishee proceedings and charging orders). By Order 48B Rule 5(1) (which applies the provisions of Order 26 Rule 5

to the recovery of parking penalties under County Court order), a warrant of execution cannot be issued without the leave of the Court where six years or more have elapsed since the date of the relevant order upon which the warrant is to be based. Section 24 of the Limitation Act 1980 equally applies from that date: so that no action on the order can be taken more than six years after the date of the order (although rarely would an action based on the order - as opposed to mere steps being taken for the execution of that order - be necessary).

After a County Court order has been made, Paragraph 8 of Schedule 6 provides for the revoking of a charge certificate and the setting aside of the order in certain circumstances (e.g. where a person gives a statutory declaration that he never received the original NTO), but otherwise liability for the increased charge cannot be challenged in the County Court. When a charge certificate is revoked, the authority have express power to issue a fresh NTO (Paragraph 8(6)).

That is the basic statutory scheme for enforcement of parking penalties by local authorities and, so far as recipients of NTOs are concerned, for contesting such penalties. Of course, although delays may be more prone to occur at particular points in the process, they can occur at any stage.

The Purpose and Aims of the Statutory Scheme

Although the 1991 Act decriminalises contraventions of parking restrictions, the primary statute - the Act under which the relevant traffic regulation or management orders are usually made - is The Road Traffic Regulation Act 1984 ("the 1984 Act"). The purpose and aims of the 1984 Act were considered by Mr Justice McCullough in R -v- The London Borough of Camden ex parte Cran [1995] RTR 346. He said (at page 365D):"

> "[It] is not a revenue raising Act."

and (at page 360J-L):

> "...[T]he 1984 Act is not a fiscal measure.... All its provisions...are concerned in one way or another with the expeditious, convenient and safe movement of traffic and the provision of suitable and adequate parking facilities on and off the highway. This is reflected in the wording of Section 122(1). There is its policy; there are its objects."

In R -v- The Parking Adjudicator ex parte The London Borough of Bexley (CO/1616/96, Unreported, 29 July 1997), this was approved by Mr Justice Scott Baker (Transcript, page 9G-H).

Section 122(1) of the 1984 Act (as amended) reads:

> "It shall be the duty of every local authority upon whom functions are conferred by this or under this Act so to exercise the functions...to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway..."

The duty imposed by this sub-section is expressly subject to the provisions of Part II of the 1991 Act (Section 122(3) of the 1984 Act as amended). This part of the 1991 Act deals with traffic in London, and includes Sections 51 and 63 under which the Secretary of State for Transport is bound to issue to the London authorities guidance with respect to the management of traffic in London (Section 51) and with a view to the authorities co-ordinating their action with respect to parking in London (Section 63). The Secretary of State did so on 26 August 1992 (Local Authority Circular 5/92). In that guidance, the main objectives of the 1991 Act are given as follows:

> "10.5 Local authorities should ensure that the new system of parking control is effective in their areas so that it makes a significant contribution to helping the movement of traffic, reducing accidents and improving the environment and managing the overall level of traffic in accordance with the strategy outlined...above...
>
> 10.6 The local authority should ensure that the new system is run efficiently and economically and that as soon as practicable it becomes overall at least self-financing where necessary taking account of receipts from off street parking places...
>
> 10.7 The local authority should operate the new system fairly..."

This comprises the relevant guidance of the Secretary of State, the passage is missing that representing merely additional information upon that guidance.

That guidance was supplemented in February 1998, by a further document issued by The Government Office for London (on behalf of the Secretary of State for the Environment, Transport and the Regions), "Traffic Management and Parking Guidance for London". This document reflected (almost verbatim) the wording of a Consultation Paper issued by The Government Office for London in August 1997, "Traffic Management and Parking Guidance: A New Approach". The February 1998 guidance says:

"8. The Local Authority Parking Enforcement System

Introduction

8.1 Sections 8-11 of this Annex brings up to date the general guidance on the local authority enforcement system ... *The Secretary of State expects the local authorities, the Parking Committee for London and, where appropriate, the Traffic Director, to take account of this Annex in operating the decriminalised parking enforcement system*...(emphasis in the original).

Main Objectives from the Road Traffic Act 1991

8.4 Local authorities should ensure that the system is run efficiently and economically and overall is at least self-financing, where necessary taking account of receipts from off-street parking places. However, self-financing should not be at the expense of safety or traffic management considerations.

8.5 Local authorities should operate the system fairly. Safeguards for drivers and owners are contained throughout the procedures for operating the system under [the 1991 Act]...

8.6 Local authorities have a statutory duty to consider representations against the issue [PCNs] and wheelclamping or removal action. The local authorities

should exercise this duty in a fair and consistent way. They should also consider using their discretion to waive additional parking charges where there are extenuating circumstances. Experience has shown that producing full and prompt replies to representations results in fewer appeals to the adjudicators and more PCNs paid...

8.10 Parking adjudicators are a major safeguard for the protection of drivers and owners under the decriminalised system. They have a comparable role to Magistrates' Courts under the existing system of criminal parking controls. They consider appeals from motorists who are not satisfied with the grounds on which a local authority has rejected their representations against the authority's enforcement action. They follow quick and simple procedures prescribed in regulations made by the Secretary of State [currently The Road Traffic (Parking Adjudicators) (London) Regulations 1993]. As the adjudicators sit alone, [the 1991 Act] requires them to have a 5 year general qualification within the meaning of Section 71 of The Courts and Legal Services Act 1990, i.e. they must have a right of audience in relation to any class of proceedings in any part of the Supreme Court, or all proceedings in County Courts or Magistrates Courts. Thus adjudicators are qualified to decide on matters of fact and of law ..."

Therefore, summarising the relevant statutory provisions, and guidance from the Secretary of State:

1. The purpose of the scheme of the 1991 Act is traffic management, and not fiscal. Indeed, the traffic management purpose is paramount even to the aim of making the scheme self-financing.

2. There is a duty on local authorities to ensure that the scheme is administered fairly, as well as efficiently and economically. In administering the scheme, authorities are to have regard to "the safeguards for drivers and owners [that] are contained throughout the procedures for operating the system".

3. Parking Adjudicators are a major safeguard for the protection of drivers and owners. In carrying out their functions, Parking Adjudicators are to “follow quick and simple procedures prescribed in regulations made by the Secretary of State”.

Individual Cases: The Facts

I now turn to the facts of the individual cases.

A. Paul Richard Davis (PAS Case No 1970198981) (PCN No KC97014601)

The Appellant is the registered keeper of a black Ford Fiesta XR2, registration mark F952 WVP. The Council say that, on 7 November 1995 between 10.19am and 10.27am, the car was parked in Lexham Gardens (a restricted street) during a time restrictions were in force. A Parking Attendant - having reasonable grounds to believe that a contravention of the relevant traffic management order had occurred - issued a PCN, which he attached to the vehicle. No payment or other response to the PCN was received by the Council, and so, on 12 December 1995, an NTO was sent to the Appellant at the address given for him on the DVLA computer. No response was received to the NTO and, consequently, on 24 January 1996, a charge certificate was sent to the Appellant at the same address: but this charge certificate was not registered at the Parking Enforcement Centre at Northampton until February 1997. In this case, this delay of over 12 months was the material delay. The Council (in evidence of Mr Yates, their Parking Enforcement Manager) said that the cause of the delay was that their computer database was not linked to the County Court until November 1996.

No doubt very shortly after an attempt at enforcement of the County Court Order, the Appellant promptly applied to the County Court by way of statutory declaration to have the NTO and charge certificate set aside, on the basis that he had never received the original NTO. The application was granted by the Court on 11 April 1997.

However, the Council issued a second NTO which they sent to the Appellant on 22 April 1997. The Appellant - again promptly - sent representations to the Council on 30 April 1997: but these were based on the misapprehension that the County Court Order had cancelled the PCN (rather than merely the charge certificate), thereby dis-enabling the Council from pursuing any penalty at all. As indicated above, on the cancellation of a charge certificate, an authority's right to issue a fresh NTO is expressly preserved (Paragraph 8(b) of Schedule 6 to the 1991 Act) The representations were turned down by the Council nearly 3 months later, on 15 July. An "M Davis" lodged an appeal on the Appellant's behalf on 13 August 1997, giving the following details of appeal:

> "I received a penalty notice 18 months after the aledge (sic) incident, with nothing prior to this at all. The vehicle has been in a garage for some time as I have been living in Germany, the rest of my family have had the keys, but they all own they're (sic) own vehicles. I or they would have no need to be in Lexham Gardens at that time as I or the rest of my family don't work or have friends who live there. We are all very puzzled why I have received this notice 18 months later. I feel there has been a mistake made on the Council's behalf. I do feel there has been a total misjustice here and I am not very amused."

That postal appeal came before Parking Adjudicator Henry Michael Greenslade on 15 October 1997. He allowed the appeal, giving the following reasons:

> "This PCN was issued in November 1995. Mr Davis says he knew nothing about it until he received an NTO in April 1997. The Council say that, with no response to the original NTO, a charge certificate was issued in January 1996. However, it then took them 13 months to register the case at PEC. This was a considerable delay. It is unreasonable to expect Mr Davis now to recall events. The contravention is disputed. I find there must be considerable doubt that it did occur."

On 22 October 1997, the Council wrote to the Parking Appeals Service seeking a review of the decision, in these terms:

> "... [F]or the Adjudicator to find that there must be considerable doubt that the contravention occurred is in the Council's viewpoint not a logical conclusion to the argument. The Council accept that there was a delay between the issue of the first charge certificate on 24.01.96, and the registration of the case at PEC on 03.02.97, but this is no reason to find that there must be considerable doubt that the offence occurred. Indeed, the facts of the case were clearly set out in the Council's Summary of Evidence and supported by documentary evidence that the contravention did in fact occur. The fact that the Appellant may not recall the events simply because they happened a long time ago cannot mean that the offence did not occur. It is for this reason why the Council wish to challenge the decision."

That letter was followed by a further letter to the Parking Appeals Service of 28 October, which said:

> "Recent adjudications have been alarming, making illogical jumps in reasoning that because an event was a long time ago there is doubt that it happened (see letter of 22.10.97 re Case 1970198981) ..."

On 11 November, the Chief Parking Adjudicator agreed that the decision be reviewed, and that review is now before me.

What is clear in this case, is that the Appellant appears to have acted promptly at all times. Under Paragraph 8 of Schedule 6 to the 1991 Act, the County Court have accepted - and I must accept - that the Appellant knew nothing about the alleged contravention (which took place in November 1995) until about April 1997, when presumably there was some attempted enforcement of a County Court Order. In the intervening period, the matter was entirely in the hands of the Council. Until the attempted service of the charge certificate in January 1996, matters had progressed with reasonable expedition: by my calculation, it took only just over 2 months between the alleged contravention and service of the charge certificate. There was then a delay of over 12 months before the certificate was registered. Responsibility for that delay was entirely the Council's. As soon as the Council attempted to enforce the County Court order (after the registration of the certificate) - and the Appellant knew, for the first time, of the alleged contravention for which he was being held responsible - matters moved quite swiftly. It is notable that, but for the delay between the attempted service and registration of the charge certificate, the second NTO could have been served in this case in under 6 months after the alleged contravention.

B. <u>Saeed Rezvani (PAS Case No 1970182813) (PCN No KC82031753)</u>

The Appellant is the registered keeper of a green Volkswagen Polo CL Coupe, registration mark L397 GUY. He is disabled, and holds a Kensington & Chelsea blue disabled badge (under the Kensington & Chelsea Free Parking Places) (Disabled Persons) Order 1991). However, that badge does not entitle him to park on yellow lines during restricted hours, except for up to 20 minutes for the purposes of allowing a disabled person to be dropped off or picked up.

The Council say that, on 31 July 1995, the vehicle was seen in Pitt Street by Parking Attendant No KC127, parked on a yellow line during prescribed hours, between 11.42am and 12.08pm (i.e. for a period of 26 minutes). A PCN was issued and fixed to the vehicle's windscreen. It seems that the Appellant wrote to the Council immediately upon receipt of this PCN, to point out that he is a disabled badge holder: but that letter is undated, and it is not entirely clear that it was sent at that stage. If it was sent then, it is certainly unclear why the Council did not use the address shown on that letter, rather than seek the address given for the keeper on the DVLA computer. In any event, the Appellant's letter did not enclose any payment.

In the absence of a payment in response to the PCN, the Council made a request to the DVLA for details of the owner, which they received on 25 September 1995. The owner was given as "Saeed Rezvani c/o Motability Finance Ltd, 20 Cadogan House, Beaufort Street, London SW3 5BL". As I understand it, Motability is a private company which operates schemes for the benefit of disabled drivers, including a hire scheme and a hire purchase scheme in which the hire premium is linked to the amount of allowance to which a disabled person is entitled. An NTO was sent to the Appellant at that address, on 2 October 1995. There was no response to the NTO and, on 17 November 1995, a charge certificate was posted to that same address. However, a week later (on 24 November), the NTO was returned to the Council in the course of the post. It is not clear why the letter was returned (e.g. whether it was because the address at the DVLA was wrong, or for some other reason). Further enquiries were sent by the Council to the DVLA in January, February and March 1996, but apparently no response was received, and no further enquiry appears to have been made. However, in November 1996, the Council's computer shows that the Appellant's home address was added: it is unclear from where this information came, but, as I have indicated above, it seems that the Appellant had written to the Council very shortly after the issue of the PCN, and that letter contained his home address details. A second NTO was sent to the Appellant at his home address on 6 February 1997.

The Appellant received that NTO and, within days, he made representations to the Council in the following terms (and with grammar and spelling as in the original)::

> "This ticket has been issued incorrectly as you sent me two more earlier last week. I don't know wethear your trafic-warden has been careless or you've got problems with your computer. I live in the Borough and holding an orange and blue badge. Still don't

know on what circumstances you have given me this tickets. If you can't cancel them please arrange a court hearing. There might be someone listen to me."

Those representations were sent on 17 February 1997. They were rejected by the Council 5 months later, on 22 July 1997, with an apology for the delay in response. The Council rejected the representations, on the basis that a disabled badge does not allow parking on yellow lines except for up to 20 minutes to allow a disabled person to be picked up or for goods to be collected.

Again very promptly, on 26 July, Mr Rezvani appealed to the Parking Appeals Service, in the following terms:

> "Aparently you'd given me this ticket almost 3 years ago which I have no knoledge about it, first of all. Second of all, I am disabled involve with kidney failure going on dialysis, have had heart attack, extremely anaemic. I live in the Borough and holding orenge and blue badge finalcialy, I am really in a very bad situation. I can't aford a penny. You tell me how am I supose to pay for a ticket which had been issued three years ago. I want to appeal against the decision. Please can you cancel it. If you can't please send me a Court Order so I can explain it to them. Thank you for understanding my situations."

The appeal came before Parking Adjudicator Paul Wright on 16 September 1997. He allowed the postal appeal, giving the following reasons:

> "Without a copy of the attendant's notebook I cannot be satisfied as to the observation carried out in respect of the vehicle. Furthermore, the unconscionable delay in the case has severely prejudiced the Appellant's ability to collate and preserve evidence."

A copy of the PCN was available to the Parking Adjudicator at the hearing, which indicated that the vehicle had been seen in Pitt Street between 11.42am and 12.08pm. There was also a computer printout from the hand-held computer, but this did not indicate the observation period. The Parking Attendant's hand-written notebook was not available. The Council said:

> "[We] apologise for the fact that we do not have a copy of the PA's pocket-book. It was archived and cannot now be found."

The Council sought a review of the Adjudicator's decision by letter to the Parking Appeals Service of 28 October 1997.

At the hearing of the review, the Council submitted a copy of what purports to be the relevant Parking Attendant's hand-written notes. They are headed with the correct PCN number (KC82031753). However, these notes apparently show that, at the relevant time on 31 July 1995, the Parking Attendant whose notes these are was not in Pitt Street, but in Holland Street: and there is no reference to vehicle registration mark L397 GUY between 11.42am and 12.08pm (or, indeed, in the notes at all).

C. Beaudecor Ltd (PAS Case No 1970161595) (PCN No KC73035254)

The Appellant is a company of painters and decorators. It is the registered keeper of a grey Toyota vehicle registration mark M624 ALA.

The Council say that that vehicle was seen at 9.03am on 7 December 1995, parked in a suspended meter bay in Kensington Park Road. A PCN was issued and attached to the vehicle.

The Appellant wrote to the Council shortly after the incident. Not all of the correspondence is now available (because, the Council say, "as the case is old the Council's record of correspondence from Beudecor has been archived and we are unable to access these for the purposes of this appeal"): but the Council have lodged a letter from them dated 12 December 1995, which refers to a letter from the Appellant dated 8 December 1995 (not now available). The Council's letter said that they were willing to accept payment at the reduced rate of £30 but, if that payment was not received by 3 January 1996, an NTO would be sent. However, a letter was sent on 8 January 1996 from Sureway Parking Services Ltd (expressly "on behalf of the Royal Borough of Kensington & Chelsea": Sureway are the Council's parking contractors), saying:

> "Thank you for your letter with regard to the above PCN. Unfortunately we are unable to reply at present, however we would advise that we will investigate your case

> as soon as possible and reply to your letter in due course. In the meantime your details have been logged and your case has been put on hold".

The Appellant heard nothing more about this for 14 months, when it received an NTO dated 25 February 1997. This 14 months was the material delay in this case. There is no explanation for this delay: Mr Yates of the Council merely said, "A standard acknowledgement was sent in response to a letter but procedures are now in place to identify matters requiring a substantive response".

Promptly, on 3 March 1997, the Appellant wrote in response to the NTO:

> "With reference to the enclosed penalty charge: please note that this penalty has been incorrectly issued. How is it possible for the "PCN Issue Date" to be 7.12.95 and we receive this notice now in March 1997. We have no record of receiving a fixed penalty in Kensington Park Road at 9.03am on 07.12.95."

Those representations were turned down 3 months later, on 6 June 1997, although the Council indicated in the letter of rejection that it was still willing to accept payment at the reduced rate of £30 if made by 23 June 1997. However, no payment was made: rather, the Appellant appealed to the Parking Appeals Service on 7 July 1997, giving its details of appeal as follows:

> "The first indication of the PCN arrived at our office on the 3 March 1997. The notice to owner was dated 25 February 1997. However, the NTO says the PCN was issued on 7 December 1995... We never contravened parking laws in Kensington Park Road in December 1995. How can a NTO be issued 15 months after an alleged parking contravention; especially since we have no record of ever receiving a penalty notice. It seems that Sureway can backdate or make-up any penalty notices going back a over a year and the public have no way of proving innocence. How can a computerised system "forget" and suddenly "find" a penalty notice over 15 months old?..."

The postal appeal came before Parking Adjudicator Susan Turquet on 27 August 1997. She allowed the appeal, giving the following reasons:

> "Although there is evidence that Beaudecor responded to the PCN in December 1995 at the time, the subsequent delay of 15 months in sending out the NTO is prejudicial to the Appellant and is an abuse of process."

The Council sought a review of this decision by letter of 28 October 1997.

D. Patras Mahgaram (PAS Case No 1970213021) (PCN No KC71041959)

The Appellant is the registered keeper of a black Mercedes 300SE Auto registration mark D668 TGK.

The Council say that, on 14 October 1995, that car was seen parked in Gloucester Road, at a place where parking and loading/unloading restrictions were in force. There was no response to the PCN, and the Council made enquiries of the DVLA to identify the keeper on 6 November and 4 December 1995 (to which there was no response as at 9 January 1996): and a third enquiry was made on 14 May 1997 (some 17 months after the second enquiry), which did elicit a response on 26 May 1997. An NTO was then sent to the Appellant on 3 June 1997.

The material delay in this case is between the second and third requests by the Council for details of the owner, from the DVLA. In his letter of 27 October 1997 to the Parking Appeals Service, Lawrence Blake (the Council's Senior Parking Assistant) explained the delay as follows:

> "The Council accept however that there was a long delay between the issue of the second and third VQ4 forms - some 17 months. The explanation for this is that as a result of the Council taking over enforcement of parking from the Metropolitan Police, new systems had to be introduced between the Council and its Contractors. Inevitably, there were some problems experienced with those systems, one of which has resulted in delays occurring on the reissue of VQ4 enquiries. I am pleased to say that these problems are now being resolved..."

It is again to be noted that the material delays in this case were not caused or contributed to by the Appellant.

The Appellant responded to the NTO within days, on 14 June, in the following terms:

> "I was disconcerted to find that I received this [PCN] as attached. I have absolutely no recollection of receiving any notice on my windscreen on the date mentioned. Furthermore, I am surprised to have received this notice one year and eight months after the alleged offence occurred. I am certain that this is a clear misunderstanding and, as a matter of urgency, I would be very grateful to receive confirmation from your offices of a cancellation of this [PCN]. This is the first ticket I have received and I would like to point out that I have always observed penalty parking restrictions when parking in the Borough."

Those representations were turned down by the Council in a letter of 27 August 1997. The Appellant then appealed (on 1 September 1997), giving the following as his details of appeal:

> "I surprised to receive your letter dated 27th Aug 1997 Notice No KC1041959. This matter has already carry to close upon 2 year's. Hence I am pleading once again to ask you to cancel the penalty charge. As I mentioned to you in my previous letter, I never received the penalty notice at all. Nor for your information, traffic warden has in fact not even taken the excise licence number. I trust that at this late stage you will kindly use your high offices to cancel all my penalty notice's what you have mentioned in your letter. Thank you very much."

The postal appeal was adjourned on 13 October 1997, to allow the Council to explain the delay in pursuing the penalty, which the Council did in Mr Blake's letter of 27 October to which I have already referred. The case was adjourned to be dealt with by me, together with the other, review cases I am now dealing with.

E. General

I deal with the particular issues that these cases raise below. However, it will be apparent from each of the individual cases that:

(i) The respective owners of the relevant vehicles were surprised and concerned to receive documentation that indicated the Council was pursuing a penalty many

months after the alleged contravention. Some expressed their views in forceful or angry terms.

(ii) In a number of cases, the owner indicated that he could not remember - and could not be expected to remember - the circumstances of the parking of a particular vehicle on a particular day, many months or even years before.

(iii) In the case of Saeed Rezvani, the Appellant was not the only one with evidential problems, because the Council archived the parking attendant's notes and could not find them prior to the first hearing, and, when the notes were found prior to the review hearing before me, they appeared to show no reference to the Appellant's car and indeed that, at the relevant time, the Parking Attendant was not in the same street as appeared on the Appellant's PCN. Similarly, in Beudecor Ltd, the Council indicated that, because of the age of the case, it had archived certain relevant correspondence, which they could not access for the appeal.

Whilst on the individual cases, what is in issue in each of them is a matter of law of far wider application than their cases alone, and the Council have - in accordance with common practice - consequently confirmed, both in their letter of 22 October 1997 and at the hearing before me, that, whatever the result of the review, they will not pursue the Appellant for any penalty or charge in any of these particular cases.

The Council's Case

Hopefully doing justice to a substantial and carefully argued case, I summarise the Council's case as put by Mr Harrison as follows.

1. Limitation

A cause of action to recover a sum of money due under the 1991 Act arises when a PCN is properly issued and served under Section 66 of the 1991 Act, i.e. when a Parking Attendant, with grounds to believe that there has been a contravention of the parking regulations, affixes a PCN to a vehicle or gives it to the driver/person in

charge. It is irrelevant, Mr Harrison submits, that the owner of the vehicle (the only person against whom a penalty can be enforced) may know nothing about the issue of a PCN.

By Section 9 of the Limitation Act 1980, the sum of money recoverable is subject to a six year limitation period, i.e. the Council can pursue the penalty at any time up to six years after the issue and service of the PCN. That is the effective time restriction beyond which an authority cannot seek to enforce a penalty.

2. Striking-out

Where delay is the only relevant factor, a Council's ability to pursue a penalty is not jeopardised except to the extent that their right to pursue a cause of action would be jeopardised in a County Court action, i.e. on the basis of the principles set out in Birkett -v- James [1978] AC 297 and summarised by the Court of Appeal in Trill -v- Sacher [1993] 1 All ER 961. In short, there must have been inordinate and inexcusable delay on the part of the Council, such that there arose a substantial risk that it would not be possible to have a fair determination of the issues or such as is likely to cause serious prejudice to the recipient of the NTO: and, even then, a case will not normally be struck out within the limitation period. Although Mr Harrison did not express it as such, it seems that it is inherent in this submission that an authority should be allowed to proceed to enforce a parking penalty by issuing an NTO for six years after the issue of a PCN, irrespective of the prejudice that may have been caused to the recipient of an NTO by delay (that prejudice only being relevant where an NTO has been issued within six years, but proceedings continue through the six year point). However, even where delay is a factor to be taken into account, in line with these authorities, Mr Harrison considered that a fair trial of the issues arising out of an alleged parking contravention could be fairly determined despite delay, so long as the owner had not been prejudiced. Prejudice, he said, was the crucial factor: and the "very high" burden of showing prejudice falls upon the car owner (just as the burden of proof on an application to strike out for want of prosecution is on the defendant).

Therefore, in short, Mr Harrison's submitted that, under the statutory scheme, the Council is able to issue an NTO at any time up to six years from the issue of a PCN:

and, even where there is delay after the issue of the NTO, it would be unlikely that that delay would be such as to warrant the enforcement proceedings being struck out. On this basis, an authority could quite properly take six or eight or more years to complete proceedings to enforce a parking penalty.

3. The Duty to Act Fairly

The Council (through Mr Harrison) accept that, when exercising any of its functions under the scheme, it has a duty to act fairly (or, as he preferred it to be put, "a duty not to act unreasonably"), arising out of the limb of natural justice requiring there to be a fair hearing: and that delay can be a relevant factor in determining whether the Council have acted in breach of that duty. Mr Harrison conceded that it would be possible for an authority to behave so outrageously that it would be a breach of natural justice to allow it to pursue any penalty in the circumstances (e.g. where an authority by delay deliberately manipulated the statutory scheme to its own advantage): but, in the absence of conduct of that sort, there would be no breach of the duty to act fairly unless the owner had been prejudiced. Again, the burden of proving sufficient prejudice would fall on the owner himself.

He said that, for the purposes of this case, Article 6(1) of the European Convention on Human Rights would (even if applicable) impose no greater an obligation on an authority than do the rules of natural justice. He submitted that Article 6(2) and (3) of the Convention (which apply to "criminal" proceedings) would not in any event apply to the enforcement of parking penalties under the 1991 Act: but, even if they did, they would not impose a greater obligation on an authority than do the rules of natural justice.

4. Evidential Matters

The Council rely upon contemporaneous records, in the form of parking attendants' hand-written and computer-recorded notes. Whilst accepting that a (civil) burden of proof lay upon the Council to prove that the contravention occurred, Mr Harrison submitted that, so long as the Adjudicator is satisfied on the balance of probabilities that the details were recorded accurately and had not subsequently been altered, then "the

only supportable conclusion will be that the contravention occurred". Such documentary records will be as credible after a lengthy period of time as after a shorter period. On the other hand, the recollection of the driver/owner - who is unlikely to have any relevant contemporaneous documents - can only fade with time, so that, as time passes, an Adjudicator can only rely more heavily upon the (Council's) documentary evidence showing a contravention did indeed occur. Therefore, Mr. Harrison said, Adjudicators should therefore be very slow indeed to find that, as a matter of evidence, time alone meant that they could not be sure that a contravention had occurred (cf the decisions of the Adjudicators in the cases of Paul Richard Davis, Saeed Rezvani and Beaudecor Ltd, that are now before me on review).

5. Conclusion

The Council say that, in each of the cases before me, the delay was not caused by them and/or the Appellant has failed to prove that any delay by the Council has caused prejudice to him.

For these reasons, the Council asked me to refuse the appeal in each case.

I deal with each of these submissions below. However, in considering these matters, Mr Harrison in particular urged me to view an authority's pursuit of a penalty against a car owner as the same as any other County Court action, such as (for example) the pursuit of damages by a plaintiff in a running down case. He said that that should be the starting point in my consideration of issues such as limitation, striking out and the effects of delay. I have already commended Mr Harrison for his careful and helpful submissions, but I consider this to be an over-simplification and a misconception of the true position.

First, there is a difference in the purpose. The proper purpose of a claim for a typical claim for damages in the County Court (in, e.g., a running down case) is the recovery of compensation: but the paramount purpose of the scheme for the enforcement of parking regulations under the 1991 Act is not fiscal, but rather for good traffic management. A Council is not bound to pursue every parking penalty, irrespective of the circumstances: and the extent to which very belated attempts to recover penalties lead to better future compliance must be doubted. Indeed, it is

possible that, if such attempts are perceived by the public to be inherently unfair, they will result in an undermining of the public confidence in the system as a whole.

Second, there is a difference in the nature of the scheme. Under the statutory scheme, so far as the determination and enforcement of penalties are concerned there are three distinct stages:

(i) The First Stage : From the issue of the PCN to the rejection of any representations made in respect of the NTO.

During this stage, the local authority is not only the enforcing authority, it is also the decision-making authority (although not, of course, "a Court" because it does not exercise any judicial function, its role being administrative only). The subject matter is the penalty charge. During this stage, neither the local authority nor the recipient of the NTO has any right to take any step before either the Parking Adjudicator or the County Court.

(ii) The Second Stage : From the rejection of representations against an NTO to the determination of an appeal by the Parking Adjudicator.

Once the local authority has rejected the representations of the recipient of the NTO, that person has the right to appeal against that administrative decision to the Parking Adjudicator. In any appeal, as the respondent, the local authority continues to be the enforcing authority: but the decision-making authority is now the Parking Adjudicator. An Adjudicator is "a Court" because he or she exercises judicial functions and forms part of the judicial system of the country rather than the administration of the Government (see Peach Grey & Co -v- Sommers [1995] 2 All ER 513 at 519-521, per Rose LJ, who was in that case considering the status of an industrial tribunal: he found that such a tribunal was "an inferior Court", for the purposes of contempt of Court, and it is noteworthy that he did so despite the fact that an industrial tribunal "is not a Court of record and that its monetary awards have to be enforced ... by the County Court ..." (page 519H)). Before the Adjudicator, the subject matter remains the penalty charge. During this stage, the local authority cannot take any steps in the County Court: its sole role is as respondent in the appeal before the Adjudicator. Neither can the recipient of the NTO take any steps in the County Court at this stage.

(iii) The Third Stage : From the determination of liability for the penalty charge.

This stage will commence at the conclusion of any appeal before the Parking Adjudicator, or earlier if the recipient of the NTO ceases to dispute liability for the penalty earlier. By this stage, even if there has been an appeal, the Parking Adjudicator is *functus officio*. The local authority continue to be the enforcing authority, and it can at this stage issue a charge certificate in respect of, not the penalty charge, but "the increased charge" which, in amount, is the original penalty charge plus 50%. If this is not paid within 14 days, then the local authority can seek an order from the County Court for the recovery of the increased charge.

The County Court therefore only becomes involved at a stage when liability for the increased charge has been settled (either because the penalty is accepted by the vehicle owner, or he does not dispute it, or an Adjudicator has determined it), and the resulting liability is simply enforced through the County Court as a County Court money order or judgment. At that stage, enforcement can go no further without the assistance of a Court. The County Court's role is therefore very late in the scheme, and limited to enforcement: indeed, the right to challenge liability for the increased penalty is expressly excluded (although, as I have indicated, the County Court order can be set aside on procedural grounds if, for example, the NTO was never received by the relevant person).

Therefore, whilst in these novel areas it is sometimes helpful to work from analogy, I do not consider the statutory scheme for the enforcement of parking regulations can simply be looked at as if it were a running down case wending its course through the County Court, with the service of the NTO being the equivalent of issue (or service) of a County Court Summons and the recipient's representations being the equivalent of a Defence. I do not consider that an authority's statutory duty to consider representations (under Paragraph 2(7)(a) of Schedule 6 to the 1991 Act) can be equated with a plaintiff's consideration of a Defence in a typical County Court case. It seems to me that the Council's submissions fail to give proper weight to its public responsibilities under the 1991 Act and the purposes of that Act. Those purposes are quite different from the purposes of a County Court plaintiff in a damages action, whose only concern is compensation (i.e. the recovery of damages of monies he considers due to himself). The

scheme of the 1991 Act is an entirely distinct creation of statute, in which the role of the County Court (as the ultimate enforcer by way of recovery of the increased charge) is purely incidental. This is a matter to which I will return when I deal with the Council's submissions on the specific issues.

Nor did I find helpful the comparison between the 1991 Act scheme and the Inland Revenue scheme for the collection of taxes, in which there is a six year limitation period (made by Linda Wheeler, the Council's Head of Parking Operations, in her letter to the Parking Appeals Service dated 28 October 1997). Again, both the purposes and the nature if the relevant schemes are very different. The purpose of the Inland Revenue scheme is fiscal (the collection of taxes), whereas the purpose of the 1991 Act scheme is not (it is for good traffic management). The taxation scheme has express limitation provisions built in: for example, in cases brought by the Revenue (which Miss Wheeler prayed in aid), an action must be brought within six years from the end of the chargeable period to which the claim relates by virtue of the specific provisions of Section 34 of The Taxes Management Act 1970. There are no similar express provisions in the 1991 Act. Bearing in mind these differences between the 1991 Act scheme and the scheme for taxation, the extent to which useful parallels can be drawn is very limited.

Limitation

As I indicate above, the Council's argument on limitation is simply put. They say that a cause of action to recover a sum of money due under the 1991 Act arises when a PCN is properly issued and served under Section 66 of the 1991 Act, i.e. when a Parking Attendant, with grounds to believe that there has been a contravention of the parking regulations, affixes a PCN to a vehicle or gives it to the driver/person in charge. As this is a sum recoverable by virtue of a statute (the 1991 Act), they say that Section 9 of the Limitation Act 1980 applies, so that the penalty recoverable is subject to a six year limitation period, i.e. the Council can pursue the penalty by way of action at any time up to six years after the issue and service of the PCN when the cause of action accrued. The step the authority takes to stop the limitation clock running is the issue and service of the NTO which, it is said, commences "the action" Mr Harrison said that Parliament had therefore provided that an authority should have six years to pursue a parking penalty, with limitation providing the effective "cut-off" date for pursuit of a penalty: he submitted that Parliament had contemplated with apparent equanimity the possibility of a local authority pursuing the owner of a vehicle for a parking penalty six years after the alleged

contravention, even though (for reasons referred to below) the owner may during that time be in complete ignorance of his potential liability.

However, this position appears largely to derive from the Council's position that the 1991 Act scheme can be equated with a typical County Court damages action. As I have pointed out, that position fails properly to distinguish between the three distinct stages of the scheme referred to above. On a proper construction of the relevant statutory provisions, I do not consider that limitation provides any effective restriction at all on an authority's right to pursue a penalty under this statutory scheme.

Although the Courts today properly abhor undue delay, at Common Law, if one had a right, there was no time limit on when it could be enforced by way of Court action. Leaving aside the equitable principles of acquiescence and laches (not relevant in this case), time restrictions on the bringing of an actions derive from statute, now the Limitation Act 1980. Under that Act, periods of limitation begin to run when the "cause of action" accrues. "Action" is defined in Section 38(1), to include "any proceeding in a Court of law...". A cause of action is a factual situation which gives a person a right to a remedy in the Courts. As I have already indicated, in my view, for these purposes both the County Court and the Parking Adjudicator are "Courts of law".

Therefore, in the scheme of the 1991 Act, when does a cause of action arise? At which stage does the authority accrue a right to a remedy from either the Adjudicator or the Court? The answer to that is, not before a default in payment of the increased charge following the service of the charge certificate.

It seems to me that no cause of action arises at the time of the issue of the PCN, when the Council have no right to seek recourse from either the Court or the Adjudicator. Similarly, no cause of action arises when the NTO is served. The recipient of the NTO only has the right to make representations to the local authority in respect of it: and neither he, nor the local authority, has any recourse to either the Court or the Adjudicator. Therefore, in my view, clearly no cause of action arises during the first stage of the procedure referred to above.

During the second stage, the recipient of the NTO has the right to challenge the administrative decision of the authority to reject his or her representations before the Adjudicator. Although the

Adjudicator exercises a judicial function and is a "Court", the local authority can take no steps to enforce the penalty whilst an appeal is being determined. Indeed, at this stage, it is only the "penalty charge" that is in dispute: and the penalty charge (as opposed to the "increased charge") is never capable of being enforced by the authority. Therefore, I do not consider that any cause of action arises in the authority during the second stage, either.

The third stage is clearly different. Liability for the penalty charge has been determined and, if not paid promptly, the local authority are able to serve a charge certificate in the amount of the increased charge. If not paid within 14 days, it is the recovery of the increased charge that can be enforced by the local authority through the County Court. The Council has no cause of action - it has no right to a remedy in any Court of law - prior to 14 days after the service of a charge certificate for the "increased charge" under Paragraph 6(1) of Schedule 6 to the 1991 Act. I note that, as indicated above, under Paragraph 7 of Schedule 6, it is in respect of the *increased charge* (and not the penalty charge) that proceedings can be taken in the County Court by way of enforcement.

My view that the authority does not have any cause of action prior to 14 days after an issue of the charge certificate is in line with the general principle that a cause of action is complete only when someone has the right to seek a remedy in Court in respect of it. I have in mind that there are some cases - albeit rare - when time for limitation purposes may begin running before anyone has such a right. In O'Connor v Isaacs [1956] 2 QB 288, Diplock J (as he then was), in a full judgment upheld as to decision and reasoning by the Court of Appeal ([1956] 2 QB 288 at 328), differentiated between those cases where a later event is an integral part of the cause of action and those cases where a later event merely removes a procedural bar to the bringing of the action. Cases falling within each category are given in the text books (e.g. "Limitation Periods" by Andrew McGee, 2nd Edition (1994), at pages 85-9). In my view, it cannot properly be said that the various actions necessary under the 1991 Act scheme prior to an authority having the right to take action in the County Court are merely a procedural bar to recovery. Rather, they are essential steps necessary for the crystallisation of liability for the increased charge that alone the authority can pursue by way of Court claim. The service of the charge certificate - at which time, for the first time, the increased charge becomes due - is an essential ingredient of the cause of action: without it, the authority's cause of action is incomplete.

None of the cases before me turns on whether time for seeking a County Court order commences for limitation purposes at the time of service of the charge certificate or 14 days thereafter (when action in the County Court can be commenced), and it is unlikely that any case will ever be dependent on such a point. However, on the basis of principle, I consider it would be the later date.

Therefore, as a matter of limitation, having served a charge certificate and waited the statutory 14 days, an authority will have six years within which to seek a County Court order under CCR Order 48B Rule 2. But, prior to the service of a charge certificate, I do not consider the Limitation Act imposes any restriction upon an authority's ability to pursue a penalty.

Of course, once an application for an order has been granted by the County Court, the provisions of Section 24 of the Limitation Act will apply, as it applies to all money orders and judgments: but, because actions on (as opposed to enforcement of) judgments will be very rare indeed, the effective limitation on pursuit of the order will be the requirement to seek leave to enforce the order under CCR Order 48B Rule 5(1) and Order 26 Rule 5.

Striking-out

The power of a Court to dismiss an action for want of prosecution or abuse is based on the inherent jurisdiction to control its own procedure, and not on any statute or Rule of Court (Trill v Sacher [1993] 1 All ER 961 at 975, per Neill LJ: see also the historical review of this aspect of the inherent jurisdiction by Brooke LJ in AB & Others v John Wyeth & Brother Limited [1997] 8 Med LR 57 at 70 et seq). A Parking Adjudicator is a tribunal entirely created and governed by statute and regulations. Although he has a wide discretion to govern his own procedure (see, particularly, Regulation 9(2) of The Road Traffic (Parking Adjudicators) (London) Regulations 1993), he does not have the same inherent jurisdiction as the Court.

In considering the cases before me - in which, I have found, limitation plays no effective part and the circumstances in which the jurisdiction to control the tribunal's own procedure are different from that of the High Court - I do not consider that I can be assisted by what a Court does in its inherent jurisdiction, when cases are commenced before - but then pursued beyond - the lapse of the limitation period. What I must do is to construe the relevant statutory provisions that apply to the statutory scheme of the 1991 Act, to which I now turn.

The Duty to Act Fairly

Whilst at several stages the statutory scheme fixes a minimum time period before which an authority cannot go to the next stage of the process (of course, to allow payment of the relevant penalty, which would bring the matter to a conclusion), it does not specifically provide for a maximum period within which (e.g.) an NTO must be sent out following the issue of a PCN, or an authority must respond to representations in respect of an NTO. Outside the scheme for clamping and removal (where the authority are holding the penalty and release charges, which the owner is attempting to recover), the statutory provisions provide no specific time limit for any action of the authority, at least prior to the service of the charge certificate (that is the last stage of the statutory scheme: the enforcement scheme from there onwards is simply the same as in respect of any County Court money order or judgment). However, this does not mean that there are no time limits at all.

In construing the relevant statutory provisions, the question to be asked is whether the intention of those provisions is that there be no limit on the time in which an authority can pursue the enforcement of a penalty the subject of a PCN: or whether they intend some limit and, if so, what that limit is. Of course, although at root one may be striving to ascertain Parliament's intention or what Parliament meant to enact, one can only seek the intention of the words Parliament uses: that is, not what Parliament meant but the true meaning of what they said (Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 at 613, per Lord Reid). However, do the statutory provisions really mean to allow an authority to pursue a penalty under a PCN years - perhaps many years - after the alleged contravention? I have come to the conclusion that this is not the proper construction of the relevant provisions: and that the proper construction requires the enforcing authority to take each step in the process within a reasonable time. Such an implication is necessary, so that justice is done and the purposes of the statute are not frustrated. My reasons for coming to this conclusion are as follows.

The Council accepted - in my view quite correctly - that, in exercising any of its functions under the scheme, it has a duty to act fairly or, as Mr Harrison preferred it, "a duty not to act unreasonably". In my view, because an authority must be acting unreasonably if it does not act fairly, the duty to act reasonably entirely encompasses the duty to act fairly. The more specific

and preferred terminology in this context is "the duty to act fairly" (see R v The Secretary of State for the Home Department ex parte Fayed [1997] 1 All ER 228 at 230 per Lord Woolf MR): and that is the terminology I will use in this decision.

The duty to take any decision in a manner which is fair encompasses two basic requirements (the so-called "rules of natural justice"), which are often expressed in the Latin maxims *nemo iudex in re sua* (the rule against bias) and *audi alteram partem* (the duty to hear the other side). The duty is unaffected by the absence of any specific procedural provisions: the principles of fairness supplement even detailed regulations concerning procedure (Wiseman v Borneman [1971] AC 297 at 308, per Lord Reid). On the delegation of any power, unless the contrary appears, there is an implication that Parliament has not authorised the exercise of such powers in breach of these principles (Fairmount Investments Limited -v- Secretary of State for the Environment [1976] 1 WLR 1255 at 1263, per Lord Russell): and a decision which offends against these principles is outside the jurisdiction of the authority (Attorney-General -v- Ryan [1980] AC 718), and is consequently *ultra vires* and void.

The implication can of course be rebutted by the express words of the empowering statute, although to oust such fundamental principles, the words used must be clear and unambiguous. In the case of the scheme of the 1991 Act, there *is* a derogation: because, by Paragraph 2 of Schedule 6 to the 1991 Act, the relevant authority must consider any representations made against the NTO - and either accept or reject them - despite the fact that that authority has an interest in the decision it is making, because it is the ultimate beneficiary of any penalty that eventually becomes due. Consequently (and certainly not uniquely), the authority is in a very real sense "a judge in its own affairs", contrary to the rule against bias (which applies to authorities exercising an administrative power, as well as those exercising a judicial one). However, this is as a result of clear words in the empowering statute, which provide other safeguards to the recipient of an NTO. These of course include the right to appeal to an independent Parking Adjudicator.

However, this derogation is limited: and there is no derogation from the second requirement. Although this derives from the *audi alteram partem* rule (i.e. that requires the other side being heard), it is now a far-reaching principle embracing every aspect of fair procedure. Any derogation from the principle requires clear statutory words, and there is none in the 1991 Act. Indeed, the Secretary of State's guidance indicates that it is the intention of the statute that those

who are subject to the scheme must be dealt with fairly at every procedural stage, whether that stage is administrative or judicial.

The Courts have emphasised that the requirements of the principle must be flexibly applied to the circumstances of a particular case: they are "not engraved on tablets of stone" (Lloyd v McMahon [1987] AC 625 at 702, per Lord Bridge). In Russell -v- The Duke of Norfolk [1949] 1 All ER 109 at 118, Tucker LJ said:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

More recently, Lord Mustill confirmed the need for flexibility and, having reviewed the authorities, set out the following guidance as to the proper modern approach to the duty of those to whom powers have been delegated to act with procedural propriety and fairness (R v Secretary of State for The Home Department ex parte Doody [1994] 1 AC 531 at 560):

> "(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

In assessing the scope of the duty in relation to the 1991 Act scheme, it seems to me that the following factors are particularly relevant.

(i) Parking contraventions may not seem important relative to some other wrongdoings, but people who are involved often regard them as serious and worry over them, particularly those who are in difficult financial or social circumstances and the elderly. Although not criminal, the scheme is penal; and where a PCN or NTO has been served, the recipient is entitled to have the matter concluded with reasonable expedition, so that it is not hanging over him for an unreasonable time.

(ii) Although there is a clear legal distinction between a criminal fine and a civil penalty (and the decriminalisation of the enforcement of parking regulations is at the heart of the 1991 Act scheme), members of the public do not regard them as very different animals. Understandably from their point of view, they see very little difference between paying a fine to Magistrates (as they do in those areas outside London where the 1991 Act scheme has not yet come into effect), and paying a penalty to a local authority (under the scheme, for example within London). Members of the public are aware that, if a criminal parking fine is not pursued within 6 months (by the laying of an information within that time), then they cannot be pursued for it (Section 127 of The Magistrates Courts Act 1980). Although I do not consider this practice in the criminal arena formally gives rise to a "legitimate expectation" (as that technical term is used in cases such as R v Commissioners of Inland Revenue ex parte Unilever plc [1996] STC 681), if several months pass at any stage within the 1991 Act procedure without the driver or owner hearing anything, he assumes that the penalty is not going to be pursued. In the cases before me, individual appellants reacted with astonishment - and some with anger - at the process being revived after a lengthy delay. Certainly, such a disparity between the criminal and civil schemes in the ability to pursue a penalty would be odd and would be contrary to the intention of the decriminalised legislation that procedures under it should be speedy.

(iii) The expectations of the public - that they will be pursued promptly or not at all - are heightened by the fact that, just as the police often exercise their discretion not to pursue a contravenor of parking regulations, the enforcing authority under the scheme has a similar discretion. Indeed, as I indicate above, the back of the PCN says that, in

the event of non-payment, the Council *may* proceed to issue an NTO to the owner. That makes clear that the Council also *may not* pursue the penalty. The recent guidance from the Secretary of State (Paragraph 8.6: quoted above) makes it clear that, an enforcing local authority should carefully consider exercising its discretion in cases where there are extenuating circumstances. After a reasonable period of time, the recipient of the PCN (who will, in many cases, be the owner) is entitled to assume that the Council has decided, for one reason or another, to exercise its discretion not to pursue the penalty further.

(iv) There are time limits imposed on certain procedural steps that the recipient of the PCN and NTO are required to do. To take advantage of the 50% discount, he must pay the penalty within 14 days of the PCN being issued (Section 66(3)(d) of the 1991 Act). Representations against an NTO have to be made within 28 days, or the authority can simply ignore them (Paragraph 2(3) of Schedule 6). An appeal to the Parking Adjudicator generally has to be made within 28 days of the rejection of representations by the authority (Paragraph 5(1) of Schedule 6). Payment of the full penalty has to be made within 14 days of the rejection of an appeal by the Adjudicator, or the authority can issue a charge certificate. If the authority were under no time constraints at all, there would be a peculiar one-sidedness about the obligations under the scheme, in favour of the enforcer rather than person in jeopardy of the penalty.

(v) As time passes, evidential difficulties arise. The authority largely rely upon written evidence - the Parking Attendant's notebook, the computerised record, the PCN and NTO themselves - and such evidence is less prone to such difficulties. Nevertheless, the particulars of the case of Saeed Rezvani set out above (in which the Council could not locate the Attendant's notes after two years because they had been archived and were lost: when found, prior to the hearing of the review, they suggested that the Parking Attendant was not at the relevant place at the time of the alleged contravention), and Beudecor Ltd (in which relevant correspondence had been archived by the Council, and was consequently not available at the hearing or the review) show that time withers even documentary evidence. Memories certainly fade, and in many cases the recipient will have only his memory to rely upon. The scheme concerns an everyday activity. Many people - and not just those who drive as part of their living - park in various places many times a day. There is often nothing memorable in any

particular incidence of parking, and consequently they are unlikely to remember the circumstances of one incident of parking for very long. Therefore, delay is likely to prejudice an owner differentially.

Mr Harrison sought to use the fact that an Appellant was likely to have only his memory to rely upon in support of his submissions. In his skeleton argument he said:

> "The allegation of a driver that a notice was not received is in fact of less weight as time goes on and recollection may become more blurred than if the evidence is heard earlier, e.g. a driver may reliably and confidently state that they did not receive a ticket in the last week but it may be harder to assert a negative for a period of more than two years ago."

However, this proposition merely highlights the inevitable evidential prejudice suffered by an Appellant, reliant upon his memory rather than documentary evidence.

There is a further evidential point. As the Council properly accept, the burden of proof lies upon them to show that there was a contravention (Ronald Kenrick Douglas v The London Borough of Brent (PAS Case No 1960031276, 4 July 1997)). Mr Harrison makes the point that the Council usually rely upon documentary evidence to satisfy this burden: and such evidence is less likely to diminish in value. However, where the Appellant has (or may have) a defence to the contravention - for example, that he was engaged in loading or unloading, which comprises an exception to most regulations) - the burden of proof falls on him. Undue delay may well not only restrict an Appellant's ability to challenge evidence put forward by an authority, it may also prejudice his ability to satisfy the burden of proof that falls upon him in relation to these matters: after such delay he may simply be unable to recall what he was doing at a particular time, yet alone provide cogent evidence of it.

I believe it is for this reason that, in cases involving extensive delay, Adjudicators have held that they are not satisfied that the contravention in fact occurred. For example, in Paul Richard Davis, the Adjudicator found that, after the delay: "It is unreasonable to expect Mr Davis now to recall events. The contravention is disputed. I find there must be considerable doubt that it did occur." In Saeed Rezvani, the Adjudicator found that:

"... the unconscionable delay in the case has severely prejudiced the Appellant's ability to collate and preserve evidence." Of course, the passage of time may diminish the credibility of evidence to such an extent that an Adjudicator cannot be satisfied that the contravention occurred: but, in my view, it is not necessary for an Adjudicator to make any such finding in every case involving unreasonable delay. He may simply find that the authority has failed to comply with its obligation to act within a reasonable time: although, of course, in considering this issue, the actual or potential prejudice suffered by an Appellant as the result of delay (including potential evidential difficulties to which he may be put) is a relevant factor that the Adjudicator can and should take into account.

(vi) Such difficulties for the owner are compounded by the fact that the scheme imposes "strict" liability for a parking penalty on the owner of the vehicle, who may well not have been the driver or in charge of the vehicle at the time of the alleged contravention. The person responsible in fact may be a relative, or a friend, or a garage that has the car for repair (R v The Parking Adjudicator ex parte The London Borough of Wandsworth, QBCOF 96/1153/D, Unreported, 1 November 1996), or a customer borrowing a car from a garage whilst his car is being repaired, or some other person who has hired the vehicle other than under a "vehicle hiring agreement" agreement as defined in the statutory provisions: whereas the person liable to pay the penalty under the 1991 Act will be the owner. The Council submitted that it did not matter that the owner may not know about the issue of a PCN for months or years after the alleged contravention. But, as months and years pass, the owner may well be unable to trace the person responsible against whom he may well have a moral or even legal claim: for example, a hire company may - in the ordinary course of its business - destroy its hiring records after a certain period of time. This form of so-called "owner liability" is inconsistent with potential lengthy delays in the enforcement of penalties by authorities.

(vii) To enable an authority to enforce a penalty, a PCN must be issued and served, by being handed to the driver or person in charge of the vehicle, or (more usually) being affixed to the vehicle (Section 66(2)). Once the PCN has been served by being fixed to the vehicle, for the purposes of enforcement, it does not matter if the PCN does not come to the attention of the owner, or even the driver/person in charge. Therefore, an authority can enforce a penalty even if a PCN is removed (e.g. by a third party) prior to the return of the driver/person in charge to the vehicle. In these circumstances, lengthy

delay could severely prejudice the owner's ability to obtain or retain evidence with regard to the alleged incident. Again, this characteristic of the scheme (whereby it is quite possible that the person potentially liable may not know of his potential liability until service of an NTO) is inconsistent with lengthy delays in the enforcement of penalties by the relevant authority.

(viii) As indicated above, the primary purpose of the 1991 Act is for the good management of traffic (the ex parte Cran and ex parte The London Borough of Bexley cases referred to above). It is difficult to see how the pursuit of stale penalties after a lengthy period of time can in any way assist that purpose: certainly, there is no evidence before me that that purpose is facilitated.

Although the scheme is not fiscal in purpose, it may well be that timeliness on the part of the enforcing authority will also result in a higher recovery of penalties: the recent guidance from the Secretary of State (Paragraph 8.6: quoted above) suggests that full and prompt replies to representations "results in fewer appeals to adjudicators and more PCNs paid". However, bearing in mind the proper purpose of the scheme, this is a matter to which I can attach little, if any, weight.

Mr. Harrison argued that, to disenable an authority from pursuing a penalty after a limited time (say, six months), would defeat the traffic management purposes of the scheme, presumably because it may in some way encourage motorists to contravene the regulations, "chancing their arm" that the authority will not pursue them in good time. With respect, this argument has no merit. On the face of the argument, it seems highly unlikely that requiring an authority to act with reasonable expedition would encourage law breaking. But, in any event, as I point out in paragraph (ii) above, Parliament has seen fit to impose a six month time limit on commencing criminal proceedings in those geographical areas where the 1991 scheme is not in force.

Furthermore, following criticism of delays on the part of authorities in the Parking Appeals Service Report 1994-5 and elsewhere, the Parking Committee for London (of which The Royal Borough of Kensington & Chelsea is a member) said in their 1995-6 Report (at page 8): "[The Parking Committee for London is now seeking a change in the law to impose a six month maximum delay between serving a PCN and the first

[NTO]". The London Local Authorities Bill currently before Parliament (a Bill promoted by all London boroughs except Barnet, but including Kensington & Chelsea), with some exceptions (for example where there have been undue delays in the DVLA providing details of a registered keeper), it is proposed expressly to prevent an authority from pursuing a PCN if it has not issued an NTO within 6 months (Clause 29). It is inconceivable that such a Bill would be so sponsored if it were thought that such a time limit would defeat the purposes of the scheme. Indeed, the proposed provision suggests that the requirement for reasonably prompt prosecution of process by authorities is regarded as an important element in the scheme.

(ix) A further, important purpose of the scheme is to provide for the quick and simple determination of liability for, and enforcement of, a particular parking penalty. The Secretary of State's Consultation Paper (referred to above) refers to the "quick and simple procedures" of the Parking Appeals Service: the intention of the Act would be denied if the speed and simplicity of such procedures were compromised by unreasonable delays on the part of the relevant local authority.

(x) Although yet to have been incorporated directly into our domestic law, the United Kingdom is a signatory to the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("the European Convention on Human Rights"). The Human Rights Bill currently before Parliament expressly provides that all domestic primary and secondary legislation must be read so as to be compatible with the Convention rights (Clause 3). In the meantime, the Courts have vacillated about whether the Convention has any effect in this jurisdiction. Although there are conflicting authorities, the generally held view (set out, for example, by Lord Donaldson MR in R v Secretary of State for the Home Department ex parte Brind (1991) 2 WLR 588) is that, where the English statutory provisions are clear, the terms of the Convention have no relevance: but, where the statutory provisions are ambiguous, then there is a presumption that Parliament intended to comply with the Government's Convention obligations. In other words, the Courts will strive to interpret English law in accordance with the Convention wherever possible (Attorney General v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 at 658, per Lord Goff).

Reflecting the Universal Declaration of Human Rights (Paris, 10 December 1948; UN 2 (1948); Cmd 7662) upon which it is based, Article 6 of the Convention provides (emphasis added):

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law...
>
> 2. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him..."

Whether a contravention of parking regulations under the scheme of the 1991 Act is "criminal" or "civil" is a moot point. Mr. Harrison considered, on balance, that it was civil. However, although the Act decriminalises such contraventions, that is not decisive: nor is the fact that the sanction for the contravention is not serious (a penalty and charges that can in aggregate amount to no more than £100 or so at maximum). The European Court case of Öztürk v Germany (1984) 6 EHRR 409 was considered at the hearing of this review. German law allows minor traffic offences - including careless driving - to be treated as "regulatory" and dealt with by administrative authorities. Nevertheless, the European Court held that, despite "decriminalisation", such offences were still "criminal" within the meaning of the Convention, and consequently attracted the greater protection of Article 6(3). The Court said (at pages 423-4):

> "...[T]he Court would firstly note that, according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty....The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6."

Therefore, although it is not a matter I need to decide for the purposes of this decision, it is certainly arguable that the 1991 Act scheme is such as to bring Article 6(3) into play. That would require the contravention to be notified to the owner (presumably by service of the NTO) "promptly".

In any event, whether criminal or civil under the Convention, Article 6(1) applies, and that requires the determination of rights by an independent and impartial tribunal - in the case of the 1991 Act scheme, that would be a Parking Adjudicator - "within a reasonable time". That necessarily requires all preceding steps to be taken reasonably timely. Factors to be taken into account in considering whether there has been undue delay include (i) the conduct of the relevant administrative and judicial authorities (i.e. whether responsibility for delay lies with the authorities or the Courts): and (ii) the complexity of the issues involved (the more complex, the greater the reasonable time they may take to investigate and determine) (Conig v Federal Republic of Germany (1978) 2 EHRR 170). I do not find the cases that have come before the European Court with regard to delay of which I am aware to be particularly helpful on what might be regarded as reasonable in the context of the 1991 Act scheme: but, of course, the issues involved in most cases under the 1991 Act are not complex, and do not require any substantial investigation at all. In none of the cases before me has complexity been suggested as a reason for any delay. Furthermore, in all of the cases, the Council has been guilty of material delay: and the Appellant has not been guilty of none.

I need say no more about Article 6 for the purposes of this decision: other than to remark that the provision again underlines the concern expressed in many places and in many fora about the evils of delay in the determination of rights, echoing the adage that "Justice delayed is justice denied".

In all of the circumstances, I am satisfied that, the wording of the statutory scheme necessarily imposes on an authority a burden to take all steps within a reasonable time. What will amount to a reasonable time will, of course, depend upon the individual circumstances of a particular case. Where an authority has used its best efforts to pursue a penalty, but are thwarted (e.g.) by a vehicle owner avoiding service of the NTO, then a substantial period may pass without the authority losing the ability to pursue a penalty. However, where delay lies at the door of the authority itself, then the period may be relatively short.

Mr Harrison for the Council suggested that delay alone - without prejudice to the owner of the vehicle - could never be sufficient to deny an authority the right to pursue a penalty. That submission was based upon the premise that the authority's right to pursue a penalty could only be prejudiced in the same way as a right to sue in Court. For the reasons set out above, I consider that analysis to be wrong. The extent to which the owner has been prejudiced by the delay is, in my view, just one factor that has to be taken into account in assessing whether that delay has been reasonable. It is neither necessary nor determinative: and there is no burden falling on the owner to prove that delay is prejudicial to him before delay can be held to be so unreasonable that the Council are denied from further pursuing the penalty (although of course evidence of prejudice in a specific case may be compelling). I do not consider that the statutory scheme envisages a detailed examination of the individual circumstances of an Appellant and a particular instance of parking in every case, in a search for specific prejudice to be balanced against the legitimate rights of an authority to pursue a penalty, where an authority has unreasonably delayed in pursuing a penalty under the scheme. The scheme requires in this aspect - as in so many others - a simpler and more robust approach than that.

I must stress that each case will depend on its own facts, and there are consequently dangers in expressing any view as to appropriate times for an authority to take a particular step. The Council submit - and I fully agree - that it would be wrong for either local authorities or Adjudicators to operate any fixed absolute time limit on the performance of any act under the scheme, that would be applied in all circumstances, or even a rigorously applied "rule of thumb". However, I know that the Council (and other authorities) are understandably looking to this case in the hope that it may give them some guidance for the future. Therefore, with the caveats I have made and with some diffidence, before returning to the individual cases before me, I will make some general comments on some of the factors that I consider relevant when considering whether a delay has been reasonable or unreasonable.

(i) Issue of NTO

In considering what is a reasonable time for service of an NTO, I consider the following factors are relevant:

(a) The authority has a discretion as to whether or not it issues an NTO (Paragraph 1 of Schedule 6 to the 1991 Act), and it is clear from the face of the PCN that the authority may (or, alternatively, may not) pursue the penalty by serving an NTO. As it is clear that the authority may legitimately exercise its discretion not to proceed, there will come a time when the passage of time will legitimately lead the driver/person in charge and owner to believe the matter not to be pursued.

(b) In the parallel criminal scheme (operating in most areas outside London), a parking fine cannot be pursued if an information is not laid within six months (Magistrates' Courts Act 1980 s 127). That six month period is, of course, a log stop limitation: in practice, the period between alleged contravention and the police proceeding is usually much shorter.

(c) In its Annual Report 1994-5, the Parking Appeals Service recommended that the first NTO be sent out within six months of the PCN: and, where it had not been, then a senior member of the authority should consider whether there were any exceptional reason as to why an NTO should be served. Otherwise, it was recommended that the PCN should be cancelled. As in the criminal scheme, this six month period was put forward as a long stop limitation for all but extraordinary cases.

(d) In response to criticisms about delay, the Parking Committee for London indicated in its 1995-6 Report that it was seeking a change in the law to impose a six month maximum period for the issue of the first NTO. As indicated above, the Committee have since sponsored The London Local Authorities Bill, Clause 29 of which would expressly prevent an authority from pursuing a penalty if it had not issued an NTO within six months of the PCN. However, that Bill excepts circumstances in which there have been undue delays by the DVLA in providing details of a registered keeper.

(e) When the 1991 Act scheme was first introduced to London, The Association of London Authorities and The London Boroughs Association commissioned a Code of Practice on Parking Enforcement, which was published by The Parking Committee for London. That Code of Practice (Paragraph 4) assumed there would be a computer transfer data system with the DVLA (with a turnaround time of 7-8 days), and indicated that an authority should submit an application to the DVLA for data at or around 21 days

after the issue and non-payment of a PCN, so that NTOs could be sent out very shortly after 28 days had elapsed after issue of the PCN. The Code assumed that each authority would issue an NTO in appropriate circumstances as soon as it could, to obtain payment as quickly as possible. However, even the Code envisaged circumstances in which a request to the DVLA was unsuccessful: it suggested a repeat request after 6 weeks (Paragraph 4.5).

(f) Although at the outset it was anticipated that there would be a computer link between the authorities and the DVLA, this has not materialised. Enquiries are made by enforcing authorities by post, on a VQ4 form. The Council complains about substantial delays in the DVLA responding. In her letter to the Parking Appeals Service dated 28 October 1997, Miss Linda Wheeler (the Council's Head of Parking Operations) said:

> "A large number of cases are delayed due to poor and erratic performance of the DVLA and their enquiry procedures. As a result, information is not obtained until the second, third or even fourth attempts. Despite repeated references to this in reports to the Parking Committee, no acknowledgement of this difficulty appears to be made by the Parking Appeals Service. This is not a service that can be obtained elsewhere and neither the [Parking Committee] or the [local authorities] have any appreciable input to change the position.
>
> It is our strong position that the enforcement of parking law should not be compromised by the failure of the sole information source to properly administer their records."

Similarly, Mr Yates in his evidence (Statement dated 26 November 1997) said:

> "It is evident from the four cases that one request to the DVLA for owner and vehicle details is seldom sufficient. In some instances the reply that is provided contains no information or incomplete information. In other instances, the lack of information kept by the DVLA is attributable to failure by the owners to provide information when there is a change of ownership or address, which is often only remedied within a period of up to one year in addition to processing time because of the obligation to renew road tax at least once a year.

> Without sufficient information as to current owner and a current address, no [NTO] can be issued with regarding to the enforcement of the penalty charge."

However, in the four cases before me, the material delays were not directly caused by the DVLA. It is true that, in the case of Patras Mahgaram, three requests to the DVLA for keeper details were necessary before the relevant information was provided, but, as explained in the evidence of Mr Blake (quoted above), the material delay was a period of 17 months between sending the second and third request, apparently because of a systems failure at the Council's end, which "problems are now being resolved". In the case of Saeed Rezvani, the DVLA returned the address of the finance institution for the disabled, Motability, as the registered keeper (and post was apparently returned from that address unopened). However, it seems that Mr Rezvani had in any event written to the Council shortly after the PCN was issued, with his home address: and there is no evidence that the Council made any efforts to trace an address for service on Mr Rezvani through the Motability organisation. There were no suggested delays at the hands of the DVLA in the other two cases.

Nevertheless, I know from experience in other cases that delays can occur when the DVLA are slow in responding to even repeated requests. In a case where the authority has done everything it reasonably can to obtain the owner's details from the DVLA (by regular requests, if necessary), or other sources, then that is something which can and should taken into account in assessing whether an NTO has been served within a reasonable time. Similarly, where an owner has by his own act or omission led to difficulties in obtaining this information - for example, where a new owner has not sent his details to the DVLA promptly - that too is a matter that should be taken into account.

(g) An owner may seek to avoid service of the NTO, and thereby cause delay, by all sorts of other means. Where delay has been caused by the owner, this is of course a matter that should be taken into account in considering whether there has been unreasonable delay in service: particularly in circumstances in which the authority has done what it can to ensure prompt service.

(h) Of course, local authorities have many and diverse calls upon their time and resources: the resources for any particular function are necessarily not limitless, and that applies to parking enforcement as much as any other function. In relation to the Patras Mahgaram case (in which there was a 17 month delay in the Council sending a repeat request for keeper details to the DVLA), one reason given for the delay was "the amount of time that can be allocated to this task by the Council's Contractors" (letter from Lawrence Blake of the Council to the Parking Appeals Service dated 27 October 1997).

The way in which valuable resources are allocated by local government is, of course, a matter of policy for the relevant authorities. However, it is unlikely that a lack of resources (or the manner in which scarce resources are allocated) would render reasonable an otherwise unreasonable delay in serving an NTO.

(i) Similarly, with a failure of the systems used by the Council. In his letter of 27 October 1997 referred to above (dealing with the case of Patras Mahgaram), Mr Blake of the Council said, in explanation of the 17 month delay between the issue of the second and third enquiry forms to the DVLA:

> "The explanation for this is that as a result of the Council taking over enforcement of parking from the Metropolitan Police, new systems had to be introduced between the Council and its contractors. Inevitably, there were some problems experienced with those systems, one of which has resulted in delays occurring on the reissue of VQ4 enquiries. I am pleased to say that these problems are now being resolved..."

In her letter of the following day to the Parking Appeals Service, the Head of Parking Operations for the Council (Miss Linda Wheeler) wrote, in similar terms:

> "It is accepted that at the start of the local authority enforcement of parking restrictions the computer systems were underdeveloped and untested. Where administrative procedures were insufficient to identify these blockages a number of cases became "stuck" at fairly early stages in the process. These were minor problems in themselves but as they were not

spotted for some time a large number of cases were involved. Subsequently, strenuous efforts have been made to catch though it is a process that has to be phased over a number of months to avoid overload of the DVLA, administration and representation clerks."

However, again, it is unlikely that such problems would render reasonable an otherwise unreasonable delay: but, some comfort can be drawn from the fact that these problems appear to have been of a "teething" nature and not long-term.

(j) The Code of Practice referred to above indicated that a ground for cancelling a PCN (and, presumably, an NTO) could include "where there has been undue delay in the processing of the PCN" (Paragraph 7.7).

(k) In Mr Blake's letter to the Parking Appeals Service dated 27 October 1997, he indicates that the 2 month between the issue of the PCN and issue of the NTO in the Patras Mahgaram case, was considered by the Council to be "quite normal in processing the case". In the Paul Richard Davis case, it took about 10 weeks from the issue of the PCN (on 7 November 1995) to the issue of a charge certificate (on 24 January 1996). In other cases before me, of course, it took several months or more to issue the NTO or respond to representations.

(l) In two of the cases before me, following the issue of a charge certificate, the Appellant successfully applied to the County Court (on the basis of a statutory declaration) for an order setting aside both the charge certificate and NTO, on the basis that he had never received the NTO. Paragraph 8(5) of Schedule 6 to the 1991 Act effectively makes the statutory declaration conclusive proof that the original NTO was not received by the owner, and that is something I do not consider an Adjudicator can properly go behind.

Therefore, I must work on the basis that in each of these cases the Appellant received an NTO for the first time many months after the alleged contravention. In the case of Paul Richard Davis, the alleged contravention was in November 1995: the first he knew of the contravention was in February or March 1997: and, following the setting aside of the first NTO, a second NTO was served in April 1997 (18 months after the

contravention). In the case of Saeed Rezvani, the alleged contravention was in July 1995: and, following the events which I have set out above, an NTO was first served on the Appellant in February 1997 (again, 18 months after the contravention).

Where there has been an aborted attempt at service of an NTO - followed later by successful service - again it will depend upon the circumstances of the case as to whether the delay has been unreasonable. Where an authority has been expeditious in obtaining and attempting to enforce a charge certificate, that will clearly be an important factor that will have to be taken into account. However, where the authority has not been prompt - and particularly where the owner has not been at fault - the fact that the effective NTO is not the first may well not be determinative. On the basis that an NTO can normally be served within 2-3 months of an alleged contravention, even in a statutory declaration case the (second) NTO could normally be served within six months of the PCN. However, in such a case an authority may have more compelling reasons why a longer period is not unreasonable, for example where the delay has been caused by the owner himself (e.g. where the owner has failed to keep up to date his details as registered at the DVLA, and that resulted in the failed service of the first NTO).

As an alternative to their submission with regard to limitation, the Council submitted that in any event it would not amount to unreasonable delay if an NTO were issued up to six years after the issue of a PCN. I cannot accept this. Bearing the above factors in mind, and reiterating the caveats I have made above, I would say that for my own part I consider that, bearing in mind the administration of these matters that is involved, in the usual case an NTO should certainly be served within six months after the issue of the PCN upon which it is based. Even after the expiry of six months, it would still be open to the authority to show that the time taken to serve the NTO was not unreasonable in all of the circumstances (unlike under the proposed statutory amendment that, if enacted, would generally restrain an authority from serving a first NTO more than six months after the PCN). However, at that stage it would in my view be incumbent on the authority at least to show good reason why there had been delay and that, in all the circumstances of the case, they should be allowed to proceed to enforce the penalty.

(ii) Consideration of Representations

In considering what is a reasonable time for an authority to consider representations made to it, I consider the following factors are relevant:

(a) The authority has a duty to consider representations (Paragraph 2(7) of Schedule 6) and, in addition to a duty to accept them if one of the statutory grounds are met (Paragraph 3(1)), it has a discretion as to whether or not to cancel the NTO at this stage. Indeed, this is the stage at which matters of mitigation can be taken into account. As with the service of the NTO, as it is clear that the authority may legitimately exercise its discretion not to proceed at this stage, there will come a time when the passage of time will legitimately lead the owner to believe the matter not to be pursued.

(b) The Parking Committee for London Code of Practice referred to above says (at Paragraph 6.3):

> "There is no stipulated time limit for authorities to deal with representations against an [NTO], but authorities will, no doubt, wish to respond speedily in order to obtain payment as quickly as possible..."

(c) In a case of clamping or removal (where the authority is holding the money of the driver/owner), the authority is required to consider representations within 56 days (Section 71(6) of the 1991 Act). A precise time limit is necessary in this instance because there is a specific sanction in default, namely the authority are deemed to have accepted the representations and they have to effect a refund of both penalty and charges (Section 71(9)). However, Parliament clearly considers 56 days a reasonable time (as a long stop limitation) for an authority to consider representations made to it in respect of clamping and removal.

(d) In its Annual Report 1995-6, the Parking Appeals Service made the following recommendation:

> "All representations, whether following clamp or removal, or [an NTO], should normally be dealt with as soon as possible, preferably within 28 days but, in any event, within 56 days, despite the fact that Schedule 6 does not impose a 56 day bar on dealing with representations following [an NTO]. Where there is good

reason for taking longer than 56 days, for example the representations require the local authority making further investigation. A holding letter should be sent to the person making the representations explaining the reason for the delay and that the matter is being held open by the authority pending the investigation. Where representations have not been considered within 56 days for no good reason (lack of resources is a doubtful reason) the Section 71(9) procedure should be followed and the representations adopted."

Bearing the above factors in mind, and again reiterating the caveats I have made above, for my own part I consider that in the usual case representations in respect of an NTO should be considered by an authority within 2-3 months from receipt. However, again, thereafter, it would still be open to the authority to show that the delay in considering the representations was not unreasonable in all of the circumstances. That may be a difficult task, as the consideration of the representations is likely to be entirely within their own hands: but, for example, as the Parking Appeals Service Report points out, a particular case may require further investigation (into the facts and/or legal issues) and such investigation may mean that a period of over 2-3 months would be quite reasonable.

(iii) Enforcement of a Charge Certificate

In considering what is a reasonable time for an authority to serve, register with the County Court and enforce a charge certificate it has obtained from, I consider the following factors are relevant:

(a) The authority has a discretion as to whether or not to serve, register or pursue a charge certificate (Paragraphs 6(1) and 7 of Schedule 6: both of which specifically identify the discretion by the use of the word "may"). Once more, the same point can be made with regard to the exercise of the authority's discretion here, as at earlier stage of the procedure: there will come a time when the passage of time will legitimately lead the owner to believe the matter not to be pursued.

(b) There is no express limitation period for the service of a charge certificate. Having served the certificate and waited the statutory 14 days, as a matter of limitation, an authority will have six years within which to seek a County Court order under CCR

Order 48B Rule 2. After the order has been obtained, a warrant of execution will not issue more than six years after the order, except with the leave of the Court (CCR Order 48B Rule 5(1) and Order 26 Rule 5).

(c) In its Annual Report 1995-6, the Parking Appeals Service made the following recommendation:

> "The penalty charge should be cancelled without further process if more than six months has elapsed after the service of the charge certificate without the local authority taking steps to register the debt at the County Court. If delay is anticipated in taking the decision to register debts, warning letters should be sent to defaulters giving a further opportunity to pay and warning again of the potential debt registration"

It seems to me at this stage of the procedure, the real incentive for an authority to ensure speedy enforcement (in a case where it decides to enforce through the County Court) is that, if the owner submits an application under Paragraph 8 of Schedule 6 to the 1991 Act - and successfully revokes the charge certificate and NTO - the authority may be unable to prosecute a second NTO because of that delay, if it has not acted expeditiously. In these circumstances, it is unlikely that delay at the charge certificate stage will feature in many cases.

Nevertheless, the case of Paul Richard Davis is one example of such a delay: in that case, the Council did not seek a County Court order for 12 months after purporting to serve the charge certificate on Mr Davis. However, the reason for this delay (the lack of a computer link-up with the relevant County Court) appears now to have been dealt with, and is unlikely to be repeated.

There seems to me to be no good reason for an authority to take any great length of time in deciding to proceed to serve, register and enforce a charge certificate. A vehicle owner is just as entitled to know where he stands with regard to enforcement at this stage, as at any other. However, bearing in mind the fact that an authority will jeopardise its own ability to enforce through a second NTO (if the person the subject of the first lodges a proper statutory declaration), it seems to me that cases will be so rare and so turn on their own individual facts that it is unnecessary - and would be unwise - for me to suggest any time that I would consider reasonable in a "normal" case. Each case will have to be considered upon its own facts.

Evidential Matters

I have already considered these fully, when dealing with the duty to act fairly, above.

Consequences of a Breach of the Council's Duty to Act Fairly

In a case where a Parking Adjudicator finds that an authority (such as the Council) has acted in breach of its obligation to act with reasonable timeliness, what are the consequences of that failure?

Mr Harrison submitted that, in any case of undue delay, the Council would in practice consent to an appeal to the Adjudicator being allowed, under Regulation 14(c) of The Road Traffic (Parking Adjudicators) (London) Regulations 1993. It is certainly hoped that that would be the case with any local authority - but it does not address the question of the jurisdiction of the Adjudicator in these circumstances.

I have held that the Council's obligation to act with reasonable timeliness is part of its wider duty to act fairly. The Council is itself a creature of statute, and cannot act outside the powers that have been conferred upon it by Parliament. As I have already indicated, unless the contrary appears, there is an implication that Parliament has not authorised the exercise of such powers in breach of this duty: and a decision which is taken contrary to the obligations imposed by the duty is outside the jurisdiction of the authority, and is consequently *ultra vires* and void.

Where an authority may have acted outside its lawful powers, a Parking Adjudicator is entitled to consider the *vires* of the authority and adjudicate upon the matter. That this is the role of a Parking Adjudicator was endorsed by the Divisional Court (Scott Baker J) in R v The Parking Adjudicator ex parte The London Borough of Bexley (CO/1616/96, Unreported, 29 July 1997) (Transcript, pages 12E-15D). That case concerned the collateral challenge to part of an underlying traffic management order, and the Court found that the Adjudicator had express powers to consider the *vires* of this order by virtue of Paragraph 2(4)(d) of Schedule 6 to the 1991 Act: but it made clear that, even without that express provision, it would have considered the Adjudicator would have been entitled to consider the *vires* of the authority (Transcript, page 14E). The fact that the Adjudicator has no power to make a declaration as to the invalidity of

such an order does not affect his ability to consider a collateral challenge to that order (Chief Adjudication Officer -v- Foster [1993] AC754 at 764 E-G, per Lord Bridge).

I do not consider there is any difference in principle between a collateral challenge of a traffic management order (as in the Bexley case) and of a decision of an authority to pursue a penalty in circumstances in which it has breached its duty to act fairly. That duty is implied into the statutory provisions and is as much a part of them as the express terms of the statute or order themselves.

If the Adjudicator did not have this power, where an owner received an NTO in circumstances in which the authority had breached its duty to act fairly, the Adjudicator would be unable to allow the appeal. The only course open to an owner would be to seek judicial review of the authorities' decision to pursue the penalty. The parking penalties in question give rise to financial liabilities of a modest level. I do not consider that Parliament could have intended such penalties to give rise to a "cumbrous duplicity of proceedings which could only add to the already over-burdened list of applications for judicial review awaiting determination by the Divisional Court" (Chief Adjudication Officer -v- Foster [1993] AC 754 at 766H, per Lord Bridge). Insofar as owners of vehicles were deterred from seeking judicial review - by the work and time that would necessarily be involved - the result would be that the improper exercise of statutory powers would go unchecked. This could not have been the intention of Parliament.

If an Adjudicator upholds a collateral challenge, the correct analysis is not that the contravention did not occur. Rather, it is that the authority has failed to comply with the requirements of the statutory regime (including the implied obligation to act fairly), to dis-enable it from pursuing the penalty. Therefore, where a PCN failed to include all of the information it was required to include (under Section 66(3) of the 1991 Act), the Adjudicator found that the PCN was *ultra vires* and void, and the authority could not rely upon it to enforce a penalty (Frederick Moulder v The London Borough of Sutton (PAS Case No 1940113243, 24 May 1995)).

Similarly, where an Adjudicator finds that an authority has acted *ultra vires* in failing to comply with its duty to act fairly, for example by not acting with reasonable timeliness, he can - and, indeed, must - find that the authority cannot pursue a penalty based upon its own unlawful act, with the result that he must allow the Appellant's appeal.

Individual Cases: Determination

I now return to the individual cases. Because I have already set out the facts of each case at some length and dealt with the issues of principle, and because the Council has indicated that they will not pursue any penalty against any of the Appellants in any event, I can deal with the determination of these appeals quite shortly.

A. Paul Richard Davis (PAS Case No 1970198981) (PCN No KC97014601)

As I indicate in my review of the facts of this case above, the Appellant appears to have acted promptly at all times. On the other hand having "served" a charge certificate on 24 January 1996, the Council did not register the order at the County Court until 3 February 1997. The reason for that was, apparently, no cases were registered manually, and the computer link to the County Court was not up-and-running until November 1996. The Appellant was successful in having the charge certificate and first NTO set aside by the County Court. However, had it not been for this delay, the Counsel's second NTO could have been served in this case in under six months after the alleged contravention. In the event, the Appellant received an NTO only 18 months after the alleged contravention.

I do not consider that the Council acted with reasonable timeliness in this case. It is clear from the Notice of Appeal lodged on the Appellant's behalf that the driver of the relevant vehicle during the period during which the alleged contravention took place, was not the Appellant himself (who was the owner of the vehicle). The Appellant was abroad. Not surprisingly given the passage of time and circumstances, neither the driver nor the Appellant could not recall any incident at all. Certainly, none of the delay was their fault.

In the circumstances, I consider the Council did breach their obligations to act in a timely manner, with the result that they cannot now pursue any penalty against the Appellant. For these reasons, having reviewed the case, I uphold the decision of Parking Adjudicator Henry Michael Greenslade of 15 October 1997 in allowing the appeal.

B. Saeed Rezvani (PAS Case No 1970182813) (PCN No KC82031753)

Leaving aside the delay in this case, on the available evidence (including the Parking Attendant's hand written notes, that were available on the hearing of the review but not at the original hearing before Parking Adjudicator Paul Wright), I am not satisfied that this contravention took place. There is no reference at all to the Appellant's vehicle in the notes: and, from the notes, it appears that the Parking Attendant was in a different street at the relevant time.

However, even if the Council did not face these evidential difficulties, I would find that the delay before issuing the second NTO was unreasonable and inadequately explained. Again, it resulted in the Appellant not receiving an NTO until 18 months after the alleged contravention. By the time he received that NTO, he says (and I accept) that he had no knowledge about or recollection of the incident. That the penalty was pursued so long after the alleged contravention, clearly caused the Appellant (who is disabled) considerable distress. The Appellant was not responsible for any of the material delay.

In the circumstances, not only do I find that the Council have failed to satisfy me that there was indeed any contravention of the parking regulations, but also I consider the Council breached their obligations to act in a timely manner, with the result that they cannot now pursue any penalty against the Appellant. For these reasons, having reviewed the case, I uphold the decision of Parking Adjudicator Paul Wright of 16 September 1997 in allowing the appeal.

C. Beaudecor Ltd (PAS Case No 1970161595) (PCN No KC73035254)

In this case, the PCN was issued on 7 December 1995: the Council sent the first NTO out on 25 February 1997 (about 14 months later). The material delay is unexplained by the Council, but there appears to have been a system failure, in that a letter from the Appellant dated 8 December 1995, which required a substantive response, was not considered or answered (other than by a holding response from the Council's parking contractors). Again, by the time the NTO was received by the Appellant, despite the earlier correspondence (which even the Council cannot now locate, because of the passage of time), the Appellant had no record of the PCN nor could recall anything about it. None of the delay lies at the hands of the Appellant.

In the circumstances, I consider the Council breached their obligations to act in a timely manner, with the result that they cannot now pursue any penalty against the Appellant. For these reasons, having reviewed the case, I uphold the decision of Parking Adjudicator Susan Turquet of 27 August 1997 in allowing the appeal.

D. Patras Mahgaram (PAS Case No 1970213021) (PCN No KC71041959)

The delay in this case was caused by the passage of 17 months between the Counsel's second and third requests to the DVLA in respect of details of the registered keeper. By the time (first) NTO was sent to the Appellant (on 3 June 1997), 20 months had elapsed since the alleged contravention. The Appellant indicated that he had no recollection of receiving the PCN, nor of the relevant incident. None of the delay was caused by him.

In the circumstances, I consider the Counsel breached their obligations to act in a timely manner, with the result that they cannot now pursue any penalty against the Appellant. This is not a review case, but a substantive appeal. For the reasons set out above, I allow this appeal and direct the Council to cancel the PCN and NTO.

G R Hickinbottom

30 March 1998