

IN THE COUNTY COURT

Between

Claim No.:

Civil Enforcement LIMITED

(Claimant)

- and -

(Defendant)

DEFENCE

1. The Defendant denies that the Claimant is entitled to relief in the sum claimed, or at all.

The points below are within the scope of the Defendant's own knowledge and honest belief. Whilst parts of this defence may be familiar to the Claimant and/or their legal representatives, it would not be right for a litigant-in-person to be criticised for using all relevant resources available. It is noted in any case, that these Claimants use third party pre-written templates as standard. This statement was prepared by the Defendant specifically for this matter and unlike the Claimant's case, it deals properly and individually with the facts, the alleged contract, and the quantum. The contents of this defence represent hours of research by the Defendant, in order to grasp some knowledge of alien concepts of law, codes of practice and procedures relating to the specific area of Parking Charge Notices ('private PCNs').

2. In relation to parking on private land, it is settled law that for any penalty to escape being struck out under the penalty rule, it must be set at a level which already includes recovery of the costs of operating the scheme. However, this Claimant routinely claims (as in this case) a global sum of £170 per alleged PCN. This figure is a penalty, far exceeding the charge in the *ParkingEye Ltd v Beavis* [2015] UKSC 67 case and falling foul of the binding authority in *ParkingEye Ltd v Somerfield Stores* [2012] EWCA Civ 1338. In the 2012 case, the Court of Appeal held that £135 would be an unrecoverable penalty but a claim for the PCN itself would not [*ref: para 419*]. Thereafter, ParkingEye quietly dropped their 'PCN plus indemnity costs' double recovery business model and pursued £85 in the Beavis case, where it was determined by the Supreme Court that a significant justification for that private PCN was that it already included all operational costs [*ref: paragraphs 98, 193 and 198*].

The Claim is tainted by an abuse of process and should not proceed to trial

3. It is an abuse of process for a Claimant to issue an inflated claim for a sum which it is not entitled to recover. The above authorities could not be clearer. Parking firms must choose between a ‘Beavis-level’ charge calculation or loss-based damages. A parking firm cannot seek to plead their claim in both but this Claimant routinely does - and has done in this case.

4. Where it is clear as a matter of law at the outset that even if a Claimant were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks, a trial of the facts would be a waste of time and money, and the Defendant submits that it is proper that this action should be taken out of court as soon as possible.

5. When considering the Claimant’s case to the extent that is necessary at allocation or local directions stage, the court is invited to determine as a matter of law that the Claimant is not entitled to the remedy sought. An exaggerated claim such as this will always constitute an abuse of process that can be determined by a glance at the Particulars (before any facts and evidence are even scrutinised) and by applying the court’s duty under s71 of the Consumer Rights Act 2015 (‘the CRA’) at the earliest opportunity. For the avoidance of doubt and to demonstrate that this claim is unfair from the outset, the official CMA Guidance on the CRA clarifies under ‘*Disproportionate financial sanctions*’ and ‘*Indemnities against risk*’

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf]

“Other kinds of penal provisions which may be unfair are clauses saying that the business can:

- claim all its costs and expenses, not just its net costs resulting directly from the breach;*
- claim both its costs and its loss of profit where this would lead to being compensated twice over for the same loss; and*
- claim its legal costs on an ‘indemnity’ basis, that is all costs, not just costs reasonably incurred. The words ‘indemnity’ and ‘indemnify’ are also objectionable as legal jargon – see the section on transparency in part 2 of the guidance...” (p87 - 5.14.3);*

“Terms under which the trader must be ‘indemnified’ for costs which could arise through no fault of the consumer are open to comparable objections, particularly

where the business could itself be at fault. The word ‘indemnify’ itself is legal jargon which, if understood at all by a consumer, is liable to be taken as a threat to pass on legal and other costs incurred without regard to reasonableness.” (p119 - 5.31.7).

6. The Claimant’s claim is entirely tainted by their ‘forum-shopping’ business model which relies on routine abuse of process and disregard for the protections in the CRA. The Defendant avers that parking firm claims which add a duplicitous ‘costs’ sum to the private PCN are easily identified to be unlawful from the outset, without any need for a hearing to determine where the truth lies in terms of evidence. The Court is, therefore, invited to strike out the claim *ab initio* as an abuse of process, using its case management powers pursuant to CPR 3.4 and also give serious consideration to Practice Direction 3C, as to whether the level of similar abusive (and thus, wholly without merit) claims cluttering up the courts may provide grounds for issuing an Extended Civil Restraint Order to protect consumers in future from this Claimant and to save the courts time and money.

7. The Claimant’s notices/demands vaguely allude to unidentified sums being claimed ‘*on an indemnity basis*’. Such imprecise terms would be considered incapable of binding any person reading them under common contract law, and would also be considered void pursuant to Schedule 2 of the CRA. Claims pleaded on this basis by multiple parking firms have routinely been struck out *ab initio* in various County Court areas. Recent examples include multiple Orders from District Judge Fay Wright sitting at Skipton County Court, with similar Orders seen in the public domain from Deputy District Judge Josephs sitting at Warwick County Court, District Judge Taylor at the Isle of Wight and Deputy District Judge Colquhoun sitting at Luton County court in March 2020. All were summarily struck out, solely due to parking firms falsely adding £60 to inflate the claim.

8. This matter was recently determined by District Judge Grand, sitting at Southampton County Court on 11 November 2019, where the Claimants sought to have multiple strike out Orders set aside. The application was dismissed, and a copy of the Approved Judgment is appended to this defence. No appeal was made in that case, where the learned Judge found that £160 parking claims represented an abuse of process that ‘tainted’ each case. It was not in the public interest for courts to allow exaggerated claims to proceed and merely disallow the added £60 at trial on a case-by-case basis. To continue to do so would restrict the proper protections only to those relatively few consumers robust enough to reach hearing stage.

9. That hearing was attended by BW Legal's barrister, acting for an AOS member of the British Parking Association ('the BPA') but in February 2020, Skipton County Court refused a similar application from a barrister for Excel Parking Services Ltd (members of the rival Trade Body, the International Parking Community - 'the IPC'). Whilst these cases are not precedents, it is only right that Defendants should use them and expect no less protection and proactive sanctions against parking firms whose claims happen to fall to other courts.

10. In this situation, it ought not to be left to hardy individuals to raise this issue time and again at trial, yet other disputing consumers are being so intimidated by the threats in a barrage of debt demands and the possibility of facing court, that they pay a legally unrecoverable sum to make it go away. Such conduct has no proper function in the recovery of alleged consumer debt. To use the words of HHJ Chambers QC [ref: *Harrison v Link Financial Ltd* [2011] EWHC B3 (Mercantile) - <https://www.bailii.org/ew/cases/EWHC/Mercantile/2011/B3.html>]:

"Whatever the strength of the suggestion that the courts should only be a last resort, there can be no excuse for conduct of which the sole purpose must have been to make [...] life so difficult that they would come to heel. In a society that is otherwise so sensitive of a consumer's position, this is surely conduct that should not be countenanced"

11. The quantum claimed is unconscionable and the falsely added sum not there at all (or was buried in small print) on the sparsely-placed car park signs. As such, the Defendant avers that the charge offends against Schedule 2 of the CRA, where s71(2) creates a duty on the Court to consider the fairness of a consumer contract. The court's attention is drawn (but not limited to) parts 6, 10, 14 and 18 of the list of terms that are likely to be unfair and the CMA Guidance linked earlier, and the Defendant invites the court to find this Claimant in breach.

12. Even if the Claimant had shown the global sum claimed in the largest font on clear and prominent signs - which is denied - they are attempting double recovery of costs. The sum also exceeds the maximum amount which can be recovered from a registered keeper as prescribed in Schedule 4, Section 4(5) of the Protection of Freedoms Act 2012 ('the POFA'). It is worth noting that in the Beavis case, even though the driver was known, the Supreme Court considered and referred more than once to the POFA because it was only right that the intentions of Parliament regarding private PCNs were considered.

The part played by the (non-regulatory) two conflicting Accredited Trade Associations

13. Should this claim continue, the Claimant will no doubt try to mislead the court by pointing to their Trade Association 'ATA' Code of Practice ('CoP') that

now includes a clause 'allowing' added costs/damages. The CoP is a self-serving document, written in the parking firms' interests. Further, the 'admin fee' model was reportedly the proud invention of a member of the BPA Board, Gary Osner, owner of ZZPS and whose previous firm, Roxburghe (UK) Limited, folded after being declared 'unfit' by the Office of Fair Trading who refused to renew their consumer credit licence due to 'unfair and misleading' business practices.

14. The BPA's Mr Osner states in an article in the public domain since 2018:

<https://parkmaven.com/news/gary-osner-zzps-interview> *"I created the model of 'admin fees' for debt recovery because ticket value was so low that nobody would make any money. Parking is business and business is about money, afterall."* The Defendant avers that it is clear that the competing 'race to the bottom' ATAs are sanctioning double recovery and both the BPA and the IPC/Gladstones (who had shared Directors) have engineered a veil of legitimacy to protect this industry for years. The ATAs operate more like a cartel, not 'regulators' and the conflicting CoPs have failed consumers so badly that the Secretary of State is overseeing a new regulatory Code, following the enactment of the *Parking (Code of Practice) Act 2019*.

In contrast to the BPA Board member's mindset, the will of Parliament as set out in the new 2019 Act is very much consumer-focussed, aiming for: *"good practice...in the operation or*

management of private parking facilities as appears to the Secretary of State to be desirable having regard to the interests of persons using such facilities."

Pre-action protocol breach and nonsensical Particulars of Claim

15. In the alternative, the defence is prejudiced and the court is invited to note that, contrary to the Pre-Action Protocol for Debt Claims, the Letter Before Claim omitted evidence of any breach and failed to append the wording of the sign or consumer notice. Further, the stylised Particulars of Claim are embarrassing and incoherent, lacking specificity re the status of the contracting parties and failing to detail any contract, conduct or liability that could give rise to a cause of action. There is insufficient detail to ascertain the nature, basis and facts of the claim and even the exaggerated quantum has fluctuated, changing with each debt demand and/or letter of claim over the preceding months.

The facts - lack of prominently displayed contract and no agreement on the charge

16. Should this poorly pleaded claim not be summarily struck out for any/all of the reasons stated above, it is the Defendant's position that no contract was entered into with the Claimant, whether express, implied, or by conduct.

Therefore, as a matter of contract as well as consumer law, the Defendant cannot be held liable to the Claimant for any charge or damages arising from any alleged breach of the purported terms. Whilst there is a lack of evidence from the Claimant, the Defendant sets out this defence as clearly as possible in the circumstances, insofar as the facts below are known.

17. The Defendant is not the only driver of this vehicle and the Particulars of Claim offer little to shed light on the alleged breach, which relates to an unremarkable date some time ago. It is not established thus far, whether there was a single parking event, or whether the vehicle was caught by predatory ticketing and/or by using unsynchronised timings and camera evidence to suggest a contravention. A compliant Notice to Keeper ('NTK') was not properly served in strict accordance with section 8 or 9 (as the case may be) of the POFA.

18. Having attended the supposed carpark upon receipt of this notice, I can confirm that signage is not apparent and given this alleged contravention was in the evening it is clear that signs can be easily missed.

The site has 4 different 'private' carparks within a very small vicinity, one of which being a council carpark. Without extremely clear signage it would be almost impossible to distinguish between Council and this, it is as though this is an intentional placement for manipulation.

19. The Claimant's signs have vague/hidden terms and a mix of small font, such that they would be considered incapable of binding any person reading them under common contract law, and would also be considered void pursuant to Schedule 2 of the CRA. Consequently, it is the Defendant's position that no contract to pay an onerous penalty was agreed by the driver.

The *ParkingEye Ltd v Beavis* [2015] UKSC 67 case is distinguished

20. Unlike in this case, ParkingEye demonstrated a commercial justification for their £85 private PCN, which included all operational costs, and they were able to overcome the real possibility of the charge being struck out as punitive and unrecoverable. However, their Lordships were very clear that 'the penalty rule is plainly engaged' in such cases. Their decision was specific to that 'unique' set of facts: the legitimate interest argued, the car park location, and the 'brief and clear' signs with the parking charge itself in bold and the largest text. The unintended consequence is that, rather than persuade courts considering other cases that all private PCNs are automatically justified, the *Beavis* case facts and pleadings (and in particular, the brief and prominent signs) set a high bar that this Claimant has failed to reach.

21. Due to the authority set by their earlier *Somerfield* case - mentioned at the start of this defence - it is worth noting that ParkingEye no longer add 'debt letter costs/damages' to their private PCNs and their own claims have escaped any reports of being summarily struck out for abuse of process. This Claimant has failed to plead their case or to set out their terms or construct their charges in the same way as in *Beavis* and the penalty rule remains firmly engaged.

22. Without the *Beavis* case to prop it up, and no alternative calculation of loss/damage, this claim must fail. Paraphrasing from the Supreme Court, deterrence is likely to be penal if there is a lack of an overriding legitimate interest in performance extending beyond the prospect of compensation flowing directly from the alleged breach. The intention cannot be to punish a motorist - nor to present them with concealed pitfalls, traps, hidden terms or unfair/unexpected obligations - and nor can the operator claim an unconscionable sum.

23. Further, in its conduct and signage, this Claimant has failed to comply with the CoP that they are signed up for, such as it is. Under the *Consumer Protection from Unfair Trading Regulations*, it is an unfair/misleading business practice to state that a Trader complies with a Code of Practice, but in reality, does not. This Claimant's conduct is also significantly different from the *Beavis* case [para 111.] where even the Supreme Court were wrongly convinced that the CoP was some sort of regulatory framework:

"And, while the Code of Practice is not a contractual document, it is in practice binding on the operator since its existence and observance is a condition of his ability to obtain details of the registered keeper from the DVLA. In assessing the fairness of a term, it cannot be right to ignore the regulatory framework which determines how and in what circumstances it may be enforced."

24. A more relevant list of binding Court of Appeal authorities which are on all fours with a case involving unclear terms and a lack of 'adequate notice' of an onerous parking charge, would include:

- (i) *Spurling v Bradshaw* [1956] 1 WLR 461 and
 - (ii) *Thornton v Shoe Lane Parking Ltd* [1970] EWCA Civ 2,
- both leading examples of the 'red hand' rule, that an unseen/hidden clause cannot be incorporated after a contract has been concluded; and
- (iii) *Vine v London Borough of Waltham Forest*: CA 5 Apr 2000, where the Court of Appeal held that it was unsurprising that the appellant did not see the sign "*in view of the absence of any notice on the wall opposite the southern parking space*". In other cases where parking firm Claimants and/or their legal teams have cited *Vine* in their template witness statements, they have misled courts by quoting out of context from Roch LJ, whose words related to the Respondent's

losing case, and not from the decision. In fact, Miss Vine won because it was held as a fact that she was not afforded a fair opportunity to learn of the terms by which she would be bound.

25. The Claimant is also put to strict proof, by means of contemporaneous and unredacted evidence of a chain of authority flowing from the Landowner or Lessor of the relevant land to the Claimant. It is not accepted that the Claimant has adhered to the landholder's definitions, exemptions, grace period, hours of operation, etc. and any instructions to cancel charges due to complaints. There is no evidence that the freeholder authorises this particular Claimant (Companies House lists their company number as 05645677) to issue private PCNs or what the land enforcement boundary and start/expiry dates are/were, and whether this Claimant has standing to enforce such charges by means of civil litigation in their own name rather than a bare licence to issue PCNs 'on behalf of' the landowner on an agency basis.

In the matter of costs; if this claim is not struck out, the Defendant seeks:

26. (a) standard witness costs for attendance at Court, pursuant to CPR 27.14, and (b) that any hearing is not vacated but continues as a costs hearing, in the event of a typical Notice of Discontinuance. The Defendant seeks a finding of unreasonable behaviour in the pre-and post-action phases, by this Claimant. Pursuant to CPR 46.5, whilst indemnity costs cannot exceed two thirds of the applicable rate if using legal representation, the Defendant notes that LiP costs are not necessarily capped at £19 ph. It is noted that a Defendant may ask in their Summary Costs Assessment for the court to award their usual hourly rate for the many hours spent on this case [*ref: Spencer & anor v Paul Jones Financial Services Ltd*].

27. In summary, the Claimant's Particulars disclose no legal basis for the sum claimed and the abuse of process taints this Claim. The Claimant knew, or should have known, that an exaggerated claim where the alleged 'debt' exceeds £100 (ATA Code of Practice ceiling for a private PCN) is disallowed under the CPRs, the Beavis case, the POFA and the CRA. The Defendant invites the court to find that this exaggerated claim is entirely without merit, and to bring an end to the case without a hearing.

Statement of Truth

I believe that the facts stated in this defence are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Defendant's signature:

Defendant's name:

Date:

Approved Judgment from Southampton Court is appended to show why claims such as this are being summarily struck out