



# Private Parking – Public Concern

Jo Abbott and John de Waal QC  
February 2015



RAC  
Foundation

The Royal Automobile Club Foundation for Motoring Ltd is a transport policy and research organisation which explores the economic, mobility, safety and environmental issues relating to roads and their users. The Foundation publishes independent and authoritative research with which it promotes informed debate and advocates policy in the interest of the responsible motorist.

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# Acknowledgements

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The Foundation is also grateful to Steve Green QPM, formerly Head of ACPO Roads Policing and currently Chair of the Office for Legal Complaints, for advice on the overview paper, and to Ben Kennington of Beneficial Proofreading Services whose review of the draft work has been invaluable.

# Disclaimer

This report has been prepared for the RAC Foundation by Jo Abbott and John de Waal QC. Any errors or omissions are the authors' responsibility.

# List of Abbreviations

AOS	Approved Operator Scheme (BPA–AOS) or Accredited Operator Scheme (IPC–AOS)
ATA	Accredited Trade Association
BPA	British Parking Association
DfT	Department for Transport
DVLA	Driver and Vehicle Licensing Agency
IAA	Independent Appeals Assessor
IAS	Independent Appeals Service (note: this is the general term, and also the name of IPC’s IAS)
IPC	Independent Parking Committee
ISPA	Independent Scrutiny Board for Parking Appeals on Private Land
ONS	Office for National Statistics
PATAS	Parking and Traffic Appeals Service
PATROL	Parking and Traffic Regulations Outside London
PCN	Parking charge notice or Penalty Charge Notice
PoFA	Protection of Freedoms Act
POPLA	Parking on Private Land Appeals
TPT	Traffic Penalty Tribunal

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# Foreword

Around 20,000 privately operated car parks in England and Wales offer an essential but largely unregulated service to motorists. Alongside parking provided by local authorities, car parks on private land allow the motoring public to access work, education, health care and shopping opportunities.



Finding a parking space can be stressful but when things go wrong in car parks on private land and disputes arise over parking tickets emotions run high. It is not always clear how the charges invoiced by private parking companies are arrived at, whilst the process for appealing may not be fully understood.

Private parking enforcement has changed significantly in recent years. When *wheel-clamping without lawful authority* became illegal on private land throughout England and Wales in 2012 it was welcomed by many, including the RAC Foundation. However, its demise had the potential to compromise legitimate business for some land owners and parking enforcement companies. To avoid situations where parking restrictions could not be enforced, the Government enabled *vehicle keeper liability*, allowing private parking companies who are members of an ATA to request DVLA data. But by selling publicly owned data about vehicle owners without defining what constitutes a reasonable parking charge, the Government has sold the motoring public short.

In addition, the governance and structure of the private parking appeals services has become asymmetrical and is confusing to the public. That parking operators are choosing to move from one appeals regime to another, where the independence of the service is less easy for consumers to discern, is a matter relevant authorities should address.

In publishing these papers, the RAC Foundation has described the most concerning aspects of parking on private land from the motorist's point of view. The first paper presents an overview of parking on private land in England and Wales and how its governance differs from that which exists for parking on the public highway or in local authority car parks. The second is legal opinion on the use of genuine pre-estimate of loss to impose extra parking charges.

The RAC Foundation wants change. Where publicly owned personal data is shared with private parking companies, regulation must be put in place to ensure consumers are not disadvantaged. Government must satisfy itself that extra parking charges are reasonable and enforceable.

It must also assure itself that the highest standards of governance and operation are maintained by private parking companies and their relevant Accredited Trade Associations. It follows that all such companies should adhere to the same code of practice and that one indisputably independent body has oversight of their processes for issuing tickets and adjudicating their appeal.

Complacency on this important matter or promises of better consumer legislation at some point in the future are not acceptable. Amongst the 32.8 million motorists in England and Wales, the Government's reputation is at stake. Action is needed now.

Stephen Glaister



Director, RAC Foundation

# An overview of parking in England & Wales

Jo Abbott  
RAC Foundation  
February 2015

# Executive Summary

In recent years a significant change has taken place in the arena of parking enforcement in England and Wales, prompted by mounting public concern about wheel-clamping in the private parking sector. Consequent legislative changes have led to a new focus, this time on the nature, context and magnitude of extra charges imposed by private operators in cases where there has been an alleged contravention of the contract into which the driver has entered at the same time that they entered the car park.

This document examines parking charges arising from breaches of contract on private land in England and Wales where the public has been invited to park.

To clarify the terminology used, **these are not ‘charges’ in the sense of a fee paid to park for a period of time. In this context the term ‘parking charges’ – or sometimes ‘extra parking charges’ – refers to amounts demanded by parking operators from motorists who have overstayed, parked across a bay, failed to display a receipt, or have otherwise contravened the terms and conditions displayed in the car park in question.**

The invoices issued for the charges are commonly referred to as parking charge notices, PCNs, or ‘parking tickets’ (and for brevity in this report, often simply ‘tickets’).

## Parking on private land and dealing with breaches of contract

Where it is permitted, parking on private land is carried out under the terms of a contractual licence. If parking is allowed under any other arrangement, the signage should make it clear. The terms of the contract should be prominently displayed on signage in the car park and drivers are considered to have agreed to them when they park and leave their vehicles at the site. Since the terms comprise part of a contract, charges might be made by the owners or operators of the car park for breaches of that contract, in order to compensate any loss suffered as a result of the motorist’s action.

However, when the driver or the keeper of a vehicle receives a PCN, it may become clear that he or she did not fully understand the nature of the contract agreed, or the legal status of the compensation being claimed. During the 12 months covered by the 2014 Annual Report of the Lead Adjudicator for the Parking on Private Land Appeals service (POPLA), over 25,000 motorists appealed parking tickets issued on private land using the service (POPLA, 2014: 2).

Although this figure is small when compared to the 2.2 million vehicle keeper details actually requested in 2013 from the Driver and Vehicle Licensing Agency (DVLA) by private parking operators, it represents a large number of people, and that number is increasing (POPLA, 2014: 1, 2). It should be noted that POPLA, and a new appeals service run by the Independent Parking Committee (IPC), are actually the second stage of the appeals process. In the first instance, motorists must appeal to the parking operator who issued the ticket. It is only when that procedure has been exhausted that they may take the appeal further. Citizens Advice stated in September 2014 that in the past six months they had helped with 2,000 cases of excessive or unwarranted charges (Citizens Advice, 2014).

The provision of parking, the process of managing it, and its use by the motoring public can be an emotive issue, particularly when it comes to the matter of parking tickets. There is evidence that many people do not appeal tickets with which they disagree simply because they fear having to pay more if they fail – or because the process seems opaque, time-consuming, and weighted in favour of the operators.



## An overview of parking in England and Wales

As well as being emotive, parking provision is also a somewhat complex issue owing to the multiplicity of bodies and agencies (and acronyms!) involved in the private sector alone, before one even considers the public sector. Figure 1 offers a simple guide to the maze of abbreviations.

**Figure 1: Basic structure of private and public parking sectors**

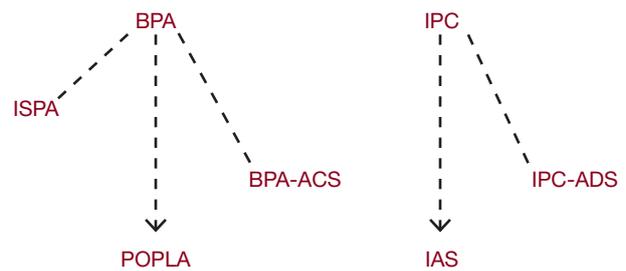
### Private sector

The Accredited Trade Associations (ATAs):

Independent scrutiny:

Their operator schemes:

Their independent appeals services (IASs):



### Public sector

The independent appeals services:

Committee established to appoint adjudicators.

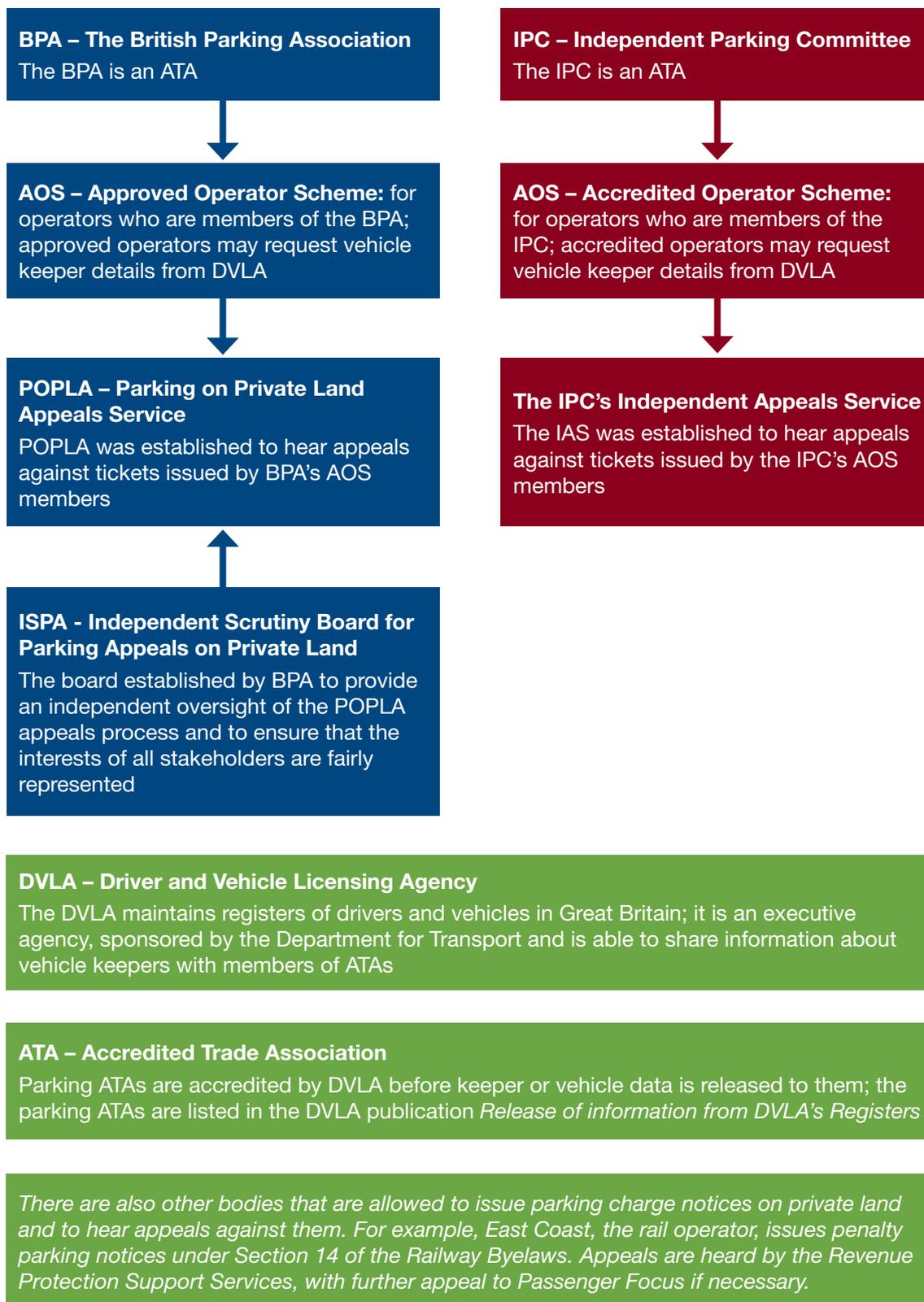


Source: RAC Foundation



Figures 2 and 3 go into more depth about the elements shown in Figure 1 and other relevant organisations.

**Figure 2: Parking on private land appeals services**



Source: RAC Foundation

**Figure 3: Parking on public land appeals services**



Source: RAC Foundation

## Public parking and the law

A parking ticket issued on the *public highway* and in car parking areas managed by *local authorities* in their capacity as traffic authorities is properly called a *Penalty Charge Notice* (abbreviated, confusingly, to PCN, the same as for a parking charge notice – and to make matters worse, many local authorities use the term ‘Parking Charge Notice’ to describe their Penalty Charge Notices). Their issue is carried out under guidance from the Secretary of State for Transport (DfT, 2010a) and the Traffic Management Act 2004 (TSM, 2004). Motorists who disagree with a parking Penalty Charge Notice are able to appeal to one of two statutory appeals services: the Traffic Penalty Tribunal for England and Wales (TPT)<sup>1</sup> or, for those issued by London authorities including Transport for London (TfL), the Parking and Traffic Appeals Service (PATAS).<sup>2</sup>

The public may not like getting Penalty Charge Notices, but at least they can be confident that the system under which they are issued is transparent and well regulated. The amounts that can be charged are limited by a statutory process (DfT, 2008).

## Private parking and the role of government

On the other hand, the amounts charged by private parking companies for overstaying or other breaches of contract are not limited by law. Whilst allowing parking companies that are members of the British Parking Association’s Approved Operator Scheme<sup>3</sup> (BPA–AOS) or the IPC’s Accredited Operator

1 [www.trafficpenaltytribunal.gov.uk](http://www.trafficpenaltytribunal.gov.uk)

2 [www.patas.gov.uk](http://www.patas.gov.uk)

3 [www.britishparking.co.uk/AOS](http://www.britishparking.co.uk/AOS)

Scheme<sup>4</sup> (IPC–AOS) to pursue registered keepers for payment of parking charges, the Protection of Freedoms Act (PoFA) 2012,<sup>5</sup> which outlawed wheel-clamping on private land, did not make any provision as to a reasonable parking charge. And to avoid accusations of price fixing, the two trade associations – the BPA–AOS and the IPC–AOS – do not set limits either, although both recommend that members charge no more than £100, an amount that has never been universally justified and seems rather arbitrary.

Considering the direct involvement of the government in the recovery of charges, it is regrettable that Parliament did not incorporate a definition of what are and are not reasonable charges into the Bill that became the PoFA 2012. Where the level of charges is particularly high – say, many times greater than the going rate for the parking space in question – the issue clearly arises as to whether such charges are likely to represent fairly the loss suffered by the landholder as a result of a motorist not complying with terms and conditions. Research commissioned by the British Parking Association (BPA), *The Size and Shape of the UK Parking Profession* (BPA & Skyblue Research, 2013: 3) estimates that “across the country, most short-term parking (i.e. hourly) costs approximately £1 per hour” – though clearly there will be sharp increases on this price at car parks with very high demand or very short supply.

The process by which DVLA supplies vehicle keeper details to private companies has attracted some adverse attention from the media (Carter, 2013). It is more often, however, the size of the amounts charged by private parking companies that brings the matter of parking charges to the fore. Some of these charges have been called unreasonable not only by motorists but also by their MPs, consumer organisations, and the media (Phillips, 2013).

## The size of the private parking sector

The value of the private parking industry is unknown – even to the BPA. Recent research carried out for the Association says that turnover figures from the private sector are neither fully collated nor comprehensive (BPA & Skyblue Research, 2013: 3). It is able to say, however, that the relative size of the public and private parking sectors suggests that the turnover for the latter will be higher than the former. RAC Foundation research (Leibling, 2014a; 2014b) shows that in 2012/13, local authorities in England and Wales turned over more than £1.43 billion on their parking accounts. On the basis of BPA research, it could be assumed the private parking sector’s turnover was in excess of that amount. That is not to say that BPA–AOS members, nor members of both parking Accredited Trade Associations (ATAs) together, see this level of return. Parking is provided by many agencies that are not members of either organisation. Of course, parking companies that are not members of either the BPA–AOS or the IPC–AOS cannot request DVLA data.

4 [www.theipc.info/#!accredited-operator-scheme/c1yws](http://www.theipc.info/#!accredited-operator-scheme/c1yws)

5 [www.legislation.gov.uk/ukpga/2012/9/schedule/4/enacted](http://www.legislation.gov.uk/ukpga/2012/9/schedule/4/enacted)

Members of parking ATAs (around 180 companies) made, as mentioned above, 2.2 million requests for vehicle keeper details from DVLA in 2013.

### **The basis of parking charges and appeals against them**

Some parking enforcement companies (though by no means all) rely on income from PCNs. Moreover, some companies actually pay landholders to allow them to enforce parking restrictions on their property.<sup>6</sup> Such an arrangement invites zealous enforcement using methods that ensure the greatest income for the operator. If landholders were to pay for their enforcement services and then charge – or not charge – motorists for their parking in a transparent way, it would remove any potential undesirable motivation for parking operators to be heavy-handed in the issue of PCNs. And is it possible that these zero-charge businesses models might be discouraging operators from using the kind of payment systems which can reduce the likelihood of a motorist being ticketed?

Not all parking operators issue tickets, but those who do should be prevented from considering the income from them to be a fundamental part of their business plans. It is difficult to accept the argument sometimes proposed by those enforcing restrictions in apparently free car parks that those motorists who get tickets are actually keeping down costs for others.

<sup>6</sup> [www.debtrecoveryplus.co.uk/debtor/ParkingEye%20v%20Beavis%20and%20Wardley%20Judgment.pdf](http://www.debtrecoveryplus.co.uk/debtor/ParkingEye%20v%20Beavis%20and%20Wardley%20Judgment.pdf)

### **An example of a holder to allow parking tickets to be attached to the windscreen of a vehicle parked on private land.**



It is possible to appeal tickets issued for parking on private land by BPA–AOS and IPC–AOS members. It is a two-stage process: firstly appeal must be made to the operators themselves and then, if unsuccessful, to the appeals services run by POPLA and the IPC. These services are offered at no charge to the motorist but grounds for appeal are narrow and neither the IPC’s service<sup>7</sup> nor POPLA’s (POPLA, 2014: 13) takes account of mitigating circumstances. Department for Transport (DfT) guidance states that POPLA may refer cases back to the landholder (usually the operator) where it considers evidence of reasonable mitigating circumstances has not been taken into account (DfT, 2012: 24). However, there is evidence that such requests for reconsideration by operators are being ignored (POPLA, 2014: 27).

John de Waal QC has written the expert legal opinion which is the focus of the second part of this document to enable the legal status of parking charges to be considered more fully. He discusses the law relating to charging for overstaying and other breaches of contract in car parks on private land, and makes suggestions as to circumstances in which parking charges might be considered to be unenforceable.

Some material available on the Internet might appear to suggest that parking charges have actually been tested and approved by the Courts.<sup>8</sup> However, this information is often misleading, since the cases referred to decide other matters, or are simply not authority for the claims made for them. Decisions by county court judges or by dispute resolution services do not set precedent. Mr de Waal argues that there is a public interest in prohibiting extravagant and unconscionable charges for parking and that there are precedents for doing so in other consumer protection legislation. He suggests that it would be possible and desirable for Parliament to amend Schedule 4 of the PoFA 2012 so that only reasonable parking charges could be recovered from vehicle keepers.

## Parking charges, government and the future

By allowing the private parking industry to access vehicle keeper data without defining what constitutes a reasonable parking charge, it would seem that government has sold the motoring public short. It is also questionable whether or not either of the services set up to hear appeals for tickets issued on private land reflect this Government’s original intentions as signalled in letters, speeches<sup>9</sup> and departmental guidance.

From July 2015 the European Alternative Dispute Resolution Directive<sup>10</sup> will require all suppliers of consumer services to provide free access to an accredited Alternative Dispute Resolution (ADR) service that will independently

7 [www.theipc.info/#!independent-appeals-service/citr](http://www.theipc.info/#!independent-appeals-service/citr)

8 <https://www.parkingeye.co.uk/motorist-information/is-the-parking-charge-enforceable-is-it-a-penalty>

9 Speech by Norman Baker MP to the BPA IAS Working Group, 1 February 2012

10 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>

determine unresolved complaints. Arrangements for England and Wales are being overseen by the Department for Business, Innovation and Skills (BIS) and the Trading Standards Institute. If it is determined that an appeal about a parking charge amounts to a consumer complaint against the parking operator provider the current appeals services will need to be accredited to comply with the Directive.

To rectify the situation, the RAC Foundation is calling on the Government to act now.

- It should make the necessary changes to Schedule 4 of the Protection of Freedoms Act (PoFA) 2012 to ensure that only reasonable parking charges can be recovered, and be specific as to how 'reasonable' should be defined.
- It should ensure that ATA member companies do not rely solely on income from PCNs in any car park. Landholders should pay for enforcement services and then charge motorists for their parking in a transparent way. Where free parking is allowed for an initial period of time, the requirement to take a ticket to heighten their awareness that they have entered into an agreement by the act of parking could be considered.
- It should also require the ATAs to write into their codes of practice provision for payment of extra charges by methods other than online, for those without Internet access.
- It should consider unifying the parking ATAs under one code of practice owned or administered by a government department or agency, or an indisputably independent body.
- It should put in place a mechanism to guarantee that tickets referred back to operators by adjudicators for compelling reasons are cancelled. This would reverse the trend noted by the Lead Adjudicator at POPLA in his most recent report (POPLA, 2014: 27).
- It should ensure that the Department of Business, Innovation and Skills or the Trading Standards Institute (TSI) issues clear guidance as to whether appeals by motorists against a demand from an operator for payment of parking charges fall within the provisions of the European ADR Directive. If they do, the parking appeals services must be accredited as ADR providers with each offering the same level of service.



# 1. Background: wheel-clamping, parking tickets and keeper liability

From 1 October 2012, the Protection of Freedoms Act 2012 (PoFA 2012) made it an offence to clamp, block in or tow away vehicles on private land in England and Wales (TSO, 2012).

Calls for a change in the law first announced in 2010 (DfT, 2010b) had been motivated by the excessive amounts charged by some vehicle-clamping operators and their aggressive behaviour (Smith, 2011). The public at large had become frustrated by the apparent inability of relevant authorities to regulate private wheel-clamping companies effectively; consequently, the ban on the use of wheel clamps on most private land was welcomed by drivers and campaign groups alike. But certain organisations, such as the British Parking Association (BPA),<sup>11</sup> had reservations. They expressed concern that some motorists would exploit the ban to avoid paying for parking, or by parking in free car parks where they did not have permission to be, such as those to be found in ungated housing estates.



Whilst wheel-clamping in England and Wales is now illegal on most private land, local authorities and others with legal entitlement, such as the police and the Driver and Vehicle Licensing Agency (DVLA), are still allowed to use wheel clamps.<sup>12</sup> Clamps may also be used on land where bye-laws permit, such as at airports, seaports, and in railway station car parks. From mid-2013, even the Legal Aid Agency assumed the power to clamp and sell cars if a debt for legal aid remains unpaid.

So, although the usefulness of legal wheel-clamping was (and still is) widely recognised in some situations, by 2010 its general use on private land had become socially and politically unacceptable, and subsequently illegal (DfT, 2011a). However, the Government still faced the concerns of the BPA and members of its Approved Operator Scheme (BPA–AOS<sup>13</sup>), some of whom had been using wheel-clamping to enforce compliance with terms and conditions in private car parks as part of their management strategy.

Both the Government and the BPA–AOS recognised that the proposed ban on wheel-clamping<sup>14</sup> would leave operators with only one method to recover charges: ticketing. And, of course, this is effective only if the driver of the vehicle in question can be identified and traced.

If a driver, for example, fails to buy a ticket, or overstays, or parks across two bays, or in some cases walks off the premises of the retail estate with which the car park is associated, the parking operator may judge that terms and conditions for parking have not been met and issue a ticket (a parking charge notice). Except for cases where the ticket can be handed directly to the driver or left on the windscreen of his or her vehicle, and he or she immediately agrees that the operator has a valid claim and pays, the operator has no way of enforcing the ticket without knowing the driver's address.

12 Paragraph 211 of *Explanatory Notes to Protection of Freedoms Act 2012*, retrieved 19 January 2015 from <http://legislation.data.gov.uk/ukpga/2012/9/notes/division/5/1/3/2/1/data.htm?wrap=true>

13 [www.britishparking.co.uk/AOS](http://www.britishparking.co.uk/AOS)

14 A useful background on legal wheel-clamping prior to the ban can be found at [www.parliament.uk/briefing-papers/sn01490.pdf](http://www.parliament.uk/briefing-papers/sn01490.pdf)

A driver's address cannot necessarily be obtained via a vehicle's registration: only the keeper's details can be tracked this way. If the keeper is not the driver when a contract is established in a car park, he or she cannot be a party to it, not having seen or agreed to its terms.

Prior to the enactment of the PoFA 2012, parking operators who were members of an Accredited Trade Association (ATA) with a code of practice in place could apply to DVLA for keeper details associated with a particular vehicle registration. But if the keeper did not accept liability or did not give the driver's details, the operator was at an impasse. When operators were confronted with persistent offenders, wheel-clamping had, before the change in the law, been a means of guaranteeing that they would be paid; but when clamping became illegal it was recognised that another way would have to be found to ensure reasonable parking behaviour.

To meet the need of the operators to pursue those in breach of contract, after much debate in Parliament and after carrying out an impact assessment (DfT, 2011b), the Government decided to offer 'keeper liability' to members of the BPA-AOS (at the time the only parking ATA allowed to request DVLA data). Keeper liability meant that operators would be able to recover charges from the keeper of a vehicle at the time of an alleged breach of conditions, regardless of whether or not he or she had been the driver.

**An example of signage in a car park on private land,  
February 2015.**



## 2. A safeguard: the independent appeals services

In return for the changes brought about by PoFA 2012, the Government asked the BPA to set up an appeals service for motorists who might want to dispute a ticket issued by one of its AOS members.

In February 2012, while details of the new legislation were being considered, Philip Hammond MP, then Secretary of State for Transport, wrote to the RAC Foundation:

“I fully agree that an independent appeals service will be an essential part of the new system. We have therefore made it clear that we will not commence the keeper liability provisions in Schedule 4 of the Bill until an independent, sector-funded appeals body is in place... Whilst I do not disregard your concerns about potential problems I believe we should look at how the new system operates before we decide whether or not further regulation may be necessary.”<sup>15</sup>

<sup>15</sup> DfT reference MC/13498



Consequently, the service called Parking on Private Land Appeals – more commonly known as POPLA<sup>16</sup> – was established on 1 October 2012 and run on behalf of BPA–AOS members by London Councils (BPA, 2012). POPLA is not a statutory body, but rather an alternative dispute resolution service. Since its inception it has been kept busy. According to its Chief Adjudicator’s Annual Report for 2014, by the middle of the year POPLA was hearing about 600 cases a week and numbers were rising (POPLA, 2014: 1). This is many more than are heard by the Traffic Penalty Tribunal (TPT), which deals with all tickets issued by local authorities in England and Wales (outside London). For the year ending in March 2013, the TPT heard approximately 310 parking appeals per week (TPT, 2013).

During the year to 31 March 2014, 25,214 valid appeals were registered with POPLA; a total of 23,500 appeals were decided, of which 10,661 (45.4%) were allowed and 12,839 (54.6%) were refused. The number of appeals allowed includes some 2,263 cases (i.e. about a fifth of them) where the parking company indicated – at some point after the case was registered, but before it was decided – that they no longer sought to contest the matter.

In addition to establishing POPLA, the BPA subsequently set up, in February 2014, an Independent Scrutiny Board (ISB) – now the Independent Scrutiny Board for Parking Appeals on Private Land (ISPA) to ensure the independence of the appeals service and to fulfil the expectations of ministers that the appeals service should not only *be* independent but should *be seen to be* independent. In a speech to the BPA’s Independent Appeals Service Working Group on 1 February 2012, Norman Baker MP, then Parliamentary Under Secretary of State for Transport, said,

“The need for an independent appeals body is clear, and the challenge we are presenting to you today is to work towards the establishment of such a body that will provide reassurance to motorists by helping to drive out unfair and unreasonable practices in the sector...

16 [www.popla.org.uk](http://www.popla.org.uk)

The appeals body must be, and seen to be, completely independent...”

However, the Government declined close involvement with the ISB (now called ISPA). Ministers seemed to be content to wait to see if the “further regulation” mentioned in the Secretary of State’s letter to the Foundation (see above) would be needed.

Meanwhile, in mid-2014 the Independent Parking Committee (IPC) was given ATA status by DVLA, meaning that there are presently two ATAs: the BPA and the IPC, each with its own code of practice<sup>17</sup> and each with an appeals service. In a free market, a second ATA in the parking sector was admittedly always a possibility, but that it was originally the intention of ministers to allow multiple codes of practice and appeals services, working in different ways and with different levels of governance, is doubtful.

It could be inferred from Mr Hammond’s letter<sup>18</sup> to the RAC Foundation that there was to be only one appeals body funded by the sector and taken forward by the BPA. Moreover, the Department for Transport’s (DfT’s) publication *Guidance on Section 56 and Schedule 4 of the Protection of Freedoms Act 2012: Recovery of unpaid parking charges* (DfT, 2012), itself refers to “**the** appeals service” (paragraph 15.6) but “**an** appropriate ATA” (Frequently Asked Questions 2 and 5). The guidance seems also to indicate an expectation that POPLA adjudication would address the issue of whether operators had behaved reasonably, and, significantly, the question of genuine pre-estimate of loss (DfT, 2012: 23–4):

“The Government has made it a condition of bringing Schedule 4 into force that an independent appeals service (IAS) must first be brought into force covering all tickets issued on private land by members of an Accredited Trade Association. The independent appeals service is called Parking on Private Land Appeals (POPLA), and begins operating on 1 October 2012. POPLA operates on the following basis:

- It is completely independent;
- It covers all tickets issued on relevant land in England and Wales by ATA members;
- It is provided free to motorists;
- Its decisions are binding on the industry (but not on drivers and registered keepers); and
- It is entirely sector funded.

<sup>17</sup> In 2012 the DVLA consulted on the acceptability of a voluntary code of practice for private parking companies operating on private land.

<sup>18</sup> DfT reference MC/13498

In considering appeals, POPLA is able to consider whether a landholder who is a member of an appropriate ATA has behaved reasonably. This includes whether any parking charges are based on a genuine pre-estimate of loss. POPLA can also consider whether the landholder has complied with the ATA's Code of Practice, and inform the ATA of any suspected breaches so they may take appropriate action.”

The RAC Foundation regards it as essential that the appeals services offered by the current parking ATAs should mirror each other exactly in terms of access, service and governance. Motorists already struggle to understand the difference between the outcomes arising from parking on private land and parking on land managed by traffic authorities. Having parked on private land, why should they then be faced with the need to grasp a further level of distinction, that between the differing services offered by the two (so far) parking ATAs? It is little wonder that confusion often results.

## 2.1 Accessing appeals services and Internet availability

The two existing ATAs differ on the matter of how appeals can be made by motorists. POPLA takes appeals by post and online.<sup>19</sup> If a motorist does not have access to the Internet, he or she can ask the relevant parking operator to supply him or her with a form to complete and forward by post. In contrast, the IPC website suggests that it accepts only online appeals (see box *Appealing Against a Parking Charge*).

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<sup>19</sup> [www.popla.org.uk/makinganappeal.htm](http://www.popla.org.uk/makinganappeal.htm)



### ***Appealing Against a Parking Charge (from the IPC website)***

All Accredited Trade Associations within the parking sector are required to provide access to an independent appeals system so that people who believe that a charge has been improperly issued to them can appeal against it.

Before you can consider appealing against a charge, you must first exhaust the operator's own internal appeals procedure.

If you have unsuccessfully appealed a matter to a parking operator and you believe that the charge was unlawful then you can appeal the matter to the Independent Appeals Service. The parking operator concerned will inform the IAS when your appeal has been internally rejected and you can register your IAS appeal by visiting [www.theias.org](http://www.theias.org). Appeals must be received by the IAS within 21 days of the operator rejecting your initial appeal.

When you submit your appeal it is important that you provide ALL of the grounds that you wish to rely upon and ALL of the evidence that supports your case along with your appeal form. Once this is received by the IAS, it will be presented to the Operator who will have the opportunity to respond. The Adjudicator will then consider the case on what is before him and a decision made on the merits. You will not be able to present additional information to the adjudicator after the IAS appeal has been submitted.

Appeals will only be accepted from the driver of the vehicle or from the registered keeper. Third parties cannot appeal on behalf of the keeper or driver.

Please keep copies of all information that you submit as we regret that the IPC is unable to return any documentation that is submitted.

Retrieved 20 January 2015 from [www.theipc.info/#!/independent-appeals-service/citrw](http://www.theipc.info/#!/independent-appeals-service/citrw)

Parking appeals services intended to be universally accessible should surely not require everyone who has been issued with a ticket to have Internet access. They should both accept appeals by post, as do the appeals services operating for the public sector. The Traffic Penalty Tribunal (TPT) accepts appeals by post, by phone, and in some cases online; the Parking and Traffic Appeals Service (PATAS) accepts appeals by post, in person and in some cases online.

Motorists who want to appeal by post should be sent paper copies of the appropriate forms by the relevant operator through the postal system. The completed form can then be forwarded to the appeals service by the same means.

## 2.2 Mitigating circumstances

It is clear from DfT's publication *Guidance on Section 56 and Schedule 4 of the Protection of Freedoms Act 2012: Recovery of unpaid parking charges* that it intended to give the individual operators responsibility for taking into account mitigating circumstances when motorists appeal a ticket. But it included, in what is its only mention of such circumstances, a safety net (DfT, 2012: 24):

“POPLA may also refer cases back to the landholder where it considers the landholder has failed to take reasonable account of evidence of reasonable mitigating circumstances which has been presented by the driver or registered keeper.”

However, the Department did not empower the adjudicators to make an operator reverse a decision, and a worrying trend is emerging. In his 2014 Annual Report, POPLA's Lead Adjudicator wrote (POPLA, 2014: 27):

“In appropriate cases Assessors can make recommendations to the operator that the parking charge notice should be cancelled or at least that liability for the charge itself is.

The criteria that we have used for such recommendations is the same as exists for some penalty charge notices in the statutory schemes, in other words where there are 'compelling reasons'.

At the time of the first Annual Report, I recorded that there had been four such recommendations. In the period covered by this present Report, there have been thirty-nine such recommendations...

If any pattern emerges it may be that operators became less willing to accept such recommendations over the course of the year.” p.27

The Code of Practice of the IPC (the second ATA) states in Schedule 6 (IPC, 2013: 39):

“The IAS will not consider the merits of any mitigating circumstances which do not compromise the lawfulness of the charge but the IAA, in their reasons for disallowing an appeal, may advise the Operator to review an otherwise lawful charge where there are exceptional circumstances for doing so.”

It is not possible to say how many appeals have been returned to IPC members for such review.

In line with POPLA however, the IPC makes it clear to appellants that mitigating circumstances cannot be dealt with by their appeals service and that motorists must exhaust the internal procedures of the IPC members (see box).

***I want to appeal against a charge? (from the IPC website)***

The Parking Operator may have an internal appeals procedure. Reputable companies, who are members of an ATA, are required to inform people about their appeal procedures at the time that they issue a charge and also about any independent appeals procedures that they have.

Members of the IPC subscribe to the Independent Appeals Service [sic] (IAS) who will consider the lawfulness of a charge once a person has exhausted their internal procedures. The IAS will not consider grounds of appeal that do not effect [sic] the lawfulness of it such as mitigating [sic] circumstances.

The IAS is administered by the IPC but the decision as to whether to allow or reject your appeal is made by a completely independent adjudicator who is a current practicing [sic] lawyer and who is not allowed to exercise [sic] any bias in favour of the motorist [sic] or the operator.

If you want to appeal against a charge, you should visit this page.

Retrieved 11 January 2015 from [www.theipc.info/#!faq/cl0a](http://www.theipc.info/#!faq/cl0a)

It would appear, then, that there has been a shift in the treatment of genuinely mitigating circumstances between the original DfT guidance on the one hand, which indicates an expectation from government that such circumstances should be taken into account by the appeals services, and the two codes of practice of the existing services on the other, each of which goes out of its way to state that mitigating circumstances are irrelevant to an appeal except insofar as they might point to some unlawfulness in the issuing of the charge. In this regard, it is of note that the Consumer Association has gone on record as saying that it would like to see “an independent appeals scheme that considers mitigating circumstances”.<sup>20</sup>

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<sup>20</sup> [www.which.co.uk/cars/driving/driving-advice/how-to-appeal-a-parking-ticket/how-to-contest-a-parking-ticket](http://www.which.co.uk/cars/driving/driving-advice/how-to-appeal-a-parking-ticket/how-to-contest-a-parking-ticket)

**Case study number 1**

In 2014, Mère, a young mother from High Wycombe, got in touch with the RAC Foundation. She had recently visited a recreational area in the centre of town with her two young children aged seven months and three years. When the time came to leave the swings and return to the car park, the three-year-old became upset and Mère needed time to attend to him and to get him back into the car.

A few days later Mère had to pay the price for attending to her young son. She received a parking charge notice through the post from Civil Enforcement Limited for £100.

She appealed to the parking operator explaining the circumstances of her delayed departure from the car park. She was told that her reasons were not grounds to cancel the charge and that she must pay. Mère considered appealing to POPLA but had lost confidence and doubted her chances of success. Within the time she had left to settle at the reduced amount she could not raise £60 and in the end paid the full amount of £100.

The cost of the car park had been 20p per hour.

She wrote to the Foundation:

“My main question is how are such huge charges arrived at? The car park had been half-empty and it would only have cost £5 to park there for a full day. I suggest this car park should have barriers so that you pay when you leave. I have had many sleepless nights wondering how such companies have been allowed to get away with such huge charges. I was made to feel like a criminal since the charge compared with fines given to people caught without licences or drinking and driving.”

From July 2015 the European Alternative Dispute Resolution Directive will require all suppliers of consumer services to provide access to an accredited alternative dispute resolution service that will independently determine unresolved complaints. At present, the Government's plans for implementing the requirements of the Directive are being overseen by the Department for Business, Innovation and Skills. The Trading Standards Institute (TDI) has been appointed as the UK's competent authority to monitor ADR providers in the non-regulated sectors. Since parking on private land falls into this category the RAC Foundation would expect TDI to set up accreditation procedures for the parking appeals services.

### 2.3 The legal status and unique features of parking charge notices

A veritable industry has grown up amongst the confusion over the legal status of parking charge notices (PCNs, often called ‘parking tickets’, or simply ‘tickets’) issued to motorists who have parked on private land and have – knowingly, or unknowingly – breached the terms and conditions posted there. There is a plethora of websites<sup>21</sup> offering advice, and both broadcast and print media feature the matter regularly.

In practice, someone returning to their car and finding a PCN attached to their windscreen, or receiving one some time later in the post, will in all probability think to themselves “I’ve got a parking fine” and treat it as such, often believing that they are breaking the law if they don’t pay. There is a widespread lack of understanding among members of the public about the issue of parking charge notices.

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21 <http://forums.moneysavingexpert.com/showthread.php?t=4816822>



### **Case study number 2**

In 2014 Ellen from Stokenchurch wrote to the RAC Foundation about a parking ticket that was left on her windscreen by a company called CPM. She had heard a programme on LBC about parking and was surprised to hear about the appeals service POPLA.

“I have in fact paid this parking ticket now, because after numerous phone calls where the operator was very rude – and repeatedly told me that I would be taken to court because there were parking restrictions – I was worried, and paid the fine. As you will see from the letter, my car was parked directly outside my partner’s house. There are no parking bays or restriction signs (although there are elsewhere on the development). He has lived there for two years, and I have parked there every weekend.

I know nothing can be done to revoke this but it is another case of a ticket given unnecessarily, and I am now extremely disappointed with myself for paying the £100 after reading forums online about CPM.

I have since spoken to a neighbour who had received a ticket outside his house, and he just ignored the letters. Eventually they stopped. Unfortunately I was too worried and paid the £100 fine.”

Confusion is created in the first place by the appearance of the tickets. The parking companies who issue them are in a difficult position: they want their tickets, invoices and letters to be noticed, and for the format to match the seriousness of the content; yet in seeking to achieve this they risk accusations of mimicking official stationery and branding. There are, however, no official documents to mimic since there is no prescribed design for a local authority Penalty Charge Notice. Nevertheless, letters sent by private parking companies regarding parking charges tend to look official and to use official-sounding language (and in contrast, those issued by local authorities may take a less formal tone, only adding to the confusion).

DVLA has recently asked members of ATAs to add wording to their parking charge notices to warn the public that the notices are not *Penalty Charge Notices*. However, there is no mechanism for demanding that such wording is added to tickets issued on private land by operators who are not members of an ATA and who are thus not able to request vehicle keeper data from DVLA.

But regardless of their appearance, the PCNs sent out to vehicle keepers under the provisions of Schedule 4 of the PoFA 2012 are legal provided the companies issuing them have adhered to the relevant codes of practice. Government acknowledges their legitimacy by allowing parking ATA members to request information from DVLA’s register of keepers to get the details necessary to send the PCNs to the correct address.

Since government facilitates in this way the collection of extra parking charges, its obligation to uphold the public interest without bias toward business requires it to assure both itself and the motoring public that the charges in question are reasonable and that consumer rights are protected. In other transactions involving goods and services, from changing mobile phone provider to employing a solicitor, there are many examples of protection for customers. These include legislation and recourse to an entity such as Ofcom or the Legal Ombudsman. However, when it comes to extra parking charges, the motorist is faced with a different set of circumstances.

- Firstly, not one but two bodies adjudicate disputes about parking charges. There is no geographical basis for the split of cases between them, as with the statutory bodies: it depends on which ATA the parking company subscribes to. This a further area of confusion for motorists. Since the two existing ATAs do not share a common code of practice, it is not easy for the motoring public to judge whether or not they are getting a fair deal; many feel they are not (Chapman & Bentley, 2014).
- Secondly, motorists do not generally understand the relationship between the alternative dispute resolution services and the Courts. Decisions made by POPLA and the IPC's appeals service are binding on the operators but not on motorists. This means that if an appeal against a charge is upheld, an operator cannot then pursue the motorist for payment through the court system. On the other hand, if the appeal is not upheld, and the motorist nevertheless opts not to pay, the operator must decide whether to drop the case or to continue to recover the debt, ultimately through the county courts (although even then the judge is not bound by the decision of the relevant appeals service).
- Thirdly, motorists, even those who admit being in the wrong, do not understand why parking charges are set at levels that seem so surprisingly high, particularly when compared with what they might expect from a local authority parking penalty.

## **2.4 Levels of charges**

Parking on the public highway and in car parks managed by local authorities in their capacity as traffic authorities is regulated: local authorities manage their parking under legislation, which includes the Traffic Management Act 2004, and are guided by advice from relevant government departments and the Secretary of State for Transport (DfT, 2010a). For motorists, parking in these regulated places means that, for example, failure to pay the correct amount, or overstaying, attracts a penalty which is limited by a statutory process (DfT, 2008). Motorists who disagree with a Penalty Charge Notice are able to appeal to one of two statutory appeals services: the Traffic Penalty Tribunal for England and Wales (TPT) or, for those issued by London authorities including Transport for London (TfL), the Parking and Traffic Appeals Service (PATAS).

However, the levels of extra parking charges for failing to pay, overstaying or other contractual breaches on *private* land where parking is allowed are not subject to statutory regulation. That is to say Parliament has not legislated to limit what amounts operators can demand when they issue a ticket for extra charges to a motorist. They may only be suggested by the ATAs.

The BPA's AOS recommends that its members charge no more than £100. But because competition rules forbid the setting of an absolute limit this amount can only be a recommendation. At paragraph 19.5 its Code of Practice states (BPA, 2014: 11):

“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.”

Schedule 5 of the IPC's Code of Practice includes these sentences (IPC, 2013: 37):

“However, if the motorist uses the land other than in accordance with the terms and conditions then they agree to pay a fixed fee by way of damages to the operator. This is based on a genuine pre-estimate of loss that flows from the breach of contract by acting otherwise than in accordance with the terms of the agreement the motorist entered into when deciding to park...

It is suggested that the maximum parking charge should be: £100. Where there is a prospect of additional charges, reference should be made to this where appropriate on the signage.”

**2 Hours Free Parking**

**PARKING TARIFFS**

Car: 2 to 24 hours **£11.00** parking only

HGV/Coach/Commercials: 2 to 24 hours **£21.00** parking only

HGV/Coach/Commercials: 2 to 24 hours **£23.50** parking + meal voucher

Please pay for parking at: WH Smith, EAT IN, Petrol Forecourts

Failure to comply with the terms & conditions will result in a Parking Charge of: **£100**

Parking tariffs apply after 2 hour free period (no return within 2 hours)

Parent and toddlers only in marked bays

Blue badge holders only in marked bays

Specific vehicles only in designated areas

No parking on double yellow lines

ParkingEye Ltd (Company No: 5134461) is authorised by the licensee to operate this private car park for and on its behalf. This operation is limited and necessary. We are not responsible for the use of the car park surface, other motor vehicles, damage to loss to or from motor vehicles or general site safety. Parking is at the absolute discretion of the licensee and the terms and conditions that apply are set out within this notice (the "Parking Contract"). By parking, waiting or otherwise remaining within this private car park, you agree to comply with this Parking Contract and are authorised to park, only if you follow these terms and conditions. If you fail to comply, you accept liability to pay the fee for unauthorised parking (the "Parking Charge"). By entering this private car park, you consent for the purposes of parking control and enforcement of the Parking Contract for the capturing of photographs of the vehicle and registration by the ASPR cameras and to the processing of the data, together with any data provided via the payment or search systems, by ParkingEye Ltd to check compliance with the Parking Contract, and to the processing of this data to request suggested longer stays from the ASPR. Parking Charges levied will, in the first instance, be notified to the registered keeper. Personal data may also be shared with the ASPR, POPA, collection agents or vehicles for this purpose. A reduction of at least 60% of the Parking Charge will be available for a period of 14 days. Failure to pay the Parking Charge within this period will result in the full amount becoming payable. Where Parking Charge notice is not received 14 days, immediate charges in respect of further unauthorised parking apply. An administrative charge of £2.00 will apply for payments made after a month/14 days.

This car park is private property and for the use of Welcome Break customers only.

Managed by:  
ParkingEye Ltd  
Telephone 0844 247 2955  
PO Box 565, Chorley, PR6 6HT

To park here

Regardless of any discounts that the parking operators may offer drivers or keepers for early settlement, the amounts being suggested by the ATAs are very large. To put them in context, the average weekly spend on food and non-alcoholic drink per household in England in 2011-2013 was £56.90 and in Wales £55.30, according to the ONS Family Spending Survey 2014 (ONS, 2014). Moreover, it is noticeable that the wording just quoted from the codes of practice of both existing ATAs invites an assessment of reasonableness of the charges in terms of the genuine loss that the motorist's action has caused the operator. The figure of £100, however, seems on the face of it to be a convenient round number rather than a rigorously calculated estimate of any genuine loss – one indication of this being that such an estimate would come up with amounts that differed from one car park to another. Of course the £100 cited is a maximum value, but it is treated for the most part as the standard charge.

In contrast to the situation just described, the amounts payable for Penalty Charge Notices issued by local authorities are set by DfT. Varying amounts are set for contraventions according to their seriousness, and whether they occurred in London or elsewhere in England and Wales. Parking incorrectly in a marked parking bay area, or overstaying there, would attract a lower penalty than would parking on the zigzag lines close to a pedestrian crossing, for example.

Current charges at the lower rate outside London are £50 (discounted to £25 if paid within 14 days, or 21 days if issued in an area controlled by CCTV). In London the lower charge is £60 in the outer boroughs and £80 in the inner boroughs and Croydon, both with the same rates and conditions for discount as outside the Capital.



## 3. Conclusions

According to government statistics, by the end of September 2014 there were 35.9 million vehicles licensed for use on British roads, of which 29.7 million were cars (DfT, 2014b: 2).

All parties concerned are in favour of strategies to encourage people to use the most appropriate means of travel in the interests of the environment and personal health, but it is clear that without access to a car many people would find their daily routines difficult, if not impossible, to complete. For very many indeed, the car is a lifeline that enables access to work, jobs and education.

The 2011 Census illustrates just how essential that lifeline is, recording 15.3 million people travelling to work by car or van, carrying a further 1.4 million people as passengers (ONS, 2013a).



According to the National Travel Survey, 2013 (DfT, 2014a), for all trips in England of more than a mile (which is over 80% of the total), the car is by far the most popular way of getting about, although clearly there are some differences from region to region. The car remains an essential means by which to access work, education, shopping and leisure activities for the vast majority of the population, not only in rural areas but also in the conurbations which we more readily associate with journeys by public transport and the active modes. And each one of those journeys will need a parking space.

It is difficult to estimate the number of privately operated car parks in England and Wales, since not all car parks are operated by Accredited Trade Association (ATA) members, but it is thought that the number is in the region of 20,000. Between them they offer an essential service: alongside local authority car parking they allow the millions of us who use our cars the necessary access to places of work, to school, to the shops, and in many cases to onward journeys by other modes of transport.

But as we have seen, these two sectors, although complementing each other to meet our parking needs, stand in contrast to each other in some notable respects. Many car users have a poor understanding of the difference between the status of parking offered by local authorities and that offered by private companies... until, that is, something goes wrong.

Frustration and anger are often the response, quite understandably, to being issued a charge of up to £100 for overstaying the prescribed time, even briefly, in a so-called 'free' parking space at a retail park or supermarket (or in some cases simply leaving the prescribed limits of the retail park), to take a common example. Unless there is prominent and clear signage, or a receipt for parking is issued, it is easy to fail to notice the parking restrictions in place at certain locations, particularly those where the driver's mind is focussed on other matters.

Recognising the potential for high charges and unacceptable practices in the private sector to cause concern, Norman Baker MP, then Parliamentary Under

Secretary of State for Transport, made these significant comments in a speech to the British Parking Association (BPA) Independent Appeals Service Working Group on 1 February 2012:

“We cannot deny that parking can be a very contentious issue, and there are problems that need to be addressed – for example most of the complaints about parking in my postbag are either about extortionate charges or unreasonable behaviour by private parking companies.”

He added:

“As you know, unlike on-road penalty charges, excess parking charges in private car parks are currently not limited by regulation. Ideally the Government would want to keep it that way, and we understand that charges need to be appropriate to the parking contravention in question. However, there is real public concern... about some organisations setting unreasonably high parking charges – this cannot be ignored.”

But for more than two years that is exactly what ministers and officials have seemed to do. They have ignored the impact on motorists who have received demands for large amounts in extra parking charges from operators. In particular, they have missed the opportunity to enshrine in legislation some means of interpreting the legal basis for limiting the level of extra parking charges by specifying a clear method of calculating them – a method which precludes unfair overestimates of loss incurred. Somewhere along the line they failed to foresee the danger of business models arising within the parking industry that might use payments from those who contravene their regulations to do more than merely compensate them for the cost of the transgression.

In addition, officials have failed to ensure that there is consistency between the industry-funded appeals services in terms of the kind of robust governance which would command public confidence – POPLA, for example, has its independent scrutiny board (ISPA), but it would seem that IPC has no equivalent body. And POPLA issues an annual report naming its assessors. There is no equivalent report by which it is possible to judge the status and independence of assessors employed by the IPC.

It is the Government's responsibility to inform itself as to exactly what improvements are needed to the framework that relates to parking charge notices. The RAC Foundation believes the Government should, in the interests of the public:

- make changes to Schedule 4 of the Protection of Freedoms Act 2012 to ensure that only reasonable parking charges can be recovered, and be specific as to how 'reasonable' should be defined;

- demand changes to the ATA's codes of practice to ensure that no ATA member relies solely on income from parking charge notices in any particular car park: landholders should pay for enforcement services and then charge motorists for their parking in a transparent way, giving discounts if appropriate to bona fide customers;
- require the ATAs to write into their codes of practice provision for payment of extra charges by methods other than online, for those without Internet access;
- consider unifying the parking ATAs under one code of practice owned or administered by a government department or agency, or an indisputably independent body;
- put in place a mechanism to guarantee that tickets referred back to operators by adjudicators for compelling reasons are cancelled; this would reverse the trend noted by the Lead Adjudicator at the appeals service POPLA (Parking on Private Land Appeals) in his most recent report (POPLA, 2014: 27);
- ensure that the Department of Business, Innovation and Skills or the Trading Standards Institute (TSI) issues clear guidance as to whether appeals by motorists against a demand from an operator for payment of parking charges fall within the provisions of the European Alternative Dispute (ADR) Resolution Directive. If they do, all the parking appeals services must be accredited as ADR providers with each offering the same level of service.



Ministers have a duty to ensure that both of the services which hear appeals for tickets issued on private land are consistent with the Government's original intentions as declared in 2012 by the Parliamentary Under Secretary of State for Transport at the time, quoted on P.6 – that they should be effective and legitimate, should provide reassurance to motorists, and should drive out unreasonable practices in the private parking sector.<sup>22</sup>

Although in recent years the trend in Whitehall has been to identify opportunities to reduce regulation, not all regulation is bad. Lord Haskins, in his capacity as Chair of the Better Regulation Task Force (2005: 8), said:

“Good regulation is a symptom of an affluent and just society... Under-regulation should be the greatest concern. It exists in poor societies which lack institutions with the capacity to protect the rights of citizens in terms of safety, health and social justice.”

Perhaps it is now time for the Government to review how successful, in terms of protecting the rights of our citizens, self-regulation of the private parking sector has been, and to consider whether or not further changes to the law are necessary. The impact assessment carried out before the Protection of Freedoms Act 2012 was enacted included the following as the rationale for introducing keeper liability (DfT, 2011c: 11):

“The aim is to reduce unauthorised parking and its adverse impact on the general public, businesses and wider economy, whilst reducing levels of unpaid charges when a parking ticket has been issued. There will be consistency between the enforcement regimes on the public road and private land. Motorists will have a clearer understanding of their responsibilities for a vehicle and the DVLA role in providing information to enforcement companies. There will be a reduction in inappropriate parking that causes a loss of business for landowners and benefit to the public as consumers will be able to park near businesses of their choice.”

It is apparent from even a cursory glance at the many online ‘parking appeal’ websites that many motorists do not understand “the DVLA role in providing information to enforcement companies”. And far from there being “consistency between the enforcement regimes on the public road and private land”, it is clear that there is a wide gap between these two sectors, most starkly evidenced by the differences in the cost of parking tickets and the methodology by which they are calculated. Private parking, and in particular the high level of the extra charges often being imposed, is indeed a public concern. Responsible governments will make it their concern too.

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<sup>22</sup> Speech by Norman Baker MP to the BPA IAS Working Group, 1 February 2012

## 4 References

Better Regulation Task Force (2005). *Annual Report 2004–5*. Retrieved 20 January 2015 from [www.eesc.europa.eu/resources/docs/designdelivery.pdf](http://www.eesc.europa.eu/resources/docs/designdelivery.pdf).

BPA (British Parking Association) (2012). *New Parking Appeals Service will Give Extra Protection to Motorists*. Press release, 3 August. Retrieved 19 January 2015 from [www.britishparking.co.uk/News/new-parking-appeals-service-will-give-extra-protection-to-motorists](http://www.britishparking.co.uk/News/new-parking-appeals-service-will-give-extra-protection-to-motorists).

BPA (2014). *BPA Approved Operator Scheme Code of Practice: Control and enforcement of parking on private land and unregulated public car parks*. Retrieved 19 January 2015 from [www.britishparking.co.uk/write/Documents/AOS/AOS\\_Code\\_of\\_Practice\\_-\\_V4,\\_Feb\\_2014.pdf](http://www.britishparking.co.uk/write/Documents/AOS/AOS_Code_of_Practice_-_V4,_Feb_2014.pdf).

BPA & Skyblue Research (2013). *The Size and Shape of the UK Parking Profession*. Retrieved 19 January 2015 from [www.britishparking.co.uk/write/Documents/Library/Reports%20and%20research/BPA\\_UK\\_Parking\\_Sector\\_Report\\_AWweb.pdf](http://www.britishparking.co.uk/write/Documents/Library/Reports%20and%20research/BPA_UK_Parking_Sector_Report_AWweb.pdf).

Carter, C. (2013). *DVLA made £10m in a year by selling on names and addresses*. The Telegraph, 15 April. Retrieved 20 January 2015 from [www.telegraph.co.uk/news/uknews/9994089/DVLA-made-10m-in-a-year-by-selling-on-names-and-addresses.html](http://www.telegraph.co.uk/news/uknews/9994089/DVLA-made-10m-in-a-year-by-selling-on-names-and-addresses.html).

Chapman, J. & Bentley, P. (2014). *We will curb the parking cowboys, says Cabinet Minister: victory for Mail campaign as official probe is launched into bully boys*. Daily Mail Online, 1 August. Retrieved 20 January 2015 from [www.dailymail.co.uk/news/article-2713646/We-curb-parking-cowboys-says-Cabinet-Minister-Victory-Mail-campaign-official-probe-launched-bully-boys.html](http://www.dailymail.co.uk/news/article-2713646/We-curb-parking-cowboys-says-Cabinet-Minister-Victory-Mail-campaign-official-probe-launched-bully-boys.html).

Citizens Advice (2014). *Government Must “Throw the Book” at Predatory Parking Firms*. Press release, 2 August. Retrieved 19 January 2015 from [www.citizensadvice.org.uk/index/pressoffice/press\\_index/press\\_20140802.htm](http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20140802.htm).

DfT (Department for Transport) (2008). *The Secretary of State’s Statutory Guidance to Local Authorities on the Civil Enforcement of Parking Contraventions*. Retrieved 19 January 2015 from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/364418/betterprkstatutoryguid.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364418/betterprkstatutoryguid.pdf).

DfT (2010a). *Operational Guidance to Local Authorities: Parking policy and enforcement*. Retrieved 19 January 2015 from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212559/parkingenforcepolicy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212559/parkingenforcepolicy.pdf).

DfT (2010b). *Wheel Clamping on Private Land will be Banned in England and Wales, the Government Announced Today*. Press release, 17 August. Retrieved 19 January 2015 from <https://www.gov.uk/government/news/government-announces-ban-on-wheel-clamping>.

DfT (2011a). *Impact Assessment: Reform of vehicle immobilisation*. IA HO0032. Retrieved 19 January 2015 from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/98419/reform-vehicle-immob-ia.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98419/reform-vehicle-immob-ia.pdf).

DfT (2011b). *Impact Assessment: Proposal to introduce keeper liability for parking charges on private land*. IA DfT00079. Retrieved 19 January 2015 from [www.parliament.uk/documents/impact-assessments/IA12-004F.pdf](http://www.parliament.uk/documents/impact-assessments/IA12-004F.pdf).

DfT (2011c). *Impact Assessment: Protection of Freedoms Bill*. IA HO0037. Retrieved 19 January 2015 from [www.parliament.uk/documents/impact-assessments/IA11-025.pdf](http://www.parliament.uk/documents/impact-assessments/IA11-025.pdf).

DfT (2012). *Guidance on Section 56 and Schedule 4 of the Protection of Freedoms Act 2012: Recovery of unpaid parking charges*. Retrieved 19 January 2015 from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/9155/guidance-unpaid-parking-charges.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9155/guidance-unpaid-parking-charges.pdf).

DfT (2014a). *National Travel Survey: England 2013*. Statistical Release, 29 July. Retrieved 19 January 2015 from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/342160/nts2013-01.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342160/nts2013-01.pdf).

DfT (2014b). *Vehicle Licensing Statistics: Quarter 3 (Jul–Sep) 2014*. Statistical Release, 11 December. Retrieved 19 January 2015 from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385476/vls-q3-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385476/vls-q3-2014.pdf).

IPC (Independent Parking Committee) (2013). *Accredited Operator Scheme: Code of practice*. Retrieved 19 January 2015 from [http://media.wix.com/ugd/bd9e08\\_a2dad1a02f8ea46a76b78ba0982af9a3.pdf](http://media.wix.com/ugd/bd9e08_a2dad1a02f8ea46a76b78ba0982af9a3.pdf).

Leibling, D. (2014a). *Local Authority Parking Finances in England 2012–13*. RAC Foundation. Retrieved 20 January 2015 from [www.racfoundation.org/assets/rac\\_foundation/content/downloadables/council\\_parking\\_accounts\\_2012-13\\_report\\_david\\_leibling.pdf](http://www.racfoundation.org/assets/rac_foundation/content/downloadables/council_parking_accounts_2012-13_report_david_leibling.pdf).

Leibling, D. (2014b). *Local Authority Parking Finances in Wales*. RAC Foundation. Retrieved 20 January 2015 from [www.racfoundation.org/assets/rac\\_foundation/content/downloadables/local\\_parking\\_finances\\_wales\\_2012-13\\_leibling.pdf](http://www.racfoundation.org/assets/rac_foundation/content/downloadables/local_parking_finances_wales_2012-13_leibling.pdf).

ONS (Office for National Statistics) (2013a). *Method of Travel to Work in England and Wales – 2011*. Retrieved 20 January 2015 from [www.ons.gov.uk/ons/rel/census/2011-census-analysis/method-of-travel-to-work-in-england-and-wales/sty-method-of-travel-to-work.html](http://www.ons.gov.uk/ons/rel/census/2011-census-analysis/method-of-travel-to-work-in-england-and-wales/sty-method-of-travel-to-work.html).

ONS (2014). *Table A33: Household expenditure by UK countries and regions, 2010–2012*. Retrieved 4 February 2015 from [www.ons.gov.uk/ons/rel/family-spending/family-spending/2014-edition/rft-a33-final-2013.xls](http://www.ons.gov.uk/ons/rel/family-spending/family-spending/2014-edition/rft-a33-final-2013.xls).

ParkingEye. *Motorist Information*. Retrieved 19 January 2015 from <https://www.parkingeye.co.uk/motorist-information/is-the-parking-charge-enforceable-is-it-a-penalty>.

Phillips, N. (2013). *Fury over Wycombe Lido parking fines*. Bucks Free Press, 23 August. Retrieved 20 January 2015 from [www.bucksfreepress.co.uk/news/10631435.Fury\\_over\\_Wycombe\\_Lido\\_parking\\_fines](http://www.bucksfreepress.co.uk/news/10631435.Fury_over_Wycombe_Lido_parking_fines).

POPLA (Parking on Private Land Appeals) (2014). *Annual Report of the Lead Adjudicator*. Retrieved 20 January 2015 from [www.popla.org.uk/London%20Councils/POPLAAnnualReport2014.pdf](http://www.popla.org.uk/London%20Councils/POPLAAnnualReport2014.pdf).

Smith, R. (2011). *Cowboy clampers who bullied drivers out of £350k are jailed*. Mirror Online, 21 December. Retrieved 20 January 2015 from [www.mirror.co.uk/news/uk-news/cowboy-clampers-who-bullied-drivers-98449](http://www.mirror.co.uk/news/uk-news/cowboy-clampers-who-bullied-drivers-98449).

TPT (Traffic Penalty Tribunal) (2013). *Annual Statistics Report*. Retrieved 20 January 2015 from [www.trafficpenaltytribunal.gov.uk/download/downloads/id/14/annual\\_statistics\\_201213](http://www.trafficpenaltytribunal.gov.uk/download/downloads/id/14/annual_statistics_201213).

TSO (The Stationery Office) (2004). *Traffic Management Act 2004 (c.18)*. Retrieved 20 January 2015 from [www.legislation.gov.uk/ukpga/2004/18/contents/enacted](http://www.legislation.gov.uk/ukpga/2004/18/contents/enacted).

TSO (2012). *Protection of Freedoms Act 2012 (c.9)*. Retrieved 20 January 2015 from [www.legislation.gov.uk/ukpga/2012/9/contents/enacted](http://www.legislation.gov.uk/ukpga/2012/9/contents/enacted).

## 5 Further Reading

(Note: to avoid duplication, this list excludes organisations featured in References above.)

Citizens Advice <http://www.citizensadvice.org.uk>

Department for Transport <https://www.gov.uk/government/organisations/department-for-transport>

Driver and Vehicle Licensing Agency (DVLA) <https://www.gov.uk/government/organisations/driver-and-vehicle-licensing-agency>

Parking on Private Land Appeals Service (POPLA) <http://www.popla.org.uk/default.htm>

British Parking Association <http://www.britishparking.co.uk>

HM Courts and Tribunals Service(HMCTS): [www.justice.gov.uk](http://www.justice.gov.uk)

The Independent Parking Committee <http://www.theipc.info/#!accredited-operator-scheme/c1yws>

GOV.UK's Freedom of Information response (letters, emails and other documents): *Independent appeals service for parking on private land*. Retrieved 20 January 2015 from <https://www.gov.uk/government/publications/independent-appeals-service-for-parking-on-private-land>

PATROL (Parking and Traffic Regulations Outside London)'s *Glossary of Terms*: [www.patrol-uk.info/site/custom\\_scripts/glossary.php](http://www.patrol-uk.info/site/custom_scripts/glossary.php)

The Plain Language Commission on signage: *Phoney fines and dodgy signs take drivers for a ride* (June 2012). Retrieved 20 January 2015 from [http://s3-eu-west-1.amazonaws.com/plcdev/files/134/original/DVLA-BPA-Cutts12June2012\\_v2\\_mf.pdf](http://s3-eu-west-1.amazonaws.com/plcdev/files/134/original/DVLA-BPA-Cutts12June2012_v2_mf.pdf)

# Parking enforcement on private land

John de Waal QC  
February 2015

# Parking enforcement on private land

This paper considers the law as it relates to charges for parking on private land in England and Wales and in particular the problem of charges for overstaying which cause great public concern. It is not concerned with the question of wheel clamping which has been addressed in an earlier paper published by the RAC Foundation: Elliott C. (2009), *A policy on vehicle immobilisation*.

## Introduction

- (1) Charges made by owners and operators of car parks are not subject to statutory regulation, that is to say Parliament has not passed any law which limits what operators can charge for parking or for overstaying.
- (2) POPLA (the Parking on Private Land Appeals service) is an independent non-statutory appeals body which has been set up by and is also paid for by the parking industry. Because it is not set up by government, decisions made by POPLA are not binding and there is no appeal to the Courts. The POPLA scheme is best described as a form of alternative dispute resolution in which the decisions made by the assessors are binding on the members of the British Parking Association whose operators who have chosen to participate in the scheme, but not binding on members of the public.
- (3) The Protection of Freedoms Act 2012 ('the 2012 Act') includes provisions at Schedule 4 for the recovery of unpaid parking charges from the owner or driver of vehicles but does not regulate what can be charged in the first place.
- (4) The Department of Transport has published Guidance on Schedule 4 of the 2012 Act which states in reply to a 'Frequently Asked Question' about the law in relation to parking charges that:

'Charges for breaking a parking contract must be reasonable and a genuine pre-estimate of loss. This means charges must compensate the landholder only for the loss they are likely to suffer because the parking contract has been broken.'



- (5) This guidance gives the impression that Schedule 4 includes provisions to make sure that charges imposed by operators, for overstaying for example, must be reasonable. This is not so – there is nothing in the 2012 Act or Schedule 4 which legislates about this.
- (6) So it is that the owner of a car who has been notified of a charge for overstaying in a car park must look to the general law of England and Wales to see if he or she can find a remedy to a demand for payment which often seems exorbitant and unfair.
- (7) Not only is there no statutory regulation of charges by parking operators, there is in fact no body of case law that drivers and operators can look to for guidance as to what charges are and are not lawful. In England and Wales only decisions made by the High Court or above (the Court of Appeal and the House of Lords, now the Supreme Court) create precedents which are binding. Decisions by judges at county court level do not.
- (8) The websites of some operators give the impression that their charges have been tested and approved by the Courts, and refer the reader to named cases. This information is often misleading since the cases referred to decide other matters, or are simply not authority for the claims made for them. Decisions made by county court judges or by POPLA do not establish binding precedents.
- (9) In point of fact, there is no single decision by a judge at High Court level or above which anyone can point to and rely on to say that certain charges for overstaying in car parks on private land are lawful and others are not. The nearest there is to this are some paragraphs (414–428) in a decision of Judge Hegarty QC in a dispute between a parking operator and a supermarket – ParkingEye Ltd v Somerfield Stores Ltd [2011] EWHC 4023 (QB). But because the judge did not have to decide a dispute between a driver and the landowner these comments are obiter, that is to say not a precedent for other judges to follow.

- (10) In this paper I have attempted to set out a considered legal analysis of the position by reference to long-established principles of common law on the subject of what is known as ‘genuine pre-estimate of loss’ (GPEL) and relevant European legislation concerning fair and unfair terms in contracts in the hope that this will bring some clarity to the problem and assist drivers who wish to challenge charges that they consider to be unfair or extortionate.

### The right to park

- (11) None of us has a right to park on private land without the permission of the owner of the land. When we drive into a car park whether it is a supermarket car park, a car park at a motorway service station, or a multi-storey car park in the centre of town we are doing so under the terms of what is known as a ‘contractual licence’. Other examples of contractual licences are those we obtain when we purchase a ticket to watch a film at the cinema or go to a football match.
- (12) That we have a contractual licence is important: without such a licence we are simply trespassers and are committing a legal wrong which can end up with our vehicles being clamped or towed away.
- (13) It is obvious what you get when you buy a cinema ticket – a right to a seat to watch a specified film at a specified time; when the film is over you are expected to leave. If you cause trouble and spoil others’ enjoyment of the film, you can expect to be asked to leave.



- (14) Parking a car in a car park is less straightforward because most of us do not know exactly when we are going to leave, and even if we think we do events can prove us wrong. Of course if it is a 'pay on exit' car park there is no problem – we just pay for the time we have left our vehicle there. But 'pay and display' car parks present a problem. And then of course there is the quite separate question of supermarket (or indeed cinema or service station) car parks where notices make it clear that you are only expected to stay for a limited period of time – often 2 or 2½ hrs.
- (15) All contracts contain terms which are so obvious that they are implied – leaving the cinema at the end of the film is such an implied term. But contracts and contractual licences also contain express terms. Because these terms are not individually negotiated they are, in effect, the terms set by the owners and operators and are usually displayed on signs at the entrance to and at various other places in the car park. These signs tell us where and how to park and, most importantly, what the charges for overstaying are.
- (16) If operators want their terms and conditions to have effect they must display them prominently and make sure they come to the attention of people who are parking their cars. If they fail to do so then they are not binding: such was the case in the famous decision in Thornton v Shoe Lane Parking [1971] 2 QB 163 and also in a more recent decision (about wheel clamping): Vine v Waltham Forest LBC [2000] 1 WLR. 2383, both decisions of the Court of Appeal.
- (17) A typical sign at a supermarket will state this fairly prominently:

'2½ Hour Max Stay  
Customer only car park  
Failure to comply with the following  
will result in a Parking Charge of £100.  
Parking limited to 2½ hours  
(no return within 2 hours)'

Then below that in rather small letters:

'Parking is at the absolute discretion of the landowner and the terms and conditions that apply are set out within this notice ("the Parking Contract"). By parking, waiting or otherwise remaining within this private car park, you agree to comply with this Parking Contract and are authorised to park, only if you follow these terms and conditions. If you fail to comply you accept liability to pay the fee for unauthorised parking ("the Parking Charge").'

- (18) The British Parking Association Code of Practice sets out detailed suggestions for good practice on the part of operators including where and how prominently such terms should be displayed. Consideration of this question falls outside the scope of this paper.

- (19) On the assumption then that they have been drawn to the attention of the driver, these are the relevant express terms of the contract between the driver who parks his or her car in the supermarket car park and the owner of the supermarket, and the starting point for any analysis of the problem of overcharging is that this is the agreement that is made by driving in and parking, even though of course no normal person gives it a moment's thought – unless and until it all goes badly wrong.

### **Contract law and 'fairness'**

- (20) Surprisingly enough there is no common law principle that says that contracts have to be fair. Freedom of contract means that I am free to make what lawyers often describe as 'a bad bargain'.
- (21) Historically, Courts in England and Wales would only interfere with people's bargains in very rare circumstances – if the contract was illegal (but not always then), or if some advantage was obtained by duress, undue influence or misrepresentation for example.
- (22) The Unfair Contract Terms Act 1977 has quite a misleading title since the Act does not seek to control unfair terms but applies mostly to 'exemption clauses', that is terms that seek to exclude or restrict liability. So unfortunately this Act does not help us here.
- (23) However as most people are aware, English law is being gradually influenced and changed by European law. Since 1994, and relevantly 1999, as result of an EU Directive, the Unfair Terms in Consumer Contracts Regulations ('the Regulations') have been part of our law.
- (24) The Regulations apply to all contracts for the sale of goods and the supply of services to consumers. The seller or supplier is defined in the Regulations at regulation 3(1) as:

'...any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.'

That includes of course the business of operating a car park.

- (25) Regulation 3(1) also defines 'consumer':

'... 'consumer' means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.'

Note that the definition of 'consumer' excludes companies – protection is given only to individual people.

(26) The Regulations make two requirements of contract terms, that they be fair and that they be expressed in plain, intelligible language. There are however two restrictions on the terms governed by the requirement of fairness. The first is where terms have been individually negotiated – that will not apply here.

(27) The second restriction is however very important. Regulation 6(2) provides as follows:

'In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate –

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.'

(28) These are sometimes referred to as 'core terms'. On the face of it therefore the price paid for a service – the charge for car parking – cannot be challenged on the ground that it is unfair.

### May an unfair price be challenged?

(29) The question of whether 'fairness' can apply to price was first discussed by the House of Lords in Director General of Fair Trading v First National Bank [2002] 1 AC 481 in a case about interest rates. The bank argued that the provision which permitted it to charge interest on amounts payable in default was a core term because it was part of the price.

(30) The House of Lords disagreed. Lord Bingham explained at para. [12] that:

'The object of the Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if [reg. 6(2)] were so broadly interpreted as to cover any terms other than those falling squarely within it. In my opinion the term, as part of a provision prescribing the consequences of default, plainly does not fall within it.'

(31) A different decision was reached by the Supreme Court (the successor to the House of Lords) on the question of overdraft charges – Office of Fair Trading v Abbey National plc [2010] 1 AC 696. That case was concerned with the question of whether certain personal current account charges levied by banks on transactions for which the customers did not have sufficient funds in their accounts to meet the requested payments were fair.

(33) The issue turned on whether regulation 6(2) applied: if it did, the question of whether the charges were ‘fair’ was irrelevant since they were nonetheless binding as core terms of the contract. The Supreme Court found that regulation 6(2) did apply. I refer to three of the five judgments given. First of all, to the judgment of Lord Walker JSC at para. [47]:

‘Charges for unauthorised overdrafts are monetary consideration for the package of banking services supplied to personal current account customers. They are an important part of the banks’ charging structure, amounting to over 30% of their revenue stream from all personal current account customers. The facts that the charges are contingent, and that the majority of customers do not incur them, are irrelevant.’

(34) Then at para. [88] Lord Phillips JSC said this:

‘When the relevant facts are viewed as a whole, it seems to me that the relevant charges are not concealed default charges designed to discourage customers from overdrawing on their accounts without prior arrangement. Whatever may have been the position in the past, the banks now rely on the relevant charges as an important part of the revenue that they generate from the current account services. If they did not receive the relevant charges they would not be able profitably to provide current account services to their customers in credit without making a charge to augment the value of the use of their funds.’

(35) Finally, at para. [117] Lord Mance JSC expressed the view that there was no reason why the price or remuneration payable for a package of services should not consist of a contingent liability.

(36) Thus the reasoning behind the decision was that charges – even ‘excessive’ charges which arise on a contingency, going into overdraft – fall outside the scope of regulation 6(2) if they are part of the package of services provided.

(37) But I am not sure that this reasoning would apply to parking charges of the kind identified above. These charges are not expressed to be part of a fee for the provision of services, but a charge for exceeding the maximum time allowed on the car park – they are really best understood as a ‘default provision’, that is to say a price paid by the consumer when he or she has done something wrong. Therefore it seems to me that the reasoning expressed in the First National Bank case has more application than that in the subsequent Abbey National case.

## ‘Unfairness’

- (38) The basic test of unfairness of a term set out at regulation 5(1) is that:
- ‘...contrary to the requirement of good faith it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer.’
- (39) Schedule 2 to the Regulations sets out what is described formally as an ‘Indicative and non-exhaustive list of terms which may be regarded as unfair’. This is informally known as ‘the grey list’.
- (40) I refer to paragraph 1 of Schedule 2 which lists 17 example terms, including the following which is relevant: a term
- ‘(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;’
- (41) Thus the starting point is that a charge of typically £85 or £100 for overstaying is probably unfair.
- (42) However Schedule 2 cannot be read on its own. It is necessary to go back to regulation 5(1) and consider the important concept of ‘good faith’
- (43) In the First National Bank case Lord Bingham explained at para. [17] that:
- ‘The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer.’



- (44) So far as the question of ‘imbalance’ in the parties’ rights and obligations is concerned, the argument for the operators will be that the consumer (here the driver) has the option of avoiding the charge simply by making sure he or she leaves the car park before the time allowed for free parking is up. This is analogous to a situation where a seller has the right to increase prices but the buyer has the right to get out of the contract without penalty.
- (45) There is therefore a good argument for the proposition, and my view is, that where the term providing for a charge for overstaying is both displayed prominently in the car park and set out clearly, then it is not unfair.
- (46) If however the relevant term is not properly drawn to the customer’s attention then either it may not form part of the contract in the first place, or if it does, it may be considered ‘unfair’ within the meaning of the Regulations.
- (47) The effect of finding that a term is unfair is that it will not be binding on the consumer (regulation 8). In this case, that means that the charge of £85 or £100 is not payable, or if it has been paid, it should be repaid. In English law the ground for ‘restitution’ of the sum paid would be that it was paid under a mistake of law, i.e. a mistake as to its legal effectiveness.



## Discounted payments

- (48) Many operators' standard terms include something like the following:

'Parking Charge: £100.00  
We will issue a  
£100.00 Parking Charge Notice  
which will be reduced to £50.00  
if paid within 14 days of issue.'

### Is this fair?

- (49) A similar provision was discussed in a case about estate agents' fees – Bairstow Eves v Smith [2004] EWHC 263 (QB). In that case the fee payable to an estate agent on the sale of a house was the standard commission rate of 3% or an early discounted commission rate of 1.5%. The discounted rate was only available if the full sum was paid within ten working days of completion.
- (50) The judge, Gross J, decided that on the material available to him both parties contemplated an agreed operative price of 1.5% with a default provision of 3%. His observations at para. [25] are particularly relevant:

'The object of the regulations is not price control nor are the regulations intended to interfere with the parties' freedom of contract as to the essential features of their bargain. But, that said, regulation 6(2) must be given a restrictive interpretation; ... So, while it is not for the court to re-write the parties' bargain as to the fairness of adequacy of the price itself, regulation 6(2) may be unlikely to shield terms as to price escalation or default provisions from scrutiny under the fairness requirement contained in regulation 5(1).'

- (51) It seems to me that the example given is not really an early payment discount but a price escalation provision – 'pay this sum now or it will double'.
- (52) I consider that such a provision is likely to be considered unfair. The reason is that by allowing the consumer only a short period of 14 days in which to make the lower payment it causes a significant imbalance in the parties' rights since such a short period is insufficient to allow the consumer to investigate the position or take advice: it puts most people in a position where they consider that they cannot risk not paying. That is unfair within the terms of regulation 5(1).

## The 2013 Regulations

- (53) On 13th June 2014 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations SI 2013/3134 came into force.

- (54) Part 4 of these new Regulations is concerned with protection from inertia selling and additional charges. Regulation 40 states as follows:

**‘40 – Additional payments under a contract**

- (1) Under a contract between a trader and a consumer, no payment is payable in addition to the remuneration agreed for the trader’s main obligation unless, before the consumer became bound by the contract, the trader obtained the consumer’s express consent.
  - (2) There is no express consent (if there would otherwise be) for the purposes of this paragraph if consent is inferred from the consumer not changing a default option (such as a pre-ticked box on a website).
  - (3) ...
  - (4) Where a trader receives an additional payment which, under this regulation, is not payable under a contract, the contract is to be treated as providing for the trader to reimburse the payment to the consumer.’
- (55) The principle purpose of these Regulations which follow the EU Directive on Consumer Rights (2011/83/EC) was to protect consumers who, by default, buy insurance for example when booking a holiday with a tour operator online.
- (56) I have considered how regulation 40 might assist drivers. My provisional view is that there are unlikely to be many parking situations where drivers have such a ‘default option’ but that the principle may be of importance when considering the issue of penalties discussed below. The reason for that is that one of the justifications put forward by operators for the parking charges are the high cost of administration: this does not form part of the trader’s ‘main obligation’ and is not something that drivers have the opportunity to opt out of when they first park.

**Penalty charges and genuine pre-estimate of loss (GPEL)**

- (57) Where the parties to a contract agree that, in the event of a breach, the contract-breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the Courts either as a penalty (which is irrecoverable) or as liquidated damages (which are recoverable). Liquidated damages clauses are a particular feature of building contracts where precise ascertainment of the loss caused to the innocent party is often difficult.
- (58) It is therefore not surprising that most of the discussion about parking charges focuses on the question of whether parking charges of the kind referred to above, £85 or £100 for overstaying, are penalties or not.

- (59) There is however an important question to ask first of all before discussing this point, which is whether the parking charge forms part of the contract or whether it is a pre-agreed sum for breach of the contract. If the contract simply states in terms that the price for parking is £5 an hour for the first two hours, but £80 per hour afterwards then it is not breach of contract to park for four hours and the cost will be £170 in total. As the House of Lords explained in a very different context in the case of Export Credits Guarantee Dept. v Universal Oil Products Co [1983] 1 WLR 399 at 402:

‘The clause was not a penalty clause because it provided for payment of money upon the happening of a specified event other than a breach of a contractual duty owed by the contemplated payor to the contemplated payee.’

- (60) This, as it happens, was the conclusion that Judge Hegarty QC came to in the Somerfield Stores case. I consider however that on a fair reading of the example given above which refers to ‘Maximum Stay’ and a ‘failure to comply’, what the motorist would understand is that he or she was only supposed to park for a specified amount of time and that after that time a penalty charge or fine would be incurred. Therefore it is legitimate to ask whether the charge is indeed a penalty – as the law understands it – or a GPEL.

- (61) The difference between a payment which is treated by the Courts as a penalty and a payment which is treated as a GPEL is explained by Lord Browne-Wilkinson in the case of Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573 at 578:

‘In general a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach.’

- (62) A genuine GPEL clause, such as those commonly found in building contracts, will attempt to work out in advance what the loss has been caused to the employer by the delay in handing over the building.
- (63) The starting point in any consideration of the question of whether a contractual provision requiring payment of a specified sum in the event of breach of contract is a penalty is the decision of the House of Lords in Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd [1915] AC 79 at 86–88. In that case the law is set out as a series of four propositions, the most relevant for our purposes being the last which itself is in four parts:

‘(4) ....

- (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
- (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ...
- (c) There is a presumption (but no more) that it is a penalty when ‘a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage’.
- (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.’

(64) There are a number of recent cases concerned with commercial contracts, most notably the decision of the Court of Appeal in Makdessi v Cavendish Square Holdings [2013] EWCA Civ 1539, which explain that there is no reason in principle why a contractual provision which increases the sum payable in default should be struck down as a penalty if the increase is commercially justifiable, provided that the dominant purpose was not to deter the other party from the breach, the relevant point being that if the function of the provision is ‘deterrent’ rather than ‘compensatory’ it is likely to be a penalty as opposed to a GPEL.

(65) Referring to a number of contemporary cases, at paragraph [104] in Makdessi Christopher Clarke LJ said this:

‘These cases show the court adopting the broader test of whether the clause was extravagant and unconscionable with a predominant function of deterrence; and robustly declining to do so in circumstances where there was a commercial justification for the clause.’



- (66) In this context there is it seems to me to be an important distinction between two different types of car parks: those where the business of the landowner is itself car parking and the revenue it receives comes from payments by drivers for parking, and those where the car park is ancillary to the landowner's principal business, for example as a retailer or cinema owner.
- (67) In the first case it seems to me that the loss that the operator suffers when a driver overstays can be no more than the price that another driver would have paid to park in the space occupied by the defaulting driver. Thus if an hour's parking costs £3, a GPEL for a driver who overstays for a period of an up to an hour might be £13, calculated as to £3 for use of the space and a £10 charge for administration. On this basis the charge for overstaying by two hours would be £16 because the administration charge would stay the same.
- (68) Although it could be argued on behalf of the driver that the space he occupied might never have been used, because precise pre-estimation of damage is an impossibility I would suggest that such a charge would be a GPEL (proposition 4(d) in Dunlop). However a charge of £35 (£25 + £10) or more would be a penalty because it would be far more than the greatest loss the operator would suffer (propositions 4(a) and 4(b)).
- (69) In the second case parking is typically provide free for, in the case of a supermarket car park, two hours, or cinema, four hours. The landowner can justify charges after this specified time expired because it needs to maximise the space available to customers and ensure that there is a reasonable turnover of spaces. However only if the car park is full or nearly full will it lose custom, and if it does lose custom, the loss will be the profit that is made from having that one extra customer or cinema goer.
- (70) In these circumstances in my view a fixed charge of typically £85 or £100 will fall foul of propositions 4(a) and 4(c) in Dunlop since, firstly, the typical profit that is made from a visitor will be significantly less than this sum and, secondly, the charge is the same whether the overstaying is five minutes, five hours or five days. There could be no objection to a contractual provision that required visitors to the supermarket or cinema who overstayed pay a fixed sum, but that sum has to be referable to the location of the supermarket, the size of the car park, and the length of overstaying. Thus in a smaller city centre location a charge of £10 per hour for first and subsequent hours of overstaying might be a reasonable GPEL, but in a large out-of-town retail centre or cinema complex, it might be only £3, in each case with a one-off administration charge of £10.

### **The position of the operator**

- (71) There are two other important points. First of all, I have seen suggestions in some commentary that these sums can be justified because of the high administrative costs of the company that polices and enforces the right to park,

e.g. ParkingEye Limited. That consideration it seems to me is irrelevant since it focuses on a different question to the one the Court has to answer – what is the business model of the company that manages the car park? – as opposed to the correct question, which is what loss has the landowner suffered as a result of the driver overstaying and is the charge levied by the manager or operator of a car park a genuine pre-estimate of that loss or not?

- (72) It is correct to say that a company which is appointed by the landowner to manage a car park in a shopping centre can be a ‘creditor’ and thus entitled to recover parking charges under Schedule 4 of the 2012 Act. But it does not follow from this that the contract or licence is granted by the operator as opposed to the landowner. In fact, the notices erected by operators typically state that parking is permitted ‘at the discretion of’ the landowner, i.e. with the landowner’s permission or licence. Therefore whether a charge for overstaying falls to be assessed as a penalty or GPEL has to be looked at from the standpoint of this agreement between landowner and driver.
- (73) In fact, nothing else makes sense. The business model of an operator such as ParkingEye is based on the assumption that a certain percentage of drivers will overstay and can therefore be charged a sum of money. ParkingEye suffers no loss if a driver overstays in a car park that it manages; in fact if everyone came and left within the designated period it would not make any money at all, so the ‘compensatory/deterrent’ analysis is not appropriate. The payment an operator receives from a driver who overstays is not compensation for loss, but indirect payment for the benefit provided to the landowner. That is ‘the commercial justification’ for the basis of charging as between landowner and operator, but the fact that it makes commercial sense for the landowner and the company which manages the car park to agree these terms, does not mean that it is a GPEL when the position between the landowner and the driver is considered.
- (74) But even if it is relevant to approach the question of GPEL from the standpoint of an operator such as ParkingEye whose business model is based on obtaining payments from drivers who overstay, it seems to me that a charge of £85 or £100 is a penalty rather than a GPEL since for the reasons I have already suggested the sum is far greater than the loss that is caused by the fact that the particular parking space is blocked.
- (75) The second point is that consideration of extra charges such as administration charges may also bring into play the question of consent for additional payments under regulation 40 of the 2013 Regulations.

### **Changes to the law**

- (76) The law in this country develops in two ways. One is by judge-made law, that is decisions of the High Court, Court of Appeal and Supreme Court which interpret and explain the law for the benefit of the lower Courts.

- (77) The other way is by legislation made by Parliament. It is regrettable that when considering parking charges in the context of recovery Parliament did not incorporate into the Bill that became the 2012 Act a definition of what were and were not reasonable parking charges. (In fact, ironically, the authors of the Department of Transport's Guidance quoted above (paragraph 5) seem to think that Schedule 4 does in fact do so.).
- (78) There is in my view a public interest in prohibiting extravagant and unconscionable charges for parking and there are precedents for doing so in other legislation that has been passed for the protection of consumers, for example consumer credit legislation.
- (79) It would be possible and in my view desirable for Parliament to amend Schedule 4 to the 2012 Act by providing that parking charges would not be recoverable from the registered keeper of a vehicle unless they were reasonable and a genuine pre-estimate of loss, and for guidance in the form of a 'grey list' to set out what charges, or type of charges, would not be so recoverable.

## Summary

- (80) In conclusion, it seems to me that we can draw the correct legal position is as follows:
- (1) Drivers who enter and park on private land with the permission of the owner do so under the terms of a contractual licence.
  - (2) To be enforceable, the terms imposed by the operators have to be clearly brought to the attention of the drivers.
  - (3) A term that imposes a charge for overstaying is in those circumstances probably not unfair within the meaning of the 1999 Regulations.
  - (4) But a 'discount' for early payment probably is unfair because it is properly understood as a price escalation clause.
  - (5) When operators erect signs that state expressly that there is a maximum period for parking and provide for a payment to be made upon failure to comply they are in fact imposing a sanction for breach of contract.
  - (6) Payments at the level that operators presently demand as sanctions are unlikely to count as a genuine pre-estimate of loss; they should be seen by the Courts as penalties which means they are unenforceable.

The Royal Automobile Club Foundation for Motoring Ltd is a transport policy and research organisation which explores the economic, mobility, safety and environmental issues relating to roads and their users. The Foundation publishes independent and authoritative research with which it promotes informed debate and advocates policy in the interest of the responsible motorist.

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