PARKING ON PRIVATE LAND APPEALS
PO Box 70748 London EC1P 1SN
0845 207 7700
enquiries@popla.org.uk
www.popla.org.uk

POPLA
PARKING ON PRIVATE LAND APPEALS

[redacted]

Reference [redacted]
always quote in any communication with POPLA

[redacted]

-v-

ParkingEye Ltd (Operator)

The Operator issued parking charge notice number [redacted]
arising out of the presence at [redacted]
[redacted] of a vehicle with registration mark [redacted]

The Appellant appealed against liability for the parking charge.

The Adjudicator has considered the evidence of both parties and has determined that the appeal be **allowed**

The Adjudicator's reasons are as set out.

The Operator should now cancel the parking charge notice forthwith.

Reasons for the Adjudicator's Determination

1. Based on the traffic appeal tribunals familiar to motorists throughout England and Wales, Parking on Private Land Appeals (POPLA) is not a statutory creation but rather a service that provides alternative dispute resolution by way of arbitration between the motorist, typically the driver or keeper of the vehicle, on the one part and the car park operator who has issued a parking charge notice (PCN), on the other part.

2. Although the *Protection of Freedoms Act 2012* (the 2012 Act) did not create POPLA, it does prohibit unauthorised immobilisation ('clamping') or removal ('towing away') of vehicles on private land. The Act also provides, in Schedule 4, for keeper liability in certain circumstances.

3. In order to avail of POPLA, the PCN must have been issued by a member of the approved operator scheme (AOS) of the British Parking Association (BPA). Assessors will consider the BPA Code of Practice, and parties may refer to it, but a breach of the Code would not of itself be a ground of appeal. Decisions are made of the basis of the evidence produced by the parties and application of relevant law.

4. In this present matter, the Operator's case is that this parking charge notice was issued because the vehicle was parked for longer than the one hour maximum permitted at [redacted]

5. The vehicle was observed on closed circuit television with automatic number plate recognition (ANPR) as entering the car park at 17:15 and leaving at 18:31, some 1 hour and 17 minutes later.

6. The Appellant does not dispute that the vehicle was at this car park during the period alleged by the Operator. The Appellant's case is that the parking charge is disproportionate and not a genuine pre-estimate of loss. The Appellant cites the *Unfair Contract Terms Act 1997* (the 1997 Act) and the *Unfair Terms in Consumer Contract Regulations 1999* (the 1999 Regulations). In particular, the parking charge rising from £40 to £70 after 14 days is, he submits, an unfair term.

7. In respect of the 1999 Regulations, the Appellant refers to Regulation 5(1):

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer;

and to Schedule 2 (Indicative and non-exhaustive list of terms which may be regarded as unfair), in particular, to what is Paragraph 1(e), that is:

> terms which have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.

8. As is inevitably the case in car park situations, the contractual term has clearly not been individually negotiated. The issue therefore is whether, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the motorist. As to the requirement of

'good faith', there is no real bargaining situation, in that the motorist either accepts the conditions and parks their vehicle, or, alternatively, does not accept them and does not park at that location.

9. The parking charge in this case is £70 but the Operator will accept a reduced amount of £40 if received within 14 days of the notice. This mirrors the statutory schemes for penalty charge and similar notices. It is also part of the BPA Code of Practice. If the motorist accepts that the vehicle was improperly parked, they have an incentive to pay the charge promptly. It also means that in such cases the notice issuer will not have to prepare a case, with the additional time and expense that would be involved. However, the parking charge does not increase; it is merely that a discount is offered for early settlement. The parking charge remains the same from the day of issue until the Assessor's decision and, even then, no further action will be taken by the operator for at least a further 14 days.

10. The Appellant says that the amount of the charge is disproportionate to any alleged loss incurred and is punitive, contravening the 1977 Act. The Appellant does not refer to any specific provision but the Act does set out that the requirement of reasonableness for the purposes of Part 1 of the Act (amendment of law for England and Wales and Northern Ireland) is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. The rest of Section 11 is of limited assistance, if any, and in the circumstances of a parking charge notice, the issue is perhaps subsumed by the main point of the Appellant's

submission that the amount of the parking charge itself is disproportionate to the loss.

11. Paragraph 2(1) of Schedule 4 of the 2012 Act provides that 'parking charge' (a) in the case of a relevant obligation arising under the terms of a relevant contract, means a sum in the nature of a fee or charge, and (b) in the case of a relevant obligation arising as a result of a trespass or other tort, means a sum in the nature of damages.

12. Exactly what a parking charge is, or represents, is generally discernable from the sign at the location stating the conditions of parking. It may be a charge for parking, for example, the sign might state 'This is a Blue Badge bay. To park in it you must display a Blue Badge or pay a charge of £50'. For various reasons, which may include the requirements of value added tax, the sum sought is more usually by way of damages for breach of the parking contract. Typically the sign in such a case might state 'Parking is £1 per hour. A parking charge notice for £50 will be issued for the following: not displaying a valid ticket; staying parking for longer than paid for; parking outside the marked bays;' and so forth. If it is damages, then it cannot be a penalty (in the contractual sense) and must be a genuine pre-estimate of loss which, on the Operator's submission, might include commercial justification. I will return to this particular point later but the sum must still be loss based. Whether it is the charge for actually parking the vehicle or is by way of damages for breach of the conditions, the sum sought might be referred to as term of the contract.

13. To the Appellant's submission that the parking charge in this present case is disproportionate and not a genuine pre-estimate of loss, the

Operator responds that it is 'a commonly held legal argument' that the amount claimed for breach of contract should reflect the losses incurred by the breach and that, if they do not, they should be considered a penalty. The Operator then submits that this argument is no longer the method adopted when deciding whether a charge is a penalty or not.

14. Generally, loss in a case of breach of contract or tort would be the actual loss that was caused. However, if the claim is for liquidated damages, whilst the sum must be a genuine pre-estimate of loss, this is not the necessarily the specific loss caused by the actual breach.

15. Nevertheless, even if the sum need not reflect the losses actually incurred by the breach, it must be obvious that it cannot be something that could not have been so incurred.

16. Various county court decisions have been cited by the Operator in support of their case. As in the statutory traffic tribunals, a decision of one Adjudicator or Assessor is not binding on another, although they will have regard to them. Adjudicators and Assessors will clearly follow decisions of the Superior Courts. County court decisions may be persuasive but appear to vary widely and obviously relate to the specific facts. Perhaps not unnaturally, unrepresented parties tend to quote decisions, or in fact parts of decisions, that they think will assist their particular case. Since the whole judgment is not available, what is cited is usually of very limited assistance.

17. The Operator has referred to the well-known case on whether a sum is a genuine pre-estimate of loss or a penalty, *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company [1915] AC 79*.

However, therein is the classic statement, in the speech of Lord Dunedin, that a stipulation: "... will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach".

18. The Operator has also cited a number of more recent cases, including a reference in county court matter called *ParkingEye Limited v Shelley (2013)*, there is no other citation, in which District Judge Dodd apparently adhered to the finding of Colman J in *Lordsvale Finance Plc -v- Bank of Zambia [1996] QB 752* that "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provisions was to deter a party from breaking the contract or to compensate the innocent part for the breach [...] deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred".

19. However, in that same case Coleman J made reference to "a dichotomy between a genuine pre-estimate of damages and a penalty does not necessarily cover all the possibilities. There are clauses which may operate on breach, but which fall into neither category, and they may be commercially perfectly justifiable"

20. This was referred to by Manse LJ, as he then was, in *Cine Bes Filmcilik Ve Yapimcilik and Another -v- United International Pictures and Others [2003] EWCA Civ 1669*, which case the Operator has also cited. The matter involved was the licencing of cinema films and the agreement provided that in the event of certain failures, one party could

accelerate the payment of licence fees that would fall due. However, in neither this case nor the *Lordsvale* case did the total sum of money payable under the disputed provision, effectively amount to the whole basis of the business of one party to the contract.

21. Decisions in the High Court and above may well offer some specific guidance as to the general issues arising in parking tickets cases but those higher decisions are generally from matters that involve sums and issues so far removed from parking appeals as to be of perhaps only limited assistance to the Assessor. Decisions in the county courts, as already noted, do appear to vary widely as to what a genuine pre-estimate of loss might be in these situations.

22. The Operator refers to another their cases in the county court, that of *ParkingEye Limited -v- Julie Lee (2013)*. I was not provided with the full judgment but the Operator states that in that case they had submitted that that the charge was a genuine pre-estimate of loss but also that there was a need for the turnover of cars and shoppers and a need to 'deter overstays'. They also said they submitted that it is more fair for the charge to vary where there is early payment, as it reflects the lesser amount of work undertaken and the lesser costs thereby incurred. They state that the Judge ruled in their favour. The reduced payment for early settlement may be correct but it is not clear how far, if at all, the charge amounting to deterrence, even in part, was approved.

23. The Operator submits that Judge Dodd in 2013 *Shelley* case, again I do not have the full judgment, found the key issue was not whether or not the charge was a pre-estimate of loss but rather whether the purpose of the parking charge is to deter breach, or if the dominant purpose is

commercially justified. Further, they submit that he found on a balance of probabilities that the dominant purpose was regulation of the car park area, that it was not common for the courts to find a penalty within a contract and that a breakdown of the costs was not required, as the contract was formed on its own terms.

24. It is not particularly clear as to how 'regulation' and 'deter' actually differ in the scenario of a car park operation. In any event, the whole business model of an operator in respect of a particular car park operation cannot of itself amount to commercial justification.

25. In these situations, where a parking charge notice is issued, there will be is a contract to park, albeit usually a fairly simple one. However, subject to the consumer protection provisions in the legislation referred to by the Appellant, it is this contract which the driver has entered into with the car park operator when parking their vehicle.

26. If the contract provides for liquidated damages, the question to be determined, and to which this Appellant refers in some detail, is whether the sum sought does fall within a genuine pre-estimate of loss as regards parking charge notices, which the Operator in turn submits would include commercial justification, and thus not amount to a penalty.

27. The Appellant says that general running costs of the Operator's business, membership of the BPA and the like, do not demonstrate how the parking charge sought directly relates to the vehicle's overstay in what is a free car park.

28. As to what might be a genuine pre-estimate of loss, there are those items which clearly do fall within the definition. It would seem obvious that the actual direct costs arising out of the presence of the vehicle in breach of the conditions of parking do. These would include the fee payable to the Driver and Vehicle Licensing Authority (DVLA) to obtain keeper details, where required, and the administrative expenses involved. So too would costs in preparing and sending notices. A parking fee lost from another vehicle that could have been properly parked in the space occupied would also appear to be such as loss. However, often there is no charge to park, as is the position in this present case. All of these sums, apart from staff costs, are likely in themselves to be fairly modest. For example, the relevant DVLA fee is currently £2.50 and the fee lost from another vehicle parking is likely to be only a few pounds, if that.

29. As to other heads, we must look at what is being sought. The Operator has previously submitted that "this is a very difficult industry in which to determine a completely accurate pre-estimate of loss. This will depend both on the losses to ParkingEye, and on potential losses to the landowner, and will vary according to the time of day, the day of the week and even upon the weather." They continued that they have calculated the outstanding parking charge amount as a genuine pre-estimate of loss as they incur significant costs in managing a car park to ensure motorist comply with the stated terms and conditions and to follow up any breaches of these. The same Operator in other cases has listed a number of heads which they say such costs include, for example, the installation, monitoring and maintenance of automatic number plate recognition (ANPR) systems and the erection and maintenance of site signage. I will return to this.

30. The Operator also submitted that "there is a commercial justification for the charges, and the charges were approved by the British Parking Association and the Department of Transport in 2012".

31. The BPA Code of Practice states at Paragraph 19.5:

> If the parking charge that the driver is being asked to pay is for a breach of contract or act of trespass, this charge must be based on the genuine pre-estimate of loss that you suffer. We would not expect this amount to be more than £100. If the charge is more than this, operators must be able to justify the amount in advance.

32. The Operator also states that "last October after significant pressure from Government and motoring/consumer organisations, the BPA reduced the maximum recommended charge for what a motorist should be expected to pay for a breach of the parking contract or for an act of trespass from £150 to £100. Despite the BPA being unable, due to prevailing OFT [Office of Fair Trading] legislation, to fix prices at this level, the actions of the Association were welcomed by all stakeholders. In this instance being levied is within the recommendations set out in Clause 19 of the BPA Code of Practice."

33. It is probably the case that the BPA cannot actually require of its members that a parking charge not be above a specified amount but, in any event, it appears that, as of today, no AOS operator is issuing parking charge notices for a sum greater than £100.

34. The Operator, again in previous cases, stated that they have calculated this sum (the parking charge) as a genuine pre-estimate of their losses because they incur significant costs in managing the parking location to ensure compliance to the stated terms and conditions and to follow up on any breaches of these identified, including but not restricted to the following: employment of parking attendants to patrol the parking location to include supervisory staff and vehicles, training, uniforms, etc.; ad-hoc mobile patrols of the parking location; erection and maintenance of the site signage; parking payment and enforcement equipment to include the pay and display machines, hand held devices, cameras, etc.; membership and other fees requiring payment in order to manage the business effectively including those paid to BPA, DVLA and ICO [presumably the Information commissioner's Office]; general costs including stationery, postage etc.; employment of office based administrative staff along with systems and software; contribution to head office overheads.

35. The list is very similar to those produced by other operators. Some have separated employee salaries and national insurance contributions from equipment and vehicles.

36. Loss could include legal and professional costs in pursuing the charge, but membership of trade bodies and erecting signage are a business cost and not obviously a loss arising. These sums would presumably have to be paid by an operator in any event. On at least one occasion an operator has calculated a sum for each specific head. This is not necessary and may be very difficult to do with any great precision.

37. A genuine pre-estimate of loss is just what it says. The sum should represent a loss, not a profit. It is not the business overheads of the operator. It may well be that operators incur significant costs in managing parking locations but a genuine pre-estimate of loss cannot be their entire source of income.

38. The Operator has referred several times to *ParkingEye Limited -v- Somerfield Stores Limited [2011] EWHC 4023 (QB)*. This case involved wider issues between the same Operator and a company for whom they provided what might be called car park services. The Operator has partially quoted HH Judge Hegarty in respect of the £75 parking charge, described as a 'fine'. At 428, the Learned Judge said "I conclude that any motorist using the car park would be contractually bound to pay the charge of £75 if he exceeded the specified time limit and a demand for payment was made upon him. Whilst he might argue that the charge in question amounted to a penalty and was therefore irrecoverable, I think he would probably fail in that contention."

39. There were different charges but they were all for £75, payable within 28 days. There were slight variations as to how this amount then changed but, in one case, it was reduced by 50% to £37.50, if paid within 14 days, and increased to £135 if not paid in 28 days. However, the Learned Judge continued the above finding: "But it seems to me, on the limited material presently before me, that he would probably succeed in any argument that the increase to £135 in the event of a failure to pay within the specified period did amount to a penalty."

40. The Operator has also produced a list of eleven county court decisions between 19 July and 29 August 2013 which they say are every case they

have had since the creation of POPLA, when the issue of genuine pre-estimate of loss has been raised. The short précis of each show that in none has the judge found against the Operator, although it is not clear exactly what heads were put forward for the pre-estimate of loss.

41. As we have seen, the parking charge is, and must be, a specific sum. There can be a reduction for early settlement but any increase may well amount to a penalty. That situation does not arise in this present case.

42. Each appeal will always turn on its own facts but both parties should be clear that a genuine pre-estimate of loss need not be a detailed estimate for each particular case. It is not the specific loss caused by the actual breach but may include loss incurred or loss that might reasonably be incurred. However, it cannot include sums that are really the general business costs of what the Operator's car park services operation.

43. DVLA and associated fees for obtaining keeper details; clerical costs there arising, including stationary and postage; legal and other professional advice; wages and salaries of staff involved in that (which may be relatively substantial), together with national insurance and similar related sums; the fee lost by another vehicle not being able to park in the occupied space (where there is a fee); and even loss of revenue at the retail outlet for which the parking is provided, do, if established, fall within a genuine pre-estimate of loss. This list is not exhaustive but strongly indicative of the kind of items that could amount to such a genuine pre-estimate.

44. It would appear that the courts have accepted commercial justification for charges in this regard. Thus the charge cannot be a penalty but can be a genuine pre-estimate of loss or be commercially justified. Whether these two are the same category or not, the charge must be loss, rather than cost, based. The charge could well be in in excess of £70 and certainly a sum up to £100 might not be unreasonable.

45. A parking charge is unlikely, in any event, at present to exceed £100, although it is naturally open to the Operator to submit why in any particular case it does.

46. Having established what may fall within a genuine pre-estimate of loss or otherwise be allowable, items such as resurfacing and paving of the car park would seem in reality to be the costs of business and would not amount to a pre-estimate of loss or even commercial justification.

47. On the face of it, fees incurred by an operator in an appeal to POPLA might be a recoverable loss but the whole ethos of the appeals system is that there is no charge to the motorist. However, this is perhaps a matter for the BPA.

48. It is for the operator to submit, when the issue is raised, what the pre-estimate or justification is. It is not for the Assessor to have to pick eligible items from a long list produced by the operator. However, the sum is an estimate rather than an exact loss and a substantial proportion of heads of costs being allowable may mean that the total sum is. Equally, a mere assertion that it is not a genuine pre-estimate of loss must still be addressed, with some form of detailed breakdown of what it represents.

49. The Assessor will consider all evidence submitted by both parties. If one produces detail to such an extent that it actually negates their point then this also will have to be considered.

50. In this present case, the Appellant, as set out above, has challenged the specific heads of loss, submitting that the charge itself is "disproportionately high".

51. The Operator submitting that it is a genuine pre-estimate of loss, refers to general principles and to other cases, set out above, but does not appear in this present case to have specified further at the appeal stage, the actual heads. I therefore assume that those set out by the Operator in their rejection to the Appellant are relied upon.

52. In their notice of rejection of the Appellant's original representations to them, which the Appellant will have been fully aware of when making their appeal to POPLA, the Operator states:

> These costs include (but are not limited to): erection and maintenance of the site signage; installation, monitoring and maintenance of the automatic number plate recognition (ANPR) systems; employment of office biased administrative staff; membership and other fees required to manage the business effectively including those paid to the BPA, DVLA and ICO; general costs including stationary and postage etc.

53. Whilst not identical, the heads are similar to those in the list previously referred to as being produced by the Operator on other occasions.

Whilst some heads submitted in this present case may fall within a genuine pre-estimate of loss, I find that a substantial proportion of them do not. For example, the 'fees required to manage the business effectively', would imply just that, a business cost rather than a loss.

54. Equally, for the reasons set out above, a list of all their costs in the case, which is what the heads originally submitted would appear to be, cannot amount to commercial justification.

55. Considering carefully all the evidence before me in this present case, I find the following:

    a. The vehicle was parked beyond the time permitted;
    b. A breach of the parking contract thereby occurred;
    c. The contract was not contrary to relevant statutory consumer protection provisions;
    d. The parking charge has not increased since the issue of the PCN;
    e. The parking charge sought is a sum by way of damages;
    f. The damages sought on this particular occasion do not substantially amount to a genuine pre-estimate of loss or fall within commercial justification.

56. Accordingly, the appeal must be allowed.

Henry Michael Greenslade
Adjudicator