Neutral Citation Number: [2011] EWHC 295 (Admin)

Case No: CO/13317/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2011

Before :

THE HON. MR. JUSTICE BURNETT

- -

Between :

LONDON BOROUGH OF CAMDEN	**Claimant**
- and -	
THE PARKING ADJUDICATOR	**Defendant**
-and-	
(1) BFS GROUP 03568 t/a FIRST FOR FOOD SERVICE	
(2) LEE SUGDEN	**Interested**
(3) AIDAN BRADY	**Parties**

- -
- -

Philip Coppel QC (instructed by **London Borough of Camden**) for the **Claimant**
Ian Rogers (instructed by **PATAS**) for the **Defendant**

Hearing dates: **22nd and 23rd November 2010**

- -

Approved Judgment

The Hon. Mr. Justice Burnett :

Introduction

1. For a short time in 2008 and 2009 Camden Borough Council ["the Council"] applied a 1.3% 'administration charge', as they termed it, for paying sums by credit card due by way of civil penalty for parking contraventions. Between 14 August and 6 October 2009 Parking Adjudicators allowed four appeals against the imposition of the civil penalties themselves because of the existence of the 1.3% charge, which had been notified to the drivers or owners in one or more of the statutory documents generated following the alleged parking contravention. This application for judicial review seeks to quash the decisions of those Parking Adjudicators. The ground relied upon in support of the application is that none of the statutory grounds upon which an adjudicator is empowered to allow an appeal was satisfied. In consequence it is submitted that each adjudicator exceeded his powers. If the Council were to be successful in this application for judicial review, the result would not be to disturb the position in respect of the four drivers or owners concerned. A condition of the grant of permission to apply for judicial review was that they should not have to pay the charges come what may. They are technically interested parties in these proceedings but, unsurprisingly, have taken no part.

2. The appeals were argued before the Parking Adjudicators on the premise that the Council had no power to impose the charge and thus in doing so were acting *ultra vires*. The parties have assumed the same premise before this Court. I have not been asked to determine the underlying question whether the Council had power to impose the administration charge. Mr Philip Coppel QC, who appears for the Council, has explained that they will if necessary (in these or other proceedings) argue elsewhere that the imposing of the powers was within their statutory powers.

Procedural History

3. These proceedings were issued on 9 November 2009. The Parking Adjudicators very properly did not oppose the grant of permission when they lodged their acknowledgment of service. The papers were placed before His Honour Judge Thornton QC sitting as a deputy High Court Judge on 5 March 2010. He granted permission on terms which included the condition already referred to. Additionally he ordered

> **"**The defendant is protected from liability [to] pay any of the claimant's costs and is to recover the reasonable costs of representation by counsel at the hearing and of any defence document or skeleton."

On 25 March 2010 the Council applied to set aside that part of the Judge's order. The application suggested that the matter be dealt with at the substantive hearing. That was a suggestion made in the interest of saving public money all round. The Parking Adjudicators did not suggest that the matter be heard sooner. Their detailed grounds followed at the end of April.

4. This chronology has resulted in an unsatisfactory state of affairs. The Parking Adjudicators have taken part in these proceedings in circumstances where there is an order providing not

only costs protection should the judicial review claim against them succeed, but also what amounts to an indemnity in respect of their own costs. Nevertheless, they were at all times aware that the order was vulnerable to being set aside. Having considered the arguments of the parties I am satisfied that it is appropriate to set aside that part of the order made by the Judge. Costs protection is not uncommonly sought in a claim form, when the claimant seeks an order freeing him from liability should he lose the claim, or limiting his liability. When that occurs the defendant will invariably deal with the issue in the acknowledgment of service and summary grounds, with a view to the judge considering the matter on the papers. The judge is then armed with argument. Any decision made can be revisited in an oral hearing if either party requests it. There is a substantial body of law concerning the provision of costs protection to claimants flowing from the decision of the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600. In *R (Ministry of Defence) v. Wiltshire & Swindon Coroner* [2005] EWHC 889 (Admin); [2006] 1 WLR 134 Collins J decided that there was 'no reason in principle why a protective costs order should not in an appropriate case extend to protect the position of a defendant'. But he considered that such an order would be 'unusual and no doubt exceedingly rare' (paragraph [34]). Whilst understanding why the judge wished to immunise the defendants from any costs liability, there was in my judgment no material before him which could lead to the conclusion that it was appropriate to do so. It is necessary, in my judgment, before such an order is made for there to be an application by the defendant concerned, with an explanation by reference to the principles established by the authorities why such protection should be granted. Quite apart from costs protection in the *Corner House* sense, there is a well established practice relating to costs in judicial review proceedings against inferior courts and tribunals, summarised by Brooke LJ in *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207; [2004] 1 WLR 2739 at [47]:

> "It will be apparent from this judgment that the answers to the questions I posed in paragraph 3 above are:
>
> (i) The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings;
>
> (ii) The established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event;
>
> (iii) If, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case-law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application;

> (iv) There are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (iii) above, so that a successful applicant, like Mr Touche, who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a coroner (or other inferior tribunal) has gone wrong in law, and there is no other very obvious candidate available to pay his costs."

Given the special treatment afforded to such bodies it is extremely difficult to envisage the circumstances in which it would be appropriate to provide wider costs protection to them in judicial review proceedings.

The Statutory Scheme

5. Parking contraventions, along with all other motoring transgressions, were historically treated as criminal offences. That rather heavy handed approach was reformed, initially by the Road Traffic Act 1991 ["the 1991 Act"]. That Act enabled local authorities to be granted decriminalised parking enforcement powers. Section 76 of the 1991 Act provided that where such powers were granted to a local authority within London, parking contraventions would cease to be criminal offences, but instead give rise to civil penalties. Section 77 provided:

> "(1) This section applies in relation to any vehicle which is stationary in a special parking area (but which is not a designated parking place) in circumstances in which an offence would have been committed with respect to the vehicle but for section 76(3) above.
>
> (2) A penalty charge shall be payable with respect to the vehicle by the owner of the vehicle."

The Traffic Management Act 2004 ["the 2004 Act"], which now governs the regime, maintained the express link between identifiable former criminal offences (largely created by the Road Traffic Management Act 1984) and civil penalties for many, but not all, parking contraventions. Civil penalties apply in respect of many traffic contraventions in addition to those relating to parking. The information provided by the Parking Adjudicators shows that there remain some local authority areas in England and Wales that have not been designated for the purposes of civil enforcement, but they are relatively few. The Council, along with all others in London, operate the civil penalty system. There are some differences in the statutory scheme as it applies to local authorities in London as opposed to other areas, but they are not material for the purposes of this application for judicial review. It is sufficient to note that the system of appeals against civil penalties provides for separate bodies of adjudicators for London and elsewhere in England and Wales.

6. Three different statutory documents might be created in the course of a council's dealings with a motorist for a parking contravention prior to an appeal to a Parking Adjudicator. They are a penalty charge notice, a notice to owner and a notice of rejection. Each is referred to in the regulations comprised in secondary legislation which governs the imposition of penalty charges, their enforcement and the appellate jurisdiction of the Parking Adjudicators. Those regulations are The Civil Enforcement of Parking Contraventions (England) General Regulations 2007 ["the General Regulations"] and The Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007 ["the Appeals Regulations"].

7. A penalty charge is defined by the General Regulations as meaning 'a penalty charge relating to a parking contravention and payable in accordance with regulation 4'. Regulation 4 of the General Regulations provides:

> "4. Subject to the provisions of these Regulations a penalty charge is payable with respect to a vehicle where there had been committed in relation to that vehicle-
>
> (a) a parking contravention within paragraph one of Schedule 7 to the 2004 Act (contraventions relating to parking places in Greater London);
>
> (b) a parking contravention within paragraph 3 of that Schedule (other parking contraventions in Greater London) in a civil enforcement area in Greater London; or
>
> (c) a parking contravention within paragraph 4 of that Schedule (parking contraventions outside Greater London) in a civil enforcement area outside Greater London."

8. Schedule 7 of the 2004 Act, which it is unnecessary to set out, divides parking contraventions in London into two groups. One group remains linked to criminal offences (parking on footways, near crossings etc) whilst the other relates to parking places and is no longer linked to a criminal offence. By contrast, parking contraventions outside London are all linked to criminal offences, including those relating to parking places.

9. Regulation 5 of the General Regulations provides that liability for payment of a penalty charge rests with the owner of a vehicle, save in cases of vehicles which have been hired or where the owner later identifies the driver, and the authority has accepted that identification. Regulation 6 is concerned with the mode of proof of a contravention. Regulation 7 provides that no criminal proceedings may be brought in respect of a parking contravention within a civil enforcement area, except for a pedestrian crossing contravention. Such a contravention may be subject to either a civil penalty or criminal proceedings (alternatively fixed penalty). In the event that criminal proceedings are commenced or if a fixed penalty notice has been given, the authority is obliged to refund any payment it has secured by way of civil penalty. Regulations 8, 9 and 10 of the General Regulations provide:

> **"Penalty charge notices**

8. – (1) In these Regulations a "penalty charge notice" means a notice which –

(a) was served in accordance with regulation 9 or 10 in relation to a parking contravention; and

(b) complies with the requirements of the Schedule which apply to it as well as to those of regulation 3 of the Representations and Appeals Regulations which so apply.

(2) The Schedule has effect with regard to penalty charge notices.

Penalty charge notices – service by a civil enforcement officer

9. Where a civil enforcement officer has reason to believe that a penalty charge is payable with respect to a vehicle which is stationary in a civil enforcement area, he may serve a penalty charge notice –

(a) by fixing it to the vehicle; or

(b) giving it to the person appearing to him to be in charge of the vehicle.

Penalty charge notices – services by post

10. – (1) An enforcement authority may serve a penalty charge notice by post where –

(a) on the basis of a record produced by an approved device, the authority has reason to believe that a penalty charge is payable with respect to a vehicle which is stationary in a civil enforcement area;

(b) a civil enforcement officer attempted to serve a penalty charge notice in accordance with regulation 9 but was prevented from doing so by some person; or

(c) a civil enforcement officer had begun to prepare a penalty charge notice of service in accordance with regulation 9, but the vehicle concerned was driven away from the place in which it was stationary before the civil enforcement officer had finished preparing the penalty charge notice or had served it in accordance with regulation 9,

and references in these Regulations to a "regulation 10 penalty charge notice" are to a penalty charge notice served by virtue of this paragraph."

These provisions show that in the ordinary course a penalty charge notice will be served by the civil enforcement officer if he is on the street, but with power to serve by post if the vehicle is driven off or he is prevented from doing so. They also allow penalty charge notices to be served by post where the contravention was witnessed via an approved device. That might include CCTV coverage. Regulation 3 of Appeals Regulations (in summary) requires the notice to explain that representations may be made against it. The Schedule referred to in regulation 8 provides:

> **"Contents of a penalty charge notice served under regulation 9**
>
> **1.** A penalty charge notice served under regulation 9 must, in addition to the matters required to be included in it by regulation 3(2) of the Representations and Appeals Regulations, state –
>
> (a) the date on which the notice is served;
>
> (b) the name of the enforcement authority;
>
> (c) the registration mark of the vehicle involved in the alleged contravention;
>
> (d) the date and the time at which the alleged contravention occurred;
>
> (e) the grounds on which the civil enforcement officer serving the notice believes that a penalty charge is payable;
>
> (f) the amount of the penalty charge;
>
> (g) that the penalty charge must be paid not later than the last day of the period of 28 days beginning with the date on which the penalty charge notice was served;
>
> (h) that if the penalty charge is paid not later than the last day of the period of 14 days beginning with the date on which the notice is served, the penalty charge will be reduced by the amount of any applicable discount;
>
> (i) the manner in which the penalty charge must be paid; and
>
> (j) that if the penalty charge is not paid before the end of the period of 28 days referred to in subparagraph (g), a notice to owner may be served by the enforcement authority on the owner of the vehicle.
>
> **Contents of a regulation 10 penalty charge notice**
>
> **2.** A regulation 10 penalty charge notice, in addition to the matters required to be included in it by regulation 3(4) of the Representation and Appeals Regulations, must state –

(a) the date of the notice, which must be the date on which it is posted;

(b) the matters specified in paragraphs, 1(b), (c), (d), (f) and (i);

(c) the grounds on which the enforcement authority believes that a penalty charge is payable;

(d) that the penalty charge must be paid not later than the last day of the period of 28 days beginning with the date on which the penalty charge notice is served;

(e) that if the penalty charge is paid not later than the applicable date, the penalty charge will be reduced by the amount of any applicable discount;

(f) that if after the last day of the period referred to in subparagraph (d) –

(i) no representations have been made in accordance with regulation 4 of the Representations and Appeals Regulations; and

(ii) the penalty charge has not been paid,

the enforcement authority may increase the penalty charge by the amount of any applicable surcharge and take steps to enforce payment of the charge as so increased;

(g) the amount of the increased penalty charge; and

(h) that the penalty charge notice is being served by post for whichever of the following reasons applies –

(i) that the penalty charge notice is being served by post on the basis of a record produced by an approved device;

(ii) that it is being so served, because a civil enforcement officer attempted to serve a penalty charge notice by affixing it to the vehicle or giving it to the person in charge of the vehicle but was prevented from doing so by some person; or

(iii) that it is being so served because a civil enforcement officer had begun to prepare a penalty charge notice for service in accordance with regulation 9, but the vehicle was driven away from the place in which it was stationary before the civil enforcement officer had finished preparing the penalty charge notice or had served it in accordance with regulation 9."

A notice to owner is defined by regulation 19 of the General Regulations in these terms:

"**The notice to owner**

> 19. – (1) Subject to regulation 20, where –
>
> (a) a penalty charge notice has been served with respect to a vehicle under regulation 9; and
>
> (b) the period of 28 days specified in the penalty charge notice as the period within which the penalty charge is to be paid has expired without that charge being paid,
>
> the enforcement authority concerned may serve a notice ("a notice to owner") on the person who appears to them to have been the owner of the vehicle when the alleged contravention occurred.
>
> (2) A notice to owner served under paragraph (1) must, in addition to the matters required to be included in it under regulation 3(3) of the Representations and Appeals Regulations, state –
>
> (a) the date of the notice, which must be the date on which the notice is posted;
>
> (b) the name of the enforcement authority serving the notice;
>
> (c) the amount of the penalty charge payable;
>
> (d) the date on which the penalty charge notice was served;
>
> (e) the grounds on which the civil enforcement officer who served the penalty charge notice under regulation 9 believed that a penalty charge was payable with respect to the vehicle;
>
> (f) that the penalty charge, if not already paid, must be paid within "the payment period" as defined by regulation 3(3)(a) of the Representations and Appeals Regulations;
>
> (g) that if, after the payment period had expired, no representations have been made under regulation 4 of the Representations and Appeals Regulations and the penalty charge has not been paid, the enforcement authority may increase the penalty charge by the applicable surcharge; and
>
> (h) the amount of the increased penalty charge."

By virtue of regulation 2 on the Appeals Regulations, where the penalty charge notice is served by post under regulation 10 of the General Regulations, that notice stands as the notice to owner. Regulation 2 additionally defines a notice of rejection as 'a notice served by an enforcement authority rejecting, or not accepting, representations made to it under regulation 4, 8 or 11' of the Appeals Regulations.

10. In the case where a notice to owner has been sent to the owner of the vehicle said to have been involved in a parking contravention, the owner may make representations to the authority why

he should not pay the penalty charge. That is provided for by regulation 4(1) of the Appeals Regulations. Regulation 4(2) and 4(4) specify the grounds upon which representations may be made.

> **"4**. – (2) Any representations under this regulation must
>
> (a) be made in such forms as may be specified by the enforcement authority;
>
> (b) be to either or both of the following effects –
>
> (i) that, in relation to the alleged contravention on account of which the notice to the owner was served, one of more of the grounds specified in paragraph (4) applies; or
>
> (ii) that, whether or not any of those grounds apply, there are compelling reasons why, in the particular circumstances of the case, the enforcement authority should cancel the penalty charge and refund any sum paid to it on account of the penalty charge.

4. – (4) The grounds referred to in paragraph (2)(b)(i) are –

(a) that the alleged contravention did not occur;

(b) that the recipient –

(i) never was the owner of the vehicle in question;

(ii) had ceased to be its owner before the date on which the alleged contravention occurred; or

(iii) became its owner after that date;

(c) that the vehicle had been permitted to remain at rest in the place in question by a person who was in control of the vehicle without the consent of the owner;

(d) that the recipient is a vehicle-hire firm and –

(i) the vehicle in question was at the material time hired from that firm under a hiring agreement; and

(ii) the person hiring it had signed a statement of liability acknowledging his liability in respect of any penalty charge notice served in respect of any parking contravention involving the vehicle during the currency of the hiring agreement;

(e) that the penalty charge exceeded the amount applicable in the circumstances of the case;

> (f) that there has been a procedural impropriety on the part of the enforcement authority;
>
> (g) that the order which is alleged to have been contravened in relation to the vehicle concerned, except where it is an order to which Part VI of Schedule 9 to the 1984 Act (a) applies, is invalid;
>
> (h) in a case where a penalty charge notice was served by post on the basis that a civil enforcement officer was prevented by some person from fixing it to the vehicle concerned or handing it to the owner or person in charge of the vehicle, that no civil enforcement officer was so prevented;
>
> (i) that the notice to owner should not have been served because –
>
> (i) the penalty charge had already been paid in full;
>
> (ii) the penalty charge had been paid, reduced by the amount of any discount set in accordance with Schedule 9 to the 2004 Act, within the period specified in paragraph 1(h) of the Schedule to the General Regulations."

'Procedural impropriety', for the purposes of regulation 4(4)(f), is defined by regulation 4(5) in these terms:

> **"4. –** (5) In these Regulations "procedural impropriety" means a failure by the enforcement authority to observe any requirement imposed on it by the 2004 Act, by the General Regulations or by these Regulations in relation to the imposition or recovery of a penalty charge or other sum and includes in particular –
>
> (a) the taking of any step, whether or not involving the service of any document, otherwise than –
>
> (i) in accordance with the conditions subject to which; or
>
> (ii) at the time or during the period when
>
> it is authorised or required by the General Regulations or these Regulations to be taken; and
>
> (b) in a case where an enforcement authority is seeking to recover an unpaid charge, the purported service of a charge certificate under regulation 21 of the General Regulations before the enforcement authority is authorised to serve it by those Regulations"

The qualification in regulation 4(4)(g) concerning the circumstances in which invalidity may be raised refers to Part IV of Schedule 9 to the Road Traffic Regulation Act 1984. That schedule provides that orders made under a total of eight sections of that Act may be challenged by way of judicial review if proceedings are brought within

six weeks. As might be expected, the nature of the orders in question involves urgency or temporary arrangements (eg for the purposes of safety or sporting events). Their validity may not be called into question in the system of representations and appeals provided for by the Appeals Regulations.

11. By virtue of regulation 5 of the Appeals Regulations the enforcement authority is obliged to consider and respond to the representations made in accordance with regulation 4. Where the enforcement authority accepts one of the grounds specified in regulation 4(4), or that there are compelling reasons why the notice should be cancelled, it must cancel the notice. If the representations are rejected, a notice of rejection must be served pursuant to regulation 6. Such a notice must warn that a charge certificate may be served if the penalty charge remains outstanding for a further 28 days, unless the person concerned appeals to the Parking Adjudicator. It must also give details of the process of appealing. Regulation 7 governs the appeal to a Parking Adjudicator. It provides:

> **"Appeals to an adjudicator in relation to decisions under regulation 5**
>
> **7. —** (1) Where an authority serves a notice of rejection under regulation 5(2)(b) in relation to representations made under regulation 4, the person who made those representations may appeal to an adjudicator against the authority's decision—
>
> (a) before the end of the period of 28 days beginning with the date of service of the notice of rejection; or
>
> (b) within such longer period as an adjudicator may allow.
>
> (2) If, on an appeal under this regulation, the adjudicator after considering the representations in question together with any other representations made to the effect referred to in regulation 4(2)(b) and any representations made by the enforcement authority, concludes that a ground specified in regulation 4(4) applies, he shall allow the appeal and may give such directions to the enforcement authority as he may consider appropriate for the purpose of giving effect to his decision, and such directions may in particular include directions requiring—
>
> (a) the cancellation of the penalty charge notice;
>
> (b) the cancellation of the notice to owner; and
>
> (c) the refund of such sum (if any) as may have been paid to the enforcement authority in respect of the penalty charge.
>
> (3) It shall be the duty of an enforcement authority to which such a direction is given to comply with it forthwith.
>
> (4) If the adjudicator does not allow the appeal but is satisfied that there are compelling reasons why, in the particular circumstances of

> the case, the notice to owner should be cancelled he may recommend the enforcement authority to cancel the notice to owner.
>
> (5) It shall be the duty of an enforcement authority to which a recommendation is made under paragraph (4) to consider afresh the cancellation of the notice to owner taking full account of all observations made by the adjudicator and, within the period of thirty-five days beginning with the date on which the recommendation was given ("the 35-day period"), to notify the appellant and the adjudicator as to whether or not it accepts the adjudicator's recommendation.
>
> (6) If the enforcement authority notifies the appellant and the adjudicator that it does not accept the adjudicator's recommendation, it shall at the same time inform them of the reasons for its decision.
>
> (7) No appeal to the adjudicator shall lie against the decision of the enforcement authority under paragraph (6).
>
> (8) If the enforcement authority accepts the adjudicator's recommendation it shall forthwith cancel the notice to owner and refund to the appellant any sum paid in respect of the penalty charge.
>
> (9) If the enforcement authority fails to comply with the requirements of paragraph (5) within the 35-day period, the authority shall be taken to have accepted the adjudicator's recommendation and shall cancel the notice to owner and refund to the appellant any sum paid in respect of the penalty charge immediately after the end of that period."

In short, if the Parking Adjudicator accepts one of the grounds specified in regulation 4(4), he must allow the appeal and the enforcement authority is obliged to comply with any direction he makes to give effect to his decision. If none of those grounds is established but the Parking Adjudicator considers that there are compelling reasons why the notice should be cancelled he can recommend that the enforcing authority do so. The decision whether to do so is left to the enforcing authority, unless they do nothing, in which case there is a deemed acceptance of the recommendation. There is no further appeal against a refusal to act upon a recommendation. Such a decision could be challenged only in public law proceedings in this Court.

The Facts

12. In London alone something of the order of 5,000,000 penalty charge notices are issued each year. Whilst there is no information before the Court indicating how many owners make representations to enforcing authorities, the Joint Annual Report of the Parking and Traffic Adjudicators for 2008 – 2009 indicates that there were just over 68,000 appeals in respect of such notices that year in London. The revenues generated for local authorities by the civil enforcement regime are very substantial. If they exceed their expenditure in respect of the

parking places the surplus must be applied for specified purposes (see section 55 of the Road Traffic Regulation Act 1984). Paradoxically, their financial interests are served if drivers contravene parking restrictions and are also dilatory in paying the charge and thereby miss the opportunity to benefit from the discount for prompt payment. Perhaps for that reason, enforcing authorities are not free to set the penalty charges at whatever level they choose. The rates of penalty charge are set by councils with the involvement of Transport for London and the sanction of the Secretary of State centrally.

13. The four penalty charge notices which gave rise to the appeals underlying these applications for judicial review were issued between December 2008 and May 2009. On 5 January 2009 the Council introduced the practice whereby an additional 1.3% administration fee was charged to those who sought to pay a penalty charge by credit card. The practice was abandoned on 9 June 2009 and the reference to it on the pro forma penalty charge notice was removed three days later. This was a response to a decision of Parking Adjudicator Greenslade (PATAS reference 2090198127) of 1 June 2010 whereby he had allowed an appeal on the basis that the imposition of the administration fee resulted in the penalty charge exceeding the amount applicable in the circumstances of the case. That is the ground found in regulation 4(4)(e) of the Appeals Regulations.

14. The first appeal concerned a parking charge notice which alleged a parking contravention in Heath Street, London NW3 at 11.52 on 8 May 2009. The vehicle was a Scania truck belonging to BFS Group Limited trading as 3663 First for Foodservice ["3663"]. They are a large delivery organisation. The parking charge notice was affixed to the truck by a parking enforcement officer. In the ordinary way it said that the charge of £120 would be reduced to £60 if paid within 28 days and indicated that a notice to owner might be served if it was not paid within that period. The penalty charge notice made no reference to an administrative fee for payment by credit card. In accordance with paragraph 1(i) of the Schedule to the General Regulations it stated the manner in which the penalty charge must be paid under a heading 'Payment Instructions'. Four methods were identified. First, by credit or debit card over the telephone; secondly, online using the same mechanisms; thirdly, in person at Camden Town Hall or one of the 'Environment Locals'; and fourthly, by post using a cheque or postal order. The evidence of Nicolina Cooper on behalf of the Council is that anyone attempting to pay by credit card whilst the administration fee was in place would have been informed of its existence (by the website if online, verbally over the phone and verbally and by a sign if attending in person). Payment of the penalty would not have been accepted by credit card in the absence of agreement to pay the additional charge.

15. No payment was received within 28 days. The Council sent a notice to owner dated 8 June 2009. It noted that nothing had been paid and stated that the charge of £120 had to be paid within 28 days of the service of the notice to owner, failing which the sum would increase to £180. That could be enforced, unless within that same period representations were made under the Appeals Regulations. Payment instructions were included which substantially repeated those contained in the penalty charge notice but with this caveat:

> "If you choose to make payment of the Penalty Charge Notice (PCN) by credit card there is a credit card administration fee of 1.3% covering the council's costs for processing the payment will be added to the amount that is being paid. **If you do not accept this administration charge please do not use your credit card to make payment for the PCN.**" (original emphasis)

3663 made representations by return which related to the activity being undertaken by the driver (unloading) at the time of the alleged contravention. Those representations were rejected by a notice of rejection dated 24 June 2009. Mr Woods, the correspondence officer who wrote the letter which comprised the notice, said this:

> " …I am satisfied that a contravention occurred. However, we will accept the discount payment of £60.00 if received within 14 days of the date of this letter. After this period the charge will revert to £120 and this amount will apply to any further correspondence or an appeal to the Parking and Traffic Appeals Service."

The ways in which payment could be made were again set out, this time omitting any reference to the additional payment for use of a credit card. Regulation 7(1)(a) of the Appeals Regulations allows an owner at least 28 days from service of a notice of rejection to appeal to a Parking Adjudicator. The financial concession made in the letter provided a powerful disincentive against appealing. The owner nonetheless appealed. Its appeal was considered at the same time as the appeal in respect of the second penalty charge notice.

16. That notice was affixed to a different Scania truck owned by 3663 on 11 May 2009 in West End Lane, London NW8. The contravention was different from the first. The penalty charge was £80, reduced to £40 if paid within 28 days. The payment instructions were the same as on the first but with the caveat already set out referring to a 1.3% administration charge in the event that payment were to be made by credit card. Nothing was paid. A notice to owner dated 11 June 2009 was sent to 3663 in unexceptional terms. It did not mention the 1.3% charge. However, the representations made by 3663 took the point that the penalty charge sought in the penalty charge notice exceeded the amount applicable, because of the attempt to require payment of 101.3% of that charge. By the time a notice of rejection was sent to the owner, this time signed by Claire Pankhurst and dated 29 June 2009, the Council had abandoned the practice of seeking to recover the additional charge. So it was that the notice of rejection said this:

> "I would like to advise you that the 'credit card administration fee of 1.3% mentioned on the PCN has been withdrawn and will not be charged. As the council no longer pursues the 1.3% fee, we feel that your right to pay the penalty charge at the set amounts created by London Councils has not been affected and the PCN remains valid."

The Notice went on to record that the Council was satisfied that the contravention had occurred. The penalty charge of £80 stood.

17. It has not been suggested on behalf of the Council in these proceedings that if, contrary to their arguments, the reference in the penalty charge notice to the 1.3% additional payment resulted in the appeal being properly allowable, the subsequent abandonment of the practice could alter that fact. That is obviously right. If a penalty charge notice, for example, demanded twice the proper penalty, that error could not be cured by the enforcing authority later agreeing to accept what would have been the correct charge.

18. The Parking Adjudicator, Martin Wood, allowed both appeals by 3663. There was much debate in the written material before this Court (and in oral argument) about the precise basis upon which Mr Wood allowed those appeals. The reason for allowing the appeals was stated in identical terms:

> "The Adjudicator has allowed the appeal on the grounds that the penalty charge exceeded the amount applicable in the circumstances of the case."

He issued a direction that the penalty charge notices and notices to owner should be cancelled. Reasons were attached. Mr Wood recorded that 3663 had not disputed the facts relied upon by the Council relating to each alleged contravention. He noted that Mr Greenslade had already held that the imposition of the fee resulted in the penalty exceeding the applicable amount. He rejected the Council's argument that Mr Greenslade was wrong and that, on analysis, the penalty charge throughout remained the prescribed amount. He concluded that however the facts were analysed:

> 'the substance of what [the notice] is saying is that to discharge the penalty the motorist will have to pay a sum greater than the penalty prescribed by law.'

He therefore determined to follow Mr Greenslade's decision, with which he was in full agreement. Mr Wood also speculated that the circumstances may have amounted to a 'procedural impropriety' for the purposes of the Appeals Regulations, which would also provide a ground of successful appeal. Further, he considered that he could allow the appeal 'as a collateral challenge' on the basis of the decision of Scott Baker J in *R v Parking Adjudicator Ex parte Bexley LBC* [1998] RTR 128. It will be necessary to return to the question of 'collateral challenge' and *Bexley* later in this judgment.

19. The third appeal arose from a penalty charge notice served by post on Lee Sugden, the owner of a green Seat vehicle. It was said to have been parked on 19 January 2009 in a loading place in Holly Hill, London NW3 during restricted hours, but in circumstances in which there was no loading or unloading taking place. The notice was dated 27 January 2009. It identified the penalty charge as £120 but, in the usual way, offered a 50% reduction if payment was made within 14 days. It warned of the increase to £180 if not paid within 28 days, absent representations. Under the heading 'how to pay', the notice set out the four methods already identified. It did not, however, warn that an attempt to pay by credit card (either by telephone or on line) would be visited with a demand for the 1.3% additional charge. Mr Sugden made representations. Those representations suggested that he had stopped to deal with a call on his mobile phone. A notice of rejection was sent to Mr Sugden on 3 March. It stated that a civil enforcement officer had seen the vehicle in position for five minutes and that it was driven away before the notice could be given to the driver. That, the author explained, was why the penalty charge notice had been served by post. The notice of rejection repeated the mechanisms for payment but with this caveat:

> "Please note that from 5th of January 2009, if you choose to make payment for the PCN by credit card then a credit card administration fee of 1.3% covering the council's costs for processing the payment will be added to the amount that is being paid. If you do not accept this administration charge please do not use your credit card to make payment for the PCN."

Mr Sugden appealed to the Parking Adjudicator. His appeal was determined by Mr Harman on 6 October 2009. The appeal was allowed on the grounds that the council had been guilty of procedural impropriety. Mr Harman's reasons were as follows:

> "The Notice of Rejection issued by the Authority in this case states that an administration fee of 1.3% will be added to the amount to be paid in respect of the penalty charge where payment is made by credit card.
>
> I am satisfied for the reasons given by my learned colleague Mr Greenslade in PATAS case reference 2090198127 decided on 1 June 2009 that the Authority has no power to require payment of more than the sum shown on the Penalty charge notice finding that it has done so in this case the same - amounting to procedural impropriety on the part of the authority. The appeal must accordingly be allowed."

20. The fourth appeal once again arose from a penalty charge notice which had been served by post. This time the contravention, which was said to have occurred on 19 December 2008 in Kentish Town Road, London NW5, was a failure clearly to display a 'pay and display' ticket. The notice was dated 14 January 2009. The civil enforcement officer noted that he did not affix a notice to the vehicle because it was driven away before he could do so. The vehicle concerned was a white Lexus owned by Aidan Brady. The penalty charge was £80, subject to the usual reduction and increase by 50% depending on the date of payment. The penalty charge notice made no reference to the 1.3% additional charge that would be demanded if an attempt were made to pay by credit card. The four methods of payment identified in the other cases were specified. Mr Brady made representations, which were rejected in a notice of rejection dated 13 February 2009. The notice made reference to the 1.3% charge in precisely the same terms as appeared in Mr Sugden's case.

21. Mr Brady appealed. His appeal was determined by Mr Styles on 6 October 2009 and allowed on grounds of procedural impropriety. There were short additional reasons. They noted that the 1.3% charge identified in the notice of rejection was not 'legally acceptable'.

The Greenslade Decision

22. The formal basis upon which Mr Greenslade allowed the appeal in PATAS Case No 2090198127 was that, in seeking to charge a 1.3% fee for using a credit card 'the penalty exceeded the relevant amount'. The appeal before him, concerned a box junction. It was advanced by reference to the facts, as well as a procedural impropriety case and also on the ground that the council had no power to levy the charge. He rejected the appeal on the facts and decided that procedural impropriety was 'not strictly relevant'. Mr Greenslade noted the argument advanced by the local authority before him in support of the contention that the penalty charge did not exceed the amount applicable as containing the following elements:

> "(i) The fee was not payable by virtue of Regulation 4 of the General Regulations. It does not relate to the underlying contravention but to the costs associated with accepting payment by credit card.

> (ii) The penalty charge remains the same because the use of a credit card is optional, with total clarity concerning the difference between the penalty charge and the fee."

23. Mr Greenslade was addressed extensively on whether the local authority had statutory power to charge the fee for the 'service' it provided, namely the convenience of paying by credit card, but determined that the question for him was whether the local authority could impose an additional charge beyond the penalty charge itself, whatever its decription. He noted that statutory guidance issued in May 2008 under section 87 the 2004 Act recommended that local authorities should enable parking charges to be paid by a range of different means. Paragraph 10.17 of that Guidance said this:

> "Paying by online debit and credit card is convenient for many motorists and is more secure for local authorities. The electronic card reader automatically seeks authorisation for values previously agreed between the card holder and the card company, and automatically bars any 'blacklisted' cards. Auditors favour the use of online debit and credit cards to avoid creating bad debts and minimising collection costs. There are operational savings to debit/credit cards so authorities cannot justify applying surcharges for their use."

Mr Greenslade concluded that the local authority had no power to impose an additional charge for any purpose in addition to the penalty charge and for that reason decided that the penalty charge exceeded the amount applicable.

24. Mr Coppel has subjected the decision to considerable textual analysis and is critical of the elision of two concepts, namely (a) whether the local authority had statutory power to impose a fee for the use of a credit card, and (b) whether the imposition of the fee resulted in the penalty charge exceeding the amount applicable in the circumstances on the case. It is the latter that is material for the purposes of Regulation 4(4)(e) of the General Regulations.

25. As is apparent from the discussion of the submissions advanced before him, the two issues were intertwined in argument. Whilst I accept that the two issues are separate, Mr Greenslade's conclusion rested on the fact that in adding a fee to the penalty charge the result was a demand for a charge that exceeded that authorised by the statutory scheme.

26. In three of the appeals with which this application is concerned, the Parking Adjudicators expressly followed the decision of Mr Greenslade (albeit in the third the Adjudicator mistakenly suggested that Mr Greenslade allowed the appeal on grounds of procedural impropriety). The fourth appeal was allowed on the broad basis that the charge was 'not legally acceptable' coupled to procedural impropriety.

Did the Penalty Amount Exceed the Amount Applicable?

27. Mr Coppel's argument on behalf of the Council embarks from the legal nature of a credit card transaction. That involves the credit card company having separate contracts with the cardholder and the supplier of goods or services. Under the arrangement the supplier of goods

or services agrees to accept payment by credit card in discharge of the cardholder's liability to him. The credit card holder agrees to pay the full price of the goods to the card company, albeit at a later date and subject to interest if not paid promptly. The supplier of goods or services agrees to pay to the card provider a percentage of the total cost of the goods or services provided. In this instance the percentage agreed was 1.3% so that for every £100 paid by motorists via credit card, the Council received £98.70.[1] The Council point out that the motorist in these circumstances secures a valuable benefit, namely the delay in having to pay the credit card company albeit that there are substantial benefits to the Council in addition. The general convenience (and thus reduction in administrative overheads) is obvious and importantly the credit card company assumes the risk of non-payment. That is not altogether altruistic, since very high interest is generally charged in the event that a credit card bill is not settled in full at the first opportunity. However, the Council is freed of the problem of chasing bad debts or dealing with bouncing cheques.

28. Mr Coppel submits that the only form of payment that the Council are obliged to accept as a matter of law is cash in legal tender, unless they agree otherwise. As a matter of strict theory that may be right, although I venture to suggest that a Council which required parking contraveners to pay cash in notes, or coins of £1 or higher value (current legal tender) would be vulnerable to a challenge on grounds of rationality. Nobody is forced to pay by credit card. The Council suggest that it is not increasing the penalty charge but rather recovering an external cost associated with making a convenient method of payment available to those guilty of parking contraventions. Mr Coppel accepts that if this argument were right (and subject always to the *vires* to make any charge), then so far as the parking enforcement regime was concerned, the Council could recover by way of administrative fee the cost of dealing with any mechanism of payment except cash presented in denominations which were legal tender. There was no evidence before me of any external costs to a merchant associated with payment by debit card or cheque but such facilities are rarely free. There is clearly a significant cost in staff time and systems administration involved in accepting any form of payment. Cheques are especially labour intensive and costly. No doubt any enforcing authority could easily identify the global costs of collecting penalty charges by category and then attempt to divide those costs by the number of penalty charges they expect to recover to determine an administration fee appropriate to each. Yet that is far from the limit of the administrative charges that an inventive enforcing authority might seek to add to the penalty charge authorised by law. Civil enforcement officers must be employed, paid and equipped. There will, in addition, be an administrative superstructure which costs money. It is, submits Mr Coppel, only because the Parking Adjudicators failed to understand that there is a critical difference between the penalty charge and the costs of recovering that charge that they fell into the error of concluding that the penalty charge exceeded the amount prescribed by the statutory scheme. Mr Rogers, who appears for the Parking Adjudicators, submits that whatever label the Council attempt to attach to the 1.3% fee, it is in substance a surcharge that results in a demand for payment of a sum which exceeds that authorised under the statutory scheme.

29. I am unable to accept Mr Coppel's argument that for the purposes of regulation 4(4)(e) the 1.3% fee can be separated from the penalty charge. As is common ground, an enforcing authority is not at liberty to set its own penalty charges but is limited to the sums set under the statutory scheme. The substance of what the Council did was to increase their penalty charge

1. In charging the motorist 101.3% (x) of which the credit card company the takes 1.3% of x, the Council is in fact left with less than 100%.

if payment were to be made by credit card to 101.3% of the sum authorised under that scheme. On Mr Coppel's argument the Council might just as well have introduced other administrative charges and added those too. It is clear, in my judgment, that a Parking Adjudicator is obliged to allow an appeal if the sum required to be paid to an enforcing authority by the motorist exceeds the amount set by the statutory scheme, however the enforcing authority seeks to characterise the additional charge. It makes no difference that the Council identified four mechanisms of payment, only one of which included the surcharge. Having offered that method all motorists were freely entitled to use it and were exposed to the potential demand for 101.3% of the appropriate penalty charge. In these circumstances the Council was demanding a sum to discharge the motorist's liability which was greater than that prescribed by law.

30. It follows that the challenges in all four cases fail. Those Parking Adjudicators who allowed the appeals by reference to regulation 4(4)(e) were right to do so. The Adjudicators who allowed the appeals on a different basis were, as a matter of law, right to allow the appeals, even if this basis did not form part of the reasoning.

Procedural Impropriety

31. We have seen that the third of the underlying appeals was allowed on the basis of procedural impropriety (albeit on its face following the Greenslade decision) as was the fourth. Mr Rogers submits that each of the appeals could have been allowed on the basis of procedural impropriety. Mr Coppel submits that applying the 1.3% surcharge for payment by credit card did not amount to procedural impropriety as defined by regulation 4(5) of the Appeals Regulations. Regulation 4(5) is set out in paragraph 10 above. Procedural impropriety is a public law concept which found its classic articulation in the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410D – 411B:

> "One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. … By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it …By 'irrationality' I mean what can now be succinctly referred to as *Wednesbury* unreasonableness … I have described the third head as 'procedural impropriety rather than a failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred."

Lord Diplock expressly indicated that his categorisation was not exhaustive.

32. For the purposes of the Appeals Regulations it is important to note that broad as Lord Diplock's definition of 'procedural impropriety' was, including long-established concepts of fairness as well as rule-based imperatives, the term has the meaning given to it by regulation

4(5) and nothing wider. It is a 'failure by the enforcement authority to observe any requirement imposed on it by the 2004 Act' or by the Appeals or General Regulations. In particular, it is the failure to take a step 'otherwise than (i) in accordance with the conditions subject to which; or (ii) at the time or during the period when, it is authorised or required by' either set of regulations to be taken. The Appeals Regulations make clear that procedural impropriety as defined is fatal to the recovery of a penalty charge. It is therefore incumbent upon enforcing authorities to comply meticulously with the requirements of the statutory scheme if they are to recover penalty charges.

33. Mr Rogers submits that a step will not have been taken in accordance with the statutory scheme if a requirement has been contradicted or undermined. It is, of course, always a matter of fact whether there has been a procedural impropriety for the purposes of regulation 4(5). In my judgment it is possible that contradictory, confusing or obscure language may result in 'a failure to observe a requirement' imposed on an enforcing authority by the statutory scheme.

34. The Schedule to the General Regulations (set out in paragraph 9 above) specifies the required contents of penalty charge notices both affixed to vehicles and served by post. Regulation 19 does the same for the notice to owner. The essence of Mr Rogers' argument is that because, in each of these cases, some but not all of the statutory notices referred to the 1.3% surcharge there was procedural impropriety. That was because various of the notices did not state 'the amount of the penalty charge' (cf paragraphs 1(f) and 2(b) of the Schedule and regulation 19(2)(c) of the General Regulations). Alternatively, Mr Rogers submits that in so far as the penalty charge notices or notices to owner failed to mention the 1.3% surcharge they failed to state 'the manner in which the penalty charge must be paid' (cf paragraphs 1(i) and 2(b) of the Schedule).

35. Thus the summary of the requirements in issue are, first that the penalty charge notice and notice to owner must state the amount of the penalty charge payable and secondly that the Penalty charge notice must state how the penalty is to be paid.

36. With those in mind, I return to the facts in each of the underlying appeals. In the first appeal the penalty charge notice stated the penalty charge as £120 and also identified the four mechanisms for payment. On its face it was correct in all respects. However, had its recipient tried to pay by credit card he would have been told to pay the additional charge. Does that mean that the Council failed to observe a requirement of the legislative scheme in the content of either the penalty charge notice or the notice to owner? In my judgment, the answer to that question, as regards this Penalty charge notice, is no. That notice specified the amount of the penalty charge to be paid in the correct sum. It specified the four mechanisms of payment. However the notice to owner expressed itself in terms which I have held amounted to demanding a sum which exceeded that applicable. So the position is different in respect of the Notice to Owner. It identified the 1.3% surcharge for credit card payment which had the effect of increasing the penalty charge and therefore overstating it. The requirement to state the 'amount of the penalty charge payable' imports the requirement to state it in the correct amount, in my judgment. The notice to owner did not do so and there was, in consequence, a procedural impropriety within the meaning of regulation 4(5) of the General Regulations. I do not consider that there was an additional procedural impropriety in connection with the identified methods of payment, which remained the same. That is because the requirement in question is to state the 'manner' of payment.

37. The same procedural impropriety arose in connection with the second appeal because the penalty charge notice itself identified the 1.3% surcharge. The third and fourth appeals are

factually different. There was no penalty charge notice. The notice subsequently served by post correctly identified the penalty charge and methods of payment without any reference to the surcharge. At that stage no procedural impropriety is apparent in the Council's conduct. The surcharge was first mentioned in the notices of rejection sent to the motorists following representations. The statutory scheme does not specify the content of a notice of rejection in the same way as it does penalty charge notices and notices to owners.

Collateral Challenge

38. Parking Adjudicator Wood, whist relying principally on the ground that the penalty charge exceeded the applicable amount, also considered that he could allow the two appeals before him on the basis of a 'collateral challenge', in reliance on the decision of Scott Baker J in *Bexley*. Mr Coppel submits that Parking Adjudicators have no free-ranging public law jurisdiction over the activities of enforcement authorities. He submits that the four corners of the Parking Adjudicators' jurisdiction are found in the Appeals Regulations. The grounds for allowing an appeal are there set out. The residual power found in regulation 7(4) to recommend that there are compelling circumstances why the notice should be cancelled, whilst directed primarily at unusual features of the contravention itself, is wide enough to encompass circumstances where a Parking Adjudicator considered that there is some public law failing which does not otherwise fall within the statutory grounds for allowing an appeal. He submits that regulation 4(4)(a), (that the alleged contravention did not occur) is directed only at the immediate factual events of the alleged contravention. Mr Rogers, by contrast, submits that the *Bexley* decision, whilst admittedly *obiter* on the point, strongly suggests that any public law failing by the enforcing authority should lead to the appeal being allowed. For the purposes of locating such a challenge within the statutory lexicon of the Appeals Regulations he submits that regulation 4(4)(a) is drawn widely enough to encompass any public law failing in connection with the process of making an order, implementing it and then enforcing a contravention. Furthermore, its language was chosen by the draftsman to put into appropriate language for civil contraventions the underlying concept that the motorist was 'not guilty' of an underlying offence. The explicit link between criminal offences and some, if not all, parking contraventions should lead to the conclusion that any point that could have been taken by way of defence in criminal proceedings should sound in an appeal to a Parking Adjudicator.

39. Collateral challenges have arisen in private and criminal proceedings in many different ways, usually by way of defence. In *Wandsworth London Borough Council v Winder* [1985] AC 461 the defendant was sued by Wandsworth Council in respect of rent arrears. By way of defence he sought to argue that the Council's exercise of a statutory power to increase his rent had been *Wednesbury* unreasonable, and sought a declaration to that effect. The Council contended that it was an abuse of process to raise the matter in private law proceedings. The proper venue for such an argument, they submitted, was in judicial review proceedings. The House of Lords held that it was not an abuse of process to defend proceedings brought against him by challenging the Council's decision. In *Boddington v. British Transport Police* [1999] 2 AC 143 a rail passenger sought to resist a prosecution for smoking in a no-smoking carriage on the basis that the bylaw in question was invalid. In *Bugg v. Director of Public Prosecutions* [1993] Q.B. 473 the Divisional Court had held that it was permissible to raise an issue of 'substantive' but not 'procedural' invalidity by way of defence in Magistrates' Court proceedings. In *Boddington* the Divisional Court concluded that it was impermissible in those criminal proceedings to raise the question of invalidity at all. The House of Lords concluded that it was permissible to raise an issue of invalidity and rejected the distinction drawn in

Bugg. Yet that position is not universal and may be contradicted by the structure of the statutory scheme in which a particular prosecution or enforcement proceedings arise. In *Reg. v. Wicks* [1998] A.C. 92 and *Quietlynn Ltd. v. Plymouth City Council* [1988] 1 Q.B. 114 the House of Lords on the one hand and the Divisional Court on the other, considered particular statutory regimes (planning and the licensing of sex shops) and concluded that it was not possible in criminal proceedings to raise suggested anterior public law failings because the statutory scheme provided opportunities for timely challenge to decisions by those who would later be prosecuted for failure to comply with them.

40. The references to 'collateral challenge' in the underlying material in these proceedings lack clear definition. Yet the implication is that the concession made by the Council for the purposes of the appeals heard by Mr Wood, namely that the imposition of the 1.3% charge was *ultra vires*, led to the conclusion that the whole process was in some way infected with illegality. In consequence the penalty notice could not be enforced.

41. *Bexley* was a case in which a motorist challenged the *vires* of a parking order on the basis that it has been made for a purpose not authorised by section 35(1) of the Road Traffic Act 1984. Scott Baker J concluded that the order in question was indeed *ultra vires* the enabling statute. He also concluded that aspects of the order were unreasonable in a public law sense. Schedule 6 to the 1991 Act at that time governed the powers of Parking Adjudicators to allow appeals. Paragraph 2(4)(d) of that Schedule concerned whether 'the relevant order is invalid'. Bexley Council sought to argue that despite the terms of paragraph 2(4)(d) the motorist could not raise public law questions in an appeal to the Parking Adjudicator, but only by way of judicial review. Scott Baker J rejected that argument. He said:

> "35. Mr. Supperstone says [paragraph 2(4)(d)] only becomes relevant when the order in question … has been declared invalid by a higher court and is therefore a pure question of fact. I cannot read paragraph 2(4)(d) in such a restricted way, for to do so would deprive it of meaningful effect. Of course the Adjudicator has no power to declare subordinate legislation invalid, nor is it contended that he has. Any decision of his on invalidity goes no further than the case before him. It may be persuasive, but it is not binding on other adjudicators. No doubt the answer is that once subordinate legislation has been questioned in this way a decision will be taken up on judicial review.
>
> 36. …
>
> 37. One point faintly taken by Mr. Supperstone was that paragraph 2(4)(d) of schedule 6 does not distinguish between the whole order and part of the order. In my judgment, there is nothing in this. It is perfectly clear that subordinate legislation can be *ultra vires* as to part only. The reference to "order" in this subparagraph is to the order, or that part of it on which reliance has been placed. In my judgment, the Adjudicator is given express power to consider *vires* in paragraph 2(4)(d), but even apart from that express power, it is my view that he would have been entitled to do so.

> 38. The law on collateral challenge often raises difficult and interesting questions. I was taken to the speeches in the House of Lords in R v Wicks [1997] 2 WLR 876. Lord Hoffmann said at page 892A:
>
> "The correct approach in my view is illustrated by the decision of the Divisional Court in Quietlynn v Plymouth City Council [1988] QB 114."
>
> 39. In that case Webster J had said that the question could be determined by the proper construction of the legislation in question.
>
> 40. Mr. Supperstone argues that questions such as the validity of paragraph 12 are much better decided by judges with expertise in judicial review cases rather than parking adjudicators and that any way the adjudicator's decision could only be binding in the case under consideration.
>
> 41. My conclusion is that Parliament has entrusted the work of parking adjudicators to those who are legally qualified (section 73(4) Road Traffic Act 1991). They are unlike magistrates, who often have to consider the validity of bye-laws, and that on a true construction of schedule 6 they are entitled to consider the issues of collateral challenge that arose in this case." (emphasis added)

42. It is the underlined passage that has given rise to the contention that Parking Adjudicators have a wide ranging power to consider public law challenges in appeals under the statutory scheme. It is striking that the argument of Bexley Council was that the reference to validity in paragraph 2(4)(d) only had any impact if prior to the appeal to the Parking Adjudicator a parking order had been successfully challenged in public law proceedings (whether by the motorist in question or someone else). In effect Bexley Council contended that an appeal could be allowed under this head only if the appellant could produce an earlier quashing order from the Administrative Court. Scott Baker J's reference to *Wicks* and *Quietlynn* shows that he was sensitive to the reasoning of the House of Lords that a statutory scheme might by implication exclude the taking of such a point in legal proceedings, for example where there had been every opportunity to mount an earlier challenge. That is not the position with parking orders. Only an unusual individual motorist would be bothered with a parking order unless and until it were suggested that he had contravened it. It is for that reason, as it seems to me, that Scott Baker J concluded that even absent the express power, a challenge to the validity of the order on the basis advanced in that case would have been available to the motorist. He did not need to decide the issue because the schedule provided express power. His *obiter dictum* does not extend beyond questions of invalidity of the parking order.

43. *R (Westminster City Council) v Parking Adjudicator* [2002] EWHC 1007 Admin; [2003] R.T.R. 1 concerned appeals against penalty charge notices issued to a motorist who suffered from various disabilities. His argument was that his personal circumstances should lead to the conclusion that the penalty charge was not payable. Schedule 6 to the 1991 Act similarly governed the powers of a Parking Adjudicator in that case. Neither it nor the parallel provision

relating to representations to the enforcing authority referred to 'compelling circumstances' or any similar formulation of words. In that it was different from the Appeals Regulations which now do so in regulation 7(4). That regulation establishes that a Parking Adjudicator may recommend to the enforcing authority that it cancel a charge in such circumstances. The Parking Adjudicator in *Westminster* nonetheless allowed the appeal using the predecessor of regulation 4(4)(e)of the Appeals Regulations, namely that an appeal would be allowed if 'the penalty charge exceeded the amount applicable in the circumstances of the case'. He concluded that the circumstances of the motorist were such that no penalty charge should be applicable. He interpreted the provision as enabling a Parking Adjudicator to allow an appeal if he concluded that it would not be right, in the circumstances of the contravention or the personal characteristics of the motorist, to make him pay. Elias J held that he was wrong to do so. The sub-paragraph of schedule 6 was concerned with the penalty charge established under the statutory scheme rather than a broad concept of a variable amount that a Parking Adjudicator considered appropriate in all the circumstances. The judge was, however, concerned that the scheme for representations then in place did not expressly provide for representations to be made in the light of personal circumstances. He was reassured when Westminster City Council explained that it has a policy which allowed its officials to waive the penalty charge in appropriate circumstances. He held:

> "In short, there are two distinct categories of representation. First, there are the statutory representations which, if successful, oblige the authority to cancel the notice to owner and impose no penalty. There are then other representations which may cause the authority to choose not to exercise its discretion to pursue or enforce payment, but which do not oblige it to do so. No doubt in a very exceptional case that discretion could be challenged by way of judicial review if there were grounds for saying that it had been unlawfully exercised. However, the statutory power of the adjudicator is limited to the consideration of the matters which are statutorily set out in paragraph 2. It is only those matters which he can consider, and only those in respect of which he can issue directions. Accordingly, the wider mitigating or extenuating factors which may affect the exercise of the authority's discretion when deciding whether or not to collect parking fines are not issues which the adjudicator can consider. They simply fall outside his province: his powers are limited by the statutory provisions." (paragraph 22)

44. *R (Walmsley) v Lane* [2005] EWCA Civ 1540; [2006] R.T.R. 15 was a case which arose under the provisions relating to the enforcement of the congestion charge in central London, the statutory regime for which was indistinguishable from those relating to parking enforcement (see paragraph 32 of the judgment of Chadwick LJ). The motorist in question had paid the charge online but had entered an incorrect registration number with the result that she was issued with two penalty notices. What she had done was intermingle part of the number of her current vehicle with that of her last. She appealed to the relevant Adjudicator, having first disputed liability with Transport for London ("TfL"). She contended that she had paid the appropriate charge. The Adjudicator rejected her contention on the basis that she had not paid in respect of the specific registration mark of the vehicle she drove. In judicial review proceedings Stanley Burnton J overturned that decision and concluded that the language of the

regulations in question was such that an Adjudicator had a general discretion to direct TfL to cancel a charge if the circumstances, in his view, warranted it. The Court of Appeal reversed that decision explicitly endorsing the paragraph of the judgment of Elias J in *Westminster* that I have set out. There was a debate about 'collateral challenge' in the Court of Appeal in particular by reference, to the *obiter dictum* of Scott Baker J in *Bexley*. Chadwick LJ pointed out that neither the facts in *Walmsley*, nor in the *Westminster* case gave rise to a collateral challenge properly understood. In both there was no direct attack on the decision of the enforcing authority on a public law basis. Rather it was suggested that the powers given to the Adjudicator allowed him a broad discretion to direct the enforcing authority to cancel penalty charges. Chadwick LJ said this:

> "I am not persuaded that there is anything in the Bexley case which should lead to the conclusion that Elias J was wrong to take the view that (absent a collateral challenge) the power of the adjudicator is limited to consideration of the matters on which the statutory scheme provided for representations to be made." (paragraph 41)

He concluded his judgment with these observations:

> "53. I am conscious that I have left open the question whether an adjudicator has power to entertain a challenge to TfL's decision to pursue payment on grounds which would found an application for judicial review … We were taken to the decision of Mr. Gary Hickinbottom, sitting as a parking adjudicator, in *Davis v Royal Borough of Kensington and Chelsea* (PATAS Case No. 1970198981) which provides a helpful analysis of the arguments. … For the reasons I have given I do not think that we can or should address that question on this appeal. It can be expected that, sooner or later, there will be an appeal to this court in which the question will arise and will need to be decided. But it may be that the rule maker will think it sensible to consider the question as a matter of policy and put it beyond doubt by an appropriate provision …"

45. The decision of Mr. Hickinbottom there referred to concerned a series of cases in which, having issued penalty charge notices, the enforcing authority delayed for years before sending notices to owner and then commencing proceedings in the County Court when the charges were not paid. He concluded that although the statutory scheme made the service of a Notice to Owner discretionary and imposed no time limit, it was implicit that a Notice to Owner must be served within a reasonable period. A failure to do so amounted to a failure to comply with the requirements of the scheme. In the result the authority could not enforce the charge and the appeals were allowed. This decision was of a piece with another of Mr Hickinbottom in PATAS Case No. 1940113243 given in May 2005. There the Penalty charge notice failed to contain prescribed information. The appeal was allowed on the basis that the authority could not rely upon a Notice that failed to comply strictly with the requirements set out in the statutory scheme. Both these cases were decided before the General Regulations and the Appeals Regulations were made in December 2007 and subsequently came into force on 31

March 2008. So too were the decisions of this Court and of the Court of Appeal to which I have referred.

46. In my judgment, in framing the new regulations, the policy maker has heeded the suggestion of Chadwick LJ and made clear the nature and extent of collateral challenges that may be considered by Parking Adjudicators whilst adhering to the principle found in the judgment of Elias J in the *Westminster* case, that the four corners of their powers are contained within the Appeals Regulations. There are three significant changes between the old powers found in schedule 6 to the 1991 Act and those found in the Appeals Regulations which unequivocally lead to that conclusion.

47. The first change is that a Parking Adjudicator must allow an appeal if a procedural impropriety is established. We have seen that the term is given a special definition for the purposes of the Appeals Regulations. That, in my judgment, demonstrates that Parking Adjudicators are empowered to consider what would otherwise require a collateral challenge, but that they may do so only within the confines of the definition within the regulation. Both the appeals considered by Mr Hickinbottom discussed above would now be allowed under the head of 'procedural impropriety'.

48. The second change relates to 'compelling reasons' upon which a motorist may now make representations to the enforcing authority and which a Parking Adjudicator may consider on appeal. Regulation 7(4) of the Appeals Regulations, set out in paragraph [11] above, comes into play only if the Adjudicator does not allow the appeal under one of the heads set out in regulation 4(4). If there are compelling reasons why the notice should be cancelled he may recommend to the enforcement authority that it cancel the notice. The enforcement authority is obliged by regulation 7(5) to consider afresh the cancellation of the notice but the decision whether to do so is for the enforcement authority, not the adjudicator, from which there is no appeal. Were an enforcement authority to refuse to accept such a recommendation the aggrieved motorist's remedy would lie in judicial review, inconvenient though that would be. This regulation deals with the precise question which was left open by the Court of Appeal in *Walmsley*. It denies the Adjudicator the power to direct the cancellation of the charge in circumstances where he considers an earlier refusal of the enforcing authority to do so wrong in law. Instead it gives a power of recommendation. This is a clear example of the statutory scheme denying an Adjudicator a general power to intervene by way of collateral challenge, but instead carefully carving out the parameters of the appellate jurisdiction and distributing responsibility for decision making between Parking Adjudicators and enforcing authorities.

49. The third change concerns the circumstances in which 'invalidity' of the underlying order can be relied upon. Paragraph 2(4)(d) of Schedule 6 to the 1991 Act provided that an appeal should be allowed on the ground 'that the relevant designation order is invalid'. Regulation 4(4)(g) of the Appeals Regulations repeats that ground but makes it subject to a qualification that exempts a whole class of orders from its scope. Questioning the underlying validity of an instrument upon which a public authority seeks to rely is the classic collateral challenge. The Appeals Regulations confer qualified power upon Parking Adjudicators to do so. That is another indication that these Regulations encompass the entire basis on which an appeal may be allowed and circumscribe the collateral challenges within the purview of Parking Adjudicators.

50. Mr Rogers expressed concern that if a free standing and unfettered power to allow appeals on the basis of 'collateral challenge' were not recognised, the approach of Parking Adjudicators to cases where motorists contend that signs or notices erected by enforcing authorities fail to

comply with statutory requirement would be undermined. These cases are colloquially known as 'signs and lines' cases and make up about 15% of the workload of Parking Adjudicators. However, it became apparent in the course of argument that the current approach of the Adjudicators would be accommodated by the first ground of appeal: 'that the alleged contravention did not occur'. That is because for a contravention to occur in addition to the underlying parking order being valid signs and lines complying with statutory rules must be in place. Various arguments have long been made by motorists, originally by way of defence in Magistrates' Court proceedings and now in response to Penalty Charge Notices and before Parking Adjudicators, that signs or lines did not comply with the rules. There is a well established body of case law which deals with this issue. Subject to a *de minimis* rule the signs must comply with the Traffic Signs Regulations and General Directions 2002/3113, or otherwise be authorised by the Secretary of State. These arguments raise issues of fact which go to the question whether there has been a contravention.

51. An enforcing authority has a statutory duty under regulation 18 of The Local Authorities Traffic Orders (Procedure) (England and Wales) Regulations 1996 to place signs giving notice of the effect of a traffic order. The authority must take such steps as are necessary to secure the placing of traffic signs in such positions as it considers requisite for securing adequate information as to the effect of a traffic order. The decision is one for the authority in the first instance. A failure to perform the duty, including a public law failure in the judgements it makes as to the requisite number and placing of signs, and the adequacy of the information thereby conveyed, would properly lead to the conclusion that a contravention had not occurred.

52. The restatement and reformulation of the powers of Parking Adjudicators in the Appeals Regulations show public law issues do fall to be considered in the appeals process but only in so far as the regulations themselves allow it. There is no independent roving commission to identify public law failings with consequent power to allow appeals outside the relevant regulations.

53. Subject to one caveat, in my judgment Mr. Rogers is correct to submit that the first ground of appeal, namely that the alleged contravention did not occur, is apt to enable a motorist to argue any point that would provide a defence to the underlying criminal transgression. It would be very surprising if precisely the same infringement committed in an area with no civil enforcement regime could be successfully defended in the Magistrates' Court but not before a Parking Adjudicator in an area subject to civil enforcement. That some contraventions have never been criminal offences and are new creations of the civil enforcement scheme, does not affect that conclusion. Parliament cannot have intended a different approach depending on that happenchance. I do not accept Mr. Coppel's argument that this ground for allowing an appeal is confined to consideration of the narrow factual circumstances of the alleged contravention. So, for example, conduct on the part of the enforcing authority prior to the alleged contravention which would have made it an abuse to prosecute would be covered by this ground. The caveat I mention is this. The ground that 'the alleged contravention did not occur' would appear naturally to call for an assessment of events and circumstances leading up to the time of the alleged contravention. Although it is difficult to envisage, it is at least theoretically possible to imagine events that could occur after the alleged contravention which might have been used by way of defence in the theoretical criminal proceedings. Whether that would fall within this ground, one of the other grounds or be accommodated within the 'compelling circumstances' envisaged in regulation 7(4) of the Appeals Regulations is something that would need to be worked through on the facts of a real case.

54. The levying of a 1.3% administration fee for payment by credit card was assumed for the purposes of the appeals to the Parking Adjudicators as being *ultra vires.* However it does not provide a further independent basis for allowing the appeals on the broad ground of 'collateral challenge'. That is because, whilst I accept that it provided a basis for allowing the appeals in these cases because the penalty charge exceeded the amount applicable and also because of procedural impropriety as defined by the Appeals regulations, this broad public law failing (conceded only for the sake of argument) does not fall within any grounds upon which a Parking Adjudicator may allow an appeal.

Conclusion

55. These applications for judicial review must be dismissed.

56. I heard no argument about the consequences of this conclusion, if any, in respect of other penalties which were never appealed but where the additional fee was charged or sought. I merely record that it formed no part of the Council's case (nor indeed that of the Parking Adjudicators' case) that the Council would, as a matter of law, be obliged to repay such sums now.