

**POPLA Appeal Code: xxx**

**Vehicle Registration: xxx**

I am the registered keeper of this vehicle and received a letter dated 16-Sep-20 (issue/given date stated as 18-Sep-20) from Carflow Ltd acting as a notice to the registered keeper. My appeal to Carflow was submitted and acknowledged on 22/09/20 and rejected via email dated 23/09/20. I contend that I, as the keeper, am not liable for the alleged parking charge and wish to appeal against it on the following grounds:

- 1. The NtK does not meet PoFA 2012 requirements – no Keeper Liability can apply**
- 2. The operator has not shown that the individual who it is pursuing is in fact the driver who may have been potentially liable for the charge**
- 3. No Evidence of Period Parked – NtK does not meet PoFA 2012 requirements**
- 4. No Evidence of Landowner Authority - the operator is put to strict proof of full compliance with the BPA Code of Practice**
- 5. The ANPR System is Neither Reliable nor Accurate**
- 6. The Signs Fail to Transparently Warn Drivers of what the ANPR Data will be used for**
- 7. The entrance signs are inadequately positioned and lit and signs in this car park are not prominent, clear or legible from all parking spaces and there is insufficient notice of the sum of the parking charge itself**
- 8. The parking tariff was paid**

**1. The NtK does not meet PoFA 2012 requirements – no Keeper Liability can apply.**

The operator is pursuing the appellant as the Registered Keeper of the vehicle. In this instance the NtK will need to comply with Schedule 4 section 9 of the PoFA 2012, that states: -

*9 (2) The notice must—*

- (f) warn the keeper that if, **after the period of 28 days beginning with the day after that on which the notice is given—***
- (i) the amount of the unpaid parking charges specified under paragraph (d) has not been paid in full, and*
- (ii) the creditor does not know both the name of the driver and a current address for service for the driver,*

*the creditor will (if all the applicable conditions under this Schedule are met) have the right to recover from the keeper so much of that amount as remains unpaid;*

The NtK sent to the keeper by the operator (see Appendix A) states: -

*“The charge must be paid **no later than 28 days from the date of issue** (by 16-Oct-20). If payment is delayed beyond 28 days, an administrative charge may be added and debt recovery or court action may be taken. Additional costs may also be incurred as a result of debt recovery or court action.”*

In this case the operator has clearly failed to meet the requirements of POFA as by informing the appellant it can seek to recover payment after 28 days, it has failed to meet section (2f) as this 28 day period will not begin until the day **after** the notice is given. As such, the operator has failed to comply with the mandatory requirements of the POFA, the conditions under this Schedule have not been met therefore the operator has no right to recover from the keeper.

In addition to the above, the operator has also failed to comply with section 9 (2) (e) of the Act, which states: -

9 (2) *The notice must—*

(e) *state that the creditor does not know both the name of the driver and a current address for service for the driver and invite the keeper—*

(i) *to pay the unpaid parking charges; or*

(ii) *if the keeper was not the driver of the vehicle, to notify the creditor of the name of the driver and a current address for service for the driver and to pass the notice on to the driver;*

The operator has failed to give the invitation to keeper in the correct format prescribed by section 9 (2) (e) of the Act. The fact that Carflow Ltd have failed to meet the requirements of the LAW, is more than sufficient for their claim to fail.

## **2. The operator has not shown that the individual who it is pursuing is in fact the driver who may have been potentially liable for the charge.**

In cases with a keeper appellant, yet no POFA 'keeper liability' to rely upon, POPLA must first consider whether they are confident that the Assessor knows who the driver is, based on the evidence received. No presumption can be made about liability whatsoever. A vehicle can be driven by any person (with the consent of the owner) as long as the driver is insured. There is no dispute that the driver was entitled to drive the car and I can confirm that they were, but I am exercising my right not to name that person.

In this case, no other party apart from an evidenced driver can be told to pay. I am the keeper throughout (as I am entitled to be), and as there has been no admission regarding

who was driving, and no evidence has been produced, it has been held by POPLA on numerous occasions that a parking charge cannot be enforced against a keeper without a valid NTK.

As the keeper of the vehicle, it is my right to choose not to name the driver, yet still not be lawfully held liable if an operator is not using or complying with Schedule 4. This applies regardless of when the first appeal was made and regardless of whether a purported 'NTK' was served or not, because the fact remains I am only appealing as the keeper and ONLY Schedule 4 of the POFA (or evidence of who was driving) can cause a keeper appellant to be deemed to be the liable party.

The burden of proof rests with the operator to show that (as an individual) I have personally not complied with terms in place on the land and show that I am personally liable for their parking charge. They cannot.

Furthermore, the vital matter of full compliance with the POFA was confirmed by parking law expert barrister, Henry Greenslade, the previous POPLA Lead Adjudicator, in 2015:

Understanding keeper liability

*"There appears to be continuing misunderstanding about Schedule 4. Provided certain conditions are strictly complied with, it provides for recovery of unpaid parking charges from the keeper of the vehicle.*

*There is no 'reasonable presumption' in law that the registered keeper of a vehicle is the driver. Operators should never suggest anything of the sort. Further, a failure by the recipient of a notice issued under Schedule 4 to name the driver, does not of itself mean that the recipient has accepted that they were the driver at the material time. Unlike, for example, a Notice of Intended Prosecution where details of the driver of a vehicle must be supplied when requested by the police, pursuant to Section 172 of the Road Traffic Act 1988, a keeper sent a Schedule 4 notice has no legal obligation to name the driver. [...] If {POFA 2012 Schedule 4 is} not complied with then keeper liability does not generally pass."*

Therefore, no lawful right exists to pursue unpaid parking charges from myself as keeper of the vehicle, where an operator cannot transfer the liability for the charge using the POFA.

This exact finding was made in 6061796103 against ParkingEye in September 2016, where POPLA Assessor Carly Law found:

*"I note the operator advises that it is not attempting to transfer the liability for the charge using the Protection of Freedoms Act 2012 and so in mind, the operator continues to hold the driver responsible. As such, I must first consider whether I am confident that I know who the driver is, based on the evidence received. After considering the evidence, I am unable to confirm that the appellant is in fact the driver. As such, I must allow the appeal on the basis that the operator has failed to demonstrate that the appellant is the driver and therefore liable for the charge. As I*

*am allowing the appeal on this basis, I do not need to consider the other grounds of appeal raised by the appellant. Accordingly, I must allow this appeal."*

### **3. No Evidence of Period Parked – NtK does not meet PoFA 2012 requirements.**

Contrary to the mandatory provisions of the BPA Code of Practice, there is no record to show that the vehicle was ***parked*** versus attempting to read the terms and conditions before deciding against parking/entering into a contract.

Furthermore, PoFA 2012 Schedule 4 paragraph 9 refers at numerous times to the “period of parking”. Most notably, paragraph 9(2)(a) requires the NtK to:

*“specify the vehicle, the relevant land on which it was parked and the **period of parking** to which the notice relates;”*

The operator’s NtK simply claims an entry time and exit time of a moving vehicle. At no stage do the operator explicitly specify the “**period of parking** to which the notice relates”, as required by PoFA 2012.

The NtK use capture images of vehicles entering and leaving the car park to calculate their length of stay”. It is not in the gift of the operator to substitute “entry/exit” or “length of stay” in place of the POFA requirement - “period of parking” - and hold the keeper liable as a result.

By virtue of the nature of an ANPR system recording only entry and exit times, the operator is not able to definitively state the ***period of parking***.

I require the operator to provide evidence to show the vehicle in question was ***parked*** on the date/time (for the duration claimed) and at the location stated in the NtK.

### **4. No Evidence of Landowner Authority - the operator is put to strict proof of full compliance with the BPA Code of Practice.**

As this operator does not have proprietary interest in the land then I require that they produce an unredacted copy of the contract with the landowner. The contract and any 'site agreement' or 'User Manual' setting out details including exemptions - such as any 'genuine customer' or 'genuine resident' exemptions or any site occupier's 'right of veto' charge cancellation rights - is key evidence to define what this operator is authorised to do and any circumstances where the landowner/firms on site in fact have a right to cancellation of a charge. It cannot be assumed, just because an agent is contracted to merely put some signs up and issue Parking Charge Notices, that the agent is also authorised to make contracts with all or any category of visiting drivers and/or to enforce the charge in court in their own name (legal action regarding land use disputes generally being a matter for a landowner only).

Witness statements are not sound evidence of the above, often being pre-signed, generic documents not even identifying the case in hand or even the site rules. A witness statement

might in some cases be accepted by POPLA but in this case I suggest it is unlikely to sufficiently evidence the definition of the services provided by each party to the agreement.

Nor would it define vital information such as charging days/times, any exemption clauses, grace periods (which I believe may be longer than the bare minimum times set out in the BPA Code of Practice) and basic information such as the land boundary and bays where enforcement applies/does not apply. Not forgetting evidence of the various restrictions which the landowner has authorised can give rise to a charge and of course, how much the landowner authorises this agent to charge (which cannot be assumed to be the sum in small print on a sign because template private parking terms and sums have been known not to match the actual landowner agreement).

Paragraph 7 of the BPA Code of Practice defines the mandatory requirements and I put this operator to strict proof of full compliance:

- 7.2 If the operator wishes to take legal action on any outstanding parking charges, they must ensure that they have the written authority of the landowner (or their appointed agent) prior to legal action being taken.
- 7.3 The written authorisation must also set out:
  - a. the definition of the land on which you may operate, so that the boundaries of the land can be clearly defined
  - b. any conditions or restrictions on parking control and enforcement operations, including any restrictions on hours of operation
  - c. any conditions or restrictions on the types of vehicles that may, or may not, be subject to parking control and enforcement
  - d. who has the responsibility for putting up and maintaining signs
  - e. the definition of the services provided by each party to the agreement.

#### **5. The ANPR System is Neither Reliable nor Accurate.**

The NtK shows no *parking* time, merely two images of a number plate corresponding with that of the vehicle in question. There is no connection demonstrated whatsoever with the car park in question.

The Notice to Keeper states:

*“On 08-Sep-20 at 10:20:33, vehicle xxxx entered Moorlands Shopping Centre, Pickwood Road, Leek. The vehicle was recorded leaving the car park on 08-Sep-20 at 11:00:16, for a total stay duration of 00:39:43.”*

These times do not equate to any single evidenced **period of parking**. By the operators own admission on their NtK, these times are claimed to be the entry and exit time of the vehicle. There is no evidence of a single **period of parking** and this cannot reasonably be assumed.

Since there is no evidence to actual parking times this would fail the requirements of POFA 2012, paragraph 9(2)(a), which states;

*“Specify the vehicle, the relevant land on which it was parked and the **period of parking** to which the notice relates.”*

Paragraph 21.3 of the BPA Code of Practice states that parking companies are required to ensure ANPR equipment is maintained and is in correct working order.

I require the operator to provide records with the location of the cameras used in this instance, together with dates and times of when the equipment was checked, calibrated, maintained and synchronised with the timer which stamps the photo images to ensure the accuracy of the ANPR images.

#### **6. The Signs Fail to Transparently Warn Drivers of what the ANPR Data will be used for.**

The signs fail to transparently warn drivers of what the ANPR data will be used for which breaches the BPA Code of Practice and the Consumer Protection from Unfair Trading Regulations 2008 due to inherent failure to indicate the 'commercial intent' of the cameras.

Paragraph 21.1 of the BPA Code of Practice advises operators that they may use ANPR camera technology to manage, control and enforce parking in private car parks, as long as they do this in a reasonable, consistent and transparent manner. The Code of Practice requires that car park signs must tell drivers that the operator is using this technology and what it will use the data captured by ANPR cameras for.

The operator signs do not comply with these requirements because these car park signage failed to accurately explain what the ANPR data would be used for, which is a 'failure to identify its commercial intent', contrary to the BPA CoP and Consumer law.

The operator's sign states:

*“Camera controlled – Automatic number plate recognition in use.”*

Specifically missing from this is the vital information that these camera images would be used in order to issue Parking Charge Notices. There is absolutely no suggestion in the above that the cameras are in any way related to Parking Charge Notices. The only reference to Parking Charge Notices on the operator's sign makes no mention of Parking Charge Notices being issued as a result of images captured by the ANPR cameras and instead merely states:

*“Tariff Parking – Charges apply – see notices for details.”*

In circumstances where the terms of a notice are not negotiable (as is the case with the car park signage, which is a take-it-or-leave-it contract) and where there is any ambiguity or

contradiction in those terms, the rule of contra proferentem shall apply against the party responsible for writing those terms.

This is confirmed within the Consumer Rights Act 2015 including: Paragraph 68:

Requirement for Transparency:

- (1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.
- (2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

and Paragraph 69:

Contract terms that may have different meanings:

- (1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.

Withholding material information from a consumer about the commercial (not security) purpose of the cameras would be considered an unfair term under The Consumer Protection from Unfair Trading Regulations 2008 because the operator '*fails to identify its commercial intent*':

<http://www.legislation.gov.uk/uksi/2008/1277/contents/made>

Misleading omissions: 6. - (1) "A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2) –

(a) **the commercial practice omits material information,**

(b) the commercial practice hides material information,

(c) **the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or**

(d) **the commercial practice fails to identify its commercial intent,** unless this is already apparent from the context, and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."

It is far from 'apparent' that a camera icon means a vehicles data is being harvested for commercial purposes of charging. A camera icon suggests CCTV is in operation for security within the car park.

**7. The entrance signs are inadequately positioned and lit and signs in this car park are not prominent, clear or legible from all parking spaces and there is insufficient notice of the sum of the parking charge itself.**

There was no contract nor agreement on the 'parking charge' at all. It is submitted that the driver did not have a fair opportunity to read about any terms involving this huge charge, which is out of all proportion and not saved by the dissimilar 'ParkingEye Ltd v Beavis' case.

In the Beavis case, which turned on specific facts relating only to the signs at that site and the unique interests and intentions of the landowners, the signs were unusually clear and not a typical example for this notorious industry. The Supreme Court were keen to point out the decision related to *that* car park and *those facts* only.

In the Beavis case, the £85 charge itself was in the largest font size with a contrasting colour background and the terms were legible, fairly concise and unambiguous. There were 'large lettering' signs at the entrance and all around the car park, according to the Judges.

This case, by comparison, does not demonstrate an example of the 'large lettering' and 'prominent signage' that impressed the Supreme Court Judges and swayed them into deciding that in the specific car park in the Beavis case alone, a contract and '*agreement on the charge*' existed.

Here, the main signs at the entrance to the entry onto the carpark (see Appendix B) are extremely difficult to see until you are already onto the ramp leading into the carpark, at which point it is too late to do anything other than continue up the ramp into the carpark. The sign on the left is impossible to read until you have already committed to entering the car park, and the sign on the right is not immediately prominent and dwarfed into insignificance by the large clear signs showing "Public Car Park" which immediately grab your attention. It is indisputable that placing these signs in the way they are placed can drastically reduce their effectiveness to warn motorists that this is a private paying car park. Carflow's main entry signs, the only signs available on entry into the carpark, also show no tariff fees or terms & conditions which must be read **before** the action of parking.

#### **8. The parking tariff was paid.**

The driver paid the correct tariff by inserting into the terminal 80p for 1 hour parking and the vehicle registration entered into the keypad. The driver had problems with the machine keypad not accepting the VRN but contends it was eventually accepted despite no ticket/receipt given from the machine. As the correct tariff and VRN had been entered, the driver believed they had fully complied with the parking requirements and any errors to be attributed to machine malfunction.

In the operator's rejection email, they state there was no issues with the machine. They go on to say that their terminals are the most user friendly and reliable in the market and have rarely had any complaints. Now this is not the response I received when asking on a local social media group regarding if anyone has had problems with the parking at this particular car park. There were many expressing their anger towards the parking system at this site, saying it takes many attempts to get the machine to register their stay, and others who now shop elsewhere as they refuse to use the unreliable parking machine at this site.

If Carflow contest that no parking fee was paid, I request a full time-stamped transaction log from the ticket machine showing all transactions either side of the entry time of the vehicle.