PARKING APPEALS SERVICE

ARNOLD ROSEN -and- WESTMINSTER CITY COUNCIL

PAS CASE No 1980293118

APPLICATION FOR REVIEW

DECISION

Introduction

This is an application by Mr Arnold Rosen for the review of a decision of 16 December 1998 of Parking Adjudicator Usha Gupta, refusing his appeal.

The Facts

On 27 May 1998, at 1.34pm, Mr Rosen's Lexus car registration mark J399 UNB was parked at a meter bay in Jermyn Street, the meter showing 29 minutes of penalty time. A parking attendant issued a Penalty Charge Notice ("PCN") (PCN No WE89498922), for the vehicle being parked in a meter bay where penalty time was shown. Mr Rosen disputes none of this. However, he has maintained that no penalty is due on two grounds, namely that, at the relevant time (i.e. at the time of issue of the PCN), (i) the meter was suspended and consequently he could park at it without payment: and (ii) he was engaged in loading the vehicle.

Giving evidence, Mr Rosen said that he had visited Simpsons in Piccadilly earlier that day. He walked there from his office which was close by: his car was in a car park in Spring Gardens. Simpsons was due to close, and he met one of their employees (Sarah Southgate) in her office on the 6th floor with a view to purchasing one or more of their window displays. He was a regular customer at Simpsons, and had known Miss Southgate for 3-4 years. She agreed to sell him a pair of displays of £300 plus VAT. She gave him a handwritten note from a book, to enable him to collect the displays from Simpsons' back door in Jermyn Street. This note was not a formal VAT invoice, which followed in the post. The note was not available before Miss

Gupta, or at the first hearing before me: but Mr Rosen found it in late March when looking for something else. I will return to this collection note.

Mr Rosen said he then went to pick up his car, to collect the displays. It was then that he parked at the meter bay in Jermyn Street, by the back entrance of Simpsons. He said that, although none of the meters was hooded, unusually for that time of day there were no vehicles parked in the meter bays: and there were yellow bollards down the road. In his representations to the Council (following the issue of a Notice to Owner ("NTO")), he said that he thought the meter was "out of action" or suspended by police order. Before Miss Gupta he said he was shocked that there was going to be controversy about the suspension. He said he assumed he could park there without payment, and he was misled by the bollards: if he had thought the meter was functioning, he said he would have put a pound in it. However, he has tried to verify with the police that some form of suspension was marked at the relevant time. The Council have also made their own enquiries, of both their own suspensions and those prompted by the police. None of these enquiries has revealed any evidence of a suspension, or bollards in Jermyn Street, on that day. In the circumstances, Mr Rosen does not now rely upon there being any suspension.

However, he does rely upon a second ground, namely that he was loading. It is a defence for an owner to show that the vehicle was engaged in loading or unloading at the relevant time - the burden of proof being upon him, to the civil standard of balance of probabilities. This ground was not at the forefront in his representations to the Council against the NTO, or at the outset of his appeal: but it became apparent during the hearing before Miss Gupta that it was the main issue, and, before me, it was the sole substantive ground of appeal pursued. He said that he stopped at the meter simply to load the display panels that were stacked by the wall just inside the back security entrance to Simpsons. He tried to put one panel in the car, and it became quickly apparent that he could not get it in without risking damage to either the car or the panels or both. He said he telephoned from the Security Office on the Ground Floor to Miss Southgate's assistant, to say that he could not collect them. He said that it was whilst making this call that he was issued with the PCN: he was only inside for only a few minutes. He said it was no more than 5-7 minutes. When he came out, the parking attendant was in the process of putting the PCN onto the windscreen. He said he had a conversation with the parking attendant, in which he said he had parked to load: and, indeed, the attendant's contemporaneous written notes say:

"13.34 O/R [i.e. owner returned]. Said he'd just parked while loading to 'Simpsons'".

He then said that he saw a second parking attendant who said that the PCN given by the first attendant was invalid, because (as I understand it) of the suspension marked by the bollards. The Council have investigated this, and there is apparently no note in the notebook of any attendant who may have been in Jermyn Street at the relevant time, although attendants are instructed to make notes of any incident that occurs.

Before Miss Gupta, Mr Rosen said that, when he had arrived back at Simpsons, only three of the panels were there. He said he had to make enquiries about the fourth panel, which he did from the Ground Floor, by telephoning someone in Miss Southgate's office: and he asked the security guard to guard the car. He was upset that the guard did not do so: and a PCN was issued. He denied ever leaving the Ground Floor from the time he parked, until the time he went out and saw the attendant putting the PCN onto his car.

The 16 December Appeal Hearing

Whether an activity falls within the definition of "loading" is largely a matter of fact and degree. It has been said:

> "At some point there will be a fine line between what is acceptable and what is not. It seems to me that the driver should normally be covered during unexpected delays (as the driver waiting for the parcel was in Macleod -v- Wojkowska [1963] SLTN 51) but if he embarks on some other activity such as going off for refreshment or starting some other work it will be difficult for him to say that the process of delivery/collection is still continuing" (Jane Packer Flowers -v- Westminster City Council, PAS Case No 1960034955).

In this case, the Council do not suggest that Mr Rosen would not have been covered by the loading exemption simply because he could not get the panels into his car, or had to telephone upstairs in Simpsons because of that or because one panel was missing. The real issue was whether Mr Rosen's version of events is accepted, and accepted as satisfying the burden of proof that was upon him.

Mr Rosen did not produce any documentary evidence that he was loading (i.e. collecting the panels) at the relevant time. Although the Council had pressed him for such evidence (e.g. in their letter of 26 August 1998, rejecting his representations, the Council said that the PCN would be cancelled if documentary evidence of loading were provided in the form of a delivery note, or in this case presumably a collection note), none was forthcoming. However, as Miss Gupta recognised towards the end of the 16 December 1998 hearing before her, for some time the focus of Mr Rosen's representations had been that the meter was suspended in such a way that he could park there without any payment. It was really only during the course of that hearing that it became clear that the real issue was whether he was engaged in loading. Once it became apparent that that was the real issue, Miss Gupta appeared minded to give Mr Rosen an opportunity (i.e. an adjournment) to obtain evidence that he was collecting the panels that day. Because it seemed that the collection note to which I have referred was thought no longer to be available, she appeared to have in mind a letter or statement from someone at Simpsons. Mr Rosen said that, if that evidence was required, he would get it: but he did not say expressly whether or not he wished to have an adjournment or not. He responded by asking a question of the Council, namely whether they were prepared to accept his evidence - and the hearing then proceeded to consider the issue of the credibility of the evidence Mr Rosen had put forward. The question of an adjournment was not revisited.

Following the submissions made, Miss Gupta was not satisfied that Mr Rosen had discharged the burden of proof with regard to loading, and she dismissed the appeal. In her decision, she said:

> "Mr Rosen challenges this PCN on the basis that he was loading and therefore no contravention occurred. Having heard from him and from Westminster City Council and considered all the evidence I find as a fact that he was not loading and in those circumstances the appeal is refused."

The Application for Review

Mr Rosen now applies to review that decision on the basis that the interests of justice require it, because the manner in which Miss Gupta conducted the hearing was procedurally unfair, and she erred in finding that he was not loading at the relevant time.

The application for review was the subject of an oral hearing before me on 14 March 1999. Mr Rosen attended, and made both written and oral submissions. He was accompanied by an assistant solicitor from his office, Miss Cavalier. Mr Symes and Ms Brook attended for the Council. During that hearing, it became clear that there were substantial differences between Mr Rosen and the Council as to the manner in which the hearing before Miss Gupta was conducted, and even as to what was said by Mr Rosen giving evidence at that hearing. Consequently, the hearing was adjourned to allow the parties and me an opportunity to hear the tape recording of the original hearing. A transcript was not made, because of the potential cost of that exercise: but both Mr Rosen and I have taken the opportunity of listening to the tape of the earlier hearing. Following that, Mr Rosen asked for a further opportunity to make oral submissions to me, which were made at a further hearing on 21 April. The Council have declined the opportunity to hear the tape recording and to attend the further hearing: but they have submitted further written submissions.

Allegations of Gross Procedural Irregularity

First, I wish to deal with Mr Rosen's suggestion that there were gross procedural irregularities in the hearing conducted by Miss Gupta. In his written submissions on the review, Mr Rosen says:

> "In December 1998 I appeared before a lady barrister who made a travesty of the hearing... The hearing before Miss Gupta was neither independent, nor impartial, nor fair."

Miss Gupta is a barrister of some 15 years call, and has been a Parking Adjudicator since 1993. She also sits as a judge of the Crown Court as an Assistant Recorder. She is, consequently, experienced at sitting in a judicial capacity. I should say at the outset that I find no substance in any of these serious allegations made in respect of her general conduct of the case.

Mr Rosen's complaints can be broken down into broad categories, as follows:

(i) Mr Rosen criticises Miss Gupta for being partisan, or biased. In various documents he has said:

> "However, from my view point, she saw herself as a prosecutor and gave me the impression that she was determined to establish that this was a unmeritorious case. She from start to finish gave me the impression that she had adopted a mind set..."
>
> "At every turn the Adjudicator... wanted to level an accusation of dishonesty towards [me].... "
>
> "At the end of those proceedings, the representative of the City of Westminster actually shook hands with [Miss Gupta] and congratulated her on her performance."
>
> "The Adjudicator was not independent of [the Council] representative. The Adjudicator's conduct to the... representative was deferential by contrast to her manner towards [me] which was at first sceptical and thereafter cynical."
>
> "A hearing of the tape in comparison of the written submissions throughout by the Applicant will indicate that the Adjudicator was not independent or impartial..."

I have listened to the tape of the hearing, and the picture painted by Mr Rosen is not one borne out by it. I do not consider there was anything said by Miss Gupta to suggest that she was anything other than impartial. Indeed, at the 21 April hearing before me, Mr Rosen accepted that, shortly before the end of the hearing (when Miss Gupta was asking him whether he wished to have an adjournment to obtain and lodge evidence from Simpsons with regard to the collection of the panels), Miss Gupta was behaving absolutely correctly. Up to that point in the hearing, in my view, Miss Gupta conducted the case in exemplary fashion. There is nothing in the tone or substance of what was said during any part of the hearing to suggest that Miss Gupta was partisan or biased, or that she had closed her mind against allowing Mr Rosen's appeal. Mr Rosen's immoderate criticism of her has no basis whatsoever.

Dealing with the specific matters raised by Mr Rosen, far from levelling an accusation of dishonesty against Mr Rosen, the Adjudicator indicated that no one was accusing him of being a liar: but, as the burden of proof was on him to show he was loading at the relevant time, it was proper for his evidence to be tested. There is no reference on the tape at the end of the hearing to the Council's representative "congratulating" Miss Gupta, or making any other inappropriate remark. Although it is convention that the Adjudicator does not shake hands with either party, proceedings in this tribunal are relatively informal and occasionally one party instinctively shakes the hand of the Adjudicator at the end, meaning nothing but courtesy by it. From the tape, there is no evidence that this happened in this case. If it did, in the circumstances, I do not consider it was of any moment.

(ii) Mr Rosen complains that Miss Gupta was, effectively, oppressive. In his letter of 11 January, he said:

> "The local government officers were permitted to intervene at will... The Adjudicator herself interrogated me and did not, without regular interruption, permit a narrative to be given by me...."

He describes her as becoming "ultra-impatient". In his written submissions to me, he said:

> "The Adjudicator conducted an interrogation and did not permit the story of the Applicant to be told with coherence...[She] permitted interruptions from the [Council] at any stage without discipline of any kind despite the fact that she as a member of the English Bar would know that no Judge sitting in open Court would tolerate any such interruptions of that kind. [She] accepted argument from [the Council] when permitting such interruption... At no time did the Adjudicator give the Applicant any opportunity or fair opportunity of listening to the evidence given by him."

This complaint is effectively a further complaint that Miss Gupta was not fair or even-handed in her conduct of the hearing.

Having listened to the tape, I find that there is no evidence to suggest that Miss Gupta did not allow Mr Rosen properly to put his case. According to the computer record, the hearing (set down for 15 minutes) lasted nearly well over an hour. Mr Rosen was represented by Counsel (Mr Edward Lee MP) who expressly indicated that he was Mr Rosen's legal representative for the purposes of the hearing, and Mr Rosen was given more than a reasonable opportunity to give his evidence and put his submissions, and did so. It is simply wrong to suggest that he was consistently or improperly interrupted when doing so, whether by Miss Gupta or those representing the Council. An adjudicator is given a wide discretion as to how to conduct a hearing, and is required to avoid formality as far as he or she properly can (Regulation 9 of the 1993 Regulations). Indeed, the limiting of formality is one of the very purposes behind the statutory scheme of The Road Traffic Act 1991 which took disputes concerning parking penalties out of the Court system. The fact that the hearing before Miss Gupta was not as formal as a Court hearing before a judge is not a criticism that can properly be made. The conduct of the hearing must, of course, be in accordance with the rules of natural justice which require each party to have a proper opportunity to put his case. The lack of full formality does not undermine that requirement. But I am in no doubt that Mr Rosen had that opportunity.

(iii) Mr Rosen criticises both the Council and the Parking Appeals Service, for the resources they have devoted to this case. With regard to the PAS, in his written submissions to me, he said:

> "I am still angry ... at my treatment by ... the Parking Appeals Service ... for spending 70 plus minutes considering the case and then determining that I was untruthful."

He also said:

> "It is not only disproportionate to demand of any Applicant that they should pay £400 for a transcript when the Fixed Penalty Notice (sic) is £30. In addition, the [Council] have raised costs by levelling an oblique accusation of forgery."

Whilst it is true that all steps in all judicial processes should be proportionate to the issues and money involved, I do not consider Mr Rosen has any legitimate complaint against Miss Gupta for allowing him the time to develop his evidence and arguments as she did. Neither Miss Gupta nor the Council were responsible for unduly extending the original hearing.

So far as the costs of a transcript of the original hearing are concerned, I believed that £400 for a transcript was difficult to justify, which is why I directed the exceptional course that the parties and I be given an opportunity of listening to the tape recording of that hearing. The way in which this was dealt with is not criticised by Mr Rosen. So far as his suggestion that the Council raised costs "by levelling an oblique accusation of forgery" is concerned, the Council pointed out to Mr Rosen and to Miss Gupta and to me apparent inconsistencies in the evidence that led them to doubt that Mr Rosen was loading his vehicle at the relevant time. As the burden of proof was on Mr Rosen to show he was loading, that was perfectly legitimate. I do not see how unnecessary costs were incurred by the Council taking this course.

(iv) Mr Rosen finally suggests that Miss Gupta made a finding against him, with regard to whether he was loading, in the absence of evidence entitling her to do so. It is trite to say that any tribunal can only act on evidence presented to it. However, the weight given to various pieces of evidence is a matter for the tribunal alone. The burden of proof was on Mr Rosen to show that he was engaged in loading his vehicle at the time the PCN was issued. There was clearly evidence before Miss Gupta upon which she could make the finding that she did make.

Mr Rosen made much of one particular piece of evidence, and the way in which Miss Gupta dealt with it. As I have already indicated, in his evidence, Mr Rosen said that, after receiving the PCN, he saw a second parking attendant who (Mr Rosen said) told him that the PCN should not have been issued, apparently because the suspension of the meter. This is not a ground upon which Mr Rosen now pursues his appeal: and whether this incident happened or not can only go to Mr Rosen's credibility. Mr Rosen is wrong when he says (in his letter of 11 January 1999 to the Chief Adjudicator) that Miss Gupta stated categorically that she knew that all parking wardens made notes of anything significant. Miss Gupta merely said that parking attendants were trained to

take notes of such incidents and, had the second parking attendant acted in accordance with his training, he would have made a record in his notes that he had spoken to Mr Rosen. That was something Miss Gupta could properly take into account: although it seems to me from listening to the tape of the hearing that this point was not crucial to her finding that Mr Rosen was not loading.

Paragraph 9(2) of the 1993 Regulations provides:

> "... [T]he adjudicator shall conduct the hearing of an appeal in such manner as he considers most suitable to the clarification of the issues before him and generally to the just handling of the proceedings; he shall so far as appears to him appropriate seek to avoid formality in the proceedings."

The Regulations therefore provide a considerable discretion in an adjudicator as to how he or she conducts a particular appeal. During the course of the hearing, Miss Gupta properly strove to identify the real issue between Mr Rosen and the Council which, during the course of the hearing, changed from (if I may be permitted to use this shorthand) the "suspension of the restriction" point to the "loading" point. Having identified the issue, she attentively read and listened to the evidence and submissions on it.

Mr Rosen has made serious suggestions as to Miss Gupta's partiality and competence. Having listened to the tape of the original hearing - and Mr Rosen's submissions in respect of it - I do not consider that any of these suggestions have any substance. That such allegations have been made of an experienced tribunal by a solicitor, without any evidence to support them, is a matter of great regret.

The Substantive Review

However, these allegations, ill-founded as they are, appear to me to be of little relevance to this review. This case concerns a £60 penalty for parking at a meter showing penalty time. The only issue is whether Mr Rosen was engaged in loading at the time the PCN was issued. That issue is a simple one. It is again a matter of regret that the investigation of the wide-ranging issues raised by Mr Rosen have led to the production of large numbers of documents, and the need to have three lengthy hearings.

As with many cases in which the loading/unloading defence is raised, however, there was in this case a problem for Mr Rosen in that he had the evidential burden of proving the defence. From the outset, the Council requested documentary evidence that he was loading at the relevant time. They clearly indicated that, if cogent evidence were provided, they would cancel the PCN and NTO and not pursue any penalty. Although documentary evidence of loading is not necessarily determinative, it can understandably be very persuasive, either when put before the Council in response to an NTO or before an adjudicator in an appeal. Indeed, before Miss Gupta, the Council indicated that the only reason why Mr Rosen had been pursued for a penalty was the dearth of evidence: Mr Symes for the Council said that, if and when they had that evidence, they could cancel the PCN.

With regard to the potential evidence that might have been available, there was of course the collection note produced by Miss Southgate, referred to above. As I have said, that was made available to neither the Council nor Miss Gupta. From the correspondence, it seems that at one stage Mr Rosen thought that it was with his accountants. By the time of the March 1999 hearing before me, it seems that Mr Rosen believed the note to have been irretrievably lost.

In the absence of harder evidence, before Miss Gupta, matters which went to the credibility of Mr Rosen's oral evidence gained a great significance. There was lengthy consideration of whether Mr Rosen had a conversation with a second attendant, about the suspension of the bay and the validity of the PCN: there was a further discussion at the end of the hearing about perceived internal inconsistencies in Mr Rosen's own evidence.

Mr Rosen now seeks to adduce further evidence before me. First, he has found the collection note prepared by Miss Southgate. He says that he found this, in a place it ought not to have been, when he was looking for an address. It came as a complete surprise to him. Second, he has submitted a statement from Miss Southgate, broadly confirming his version of events on 27 May 1998, and exhibiting a copy of that self-same collection note which (she confirms) was "to enable the goods to be passed at the security desk by the exit at the back of Simpsons".

The Council have expressed surprise that the collection note has only just been found and produced, despite many requests of Mr Rosen to produce documentary evidence of the collection and many opportunities given to him to produce it. However, this was precisely the

sort of evidence requested by the Council on numerous occasions: and the sort of evidence Miss Gupta clearly had in mind when she asked Mr Rosen whether he wished to have an adjournment, towards to the end of the hearing before her.

I have no doubt that the note is a genuine document. It is a Simpsons' standard form. It is dated 27 May 1998. It is addressed to Mr Rosen. It is headed "Supplier's Inspection Note" and has a unique number. It says: "The articles listed below are the property of Simpson (Piccadilly) Limited and should be returned to us no charge". Miss Southgate's signature is in a box entitled "Buyer's Signature". The standard form was clearly not intended for the purpose for which Miss Southgate used it that day. The text reads:

> "2 paintings @ £150 each £300
> + VAT 17.5%.
> To be collected 1.30pm Wed 27th March
> Invoice to follow".

Although the Council query the date for collection, "27th March" is an patent error for "27th May". Not only would a March collection date not make sense in a document dated May, but 27 *May* was a Wednesday (27 *March* 1998 being a Friday). I accept that this document was produced by Miss Southgate, to enable Mr Rosen to collect the panels from the back entrance of Simpsons that day: it was sufficient authority for Simpsons' own security guards to release the panels to the possessor of it.

As I have said, this was the very evidence sought for months by the Council, and at the hearing by Miss Gupta. Had this document been available to the Council at the NTO representations stage, I would hope that they would have cancelled the PCN and NTO as they said they would do on the furnishing of such a document as this, and not pursued the penalty further. The collection note alone is very cogent evidence, that utterly over-shadows the less substantial evidence that was before Miss Gupta. It is of course made more compelling by Miss Southgate's statement. Taken with the contemporaneous note taken by the parking attendant that Mr Rosen had referred to loading when he returned to his car, on all of the evidence I am satisfied that Mr Rosen was engaged in loading at 1.34pm on 27 May 1998, when the PCN was issued. Indeed, had she had this new evidence before her, I have no doubt that Miss Gupta

would also have been satisfied that Mr Rosen had discharged the burden of proof that rested upon him.

Consequently, the issue which I have to decide is whether to allow Mr Rosen to rely upon the collection note at this stage. Clearly, his production of it is very late indeed. At all relevant times, it was in his own possession. It is for each party to adduce the evidence upon which it relies, in time for the appeal hearing. Even if Mr Rosen could not find his copy of the collection note, he could have obtained a statement from Miss Southgate, which he only obtained on 20 April 1999. Furthermore, the Courts have repeatedly stressed the importance of the principle of finality when they have considered the decisions of tribunals against which there is no right of appeal. It is trite law that a review is not an appeal, and there is no right to a review simply because the original tribunal made (or may have made) an incorrect finding. Bearing in mind the importance of the principle of finality of tribunal decisions, it is only with reluctance that I would re-open a factual issue.

Nevertheless, in this case, I accept Mr Rosen's version of events as to how he came to find the collection note, which in my view is clearly a genuine document. As I understand it, he had looked for it and thought it irretrievably lost, but he found it in an unexpected place when looking for another document. I accept that it was not his fault that he had not found it before.

Furthermore, it is clear from what was said at the December 1998 hearing before Miss Gupta that the "loading" issue was not at the forefront of anyone's mind until that hearing. As I have said, towards the end of the hearing, Miss Gupta appeared minded to grant an adjournment to enable Mr Rosen to get evidence from Simpsons. Mr Rosen never expressly responded to the question as to whether he wished to have an adjournment: and the hearing then moved back into the issue of the credibility of the evidence Mr Rosen had submitted, which resulted in Miss Gupta determination that the burden of proof had not been satisfied. It is unclear why the question of an adjournment was not pursued or revisited. Mr Rosen suggests that an intervention by the Council's representative when he (Mr Rosen) was explaining what had happened led to the issue being forgotten. I do not know. However, although it is true that Mr Rosen (or his legal representative, Mr Lee) could have specifically asked for such an adjournment - and they did not - in all of the circumstances, I do not consider he should be penalised by my shutting out the evidence at this stage.

Although I consider it a finely balanced matter, in all of the circumstances, I consider it is in the interests of justice that I should allow Mr Rosen to rely upon this new evidence: and that I should allow his application to have Miss Gupta's decision reviewed. For the reasons given above, on all of the evidence before me, I consider that this appeal should be allowed: and I direct the Council to cancel the PCN and NTO.

In allowing this appeal, it should not be thought that I am levelling any criticism of the Council. The circumstances in which I have allowed Mr Rosen to rely upon late evidence in this case are exceptional: and, just as I consider Miss Gupta was quite entitled to refuse the appeal on the evidence before her, the Council cannot be open to criticism for rejecting Mr Rosen's representations against the NTO on the evidence then before them or for contesting this appeal in the absence of the evidence obtained and lodged by Mr Rosen on 20 April 1999.

G R Hickinbottom

23 April 1999