

**POPLA Verification Code: XXX**

**Parking Charge Notice Number: XXX**

**Vehicle Registration: XXX**

**Operator: P4Parking (UK) Ltd**

I am appealing a PCN which was issued for an expired permit on display on XX/XX/2020. An appeal to the operator was submitted and acknowledged on XX/XX/2020 but subsequently rejected by a letter dated XX/XX/2020. Therefore, I am now elevating this appeal to POPLA on the following grounds:

- 1) No evidence of Landowner Authority - the operator is put to strict proof of full compliance with the BPA Code of Practice
- 2) Not a genuine contractual fee nor genuine pre-estimate of loss
- 3) The 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
- 4) 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

I consider any one of the above reasons as sufficient for you to uphold my appeal. I look forward to your positive response.

**Details:**

**1. 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 - such as any 'genuine customer' or 'genuine resident' exemptions or any site occupier's 'right of veto' charge cancellation rights, and of course all enforcement dates/times/days, and the boundary of the site - is key evidence to define what this operator is authorised to do, and when/where.

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 authorised on the material date, 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 CoP) and basic but crucial information such as the site boundary and any bays where enforcement applies/does not apply. Not forgetting evidence of the only restrictions which the landowner has authorised can give rise to a charge, as well as the date that the parking contract began, and when it runs to, or whether it runs in perpetuity, and of course, who the signatories are: name/job

title/employer company, and whether they are authorised by the landowner to sign a binding legal agreement.

Paragraph 7 of the BPA CoP 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

## **2. Not a genuine contractual fee nor genuine pre-estimate of loss**

The demand is a punitive amount that was not a contractually agreed parking tariff and bore no relationship to any loss. The Operator would have been in the same position had the parking charge notice not been issued. P4Parking notices allege 'breach of terms/failure to comply' and as such, the landowner/occupier (not their agent) can only pursue liquidated damages directly flowing from a parking event.

I require P4Parking to provide a detailed breakdown of their loss and on what basis this can be their loss at all, when the car was parked in an empty area in which there is no charge for parking with the correct permission. The Office of Fair Trading has stated to the BPA Ltd that "a parking charge is not automatically recoverable simply because it is stated to be a parking charge, as it cannot be used to state a loss where none exists".

Neither can the charge be 'commercially justified', if P4Parking attempt that argument. POPLA Assessor Chris Adamson stated in June 2014 that:

"In each case that I have seen from the higher courts...it is made clear that a charge cannot be commercially justified where the dominant purpose of the charge is to deter the other party from breach. This is most clearly stated in *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752, quoted approvingly at paragraph 15 in *Cine Bes Filmcilik Ve Yapimcilik & Anor v United International Pictures & Ors* [2003] EWHC Civ 1669 when Coleman J states a clause should not be struck down as a penalty, "if the increase could in the circumstances be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach".

This supports the principle that the aim of damages is to be compensatory, beginning with the idea that the aim is to put the parties in the position they would have been in had the contract been performed. It also seems that courts have been unwilling to allow clauses designed to deter breach as this undermines the binding nature of the initial promise made. Whilst the courts have reasonably moved away from a strict interpretation of what constitutes a genuine pre-estimate of loss, recognising that in complex commercial situations an accurate pre-estimate will not always be possible, nevertheless it remains that a charge for damages must be compensatory in nature rather than punitive."

The operator may attempt to make use of the Beavis case, yet they are well aware that the circumstances of the Beavis case were entirely different. Essentially, that case was about the abuse of a free, time-limited public car park where signage could be used to create a secondary contract arising from a relevant obligation and where there was a 'legitimate interest' flowing from the landowner, in charging more than could normally be pursued for trespass.

In this case, we have an authorised user accidentally using the car park incorrectly and there has been no loss nor detriment caused to the owner. While the courts might hold that a large charge might be appropriate in the case of a public car park, essentially as a deterrent, there is nothing in the case to suggest that a reasonable person would accept that this 'fine' is a conscionable amount to be charged under these circumstances.

At the Supreme Court in Beavis, it was held at 14: "...where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty..."

This is NOT a more complex case by any stretch of the imagination. At 32 in the Beavis decision, it was held that a trader, in this case a parking company: "...can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity."

Therefore, any putative contract needs to be assessed on its own merits. Consumer law always applies and no contract "falls outside" The Consumer Rights Act 2015; the fundamental question is always whether the terms are fair:

- Schedule 2: 'Consumer contract terms which may be regarded as unfair':

"A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations..."

"A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation."

This charge is clearly punitive and is not saved from breaching the 'penalty rule' (i.e. Lord Dunedin's four tests for a penalty) by the Beavis case, which does NOT supersede other defences. It turned on completely different facts and related only to that car park with its own unique complexity of commercial justification. This case is not comparable.

In this case the specific question is whether a reasonable person would agree to a term where parking in a place that they enjoy rights of way and easements and pay a significant rent for the privilege of peaceful enjoyment would also accept a further unknown/not agreed liability. I would suggest that a court would not accept this is reasonable and indeed appeal point 2 shows that a District Judge in a 2016 case supports my view.

### **3. The 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**

I note that within the Protection of Freedoms Act (POFA) 2012 it discusses the clarity that needs to be provided to make a motorist aware of the parking charge. Specifically, it requires that the driver is given 'adequate notice' of the charge. POFA 2012 defines 'adequate notice' as follows:

"(3) For the purposes of sub-paragraph (2) 'adequate notice' means notice given by: (a) the display of one or more notices in accordance with any applicable requirements prescribed in regulations under paragraph 12 for, or for purposes including, the purposes of sub-paragraph (2); or (b) where no such requirements apply, the display of one or more notices which: (i) specify the sum as the charge for unauthorised parking; and (ii) are adequate to bring the charge to the notice of drivers who park vehicles on the relevant land".

Even in circumstances where POFA 2012 does not apply, I believe this to be a reasonable standard to use when making my own assessment, as appellant, of the signage in place at the location. Having considered the signage in place at this particular site against the requirements of Section 18 of the BPA Code of Practice and POFA 2012, I am of the view that the signage at the site - given the minuscule font size of the £XXX, which is illegible in most photographs and does not appear at all at the entrance - is NOT sufficient to bring the parking charge (i.e. the sum itself) to the attention of the motorist.

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:

<http://imgur.com/a/AkMCN>

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.

Here is the 'Beavis case' sign as a comparison to the signs under dispute in this case:

[http://2.bp.blogspot.com/-eYdphoIIDgE/VpbCpfSTail/AAAAAAAAAE10/5uFjL528DgU/s640/Parking%2Bsign\\_001.jpg](http://2.bp.blogspot.com/-eYdphoIIDgE/VpbCpfSTail/AAAAAAAAAE10/5uFjL528DgU/s640/Parking%2Bsign_001.jpg)

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 signs are sporadically placed, indeed obscured and hidden in some areas. They are unremarkable, not immediately obvious as parking terms and the wording is mostly illegible, being crowded, miniscule and cluttered with a lack of white space as a background (indeed, the background colour has been chosen to be as dark as possible in order to obscure the details). It is indisputable that placing letters too close together and shrinking the font size in order to fit more information into a smaller space can drastically reduce the legibility of a sign, especially one which must be read BEFORE the action of parking and leaving the car.

It is vital to observe, since 'adequate notice of the parking charge' is mandatory under the POFA Schedule 4 and the BPA Code of Practice, these signs do not clearly mention the parking charge which is hidden in small print (and does not feature at all on some of the signs). Areas of this site are unsigned and there are no full terms displayed - i.e. with the sum of the parking charge itself in large lettering - at the entrance either, so it cannot be assumed that a driver drove past and could read a legible sign, nor parked near one.

This case is more similar to the signage in POPLA decision 5960956830 on 2.6.16, where the Assessor Rochelle Merritt found as fact that signs in a similar size font in a busy car park where other unrelated signs were far larger, was inadequate:

*"the signage is not of a good enough size to afford motorists the chance to read and understand the terms and conditions before deciding to remain in the car park. [...] In addition the operators signs would not be clearly visible from a parking space [...] The appellant has raised other grounds for appeal but I have not dealt with these as I have allowed the appeal."*

In this case, the terms are displayed inadequately, in letters no more than about half an inch high, approximately. I put the operator to strict proof as to the size of the wording on their signs and the size of lettering for the most onerous term, the parking charge itself.

The letters seem to be no larger than 25 font size going by this guide:

<http://www-archive.mozilla.org/newlayout/testcases/css/sec526pt2.htm>

As further evidence that this is inadequate notice, Letter Height Visibility is discussed here:

<http://www.signazon.com/help-center/sign-letter-height-visibility-chart.aspx>

*"When designing your sign, consider how you will be using it, as well as how far away the readers you want to impact will be. For example, if you are placing a sales advertisement inside your retail store, your text only needs to be visible to the people in the store. 1-2' letters (or smaller) would work just fine. However, if you are hanging banners and **want drivers on a nearby highway to be able to see them, design your letters at 3' or even larger.**"*

...and the same chart is reproduced here:

<http://www.ebay.co.uk/gds/Outdoor-Dimensional-Sign-Letter-Best-Viewing-Distance-/10000000175068392/g.html>

*"When designing an outdoor sign for your business keep in mind the readability of the letters. **Letters always look smaller when mounted high onto an outdoor wall**".*

*"...a guideline for selecting sign letters. Multiply the letter height by 10 and that is the best viewing distance in feet. Multiply the best viewing distance by 4 and that is the max viewing distance."*

So, a letter height of just half an inch, showing the terms and the 'charge' and placed high on a wall or pole, inside a hedge or buried in far too crowded small print, is woefully inadequate in an outdoor car park. Given that letters look smaller when hidden or viewed at a distance, you would have to stand right in front of it and still need a torch and/or magnifying glass to be able to read the terms.

Under Lord Denning's Red Hand Rule, the charge (being 'out of all proportion' with expectations of drivers in this car park and which is the most onerous of terms) should have been effectively: 'in red letters with a red hand pointing to it' - i.e. VERY clear and prominent with the terms in large lettering, as was found to be the case in the car park in 'Beavis'. A reasonable interpretation of the 'red hand rule' and the 'signage visibility distance' tables above and the BPA Code of Practice, taking all information into account, would require a parking charge and the terms to be displayed far more transparently, on a lower sign and in far larger lettering, with fewer words and more 'white space' as background contrast. Indeed in the Consumer Rights Act 2015 there is a '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.

The Beavis case signs not being similar to the signs in this appeal at all, I submit that the persuasive case law is in fact *'Vine v London Borough of Waltham Forest [2000] EWCA Civ 106'* about a driver not seeing the terms and consequently, she was NOT deemed bound by them.

This judgment is binding case law from the Court of Appeal and supports my argument, not the operator's case:

<http://www.bailii.org/ew/cases/EWCA/Civ/2000/106.html>

This was a victory for the motorist and found that, where terms on a sign are not seen and the area is not clearly marked/signed with prominent terms, the driver has not consented to - and cannot have 'breached' - an unknown contract because there is no contract capable of being established. The driver in that case (who had not seen any signs/lines) had NOT entered into a contract. The recorder made a clear finding of fact that the plaintiff, Miss Vine, did not see a sign because the area was not clearly marked as 'private land' and the signs were obscured/not adjacent to the car and could not have been seen and read from a driver's seat before parking.

I am of the view that the signage at the site - given the minuscule font size of the £XXX, which is illegible in most instances - is NOT sufficient to bring the parking charge (i.e. the sum itself) to the attention of the motorist.

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. It is vital to observe, since 'adequate notice of the parking charge' is

mandatory under the POFA Schedule 4 and the BPA Code of Practice, these signs do not clearly mention the parking charge which is hidden in small print (and does not feature at all on some of the signs). Areas of this site are unsigned and there are no full terms displayed - i.e. with the sum of the parking charge itself in large lettering, so it cannot be assumed that a driver drove past and could read a legible sign, nor parked near one.

So, for this appeal, I put this operator to strict proof of where the car was parked and (from photos taken in the same lighting conditions) how their signs appeared on that date, at that time, from the angle of the driver's perspective. Equally, I require this operator to show how the entrance signs appear from a driver's seat, not stock examples of 'the sign' in isolation/close-up. I submit that full terms simply cannot be read from a car before parking and mere 'stock examples' of close-ups of the (alleged) signage terms will not be sufficient to disprove this.

#### **4. 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 but the right not to name that person is being exercised.

In this case, no other party apart from an evidenced driver can be told to pay. 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.

It is the right of the legal keeper of the vehicle 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 that 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) who has personally not complied with terms in place on the land and show that that person is 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 the 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."*