

NPAS CIRCULAR

WORDING OF THE PENALTY CHARGE NOTICE (“PCN”)

This circular informs you about a recent decision, which has already attracted press coverage in the Manchester area and is potentially relevant to all DPE councils.

The case concerns the wording of the PCN form. Mr Macarthur argued that the Bury standard PCN failed to comply with section 66(3) of The Road Traffic Act 1991 in ways that were “significant, material and potentially prejudicial” so as to render it void and unenforceable. The appeal was allowed, both at first instance and again following a review under Regulation 11 of the Road Traffic (Parking Adjudicators) (England and Wales) Regulations 1999, although the original decision was varied in some respects.

The reviewing Adjudicator’s decision is attached in full. We recommend that you read it carefully, carry out a review of your own standard PCN and, if appropriate, pass both to your Legal Department for further consideration. We understand that Bury Council and its solicitors are still considering whether to apply to the High Court for a Judicial Review of all or part of the decision. We shall keep you up to date with any developments in that regard. In the meantime, we have summarised the key points emerging from the decision.

- Section 66(3) requires every PCN to convey certain specified information. The exact words of the sub-section are not mandatory but the PCN must accurately convey the information there set out.
- A PCN which follows the precise wording of section 66(3) or otherwise accurately conveys the specified information will not be criticised by the Adjudicator.
- However, councils may not play fast and loose with statutory requirements designed to inform the subject of his legal rights and obligations in relation to an authority possessed of penal powers; thus, a PCN which fails accurately to convey the information specified by section 66(3), although not necessarily void, may be vulnerable to challenge at a hearing before the Adjudicator.
- It must be established that any inaccuracy produces a real possibility of prejudice to the appellant; it need not be shown that actual prejudice was caused.
- Many councils have based their standard PCN’s on the model set out in the Department of Transport’s Guidance on Decriminalised Parking Enforcement Outside London (Local Authority Circular 1/95). This model itself differs from the statutory formula in the following respect.

The DoT model states:

“You are required to pay a penalty of... within 28 days”,

whereas section 66(3)(c) actually provides:

“A penalty charge notice must state... that the penalty charge must be paid before the end of the period of 28 days beginning with the date of the notice”.

There is a similar discrepancy in relation to the 14 day discount period.

The legal effect of the “within” formula is to exclude the date of issue of the PCN from the calculation of time and therefore to extend by one day the time for the recipient of the PCN to pay. Real prejudice cannot be said to arise from extending time for payment. Thus, a PCN based on the DoT model is unlikely to attract criticism from the Adjudicator.

- Councils which adopt forms which deviate both from the statutory requirements and the DoT model do so at their own risk.
- The Bury PCN, as well as adopting the (unobjectionable) “within” formula, failed to comply with section 66(3) in three further respects. These are as follows:
 1. The Bury PCN does not have a date. Although the date of the contravention is stated, the date of the notice itself appears only on the tear-off payment slip. Thus, it differs not only from the statute but also from the DoT model, which says “*Date of Issue*” at the top. The Adjudicator decided that to comply with section 66(3)(c) a PCN must have a date. The date of the contravention is not the date of the notice even if, in most cases, the PCN will be issued on the same day as the contravention. A real possibility of prejudice arises from potential uncertainty as to when the 28 day and 14 day periods for payment begin and end.

This finding will be of particular interest to those of you whose standard PCN’s state the date of the contravention on the face of the PCN but specify the date of the notice itself only on the tear-off payment slip.

2. The Bury PCN says:

“If we have not received your payment after 28 days from the date of this notice, we will send you a letter called the Notice to Owner, and you will have lost the chance to pay the reduced amount”.

This wording fails to acknowledge that the driver / user of the vehicle may not be the owner and is misleading as to whom the Notice to Owner will be sent. It does not convey accurately the statutory information and produces a real possibility of prejudice.

3. The Bury PCN refers to payment of “*a sum*” instead of “*a penalty*”. This discrepancy is both significant and potentially prejudicial; the PCN must make clear the penal nature of the obligation to pay.

For these three specific reasons the Adjudicator allowed the appeal.

Application for Review of Adjudicator's Decision

The Road Traffic (Parking Adjudicators) (England and Wales) Regulations 1999 Regulation 11

Mr Roger L. Macarthur

and

Bury Metropolitan Borough Council

Penalty Charge Notice (PCN) BC30016187

By a decision dated 16/2/05, made after a personal hearing, the adjudicator (Mr T.J. McNeill) allowed the appeal.

The Council made application under Regulation 11 for an adjudicator to review, and then to revoke or vary Mr McNeill's decision. The Chief Adjudicator considered the Council's letter dated 2/3/05 and, by letters dated 8/3/05, caused the parties to be advised of her decision to have the application for review listed for hearing. The Chief Adjudicator ruled that an adjudicator other than Mr McNeill should consider the Council's application and then decide whether the interests of justice required that the original decision be revoked or varied. The matter came before me on 4/4/05. Mr Parry appeared on behalf of the Council, and Mr Macarthur appeared in person.

There is no right of appeal from an adjudicator's decision under the Road Traffic Act 1991 (the Act) although an application under Regulation 11(1) may be made if one (or more) of the grounds set out in the Regulations applies. Even then, however, an application for review may be refused if there is no realistic prospect that, after review, the outcome would be any different.

It will be seen that the grounds for review are very restricted in scope. This is because the adjudication scheme set up by the 1991 Act was intended to provide a relatively cheap and expeditious appeal against a Council's refusal to accept a car owner's representations. An inherent part of the scheme is to ensure that the adjudicator's decision is final and conclusive, save in very exceptional cases. It is therefore clear, both from the narrow grounds set out in Regulation 11, and the general scheme of the Act, that reviews will be rare.

It is also clear that a party is not able to seek a review of a decision merely because that party believes the decision is wrong.

Mr Macarthur's lengthy grounds of appeal raised three substantive issues. The adjudicator found against Mr Macarthur in relation to two of the three, but found in his favour in relation to the third ground of appeal. The reason for the finding in favour of Mr Macarthur was that the PCN did not properly set out the information required by section 66 of the Act, and the Council's own amending Traffic Regulation Order (TRO) specifically provided that the PCN should show the information required by Section 66 of the Act. The adjudicator expressed the view that, in view of the Council's amending TRO, the Council were required to use the exact wording to be found in section 66(3)(c)&(d) of the Act, on their printed PCN.

The issue raised by the Council in their application for review is set out by them in the following terms:

“The applicant contends that the notice did contain the information required by section 66 Road Traffic Act 1991 and that the adjudicator's contrary decision was irrational and unsubstantiated by the written reasons issued by the adjudicator.

Section 66 Road Traffic Act 1991 requires certain information to be included on a penalty charge notice. The adjudicator formed the view, but gives no reason to support that finding, that the exact wording within section 66 must be used. It is the applicant's view that such an interpretation is wrong in law and unreasonable. It is the information that must be included and not the form of words.”

Mr Macarthur sought an adjournment of the hearing because, he said, the Council had not provided him with the documents that he said he needed in order to argue his points. Mr Macarthur wished to re-argue the two points that he had raised but which had not succeeded before the adjudicator. Mr Parry was also willing to deal with all matters on a *de novo* basis, should I decide that this was appropriate. Before considering the adjournment request, I resolved to first decide whether it was appropriate to review the adjudicator's decision and, if so, on what basis and to what extent.

An application for review should be made within 14 days after the date on which the decision was sent to the parties. Either party may make application, including the winner, if it is considered that the reasoning was so flawed that the interests of justice require a review. Mr Macarthur did not ask for a review and, having read the whole of the adjudicator's decision, I see no reason to re-visit that aspect of the adjudicator's decision that deals with the validity of Bury's Permitted Parking Area and Special Parking Area Order, made by the Secretary of State in 2002. Nor do I see any good reason to re-visit that aspect of the adjudicator's decision that deals with the validity of the TRO following difficulties encountered by Mr Macarthur in viewing it.

Regulation 11 provides, if a decision is reviewed on one or more of the 5 specified grounds, that the reviewing adjudicator may either revoke a decision, or *vary* it. The grant of a review, therefore, does not require an *ab initio* re-hearing.

I find that the interests of justice do require a review in relation to that aspect of the adjudicator's decision that relates to the wording of the PCN, the requirements of section 66 of the Act, the effect (if any) of the Council's own amending TRO, and the effect (if any) of any failure to comply with section 66. My reasons are that the adjudicator's decision, although full and cogent in other respects, appears to lack any explanation as to *why* the Council's amending TRO should be read so as to require the Council to use the *exact* wording of section 66 in its PCNs. This is not what the amending TRO says, and the wording of the amending TRO does not, on the face of it, create an obligation any stricter than the apparently mandatory words of section 66. The adjudicator also found as fact that Bury Council had followed the format of the specimen PCN to be found at ANNEX 12.1 of the Guidance on Decriminalised Parking Enforcement Outside London (see below) when, in fact, there are potentially significant differences. Finally, it is my respectful view that the adjudicator's decision fails to adequately deal with all the pertinent and material issues raised by Mr Macarthur in relation to the PCN wording.

The Council intimated that, if unresolved, they would initiate proceedings for judicial review in relation to this part of the adjudicator's decision. A review of this aspect of the case may, therefore, provide a more proportionate, speedy, and less costly alternative.

This application for review is, therefore, allowed in relation to the wording of the Bury PCN that was issued in this case.

This being the narrow scope of the review, Mr Macarthur did not further raise his request for an adjournment. I decided that I could immediately go on to consider the substantive arguments in relation to this aspect of the case on the basis of the oral and documentary evidence placed before me.

Section 66(3) of the Act provides that a penalty charge notice must state:

- (a)
- (b)
- (c) that the penalty charge must be paid before the end of the period of 28 days beginning with the date of the notice;
- (d) that if the penalty charge is paid before the end of the period of 14 days beginning with the date of the notice, the amount of the penalty charge will be reduced by one half;
- (e) that, if the penalty charge is not paid before the end of the 28 day period, a notice to owner may be served by the authority on the person appearing to them to be the owner of the vehicle;
- (f)

In 1995 The Department of Transport and The Welsh Office jointly issued: “Guidance on Decriminalised Parking Enforcement Outside London” (Local Authority Circular 1/95). At the beginning of the Guidance, an Explanatory Note explains that:

“Sections of this Guidance highlighted in ***bold italics*** refer to certain minimum or common standards with which the Secretary of State expects all local authorities enforcing decriminalised parking to comply. The remainder of the Guidance is intended to assist local authorities and encourage a similarity of approach, whilst at the same time allowing sufficient flexibility to cater for differing local circumstances”.

Chapter 12 of the Guidance deals with PCNs. Paragraph 12.1 concludes, in bold italics:

“A specimen PCN is at ANNEX 12.1, and all authorities introducing decriminalised parking enforcement should use PCNs modelled on this one”.

The Bury PCN differs from the specimen in the Guidance in the following pertinent respects:

- (a) The specimen PCN shows, at the top, a “Date of Issue”. The Bury PCN does not have any date shown specifically as the date of the notice, or the date of issue. The payment slip shows a “Date” and the body of the PCN itself shows the date of the alleged contravention, but the PCN itself does not separately show the date of the notice.
- (b) The specimen PCN shows the following wording intended to comply with section 66(3)(c) and (d): “You are required to pay a penalty of ... within 28 days. The charge will be reduced to ... if payment is received within 14 days”. The Bury PCN follows this wording, except that the phrase “a penalty of ...” is replaced with the words “the sum of ...”.
- (c) The specimen PCN shows the following wording intended to comply with section 66(3)(e): “If payment is not made within 28 days, the registered keeper or the person who the Borough believes to be the owner of the vehicle may receive a Notice to Owner asking for payment ...”. The Bury PCN says: “If we have not received your payment after 28 days from the date of this notice, we will send you a letter called a Notice to the Owner, and you will have lost the chance to pay the reduced amount ...”.

Mr Macarthur contended that these were significant, material and potentially prejudicial differences - such as to render the PCN completely void and unenforceable. He argued that section 66 was mandatory, that Bury enforce parking penalties with vigour (and rarely exercise their discretion sympathetically), and that motorists who parked in Bury would rely on the PCN as accurately complying with, and setting out, the law – when in fact it did neither. Mr Macarthur also contended that the phrase “within 28 days” had a different meaning from the words of section 66(c), although he accepted that the specimen PCN in the Guidance also used the “within 28 days” formula, rather than the wording of the statute.

Mr Parry submitted that the date of the PCN could be deduced from the face of the PCN, and stressed that the date shown as the date of contravention would, in every case, be the same as the date of the notice. He contended that Bury Council had followed the Guidance to a large degree (and should not be criticised where it had done so) but that departure from the

Guidance was permitted, and not fatal. The “within 28 days” wording either bore the same meaning as the statutory formula, or was more generous, and so no prejudice could possibly arise. Finally, Mr Parry argued that compliance with section 66(3)(e) had been achieved, notwithstanding the reference to “we will send *you* a letter called a Notice to the Owner...” (instead of, say, “we will send a notice to owner to the registered keeper or the person we believe to be the owner of the vehicle ...”) because reference to a “Notice to the Owner” made it plain that the Notice would be sent to the owner or registered keeper. Again, Mr Parry stressed his point that Mr Macarthur had not been prejudiced by any deviations from either the statutory wording or the specimen PCN in the Guidance, and any such deviations could not conceivably cause prejudice – as evidenced by statistics showing only a modest level of challenge to issued PCNs.

Having said that, Mr Parry accepted that the Council had resolved to pursue judicial review proceedings following receipt of Mr McNeill’s decision because the case raised issues of wider significance, beyond the narrow question of Mr Macarthur’s individual liability. Already, a number of similar appeals had been placed on ‘hold’, pending determination of the matter judicially. In the first instance, the Council sought clarity from an independent judicial decision-maker, and needed a ruling to inform the way in which parking in Bury might be enforced in future. Thus, although Mr Parry contended that Mr Macarthur had not suffered real prejudice, he accepted that the test to be applied should be whether there was a serious possibility of real prejudice. He also accepted that, in relation to the driver/user and owner distinction, there was no obligation on Mr Macarthur to say whether he was the driver when the PCN was issued.

I am not the first Parking Adjudicator to consider these matters, and I am mindful of the desirability of consistency. I am required to reach my own decisions whilst having regard to the previous decisions of colleagues both in England and Wales, and in London. Accordingly, I have reached a number of conclusions:

- Section 66(3)(c), (d) and (e) requires every PCN to convey certain specified information. The use of the words: “must state *that*” suggests that the exact words of the section are not mandatory, but the PCN must accurately convey the information set out in the sub-sections.
- The Council’s amending TRO, which refers to “a penalty charge notice showing the information required by section 66 ...” does not alter the nature of the Council’s obligation, and the exact wording of section 66 is not required.
- To comply with section 66(3)(c), a PCN must have a date. The date of the contravention is not the date of the notice even if, in most cases, the PCN will be issued on the same day as the contravention. I accept that, in Bury, there are no notices issued after the event. Nevertheless, the absence of a date of notice is a serious problem because a motorist will not always be sufficiently *au fait* with the Act to appreciate that as a matter of practice (but not as a matter of law) the date of the contravention will usually be the same as the date of the notice. It is perhaps worth remarking, by way of example, that in certain circumstances in London contraventions can be photographed and then subsequently followed up with a PCN issued on a

completely different date. In Bury, a motorist will search in vain for a “Date of Notice” or “Date of Issue” on the face of the PCN. A date is necessary because the 28 day period begins with “the date of the notice”. In my view, if Parliament had intended the date of contravention to be the starting point for the relevant periods, it would have said so. The specimen PCN in the Guidance specifically shows a “Date of Issue” at the top. The tear off slip is not part of the PCN and may be detached. The Bury PCN does not comply with section 66(3)(c), nor was it modelled on the Guidance. There is a serious possibility that real prejudice could be caused as a consequence of this omission - because of potential uncertainty as to when the 28 day period begins. The same reasoning applies to “the period of 14 days beginning with the date of the notice” referred to in section 66(3)(d).

- The phrases “within 28 days” and “within 14 days” convey different information from that specified in section 66(3). By legal convention, where the “within” formula is deployed, the day upon which the triggering event occurs is excluded from the period. The 14 and 28 day periods referred to in section 66, however, include the date of the notice. The wording of the Bury PCN, therefore, does not comply with the requirements imposed by section 66(3). The Guidance, however, also uses the “within” formula, and it is hard to see how real prejudice could arise by virtue of allowing an extra day for payment. Modelling a PCN on the specimen at ANNEX 12.1 of the Guidance is urged by the bold italics of Paragraph 12.1 of the Guidance. I therefore find that, in this respect, the wording of the Bury PCN does not warrant judicial criticism, and it is therefore without adverse legal consequence.
- Reference to a requirement to pay “the sum of ...” rather than “a penalty of ...” appears, superficially, to be of little materiality. But, upon reflection, I consider that a penal notice should be unequivocal and clear, not only about the quantitative nature of the sum of money required, but also about the *qualitative* nature of the sum. If the sum is a penalty as opposed to, say, a contractual obligation, or a statutory charge or levy, then it must say so – not least so that it is clear why and how the obligation has arisen. A person needs to know what sort of charge it is if they are to also know how to challenge it, and what will happen if they don’t pay it. I reject Mr Parry’s submission that the PCN envelope and “the wording of the PCN taken as a whole” adequately explains the nature of “the sum” referred to on Bury’s PCN and, for the reasons set out above, I consider that there is a serious possibility of prejudice. In this respect, Bury’s PCN is not modelled on the specimen PCN in the Guidance.
- The Bury PCN completely fails to accurately convey the information contained in section 66(3)(e) and is not modelled on the specimen PCN in the Guidance. The Bury PCN is, in fact, positively misleading as to whom the Notice to Owner will be sent. Drivers and users of motor vehicles are not always the owners. The nature of the relationship between a driver/user and owner may vary. Examples frequently seen at NPAS include employee and employer, child and parent, husband and wife, customer and car repairer, friend and friend - and so on. Very many drivers/users would rather that the owner did not know that a PCN has been incurred. Very many drivers/users write to NPAS asking that they be treated as the appellant. Very many drivers/users write to Councils after they have received a PCN, giving their address, and Councils respond and write back to them. Thus, the wording of the Bury PCN might lead a driver/user who has been in touch with the Council to think that the Notice to Owner will be sent to him or her (possibly to pass on to the owner) because this is what the

Bury PCN says will happen. Thus an owner may be kept in the dark by a driver/user who wishes to keep the owner out of the picture. It will therefore come as a shock to the driver/user, and indeed to the owner who has not been told about the PCN in time to pay the discounted amount, when the Notice to Owner is sent to the registered keeper. The statute requires that the fact that the Notice to Owner will be sent to the person who appears to be the owner should be spelled out on the PCN. It may or may not matter if the PCN refers to the registered keeper as opposed to the owner – and the specimen in the Guidance refers to both. But it is entirely unacceptable for the PCN to say “we will send *you* a letter called a Notice to the Owner”, and whoever drafted this part of Bury’s PCN manifestly failed to understand, and seriously misrepresented, the nature of the scheme. There is a serious possibility of real prejudice as a consequence.

- If Councils model their PCNs on the specimen in the Guidance, then criticism by Parking Adjudicators is unlikely to arise - although apparent differences in the wording thereof, and the requirements of the statute, might properly be drawn to the attention of ministers by the Chief Adjudicator, so that amendments can be made in any revised guidance. This, of course, would not prevent Councils adopting a policy of extending the deadline, as a matter of practice, beyond the statutory period. But if Councils fail to comply with the requirements of the statute *and*, additionally, deviate from the model contained in the Guidance then, in my judgment, they do so at their own risk, especially if there is a serious possibility of real prejudice resulting – which I conclude there is here.
- I find that there has not been “substantial compliance” with the legal requirements, and I agree with the proposition that, in this field where Councils are often quick to insist that motorists comply with the letter of the law, Councils are not entitled to play fast and loose with statutory requirements designed to inform the subject as to his legal rights and obligations in relation to an authority possessed of penal powers.
- I consider that the body of jurisprudence helpfully referred to by the adjudicator in the case of London Borough of Wandsworth v Al’s Bar & Restaurant Ltd (London case reference 2020106430) leads to the conclusion that non-compliant PCNs are not necessarily void. In London & Clydesdale Estates Ltd v Aberdeen DC (1980) 1 WLR 182, Lord Hailsham held that a defective document “was effective until it was struck down by a competent authority”. And Lord Fraser of Tullybelton said: “I have no doubt that the effect of the omission in the case was to make the certificate invalid in the sense that it cannot stand if challenged by the appellants. It is not a complete nullity”. This approach commends itself to me. On the facts, I find that the totality of deviation from the statute and the Guidance renders the Bury PCN vulnerable to challenge.
- It would clearly be most unattractive if owners had to say in their representations, and their grounds of appeal, *how or to what extent* they had actually been prejudiced by the defects in the Bury PCN, and I think it would be virtually impossible to devise a workable test for Council caseworkers and Parking Adjudicators to apply. It follows that, in my view, it cannot be necessary for an individual owner to prove actual prejudice before he or she can mount a successful challenge to a Bury PCN. It is enough if the defects in the PCN are capable of causing a serious possibility of real prejudice, which I find they are, and a person challenges the PCN on these grounds within the time limits and other requirements of the statutory framework. This what

Mr Macarthur did.

Mr Macarthur's appeal is allowed. I direct the Council to cancel the PCN and the Notice to Owner.

I order that the decision of Mr McNeill, dated 16/2/05, be varied by deleting all of the decision starting from, and including, the words "Section 66(3)(c) of the Act states ...", to be found on page 3 of the decision, up to the end, and by replacing the deleted part with the wording of this decision, starting from, and including, the words "Section 66(3) of the Act provides that a penalty charge notice must state ..." to be found on page 3 of this decision, up to the end.

Mark Hinchliffe

Parking Adjudicator appointed under Section 73 of the Road Traffic Act 1991

Date: 4/4/05