PARKING APPEALS SERVICE

LONDON BOROUGH OF SUTTON

DIANE SCORE

CASE No: 1950122932 (PCN No. SU70305761)

REVIEW OF THE DECISION OF THE PARKING ADJUDICATOR

Introduction

The facts of this case are straightforward and uncontroversial. On 20 July 1995, Mrs Score parked her car in the Cheam Library Car Park, otherwise known as the Stone Place Car Park, Cheam. It was not displaying a vehicle excise licence tax disc. A Parking Attendant issued and fixed to the car a Penalty Charge Notice ("PCN"). The PCN indicated that it had been issued on the grounds, "Valid tax disc not on display": and that the penalty was £40, but a discounted penalty of £20 would be accepted if paid to the London Borough of Sutton ("the Council") within 14 days.

Mrs Score did not pay the penalty. As a result, on 29 August 1995, the Council sent her a Notice to Owner ("NTO") requiring payment of the £40. The NTO was again, on its face, issued for the parking contravention, "Valid tax disc not on display". Mrs Score lodged representations with the Council, but these were turned down. She consequently appealed to the Parking Appeals Service. The Parking Adjudicator, Brian James, allowed her appeal on 16 December 1995. Following a request for a review, that decision was reviewed by the same adjudicator on 9 February 1996, when he upheld his earlier decision. The Council thereafter issued judicial review proceedings in the High Court, but these were withdrawn, on the basis that Mr James' decision would be reviewed de novo by another adjudicator, under Regulation 11 of The Road Traffic (Parking Adjudicators) (London) Regulations 1993. That review has come before me.

Both the applicant and Mrs Score have submitted written submissions to the Parking Appeals Service, all of which I have considered. I have also seen the evidence lodged in the proposed judicial review, which has assisted me in understanding the issues raised by the Council. Mrs Swan and Mr Troy appeared for

the Council at the oral hearing before Mr James, on the February 1996 review. Neither party has sought an oral hearing before me: they have both indicated that they are content for me to deal with the matter on the papers. However, because of the legal issues involved, the Parking Appeals Service appointed Timothy Ward of Counsel as amicus curiae. He lodged written submissions, to which the Council have responded, and expanded on these at a hearing on 25 November to which the parties were invited to attend. I would like to thank him - as well as both parties - for his assistance.

As I have already indicated, this case raises a number of legal points. In my view, a decision on any one of a number of these would be determinative of this appeal. However, the Council have specifically asked me to deal with each of the issues raised as a matter of principle, which I propose to do. Because the Council consider this case raises matters of principle, they have agreed not to pursue Mrs Score for any penalty, in any event. This concession is very properly made in cases such as this, in which matters of principle arise, and is in line with the guidelines as to the proper approach to the review of an adjudicator's decision set out in the decision of The London Borough of Enfield -v- Cheryl Ross (Case No 1950094429) (23 February 1996).

The Statutory Background

The PCN was issued in respect of a purported breach of Article 12 of The Sutton (Off-Street Parking Places) Order 1992 ("the Order"). The Order was made by the Council "in exercise of the powers conferred it by Sections 32, 35 and 124 of and Part IV of Schedule 9 to the Road Traffic Regulation Act 1984...as amended by Section 8(1) of and Schedule 5 to the Local Government Act 1985 and all other powers so enabling..." (this being recited in the preamble to the Order).

Article 12 provides:

> "The driver of a vehicle shall not permit that vehicle to wait in a parking place unless the vehicle is licensed in accordance with Section 1 of the Vehicles (Excise) Act 1971 and unless there is in relation to the use of the vehicle by the driver such a policy of insurance as complies with the requirements of Part VI of the Road Traffic Act 1972."

Section 1 of The Vehicles (Excise) Act 1971 has now been revoked and replaced by Section 1 of The Vehicle Excise and Registration Act 1994.

Article 30 provides that a penalty notice will be issued to vehicles parked in a parking place during charging hours in contravention of Article 12. Under the decriminalised scheme of The Road Traffic Act 1991, such a notice will be a PCN.

The Adjudicator's Decision

Because this is a de novo review, I need not dwell at length on Mr James' decision. However, briefly, he gave three reasons for allowing Mrs Score's appeal, namely:

(i) He found that Article 12 was ultra vires of Section 35 of the 1984 Act, by virtue of which it was purportedly made.

(ii) The PCN and NTO only alleged a failure to display a tax disc, which was not itself a contravention of Article 12. Consequently, there was no contravention upon which a PCN or NTO could be based.

(iii) The condition in Article 12 (that the vehicle be licensed in accordance with Section 1 of the 1994 Act) was not breached, because Section 1 of that Act had no application to the circumstances of this case. The car park was an off-street car park, and not "a public road" for the purposes of Section 1 of the 1994 Act. Mr James found that Section 1 only applied to vehicles whilst they were upon public roads, and Mrs Score's vehicle was not failing to comply with Section 1 of the 1994 Act at the time the PCN was issued.

The Points of Law Arising

The Council say that Mr James was wrong to allow the appeal, and they have raised the following points in their request for a review.

(i) The Council say that Mr James was himself acting ultra vires in holding that Article 12 of the Order was invalid. The first question for me to consider is: Is an adjudicator now able to consider the validity of the Order or any part of it? The Council say that he cannot.

(ii) If an adjudicator can consider the validity of the Order: Is Article 12 in fact valid, or did the Council act ultra vires in purporting to make it? The Council say that the Article is valid.

(iii) If Article 12 is valid: Was there in fact a breach of Article 12 in this case? The Council say that there was.

(iv) If Article 12 is valid and has been breached: Can the Council properly issue a PCN for a breach of Article 12? The Council say that they can.

(v) In any event, leaving the statutory provisions aside, was the requirement to have a tax disc a term of a contract between the Council and Mrs Score? If so, was that contractual term breached? If so, was the penalty a proper contractual remedy for the Council to enforce? The Council say that there was a contract between themselves and Mrs Score: that the requirement for Mrs Score's car to have a tax disc was a condition of her being allowed to park: that that term was breached: and that enforcement of the penalty is a proper contractual remedy for them to pursue.

(vi) As a separate issue, can a Parking Adjudicator review his/her own decision under Regulation 11 of The Road Traffic (Parking Adjudicators) (London) Regulations 1993? The Council say that an adjudicator cannot. Although that is not a point arising in this review (because I am being asked to review a decision of another adjudicator, Mr James), it is a question of principle that arose in Mr James' review of his own decision and one which I should address.

Question 1: Is an adjudicator able to consider the validity of the Order or any part of it?

The Council submit that neither Mr James nor I have jurisdiction to hold that Article 12 of the Order is invalid, because Paragraph 37 of Part VI of Schedule 9 to The Road Traffic Regulation Act 1984 ("the 1984 Act") precludes the questioning of the validity of any Order passed pursuant to Section 32 of that Act in any legal proceedings, save as is provided in Paragraph 35 of the same Schedule. Paragraph 35 requires any question concerning validity to be raised by an application to the Court within 6 weeks from the date on which the Order is made. The Order was made on 20 March 1992.

I do not agree with the Council's submission. Section 32 concerns the power of local authorities to provide parking places. In my view, Article 12 - which concerns purported conditions of using parking places, and not the provision of such places - cannot have been made pursuant to that section. Rather, of the various potential enabling sections, Article 12 was, and could only have been, made pursuant to Section 35. This section is headed, "Provisions as to use of parking places under ss 32 or 33", and it provides that a local authority may by Order make provision as to (amongst other things):

> "(i) the use of the parking place, and in particular the vehicles or classes of vehicles which may be entitled to use it
>
> (ii) the conditions on which it may be used..."

Indeed, in their proposed judicial review of Mr James' decision, the Council expressly rely on that section in terms of enablement. They say:

> "...[U]nder Sections 35(1)(i) and (ii) of [the 1984 Act] [the Council] can restrict the vehicles and classes of vehicles using parking provided pursuant to that Act on any reasonable basis"

and they say that Mr James erred in construing the words "classes of vehicles" in these enabling provisions in a restrictive way. Although this ground is expressed to be an alternative ground to the inability of an adjudicator now to question the validity of Article 12, the Council did not seek to argue that Mr James was wrong to find Section 35 the relevant enabling section, as opposed to Section 32. In my view, such an argument cannot properly be made.

Part VI of Schedule 9 to the 1984 Act only applies to Orders made under specified sections, including Section 32, but not Section 35. In my view, as Article 12 was made pursuant to Section 35, the restricted provisions for challenge as set out in Paragraph 35 of Schedule 9 do not apply to it.

It was consequently open to Mr James (and is open to me) to question the validity of Article 12, despite the fact that over 6 weeks have elapsed since the making of the Order.

Question 2: Is Article 12 in fact valid, or did the Council act ultra vires in purporting to make it?

The question still remains, is Article 12 in fact valid or invalid?

The Council is a corporation, and it is consequently subject to the doctrine of ultra vires. A local authority can only do those things in respect of which it has an express or implied authority, or which are incidental to the doing of those things (this extension now being provided by statute: Section 111 of The Local Government Act 1972). In this context, "incidental to" has been construed narrowly (AG v Mersey Railway Co [1907] AC 415, and Hazell v The London Borough of Hammersmith [1992] 2 AC 1). The authorities show that "a power is not incidental merely because it is convenient or desirable or profitable" (Hazell at page 31E, per Lord Templeman). "Since delegated powers of legislation are nearly always given for the specific purposes, their use for other purposes will be unlawful" (Wade, Administrative Law, 7th Edition, page 882, and the authorities there cited: Hazell underlines the point). These general principles clearly apply to the exercise of Council's powers in connection with parking (see R v The London Borough of Camden ex parte Cran [1995] RTR 346).

The purpose of The Vehicle Excise and Registration Act 1994 ("the 1994 Act") is the imposition of (prior to the collection of) vehicle excise duty in respect of vehicles "used, or kept, on a public road" (Section 1).

The 1984 Act - as the title of that Act suggests - concerns traffic management. The purpose of Section 35 is the proper governance of parking. I do not know the extent to which the levying of penalties in respect of unlicensed vehicles in car parks might further the purposes of the 1994 Act (i.e. the imposition and collection of vehicle excise duty) - I would be sceptical as to the assistance that would be gained - but, in any event, those functions are not ones allocated to local authorities (including the Council) by Parliament, in Section 35 or elsewhere. Therefore, no matter how laudable the aims of the Council, it is beyond their powers to pursue the purposes of Section 1 of the 1994 Act. Similarly, although the Council say that one of their purposes in checking licenses is to satisfy themselves that vehicles have MOT certificates, it is not their function to police whether vehicles have such certificates either.

Does the levying of such penalties serve any other purpose, that is properly the Council's? So far as purpose is concerned, the Council rely heavily upon the policing of vehicle excise and MOT requirements, which I have found to be improper. The only other purpose suggested by the Council in their submissions - and it is, on its face, a parking purpose - is this:

> "Cars which are MOT'd and taxed are less likely to be abandoned, hence the Council in Article 12 attempts to ensure that vehicles are not going to be permanently abandoned in its off-street parking."

As I understand it, the Council's point is that, by penalising the owners of vehicles that are unlicensed, this will act as a disincentive to owners who are minded to abandon their vehicles in the Council's car parks. I do not find this submission at all compelling. Even on the assumption that, statistically, vehicles that are licensed are less likely to be abandoned than licensed vehicles (about which I have seen no evidence, but which I shall assume in favour of the Council for the purposes of this submission), it seems to me that levying a penalty for being unlicensed will make abandonment of vehicles in a car park no less attractive. In any event, the potential penalty can be no disincentive to prospective abandoners of cars in a Pay & Display car park, such as in this case (the Cheam Library Car Park). In such a car park, any vehicle that is abandoned will in any event incur a penalty after 24 hours for either (i) a failure to display a Pay & Display ticket at all, or (ii) for staying beyond the time purchased as evidenced by the Pay & Display ticket displayed. The penalty in each case is in the same amount as the penalty sought by the Council for a breach of Article 12. In these circumstances, the threat of such a penalty for failure to license a vehicle (or a failure to display a licence) could not possibly be a disincentive to a would-be abandoner of a vehicle.

In any event, I do not consider a power to levy penalties for a failure to license (or display a license) could properly be said to be "incidental to" the authority given to the Council to govern the use of parking places or any other authority of the Council to which I have been referred, in the sense described by the House of Lords in the cases referred to above, even if it were some disincentive to the abandonment of vehicles in a car park.

The Council do not suggest any other purpose insofar as the exercise of the power to levy a penalty in respect of unlicensed vehicles in one of their car parks is concerned. They do, however, pray in aid the fact that Article 12 of the Order is in substantially the same form as suggested in Article 8 of Model M of the Department of Transport Circular Roads 6/84 (19 September 1984). However, this circular is of no

legal force, and the forms of order it contained were not prescribed by statute. In terms of construction of the relevant provisions, it is of no assistance: and, to the extent it suggests that such provisions can properly be made under Section 35 of the 1984 Act, I consider this suggestion wrong. In my view, it cannot be right, having regard to the relevant statutory provisions.

Therefore, I have seen no evidence which suggests that levying a penalty for failing to license a vehicle will further the proper purpose of the relevant provisions of the 1988 Act (i.e. the governance of parking) or, indeed, any proper purpose of the Council.

A number of points flow from this. It seems to me that, in Section 35(1), the reference to "classes of vehicles" must relate to "classes" which serve a proper purpose, e.g. parking. Classification by reference to excise duty status would be improper. Similarly, in the same section, the reference to "conditions on which [parking places] may be used" must, in my view, relate to "conditions" which serve a proper purpose. Again, conditions relating to excise duty would not be proper.

For the reasons set out above, I consider Article 12 of the Order to be invalid.

Question 3: Was there in fact a breach of Article 12 in this case?

In any event, the 1994 Act (and, in particular, Section 1 of that Act) only relates to a license "in respect of a mechanically propelled vehicle which is used, or kept, on a public road". Before me, the Council accepted that (i) there is no requirement for vehicle excise duty in respect of vehicles not used or kept on a public road (nor any corresponding requirement to exhibit on a vehicle a licence, when it is not on a public road: and (ii) the car park in this case was not "a public road" as defined in the 1994 Act (as to which, see below). Below, I refer further to the question of whether the car park is "a public road": but, in my view, these concessions were properly made, and, in any event, I hold as such as a matter of law. Therefore, there was no obligation upon Mrs Score under Section 1 of the 1994 Act to licence her vehicle, nor was there an obligation upon her to display a tax disc under the relevant regulations referred to above. Consequently, at the time the PCN was issued, she was not in breach of Section 1 of the 1994 Act. In my view, on its proper construction, for there to be a breach of Article 12 of the Order, there must be a breach of Section 1 of the 1994 Act at the relevant time. It is not sufficient, as the Council suggest, that the vehicle must have been driven to and from the car park on public roads. The fact is, at the relevant time, Mrs Score was in breach of neither the Section 1 of the 1994 Act nor Article 12 of the Order.

There is the suggestion in some of the Council's submissions that Article 12 is breached, not by an owner being in breach of Section 1 of the 1994 Act at the relevant time, but by the fact that the duty has not actually been paid in respect of that vehicle (or, possibly, no license is exhibited in the vehicle: see below) for the period during which the vehicle is in the car park. Such a submission would effectively mean that Article 12 placed an additional burden upon the user or keeper of a vehicle, namely to pay vehicle excise duty, or face an additional (penal) levy, in respect of a vehicle not being used or kept on a public road. Of course, this would be well outside the powers of the Council. In any event, it would result in vehicles that are exempt from the licence requirements of the 1994 Act (by Section 5 and Schedule 2: they include electrically propelled vehicles, and certain vehicles for disabled people), and all foreign vehicles, being in breach of Article 12 and liable to a penalty, simply by parking in the car park. This cannot have been the intention of the Order: nor can it have been the intention of Parliament that such orders be made under subsidiary legislation.

However, even if the Council's interpretation of Article 12 is correct, they face another problem. There is evidence that Mrs Score was, at the relevant time, in the process of obtaining a new licence, which was backdated by the DVLA, in the usual way. Therefore, albeit retrospectively, Mrs Score did in fact pay duty in respect of the vehicle for the period during which the vehicle was in the car park.

I now return to the question of whether the car park was a "public road". As I have indicated, the Council accepted that Section 1 of the 1994 Act only applied to vehicles used or kept "on a public road": and they accepted that the car park was not a "public road". However, I have had my attention drawn to two recent Court of Appeal decisions which concerned parking in car parks and whether the car park amounted to a road, namely Cutter v Eagle Star Insurance Co Ltd (22 November 1996) and Clarke v Kato (29 November 1996). Indeed, I have delayed finalising this decision pending sight of these two cases. I have now seen the transcript of the later judgment, but I understand that the transcript of the earlier judgment is still not yet available. I have therefore had to rely upon the report of the case in The Independent (3 December 1996), but I consider that that report is sufficient for my purposes and I am anxious that this decision is not further delayed. Both cases concerned the question as to whether a car park was a "road" for the purposes of The Road Traffic Act 1988 ("the 1988 Act"). In both cases, that question was relevant for the purposes of insurance. Section 192 of the 1988 Act defines a "road" as:

> "Any highway and any other road to which the public have access..."

In Cutter, the available report says:

> "Relying principally on criteria laid down by Kilner-Brown J in Oxford -v- Austin [1981] RTR 416, the Judge considered that the question whether the car park was a road depended on whether or not there was "a definable way between two points over which vehicles could pass". It seemed to his Lordship [Beldam LJ, with whom Morritt LJ and Sir John Balcombe agreed] that too much emphasis had been placed on seeking to answer the question: "Is the car park a road?". The question would more correctly be posed by asking: "Is there within the car park a roadway?". In this case, there was within Great Hall car park a roadway, i.e. a way marked out for the passage of vehicles controlled by conventional traffic signs and markings and regularly used by members of the public seeking a car-parking space. The risk of accidents causing injury arising out of the use of cars on this roadway was scarcely less than on any other road. The fact that the car was being to or from a parking space, as opposed to using the way through the area in question as a route from one road to another, or not to decide whether or not an injured person was paid the compensation for which he had obtained judgment. The areas in Great Hall car park marked out for the passage and parking of vehicles were therefore within the definition of "road" in Section 192, and the insurers were bound under Section 151 to meet the judgment..."

In Clark -v- Kato, a different approach appears to have been taken. The earlier case does not appear to have been cited to the Court. The Judge (Potter LJ, with whom Waite LJ and McCowan LJ agreed) said:

> "The question is simply one of whether or not the whole or part of the car park comes within the definition or concept of a "road" at all...[His Lordship then reviewed the relevant authorities]...On the basis of those authorities, although it seems to me (as it seemed to Streatfield J in Griffin -v- Squires [1958] 1 WLR 1106) that, viewed at first blush, a car park is no more than a place or area and not a road, nonetheless, in appropriate cases, it (or part of it) may properly be regarded as a road. That will be so in any case where the circumstances justify a finding that the car park is not simply used as such, in the sense that the passage of vehicles and pedestrians is restricted to passage over the surface of the car park for the purpose of obtaining access to and from a parking place, but is used for what may colloquially be called "through" traffic, so as to alter its character from that of a car park used as such, to one which is also used as, or as part of, a road. It seems to me that is an appropriate distinction, consistent with common sense, the intention of

the legislature, and the authorities such as they are..."

On the available reports, I find these two cases difficult to reconcile. However, although I am well aware that I have not seen a full transcript of the Cutter decision, it does seem to me that Potter LJ's approach to when a car park can and cannot be a "road" is correct and was arrived at after a careful review of the authorities. I would respectfully follow it. There was no evidence before me in this case that the car park was used for "through" traffic (whether vehicular or pedestrian) so as to alter its character from that of a car park to that of a road, and there is consequently no evidence upon which I could find that the car park was a "road".

Unless the car park was a "road", it cannot have been a "public road". Section 1 of the 1994 Act refers to a "public road", which is defined in Section 62(1), as:

"...a road which is repairable at the public expense..."

There was no evidence before me that the car park in this case was "repairable at public expense".
I therefore find that there was no breach of the requirement to have the relevant vehicle licensed. However, as already noted, the PCN states as the offence, "Valid tax disc not on display". Similarly, the NTO refers to the same alleged contravention. Section 1 of the 1994 Act provides for the imposition of vehicle excise duty: and Section 29 of the 1994 provides that it is an offence to use or keep a vehicle on a public road, if that vehicle is unlicensed. Entirely separate provisions govern the requirement to display an excise license or tax disc, namely The Road Vehicles (Registration and Licensing) Regulations 1971 (pursuant to Section 33 of the 1994 Act): and it is a separate offence not to exhibit on a vehicle a licence for that vehicle. Offences under Section 29 and 33 are not alternatives, but distinct offences: charges under each section can therefore be pursued in respect of the same incident (Pilgram v Dean [1964] 1 WLR 601). There is a statutory defence to the Section 33 offence (for failing to display a tax disc) namely that, at the relevant time, a fresh licence is being obtained from the Post Office (as set out in the proviso to Regulation 16(1) of the Road Vehicles (Registration and Licensing) Regulations 1971). Further, a licence is in force as soon as it is issued or granted. It is quite clear that offences under Section 29 and 33 are not only distinct offences, but an offence under one section can be committed without there necessarily being a contravention of the other section.

Therefore, mere failure to display a tax disc is not a contravention of Section 1 of the 1994 Act, and

cannot have been an infraction of the Order. As a result, the contravention alleged in the PCN (and NTO) is not the contravention envisaged by Article 12. Section 66(3) of The Road Traffic Act 1991 requires a PCN to state:

> "(a) the grounds on which the Parking Attendant believes that a penalty charge is payable with respect to the vehicle..."

There are similar provisions for an NTO (Paragraph 1(2) of Schedule 6 to the 1991 Act). The fact that the PCN and NTO allege a ground which does not amount to a contravention of any parking regulation, is a fundamental defect which renders both PCN and NTO invalid (see The London Borough of Sutton v Moulder (Case No. 1940113243) (24 May 1995)). This is not cured by what the Council say happens in practice, namely:

> "In practice, if no excise license is displayed a [PCN] is issued, motorists with valid excise licenses contact the Council providing evidence that they have such and the Council immediately withdraws the PCN."

For the reasons set out above, I do not consider there any breach of Article 12 of the Order, even if that article were valid.

Question 4: Can the Council properly issue a PCN for a breach of Article 12?

Section 66 of The Road Traffic Act 1991 provides (I have added the emphasis):

> "(1) Where, in the case of a stationary vehicle in a designated parking place, a parking attendant has reason to believe that a penalty charge is payable *with respect to the vehicle*, he may:
>
> (a) fix a penalty charge notice to the vehicle; or
>
> (b) give such a notice to the person appearing to him to be in charge of the vehicle.

(2) For the purposes of this Part of the Act, a penalty charge is payable *with respect to a vehicle*, by the owner of the vehicle, if:

(a) the vehicle has been left... otherwise than as authorised by or under any order relating to the designated parking place: or...

(c) there has, *with respect to the vehicle*, been a contravention of, or failure to comply with, any provision made by or under any order relating to the designated parking place..."

Any right in the Council to recover a penalty derives from this section. In his written submissions, Mr Ward pointed out to me the argument that a breach of Article 12 was not a contravention "with respect to the vehicle", as follows:

> "The penalty charge pursuant to Article 12 is payable when a person permits a vehicle to wait in a parking place when that vehicle is not licensed. The licensing requirement, however, applies to "the person keeping the vehicle", not the vehicle itself - see Section 1 of the 1994 Act and the whole scheme of that Act."

The Order envisages PCNs being issued in respect of contraventions which are not "with respect to the vehicle". For example, Article 18 of the Order (for which penalties can also be sought: see Article 30) provides:

> "No person shall use any part of a parking place or any vehicle left in a parking place:
>
> (a) for sleeping or camping purposes
>
> (b) for eating or cooking purposes...
>
> (d) for washing any part of his person."

It is clear that this is intended to cover situations where there may be no vehicle involved at all, but merely a misuse of a parking place itself. In such circumstances, a PCN would, in my view, clearly be

inappropriate.

The position with regard to a contravention which does not involve a vehicle at all is clear cut. But does a breach of Article 12 amount to a contravention "with respect to a vehicle"? It seems to me that this is an empty question: the real question is not as to whether the contravention is "with respect to a vehicle", but whether it is in respect of the function of parking (or other legitimate function of the Council). If I am correct in my finding that, in imposing conditions on parking, the Council are restricted to conditions relating to parking (no other proper purpose having been suggested by the Council), then necessarily all contraventions will be "with respect to a vehicle", i.e. the vehicle involved in the parking incident. Consequently, I consider it is unnecessary to investigate this issue further.

Question 5: Was the requirement to have a tax disc a term of a contract between the Council and Mrs Score? If so, was that contractual term breached? If so, was the penalty a proper contractual remedy for the Council to enforce?

If they fail on enforcing the penalty under the statutory provisions, the Council say that they ought to be allowed to enforce the penalty by virtue of contract. They have put their point as follows:

> "That the use of parking places provided by the Applicant is on a contractual basis between the [Council] and users of the parking places and the requirements of Article 12 [of the Order] are terms of the contract."

Again, I do not regard this as a central issue in this case. The central issues are whether the Council had power lawfully to impose the conditions of parking which they sought to impose (whether under statutory powers or contract), and whether Mrs Score contravened any proper condition of parking (again, whether those conditions were statutory or contractual). All of the points regarding vires referred to above in connection with powers under delegated legislation apply equally to contracts entered into by local authorities: contracts of local authorities are void unless they relate to functions which the authority is expressly or impliedly authorised to perform, or are incidental to those functions. A local authority cannot avoid statutory restrictions on its powers by resorting to contract. Similarly, the points concerning the disparities between Article 12 and the noticeboard, PCN and NTO would equally apply.

In any event, in issuing the PCN and NTO, and pursuing Mrs Score for a penalty, the Council have been

purporting to act under their statutory powers, and not a contract. The notice board in the car park which says: "This car park is operated under the current London Borough of Sutton (Off-Street Parking Places) Order". A contravention is referred to as an "offence". The PCN is purportedly issued under, "Road Traffic Act 1991, Section 66 & Schedule 6". It indicates (wrongly, as it happens) that: "Under the Road Traffic Act 1991 it is an offence to fail duly to pay this Penalty Charge". The NTO is in statutory form. It indicates that, under the 1991 Act, a failure to pay can result in a Charge Certificate being served, a County Court Order being obtained and a warrant being issued to bailiffs. If the Council were acting under mere contractual provisions, all this would be quite inappropriate and improper. However, it is clear that they are not so acting, nor can they. If they cannot pursue Mrs Score for a penalty under the statutory scheme, they cannot save the penalty by purporting to pursue her in contract.

There would, of course, be considerable problems for the Council, if they were allowed to pursue the contractual line. Even assuming in their favour that there was a contract between the Council and Mrs Score, it is in my view quite impossible for them to argue (as they seek to do) that Article 12 is a term of it. The only notice to Mrs Score in evidence would have to be based on the noticeboard alone. That sets out certain references to penalties, some of which are referred to above. It also says: "Penalty Notice £50". However, none of this suggests that any of the articles in the Order are contractual terms. For such a penalty term to be incorporated, it would have to appear in the clearest possible terms. Although I note that the words "Penalty Notice £40" are in capitals and in red, they do not have "a red hand pointing" to them, or anything like (see Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686 at 690, per Lord Denning MR). Further, the contract would have to incorporate more of the machinery of the statutory scheme to be effective. In any event, there is nothing to suggest that the penalty would be an appropriate remedy for a breach of contract. If it were appropriate, the statutory grounds of appeal would not apply: the Parking Appeals Service would have no jurisdiction (only the County Court would have jurisdiction): and the penalty would not, of course, be enforceable through the mechanism of the 1991 Act which would not apply (it could only be enforced through the County Court in the usual way).

In my view, the contractual argument - which, to be fair to the Council, they only put in the alternative and then, it seems to me, without great enthusiasm - is entirely misconceived. Whether or not there is a contract between the Council and users of the car park, the enforcement of penalties can only be under the statutory provisions. If the Council fail in respect of those arguments, they cannot save the scheme by seeking to resort to contract.

Question 6: Can a Parking Adjudicator review his/her own decision under Regulation 11 of The Road Traffic (Parking Adjudicators) (London) Regulations 1993?

Although the Council took no point prior to Mr James reviewing his own earlier decision in February 1996, in the judicial review proceedings they took the point that an adjudicator cannot review his own decision. They submitted that this was a breach of natural justice. They relied on Taylor v The National Union of Seamen [1967] 1 WLR 532 as support for the proposition that an individual must not hear an appeal from his own decision. The proposition that a person ought not to participate in an appeal against his own decision is a well accepted application of the fundamental principle of natural justice, often expressed in maxim *nemo iudex in causa sua* (no man may be a judge in his own cause). I agree with the Council's submission that an adjudicator performs a judicial function.

The power of an adjudicator to review a decision derives from Regulation 11 of The Road Traffic (Parking Adjudicators) (London) Regulations 1993, which gives an adjudicator the power "to review and revoke or vary any decision to dismiss or allow an appeal...on grounds...that:

"(a) the decision was wrongly made as the result of an error on the part of his administrative staff;

(b) a party who had failed to appear or be represented at a hearing had good and sufficient reason for his failure to appear;

(c) where the decision was made after a hearing, new evidence has become available since the conclusion of the hearing, the existence of which could not have been reasonably known of or foreseen;

(d) where the decision was made without a hearing, new evidence has become available since the decision was made, the existence of which could not reasonably have been foreseen; or

(e) the interests of justice require such a review."

With respect to the Council, they misunderstand the purport of Regulation 11. There is and can be no appeal whatsoever from the decision of an adjudicator. At least for my own part, I make this very clear at the beginning of every personal hearing. It is the reason why a Parking Adjudicator's decision is described as "final and binding in law" in the confirmatory letter which is sent to both parties.

However, a party may apply to the Parking Appeals Service for an adjudicator to *review* an earlier decision, on the grounds set out Regulation 11, and set out above. The proper approach to such reviews was set out in The London Borough of Enfield v Ross (Case No. 1950094429) (23 February 1996). There is no reason of principle why an adjudicator ought not to review his own decision, and it is common in the field of tribunals for this power to be given. Indeed, depending on the circumstances of the review, it may very well be sensible and highly appropriate for an adjudicator to review his own earlier decision. In any event, the wording of Regulation 11 makes clear - by using the singular - that an adjudicator does have the power to review his own decision under that regulation.

Conclusion

Having reviewed this case de novo, for the reasons set out above, Mr James was correct in allowing the appeal of Mrs Score on the grounds that the alleged contravention did not occur and that the relevant Order was not valid (Paragraph 2(4)(b) and (d) of Schedule 6 to the 1991 Act), and consequently in cancelling the PCN and NTO in this case.

G R Hickinbottom

4 February 1997