Neutral Citation Number: [2023] EWHC 303 (Admin)

Case No: CO/1298/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITING IN MANCHESTER

Tuesday, 14th February 2023

Before:
MR JUSTICE FORDHAM
- -

Between:	
THE KING (ON THE APPLICATION OF HALTON BOROUGH COUNCIL)	**Claimant**
- and -	
ROAD USER CHARGING ADJUDICATORS	**Defendant**
- and -	
DAMIAN CURZON	**Interested Party**

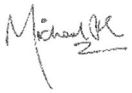
- -
- -

Tim Buley KC and Christopher Knight (instructed by DLA Piper UK LLP) for the **Claimant**
Ian Rogers KC and Imogen Proud (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **Defendant**
The **Interested Party** appeared in person

- -
Hearing dates: 7 & 8/12/2022
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

INTRODUCTION

1. This case is about penalty charges when vehicles cross the River Mersey without paying a road user charge ("RUC"). The Agreed Issues concern whether appeal adjudicators acted lawfully in allowing test case appeals against penalty charge notices ("PCNs"), on the basis that there had been a "procedural impropriety" as statutorily-defined, by reason of (i) unlawful delegation (ii) unlawful fettering and (iii) misleading notices. The Claimant ("the Council") is the "charging authority" in relation to the Road User Charging Scheme (the "RUC Scheme"), applicable to two bridges ("the Bridges"): the A557 Silver Jubilee Bridge (the "Old Bridge") and the A533 Mersey Gateway Bridge (the "New Bridge"). The Bridges span the Mersey between Runcorn and Widnes. The New Bridge opened on 14 October 2017, at which point the Old Bridge closed for works, reopening on 26 February 2021. The RUC Scheme is to be found in three successive "Scheme Orders" (§19 below), made by the Council on 9 March 2017, 19 April 2018 and 7 December 2020. The RUC Scheme identifies RUCs, payable in the case of classes of vehicle crossing the Bridges. There are exemptions and a Local User Discount Scheme ("LUDC"). Under the 2018 Scheme Order the RUC for a "class 2 vehicle" was £2. The Interested Party ("Mr Curzon") drives a class 2 vehicle. He has been prominent in raising issues relating to the RUC Scheme and penalty charge notices ("PCNs"). He scored big wins. First, before Adjudicator Kennedy in a Determination dated 11 March 2019 ("Curzon No.1"), upheld on review by Adjudicator Knapp on 15 May 2019. Then before Chief Adjudicator Sheppard and Adjudicator Kennedy ("the Adjudicators") in a Determination dated 10 January 2022 ("the Joint Determination"), upheld on review by Chief Adjudicator Sheppard on 18 March 2022 (the "Review Decision"). The Joint Determination and Review Decision, which concerned 17 PCNs and 11 test case appeals, stand as the targets for the Council's claim for judicial review.

The Encapsulation Summary

2. Writing a judgment in this case has felt a bit like doing a 5,000 piece jigsaw. The case is one of complexity and I have not found any of the issues easy. I will describe some of the many pieces I have had to examine and fit together. I can, however, start with something pithy and short. The key conclusions in the Joint Determination were encapsulated by Chief Adjudicator Sheppard in the Review Decision in one succinct paragraph. This "Encapsulation Summary" will allow me to introduce the key features and lexicon for this case:

> ***The appeal [by Mr Curzon] against liability for each of the 17 PCNs was allowed by the Adjudicators on the grounds of procedural impropriety because they found that: (a) the Council had failed in its duty to consider representations because, as a matter of fact, the representations were dealt with by a third party and not considered by, or under the direction of, the charging authority; (b) the rigid application of the "Business Rules" applied by the Council's agents does not constitute "consideration"; (c) the costs information in the Notice of Rejection of Representation ("NoR") was misleading and misrepresented the regulatory requirements, amounting to a procedural impropriety.***

PCNs and the PCN Review

3. PCNs are notices served pursuant to Regulation 7 of the Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013 (SI 2013 No. 1783) ("the Regulations"). Here is Regulation 7:

> ***7. Penalty charge notice. (1) Where a road user charge with respect to a motor vehicle under a charging scheme has not been paid by the time by which it is required by the charging scheme to be paid and, in those circumstances, the charging scheme provides for the payment of a penalty charge, the charging authority may serve a notice (a "penalty charge notice"). (2) A penalty charge notice must be served on the registered keeper of the motor vehicle unless, in accordance with regulation 6, the penalty charge to which it relates is payable by another person, in which case the penalty charge notice must be served on that other person. (3) A penalty charge notice must state – (a) the date of the notice, which must be the date on which it is posted or sent by electronic transmission; (b) the name of the charging authority; (c) the registration mark of the motor vehicle to which it relates; (d) the date and time at which the charging authority claims that the motor vehicle was used or kept on the designated road in circumstances in which, by virtue of a charging scheme, a road user charge was payable in respect of the motor vehicle; (e) the grounds on which the charging authority believes that the penalty charge is payable with respect to the motor vehicle; (f) the amount of penalty charge that is payable if the penalty charge is paid in full – (i) within 14 days of the day on which the penalty charge notice is served; (ii) after the expiry of such 14 day period but within 28 days of the day on which the penalty charge notice is served; (iii) after the service of a charge certificate; (g) the manner in which the penalty charge must be paid and the address to which payment of the penalty charge must be sent; (h) that the recipient of the penalty charge notice is entitled to make representations to the charging authority against the imposition of the penalty charge on any of the grounds specified in regulation 8(3); (i) the address (including if appropriate any email address or fax telephone number, as well as the postal address) to which such representations must be sent and the form in which they must be made; (j) that the charging authority may disregard any such representations received by it more than 28 days after the penalty charge notice was served; and (k) in general terms, the form and manner in which an appeal to an adjudicator may be made.***

As Michael Bennett, the Managing Director of Mersey Gateway Crossings Board Ltd (the "Board"), explains in his witness statement, issuing a PCN is preceded by a "PCN Review": an assessment undertaken in order to decide whether to issue the PCN. The following can be noted. (1) A "penalty charge" is an additional charge, distinct from the RUC. Under the 2018 Scheme Order (Article 12), the penalty charge was additional to the £2 RUC. The penalty charge rate was £40, discounted to £20 if paid promptly (14 days), and increased to £60 if unpaid when a "charge certificate" comes to be served (under Regulation 17). (2) Serving a PCN is a function conferred on the "charging authority" (Regulation 7(1)): the Council. (3) There are conditions before a PCN can be issued (see Regulation 7(1)): (i) that an RUC was required to be paid; (ii) that the RUC has not been paid; (iii) that the time for payment has passed; (iv) that the RUC Scheme provides for a PCN. These conditions mean there will be factual questions for evaluative judgment, during the PCN Review. (4) Serving a PCN involves: a discretion (Regulation 7(1): "may"); mandatory service requirements including identification of the right recipient (Regulation 7(2)); and prescribed information requirements (Regulation 7(3)).

Emovis and the "Operative" (CSR)

4. This is a convenient moment to introduce Emovis Operations Mersey Ltd ("Emovis") and the Emovis employee (the "Operative"). They are the "third party" and "the Council's agents" described in the Encapsulation Summary. It is the Operative who is entrusted with discharging certain functions, including the PCN Review. I have taken the word "Operative" from the Joint Determination; other documents say "CSR"

(Customer Service Representative). Emovis operates under the banner and brand name of "Merseyflow". Mark Reaney – the Council's Operational Director (Legal and Democratic) – explains as follows in his witness statement. There is a Demand Management Participation Agreement dated 28 March 2014 (the "DMPA"), entered into by the Council with the Board and Emovis. Under the DMPA, Emovis is contracted to provide "charge collection services, operate and maintain the free flow charging equipment on both of the Bridges", having developed "the relevant software and systems that are required for a road that will handle circa 20 million vehicles per annum". Under the DMPA, Emovis "must apply and collect charges in accordance with the [Scheme Order] in force at the relevant time as well as: any applicable enforcement regulations; the Council's charging policies; Emovis' own charging strategy; and the Business Rules".

"Representations" and the Regulation 8(9) duty to "consider" them

5. The reference to "representations" is to Regulation 8 and the reference to the Council's "duty to consider representations" is to Regulation 8(9). Here are Regulations 8(1) and (2) (underlining in quotations in this Judgment connotes my emphasis added):

> ***Representations against penalty charge notice. (1) Where it appears to the person on whom the penalty charge notice is served ("the recipient") that – (a) one or more grounds mentioned in paragraph (3) apply; or (b) whether or not any of those grounds apply there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled, the recipient may make representations in writing to that effect to the charging authority that served the penalty charge notice on the recipient. (2) The charging authority may disregard any such representations which it receives after the end of the period of 28 days beginning with the date on which the penalty charge notice was served…***

Here are Regulations 8(9) and (10):

> ***…(9) It is the duty of a charging authority to whom representations are duly made under this regulation – (a) to consider them and any supporting evidence which the person making them provides; and (b) within the period of 56 days beginning with the date on which the representations were served on it, to serve on that person notice of its decision as to whether or not it accepts – (i) that one or more of the grounds in paragraph (3) has been established; or (ii) that there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled. (10) Where a charging authority fails to comply with paragraph (9) within the period of 56 days mentioned there – (a) it is deemed to have accepted the representations made under paragraph (1) and to have served notice to that effect under regulation 9(1); and (b) it must as soon as reasonably practicable refund any sum paid in respect of the penalty charge notice and (if applicable) the road user charge.***

Notice of Rejection (NoR) and Costs Information

6. References to "notice of rejection" and "NoR" are to Regulation 8(9)(b) (§5 above) and Regulation 10. Regulation 10(1)(a)-(c) prescribes informational content for NoRs, while Regulation 10(2) confers a discretion to provide "other information". The reference in the Encapsulation Summary to "the costs information in the Notice" is to a statement ("the Controversial Costs Information"), contained within each NoR in these test cases: see §92iii below. Here are Regulations 9 and 10:

> ***9. Cancellation of penalty charge notice. (1) Where a charging authority accepts that a ground in regulation 8(3) has been established, or that there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled, it must- (a) cancel the penalty charge notice; (b) state in the notice served under regulation***

> ***8(9)(b) that the penalty charge notice has been cancelled; and (c) as soon as reasonably practicable refund any sum paid in respect of the penalty charge notice and (if applicable) the road user charge. (2) The cancellation of a penalty charge notice under paragraph (1) is not to be taken to prevent the charging authority from serving a fresh penalty charge notice on the same or another person.***
>
> ***10. Rejection of representations against penalty charge notice. (1) Where a charging authority does not accept that a ground in regulation 8(3) has been established, nor that there are compelling reasons why the penalty charge notice should be cancelled, the notice served in accordance with regulation 8(9)(b) (a "notice of rejection") must – (a) state that a charge certificate may be served under regulation 17(1) unless within the period of 28 days beginning with the date of service of the notice of rejection – (i) the penalty charge is paid; or (ii) the person on whom the notice of rejection is served appeals to an adjudicator against the penalty charge; (b) indicate the nature of an adjudicator's power to award costs against any person appealing; and (c) describe in general terms the form and manner in which an appeal to an adjudicator must be made. (2) A notice of rejection may contain such other information as the charging authority considers appropriate.***

Grounds of Procedural Impropriety

7. The reference to "grounds of procedural impropriety" is to Regulation 8(3)(g) and the definition in Regulation 8(4): see §35i below. Here is Regulation 8(3):

> ***… (3) The grounds are that – (a) in relation to a motor vehicle that is registered under the Vehicle Excise and Registration Act 1994 the recipient – (i) never was the registered keeper of the motor vehicle in question; (ii) had ceased to be the registered keeper before the time at which the motor vehicle was used or kept on the designated road and incurred the road user charge under the charging scheme; or (iii) became the registered keeper after that time. (b) at the time it incurred the road user charge under the charging scheme the motor vehicle was being used or kept on the designated road by a person who was in control of the motor vehicle without the consent of the recipient; (c) the recipient is a vehicle-hire firm (as defined in regulation 6(7)(c)) and liability for payment of the penalty charge had been transferred to the hirer of the motor vehicle in accordance with regulation 6(5); (d) the road user charge payable for the use or keeping of the vehicle on the occasion in question was paid at the time and in the manner required by the charging scheme; (e) no road user charge or penalty charge is payable under the charging scheme; (f) the penalty charge exceeded the amount applicable in the circumstances of the case; or (g) there has been a procedural impropriety on the part of the charging authority.***

Appeal

8. The reference to "appeal" is to Regulation 11. Here is Regulation 11(1)-(8):

> ***11. Appeals to an adjudicator in relation to decisions under regulation 10(1). (1) Where a charging authority serves a notice of rejection under regulation 10(1) in relation to representations made under regulation 8, the person making those representations may appeal to an adjudicator against the charging authority's decision – (a) within the period of 28 days beginning with the date of service of the notice of rejection; or (b) within such longer period as an adjudicator may allow. (2) An adjudicator may allow a longer period for an appeal under paragraph (1)(b) whether or not the period specified in paragraph (1)(a) has expired. (3) An appeal pursuant to this regulation must be made by delivering a notice of appeal to the proper officer in accordance with paragraph 2 of the Schedule. (4) An appeal pursuant to this regulation must be determined by an adjudicator in accordance with the procedure set out in the Schedule. (5) On an appeal under this regulation the adjudicator must consider the representations in question and any additional representations which are made by the appellant together with any representations made to the adjudicator by the charging authority. (6) If the adjudicator concludes that a ground specified in regulation 8(3) applies, the adjudicator must allow the appeal and the proper officer must notify the appellant and the charging authority of the outcome in accordance with paragraph 11(3) of the***

> ***Schedule. (7) Where an appeal is allowed the adjudicator may give such directions to the charging authority as the adjudicator may consider appropriate for the purpose of giving effect to the adjudicator's decision, and such directions may in particular include directions requiring – (a) the cancellation of the penalty charge notice; and (b) the refund of such sum (if any) as may have been paid to the charging authority in respect of the penalty charge or the road user charge it relates to. (8) A charging authority to which a direction under paragraph (7) is given must comply with it as soon as reasonably practicable.***

And here is Regulation 11(9)-(14):

> ***(9) If the adjudicator does not allow the appeal but is satisfied that there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled the adjudicator may recommend to the charging authority in writing that it cancels the penalty charge notice. (10) It is the duty of a charging authority to which a recommendation is made under paragraph (9) to consider afresh the cancellation of the penalty charge notice taking account of any observations made by the adjudicator and, within the period of 35 days beginning with the date on which the recommendation is received, to notify the appellant and the adjudicator as to whether or not it accepts the adjudicator's recommendation. (11) If the charging authority notifies the appellant and the adjudicator that it does not accept the adjudicator's recommendation under paragraph (9), it must at the same time inform them of the reasons for its decision. (12) No appeal to an adjudicator lies against the decision of the charging authority under paragraph (11). (13) If the charging authority accepts the adjudicator's recommendation under paragraph (9) it must cancel the penalty charge notice and refund to the appellant any sum paid in respect of the penalty charge and (if applicable) the road user charge it relates to as soon as reasonably practicable. (14) If the charging authority fails to comply with the requirements of paragraph (10) within the 35 day period mentioned in that paragraph, the authority is to be taken to have accepted the adjudicator's recommendation and must cancel the penalty charge notice and refund to the appellant any sum paid in respect of the penalty charge and (if applicable) the road user charge it relates to as soon as reasonably practicable after the end of that period.***

Finally, here is Regulation 11(15):

> ***(15) If, on an appeal under this regulation, the adjudicator, after considering the representations made by the appellant or the charging authority, concludes that none of the grounds specified in regulation 8(3) applies, nor that there are compelling reasons why the penalty charge notice should be cancelled, the adjudicator must dismiss the appeal and the proper officer must notify the appellant and the charging authority of the outcome in accordance with paragraph 11(3) of the Schedule.***

Mr Curzon's 17 Bridge Crossings (Cases 1-11)

9. It is time to identify the Bridge Crossings made by Mr Curzon, which gave rise to the 17 PCNs and became the 11 Cases on appeal decided by the Adjudicators in the Joint Determination. I will use date order and date proximity:

   i) The April 2019 Bridge Crossing ("Case 1"). Mr Curzon crossed the New Bridge (12.4.19) and received a PCN (24.4.19). His Case 1 Representations (25.4.19) (§76 below) were rejected. First, he received a letter (8.5.19) (§34 below), to which he replied (9.5.19), then there was Case 1 NoR (23.5.19). Adjudicator Kennedy dealt with the Case 1 appeal, issuing directions (21.8.19), to which the Council filed a Response (5.9.19).

   ii) The June 2019 Bridge Crossings ("Cases 3 & 2"). Mr Curzon crossed the New Bridge twice (13.6.19) and received PCNs (24.6.19): Case 3. His Case 3 Representations (25.6.19) were rejected by Case 3 NoR (12.7.19). Mr Curzon crossed the New Bridge twice (18.6.19) and received PCNs (28.6.19): Case 2.

His Case 2 Representations (30.6.19) (§14 below) were rejected by Case 2 NoR (12.7.19) (§14 below).

iii) The September/October 2019 Bridge Crossings ("Cases 4 & 5"). Mr Curzon crossed the New Bridge twice (7.9.19) and received PCNs (18.9.19): Case 4. His Case 4 Representations (23.9.19) were rejected by Case 4 NoR (11.10.19). Mr Curzon crossed the New Bridge twice (1.10.19) and received PCNs (11.10.19): Case 5. As to the first Crossing he made Case 5 Representations (13.10.19) rejected by letters (22.10.19) (§12 below). As to the second he made further Case 5 Representations (21.10.19) rejected by Case 5 NoR (20.11.19).

iv) The January/February 2020 Bridge Crossings ("Cases 7 & 6"). Mr Curzon crossed the New Bridge (31.1.20) and received a PCN (24.2.20): Case 7. His Case 7 Representations (3.3.20) (§80 below) were rejected by Case 7 NoR (10.3.20) (§81 below). Mr Curzon crossed the New Bridge (10.2.20) and received a PCN (26.2.20): Case 6. His Case 6 Representations (which bear a date "25.2.20") were rejected by Case 6 NoR (26.2.20).

v) The October 2020 Bridge Crossings ("Cases 8 & 9"). Mr Curzon crossed the New Bridge three times (30.10.20) and received PCNs (10.11.20). The first two became Case 8; the third was Case 9. Mr Curzon's Case 8 Representations (to which the Council attributed a date of "9.11.20") were rejected by Case 8 NoR (10.12.20) and he appealed. In Case 9, a Charge Certificate was issued (16.2.21) and Mr Curzon filed a witness statement (17.3.21) (§18 below) saying he never received the PCN; the Charge Certificate was cancelled, a new PCN issued (11.5.21); his Case 9 Representations (11.5.21) were rejected by Case 9 NoR (8.6.21) after which he appealed.

vi) The May/June 2021 Bridge Crossings ("Cases 10 & 11"). Mr Curzon crossed both the reopened Old Bridge and the New Bridge (26.5.21). He received PCNs (8.6.21): Case 10. His Case 10 Representations (10.6.21) were rejected by Case 10 NoRs (24.6.21), the Old Bridge case having first been considered by the Escalation Panel (16.6.21). Mr Curzon crossed the New Bridge (13.6.21 and 15.6.21) and received PCNs (28.6.21 and 29.6.21): Case 11. In both cases, his Case 11 Representations (28.6.21) were rejected by Case 11 NoRs (23.7.21), both having first been considered by the Escalation Panel (21.7.21). Chief Adjudicator Sheppard dealt with Cases 2-11.

The Business Rules and "Rigid Application"

10. The references in the Encapsulation Summary to the "Business Rules" are to a set of rules referred to in the DMPA (see §4 above). As will be seen, the basic structure of the Business Rules – simplified by me for the purposes of exposition – is that each Business Rule has: (i) a Reference; (ii) a Category/Sub-Category; (iii) a Scenario; (iv) Evidence/ Information/ Check; (v) an Action/ Outcome. Unless indicated otherwise, when I use illustrations in this Judgment, I am taking the Business Rule from Annexure 1 to the Council's Response (5.9.19) in the Case 1 appeal. The reference in the Encapsulation Summary to "rigid application" of the Business Rules (as to which, see §71 below) is to an approach to Representations which – in Annexure 3 of the same Case 1 appeal Response (5.9.19) – the Council described in this way:

> ***In order to locate the pre-determined decision made by Halton Borough Council for this scenario, the CSR will perform a search of the council's guidelines via the intranet based portal… Th[e] particular key word search brings … possible pre-determined outcomes based on the facts of the case … [T]he CSR would refer to the portal containing Halton Borough Council's pre-determined scenarios and decisions … [T]he staff at Merseyflow only apply a decision which has been pre-determined by Halton Borough Council… [W]here the CSR cannot find a pre-determined decision (after making multiple key word searches) or feel that a decision against a representation requires discretion, that they are instructed to refer this to the Escalation Panel.***

Mr Reaney's witness statement describes the "first version" of the Business Rules as coming into force when the New Bridge opened on 14 October 2017. He describes "a revised omnibus version" (Version 4.6: 28.3.19) being "approved in its entirety by Ian Leivesley (the Council's Strategic Director Enterprise, Community and Resources) on 29 March 2019, in consultation with Councillor Stan Hill (the Council portfolio holder for Transportation) and David Parr (the Council's Chief Executive)". The evidence refers to this sequence of versions of the Business Rules from March 2019 to May 2022: Version 4.6 (28.3.19); Version 4.7 (25.6.19); Version 4.8 (23.7.19); Version 4.9 (24.9.19); Version 4.10 (28.11.19); Version 4.11 (19.12.19); Version 4.12 (20.3.20); Version 4.13 (26.3.20); Version 4.14 (25.8.20); Version 4.15 (7.12.20); Version 4.16 (13.4.21); Version 4.17 (4.5.22). To help understand the Business Rules, I will take some illustrative examples.

BUSINESS RULE ILLUSTRATIONS

COM011: Military Vehicles

11. At the PCN Review (§3 above), the Operative deals with whether a RUC is payable (Regulation 7(1)). In the Business Rules this is known as "Compliance" (COM). One question is whether the vehicle is subject to an exemption. One exemption is for military vehicles. There is a Business Rule for this (Ref: COM011). "VPR" is the Vehicle Passage Record; "EDRA" is the European debt recovery agency in relation to the enforcement of tolls on foreign vehicles. Here is Business Rule COM011, which did not apply to any of the 11 cases in the Joint Determination.

> ***Reference. COM011.***
> ***Category. Charge: Exempt.***
> ***Scenario. The VPR is from a UK or non-UK vehicle that has the appearance of military vehicle.***
> ***Evidence/Information/Check. If it is clear from the VPR that the vehicle is a military vehicle and exempt, then the PCN shall not be issued or the VPR shall not be sent to the EDRA.***
> ***Action/Outcome. The VPR shall be processed as an exempt vehicle and PCN not issued (N.B.: if PCN is still issued it will be dealt at representation stage).***

ELG000: Third Party Communication

12. At the Representations stage (Regulation 8), the Operative deals with questions about what the Business Rules call "Representation Eligibility" (ELG). One question is whether communications are coming from a person eligible to make Representations. There is a Business Rule for this (Ref: ELG000). "RK" is registered keeper; "PL" is other person liable; "3P" is 3rd party.

> ***Reference. ELG000.***
> ***Category. Eligibility: 3rd Party.***

> ***Scenario. Representation received by unauthorised 3rd party.***
> ***Evidence/Information/Check. [blank]***
> ***Action/Outcome. Step 1 Letter to RK/PL Step 2 Letter to unauthorised 3rd Party. Refuse representation. Letter to RK/PL Letter to 3P.***

In fact, this illustration is seen in action in the present case. Mr Curzon's Case 5 Representations (13.10.19) did not lead to an NoR but rather to two letters (22.10.19). One letter was to Mr Curzon as RK. The other was to the 3P email address ("emovis-you-have-no-legal-power-to-do-this@halton.net") from which the 'Representations' had been received. Its contents, reflecting Business Rule ELG000, were:

> ***Unfortunately, due to the General Data Protection Regulations (GDPR) we are unable to process this correspondence as it is not from the registered keeper of the vehicle. We will be happy to correspond with you directly if the registered keeper gives written authorisation allowing you to act on their behalf… A letter has also been sent to the registered keeper of the vehicle asking them to supply written authorisation to allow you to act on their behalf… If we do not receive authorisation from the registered keeper, the representation will be treated as invalid…***

LREP003: Holiday

13. Also at the Representations stage, the Operative deals with Late Representations (LREP), received after the 28 day period (Regulation 8(2): §5 above). One scenario is where the person says they were on holiday. This is Business Rule LREP003, which was not in play in any of the present cases:

> ***Reference. LREP003.***
> ***Category. Reason for lateness: Holiday.***
> ***Scenario. States went on holiday immediately after crossing.***
> ***Evidence/Information/Check. EVIDENCE REQUIRED: Proof of holiday dates and RK or PL being on holiday eg airline tickets, hotel details. The details of the evidence provided must cover the representation period.***
> ***Action/Outcome. If appropriate evidence provided: - disregard lateness – consider representation. If appropriate evidence is NOT provided: - Issue letter stating rep is too late to consider.***

REP095: RUC Paid

14. Again at the Representations stage, the Operative deals with points which engage the substantive grounds (Regulation 8(3)(a)-(f)). An example is that the RUC was "paid at the time and in the manner required by the charging scheme" (Regulation 8(3)(d)). Here is Business Rule REP095 ("non account" means not an account holder):

> ***Reference. REP095.***
> ***Category. Paid – non account: States paid.***
> ***Scenario. No evidence provided.***
> ***Evidence/Information/Check. Investigate internal systems if no payment reject.***
> ***Action/Outcome. Reject representation. Ask the Scheme User to provide proof of charge payment for the vehicle captured and on the date of Contravention.***

REP095 is seen in action in the present case. Mr Curzon's Case 2 Representations (30.6.19) were:

> ***The road user charge was paid on time and as required. No user charge or penalty is payable. There has been a procedural impropriety by the charging authority. Compelling reasons.***

The Case 2 NoR (12.7.19) said this (and, as Mr Bennett's witness statement explains, no evidence of payment was subsequently received) (paragraph numbering in square brackets in quotations throughout this judgment have been added by me):

> ***… In your representation, you state that you paid the Charge (commonly termed as toll). Our investigations show that there is no record of a payment being made for this Vehicle Registration Mark and unfortunately, there has not been sufficient evidence provided to support your claim. We will reconsider your representation if you can provide: [a] A copy of your original receipt, or [b] Your unique payment reference number, or [c] A copy of your bank or credit card statement showing your payment, including the authorisation code which can be obtained from the bank. Therefore, grounds for representation have not been established and this letter is issued as a formal Notice of Rejection under Regulation 10 … You should now make payment for the outstanding amount … or make an appeal …***

REP006: Congestion

15. Once again at the Representations stage, the Operative deals with points which engage "compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled" (Regulation 8(1)(b) and (9)(b)(ii)). An example is where the Representations rely on congestion. Here is Business Rule REP006:

> ***Reference. REP006.***
> ***Category. Compelling reason: Congestion at crossing.***
> ***Scenario. Crossing was congested so did not think charge was in place.***
> ***Evidence/Information/Check. [blank]***
> ***Action/Outcome. Reject.***

In fact, REP006 is seen in action in the present case. Mr Curzon's Case 4 Representations (23.9.19) included this:

> ***The return journey I suffered congestion so why would I need to pay for that? No toll/charge due.***

The Case 4 NoR (11.10.19), reflecting Business Rule REP006, said:

> ***Grounds for representation have not been established and there are no further compelling reasons which would lead the charging authority to cancel the penalty charge notice.***

REP031: VIPs

16. Another example is where the Representations rely on VIP status. Here is Business Rule REP031, not in play in the present cases:

> ***Reference. REP031.***
> ***Category. Compelling reason: VIP.***
> ***Scenario. Claims that they are famous or a VIP and therefore do not have to pay the charge.***
> ***Evidence/Information/Check. [blank]***
> ***Action/Outcome. Reject representation.***

REP026: Signage

17. Another example is where the Representations rely on deficiencies relating to signs. Here is Business Rule REP026. It makes reference to REP181 (a Rule for the scenario when a first-time user says they were not aware of the RUC) and REP186 (a Rule for the scenario of a first-time PCN):

> ***Reference. REP026.***
> ***Category. Compelling reason: Signs.***
> ***Scenario. States that the Bridges Tolling/ Charging signs are missing / misleading / non-existent / illegal etc.***
> ***Evidence/Information/Check. [blank]***
> ***Action/Outcome. Reject representation however consideration should firstly be made under Business Rules: First Crossing (Rep181), First PCN (Rep186). Reject representation. Need to add in the relevant paragraphs to answer the representation eg. Signage paragraph if stating no signs.***

In fact, REP026 is seen in action in Cases 4, 7 and 6: Mr Curzon's Representations (23.9.19, 3.3.20 and 25.2.20) said this:

> ***The Bridges Tolling/Charging signs are missing, misleading and contradictory. Therefore they are illegal and of no effect. [23.9.19]***
>
> ***The signage is unauthorised, unlawful and renders the entire scheme unlawful and unenforceable. [3.3.20, 25.2.20]***

The NoRs (11.10.19, 10.3.20 and 26.2.20) said this, reflecting the Business Rule REP026 "relevant paragraphs" as they stood at the relevant times:

> ***… there are signs that provide advance warning on the approaches to the Mersey Gateway Bridge to give motorists the option to take alternative routes. The signs indicate: [a] The last point of exit on the highway to avoid bridge charges (commonly termed as toll). [b] The point on the highway from which charges are applicable. [c] The level of the bridge charge fees for different vehicle classifications. [d] Information on how and when to pay … [11.10.19, 26.2.20]***
>
> ***The signs in place when the new bridge opened to traffic were sufficient to meet the requirements of the Mersey Gateway Bridge Byelaws 2016 and the Transport Act 2000 and have been authorised by the Department for Transport (DfT). These signs indicated: [a] The last point of exit on the highway to avoid bridge charges. [b] The point on the highway from which charges are applicable. [c] The level of the bridge charge fees for different vehicle classifications. [d] Information on how and when to pay. Please note that in extensive discussions with DfT, they would not agree to telephone numbers or website addresses being displayed on any road signs… [10.3.20]***

WS001: Charge Certificate Cancellation

18. At the stage where a Charge Certificate has been issued and served (Regulation 17(1)), the question will arise whether it should be cancelled (Regulation 17(2)). The person who has received the Charge Certificate may raise points for consideration. One illustration is where the person says –in a witness statement (WS) – that they never received the PCN. This is from Business Rule WS001 (in version 4.6 dated 28.3.19):

> ***Reference. WS001.***
> ***Category. PCN Not Received.***
> ***Scenario. [various]***
> ***Evidence/Information/Check. [various]***
> ***Action/Outcome. PCN reissue.***

In fact, WS001 is also seen in action, in Case 9. In conjunction with his third Bridge Crossing (30.10.20), in respect of which a PCN was issued (10.11.20), this was reissued (11.5.21) after Mr Curzon responded to a Charge Certificate (16.2.21) with a WS001 witness statement (17.3.21). The Certificate was cancelled.

THE LEGISLATIVE LANDSCAPE

19. To give them their full titles, the Scheme Orders made by the Council (§1 above) are: the Mersey Gateway Bridge and the A533 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2017; the A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018; and the A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2020. These Scheme Orders need to be fitted within the legislative framework which has two interlocking schemes. First, there is the Transport Act 2000 (the "2000 Act") and the Regulations. Second, there is the Transport and Works Act 1992 (the "1992 Act") and the River Mersey (Mersey Gateway Bridge) Order 2011 (SI 2011/4) (the "2011 Bridge Order") as amended by the River Mersey (Mersey Gateway Bridge) (Amendment) Order 2016 (SI 2016/851) (the "2016 Bridge Order"). Here, as it seems to me, is how it all fits together:

The 2000 Act and the Regulations

20. The 2000 Act is national primary legislation making provision about transport. Sections 163 to 173 in Part 3 of the 2000 Act make provision for various "charging schemes". That includes, by virtue of section 164(1), a "local charging scheme" made – "by order" (section 168) – by a "charging authority" in respect of "roads" for which it is the "traffic authority". As will be seen (§26 below), it was a charging scheme of this nature, under the 2000 Act, that the 2016 Bridge Order was amending the 2011 Bridge Order to empower the Council to make. Section 171(1) requires a charging scheme to designate the relevant roads, specify the classes of vehicle, and specify the road user charge. Section 176 empowers the charging authority to install and maintain equipment and buildings. Section 192 (§64 below) empowers the charging authority to incur expenditure and enter into arrangements. Section 163(2) empowers the "appropriate national authority" (the Secretary of State) to make regulations dealing with the circumstances in which charges imposed in respect of vehicles by a charging scheme are payable by the vehicle's registered keeper. Section 172 empowers the Secretary of State to make regulations dealing with exemptions, discounted rates and maximum limits. So, the 2000 Act is the primary legislation which provides for the RUC.

21. Part 3 of the 2000 Act also deals with the, additional and distinct, "penalty charges". By section 173, Parliament empowered the making by the "appropriate national authority" (Secretary of State) of regulations making provision "for or in connection with the imposition and payment of … charging scheme penalty charges … in respect of acts, omissions, events or circumstances relating to or connected with charging schemes". This is the statutory source of the imposition of Penalty Charges. It fits with Part 2 (Regulations 4-6) of the Regulations, entitled "Penalty Charges". Also in connection with "penalty charges", Parliament made distinct provision in Part 3 of the 2000 Act, empowering a different rule maker (not the Secretary of State) to make other provision by way of Regulations. First, section 173(4) empowers the Lord Chancellor to make provision by Regulations regarding the:

> ***notification, adjudication and enforcement of charging scheme penalty charges.***

Secondly, section 195(1)(b)-(d) empowers the Lord Chancellor by those Regulations to:

> ***… make provision for or in connection with … (b) the determination of disputes relating to charging schemes, (c) appeals against such determinations or any failure to make such a determination, and (d) the appointment of persons to hear such appeals.***

22. The Regulations were made jointly by the Secretary of State for Transport and the Lord Chancellor on 16 July 2013, pursuant to these empowering provisions of the 2000 Act. Key provisions of the Regulations are set out throughout this Judgment. These Explanatory Notes give a helpful overview:

> ***These Regulations make provision for the civil enforcement of a penalty charge imposed in respect of a motor vehicle by a road user charging scheme made under Part 3 of the Transport Act 2000… Regulation 2 defines words and terms used in the Regulations. Regulation 3 contains provisions dealing with the service of penalty charge notices and other documents … Part 2 (regulations 4 to 6) deals with the imposition of, amount and liability for penalty charges… Part 3 (regulations 7 to 11) contains provisions about penalty charge notices. Regulation 7 explains when a penalty charge notice can be served and what information it must contain. Regulation 8 explains the right of the recipient of a penalty charge notice to make representations to the charging authority, which may accept the representations and cancel the penalty charge notice under regulation 9, or reject the representations under regulation 10. Regulation 11 explains the right to appeal to an adjudicator against a refusal by the charging authority to accept any representations made. Part 4 (regulations 12 to 16) makes provision for the appointment of road user charging scheme adjudicators, their procedure and the recovery of sums that are the subject of an adjudicator's award. Part 5 (regulations 17 to 20) provides for the civil enforcement of penalty charges. Where a penalty charge remains unpaid after the relevant period specified in regulation 17, the charging authority may issue a charge certificate, after which, in accordance with regulation 18, if the penalty charge continues to remain unpaid the sum due may be enforced as if it were payable under a county court order… Part 6 (regulations 21 to 31) explain the range of enforcement powers in respect of motor vehicles that a charging authority may provide for in a charging scheme… The Schedule to the Regulations provides for the procedure for appeals to an adjudicator against the issue of a penalty charge notice or the exercise of powers in respect of a motor vehicle.***

23. We can 'join the dots' between the Regulations and the Lord Chancellor's statutory powers to make "penalty charges" regulations (section 173(4) and 195(1)(b)-(d) of the 2000 Act). What Parliament in section 173(4) called "notification" fits within Part 3 (Regulations 7-11) of the Regulations (entitled "Notification of, and Representations about, Penalty Charges"). So, PCNs (Regulation 7) are a "notice" constituting a "notification". What Parliament described in section 195(1)(b) as "the determination of disputes" fits with the duty to consider Representations in Regulation 8(9), followed by the Cancellation (Regulation 9) or NoR (Regulation 10). The word "adjudication" in section 173(4), and the provision made in section 195(1)(c) and (d), fit with appeals pursuant to Part 4 of, and the Schedule to, the Regulations. Part 4 (Regulations 12-16) is entitled "Road User Charging Scheme Adjudicators" and the Schedule has "effect as to the procedure to be followed in adjudication proceedings" (Regulation 14). The "appeal" is Regulation 11 and the appointment of adjudicators fits with Regulation 12. The word "enforcement" in section 173(4) fits with Part 5 (Regulations 17-20) of the Regulations. It includes Regulation 17 (Charge Certificates), Regulation 18 (Enforcement of Charge Certificates in the County Court) and Regulation 20 (Enforcement by Execution).

The 1992 Act and the 2011/2016 Bridge Orders

24. The 1992 Act is national primary legislation concerned with transport projects, including bridges over inland waterways. By sections 3 and 5 of the 1992 Act,

Parliament empowered the Secretary of State to make Orders authorising "works" in relation to inland waterways. By virtue of section 5 and Schedule 1 §12, a section 3 Order could make provision for the "charging of tolls, fares (including penalty fares) and other charges, and the creation of summary offences in connection with non-payment". In that way, the 1992 Act was the relevant statutory framework for bridge projects such as the New Bridge, including "tolls" and "fares". It was under the 1992 Act that relevant project-specific Orders were then made by the Secretary of State. On 11 January 2011, acting pursuant to sections 3 and 5 of the 1992 Act, the Secretary of State made the 2011 Bridge Order, under which the Council was "the undertaker". As the Explanatory Notes to the original 2011 Bridge Order explained:

> ***This Order authorises Halton Borough Council to construct, operate and maintain a bridge between Runcorn and Widnes for vehicles over and in the River Mersey and St Helen's Canal and over the Manchester Ship Canal and Bridgewater Canal together with all the necessary related and ancillary works. For the purpose of the New Bridge the Order authorises Halton Borough Council, compulsorily or by agreement to purchase land and rights in land and to use lands. It provides for the new bridge over the River Mersey to be subject to tolls payable by those who use the new bridge in vehicles, and for enforcement powers in respect of non-payment of such tolls. The Order also authorises the making of alterations to the highway network, the power temporarily to close the River Mersey, St Helen's Canal, Manchester Ship Canal and Bridgewater Canal, to remove vessels and to make byelaws.***

25. Under the original 2011 Bridge Order there was provision for these "tolls" in relation to the "bridge roads" for the New Bridge. This was the subject of Article 41 (power to charge tolls) and Article 42 (payment of tolls). The original Article 46 (application of the 2000 Act) made provision whereby the "tolls" in respect of the New Bridge would be treated as if they were a RUC Scheme. This brought in the prospect of "penalty charges". Article 46 (as originally enacted) provided as follows:

> ***Application of the 2000 Act. 46.—(1) Regulations made pursuant to section 173 (penalty charges) of the 2000 Act shall have effect in respect of the new crossing as if the tolls and charges charged pursuant to this Order were charges payable pursuant to a charging scheme made by order under Part 3 of the 2000 Act. (2) The imposition and payment of penalty charges in connection with this Order shall be in accordance with such regulations as the Secretary of State may make pursuant to section 173 of the 2000 Act. (3) Sections 174 (examination, entry, search and seizure), 175 (immobilisation etc.) and 176 (equipment etc.) of the 2000 Act shall have effect in respect of the new crossing as if Part 5 of this Order was a charging scheme made by order under Part 3 of the 2000 Act.***

This is why Article 41(7) referred to "penalty charges", in conjunction with "tolls", as follows:

> ***(7) The person by whom tolls under this Order and penalty charges imposed in connection with this Order are payable in respect of a motor vehicle is the registered keeper.***

Article 41(5) provided that the undertaker could "appoint any person to collect tolls or charges as its agent" and Article 43(1) (§60iv below) empowered the undertaker to "enter into … concession agreements".

26. On 24 August 2016 the Secretary of State amended the 2011 Bridge Order by means of the 2016 Bridge Order. As the Explanatory Notes to the 2016 Bridge Order explained, it served to:

> ***… allow[] Halton Borough Council to make a road user charging scheme under the Transport Act 2000 in place of the tolling provisions in respect of the Mersey Gateway Bridge and Silver Jubilee Bridge to enable an open road charging scheme to be introduced.***

The new Article 42A(1)-(5) provided as follows:

> ***Power to make road user charging schemes 42A.—(1) The undertaker may make charging schemes in respect of the bridge roads or Silver Jubilee Bridge roads, or a single charging scheme for both. (2) Section 164(3) (local charging schemes) of the 2000 Act does not apply to such a charging scheme. (3) A charging scheme to which this article relates may make provision, in addition to anything provided for under the 2000 Act, for— (a) charges to be levied for any services or facilities provided in connection with the new crossing and the Silver Jubilee Bridge; and (b) any other matter that is provided for in articles 41 (power to charge tolls) and 42 (payment of tolls). (4) Where a charging scheme is in force on 14th September 2016 in respect of the bridge roads or Silver Jubilee Bridge roads, or both, and does not make express provision for such matters, the following is to apply in addition to that charging scheme— (a) the undertaker may levy charges for any other services or facilities provided in connection with the new crossing or the Silver Jubilee Bridge; (b) where any charge, including a penalty charge under a charging scheme or a charge levied under sub-paragraph (a), remains unpaid after it has become due for payment the person to whom it is payable may recover from the person liable to pay it the amount of the charge together with all other reasonable costs and expenses including administrative expenses, enforcement expenses and interest arising out of such failure to pay; (c) the undertaker may appoint any person to act as its agent to collect charges and other sums as provided for within sub-paragraph (b); and (d) [omitted]. (5) Subject to the provisions of this article, when a charging scheme is in force in respect of the bridge roads (whether for the bridge roads alone or with the Silver Jubilee Bridge roads) the charging scheme has effect in substitution for articles 41, 42 and 46 (enforcement), but when there is no charging scheme in force in respect of the bridge roads the imposition, payment and enforcement of payment of tolls and charges imposed under this Order is to be under the powers conferred by articles 41, 42 and 46.***

Now, instead of a scheme for "tolls" for the "bridge roads" of the New Bridge, to take effect as if they were charges under a 2000 Act charging scheme (the old Article 46), the undertaker was empowered (Article 42A(1)) to "make charging schemes" in respect of the "bridge roads" of either or both of the Bridges. This Scheme-Design power was more extensive (by virtue of Article 42A(3)) than the 2000 Act, and one of the 2000 Act restrictions was disapplied (by virtue of Article 42A(2)). The old Article 46 was repealed and replaced. Ancillary provision was made (Article 42A(4)) in relation to any charging scheme in force on 14 September 2016 in respect of the bridge roads (but in the event there was no such scheme). Article 43 was retained but Article 42A(6) contained an express restriction in relation to concession agreements (see §60v below). What all this means is this. When the Council made the RUC Scheme by the 2017 Scheme Order (and when this was replaced by the 2018 and 2020 Scheme Orders), this was as "charging authority" exercising 2000 Act powers, having been empowered to do so as an "undertaker" by virtue of Article 42A(1)-(3) of the 2011 Bridge Order as amended by the 2016 Bridge Order. This is how the legislative jigsaw pieces fit together. Importantly, in making the Scheme Orders the Council was exercising a "Scheme-Design" function, making provision including the following: (i) designating the relevant scheme roads; (ii) identifying the applicable "charges"; (iii) identifying the "classification of vehicles" to which the charges would apply; and (iv) identifying when and what "penalty charges" would be applicable.

THE STORY

Curzon No.1

27. Every case has its story. A good place to start for the story of this case is the summer of 2018. On 7 June 2018 Mr Curzon drove his vehicle across the New Bridge and back. He was issued with two PCNs, his Representations were rejected and NoRs were issued. His Regulation 11 appeal became Curzon No.1.

    i) Adjudicator Kennedy directed the cancellation of the PCNs for "numerous procedural improprieties". There were three limbs (§31 below): the use of the word "tolls" in the PCNs; failure of the "charging authority" to discharge the Regulation 8(9) duty; and the use of "tolls" in signage. The Regulation 8(9) failure was because the Representations were not considered directly by any member of the Council or its staff but by Emovis. Adjudicator Kennedy concluded that Regulation 8(9) imposed a "duty" on the Council as the "charging authority", which it could not "delegate" to an "external" body. She concluded that there was no "express or implied statutory power" allowing delegation. She accepted that some "administrative functions" could be "delegated" or "outsourced", emphasising this was a "judicial" function. She found that there was "no provision" in the 2000 Act for the delegation of powers to any other body. She concluded that the Council could not rely on Article 43 of the 2011 Bridge Order, emphasising the restriction in Article 42A(6) which she said:

    > ***… expressly provides that the Council may not transfer its powers and duties as the charging authority …***

    She found in Mr Curzon's favour under Regulation 8(3)(g):

    > ***I find that the failure of the Council to consider Mr Curzon's representations amounted to procedural impropriety.***

    ii) Adjudicator Kennedy also found in Mr Curzon's favour based, in the alternative, on Regulation 8(3)(e)

    > ***Further, the Council did not consider Mr Curzon's representations at all, and certainly not within 56 days, and I find that Regulation 8(10) deemed them to have been accepted and the PCNs should have been cancelled.***

    iii) Adjudicator Knapp on 15 May 2019 concluded that there was nothing "unreasonable" or "erroneous in law" in the "clear reasons" of Adjudicator Kennedy and therefore that the "interests of justice" did not require a review (§12(1)(b)(vi) of the Schedule to the Regulations).

    iv) Curzon No.1 was a decision by an independent judicial authority which held as follows, as a matter of law: Regulation 8(9) required consideration by the Council itself as charging authority; Emovis was not the charging authority; and an Operative could not discharge this function for the Council.

A Press Release

28. The first thing that the Council did in light of Curzon No.1 was to make an announcement by press release. It was never withdrawn or revised. It was headed: "Traffic penalty Tribunal Adjudicator's Decision: Mr Curzon". It read as follows:

> ***[1] It's business as usual at the Mersey Gateway. [2] Halton Borough Council has been made aware of the Traffic Penalty Tribunal adjudicator's decision in the recent appeal of Mr Curzon. Although this is currently being reviewed the Council would wish to reiterate that: [a] Adjudication by the Traffic Penalty Tribunal (TPT) cannot and does not, in law, invalidate or remove the powers in place from the 14 October 2017 to administer and enforce tolls on the Mersey Gateway Bridge. [b] Adjudication is specific to the case being considered, and any decision of an Adjudicator only relates to that particular case. [c] A decision of TPT does not have general effect nor carry any weight as precedent. [d] Any suggestion that the Council has no power to charge or enforce how it does this or that the Council[] is acting inappropriately or "illegally" is misleading, inaccurate and wrong in law. [e] The Adjudicator's decision in respect of signage contradicts the decision of the Adjudicator in the an [sic] early case where the Adjudicator concluded signage is "large, well sited, in clear view, and to communicate to a driver unfamiliar with the area that a payment was required and how to pay". [3] It's business as usual at the Mersey Gateway – please continue to pay to use Mersey Gateway…***

It is striking that the Council should have considered it appropriate to brief the press and the public this way – especially [2][d] – following an independent judicial adjudication finding that it had acted unlawfully and in breach of its statutory duty, with the logical consequence that it was unable to defend penalty charges on appeal following rejection of Representations. In the event, no issue has been raised before me and I say no more than to record that in the Joint Determination, Chief Adjudicator Sheppard said this:

> ***The Council and its agents are wrong to believe and state that an adjudicator's decision is specific to the case being considered, that any decision of an adjudicator only relates to that particular case and that a decision by the Traffic Penalty Tribunal does not have general effect nor carry any weight as precedent. While the decisions cannot be binding, tribunal law is clear that decisions of this Tribunal on points of law should be treated with great respect and considered as persuasive authority. The Council was wrong to ignore Adjudicator Kennedy's decision in Curzon No. 1. If the Council does not agree with the adjudicator's decision and findings, it should challenge the decision in the High Court.***

Revised Business Rules

29. The Council did other things after Curzon No.1. As I have mentioned (§10 above), "a revised omnibus version" of the Business Rules (Version 4.6: 28.3.19) was "approved" by the Council's Mr Leivesley (29.3.19). This email from Mr Leivesley to Mr Bennett was Annexure 2 to the Council's Case 1 appeal Response (5.9.19):

> ***I am writing to you exercising the delegated powers I have been given by the Council in relation to matters relating to the implementation of the Mersey Gateway project. Those delegated powers are contained both within Minute No. EXB 117 of the Executive Board of 15th January 2015 and within the Council's Constitution, approved by the Full Council on 18th May 2018 (page 294 paragraph 14). In accordance with those delegated powers I have consulted with the Portfolio Holder for Transportation (Councillor Stan Hill) before exercising those powers. In so far as this is required by law and/or any Orders or Regulations relating to Mersey Gateway and Silver Jubilee Bridges I would confirm that I have read the attached Business Rules and agree the said rules set out therein. I confirm on behalf of the Council that the attached Business Rules should be applied by [i] The Council [ii] MGCB Ltd; and [iii] Emovis when considering [a] whether to Issue a PCN in respect of the crossing of Mersey Gateway or Silver Jubilee Bridges by a vehicle [b] any Representations arising from the issuing a PCN in respect of the crossing of Mersey Gateway or Silver Jubilee Bridges by a vehicle [c] any Response to any Representations arising from the issuing a PCN in respect of the crossing of Mersey Gateway or Silver Jubilee Bridges by a vehicle [d] any associated correspondence or decision making arising from the issuing or enforcing of a PCN in respect of the crossing of Mersey Gateway or Silver Jubilee Bridges by a vehicle. Any matters relating to the above, [a] that fall within the Business Rules shall be deemed approved***

by Halton Borough Council [b] that fall outside the Business Rules shall be reviewed and approved specifically by Halton Borough Council.

Escalation Panel

30. Also on 29 March 2019 the new "Escalation Panel" was brought into operation. Previously, as explained in the Response of 20.11.18 in Curzon No.1, there was an "escalation process", through a team manager to the Board for consideration and decision, where the operative "identifies a representation is not in accordance with identified scenarios". The Council's Case 1 appeal Response (5.9.19) said in Annexure 3:

> ***[W]here the CSR cannot find a pre-determined decision (after making multiple key word searches) or feel that a decision against a representation requires discretion, … they are instructed to refer this to the Escalation Panel.***

The Response described the Escalation Panel as follows (at §§2.11-2.19):

> ***2.11 The Escalations Panel comprises senior Council and Mersey Gateway Crossings Board staff who meet to consider cases escalated by the agent via CRM as required by the Council's comprehensive guidance for delivery of its function as charging authority, including the Business Rules. 2.12 The agent will escalate a case for the following reasons: [a] the guidance requires escalation in a particular circumstance; [b] Appeals received which there is no HBC approved guidance to address the point at issue or the guidance requires escalation in a particular circumstance; [c] Circumstances which may require changes/amendments to Business Rules; [d] General enquiries which need further support from the charging authority. 2.13 All escalations to the panel are made by the agent using a standard submission form and these submissions are added to the meeting agenda as required. 2.14 The Panel members comprise: [a] Halton Borough Council: Jim Yates – Divisional Manager and personal assistant to the Chief Executive, Council lead officer in respect of dealing with the Local Government Ombudsman, Information Commissioner's Office and all corporate complaints; and [b] MGCB: Mike Bennett - Managing Director; Helen Dearden - Finance Director; David Lyon - Company Secretary; Jeff Hayes - Operations Manager; Ged Herby - Technical Manager; Ray Hunt - Communications Manager; Darren Wollaston – Operations Co-Ordinator (Panel Administrator). 2.15 The Panel meets weekly (if there is business to discuss) with a quorum of three people, one of whom must be the Council representative. On a very rare occasion when there is no Council availability, any recommendations arising from the panel meeting are subject to Council approval before implementation. The panel functions such that whilst matters are discussed between the members, the decision is always that of the Council representative. 2.16 Notes of panel meetings are recorded and circulated to panel members. 2.17 The actions arising from the escalation panel meetings represent the Council's decision, arrived at by exercising discretion in consideration of those matters escalated to the panel. The determination represents the Council's decision in respect of the matter and is communicated to Merseyflow by MGCB using the submission form. 2.18 Should the escalation panel find a pattern of similar scenarios which could be more efficiently and effectively managed by formal guidance relating to a finding of fact, this is put into effect through creation of a new business rule. 2.19 Any addition, amendment or deletion of business rules requires the approval and formal endorsement of both HBC's Strategic Director and Executive Board Member.***

In fact, the Escalation Panel is seen in action in the present case. In Cases 10 and 11, three of the four NoRs arose from decisions of the Escalation Panel (§9vi above).

REP182: Three Limbs from Curzon No.1

31. New Version 4.7 (25.6.19) contained a new Business Rule REP182, designed to deal with a situation where a Regulation 8 Representation raised one of the three limbs

from Curzon No.1 (§27i above). This new Rule was recorded, as "Agreed and Approved by HBC", with the signatures of Mr Leivesley and Councillor Hill (dated 21.6.19). It was set out (Joint Determination §4.2.9):

> ***Reference. REP182.***
> ***Category. Reps Quoting Mr Curzon Case.***
> ***Scenario. Customer makes a representation or appeal quoting or making reference to the adjudicators decision for case XM01672-1807 (Curzon) or rely upon any of the 3 specific issues associated with it, namely i) The use of the word 'toll' on PCN forms or any other standard documents or online information ii) The charging authority (HBC) not being entitled to delegate discretionary power to Emovis (or any other party) and that all representations should be considered directly by HBC iii) The signage used on the highway network is based on the employment of the word 'toll' and is therefore not authorised to convey liability to pay a road user charge.***
> ***Evidence/Information/Check. No evidence provided/required.***
> ***Action/Outcome. Any representations or appeal received on this basis are to be rejected, using the explanation as provided by HBC. Reject representation.***

This is another Business Rule which can be seen in action in the present case, in Cases 4, 7 and 6. The NoRs (11.10.19, 10.3.20 and 26.2.20) all reflect Business Rule REP182. The "explanation" for REP182, as it stood in March 2020, is reflected in the text of Case 7 NoR (10.3.20) at [5]-[7] (see §81 below).

REP184: Singular and Plural (Road v Roads)

32. At the same time as the new REP182, there was a new Business Rule REP184 (in Version 4.7), recorded as "Agreed and Approved by HBC" (21.6.19) with the signatures of Mr Leivesley and Councillor Hill:

> ***Reference. REP184.***
> ***Category. Road v Roads.***
> ***Scenario. Customer makes a representation related to the use of the singular word 'road' within the PCN.***
> ***Evidence/Information/Check. No evidence provided/required.***
> ***Action/Outcome. Any such representation or appeal will be refused on the grounds that; a) a PCN can be generated by accessing any element of road within the scheme roads; b) the evidence provided on the PCN (photo and location description) relates to one point on one particular road within the defined scheme roads; c) this particular road is designated as being subject to the Order; d) the use of the singular word is entirely appropriate. The evidence provided by the PCN demonstrates that the designated road within the scheme roads which generated the liability for payment of a charge was Mersey Gateway Bridge. This is clearly within the definition of item (i) of scheme roads within the Order as being "the road that approaches and crosses the new crossing" and therefore no further explanation is required. Reject Representation.***

REP184 features indirectly in the present case. The text which subsequently became the wording of REP184 was included by the Operative in the Case 1 NoR (23.5.19), responding to the Case 1 Representations (§76 below).

Progress of the Appeals

33. The 11 Cases are the sequel to Curzon No.1. As has been seen (§9 above), what happened was that Mr Curzon continued to make his Bridge Crossings giving rise to the appeals addressed in the Joint Determination. The first Bridge Crossing (12.4.19) was followed by the others (13.6.19, 18.6.19, 7.9.19, 1.10.19, 31.1.20, 30.10.20, 26.5.21, 13.6.21 and 15.6.21). The appeals were treated as test cases. They were

consolidated by Adjudicator Kennedy and Chief Adjudicator Sheppard, acting 'of their own motion', to be dealt with together. It is striking that the Adjudicators should have taken until 10 January 2022 to decide appeals – with issues – that go back to 2019. I was told by Tim Buley KC (who appears for the Council with Christopher Knight) that all other appeals were stayed pending the Joint Determination. I was told by Ian Rogers KC (who appears for the Adjudicators with Imogen Proud) that there had been problems caused by serious illness. In the event, no issue has been raised before me and I say no more than to record that in the Council's Letter Before Claim (4.2.22) its solicitors said:

> ***The Council … notes at the outset of this letter the very considerable concern it has that the earliest of the 11 appeals which were decided by the Adjudicators on 10 January 2022 was filed with the Adjudicators some two and a half years earlier. Four of the other appeals concern PCNs issued in 2019; only three concern PCNs issued in 2021 (and none later than June 2021). The approach of the Traffic Penalty Tribunal has resulted in unconscionable delay, which would of itself render the appeal process unlawfully unfair. The unrequested consolidation of the appeals on an apparent ongoing basis is no good reason for why it took so long to resolve the earliest appeals. The proposed claim [for judicial review] does not rely on this as a separate ground; the Council wishes to raise the issues of wider importance. Nonetheless, the conduct of the Adjudicators in this respect will be raised before the High Court… Over 90 million trips have been made since October 2017, and the majority of drivers pay the Charges due without issue with a payment compliance rate of 97%... During this period, a total of 8665 appeal cases have been submitted. We note that the Council has been unable successfully to defend any appeal determined by an adjudicator.***

Determining Case 1 on a Narrow Basis

34. Case 1 was dealt with by Adjudicator Kennedy in what stood as some 31-pages (10 parts) of the Joint Determination. One feature of Case 1 is this. Adjudicator Kennedy explained in Part 3 (Joint Determination §3.10) that the Case 1 appeal was being allowed, and the Council directed to cancel the Case 1 PCN, on the "ground" (§3.9) that the first letter (8.5.19) did not contain the informational content prescribed by Regulation 10 for a NoR (even if the later Case 1 NoR of 23.5.19 did do so). Adjudicator Kennedy reasoned that this of itself constituted a Regulation 8(3)(g) "procedural impropriety". She went on discuss other issues (§3.12), explaining that she was doing so because these applied to "the other appeals". In the event, Chief Adjudicator's 3-page Introduction to the Joint Determination, and the Review Decision, recorded that all 11 Cases were decided on the grounds described in the Encapsulation Summary.

"PROCEDURAL IMPROPRIETY" AS STATUTORILY-DEFINED

35. As has been seen, the grounds on which Representations can be made (see Regulation 8(1): §5 above), and on which an appeal can be pursued (see Regulation 11(6): §8 above), include (Regulation 8(3)(g)): "there has been a procedural impropriety on the part of the charging authority". There are the following key points to be made about "procedural impropriety" in Regulation 8(3)(g). The case referenced is the judgment of Burnett J in R (Camden LBC) v Parking Adjudicator [2011] EWHC 295 (Admin) [2011] PTSR 1391, a parking case where an equivalent framework is applicable:

    i) First, the term "procedural impropriety" is one which "has the meaning given to it by Regulation 8(4) and nothing wider" (Camden §32), so that "the term is given a special definition" (Camden §47). Here is Regulation 8(4):

> ***(4) In these Regulations "procedural impropriety" means a failure by the charging authority to observe any requirement imposed on it by the Transport Act 2000 or by these Regulations in relation to the imposition or recovery of a penalty charge or other sum and includes in particular – (a) the taking of any step, whether or not involving the service of any notice or document, otherwise than- (i) in accordance with the conditions subject to which; or (ii) at the time or during the period when, it is authorised or required by these Regulations to be taken; and (b) in a case where a charging authority is seeking to recover an unpaid penalty charge, the purported service of a charge certificate under regulation 17(1) of these Regulations before the charging authority is authorised to serve it.***

ii) Secondly, the "procedural impropriety" must be one which arises in the particular case which is under consideration. The fact, for example, that non-compliant PCN(s) are issued in relation to other Crossing(s) would not constitute a "procedural impropriety" invoked by a Regulation 8 complainant or Regulation 11 appellant whose own PCN was compliant. The need for this nexus is obvious. It is reflected in Regulation 8(1)(a) referring to the relevant ground as one which must "apply" to the case involving the PCN in question.

iii) Thirdly, the term "procedural impropriety" does not include those "long-established concepts of fairness" falling within the conventional public law description of "procedural impropriety" (Camden §32); nor does it embrace any "broad public law failing" (Camden §54); there being (Camden §52) "no independent roving commission to identify public law failings".

iv) Fourthly, the concept of a "procedural impropriety as defined is fatal to the recovery of a penalty charge" (Camden §32), because its existence when found by the charging authority makes Cancellation of a PCN mandatory (Regulation 9(1)), and its existence when found by the appeal adjudicator makes allowing the appeal mandatory (Regulation 11(6)). This consequence, together with the statutory definition, reflects the fact that (Camden at §32):

> ***It is ... incumbent upon enforcing authorities to comply meticulously with the requirements of the statutory scheme if they are to recover penalty charges.***

36. There is good reason for this principle requiring meticulous compliance with the requirements of the statutory scheme. Mr Rogers KC told me that some 850,000 PCNs are issued annually under the RUC Scheme. As Burnett J explained (Camden at §12):

> ***In London alone something of the order of 5,000,000 penalty charge notices are issued each year… [T]he Joint Annual Report of the Parking and Traffic Adjudicators for 2008-2009 indicates that there were just over 68,000 appeals in respect of such notices that year in London. The revenues generated for local authorities by the civil enforcement regime are very substantial… Paradoxically, their financial interests are served if drivers contravene parking restrictions and are also dilatory in paying the charge and thereby miss the opportunity to benefit from the discount for prompt payment…***

Back in March 2006, Adjudicator Wilkinson had said this (cited in R (Barnet LBC) v Parking Adjudicator [2006] EWHC 2357 (Admin) [2007] RTR 162 at §23):

> ***… parking control as an activity … is a necessary one of considerable importance that affects the daily lives of millions of motorists. PCNs are issued in their thousands every day; over 4 million every year. Only about 1 per cent gets as far as an appeal before a Parking Adjudicator. In relation to such a routine, everyday, prolific activity it is highly undesirable for non-compliant PCNs to be served in large numbers. My decision should in my view***

> ***provide every encouragement to local authorities to ensure that the PCNs they serve are compliant with the statutory requirements as to their content… The drafting of a compliant PCN is a simple drafting task and it is difficult to understand why these difficulties have arisen and continue to do so. These sentiments apply to every stage of the enforcement process, not just the issue of a valid PCN. The Parking Adjudicators have had cause in their annual report on more than one occasion to comment on procedural irregularities that have come to their attention in appeals. The motoring public deserves nothing less than that the public authorities exercising penal powers understand the importance of their complying with the conditions attached to their powers and are scrupulous about having in place administrative processes that do so. It is imperative that the public can have confidence in the fairness and propriety of the enforcement of parking controls.***

Jackson J described this reasoning as "compelling" (Barnet at §38), adding (at §§39 and 41):

> ***There are good policy reasons why PCNs should comply with the statutory requirements. These documents are issued in large numbers… Prejudice is irrelevant and does not need to be established. The 1991 Act creates a scheme for the civil enforcement of parking control. Under this scheme, motorists become liable to pay financial penalties when certain specified statutory conditions are met. If the statutory conditions are not met, then the financial liability does not arise.***

THE JURISDICTION ISSUES

37. On this part of the case, the Agreed Issue, as raised by the Council (in its judicial review claim) is this:

> ***Whether the concept of a "procedural impropriety" in Regulation 8(3)(g) includes matters which occur after the filing of representations under Regulation 8(9), with the result that it may constitute a ground upon which adjudicators can allow an appeal under Regulation 11(6).***

The further Agreed Issue, as raised by Mr Curzon (in his Interested Party's Grounds of Resistance) is this:

> ***[W]hether the Adjudicators' findings show that the decision to allow the appeal could have been made on the basis of Regulation 8(3)(e) ("no road user charge or penalty charge is payable under the charging scheme").***

My answer to the first of these Agreed Issues is "yes"; and to the second is "in a case where Regulation 8(10) has been found to apply, yes".

Jurisdiction and Temporality

38. As the Encapsulation Summary records, the Joint Determination found a "procedural impropriety", based on: (i) delegation of the Regulation 8(9) function to Emovis; (ii) fettering by use of rigid Business Rules; and (iii) inclusion in NoRs of misleading costs information. All of these are matters which arose after Mr Curzon had made his Representations. The first topic with which I need to grapple is whether "procedural impropriety" can apply to the functions of dealing with Regulation 8 Representations, deciding on Regulation 9 Cancellations and issuing Regulation 10 NoRs. If not, the Adjudicators had no jurisdiction, unless – that is – the alternative of Regulation 8(3)(e) was applicable as Mr Curzon contends. Mr Buley KC's analysis centres around temporality: it is about when, in the sequence of time, the failure took place. His analysis, in essence – as I saw it – was as follows. Subject to one express exception,

the term "procedural impropriety" (Regulation 8(3)(g)) is limited to a Regulation 8(4) "failure", to "observe any requirement" imposed by the 2000 Act or by the Regulations, which "failure" has already taken place at the time of Regulation 8 Representations. It does not apply to a "failure" which takes place only after Representations have been received. "Procedural impropriety" would apply to a failure to observe the requirement to serve a PCN on the right person (Regulation 7(2)) or a failure to observe the requirement to include the prescribed information in a PCN (Regulation 7(3)). But it would not apply to a failure to observe the requirement to consider Representations and supporting evidence (Regulation 8(9)); nor to a failure, having accepted Representations, to observe the requirement to cancel a PCN (Regulation 9(1)); nor to a failure, in issuing a NoR, to observe the requirement to include prescribed information within the NoR (Regulation 10(1)). True, these are all requirements imposed by the Regulations. But their non-observance cannot be a "procedural impropriety" under Regulation 8(3)(g). That is the analysis. Mr Buley KC's essential reasons in support of it are as follows:

i) First, the "procedural impropriety" ground – like the other Regulation 8(3) grounds – are unmistakeably located within Regulation 8 ("Representations against penalty charge notice"). That is the clear structure and design of the Regulations. It follows that a "procedural impropriety" must be one which can be raised in Regulation 8 Representations. This fits with the nature of all the other grounds: Regulation 8(3)(a)-(f). All of these are points about whether the recipient of the PCN is, viewed by objective standards, responsible to pay it. And the same temporal restriction would apply to "compelling reasons". It follows that a "procedural impropriety" is not, in principle, a failure on which no Regulation 8 Representations could succeed.

ii) Secondly, this fits with the nature, function and purpose of the right of appeal (Regulation 11). What the Regulations secure is that an independent judicial entity will consider, on its merits, any point which could have persuaded the charging authority at the Regulation 8 Representations stage. The adjudicator 'steps into the shoes' of the Regulation 8(9) decision-maker, so as to be able to correct anything which at the Regulation 8 stage has not resulted in cancellation (Regulation 9) but which, instead, has led to a NoR (Regulation 10). An appeal is not needed for failure to comply with Regulation 8(9), because there is a bespoke deeming mechanism (Regulation 8(10)), on which the person who had made the Representations will be able to rely in the county court (Regulation 18) should there be any Charge Certificate (Regulation 17). When the Regulation 11 appeal deploys (Regulation 11(6)) the grounds "specified in regulation 8(3)" – including Regulation 8(3)(g) – that must mean those grounds as they were capable of applying in Regulation 8.

iii) Thirdly, were it otherwise, very odd consequences would follow. In particular, an appeal could succeed in a case where the Regulation 8 Representations, whatever they said and whatever they relied on, had no merit at all, but something has arisen later. Indeed, Regulation 8(3) grounds could be advanced entirely prospectively, to seek (or reserve the opportunity) to take advantage of something which has not yet happened, so as then to rely on it on appeal, by which time it has happened. That is exemplified by any case making Regulation 8(9) Representations relying on limb (ii) from Halton No.1: those

Representations were complaining prospectively about something which was going to happen to them. On the other hand, if "procedural impropriety" is temporally limited, there is no lacuna whereby requirements imposed by the Regulations go unobserved and defaults unchecked. In the first place, the appeal allows all substantive issues relating to responsibility to pay the PCN (grounds 8(3)(a) to (f)) to be determined by the appellate adjudicator on their merits. This is 'curative' of any, including any later, procedural impropriety. In the second place, judicial review is always available, just as it is for any breach of natural justice or any broader public law failing, to the extent that it may be needed.

iv) Fourthly, the outcome of an appeal (Regulation 11(6)-(8)) contains no provision entitling the charging authority to issue a new PCN, by contrast with the position where there is Cancellation at the earlier Representations stage (Regulation 9(2)). That makes sense. The charging authority has the chance to identify a procedural impropriety which has arisen by the time of the Regulation 8 Representations. If it takes that chance and Cancels the PCN (Regulation 9(1)), it can reissue (Regulation 9(2)). If it does not take that chance, the appeal can succeed, with no reissue of the PCN. It would be odd if a later procedural impropriety were fatal and final, and the charging authority has had no chance to address it.

v) Fifthly, it is true that Regulation 8(4)(b) (§35i above) stands as an exception to this. It is an exception because Regulation 8(4)(b) would include, as a "procedural impropriety" – invocable on an appeal – the situation where a Charge Certificate (Regulation 17) has been served before a period of 28 days after an NoR (Regulation 17(3)(b)). That does not fit with the general temporal principle. But there is a good answer. Regulation 8(4)(b) is a single, specific extension to the general principle as to the time at which a "procedural impropriety" must have arisen. It is an extension beyond Regulation 8(4)(a). But if Regulation 8(4)(a) already applied to later "procedural improprieties", Regulation 8(4)(b) would not have been needed. Regulation 8(4)(a) would already cover the position of the premature Charge Certificate (Regulation 17(3)(b)). This proves that Regulation 8(4)(b) is a specific extension to a general temporal rule.

vi) Finally, this fits with the phrase "in relation to the imposition or recovery of a penalty charge" in the Regulation 8(4) definition of "procedural impropriety". A step could relate to "imposition" or "recovery" and yet precede the Regulation 8 Representations. Even if that is wrong, and in any event, Regulation 8(9) is neither "imposition" nor "recovery", it is something else. So, there is in any event a temporal stage – Regulation 8(9) – to which "procedural impropriety" cannot apply.

39. I cannot accept these submissions. In my judgment, this jurisdictional objection – raised for the first time by the Council in the Letter Before Claim – is legally incorrect. In my judgment, Adjudicator Kennedy and Chief Adjudicator Sheppard were correct in law to treat "procedural impropriety" as capable of applying to failures arising after Regulation 8 Representations are received. So was Adjudicator Nicholls in a Determination called Fosbeary v Gloucestershire County Council (8.7.14). No assistance is derived from Camden where, tantalisingly (at §37), Burnett J touched on – but did not need to address – the question of a procedural impropriety arising out of

failing to include specified content in an NoR. My reasons, accepting the submissions of Mr Rogers KC, are as follows:

i) First, the language should be given its ordinary and natural meaning. Regulation 8(3)(g) says "a procedural impropriety on the part of the charging authority" and Regulation 8(4) says this means "a failure" to observe "any requirement" imposed by the 2000 Act or Regulations, whether "in relation to imposition" (ie. the PCN stage) or "in relation to … recovery" (later stages). And there is no support for a 'gap' between "imposition" and "recovery", where important requirements of the Regulations fail to engage the definition of "procedural impropriety". No sensible purpose could explain such a lacuna, which would be defeating of the purpose of securing disciplined compliance.

ii) Secondly, the structure of the Regulations is that a failure must have arisen at the Regulation 8 stage in order to be invoked at that stage, under Regulation 8(1)(a) and in the Representations, as a ground for Cancellation. But such is the structure of the Regulations that the same "ground" – with the same language – is then adopted at the later appeal stage (Regulation 11(6)). So, the same "grounds" are applied. But they are dynamic. The question is whether the "ground specified" in Regulation 8(3) "applies". That means at the time of the appeal. There is no magic in the grounds having been located in Regulation 8, or first encountered when deployed at the Regulation 8 stage. The "grounds" are invoked at a later stage, when they operate – at that stage – by reference to their express terms. They are not expressed to be temporally restricted. The appeal is afresh and can also consider the position as it now is. In the same way, whether there "are" compelling reasons for cancellation in the particular circumstances (Regulation 8(1)(b)) can be looked at dynamically on an appeal and a recommendation made (Regulation 11(9)). There is no basis to treat "compelling reasons" as excluding the opportunity to rely on a dramatic new change in circumstances.

iii) Thirdly, this fits with the clear purpose of "procedural impropriety": that the requirements imposed by the 2000 Act and by the Regulations are important and are to be complied with (§§35iv, 36 above), and that failure to observe the requirements "is fatal to the recovery of a penalty charge" (Camden §32) (§35iv above). The very fact that "procedural impropriety" is a ground of appeal, and for the mandatory allowing of an appeal, shows that adjudication on the substantive merits (the grounds concerned with responsibility to pay) is not intended to be 'curative' of procedural impropriety. A charging authority who does not observe the requirements of the 2000 Act and the Regulations is not permitted to recover the penalty charge. It is no answer that the RUC was payable and unpaid and the person concerned is substantively responsible for it and the default in paying it. It would be very odd if the duty to observe a requirement, including the taking of a step – including the service of a notice – otherwise than in accordance with prescribed conditions or otherwise than when authorised or required (Regulation 8(4)) should all apply with full force to the stage of one notice namely the PCN (Regulation 7) but not at all to the stage of another being the NoR (Regulation 10). Yet that is the logic of the temporal restriction.

iv) Fourthly, the definition in Regulation 8(4) is squarely against the Council's argument. Regulation 8(4)(a) includes "any" step and "any" notice. Regulation 8(4)(b) is a Regulation 17(1) Charge Certificate issued prematurely, which includes before 28 days after an NoR (Regulation 17(3)). All of that makes sense, where the general rationale and purpose is dynamic and inclusive. But it makes no sense as a single, subsequent outlier. Regulation 8(4)(a) and (b) are limbs of an inclusive definition. And it is wrong to say that Regulation 8(4)(b) would be redundant if Regulation 8(4)(a) is already temporally dynamic. Regulation 8(4)(a)(ii) is dealing with not doing something at the time when it was allowed or required (authorised or required). Regulation 8(4)(b) is dealing with doing something too soon: at a time when it is prohibited (before it is authorised). It follows that a charging authority's failure to observe the "duty" imposed by Regulation 8(9), and its failure to observe the requirement imposed by Regulation 10(1), in principle falls within the meaning of "procedural impropriety" on which a Regulation 11 appeal can succeed pursuant to Regulation 11(6).

The Ground (e) Jurisdictional Alternative

40. Mr Curzon submits that a charging authority's failure to observe the "duty" imposed on it by Regulation 8(9) would in any event constitute a ground of appeal pursuant to Regulation 8(3)(e), which can be invoked on appeal. This logic was accepted by Adjudicator Kennedy in Curzon No.1 (§27 above). It was not, however, adopted (or even addressed) by the Adjudicators in the Joint Determination. Mr Rogers KC does not adopt it. Mr Buley KC resists it, arguing that Regulation 8(10) is its own self-enforcing mechanism. But in my judgment, Mr Curzon is correct. I reach that conclusion for the following reasons.

i) Regulation 8(9) imposes a twofold duty: (a) a duty to consider Representations and supporting evidence; and (b) a duty within 56 days to serve the notice of the decision. The 56 days mentioned in Regulation 8(9) is 56 days from the date of the Representations: Regulation 8(9)(b). The failure to comply with Regulation 8(9) has the prescribed consequence under the Regulations, namely that the Representations are deemed to have been accepted: Regulation 8(10)(a). That prescribed consequence applies to any failure "to comply with paragraph (9)" within the 56 days. It does not say a failure to comply with paragraph (9)(b) (the duty to serve a notice).

ii) Test it this way. Suppose the charging authority within the 56 days serves an NoR rejecting the Representations, but recording expressly that the Representations, though "duly made", "have not been considered". That would breach Regulation 8(9)(a). It would be a failure to comply, triggering the deemed-acceptance consequence (Regulation 8(10)(a)). The deemed-acceptance would give rise to a duty of Cancellation (Regulation 9(1)). The consequence of all of that, for the "penalty charge", must be that the penalty charge "is" not "payable". That satisfies Regulation 8(3)(e), on its ordinary and natural meaning. If this is true where the NoR makes clear on its face that there was no consideration of the Representations, then the same logic would – in my judgment – apply if it can clearly be shown that there was no consideration of the duly-made Representations, or for that matter of the supporting evidence.

iii) This logic therefore provides an analysis which is an alternative to the "procedural impropriety" analysis, in a case where there has been no Regulation 8(9) "consideration". That is said to be the case for the delegation and fettering issues. I agree with Mr Curzon: the same default in not discharging the Regulation 8(9) duty can in principle succeed both on Regulation 8(3)(e) and 8(3)(g). As he put it: it can be both. It could make a difference. Had I accepted that "procedural impropriety" is temporally restricted, I would then have concluded that Mr Curzon's Regulation 8(3)(e) analysis is legally sound, in any case where Regulation 8(10) is applicable. However, if I am right that "procedural impropriety" involves no temporal restriction, the alternative of Regulation 8(3)(e) is not needed. It is duplicative. The Regulation 8(3)(e) alternative in this case turns on the effect of Regulation 8(10), which is triggered by a "failure to comply" with Regulation 8(9). But that failure to comply is a "procedural impropriety", as a "failure to observe a requirement". The overlap is complete, so far as Regulation 8(9) is concerned. And Mr Curzon's ground (e) alternative cannot assist so far as the Costs Information Issue is concerned (§§91-95 below). That raises an issue of "procedural impropriety" which, if accepted, leads to a decision cancelling the penalty charge. But there is no applicable equivalent to Regulation 8(10). I can see no route by which there is an independent basis, in relation to that issue, for saying that the penalty charge is not "payable" for the purposes of Regulation 8(3)(e).

A FUNCTIONAL ANALYSIS

41. In the context- and case-specific world inhabited by public law principles, analysis is almost invariably required of the relevant public authority functions. Before turning to the delegation and fettering issues, I will articulate the basic nature of some key functions relating to the RUC Scheme.

A Scheme-Design Function

42. The distinct Scheme-Design Function of making the Scheme Orders – which arose pursuant to Article 42A(1)-(3) of the 2011 Bridge Order as amended by the 2016 Bridge Order (§26 above) – has been exercised by the Council, making provision including: (i) designating the relevant scheme roads; (ii) identifying the applicable "charges"; (iii) identifying the "classification of vehicles" to which the charges would apply; and (iv) identifying when and what "penalty charges" would be applicable.

A Judicial Safety-Net

43. Under the RUC Scheme read with the Regulations, the distinct function of "adjudication" of "appeals" (2000 Act s.195(1)(c)) is the preserve of duly appointed persons (s.195(1)(d)). These are clearly "judicial" functions. They are discharged by independent judicial authorities. The adjudicator can address any Regulation 8(3) ground (Regulation 11(6)) including any such point as was raised in Representations (Regulation 8(1)(a)) and rejected (Regulation 10). The adjudicator can also address any "compelling reasons" point and can recommend Cancellation (Regulation 11(9)). Such a Recommendation triggers a duty of consideration afresh by the charging authority (Regulation 11(10)) requiring reasons for rejection (Regulation 11(11)). On an appeal, further representations can be put forward (Regulation 11(5), Schedule §2(2)(e), §4) and further evidence adduced (see eg. Schedule §10(3)). Costs are

awardable in limited circumstances (Schedule §13: §93 below above). In this way, no argument that can be raised under Regulation 8 Representations – if not accepted by the charging authority – is excluded from being raised again for consideration afresh on an appeal hearing. This is a comprehensive Judicial Safety-Net. Another such Safety Net is guaranteed within Part 7 (Regulations 34 and 37) in relation to vehicle immobilisation (Regulation 25), removal (Regulation 27) or disposal (Regulation 28), after Representations and NoRs (Regulations 32-33 and 35-36).

Intrusive Powers Regarding Vehicles

44. There is a distinct set of "powers in respect of motor vehicles" (Part 6 of the Regulations). These are exercisable by an "authorised person" and Regulation 21(2) provides:

> ***An authorised person may be a charging authority, an employee of a charging authority, a constable or any other person authorised in writing by a charging authority to act as an authorised person.***

The RUC Scheme can empower an authorised person: to examine a vehicle to check that documents or equipment required by the RUC Scheme is displayed or fitted (Regulation 22); to enter a vehicle on reasonable suspicion of a false document or interfered-with equipment (Regulation 23); to seize and detain evidence of RUC charge evasion (Regulation 24); to immobilise vehicles for multiple unpaid PCNs (Regulation 25); to remove a vehicle (Regulation 27); and to dispose of a vehicle (Regulation 28). All of these are 'discretionary' powers circumscribed by the Regulations and by other relevant legal constraints.

Duties

45. A number of functions of the charging authority under the Regulations are duties. A duty is distinct from a power (or 'discretion'), but may be triggered by, or involve, a necessary exercise of evaluative judgment. In the Regulations, duties are connoted with the words "must" or "duty". So, where a PCN or NoR is served, there is a duty to include prescribed information (Regulations 7(3), 10(1)), but within that duty an evaluative judgment as to the "general terms" in which the "form and manner" of appeal are stated (Regulations 7(3)(k), 10(1)(c)). There is a "duty" to consider Representations (Regulation 8(9)), with a trigger question involving an evaluative judgment as to whether they have been "duly" made (Regulation 8(9)). There is a duty to refund a penalty charge (Regulation 8(10)(b)) with an evaluative trigger question whether there has been a relevant failure to comply (Regulation 8(10)). There is a duty of Cancellation, with an evaluative trigger question about whether a statutory ground or compelling reasons are satisfied (Regulation 9(1)).

Decision-Making, Discretion and Evaluation

46. There are many 'decision-making' functions of the "charging authority". These include decision-making associated with what the Regulations have called the "imposition or recovery" of penalty charges (Regulation 8(4)) and what Parliament has called "notification … and enforcement" (2000 Act s.173(4)). So, there are decisions about whether to allow payment of the RUC in a particular way (eg. by using an account); decisions as to whether an exemption applies; decisions about eligibility for the Discount Scheme (LUDS); decisions in the PCN Review (§3 above). There are

also a number of 'discretionary' powers. Many are expressly characterised by the word "may" in the Regulations: a decision whether or not to serve a PCN (Regulation 7(1)); a decision as to whether to serve a document or notice by post or email (Regulation 3(1)(a) and (6)); a decision whether and what "other information" to include in an NoR (Regulations 10(2), 33(5) and 36(5)); a decision whether or not to serve a Charge Certificate (Regulation 17(1)); a decision whether or not to cancel a Charge Certificate (Regulation 17(2)); a decision to enforce a county court order (Regulation 18); and a decision whether to reissue a PCN following Cancellation (Regulation 9(2)). There are a number of evaluative factual and evidential judgments to be made. Questions for the decision-maker at the PCN Review are (see Regulation 7(1)): (i) is an RUC payable in respect of this vehicle?; (ii) is the RUC unpaid?; (iii) is a PCN appropriate? Other questions include: who is the correct person to serve (Regulation 7(2)); on what grounds is the penalty charge payable (Regulation 7(3)(e)); and what is the correct amount (Regulation 7(3)(f)). Whether it is appropriate to serve a PCN engages a discretionary power ("may") and the General Discretionary Power of Non-Enforcement (§47 below). Factual issues may include the question whether the vehicle in question can reliably be identified from the image on the Vehicle Passage Record. As illustrated by COM011 (§11 above), questions could include: (i) do I think this vehicle has the appearance of a military vehicle?; and (ii) is it clear to me from the Vehicle Passage Record (VPR) that the vehicle is a military vehicle?

The General Discretionary Power of Non-Enforcement

47. There is an important general discretionary power, which permeates the entirety of the statutory scheme. It involves the question: is it appropriate in all the circumstances – independently of the "grounds" and "compelling reasons" criteria in the Regulations – to impose and enforce this penalty charge? This featured in the judgment of the Court of Appeal in R (Walmsley) v Lane [2005] EWCA Civ 1540 [2006] RTR 177 where Sedley LJ (at §54) described the "general power not to enforce a penalty charge" and Chadwick LJ explained (at §44):

> ***the charging authority … has power—without recourse to any provision in the Enforcement and Adjudication Regulations—to choose (in an appropriate case) that it will not pursue or enforce payment of the penalty charge. There is nothing in the Regulations which prevents the recipient of a penalty charge notice from making whatever representations [they] wish[] in order to persuade TfL to exercise that power.***

Evaluation and Discretion and "Dispute-Determination" (Regulation 8(9))

48. At the stage of what Parliament calls "the determination of disputes" (2000 Act s.195(1)(b)) there is the Regulation 8(9) duty. There are some 'discretionary' powers. And there are many evaluative, factual and evidential judgments to be made. One 'discretion' which is expressly characterised by the word "may" in the Regulations, is the decision whether or not to disregard late Representations (Regulation 8(2); also Regulations 33(1) and 36(1)). Taking the illustration presented by LREP003 (§13 above), questions can be: Were the Representations outside the 28 days?; What reason has been given for lateness?; Is the person stating that they went on holiday immediately after the Bridge Crossing?; Have they provided "appropriate" evidence proving their holiday dates covering the Representation period? The word "appropriate" is an evaluative judgment. Non-exhaustive examples ("eg airline tickets, hotel details") are given (but obviously will not cover the case of someone who says they went camping in this country). Another 'discretion' is the General

Discretionary Power of Non-Enforcement (§47 above), which exists at all stages. Then there is an important prescribed basis for Cancellation involving asking whether there are "compelling reasons … in the particular circumstances of the case" (Regulation 8(1)(b)) which the decision-maker is duty-bound to consider at the Representations stage (see Regulations 8(9)(b)(ii), 9(1), 10(1)) or freshly consider on an Adjudicator's appeal recommendation (Regulation 11(10)). The function of identifying "compelling reasons … in the particular circumstances of the case" is an individualised evaluative judgment. The decision-maker at the Representations stage needs to apply the Regulation 8(3) "grounds" (Regulations 8(9), 9(1) and 10(1)). These are not powers or 'discretionary'. They are mandatory grounds leading to Cancellation (Regulation 9(1)). They involve an evaluative exercise of fact-finding, sometimes with a legal overlay. Some grounds attract statutorily-required statements giving prescribed information (Regulation 8(3)(c) with Regulation 6(5) and 8(8); Regulations 9(5)-(7)), subject in some cases to the caveat "if that information is known" (Regulations 9(5), (6) and (7)(b)). For example, Regulation 8(3)(c) includes question whether there is a "vehicle-hire firm" (as defined in regulations), and whether PCN liability has been transferred to a hirer; and Regulation 6(5)(b)(iii) can pose the question whether there is a statement "to the effect" that the hirer "acknowledges responsibility". To take another example, Regulations 8(3)(b) and (7) will require the decision-maker to ask: was the vehicle being used by another person without the consent of the PCN recipient?; has a crime reference, police unique reference, insurance claim reference of "other evidence" of theft or taking without consent been provided?; and has the name and address (if known) of the other person been provided? The phrase "other evidence" reflects an evaluative judgment as to evidential appropriateness.

THE DELEGATION ISSUE

Introduction

49. The Agreed Issue on this part of the case is:

> ***In all the circumstances, were the Adjudicators entitled to decide that it was a 'procedural impropriety' within the meaning of the Regulations for the Council to delegate the consideration of Representations under Regulation 8(9) to a third-party contractor?***

My answer to this Agreed Issue is "no".

50. As the Encapsulation Summary (§2 above) records, and as Chief Adjudicator Sheppard's 3-page "Introduction" to the Joint Determination recorded (at §4), the Adjudicators concluded that the Council has delegated its functions as the charging authority to contractors (Emovis); and (at §8) the delegation to Emovis of the duty to consider representations to Emovis was a procedural impropriety. Chief Adjudicator Sheppard agreed (at §18.5) with the finding (§18.4) that "the contractors, Emovis using the name Merseyflow, are dealing with representations, not the Council".

51. Mr Buley KC says that there is no unlawful delegation, still less one constituting a "procedural impropriety". He emphasises that the Council exercised the Scheme-Design functions of making the RUC Scheme, that Council officers approve the Business Rules and that a Council officer is the ultimate decision-maker in cases referred to the Escalation Panel. He does not contend for an implied power but rather

submits that an express power of delegation – extending to the Regulation 8(9) duty – is identifiable. It can be found in Article 43 of the 2011 Bridge Order, read with Article 42A and Article 2. Alternatively, it can be found in section 192 of the 2000 Act. Mr Rogers KC responds: unlike the PCN Review, this is a duty constituting a "judicial" function with penalising consequences; that s.192 is a "general" provision which does not extend to include it; that Article 43 does not "carry over" to an RUC Scheme made under Article 42A(1); that the RUC Orders do not make provision for a concession agreement; and that the Court should not "strain" to find a power to delegate this function.

What is unlawful delegation?

52. The cases on delegation which were cited to me were: Provident Mutual Life Assurance Association v Derby City Council [1981] 1 WLR 173 (a case about whether a rating authority's function had unlawfully been delegated to its principal rating assistant); R v Birmingham City Council, ex p O [1983] AC 578 (a case concerning delegation by a local authority to its social services committee); DPP v Haw [2007] EWHC 1931 (Admin) [2008] 1 WLR 379 (a case about whether the Metropolitan Police Commissioner's function to authorise demonstrations had unlawfully been delegated to police superintendents); and Noon v Matthews [2014] EWHC 4330 (Admin) (a case about whether a River Conservators' function had unlawfully been delegated to their River Manager). As it happens, all of these cases are about delegation within a public authority, from one 'internal' entity to another. Mr Buley KC pointed in particular to observations in these cases about whether a function is "final or conclusive" (Provident at 181, Noon at §26) or there is a right of "appeal" (Provident at 181); and about whether it is "policy" or "operational" (Noon at §§39-40, 43 and 45). Mr Rogers KC pointed in particular to observations about a function being "judicial" (§58 below).

53. The essence of unlawful delegation, at least for the purposes of the present case, is this. The exercise of a public function is vitiated in public law if that function was instrumentally-entrusted to one entity, but has in fact been discharged by a distinct entity, in circumstances where the first had no express or implied power to pass-on the function to the second. The instrument entrusting the function will often be primary or secondary legislation. The function may be a power ('discretion') or a duty. Key questions will be: (i) what is the function?; (ii) to which entity was it instrumentally-entrusted?; (iii) has it been discharged by a distinct entity?; (iv) if so, was there an express or implied power to pass it on from the one to the other?

What is the function and to whom is it instrumentally-entrusted?

54. In my judgment, the relevant public function is the duty (Regulation 8(9)(a)) to "consider" the Representations and supporting evidence and make the (Regulation 8(9)(b)) decision as to whether or not to accept that a ground is established or compelling reasons exist. The entity to which the function is instrumentally-entrusted is the Council. The instrument is the Regulations. It was common ground that an employee of the Council could discharge the function; and that, if there is power to delegate the function to Emovis, so can the Operative (an Emovis employee).

Is unlawful delegation a "procedural impropriety"?

55. If there has been unlawful delegation, the consequence in public law is that the purported exercise of the function by an Operative constitutes a breach by the Council of its Regulation 8(9) duty. The Adjudicators concluded that this would constitute a "procedural impropriety" as statutorily-defined. I think that was a hard-edged question of statutory interpretation. I also think that the Adjudicators were correct. There is no temporal jurisdictional restriction, for the reasons I have given (§39 above). The "duty of a charging authority" in Regulation 8(9) is a "requirement imposed on it by … these Regulations"; the "failure by the charging authority to observe" that requirement falls squarely within the definition of "procedural impropriety" (Regulation 8(4)). The requirement has not been discharged by the charging authority if it has purportedly been discharged by another to whom it had no express or implied power to pass-on the function. I also agree (§40 above) with Mr Curzon's alternative Regulation 8(3)(e) analysis: the effect of Regulation 8(10) means that non-compliance by the charging authority with its duty in Regulation 8(9) means the Representations are deemed to have been accepted and a Cancellation notice deemed to have been served, so that no penalty charge "is payable under the Scheme".

Delegation and decisions referred to the Escalation Panel

56. I have identified this as a key question: which entity in fact discharged the function? In relation to 14 of the 17 of the Regulation 8(9)(b) decisions, with which the 11 Cases appealed to the Adjudicators were concerned, the function was discharged by the Operative. However, as I have explained (§9vi above), three decisions – those culminating in one of the Case 10 NoRs (24.6.21) and both Case 11 NoRs (23.7.21) – followed referral by the Operative to the Escalation Panel. There had been consideration by the Operative in each case, and then by the Panel (16.6.21 and 21.7.21). On the evidence, the Operative would have written a submission form. In a live case example given in Annexure 3 to the Response (5.9.19) in Case 1, this form is shown as including a "summary of case" which gists the Representations, and also as attaching the Representations. On the evidence, the decisions in cases referred to the Escalation Panel were taken by Mr Yates as the Council Representative. If Mr Yates considered the Representations and the supporting evidence – albeit summarised for him – and then made the decision to issue the NoR, then I do not see that the Issue of unlawful delegation arises in relation to those three decisions. As Mr Rogers KC put it in his own written submissions:

> ***Although a contractor may investigate the issues raised and recommend a response, an individual from the [Council] itself (ie. an employee) must perform the … function of determining Regulation 8 Representations.***

This description would apply, on the face of it, to the three decisions which followed referral by the Operative to the Escalation Panel. This was not discussed by Chief Adjudicator Sheppard when she analysed Cases 10 and 11. At one point she herself said (§18.8.3: §83 below) that the "difficulty" is where a response was not "referred to anyone in the Council before sending it", but that "difficulty" would not apply to these three decisions. There would also have been what the Encapsulation Summary called "consider[ation] by, or under the direction of, the charging authority". It seems that the Council in its response to those appeals did not explain or disclose the relevant documents to the Adjudicators. If that is right, the Adjudicators did not miss a point. Rather, given the opportunity to explain and provide evidence, the point was not made. If so, I cannot see how the Council could succeed – by now relying on 'fresh evidence'

in judicial review – in impugning the Joint Determination. If this point mattered to any contested question as to remedy, I would be looking to the parties' submissions on consequential matters to assist me further.

Delegation and the PCN Review

57. One feature of the present case is that there is no dispute before me that the Regulation 7 PCN Review function – the discretionary power to serve a PCN and related decision-making – has been lawfully delegated to Emovis. The PCN Review is conducted by the Operative, who makes the decision whether to issue the PCN. Taking the Military Vehicles illustration (Business Rule COM011) (§11 above), it is the Operative who applies the Business Rules in the PCN Review and decides whether to issue the PCN. Mr Curzon had previously expressed his position that "PCNs should be issued by the charging authority". If Operatives issuing PCNs were an unlawful delegation that would have been just as clear a "procedural impropriety" – a clear failure to observe a requirement of Regulation 7 – and with no temporal jurisdictional issue. But that was not the Adjudicators' view. They did not conclude that the PCN Review undertaken by the Operative constituted a "procedural impropriety". They accepted that the Regulation 7 function had lawfully been delegated by the Council to Emovis. They saw Regulation 8(9) as different and as warranting a different conclusion.

The Idea of a Judicial Function

58. Mr Rogers KC has strongly emphasised – as a central theme – that the Regulation 8(9) duty constitutes a "judicial", rather than an "administrative", function. He invokes this passage from Cross on Principles of Local Government Law (3rd edition) at §10-09:

> ***A public authority may not delegate its decision-making functions without express or implied statutory authority. A power to delegate is not readily implied, particularly where the decision is judicial… Where judicial functions are concerned any other body involved in the decision-making process may normally only be used for gathering information – and this information must be fully summarised for the benefit of the authority which is to make the final decision.***

He cites Beatson LJ in Noon at §26:

> ***There is also a tendency to adopt a more restrictive approach to implied authority to delegate in the cases of the proceedings of courts and cases involving other "judicial" and "disciplinary" powers.***

He points to Fosbeary (§39 above) where Adjudicator Nicholls found it to be unlawful for "these quasi-judicial functions to be contracted out". He points to what he describes as "the case law on the delegation of judicial or quasi-judicial functions". He describes the Regulation 8(9) function as "the judicial function of determining Regulation 8 Representations". He submits that "the courts are slow to interpret a grant of legislative power as empowering delegation, still less a judicial function"; that "judicial functions … require a strong implication that delegation is permitted"; adding that approval of the Business Rules is "a quasi-judicial function". Mr Curzon, for his part, has also characterised Regulation 8(9) functions and decisions as "judicial". The Adjudicators agreed. Adjudicator Kennedy said: "it is not arguable that the proper consideration of a motorist's representations is anything other than a quasi-judicial decision" (Joint Determination §4.2.6). Chief Adjudicator Sheppard referred to "the consideration of representations" as "a quasi-judicial duty placed on the

charging authority" (Joint Determination §17.6). They followed Curzon No.1 where Adjudicator Kennedy had said: "A Council may, broadly, delegate administrative functions, but it may not delegate its judicial functions. The consideration of representations is a discretionary decision, which is a judicial function."

Common ground

59. Several things are not in dispute before me: (1) that the Regulation 8(9) duty could be discharged by any employee of the Council; (2) that the PCN Review function has lawfully been delegated to the Operative; (3) that, if the Regulation 8(9) duty can be delegated to an external third party at all, it can be delegated to Emovis and discharged by the Operative; and (4) that there is no "implied" power of delegation. Mr Buley KC did not maintain his previous reliance on the Local Government (Contracts) Act 1997, on which the Council had relied in the appeals, and which the Adjudicators rejected (Joint Determination §4.1).

Article 43 as the express power

60. In my judgment, Mr Buley KC is correct in law that Article 43 is an express power of delegation which extends to the Council's "charging authority" functions under the Regulations including not only the Regulation 7 PNR Review power but also the Regulation 8(9) duty. In my judgment, this is another hard-edged question of law, and the Adjudicators were wrong in law to reject the contention. My analysis is as follows:

i) First, as has been seen (see §26 above), the Scheme-Design function (§42 above) in making the RUC Scheme were empowered by Article 42A(1)-(3) of the 2011 Bridge Order, read with the 2000 Act and the Regulations. The Council is "the undertaker" for the purposes of the 2011 Bridge Order. In addition to the existing Article 42 power, to "charge tolls or charges" for the passage of vehicles over "the new crossing" (the New Bridge) with its "bridge roads" (as defined in Regulation 2), Article 42A(1) empowered the making by the Council of (i) an RUC Scheme in respect of the New Bridge's "bridge roads" (ii) an RUC Scheme in respect of the Old Bridge's bridge roads ("Silver Jubilee Bridge roads") or (iii) an RUC which is "a single charging scheme for both". A single charging scheme would necessarily forge an intimate interrelationship between the New Bridge and the Old Bridge, and between the New Bridge's "bridge roads" and the Old Bridge's "bridge roads"; the same powers and duties under the Regulations would apply to both.

ii) Secondly, Article 2(1) of the 2011 Order provides:

> ***"authorised activities" means the construction, carrying out and maintenance of the authorised works, the operation, use and maintenance of the new crossing and the exercise of any power, authority or discretion for the time being vested in or exercisable by the undertaker under this Order or otherwise; …***

Under a single charging scheme, as empowered by Article 42A(1), the imposition and enforcement of the penalty charge would fall within a "power, authority or discretion" which was "vested in or exercisable by" the Council as "the undertaker" by virtue of the RUC Scheme made under the 2011 Order and by virtue of the Regulations. They are not "vested in or exercisable … under this Order". But they are "vested in or exercisable … otherwise". It follows that

the functions of issuing a PCN (Regulation 7), of deciding to cancel a PCN (Regulation 9) or of refusing to cancel a PCN (Regulation 10) all constitute "authorised activities".

iii) Thirdly, Article 2(1) of the 2011 Order provides:

> ***"concession agreement" means a legally binding arrangement which may be comprised in one or more documents that makes provision for the design, construction, financing, refinancing, operation, maintenance or any other matter in respect of the new crossing;***

The phrases "any other matter" and "in respect of" are wide. In the context of a "single charging scheme" – with its intimate interrelationship between the New Bridge and the Old Bridge – they are sufficiently broad to encompass the imposition and enforcement of the single penalty charge. The DMPA (§4 above) fits within the definition of a "concession agreement" within the definition in Article 2(1): it is a legally binding arrangement, in a document, which makes provision for the imposition and enforcement of the single penalty charge.

iv) Fourthly, Article 43(1) provides:

> ***43.—(1) The undertaker may, on such terms as it sees fit, at any time and for any period, enter into one or more concession agreements and for that purpose may provide for the exercise of the powers of the undertaker in respect of the authorised activities or any part of them, together with the rights and obligations of the undertaker in relation to them, by any other person and other matters incidental or subsidiary to them or consequential to them, and the defraying of, or the making of contributions towards the costs of the matters whether by the undertaker or any other person…***

This is a broad power to enter into a "concession agreement" (as defined in Article 2), in which provision can be made for the undertaker's powers "in respect of", and its obligations "in relation to", the "authorised activities" to be exercised by "any other person". The Regulation 8(9) duty is an "obligation", which is "in relation to" the imposition and enforcement of the penalty charge under the single charging scheme. This provides a basis for the Regulation 7(1) discretionary power to issue PCNs to have been lawfully delegated to the Emovis Operative, as is common ground. But, by the same logic, it involves an express power which straightforwardly also extends to encompass the Regulation 8(9) obligation. None of this is undermined by the existence of an express power to appoint a collection agent in Article 42A(4)(c), as under Articles 41(5) and 42(2)(a).

v) Fifthly, all of this is subject to this express restriction found in Article 42A(6):

> ***(6) The powers conferred by this article may not be transferred under article 43(1) (power to enter into concession agreements and lease or transfer the undertaking, etc.) to any person who is not a traffic authority under section 121A (traffic authorities) of the Road Traffic Regulation Act 1984.***

The fact that Article 42A(6) has been included is itself an indication that a concession agreement could, in principle, apply in the context of an Article 42A(1) charging scheme. Subject to this express restriction, Article 43(1) does "carry over" to an RUC Scheme made under Article 42A(1). Article 42A(6) is

a qualified restriction: it expressly allows delegation of "the powers conferred by this article" to "a traffic authority under section 121A" of the 1984 Act. The crucial question becomes the true meaning and effect of Article 42A(6). The answer to that crucial question, in my judgment, is this. The Article 42A(6) restriction – and specifically in the case of a new "charging scheme" made under Article 42A(1) – bites only on the Scheme-Design powers in Article 42A. I turn to explain why.

The Article 42A(6) restriction

61. The Adjudicators thought this was the crucial question too. I agree with them. They reached an adverse conclusion on the Article 43(1) argument because of their interpretation of the Article 42A(6) restriction. This is conspicuous throughout the analysis. Chief Adjudicator Sheppard said (Introduction §5; Joint Determination §15.6.7):

> ***When the 2011 Order was amended in 2016, it provided that the functions of the Council as the charging authority (as opposed to 'undertaker') could not be transferred to an entity other than another highways authority.***
>
> ***[T]he amended 2011 Order expressly precludes the Council from transferring the powers, and, accordingly, the duties, of the charging authority. The Council is wrong to suggest that [Article] 42(6) is restricted to the making of the order. The powers and duties embodied in the Regulations attach to the public body that made the charging order, therefore if the order-making power cannot be transferred, nor can the powers and duties that stem from it be transferred. [§15.6.7]***

Adjudicator Kennedy (at §4.2.19) reiterated her findings in Curzon No.1. There, she accepted Mr Curzon's argument, that Article 42A(6):

> ***… expressly provides that the Council may not transfer its powers and duties as the charging authority …***
>
> ***… means the Council were not entitled to delegate their powers and duties as a charging authority to Emovis.***

She had rejected the Council's argument:

> ***… that Mr Curzon has misunderstood the meaning of 42A(6) [which] relates only to the power to make a road user charging order, and that the Council did not delegate that power because the Council made the charging order(s) themselves.***

As it is put in the Adjudicators' pleaded Grounds of Defence:

> ***The 2016 Order/amended 2011 Order provided that the functions of the Council as the 'charging authority' (as opposed to 'undertaker' under the original 2011 Order) could not be transferred to an entity other than another highways authority (Art 42A(6))***

62. I cannot agree. In my judgment, in agreement with Mr Buley KC, the Adjudicators' analysis of Article 42A(6) was legally incorrect. My reasons are as follows:

i) First, it would have been easy for the drafters of Article 42A(6) to say that the "functions of the Council as the charging authority" – "the powers and duties as the charging authority" – could not be transferred by concession agreement to any entity other than another highways authority. The powers and duties as the

charging authority were very well in mind. Article 42A(1) was conferring a power to "make charging schemes", a term being defined (Article 2) as a "charging scheme" as "a charging scheme made by order under Part 3 of the 2000 Act". A new RUC Scheme made, pursuant to Article 42A(1) and by Scheme Order under Part 3 of the 2000 Act, would bring into play the powers and duties under the Regulations, themselves made under Part 3 of the 2000 Act (§§20-23 above). The "2013 Regulations" were defined in Article 2 of the 2011 Order as amended in 2016 (a new Article 46 replicated for any Article 42 toll scheme equivalent enforcement powers as conferred by the Regulations).

ii) Secondly, Article 42A(6) does not say this. It is clear, in providing that it is "the powers conferred by this article" which "may not be transferred under article 43(1)". That is the clear and express limit of the restriction. The power "conferred by" Article 42A(1) is a power to "make charging schemes"; and an extended power is conferred by Article 42A(3) to include within the design of the charging scheme certain charges and matters "in addition to anything provided for under the 2000 Act". The powers and duties of the charging authority, under the Regulations in respect of a new "charging scheme", are not "conferred by" Article 42A. The "powers conferred by this article" are to "make charging schemes" (Article 42A(1)) and to "make provision" (Article 42A(3)). These are Scheme-Design powers. This is why Article 42A is entitled: "Power to make road user charging schemes". It is the "undertaker" – Council – or, by concession agreement, "a traffic authority" (an authority responsible for roads) who must make the Scheme. The remaining provisions of Article 42A disapply a particular provision of the 2000 Act (Article 42A(2)); make ancillary provision treated as within the Scheme-Design of any charging scheme in force on 14 September 2016 (in the event there was no such scheme) (Article 42A(4)); and identify the substitutionary effect of a charging scheme (Article 42A(5)). So, the Council's argument rejected in Curzon No.1 (§61 above) was correct in law. Scheme-Design is non-transferable and reserved to the Council or another traffic authority.

iii) Thirdly, I think a further point can be made, though my analysis does not turn on it. If the Adjudicators' logic were correct, it stands to have a striking consequence. It would not be limited to expressly precluding transfer of the Regulation 8(9) duty. Rather, there would be an express prohibition on transfer by concession agreement of functions of the charging authority, except to a traffic authority. That would stand to preclude a transfer of the PCN Review function (Regulation 7) by concession agreement to Emovis (cf. §65.1 below).

A "Judicial" function?

63. I return to the central theme that this is a "judicial" function. There are two points.

i) First, I have concluded that Article 43, read with Articles 42A and 2, by their express terms permit the delegation, by concession agreement, of the charging authority's functions under the Regulations, including its powers and its obligations. That position holds, in my judgment, even if the characterisation of Regulation 8(9) is a "judicial" function. Article 42A(6) is an express restriction on a "legislative"-type function (Scheme-Design). There is no other restriction, still less tailored to a "judicial"-type function. I can see no basis for 'carving

out' an additional, implied, restriction. The passages in Cross and Noon (§58 above) do not assist, because the power to delegate is not being "implied". Given the express language of the provisions, what would be necessary would be an implied exception for a "judicial" function. This, moreover, in the context where there is an express restriction – Article 42A(6) – which on no view is limited to Regulation 8(9). So, the analysis is correct, in my judgment, even on the premise that it is right to characterise this as a "judicial" function.

ii) Secondly, and although my analysis does not turn on it, I do not agree that the Regulation 8(9) duty is a "judicial" function. Certainly it is an important, evaluative decision-making function. And so far as this function is concerned, it is the Lord Chancellor (§21 above), and not the Secretary of State, who makes the Regulations. But that is true of "notification" too (under section 173(4) of the 2000 Act). That includes the PCN Review and issuing of PCNs which, albeit evaluative and penalising, is not said by anyone to be a "judicial" function. In the primary legislation (2000 Act s.195(1)(b)): §21 above), Parliament describes the Regulation 8(9) duty as:

> ***the determination of disputes relating to charging schemes***

I accept that dispute-determination is a distinctive and important decision-making function. It is not, however, "adjudication" (section 173(4)). The function of "adjudication" is entrusted by the Regulations to independent "adjudicators", specially appointed (section 195(1)(c)(d)). Adjudication under the Regulations plainly does involve a "judicial" function, discharged by the adjudicators (Regulation 11(4)(5)), assisted by "the proper officer" (Regulation 11(3)(6)(15)) as a member of administrative staff (Regulation 13(1)). So, the Regulations, through the Judicial Safety Net (§43 above), guarantees an independent judicial adjudication. I accept of course that a judicial appeal function does not mean the appealed function is non-judicial (as an appeal from this Judgment would exemplify). But, in light of all the features of the scheme and the functional analysis, I do not think the Regulation 8(9) function is, by reference to its nature and context and setting, a "judicial" function. Yes, it is important. Yes, it is distinct. Yes, it calls for an exercise in evaluative judgment, involving certain objective criteria, engaging questions of fact and with discretionary aspects (see eg. Regulation 8(2)), and all in a penalising context. But, in fact, so does the PCN Review (§3 above). There are serious consequences for those affected by the decisions, and there could be Equality Act 2010 considerations. But that is true of other functions under the Regulations, including PCNs (Regulation 7), Charge Certificates (Regulation 17). It is also true of intrusive powers in respect of motor vehicles including entry, seizure and immobilization (Regulations 23-25) all of which can be exercise by an "authorised person" (Regulation 21(2)).

Section 192 as an Alternative Express Power?

64. The second place where Mr Buley KC locates an express power to pass-on the Regulation 8(9) function to an external third party is section 192 of the 2000 Act. It is not unfair to say that this was an afterthought. It was not relied on in Curzon No.1; nor in the responses to the appeals in these 11 cases; nor in the letter before claim; nor

the grounds for judicial review; nor even the skeleton argument. It came in a Note on 28 November 2022. But sometimes late ideas are great ideas. Section 192 provides:

> ***192. Powers of authorities. The charging authority or licensing authority, or any of the charging authorities or licensing authorities, in relation to a charging scheme or licensing scheme under this Part may— (a) incur expenditure in or in connection with the establishment or operation of the charging scheme or licensing scheme, or (b) enter into arrangements (including arrangements for forming or participating in companies) with any person in respect of the operation of the charging scheme or licensing scheme or relating to the installation or operation of any equipment used for or in connection with the operation of the charging scheme or licensing scheme.***

Under section 198:

> ***"operation" includes enforcement.***

65. If I am right about the specific and express transfer power in Article 43 of the 2011 Bridge Order, the question does not arise whether the general "arrangements" power in section 192 of the 2000 Act empowers delegation of the Regulation 8(9) duty. That question would arise if I were wrong about Article 43. There are two points:

i) First, if the Adjudicators' analysis as to the Article 42A(6) restriction were legally correct, and if my contrary analysis were legally incorrect, I see that as fatal to reliance on section 192. The starting point would be that there is an express restriction which precludes a concession agreement from conferring on a third party – other than a traffic authority – the functions arising under the Regulations in respect of a charging scheme made under Part 3 of the 2000 Act. That express restriction would have arisen in the instrument empowering the making of the charging scheme (Article 42A(1)(3)), whose terms are capable of displacing 2000 Act provisions (see Article 42A(2)), as well as extending beyond them (Article 42A(3)). As I have explained (§60iii above), the DMPA fits the definition of a concession agreement. But then it would fall foul of a direct and express prohibition. And I cannot see, from that starting-point, how the general power albeit in primary legislation (section 192) could provide a back-door route to achieve what is expressly precluded in an instrument of subordinate legislation empowering the making of this RUC Scheme for these Bridges. Section 192 would, in my judgment, need to be read as subject to the restriction in Article 42A(6).

ii) Secondly, and putting all of that to one side, I would not have accepted that in section 192(b) "in respect of the operation of the charging scheme" – including by virtue of section 198 "in respect of the enforcement of the charging scheme" – extends to the discharge of what section 195(1)(b) characterises distinctly as "the determination of disputes relating to charging schemes". That is not because dispute-determination is "judicial". It is, however, a distinctively described function, identified in close proximity, in the same Part of the same statute. I accept that (now that I am putting to one side the implications if I am wrong about the Article 42A(6) restriction), section 192 can explain why other functions, including the PCN Review, can be transferred to a third party by arrangement. My view of section 192 involves a contrast – a subtle one – with the broader express language of the 2011 Bridge Order: extending, in the context of a charging scheme, to the exercise of "powers" of the Council "in respect of",

and the "rights and obligations" of the Council "in relation to", the exercise of "any power, authority or discretion" vested in or exercisable by the Council. My interpretation of the reach of section 192 would fit with Fosbeary, where Adjudicator Nicholls concluded (at §24) that an enforcement authority could not "delegate to an outside contractor the assessment of representations and the decision whether to accept those representations"; and the Statutory Guidance for Local Authorities in England on Civil Enforcement of Parking Contraventions (22 October 2022) which says: "Enforcement authorities should not contract out the consideration of formal representations".

THE FETTERING ISSUE

Introduction

66. The Agreed Issue on this part of the case is:

> ***Whether, in all the circumstances, the Adjudicators were entitled to decide that it was a "procedural impropriety" within the meaning of the Regulations for the Council to adopt and promulgate a policy – termed the 'Business Rules' – to be applied to the determination of Representations made under Regulation 8 by caseworkers (Operatives) of the third-party contractor (Emovis).***

My answer to this Agreed Issue is "no".

What is unlawful fettering?

67. The cases cited to me in which it features were: R (West Berkshire DC) v Communities Secretary [2016] EWCA Civ 441 [2016] 1 WLR 3923 (a case about new national planning practice guidance); Humber Landlords Association v Hull City Council [2019] EWHC 332 (Admin) (a case about a local authority's private sector housing enforcement policy); R (A) v Secretary of State for the Home Department [2021] UKSC 37 [2021] 1 WLR 3931 (a case about child sex offender disclosure scheme guidance); and R (KA) v Secretary of State for the Home Department [2022] EWHC 2473 (Admin) (a case about arrangements relating to evacuations from Afghanistan).

68. The essence of unlawful fettering, at least for the purposes of the present case, is this. The rule against unlawful fettering is a public law principle. It is "a general principle of the common law" (West Berkshire at §19). It is concerned with a legally impermissible rigidity of approach to a decision-making function. It is associated with "public discretionary power" (West Berkshire §16), instrumentally-conferred, as by primary or secondary legislation. It is often called the principle against "fettering discretion" (West Berkshire §19). An unlawful fettering can arise through adherence to a secondary instrument, as where there is a 'policy' or set of 'rules'. This can mean that "both the policy and the decisions taken pursuant to it will be unlawful" (Humber §41, citing R (Adath Yisroel Burial Society) v Inner North London Senior Coroner [2018] EWHC 969 (Admin) [2019] QB 251 at §78). The fettering principle is linked to a willingness to listen, to keep an open mind, to make fair and informed decisions, and to act reasonably. It is a principle "critical to lawful public decision-making, since without it decisions would be liable to be unfair (through failing to have regard to what affected persons had to say) or unreasonable (through failing to have regard to relevant factors) or both" (West Berkshire §19). The principle is not necessarily

offended by a policy expressed "in unqualified terms" so that it does not "spell out" the key "legal fact", namely (West Berkshire §17) that: "the application of the policy must allow for the possibility of exceptions". As HHJ Klein explained in Humber at §43, the cases show that "whether a policy unlawfully fetters a decision-maker is a matter of degree".

69. The fettering principle poses a legal question which is distinct from other public law issues such as: (i) whether a public authority promulgating a policy was "required to … publish it" (A §3; Walmsley §57); (ii) whether the policy by its terms cannot "be operated in a lawful way" (A at §64); (iii) whether the policy-maker has acted to "promote an outcome which contradicts the aims of the statute" (West Berkshire §22); (iv) whether the policy "misdirects" decision-makers "as to their legal obligations" (A at §84(1); (v) whether the policy has been "applied in accordance with any other relevant legal requirements, including the common law duty of fairness and the duty under s.6 of the Human Rights Act 1998" (KA §217); (vi) whether decisions made are reasonable; and (vii) whether those decisions involve legally adequate reasons. Some of these were touched on in this case, but they are not said to constitute unlawful fettering.

70. The fettering principle is closely associated with being prepared to make an exception; and being prepared to listen to someone with something new to say. Here are examples of how the principle has been articulated. In West Berkshire (at §16) the fettering principle was stated as follows:

> ***The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception.***

In A it was explained in this way at §3:

> ***… it is unlawful for a public authority to fetter the discretion conferred on it by statute by applying a policy rigidly and without being willing to consider whether it should not be followed in the particular case.***

In KA it was put in this way at §§126 and 217:

> ***it is well-established that policies are to be applied flexibly. Exceptional circumstances have to be catered for.***
>
> ***a decision maker is entitled to adopt a policy to guide the exercise of their discretion, but must be prepared to listen to someone with 'something new to say'***

In Adath (at §78: cited in Humber at §41) it was explained that the principle does:

> ***… not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which [they] will adopt in the generality of cases… But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised.***

In Walmsley, Sedley LJ said (at §55):

> ***it is proper to adopt a policy provided it is applied flexibly in exceptional cases.***

Rigid Application

71. I have introduced the nature of the Business Rules and their "pre-determined" responses (§10 above). It is unsurprising that this emphasis on "pre-determination" of response should have been a 'red flag' to the the Adjudicators. The following description of the Business Rules and their operation was given by the Council in §§2.4-2.5, 2.7 of its Case 1 appeal Response (5.9.19):

> ***2.4 The comprehensive guidance is provided to the agent, which acts on behalf of the Council in handling the administration of the Mersey Gateway. The Business Rules have been adopted and promulgated by the Council, and are designed to be used as a decision making tree by the agent. Annexure 2 provides confirmation of the Council's confirmation of Business Rules in respect of content and application. The Business Rules reflect the decision of the Council that is to apply consistently in a range of straightforward circumstances. If the Business Rules cannot be applied to a motorist's particular case, or if a circumstance applicable to an individual case is identified, the matter is escalated to the Escalations Panel ("Panel") for a decision to be made. As described below, the exercise of judgement and discretion is different. 2.5 Decisions made under the Business Rules necessarily can only be binary in nature. For instance, if a motorist asserts that they have paid the road user charge but provides no evidence of payment or evidence which does not meet the requirement of the Business Rule because it was not in the form required by the rule, this would require the agent to reject the representation. Conversely, if evidence in accordance with the requirement of Business Rule had been provided of payment, the representation is accepted… The agent does not make qualitative decisions (which are by nature discretionary)… 2.7 Where the Council has decided as a matter of policy that it wishes to exercise qualitative discretion consistently in a particular situation, for example whether evidence of a required type is required in some cases at all, related to the cause of the failure to pay (such as certain types of event), the Business Rules tell the agent what the outcome will be and the agent follows that outcome.***

Also before the Adjudicators was the following description, subsequently introduced into the Business Rules themselves (Version 4.9 24.9.19), which was contained within the Case 4 NoR (11.10.19):

> ***Halton Borough Council is the charging authority and has established a comprehensive set of Business Rules (essentially a decision making matrix). Any decision in respect of PCN issue, representations or appeals is carried out within the framework of the Council's Business Rules. The Council considered and decided upon the comprehensive set of rules, which cover most foreseeable and/or common circumstances and the outcomes that the Council has decided should arise in those situations. The decision is entirely fact-based and does not require the exercise of any discretion. The Business Rules are clear that any decision which does not fall within them (constituting a discretionary decision) is to be referred back to the Council for a decision and this is done through an escalations panel which sits on a weekly basis (should it be required) and comprises a Senior Council Manager and the Board's Executive Management Team. When the Business Rules are applied, they represent the decision of the Council to treat certain representations and appeals in particular ways and Emovis are simply giving administrative effect to that decision, whether by confirming the validity of PCN issue or other prescribed outcome.***

Fettering, "compelling reasons" and discretion

72. Given the articulations of the fettering principle (§70 above), it is clearly relevant that the Regulations allow for "compelling reasons … in the particular circumstances" (Regulation 8(1)(b)), alongside the objective grounds. Whether there are "compelling reasons" in the "particular circumstances" is itself an evaluative judgment. A key question is whether that judgment has been unlawfully fettered.

Fettering and referral to the Escalation Panel for decision

73. Given the articulations of the fettering principle (§70 above), it is clearly also relevant that Business Rules provide for referral to the Escalation Panel, as has been explained (§30 above). This is for "Representations received where there is no HBC approved guidance to address the point at issue"; Operatives are instructed to refer if they "cannot find a pre-determined decision … or feel that a decision against a representation requires discretion"; where the "Business Rules … apply consistently in a range of straightforward circumstances" but where they "cannot be applied to a motorist's particular case, or if a circumstance applicable to an individual case is identified" there is a referral. I have explained (§56 above) that I do not see how the problem of unlawful delegation arises, in relation to the three decisions in this case which did follow referral by the Operative to the Escalation Panel. That is, if the Council officer Mr Yates considered the Representations and the supporting evidence – albeit summarised for him – and then made the decision to issue the NoR. Nor – on that premise – can I see how the problem of unlawful fettering arises. That is because the Representations have been individually considered outside the application of the Business Rules methodology. In relation to fettering, the point goes further. If each Operative approaches all Representations with the possibility and bases for referral in mind, that makes it much harder to say they blindly follow a pre-existing policy "without considering anything said to persuade [them] that the case in hand is an exception".

Decoupling fettering from delegation

74. Looking at the position of the Operative and the Business Rules, it is important to remember that the questions of delegation (who decides) and fettering (how they decide) are distinct. The principled approach to fettering is to suppose the Business Rules being applied by a Council employee. This point was rightly recognised by Adjudicator Kennedy. She said (§5.18.6):

> ***The process would be flawed even if the 'agents' were employees of the council.***

Fettering as a "procedural impropriety"

75. I accepted earlier (§55 above) that an unlawful delegation of the Regulation 8(9) function is, of itself, a "procedural impropriety". But I do not think that is true of an unlawful fettering. Fettering would not be a "procedural impropriety" in relation to the discretionary power to issue a PCN (Regulation 7(1)) or the discretion to consider late Representations (Regulation 8(2)) or those not "duly made" (Regulation 8(9)). It is the express "duty … to consider" in Regulation 8(9) which makes fettering a candidate "procedural impropriety" as statutorily-defined. But, in my judgment, in order to meet that definition there would need to be a complete failure to "consider". This, in my judgment, is another hard-edged question of interpretation. It would include the example I gave above (§40ii) where an NoR records that there was "no consideration". It is certainly the case that common law principles of public law would require that to "consider" Representations under Regulation 8(9) means doing so in a way which is fair, with a reasonable sufficiency of enquiry, with relevant considerations taken into account, with irrelevant considerations disregarded, with no improper motive, no apparent bias, acting compatibly (absent legally adequate reason for departure) with any legitimate expectation and any published policy, acting

reasonably and proportionately, promoting and not frustrating the statutory scheme, acting compatibly with external statutory duties, and so on. But failure to do these are not a "procedural impropriety" as statutorily-defined. The solution to all of this, under the Regulations, is the Judicial Safety-Net: a guaranteed judicial consideration afresh of all Regulation 8(3) grounds and any "compelling reasons" on appeal. The concept of "procedural impropriety" does not, in my judgment, extend to whether there was a "proper" or "adequate" or "sufficient" consideration; or even "legally proper", "legally adequate" or "legally sufficient" consideration. If adjudicators on appeals were to find some basic public law principle has been breached, they can certainly say so. But broad public law failings are not the same as "procedural impropriety" (§35iii above). The Regulation 8(4) "requirement imposed" by Regulation 8(9) is the "duty to consider". Public law principles are not Regulation 8(4) "requirements" or "conditions". The "procedural impropriety" enquiry is straightforward and clear-cut. It would ask: has there been consideration at all? Fettering is about consideration "with an insufficiently open mind". That is not, in my judgment, an evaluative appeal enquiry falling within "procedural impropriety" as statutorily-defined.

No consideration at all?

76. In his oral submissions, Mr Rogers KC fairly encapsulated the Adjudicators' critique as an "overall attack" on the "quality" of the consideration of Representations; a failure "properly" to consider Representations. I have only been able to find within the Joint Determination one point at which there is a description of a complete failure to consider. Adjudicator Kennedy (at §7.4.2) describes evidence submitted by Mr Curzon of "screenshots of the online process", which said under "compelling reasons" that certain "reasons will not be considered" (but also: "we may reject your representation"). The "reasons" listed were: inadequate signage; no toll booths; and sat nav/traffic diversion. Adjudicator Kennedy says (at §7.4.7):

> ***The words "will not be considered" make plain that certain representations will not be taken into account. This is clear fettering of discretion and is a breach of the Council's obligation to consider the representations made by a motorist. The statement should not be made at all as it may deter those who wish, and who are entitled, to make representations on those very grounds.***

In my judgment, Adjudicator Kennedy was fully justified in raising this concern about this description of points which "will not be considered". But whether Representations were indeed "not … considered" is a question arising on the facts of a case, including these 11 Cases. Adjudicator Kennedy was dealing with Case 1. She set out (§3.4) Mr Curzon's Case 1 Representations (25.4.19) which were as follows:

> ***The PCN is defective. It makes absolutely no sense whatsoever. "On the designated road to which the order applies". The 2018 Order (The A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads [plural i.e. with an 's' on the end of it] User Charging Scheme Order 2018) cited on the PCN says "Scheme Roads". There is no mention in the 2018 Order of a singular designated 'road'. The order says ""new crossing" means the bridge and other roads and structures built pursuant to the River Mersey (Mersey Gateway Bridge) Order 2011". It then goes on to say ""Scheme roads" [plural i.e. with an 's' on the end of it] means that part of (i) the road that approaches and crosses the 'new crossing' and (ii) the A533 road that approaches and crosses the Silver Jubilee Bridge…". The PCN then goes on to say Location: Mersey Gateway Bridge Southbound. The Mersey Gateway Bridge is the A533. So where the hell was I supposed to be and what time is April past 9? Damian Curzon***

There were here no Case 1 Representations about inadequate signage; toll booths; or sat nav/diversion. Adjudicator Kennedy set out (at §3.7) the Case 1 letter (8.5.19) – which had said "there is simply no representation for us to accept or reject" – and she went on to find a procedural impropriety. That was not because of fettering or non-consideration, but because the letter did not contain the prescribed information to constitute a compliant NoR. Adjudicator Kennedy did not then set out the reasoned contents of the subsequent Case 1 NoR (23.5.19). I have explained (§17 above) that signage was raised in the Case 4, 7 and 6 Representations where the NoR responses responded, applying Business Rule REP026. Finally, there was a Case 5 letter (22.10.19) which declined to process unauthorised correspondence, applying Business Rule ELG000 (see §12 above). The Adjudicators, rightly, did not suggest that this constituted an unlawful fetter and absence of consideration. And I can find no finding in the Joint Adjudication of a complete failure to consider Representations. That means there is no finding of "procedural impropriety" in the context of the Regulation 8(9) duty to "consider", on the legally correct approach.

77. Adjudicator Kennedy recorded (at §5.18.4) a concern that "the Merseyflow online representations process has 'radio buttons' so only allows the recipient of a PCN to select one ground". Again, that was a fully justified concern to record, and Mr Rogers KC understandably emphasised it. But Adjudicator Kennedy did not find that Mr Curzon was unable to make Representations on more than one ground. The Case 7 Representations set out by Chief Adjudicator Sheppard, in which the radio buttons point was made at [1] (see §80 below) show that Mr Curzon was able to make all the representations he wished, on all grounds. Other 'systemic' concerns were raised. For example, Chief Adjudicator Sheppard included within the Joint Determination a lengthy discussion of the duty to give reasons (§17.1-17.18) culminating in finding "an implied obligation in the 2013 Regulations for the charging authority to state reasons in a NoR", so that "where the charging authority serves a NoR which does not state reasons for its decision to reject the representations it constitutes a procedural impropriety on the part of the charging authority, as defined at Regulation 8(4)". There was no argument before me on this subject. It is not a fettering point. Chief Adjudicator Sheppard did not equate an absence of reasons with a failure to "consider". Moreover, nobody has found or contended that the NoRs in the 11 Cases failed to give reasons.

Fettering and systemic criticisms

78. I have explained (§35ii above) that a procedural impropriety must be applicable in the individual case. Insofar as 'systemic' points are being made, these would need to be relevant in the individual case or of such general impact as to constitute a fetter in every case. The key theme in the Joint Determination is about methodology. Mr Rogers KC emphasised a series of points, linked to concerns expressed in the Joint Determination, about the Business Rules methodology. They include concerns about using key words to conduct an intranet search of the Business Rules for an applicable Rule, so as to use its "pre-determined outcome" (§10 above). In my judgment, it cannot be sufficient – to constitute a fettering in every case – to point to a methodology which provides pre-determined responses to familiar scenarios. Especially in the context of objective standards, such as arise under the Regulation 8(3) grounds. Take an example. Take the question whether a PCN fails to state the date and time of the crossing (Regulation 7(3)(d): §3 above), thus constituting a "procedural impropriety"

(Regulation 8(3)(g)). A Business Rule could deal with such a case. It could identify that, if the Operative is satisfied that the PCN did fail to state the date and time, the outcome is "Allow Representations"; and if not "Reject". That could be "pre-determined". I do not see how it would be an unlawful fetter; still less of a "discretion". Take the VIP question REP031 (§16 above) or the "congestion" question (§15 above). Suppose Representations simply say "I'm a celebrity so get me out of this penalty charge"; or "I should not have to pay because there was congestion on the bridge". That would engage 'discretion' (or more accurately judgment), in the sense of "compelling reasons". But in those straightforward situations, a Business Rule addresses such a Representation. This is not someone with "something new to say". I do not see an unlawful fetter in that approach. If there is something else, something special, something which does not fit or goes further, then that is the function of referral to the Escalation Panel (§§10, 30, 73 above). In my judgment, the fact that Business Rules give "pre-determined" responses to familiar scenarios cannot, of itself, constitute a 'systemic' unlawful fetter. To take another example, if the point being made in Representations is that 'there is no power to levy a charge because the RUC Scheme is ultra vires', that raises an objective legal question. Whatever the answer is, it would not be expected to fluctuate. In my judgment, there is nothing 'systemically' unlawful in public law terms in having and using pre-prepared reasons to adopt in commonly encountered scenarios where they fit. There may be criticisms of the content of particular Business Rules, and of the response which they generate. But I cannot accept that the methodology of using rules to provide consistent responses to familiar scenarios of itself supports the conclusion of a 'systemic' fettering, still less of discretion, still less in every case.

The proof of the pudding

79. I am going to proceed by assuming, contrary to what I have concluded, that a breach of the public law no-fettering principle in relation to the Regulation 8(9) function is, of itself, sufficient to constitute a "procedural impropriety". I therefore put to one side my conclusion that what would be needed would be a complete failure to consider Representations. It is necessary, in my judgment, to examine the NoRs which were issued in these 11 Cases. Only by doing so can a safe conclusion be arrived at as to whether there was an unlawful fettering. As I have already explained, three cases involved referral to the Escalation Panel, rather than decision by the Operative. That leaves the other NoRs. The problem I immediately encounter is that there is virtually no analysis in the – otherwise thorough and comprehensive – Joint Determination of the NoRs, the reasons which they contained, the Business Rules which were applied, and the Representations to which they were responding. There is one exception to this, which is where I will start.

The Adjudicators' Analysis of the Case 7 NoR

80. Chief Adjudicator Sheppard (at Part 18) focused on the Case 7 NoR (10.3.20). She set out (at §18.8.1) Mr Curzon's Case 7 Representations (3.3.20), which she described as setting out his "usual list of issues":

> ***[1] This Statutory Representation is based upon a number of grounds. Unfortunately the on line submission portal is unfit for purpose. It has radio selection buttons. I was only able to make one choice. [2] There is no road user charge or penalty due under 2018 RUCSO. [3] There is no liability to pay a toll since there was nobody on the road to collect a toll before the crossing was completed. [4] The entire charging regime is unlawful and all the issues in***

> ***the Curzon case XM01672-1807 are still live. [5] There is no liability to pay a "road user charge" or a penalty charge for a crossing over the 'Mersey Gateway Crossing'. The 2018 Charging Order is invalid and unenforceable because it has errors on its face. This is expressed as ground E on the PCNs served by CAPITA on behalf of Emovis Operations Mersey Ltd who are unlawfully operating the entire charging regime on behalf of Halton Borough Council -the Charging Authority. [6] At this point in time the only legitimate way any payment can be demanded is by the operation of the tolling regime as set out in the TWA Order and the 2016 Byelaws. Halton Council have stated on numerous occasions that they are not demanding payment of tolls under the TWA Order and 2016 Byelaws (which would need to be demanded before a crossing is completed by the driver of a vehicle). It follows therefore that Halton Council are placing reliance on a defective RUCSO -The 2018 Charging Order. The 2018 RUCSO (as is the 2017 RUCSO) is of no legal effect. It is mere scrap paper. No payment of a Road User Charge or penalty charge is due, nor will it be until the charging authority remedy all the legal issues at fault. [7] The signage is unauthorised, unlawful and renders the entire scheme unlawful and unenforceable. This also is expressed as ground E on the PCNs served by CAPITA on behalf of Emovis Operations Mersey Ltd who are unlawfully operating the entire charging regime on behalf of Halton Borough Council -the Charging Authority. [8] There has been a mass of procedural improprieties. That is expressed as ground G on the PCNs served by CAPITA on behalf of Emovis Operations Mersey Ltd who are unlawfully operating the entire charging regime on behalf of Halton Borough Council -the Charging Authority. [9] The Charging Authority Halton Borough Council is acting inappropriately and illegally. It has entered into an unlawful contract with a third party private limited company (Mersey Gateway Crossings Board Limited) and abdicated its public law duties. The third party contractor has itself entered into a contract with another third party contractor (Emovis Operations Mersey Limited), which in turn has a number of sub-contractors working on its behalf. The law is clear in that it must be the Charging Authority (Halton Borough Council) that carry out the statutory duties as set out in the Transport Act 2000 and the supporting Regulations and Statutory Guidance for a Charging Authority. [10] PCNs should be issued by the charging authority. That is not the case here. PCNs are issued in automatic fashion well before the issue date used by CAPITA on the printed PCNs. Damian Curzon 03/03/2020***

81. Chief Adjudicator Sheppard then set out (at §18.8.2) the contents of the Case 7 NoR (10.3.20). This NoR relied on Business Rules REP177, REP182 (§31 above) and REP026 (§17 above). The contents of Case 7 NoR were as follows. First, by way of introduction:

> ***Notice of Rejection. [1] Thank you for your recent representation against the issue of the above mentioned Penalty Charge Notice(s) (PCN(s)).***

Then this, regarding "legal grounds":

> ***[2] In your representation you state that you are exempt from paying the charge on legal grounds. [3] The Council had in place a valid and legal power to charge and enforce charges (commonly termed as tolls) on the Mersey Gateway Bridge from 14 October 2017 to the 18 April 2018. All vehicles that used the Mersey Gateway Bridge on or after the 14 October 2017 were required to pay and liable to enforcement of a charge (commonly termed as toll) if no charge (commonly termed as toll) was paid, unless exempt or they benefited from the Halton Local User Discount Scheme (LUDS). [4] The 2018 Order provides a valid and legal power to charge and enforce charges (which are described here as "tolls") on the Mersey Gateway Bridge from 19 April 2018. All vehicles using the Mersey Gateway Bridge on or after the 19 April 2018 are required to pay a charge (commonly termed as toll) unless exempt or they benefit from the Halton Local User Discount Scheme (LUDS).***

Then this, regarding Curzon No.1:

> ***[5] Halton Borough Council has been made aware of the Traffic Penalty Tribunal adjudicator's decision in a recent appeal case and the further decision by the same organisation to deny the Council a review of the decision. The Council is currently reviewing***

> ***its position. In the meantime the Council is clear that: [a] Adjudication by the Traffic Penalty Tribunal (TPT) cannot and does not, in law, invalidate or remove the powers in place from 14 October 2017 to administer and enforce charges for using the Mersey Gateway Bridge. [b] Adjudication is specific to the case being considered, and any decision of an Adjudicator only relates to that particular case. [c] A decision of TPT does not have general effect nor carry any weight as precedent. [d] Any suggestion that the Council has no power to charge or enforce how it does this or that the Council is acting inappropriately or "illegally" is misleading, inaccurate and wrong in law. [e] The Adjudicator's decision in respect of signage demonstrates the inconsistency of TPT in determining Mersey Gateway cases as it contradicts the decision of a different Adjudicator some time ago who concluded signage to be "large, well sited, in clear view, and to communicate to a driver unfamiliar with the area that a payment was required and how to pay". [6] It's business as usual at the Mersey Gateway - please continue to pay to use Mersey Gateway Over 97% of our users are paying for their crossings on time, experiencing quicker, easier and more reliable journeys across the river. [7] You can pay online at www.merseyflow.co.uk, over the telephone on 01928 878 878 or in person at the Runcorn walk-in centre and at Payzone outlets.***

Then this, regarding signage:

> ***[8] The signs in place when the new bridge opened to traffic were sufficient to meet the requirements of the Mersey Gateway Bridge Byelaws 2016 and the Transport Act 2000 and have been authorised by the Department for Transport (DfT). These signs indicated: [a] The last point of exit on the highway to avoid bridge charges. [b] The point on the highway from which charges are applicable. [c] The level of the bridge charge fees for different vehicle classifications. [d] Information on how and when to pay. [9] Please note that in extensive discussions with DfT, they would not agree to telephone numbers or website addresses being displayed on any road signs.***

Finally, this:

> ***[10] Grounds for representation have not been established and there are no further compelling reasons which would lead the charging authority to cancel the penalty charge notice. Therefore, this letter is issued as a formal notice of Rejection under Regulation 10 …***

82. Although Chief Adjudicator Sheppard did not follow through in this way, we can analyse how the Case 7 NoR (10.3.20) was constructed from the "predetermined-outcomes" in the Business Rules, in light of the points made by Mr Curzon in the Case 7 Representations (§80 above). There are three components.

i) The first component is that the Case 7 NoR at [4] and [5] addresses "legal grounds", in the light of the Case 7 Representations at [2]-[3], [5]-[6] and [8]-[10]. Equivalent text is also found in the NoRs in Case 3 (12.7.19), Case 4 (11.10.19), Case 5 (20.11.19) and Case 6 (26.2.20). This text derives from Business Rule REP177, where the "Scenario" is "States not enforceable due to Procedural impropriety, Paragraph 125(v) of the TPT Adjudicator, Section 172(4) of the Transport Act 2000 or Bylaws etc". The REP177 Response is "go into the paragraphs and then 'Adjudicator decision' and drag 'Decision Part 1 to 5' into the letter". The product is seen here.

ii) The next component derives from Business Rule REP182 (§31 above), which relates to Curzon No.1. That was raised in the Case 7 Representations at [4]. In response, REP182 produces the text in Case 7 NoR at [5].

iii) The final component derives from Business Rule REP026 (§17 above), which relates to signage. That was raised in the Case 7 Representations at [7]. By way of response, REP026 produces the text seen in Case 7 NoR at [8] and [9].

This, in my judgment, is an excellent example of the Business Rules in action.

83. It is striking that, after scrutinised the Case 7 NoR with care, Chief Adjudicator Sheppard said this about it (Joint Determination at §§18.8.2-18.8.4):

> ***18.8.2. On this occasion, [Mr Curzon] was sent a NoR, again without a heading showing from whom it was from and signed 'Representations Team'. However, the content is more considered than usual… 18.8.3. To be fair to whoever sent this, it does address the points made by Mr Curzon. However, the difficulty is that there is still no evidence that this response was referred to anyone in the Council before sending it. Agent 2 is shown as rejecting the representation and it is signed off by the 'Representations Team' whom I, in accordance with Adjudicator Kennedy, find to be Emovis staff. 18.8.4. Therefore, while the NoR gives reasons that deal with the representations, there is no evidence, either specifically in the case, or generally in the description of the enforcement operations, of any oversight or involvement by the charging authority, the Council. In the circumstances I find that the charging authority failed in its duty to consider the representations, which amounts to a procedural impropriety. The appeal is allowed.***

This reasoning by Chief Adjudicator Sheppard does not identify any unlawful fettering in the reasons given in the Case 7 NoR. Instead, it accepts that the Operative "does address the points made by Mr Curzon" and "deal with the representations". And "the difficulty" is not the fettering point, but rather the delegation point. There is no reasoning which explains how the Case 7 NoR does constitute an unlawful fettering, including in the 3-page Summary of the Joint Determination.

Discussion

84. I have found Chief Adjudicator Sheppard's observations about the detail of the Case 7 NoR cogent and convincing. I agree with her reasoning in this passage of the Joint Determination, that the Case 7 NoR – which I have shown is demonstrably a faithful application of the Business Rules – does "address" and "deal with" the points made by Mr Curzon in his Case 7 Representations. Like Chief Adjudicator Sheppard in this passage, I can identify no basis on which Case 7 constitutes an unlawful fettering or a failure to "consider" Representations. It must follow from this that a decision applying the Business Rules does not – necessarily and in and of itself – constitute an unlawful fetter. The Joint Determination elsewhere concluded (at §5.17.3) that:

> ***… this system [is] no substitute for reading what the motorist has said and responding appropriately …***

Yet the Case 7 NoR was "this system" in action, and it did involve "reading" what Mr Curzon had said and "responding appropriately". The Joint Determination also elsewhere came (at §5.18.9) to:

> ***… reject entirely the propriety of using these Business Rules in place of consideration as required by the 2013 Regulations…***

And yet the Case 7 NoR was "using these Business Rules". In my judgment, and as Chief Adjudicator Sheppard acknowledged in the specific passage discussing the Case 7 NoR, the Operative can, lawfully, read and consider the Representations; can search the Business Rules on the computer; and, if the Business Rule fits the point being made, can give the answer and adopt the text from the Business Rule. That is what happened in Case 7. I am unable to see it as a breach of Regulation 8(9); nor an unlawful fettering.

85. The difficulty I then have is this. The Case 7 NoR is really the only NoR which is analysed anywhere in the Joint Determination. The Chief Adjudicator comments that the Case 7 NoR is "more considered than usual" but no example or comparison is set out to illustrate this. She does not point to or analyse any other NoR. I have read them all, and the picture is as follows. The Case 6 NoR (26.2.20) – without being a carbon copy – has equivalent content and detail to the Case 7 NoR. The Case 4 NoR (11.10.19) was, if anything, even more detailed. Similar to these cases, Mr Curzon's Case 10 Representations (10.6.21) were detailed and his Case 11 Representations (28.6.21) even more detailed, but these cases were referred to the Escalation Panel and resulted in far more detailed NoRs (24.6.21 and 23.7.21) than the Case 7 NoR. All of the other cases involved much briefer Representations by Mr Curzon (between 2 lines and 11 lines long) and the points raised in each were addressed in the NoR. Nor does Adjudicator Kennedy analyse any of the NoRs and the Business Rules on which they are based. This stands as a considerable impediment to the idea of an evaluative judgment by the Adjudicators, on the facts of these individual cases, as to whether points raised were being properly considered and addressed. It matters. These were test case appeals, collected over a three-year period, and treated as apt for resolution of issues of general importance. If there were an unlawful fettering – and especially one 'across the board' – it should and must be demonstrable in these cases. Mr Buley KC took me to specific NoRs in Cases 1, 4 and 10 (an Escalation Panel referral). He submitted that there was no unlawful fettering. Mr Rogers KC's arguments – in writing and orally – in essence rested on concerns (he listed 11) expressed in the Joint Determination, the principal thrust of which involved 'systemic' points about the Business Rules method and features which have been encountered, but none of which involved an analysis of any particular NoR in light of a particular Representations. Nor does the Joint Determination, as it was put in the Council's skeleton argument, "identify any problem with a specific Business Rule that might have been applicable to Mr Curzon's case".

86. In deliberating in this case, I have read the materials in all 11 Cases and 17 PCNs. I have done so against the backcloth of the Business Rules as they were presented to the Adjudicators. Earlier in this Judgment, I made repeated reference to Business Rules which are seen in play in these cases. I have set out (§15 above) how the Case 4 NoR reflected Business Rule REP006 (Congestion) in response to Mr Curzon's Case 4 Representation ("I suffered congestion so why would I need to pay for that?"). I have explained how the Case 7 NoR (§82iii above) reflected Business Rule REP026 (Signage) in response to the points about signage in the Representations; and I have explained that the same is true for Cases 4, and 6 (§17 above). I have explained (§14 above) how the Case 2 NoR reflected Business Rule REP095 (RUC Paid), in response to a point in Mr Curzon's Case 2 Representations (he said: "The road user charge was paid on time and as required"). I have explained how the Case 7 NoR (§82i-ii above) reflected Business Rules REP177 and REP182. Business Rule REP177 also featured in the NoRs in Cases 3, 4, 6, 8 and 9. Business Rule REP182 also featured in the NoRs in Cases 4 and 6 (§31 above). I have explained (§32 above) that what became Business Rule REP184 was relied on in the Case 1 NoR. In the same way, the Case 4 NoR reflected Business Rule REP053 (Outside Peak Hours), in response to a point in Mr Curzon's Representations; and the NoRs in Cases 4 and 5 reflected Business Rule REP178 (legal/unenforceable by reference to publicity). I have been unable to find what, in my judgment, could constitute an unlawful fettering in the decisions in any of these test cases. Nor, in my judgment, can I properly afford a judicial review latitude

to an evaluative judgment on the facts in the application of an objective public law principle; especially given the absence of a reasoned analysis of the NoRs and Business Rules invoked.

87. In my judgment, it was not open to the Adjudicators to reach the blanket 'systemic' conclusion that they did, that "the rigid application of the 'Business Rules' applied by the Council's agents does not constitute 'consideration'" (§2 above); "the method by which representations are dealt with using the 'Business Rules' does not amount to 'consideration'" (Introduction to the Joint Determination §9); and "the 'Business Rules' methodology applied by the contractors does not amount to consideration of representations" (§18.4). I entirely understand why the Adjudicators had misgivings about a "computer says no" system, with the Business Rules as "a set of pre-defined responses, purportedly intended to answer most representations made by motorists in receipt of a PCN" (§5.5), using a "bespoke search engine" choosing "the relevant pre-determined response" without making "qualitative decisions" (§5.9), that "consideration is not an algorithm, and it is not a blind process operated by rigidly following a strictly defined process" (§5.18.7), and favoured "having an experienced person" to "form a view from what the motorist has described, how they have described it, and taking into account other factors that provide context, all of which enables them to use their experience to form a fair judgment" (§5.16). But the Case 7 NoR – closely analysed by Chief Adjudicator Sheppard – was a product of that system, described in positive terms. It was said that Mr Curzon had "provided numerous examples of how poorly the use of the Business Rules addresses representations made by himself and others" (§5.17.1) but even that criticism was not illustrated by reference to any of the NoRs in these 11 Cases. There was said to be experience of cases where "the representations could not have been considered given the unrelated reason given for rejecting them" (§5.17.2) but that too was not illustrated by these cases. It was said that Representations should not be "squeezed into a generic type, for; example, by identifying a particular word like 'signs', with a pre-defined outcome" (§5.18.8), but again that criticism was not illustrated by reference to any of the NoRs in these 11 Cases.

88. I turn to whether there is within the Joint Determination any Business Rule analysed as demonstrating an unlawful fettering, still less of a discretion; and still less relevant and material to these 11 Cases. Business Rule REP182 (§31 above) is set out (Joint Determination §4.2.9) but without "the explanation" reflected in the Case 7 NoR at [5]-[7] (§81 above) and the Adjudicators do not disagree that all three limbs of REP182 pose an objective question, to which the answer is right or wrong. Business Rule REP184 (§32 above) is referenced (§5.10), but not set out, and with no explanation why its text is not objectively correct and adequately reasoned. There are then three other illustrations considered.

i) Business Rule REP183d is referenced (§5.15):

> ***Reference. REP183d.***
> ***Category. Compelling Reasons/Sensitive Circumstances.***
> ***Scenario. Where the customer states that their reason for not paying is due to anxiety, stress, depression, mental health or illness, with NO supporting evidence provided.***
> ***Evidence/Information/Check. No supporting evidence.***
> ***Action/Outcome. NOTE: Where supporting evidence is provided a decision should be sought via HBC Escalation panel. Reject Representation.***

Adjudicator Kennedy describes this Rule as "contrary to the fundamental principle that each case should be considered on its own merits" and as "disturbing" that a motorist "unable to produce 'evidence'" would have their Representations rejected. Here, the essential criticism is of the reasonableness of requiring "supporting evidence".

ii) Business Rules REP138c and REP138d are set out (§5.17.5):

> ***Reference. REP138c.***
> ***Category. Any ground/ Made X crossings, paid for Y (FOLLOW UP).***
> ***Scenario. Road user claims paid but payment(s) is/are outstanding. Road user has made a number of crossings and has paid for some, but not all of them.***
> ***Evidence/Information/Check. Review payments received - sufficient funds received.***
> ***Action/Outcome. Cancel PCN(s) and advise road user.***
>
> ***Reference. REP138d.***
> ***[ditto]***
> ***Evidence/Information/Check. Review payments received - insufficient or no funds received.***
> ***Action/Outcome. (Consideration should initially be given to Business Rules: First Crossing (Rep181), First PCN (Rep186)). Reject representation Need to add the X and Y paragraph from letter REJ123 into the letter.***

Here, Adjudicator Kennedy's essential criticism is of the enquiry, for its failure to focus on "a specified crossing where payment has not been made on time", there being "no power to reallocate or move a liability to a different crossing", expressing the view that the Regulation 8(3)(d) ground would be established.

iii) Business Rule REP04 is set out (§5.18.1):

> ***Reference. REP004.***
> ***Category. Compelling reason/Advice.***
> ***Scenario. States that they received incorrect advice from either Contact Centre or Retail Service Provider.***
> ***Evidence/Information/Check. No evidence provided.***
> ***Action/Outcome. 1. Ask for further information 2. Perform investigation if reason is said to be contact centre advice. Reject if no internal evidence can be found to support. 3. Reject if retail service advice no evidence. Reject representation Ask RK for support evidence to support case.***

Here, Adjudicator Kennedy's essential criticism (§5.18.2) is to ask: "What evidence is envisaged? How does the agent decide if the evidence supports the submission or is not material?" This relates to a situation involving factual and evidential evaluation, where "evidence" is being elicited in the application of the Rule, but the Rule is not more prescriptive about "what" and "how".

89. In my judgment, what these three examples illustrate is the appropriateness of the Adjudicators providing their invaluable independent insights as to the front-line approach taken through the Business Rules; and which the Council would be very well advised to heed. Each of them involves considerations which, if they arose in any individual case, would enable an independent adjudicator to consider the position afresh, on all the evidence, on appeal and make a finding as to whether the Regulation 8(3) ground or compelling reasons is established. None of them was in play in the present test cases. If it mattered to the resolution of the present cases – which it does not – I would not have accepted that these examples, including an insistence on

evidence (the Rules do not exclude the evidence being a statement or supporting letter), demonstrate an unlawful fettering, still less of a discretion.

OTHER POINTS

90. Other points have been canvassed in the arguments. In particular, points were made about the Board and delegation to the Board but, in my judgment, what matters in this case is the delegation to Emovis and the Operative. I do not see that there is any finding, on the basis of which the appeals were allowed, that any relevant function was delegated to the Board so as to constitute a procedural impropriety. The points identified by Mr Rogers KC – about "the entire operation"; "approval of the Business Rules"; and "monitoring Emovis" – all entailed a characterisation of a "quasi-judicial function". But I cannot see how they – or what is said about them – involve any candidate freestanding procedural impropriety, once delegation and fettering points and Regulation 8(9) have been analysed. Adjudicator Kennedy said (§§5.18.9 and 5.8.15):

> ***I reject entirely the establishment of the Escalations Panel as a remedy to the inadequacy of the Business Rules… I reject the assertion that the Council makes, or even lawfully authorises, discretionary decisions, either by reference to the inappropriate Business Rules or to the Escalations Panel, which is essentially not the Council at all...***

In my judgment, no distinct point arises: this reasoning would be unimpeachable, had Adjudicator Kennedy been correct in law that (i) the Regulation 8(9) duty is non-delegable to the Operative; or (ii) the Business Rules necessarily involve an unlawful fettering. The point is that such unlawfulness – said to constitute a procedural impropriety – would not be avoided or cured by there being other cases referred to the Escalations Panel, nor by any prior act of approving the Business Rules. As to their March 2019 "approval" by Mr Leivesley (§29 above), Adjudicator Kennedy said this (at §§5.18.13 and 5.18.14).

> ***… Bearing in mind I issued my decision in Curzon No. 1 on 11 March 2019, it would appear that following that decision the Council was asked to approve the Business Rules – some eighteen months and, apparently, four versions ("version 4.6" is said to be appended) after they were first put to use when the scheme started in September 2017. Mr Leivesley says he has read them, but given that he has made no modifications or comments it seems unlikely that thorough consideration could have been given to their content and application. In Curzon No. 1, I addressed, at length, the procedural impropriety of delegation to Emovis, and likely the MGCB. For the reasons given, the Council may not delegate its functions as the charging authority to the MGCB. Therefore, Mr Leivesley acted beyond his powers to delegate approval of the Business Rules to the MGCB. It follows that the approval is void, with the effect that the Council has not in fact approved the Business Rules (even if they are a valid and justifiable method of dealing with representations, which, as I have found, they are not).***

I cannot see what, in this judicial review claim, turns on a finding – if that is what this is – that it is "unlikely" that Mr Leivesley gave "thorough" consideration to the Business Rules. Insofar as there is a finding here that the Business Rules have not in fact been approved by the Council, that appears to be expressed as parasitic on the non-delegability analysis which I have addressed. Finally, I have seen various versions of the Business Rules which record their having been approved by the relevant Council Officers and no issue has been argued – still less convincingly – before me that this was unlawful.

THE COSTS INFORMATION ISSUE

91. On this final part of the case, the Agreed Issue is as follows:

> ***Whether in all the circumstances the Adjudicators were entitled to decide that it was a 'procedural impropriety' within the meaning of the Regulations that the NoRs issued by the Council under Regulation 10 breached the requirements of that Regulation and/or were relevantly inaccurate and/or misleading?***

My answer to that Agreed Issue is "no".

92. On this Issue the key pieces of the jigsaw are as follows.

i) First, there is the meaning of and approach to "procedural impropriety" as statutorily defined (see §35 above).

ii) Secondly, there is this passage from Camden where – in discussing "procedural impropriety" as statutorily-defined – Burnett J said at §33:

> ***[Counsel] submits that a step will not have been taken in accordance with the statutory scheme if a requirement has been contradicted or undermined. It is, of course, always a matter of fact whether there has been a procedural impropriety for the purposes of [the R]egulation[s]. In my judgment it is possible that contradictory, confusing or obscure language may result in 'a failure to observe [a] requirement' imposed on an enforcing authority by the statutory scheme.***

iii) Thirdly, there is the "Controversial Costs Information" (§6 above) which was contained in each of the NoRs in these 11 Cases. It read as follows:

> ***Costs. [1a] If your appeal is successful, adjudicators will not normally award costs against Halton Borough Council unless they consider the decision to reject your representation was wholly unreasonable. [1b] Costs may be awarded against you if an adjudicator considers your appeal frivolous or vexatious or the making or pursuing of the appeal was wholly unreasonable…***

iv) Fourthly, there is the duty in Regulation 10(1)(b) and the discretion in Regulation 10(2):

> ***10. Rejection of representations against penalty charge notice. (1) Where a charging authority does not accept that a ground in regulation 8(3) has been established, nor that there are compelling reasons why the penalty charge notice should be cancelled, the notice served in accordance with regulation 8(9)(b) (a "notice of rejection") must (a) state that a charge certificate may be served under regulation 17(1) unless within the period of 28 days beginning with the date of service of the notice of rejection— (i) the penalty charge is paid; or (ii) the person on whom the notice of rejection is served appeals to an adjudicator against the penalty charge; (b) indicate the nature of an adjudicator's power to award costs against any person appealing; and (c) describe in general terms the form and manner in which an appeal to an adjudicator must be made. (2) A notice of rejection may contain such other information as the charging authority considers appropriate.***

v) Fifthly, there are the costs rules in the Schedule to the Regulations at §13:

> ***13. Costs. (1) The adjudicator is not normally to make an order awarding costs and expenses, but may, subject to sub-paragraph (2) make such an order- (a) against a party (including an appellant who has withdrawn an appeal or a charging authority which has consented to an appeal being allowed) if the adjudicator considers that***

> ***the party has acted frivolously or vexatiously or that their conduct in making, pursuing or resisting an appeal was wholly unreasonable; or (b) against the charging authority where the adjudicator considers that the decision made by it giving rise to the appeal was wholly unreasonable. (2) An order must not be made under sub-paragraph (1) against a party unless that party has been given an opportunity of making representations against the making of the order. (3) An order under sub-paragraph (1) must require the party against whom it is made to pay to the other party a specified sum in respect of the costs and expenses incurred by that other party in connection with the proceedings.***

93. As the Encapsulation Summary records (§2 above), and as the Introduction to the Joint Determination stated (at §11):

> ***All the appeals are allowed on the grounds that there was a procedural impropriety on the part of the charging authority, Halton Borough Council… 11. The costs information on the NoR was misleading, misrepresented the Regulatory requirements and was a procedural impropriety.***

Adjudicator Kennedy – with whom Chief Adjudicator Sheppard agreed (Joint Determination at §11.1) addressed this in Part 7 – having allowed the appeal by reference to the letter of 8.5.19 (§34 above) – by reference to the NoR (23.5.19). She set out (at §7.3.2) the Controversial Costs Information (§92iii above) and (at §7.3.3) §13 of the Schedule (§92v above). She said this (at §§7.3.1 and 7.3.4-7.3.6):

> ***7.3.1. I have dealt with this issue before, including in case number XM00860-1904, for example (decided on 26 July 2019), and in relation to three crossings in March 2019… 7.3.4. [A]ccording to the Regulations, this Tribunal will not normally make any award of costs but may award them against either party (that is, including the Council) if that party has acted "frivolously or vexatiously", or their conduct in relation to the appeal was "wholly unreasonable". Costs may also be awarded against the Council if the adjudicator finds that the rejection of the representation was wholly unreasonable. 7.3.5. The NoR suggests, wrongly, that costs for frivolous or vexatious behaviour may only be awarded against the appellant. Costs for frivolous or vexatious behaviour may be awarded against the Council where evidence of such behaviour is found. 7.3.6. Furthermore, the NoR also suggests that costs against the Council will only be made where the Tribunal finds that the decision to reject the motorist's representations was wholly unreasonable. The Regulations actually provide that an award of costs may also be made against the Council where it is found that the Council's conduct in pursuing or resisting an appeal was wholly unreasonable.***

She then concluded (at §7.3.7):

> ***7.3.7. The misstatement of the costs rules is, in my view, a significant procedural impropriety. The information provided to the appellant is not only wrong but also gives the impression that an award of costs against that appellant is a possibility for several reasons, whereas the phrasing concerning costs against the Council reflects only the position in Paragraph 13(1)(b) and ignores Paragraph 13(1)(a).***

94. Mr Rogers KC submits that this reasoned conclusion that the Controversial Costs Information constituted a procedural impropriety fatal to the recovery of the penalty charges in these (and all) cases, was an approach and outcome which the Adjudicators were right – and at least entitled – to adopt. He argues, in essence, as follows. (1) The Adjudicators have lawfully and reasonably found, for the reasons given, that [1a] of the Controversial Costs Information – and [1a] and [1b] read together – constitutes a "misstatement", is "wrong", is "misleading", and gives a wrong and misleading "impression". (2) Providing partial or misleading information about costs and appeal cannot sustainably be advanced as a means of discharging the Council's duty in

Regulation 10(1)(b) to indicate the nature of an adjudicator's power to award costs against any person appealing. Nor for that matter can it sustainably be advanced as a means of discharging the Council's duty in Regulation 10(1)(c) to describe in general terms the form and manner in which an appeal to an adjudicator must be made. (3) In any event, the discretion to include within the NoRs of "other information", not required by Regulation 10(1)(b) or (c), is subject to a clear requirement imposed by Regulation 10(2). The requirement is that the information must be "appropriate". That is "a procedural requirement to be observed". It is a "requirement imposed" by the Regulations. That makes inappropriate information a "procedural impropriety" (Regulation 8(4)). Information which constitutes a "misstatement", is "wrong", is "misleading", and gives a wrong and misleading "impression" cannot reasonably be "appropriate". (4) Whether viewed by reference to the Regulation 10(1)(b) duty or the Regulation 10(2) discretion, the Controversial Costs information – permissibly found by the Adjudicators to constitute a "misstatement", to be "wrong", to be "misleading", and to give a wrong and misleading "impression" – falls squarely within Burnett J's described in Camden at §33 (§92ii above) of "contradictory, confusing or obscure language" which can be a "procedural impropriety" as statutorily defined. This fits with the strict and straightforward approach to procedural impropriety in which it is incumbent on enforcing authorities to comply meticulously with the requirements of the statutory scheme if they are to recover penalty charges (§§35iv, 36 above).

95. This is a powerful argument. But I am unable to accept it. I agree with Mr Buley KC on this issue. I will explain why.

i) I will start with what I accept. I agree that the Adjudicators found that the Controversial Costs Information [1a] and [1b] constitute a "misstatement", are "wrong", are "misleading", and give a wrong and misleading "impression". I agree that this characterisation of the Controversial Costs Information was at least open to the Adjudicators as a matter of evaluative judgment for the Adjudicators. This is not a hard-edged question, but one involving evaluative judgment. Even on a closer scrutiny, I would not disturb the Adjudicators' characterisation. The Controversial Costs Information is plainly incomplete and deficient description of the costs position on appeal. It purports to describe the power to award costs in favour of an appellant and against the Council as charging authority. But it is defective. That is because paragraph [1a] is describing one basis on which costs could be awarded against the Council, while [1b] is expressed only in terms of costs against the appellant, omitting the fact that the equivalent to [1b] also constitutes a second basis on which costs could be awarded against the Council. I also agree that it was appropriate for the Adjudicators to identify this problem. It is common ground that the Council changed the standard terms of the NoR after the Joint Determination, to say in NoRs:

> ***Costs are not normally awarded to either party and can only be applied for if you have appealed to the Tribunal and are in receipt of a decision from the Adjudicator. There are rare exceptions where costs may be awarded, if the Adjudicator considers that you or the authority were wholly unreasonable in their approach to the case, or – as defined by the law – were 'vexatious' or 'frivolous'.***

That was a wise and appropriate response. It is fair to say that Adjudicator Kennedy's determination (11.3.19) in Curzon No.1 did not find a "procedural

impropriety" on the basis of the Controversial Costs Information. But that is said (Joint Determination §7.3.1) to have been a ground for allowing an appeal in another case (26.7.19), which suggests a striking failure – despite a warning – previously to address the problem in the subsequent NoRs, in Cases 4-11. Mr Curzon was not deterred from appealing, though "prejudice" is not a prerequisite when the rigours of procedural impropriety are in play (§36 above).

ii) What I am unable to accept is that the Adjudicators were entitled for the reasons they gave to proceed from the "misstatement of the costs rules", which was "wrong", "misleading" and gave a wrong and misleading "impression", to a "procedural impropriety". In my judgment, it was and is necessary to grapple with the terms of the applicable Regulations. In my judgment, it was a material error of approach (indeed, a misdirection in law) for the Adjudicators to fail to do so; and the Adjudicators' reasoned decision was not one which was reasonably open to them.

iii) The starting point is that there is a duty, so far as concerns costs information in an NoR. It arises under Regulation 10(1)(b). Regulation 10(1)(c) is distinct, being concerned with the making of an appeal. The Regulation 10(1)(b) duty is to:

> ***indicate the nature of an adjudicator's power to award costs <u>against any person appealing</u>.***

The purpose of these clear words is to ensure that there is an accurate and express warning of the appellant's risk of an adverse costs order. The duty is about the costs 'downside' for the appellant. That reflects the wording, design and purpose. It is the requirement being imposed. But I cannot find this important point being recognised in the Joint Determination. In fact, the point is reinforced by considering Regulation 33(4), which deals with NoRs in immobilisation cases. It is expressed differently, as a duty to:

> ***indicate the nature of the adjudicator's power to award costs.***

That language is not found in Regulation 10(1)(b). So, the first – legally correct – question must be this: does the Controversial Costs Information fail to indicate the nature of the power to award costs against the appellant? I cannot find that question being asked and answered by the Adjudicators. In my judgment, the answer to that – legally correct – question would have to be "no". Paragraph [1b] of the Controversial Costs Information discharges the duty. It reflects §13(1)(a) of the Schedule, that the adjudicator may "make such an order … against" an appellant "if the adjudicator considers that the [appellant] has acted frivolously or vexatiously or that their conduct in making, pursuing or resisting an appeal was wholly unreasonable". There is nothing constituting a misstatement, nothing wrong, nothing misleading, as to the appellant's risk of an adverse costs order. Nor can I accept that a duty to indicate the costs risk "against" the appellant is breached by a failure accurately to record the nature of the costs rules <u>in their favour</u>. In my judgment, the inclusion of information about costs in favour of an appellant falls squarely within the discretion in Regulation 10(2). It is "other information".

iv) Turning to Regulation 10(2), this does not in my judgment impose a "requirement" that information is "appropriate", whose breach constitutes a procedural impropriety whenever an appeal adjudicator concludes that information was not "appropriate". Regulation 10(2) confers a discretion ("may") to include "such other information as the charging authority considers" to be "appropriate". The word "appropriate" is part of a subjective test governing a discretionary power. In public law, there is a duty of reasonableness, applicable to the discretionary power. It means that the information must "reasonably" be considered appropriate. It means that the discretion to include the information is that the charging authority "may, if it is reasonable to do so, include" the information.

v) This duty to act reasonably – in the exercise of a discretionary power – is a common law duty. It is part of what it means for the charging authority to act "lawfully". But the question is whether it falls within "procedural impropriety" as statutorily defined. In Camden, Burnett J explained (at §32) that "procedural impropriety" as statutorily defined did not even include those "long-established concepts of fairness" of the common law described as part of "procedural impropriety" as a matter of common law in the speech of Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, at 410-411 (see Camden at §31). Still less, in my judgment, can it include long-established concepts of reasonableness. Nor even, for that matter, long-established concepts of lawfulness. That is why adjudicators are "empowered to consider what would otherwise require a collateral challenge, but that they may do so only within the confines of the … regulation" (Camden §47) and "only in so far as the regulations themselves allow it" (Camden §52). As Burnett J put it (§52): "There is no independent roving commission to identify public law failings". In my judgment, the reasonableness – and reasonable appropriateness – of Regulation 10(2) discretionary information would be a public law falling outside the statutory definition of "procedural impropriety". No reasoning of the Adjudicators persuades me otherwise.

vi) Finally, I cannot read the observation of Burnett J in Camden at §33 (§92ii above) as turning an unreasonable exercise of discretionary power, because it involves information which is misleading in content, into a failure to comply with a "requirement" of the Regulations. What Burnett J was addressing was Counsel's submission that "a step will not have been taken in accordance with the statutory scheme if a requirement has been contradicted or undermined". It was in that context that Burnett J said it was "possible" for "contradictory, confusing or obscure language" to result in a failure to observe a "requirement". The point can be illustrated by returning to Regulation 10(1)(b): the duty (and so "requirement") to "indicate the nature of an adjudicator's power to award costs against any person appealing". The "nature" of that "power" is found in Schedule §13(1)(a): where the adjudicator considers that the appellant has acted frivolously or vexatiously or that their conduct in making or pursuing an appeal was wholly unreasonable. That "requirement" could be stated, described or elaborated upon in a way which "contradicted or undermined" it, by "contradictory, confusing or obscure language". Suppose the Controversial Costs Information at [1b] had said "costs may be awarded against you if an adjudicator considers your appeal frivolous or vexatious or the making or

pursuing of the appeal was wholly unreasonable" and had then added this: "an appellant whose appeal does not succeed can therefore expect to have costs awarded against them". That would be an example of language which contradicts and undermines the requirement. This description of what would constitute a "procedural impropriety" addresses Mr Rogers KC's invitation to confront the logic and consequences of extreme misinformation. Burnett J's observation does not in my judgment support, absent the contradiction or undermining of a requirement, a procedural impropriety by reference to the reasonable appropriateness of other information under the discretionary power in Regulation 10(2). For all these reasons, my answer to the Agreed Issue on this part of the case is "no".

CONCLUSION

96. For the reasons which I have given, my conclusions to the Agreed Issues which are necessary to decide this case (§§37, 49, 66, 91 above) are as follows:

i) The concept of a "procedural impropriety" in Regulation 8(3)(g) of the Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) Regulations 2013 includes matters which occur after the filing of Representations under Regulation 8(9), with the result that it may constitute a ground upon which adjudicators can allow an appeal under Regulation 11(6).

ii) In a case where Regulation 8(10) has been found to apply, adjudicator's findings would show that the decision to allow the appeal could have been made on the basis of Regulation 8(3)(e).

iii) In all the circumstances, the Adjudicators were not entitled to decide that it was a 'procedural impropriety' within the meaning of the Regulations: (a) for the Council to delegate the consideration of Representations under Regulation 8(9) to a third-party contractor; (b) for the Council to adopt and promulgate a policy – termed the 'Business Rules' – to be applied to the determination of Representations made under Regulation 8 by caseworkers (Operatives) of the third-party contractor (Emovis); or (c) that the Notices of Refusal (NoRs) issued by the Council under Regulation 10 breached the requirements of that Regulation and/or were relevantly inaccurate and/or misleading.

On i), I agree with the Adjudicators and Mr Curzon. On ii), I agree with Mr Curzon. On iii) I agree with the Council.

CONSEQUENTIALS AND COSTS

97. Having circulated this judgment as a confidential draft, I can deal here with consequential matters. It was agreed between the parties that, reflecting the judgment of the Court, I should order: (1) the claim is allowed in part; (2) the Joint Determination and Review Decision be quashed in Cases 2-11 but a quashing order refused in Case 1 (in light of the unchallenged narrow ground for decision at §34 above); and (3) no order as to costs in respect of Mr Curzon. That left the following hotly disputed issue as to costs, to be determined on the papers.

98. Mr Buley KC submitted as follows. Albeit that the Adjudicators asserted throughout these proceedings that they adopted a "neutral" position, their position in "substance" was that they "actively resisted" the claim "by way of argument in such a way" as to make themselves "an active party to the litigation", "as if [they] were a party", so that "in the normal course costs should follow the event": see R (Davies) v Birmingham Deputy Coroner [2004] EWCA Civ 207 [2004] 1 WLR 2739 at §47(2). The Adjudicators did not "decline" to "defend" the Joint Determination "choosing … to maintain … impartiality and … let the reasons which it gave speak for themselves": R (Gourlay) v Parole Board [2020] UKSC 50 [2020] 1 WLR 5344 at §46. They acted just like any public authority actively defending a judicial review claim. They did not take a "neutral position … in practice": R (Worthington) v HM Senior Coroner for Cumbria [2018] EWHC 1286 (Admin) at §59. They "crossed the line from merely seeking to assist the court on relevant aspects of law and procedure into arguing the correctness of the decision under challenge": R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London [2018] EWHC 1286 (Admin) at §28. Costs should be awarded, in full; or with no more than a "minimal" reduction in respect of the temporal jurisdiction issue (see §39 above), since that was "not truly severable".

99. I have not been persuaded by those submissions. I will make "no order as to costs". In my judgment, the Adjudicators did not merely 'assert' a neutrality. They genuinely, and in substance, "appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like": Davies at §47(3). That, in my judgment, is correct in the circumstances as a matter of 'classification' applying the general guidance in Davies. But I would, in any event and if necessary, in the special circumstances of this case, exercise my "residual discretion as to costs" on the basis that it would be "unjust to require" the Adjudicators to pay the Council's costs: Davies §59. I will explain why I have reached these conclusions:

    i) This has been an unusual case. There were difficult questions of law, with far-reaching implications, most of all for individual motorists arising in the context of a multitude of PCNs. Mr Curzon was acting in person. In pre-action correspondence and its judicial review grounds, the Council claimed that these were issues which required authoritative resolution in the High Court. The Adjudicators positively agreed, positively supported that course, and expressly invited the Court to grant permission for judicial review. The Adjudicators acted, throughout, as a judicial body welcoming an informed adjudication. They were supportive of informed and authoritative resolution, from first to last. One illustration of this is that the Council produced evidence which was not relied on before the Adjudicators; and the Council raised legal arguments not relied on before the Adjudicators, including late changes of direction. But no 'fresh evidence' or 'pleading' point was ever taken by the Adjudicators.

    ii) Absent the Adjudicators' willingness, through legal representatives, to articulate counterpoints for the Court to consider, judicial determination of these difficult questions would very significantly have been undermined. I appreciated that at the substantive hearing. As the Judge dealing with the case, I actively encouraged Mr Rogers KC and his team to assist me. I wanted to be able properly to 'stress-test' Mr Buley KC's arguments. In theory, I could have sought to insist that Mr Buley KC – facing a litigant in person as Interested Party and a neutral Defendant – to spend a hearing day (perhaps a further hearing day),

identifying and then developing all the arguments which he would have made, had he been Leading Counsel on the other side of every argument. In theory, absent the Adjudicators' assistance, I could have considered asking for an amicus. In substance, in the circumstances, Mr Rogers KC has appeared "in the role of an amicus" (Davies at §37). The Adjudicators at no stage "ceased … to assist the court" (§58). They were (Davies §22):

> ***there to assist the court with … expertise, conscious that if the court made an incorrect ruling through pardonable ignorance of some of the complexities of the legislative scheme, this might have a serious effect on … many future cases …***

This case involved "issues of general principle as to jurisdiction and procedure", where it was appropriate for the Adjudicators to "appear and be heard" (Davies §23). The assistance given to the Court by and on behalf of the Adjudicators was, in my judgment, entirely consistent with judicial impartiality and neutrality. It served the interests of justice. It promoted the public interest. It maximized this Judge's chances of getting to a legally correct answer.

iii) The Adjudicators' legal representatives have, moreover, assisted the Court (and Mr Curzon) in exposing what I concluded was a legally incorrect position taken by the Council's position on the distinct (and, in my judgment, severable) temporal jurisdiction point. That loomed large in this case. It would have given the Council a direct 'one-step' win. But it was an issue on which the Council was wholly unsuccessful. Moreover, the decisions regarding Case 1 have not been quashed. The delegation route (the 1997 Act) relied on before the Adjudicators was abandoned (§59 above). The 2000 Act s.192 argument did not succeed (§§64-65 above).

iv) Finally, and importantly, this is not a case like Worthington. On my approach to costs, nobody is or would be 'having it both ways'. Here, if the claim for judicial review had failed overall, I would have been refusing any application for costs against the Council and in favour of the Adjudicators, had such a costs application been made. Mr Buley KC would, in such a scenario, have been able to point convincingly to the 'neutrality' of the Adjudicators' position, in appearing "to assist the Court".