



ADJUDICATOR DECISION:

5 **Mr Damian Curzon – v – Halton Borough Council**

Case: XM01672-1807

Adjudicator: M.F. Kennedy

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Summary

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Mr Curzon's appeals are allowed on the ground that there was procedural impropriety on the part of Halton Borough Council, which is the charging authority, and he is not liable to pay the penalty demanded by either PCN.

35 I find that:

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1. The scheme is a road user charging scheme, not a tolling scheme;
2. Use of the word 'toll' on the penalty charge notice was a procedural impropriety;
3. The *A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018* is capable of having effect, providing that no tolls are actually charged under the provisions of the *Mersey Gateway Bridge Byelaws 2016*;

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4. Mr Curzon's submission that the *A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018* does not have a 'sunset clause' (that the Order remain in force indefinitely or until a specified time) is dismissed, because there is provision in the Order that it continue indefinitely.

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5. The signage is authorised for a tolling scheme. It is not authorised for use to convey the liability to pay a road user charge for using the bridge and scheme roads;

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6. Halton Borough Council failed to consider Mr Curzon's representations, which amounts to a procedural impropriety. Halton Borough Council cannot rely upon having delegated the consideration of representations, and the exercise of discretion, to their agent Emovis Operations Mersey Limited;

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7. Because Halton Borough Council did not consider the representations, it follows that they did not respond to Mr Curzon within 56 days (or at all), and so those representations are deemed to have been accepted by Halton Borough Council.

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Introduction

This case concerns local government law and the civil enforcement of penalties.

70 The parties to this case are Mr Curzon, the Appellant, and Halton Borough Council ("the Council" or "HBC"). There are other organisations involved, although not party to the case, including Emovis Operations Mersey Limited ("Emovis") (formerly Sanef) and Mersey Gateway Crossings Board Limited ("MGCBL"), who jointly use the brand name "Merseyflow" (which I do not believe to be an entity in itself).

75 There are two bridges across the River Mersey: The Silver Jubilee Bridge is the older of the two, and the Mersey Gateway Bridge has been constructed most recently. After a public consultation, the Council decided to charge a sum of money for crossing either bridge.

80 After making a Road User Charging Scheme Order in 2017 to apply to both bridges, that order was replaced by the *A533 (Mersey Gateway Bridge) and the A577 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018* ("the 2018 Order") also applying to both bridges, which imposes specified charges on different classes of vehicles using either bridge.

85 The 2018 Order, like the earlier ones, was made by the Council, who are the charging authority within the meaning of Section 163(5) of the *Transport Act 2000* ("TA 2000").

90 With respect to the Mersey Gateway Bridge, the Council have also made *Mersey Gateway Bridge Byelaws 2016* ("the 2016 Byelaws"). Amongst various provisions, these create a liability for a toll to be paid for vehicles using the bridge, and require signs to be placed setting out the amount of tolls to be paid.

95 Neither party requested a hearing of this case and it is decided upon the detailed evidence and argument submitted to the Tribunal by both parties through the Tribunal's online portal. Reference is made to 'Tabs', which reflect numbered items of evidence within the online portal case management system.

100 I have had regard to the Decision of Adjudicator Solomons, dated 17 May 2018, and that of Adjudicator Nicholls, dated 8 July 2014. Mr Solomons found against HBC in his Decision, on several but not all points raised, which was itself a review of the Decision of another adjudicator made at the request of the Council. The Decision of Mr Solomons was not Judicially Reviewed by the Council. Adjudicators' Decisions are not binding upon other Adjudicators and, as a general principle, should be followed unless there are material reasons not to do so.

Basis of appeals

110 The Council seek to enforce a penalty for the non-payment of two tolls, having issued a Penalty Charge Notice ("PCN") under the *Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013* ("the 2013 Regulations").

115 Both PCNs were issued on 15 June 2018 in respect of two crossings made on the same day, 7 June 2018, southbound at 17:52, and northbound at 17:59. There is no dispute that the crossings were made, and that Mr Curzon is the owner of the vehicle concerned. He explained in his representations that he was the driver, but not why he crossed the bridge and immediately returned again. He said he knew he should pay a toll for crossing the bridge, but there are no facilities to pay. He did not subsequently pay for crossing the bridge, either by telephone, online or at 'Payzone' facility elsewhere, by midnight of
120 the following day, 8 June 2018.

The PCNs state that Mr Curzon failed to pay the 'toll' each time he used the bridge.

125 Regulation 4 of the 2013 Regulations provides:

4.—(1) A charging scheme may provide that a penalty charge is to be imposed in respect of a motor vehicle where—

130 *(a) the motor vehicle has been used or kept on a designated road;*

(b) events have occurred by reference to the happening of which a road user charge is imposed by the charging scheme; and

135 *(c) the road user charge has not been paid in full within the time and in the manner in which it is required by the charging scheme to be paid.*

The PCNs indicate that they were sent jointly from 'Merseyflow' and Halton Borough Council, under the provisions of the 2018 Order and the 2013 Regulations, and
140 immediately under the heading cited:

The A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018 ("the Order") and the Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013 (as amended) (the "Regulations").
145

The PCN further stated:

150 *Halton Borough Council ("We") as Charging Authority serves this Penalty Charge Notice on you as the registered keeper of, person identified as using or keeping or otherwise liable for the following motor vehicle:-*

155 *On the following grounds: due to the use or keeping of the above motor vehicle on the designated road to which the Order applies at the time and location stated below, without payment of the required toll in the time and manner specified under the Order and the Regulations-*

160 The recipient of a PCN may make representations to the charging authority on the specified grounds as set out in Regulation 8(3) of the 2013 Regulations:

(3) *The grounds are that—*

165 (a) *in relation to a motor vehicle that is registered under the Vehicle Excise and Registration Act 1994(9) the recipient—*

 (i) *never was the registered keeper of the motor vehicle in question;*

170 (ii) *had ceased to be the registered keeper before the time at which the motor vehicle was used or kept on the designated road and incurred the road user charge under the charging scheme; or*

 (iii) *became the registered keeper after that time.*

175 (b) *at the time it incurred the road user charge under the charging scheme the motor vehicle was being used or kept on the designated road by a person who was in control of the motor vehicle without the consent of the recipient;*

180 (c) *the recipient is a vehicle-hire firm (as defined in regulation 6(7)(c)) and liability for payment of the penalty charge had been transferred to the hirer of the motor vehicle in accordance with regulation 6(5);*

185 (d) *the road user charge payable for the use or keeping of the vehicle on the occasion in question was paid at the time and in the manner required by the charging scheme;*

 (e) *no road user charge or penalty charge is payable under the charging scheme;*

190 (f) *the penalty charge exceeded the amount applicable in the circumstances of the case; or*

195 (g) *there has been a procedural impropriety on the part of the charging authority.*

(4) *In these Regulations “procedural impropriety” means a failure by the charging authority to observe any requirement imposed on it by the Transport Act 2000 or by these Regulations in relation to the imposition or recovery of a penalty charge or other sum and includes in particular—*

 (a) *the taking of any step, whether or not involving the service of any notice or document, otherwise than—*

205 (i) *in accordance with the conditions subject to which; or*

 (ii) *at the time or during the period when,*

it is authorised or required by these Regulations to be taken; and

210 (b) *in a case where a charging authority is seeking to recover an unpaid penalty charge, the purported service of a charge certificate under regulation 17(1) of these Regulations before the charging authority is authorised to serve it.*

215

In addition, Regulation 8(9) imposes a duty upon the charging authority, the Council in this case, whereby:

220 (9) *It is the duty of a charging authority to whom representations are duly made under this regulation—*

(a) to consider them and any supporting evidence which the person making them provides; and

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(b) within the period of 56 days beginning with the date on which the representations were served on it, to serve on that person notice of its decision as to whether or not it accepts—

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(i) that one or more of the grounds in paragraph (3) has been established; or

235

(ii) that there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled.

Mr Curzon appeals against the enforcement of these two penalty charges on several principal grounds. He asserts that, in very brief summary:

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1. *the charging order is invalid because it may not coexist with pre-existing byelaws;*

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- *(grounds 8(1)(e) and (g) of the 2013 Regulations: no penalty charge is payable under the charging scheme and or procedural impropriety)*

2. *the signage is inadequate and, in particular, fails to reflect the scheme in place;*

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- *(also grounds 8(1)(e) and or (g) of the 2013 Regulations)*

3. *the Council unlawfully abdicated their duty to consider his representations by delegating to a third party.*

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- *(ground 8(1)(g) of the 2013 Regulations: procedural impropriety)*

The Charging Order(s) and the Byelaws

Toll or Road User Charge?

260 This is a contested and vexed question.

As explained by Mr Solomons, the legal basis for road user charges and the enforcement process is established by the *Transport Act 2000* ("TA 2000"), as amended by the *Local Transport Act 2008* ("LTA 2008").

265 The relevant sections of the TA 2000 appear in Part III, Chapter I, at sections 163 to 177. They include details of who may make a charging scheme, what it may and must contain, the powers of national authorities and local authorities and the power of the Lord Chancellor to make regulations about the notification, adjudication and enforcement of charging scheme penalty charges.

270 The 2013 Regulations were made under the TA 2000 and set out, inter alia, the detail of how road user charging may be enforced. Regulation 4 allows a penalty charge to be imposed in specific circumstances, including where:

275 *"the road user charge has not been paid in full within the time and in the manner in which it is required by the charging scheme to be paid."*

280 The 2018 Order (which corrected a number of matters in the 2017 Order, presumably in part following Mr Solomons' Decision) allows the Council to claim both the unpaid crossing charge (Article 12(3)(a)) in addition to a penalty charge (Article 12(1)).

Article 21 of the 2016 Byelaws, meanwhile, states:

285 *A person driving a vehicle into the bridge area in compliance with byelaw 10 is liable to pay a toll/charge before it finishes its passage through the bridge area at a level displayed at all entry points into the bridge area.*

290 According to Article 32 of the 2016 Byelaws, a criminal liability arises if the toll is not paid:

295 *Any person who shall contravene or fail to comply with a provision of these byelaws shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale.*

Article 33 also provides:

300 *The Council wherever applicable in monitoring infringements of these byelaws and in the prosecution of offenders shall be entitled to rely where appropriate:*

a. On the evidence of a device adapted for measuring by radar, laser or automatic number plate recognition or any other means the speed of vehicles as shall be approved by the Secretary of state; and

305 *b. To make admissible recorded images from the flow of traffic in the bridge area.*

310 The 2016 Byelaws therefore create a liability to pay a toll (or charge), and a means of proving an offence upon failure to pay, including by way of technical evidence, before the Magistrates' Court, which may result in a fine. The 2013 Regulations, in contrast, provide a means of civil enforcement and penalty charge.

The language used on signs on and around the bridges refers to 'tolls', as does the PCN and other documentation.

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The penalty charge is claimed for the express reason that the road was used '*without payment of the required toll...*'.

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The Council say that the word 'toll' is used for clarity: motorists are more likely to recognise a requirement to pay if they see the word toll, rather than 'road user charge' or simply 'charge'. They say:

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The use of the word "toll" (and its various forms) has been adopted for the Mersey Gateway because it is a term widely understood by the general public to mean that a sum of money is to be paid for the crossing of a short section of highway...

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Use of the word "toll" is not determinative as to the power or scheme under which the monetary sum due is levied or demanded. In the case of Mersey Gateway the "toll" is a charge made pursuant to the Scheme Order 2018.

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Tolls and road user charges are different in law, although defining that difference is not straightforward. There is no definition of the word 'toll' in either the *Transport and Works Act 1992* ("TWA 1992") or the TA 2000. 'Road user charge' is, however, defined in Regulation 2 of the 2013 Regulations:

"road user charge" means a charge imposed under a charging scheme which is not a penalty charge;

340

There is no suggestion that a road user charge may also be referred to as a 'toll'.

345

There are several distinctions between charges and tolls, not least that where a toll is unpaid it is the driver of the vehicle who is potentially criminally liable and subject to a fine. An unpaid road user charge, however, leads primarily to the civil liability of the owner of the vehicle, even if that person was not driving.

350

Another difference is the purposes for which application of the money collected by each sort of payment may be used. It is not necessary for this appeal to give a detailed analysis of the underlying legislation but, in essence, tolls go towards repayment of the cost of the bridge or new road construction, whereas road user charges may be used for other purposes, such as clean air initiatives. Because the Mersey Gateway Bridge is new, a toll scheme would be permitted for putting revenue towards the cost of the bridge, but because the Silver Jubilee Bridge was not new, and the costs (presumably) already paid, a toll scheme was not appropriate. In the event, it appears that the Council decided to use a single road user charging scheme for both bridges together, which was sensible and theoretically more understandable than two different schemes.

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To the motorist, the principal feature of a toll is the requirement to pay at the time of use, generally by a barrier and toll booth type arrangement. Examples include the Severn Bridge, where the toll plaza is three miles from the Wales end of the bridge.

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Payment of an online charge was, I believe, first introduced for the London Congestion Charge Scheme, and the Dartford Crossing changed from being a toll scheme with toll booths, to an online road user charge scheme. There is a small road user charge scheme requiring online payment (or payment by phone) for the historic area of Durham; and again, the payment booth was removed once introduced.

Another practical distinction between a toll and a road user charge is the method by which payment is made: tolls are generally, but not always, paid contemporaneously at toll booths or toll plazas, whereas a road user charge is to be paid in advance or – in the schemes introduced so far – by midnight the following day, by telephone or online payment.

That tolls and road user charges are different is also exemplified by their distinction in legislation, including the TA 2000:

Section 172(3) of TA2000:

(3) A road shall not be subject to charges imposed by more than one charging scheme under this Part, or by such a charging scheme and a scheme under Schedule 23 to the Greater London Authority Act 1999, at the same time.

Section 172(4) states:

(4) A road shall not be subject to charges under a charging scheme under this Part if tolls are charged in respect of the use of the road.

There would be no purpose to Section 172(4), for example, if tolls and charges were merely interchangeable synonyms.

In broad terms, it might be said that the general intention of both the words 'toll' and 'road user charge' is that the user of the bridge should pay to cross it. Indeed, the common meaning of a 'toll' is 'a charge payable to use a bridge or road' [Oxford Online Dictionary]. Some motorists may be entirely indifferent to what the payment is called.

Equally, however, not only are tolls and road user charges different in law, but the consequences of not paying one or the other are different.

Use of the word 'toll', convenient or not, is not an accurate description of the sum payable for use of the bridges. Payment at a toll booth, or similar, was not possible, and non-payment gave rise to a civil liability to the owner not a criminal one by the driver.

I find it significant that the Council made two consecutive charging orders and, indeed, continue to assert that their scheme is a road user charging scheme. This is further supported by the letter from the Department for Transport (DfT) to the Council's solicitors, dated 18 August 2016, in response to the Council's application to amend the then *The River Mersey (Mersey Gateway Bridge) Order 2011* ("the 2011 Order") into a Road User Charging Scheme Order.

The balance of the evidence demonstrates a clear intention, at least by the time the scheme commenced, for it to be a road user charging scheme, and not a tolling scheme.

I find that the sum demanded is a road user charge, not a toll.

The evidence also leads me to conclude, however, that the scheme as originally envisioned, and as presented to the DfT for signage authorisation, was intended to be a tolling scheme. I will return to this point when discussing the signage.

I proceed, then, on the basis that the PCNs were issued to Mr Curzon under the 2018 Order and the 2013 Regulations, as stated on the face of the PCNs.

Penalty Charge Notice (PCN)

425 It follows that the use of the word 'toll' on the PCNs issued to Mr Curzon did not reflect accurately or at all what was alleged.

Section 173 of the TA 2000:

430 *The appropriate national authority may by regulations make provision for or in connection with the imposition and payment of charges ("charging scheme penalty charges") in respect of acts, omissions, events or circumstances relating to or connected with charging schemes under this Part.*

435 The penalty payable is expressly described by section 173(1) as a '*charging scheme penalty charge*'.

The 2013 Regulations, made in accordance with s. 173(1), state in Regulation 2:

440 *"penalty charge" means a charging scheme penalty charge*

"road user charge" means a charge imposed under a charging scheme which is not a penalty charge

445 Regulation 4 provides:

Imposition of penalty charge

450 *4.—(1) A charging scheme may provide that a penalty charge is to be imposed in respect of a motor vehicle where—*

(a) the motor vehicle has been used or kept on a designated road;

455 *(b) events have occurred by reference to the happening of which a road user charge is imposed by the charging scheme; and*

(c) the road user charge has not been paid in full within the time and in the manner in which it is required by the charging scheme to be paid.

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Regulation 7 states:

Penalty charge notice

465 *7.—(1) Where a road user charge with respect to a motor vehicle under a charging scheme has not been paid by the time by which it is required by the charging scheme to be paid and, in those circumstances, the charging scheme provides for the payment of a penalty charge, the charging authority may serve a notice (a "penalty charge notice").*

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...

(3) A penalty charge notice must state—

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...

(d) the date and time at which the charging authority claims that the motor vehicle was used or kept on the designated road in circumstances in which, by virtue of a charging scheme, a road user charge was payable in respect of the motor vehicle;

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...

485 The TA 2000 and the 2013 Regulations make clear that the sum payable for the use of the bridge was a road user charge. The Council's argument that use of the word 'toll' is synonymous, and that motorists understand it better, is not sustainable in view of the important differences between tolls and road user charges, and the express use of the phrase 'road user charge' in the TA 2000 and the 2013 Regulations.

490 It follows that the PCN should have stated that the penalty arose as a result of 'not paying the road user charge'. A PCN must state the grounds on which the charging authority believes that the penalty charge is payable, with respect to the motor vehicle; namely that the road user charge, with respect to a motor vehicle, under a charging scheme has not been paid. Therefore, the PCNs issued did not comply with Regulation 7 of the 2013 Regulations.

495 That non-compliance amounts to a procedural impropriety on the part of the charging authority, and on that ground I must allow these appeals.

Coexistence of road user charges and tolls

500 Mr Curzon asserts that the 2017 Order and 2018 Order are void ab initio because of the prior existence of the 2016 Byelaws, and he relies in particular upon s. 172(4) of the TA 2000:

505 *(4) A road shall not be subject to charges under a charging scheme under this Part if tolls are charged in respect of the use of the road.*

510 I may not, as a matter of law, find that the 2017 or 2018 Orders are void because there is no ground of appeal that would enable me to do that (unlike, for example, the provisions made in the *Traffic Management Act 2004* ["TMA 2004"], whereby a Traffic Regulation Order may be found to be invalid). I may find procedural impropriety, however, where there has been a failure by the Council under the 2013 Regulations, as amended, or the TA 2000, or I may find that no charge is payable under the scheme.

515 The Council say they do not 'charge' tolls under the 2016 Byelaws, arguing that, whilst the provision exists in the 2016 Byelaws whereby they could charge tolls, as a matter of fact they do not charge them. They argue, then, that Section 172(4) does not apply and that the road user charging scheme is not thereby compromised or invalidated.

520 The confusion is of the Council's own making, and unnecessarily so, but I agree with them, on balance, that the prohibition applies where a toll is 'charged'. That there is a liability to pay a toll as a result of the Byelaw is not the same as one being charged.

525 While it may not have been the intention of Parliament, the wording of ss. 172 (3) and (4), leads me to conclude that different charging schemes may co-exist providing that only one payment is demanded.

530 Although it would not be for an Adjudicator to allow an appeal on the basis of invalidity, nonetheless I find that the existence of the tolling provisions in the 2016 Byelaws does not necessarily render the 2018 Order invalid.

Arguably, it would be a simple matter for the Council to remove Article 21 from the Byelaws which, in any event, apply only to the new Mersey Gateway Bridge, not the Silver Jubilee Bridge.

Monitoring and review clauses (sunset clause)

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Mr Curzon says that the Scheme Order does not contain a clause as required by section 171(1)(e) of the TA 2000:

A charging scheme under this Part must -

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(e) state whether or not the charging scheme is to remain in force indefinitely and, if it is not to remain in force indefinitely, the period for which it is to remain in force.

Article 4 of the 2018 Scheme Order, however, states:

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4. This Order shall remain in force indefinitely.

Article 4 of the 2017 Scheme Order provided similarly.

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I therefore reject this aspect of Mr Curzon's appeal. In any event, as previously stated, had the sunset clause been missing it would not have been a matter for this Tribunal.

Signage

Authorisation

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I have found that the scheme in place is a road user charging scheme, not a tolling scheme.

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The signs in place, however, refer to 'tolls'.

It appears that the signage was authorised by the DfT, although it is also clear, see Tab 42, that the signs were authorised for use with a tolling scheme.

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Although the Council minimise its importance, it was the 2016 Byelaws which accompanied the application for authorisation (see Appendix A of the Report on Mersey Gateway Bridge Project – North Approach Toll Signs Package 1) of 7 July 2017.

570

Although the section in the accompanying document sent to the DfT discussing the 2016 Byelaws does not appear to have been included in the evidence bundle, its contents page included clear reference to it, including what appeared to have been a discussion as well as a copy of the Byelaws in the Appendix.

575

Throughout the application and the draft signage, there is reference to 'tolls' and 'bridge tolls ahead'. There is also reference to a method of online payment, at 'merseyflow.co.uk'. The DfT subsequently authorised the signs, with some modifications.

The DfT subsequently said:

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"...the Department's role is to provide traffic sign authorisations for signs that are not prescribed in regulations to enable local authorities to achieve their traffic management objectives. It is not appropriate for the Department to comment on an alternative scenario that had not been requested by the authority concerned.

585

Whilst the Department will assist an authority in developing a sign, it is for the authority to confirm, through the application form, that it is of the view that the proposed non-prescribed traffic signs are indeed appropriate for the scheme including where the signs are to be placed. The issuing of an authorisation does not validate or endorse the detailed traffic engineering of a given scheme as this is entirely the responsibility of the authority concerned."

590

The evidence leads me to conclude that the signs were authorised, but for a tolling scheme and not for this road user charging scheme.

Adequacy

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Even if they are not authorised for use with the scheme in place, are the signs adequate to convey the necessary information to motorists? Mr Solomons decided that the signage was 'adequate', but only to the extent that it conveyed that a payment to use the bridge was required.

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I find that the signs indicate the need to pay a toll, not the road user charge.

Mr Curzon says that whilst some signs were in place before the commencement of the scheme, others were not. I do not have sufficient evidence to establish when the signs

605 were put in place. Since I found that they convey a tolling scheme, it is not material to the outcome of this appeal when and where they were placed at the time of the two alleged contraventions.

610 However, Mr Curzon also says that he knew there was a toll to pay before using the bridge, and the signs reiterated that requirement. Mr Curzon was willing and able to pay the toll. He did not pay it because he found no toll booth or other *in situ* mechanism for him to do so.

615 This echoes the evidence of other bridge users in previous cases I considered following Mr Solomons' Decision. The word 'toll' seems to cause an expectation that there will be a traditional barrier type control, opened by payment of the toll, in the way, for example, that the nearby Mersey tunnels operate. Motorists described having or looking for change to pay, finding nowhere to pay, and so not paying.

620 In my view, the signs would be adequate to advise motorists of a tolling requirement, perhaps, but in this road user charging scheme, use of the word 'toll' is inaccurate, ambiguous, and likely to cause confusion. The fee payable is a road user charge, and it is not payable on or near either bridge.

625 I find that the signs are not adequate to alert motorists to the nature of the fee the Council wish them to pay. It is not sufficient to assert that the use of the word 'toll' will relieve confusion, not least because it is that very use which is likely to cause confusion.

630 **Duty to consider representations**

Regulation 8(9) of the 2013 Regulations provides:

635 *It is the duty of a charging authority to whom representations are duly made under this regulation-*

a. to consider them and any supporting evidence which the person making them provides; and

640 *b. within the period of 56 days beginning with the date on which the representations were served on it, to serve on that person notice of its decision as to whether or not it accepts-*

645 *ii. that one or more of the grounds in paragraph (3) has been established; or*

ii. that there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled.

Regulation 8(10) provides:

650 *Where a charging authority fails to comply with paragraph (9) within the period of 56 days mentioned there-*

655 *(a) it is deemed to have accepted the representations made under paragraph (1) and to have served notice to that effect under regulation 9(1); and*

(b) it must as soon as reasonably practicable refund any sum paid in respect of the penalty charge notice and (if applicable) the road user charge.

660 Regulation 8(9) requires the Council to consider the representations made by a motorist, decide whether the penalty should be payable, and to respond to the motorist within 56 days. If the Council fails to consider the representations within that time, then Regulation 8(10) deems the representations to have been accepted.

665 It is important to note that, in addition to deciding if one or more of the grounds of appeal apply, there is also a duty upon the charging authority to consider if there are 'compelling reasons', such that the penalty charge should not be paid. This is an important discretionary decision in the context of the enforcement scheme.

670 There seems to be little dispute that, as a matter of fact, the representations made by Mr Curzon were not considered directly by any member of the Council or the Council's staff, or even the MGBCL staff. Instead, all considerations were made by Emovis, using the brand name of 'Merseyflow'. Emovis is a third-party contractor engaged by the MGBCL and the Council to manage the entire Mersey Gateway project, including the charging scheme.

675

The dispute arises out of the question whether the delegation of consideration of the representations was permitted as a matter of law. Mr Curzon says not because, inter alia, Article 42A of the 2011 Order precludes it.

680

685 **Delegation in public law**

The 2013 Regulations were issued jointly by the Secretary of State for Transport and the Lord Chancellor. This is because the representations and adjudication provisions fall within the Lord Chancellor’s remit. The provisions and procedures follow civil enforcement schemes that apply to the civil enforcement of other minor traffic contraventions, in areas such as parking, bus lane contraventions and minor moving traffic contraventions.

695 The powers and duties of the charging authority are set out in the 2013 Regulations. It is the charging authority who has the power to impose road user charges and penalty charges for failure to pay the road user charge, and the duty to follow the civil enforcement procedure set out in the 2013 Regulations and the Schedule that applies to the procedure to be followed by the adjudicators.

700 It is clear from section 163(3) that a road user charging order may be made by two authorities jointly. This is not the case here, but it is relevant to considering the meaning of Article 42(A) inserted into the 2011 Order by the 2016 Amendment order (*The River Mersey (Mersey Gateway Bridge) (Amendment) Order 2016*).

705 Article 42A provides:

42A.—(1) The undertaker may make charging schemes in respect of the bridge roads or Silver Jubilee Bridge roads, or a single charging scheme for both.

710 *(2) Section 164(3) (local charging schemes) of the 2000 Act does not apply to such a charging scheme.*

(3) A charging scheme to which this article relates may make provision, in addition to anything provided for under the 2000 Act, for—

715 *(a) charges to be levied for any services or facilities provided in connection with the new crossing and the Silver Jubilee Bridge; and*

720 *(b) any other matter that is provided for in articles 41 (power to charge tolls) and 42 (payment of tolls).*

(4) Where a charging scheme is in force on 14th September 2016 in respect of the bridge roads or Silver Jubilee Bridge roads, or both, and does not make express provision for such matters, the following is to apply in addition to that charging scheme—

725 *(a) the undertaker may levy charges for any other services or facilities provided in connection with the new crossing or the Silver Jubilee Bridge;*

730 *(b) where any charge, including a penalty charge under a charging scheme or a charge levied under sub-paragraph (a), remains unpaid after it has become due for payment the person to whom it is payable may recover from the person liable to pay it the amount of the charge together with all other reasonable costs and expenses including administrative expenses, enforcement expenses and interest arising out of such failure to pay;*

735 *(c) the undertaker may appoint any person to act as its agent to collect charges and other sums as provided for within sub-paragraph (b); and*

...

740 *(5) Subject to the provisions of this article, when a charging scheme is in force in respect of the bridge roads (whether for the bridge roads alone or with the Silver Jubilee Bridge roads)*

745 the charging scheme has effect in substitution for articles 41, 42 and 46 (enforcement), but when there is no charging scheme in force in respect of the bridge roads the imposition, payment and enforcement of payment of tolls and charges imposed under this Order is to be under the powers conferred by articles 41, 42 and 46.

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

755 Article 42A enables the Council (the 'undertaker' within the meaning of the TWA 1992 and the associated 2011 Order) to make a road user charging order under section 164(3) of the TA 2000. For the avoidance of any conflict between the concessionaire, arrangements set out on the 2011 Order, Article 42(6) expressly provides that the Council may not transfer its powers and duties as the charging authority, as defined in Section 163(5):

760 (5) In this Part—

765 (a) "the charging authority", in relation to a charging scheme under this Part made or proposed to be made by one authority, means the authority by which the charging scheme is or is proposed to be made, and

770 (b) "the charging authorities", in relation to a charging scheme under this Part made or proposed to be made jointly by more than one authority, means the authorities by which the charging scheme is or is proposed to be made.

775 The 2011 order made under the TWA 1992 gives express power for the Council to enter into concessionaire agreements to undertake its functions under that Act.

775 The purported delegation of power appears in Article 43 of the 2011 Order, which provides:

Power to enter into concession agreements and lease or transfer the undertaking, etc.

780 43.—(1) The undertaker may, on such terms as it sees fit, at any time and for any period, enter into one or more concession agreements and for that purpose may provide for the exercise of the powers of the undertaker in respect of the authorised activities or any part of them, together with the rights and obligations of the undertaker in relation to them, by any other person and other matters incidental or subsidiary to them or consequential to them, and the defraying of, or the making of contributions towards the costs of the matters whether by the undertaker or any other person.

785 (2) The undertaker may, with the consent of the Secretary of State, transfer, sell, lease, charge or otherwise dispose of, on such terms and conditions as it thinks fit, the whole or any part of the new crossing and any land held in connection with the new crossing or the right to operate the authorised works under this Order.

790 (3) The undertaker may grant on such terms and conditions as it thinks fit to any person or take from any person a lease, licence or any other interest in or right over any land, including land comprising or comprised in the new crossing, if it appears to the undertaker expedient to do so for the purpose of or in connection with the exercise by that person of any or all of the authorised activities.

795 (4) The exercise of the powers of any enactment by any person in pursuance of any agreement under paragraph (1), or any sale, lease, charge or disposal under paragraph (2), shall be subject to the same restrictions, liabilities and obligations as would apply under this Order if those powers were exercised by the undertaker.

800

The 2011 Order also includes various definitions, including:

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

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

815 *“concessionaire” means any person with whom the undertaker enters into a concession agreement from time to time together with the successors and assigns of any such person;*

“the undertaker” means Halton Borough Council;

820 Article 43 relates to the delegation of the powers of the Council for *‘the authorised activities’*. Article 43 therefore purports to allow the delegation of *‘any power, authority or discretion ... exercisable by [the Council] under this Order or otherwise’*.

825 Mr Curzon argues that Article 42A(6) precludes the transfer of powers to any body other than a traffic authority, as defined. He says, this means the Council were not entitled to delegate their powers and duties as a charging authority to Emovis.

830 The Council say that Mr Curzon has misunderstood the meaning of 42A (6) and assert that that it relates only to the power to make a road user charging order, and that the Council did not delegate that power because the Council made the charging order(s) themselves.

The Council also say that Article 42A(4)(c), above,

835 *makes it expressly clear that where the power conferred by the Article has been exercised and [a road user charging order] made by Halton, it is not only permissible for the RUCSO to delegate tolling functions to a third party on its face, but in the event that a RUCSO does not provide expressly for delegation, such a term is to be read into it.*

840 The Council is a local authority. Their powers and duties in respect of road user charging are statutory powers and duties arising from the TA 2000.

Cross on Principles of Local Government Law [Third Edition] sets out the principle of unlawful delegation at paragraph 10-09:

845 *A public authority may not delegate its decision-making functions without express or implied statutory authority. A power to delegate is not readily implied, particularly where the decision in question is judicial. A local authority has wide powers under s.101 of the Local Government Act 1972 to arrange for the discharge of any of its functions by a committee, a sub-committee or officer of itself or any other local authority. ... A local authority may lawfully place considerable reliance on the views of other persons or bodies, provided that the power of decision is in the last resort retained by the authority.”*

855 This is not to say that some administrative functions may not be delegated or outsourced. However, as *Cross* emphasises further down the paragraph:

... where judicial functions are concerned any other body involved in the decision-making process may normally only be used for gathering information – and this

860 *information must be fully summarised for the benefit of the authority which is to make the final decision*

The Council state that Mr Nicholls' Decision of 8 July 2014 in *Fosbeary v Gloucestershire County Council* [Tribunal case number GD 05067G] is irrelevant to this case. I disagree. I take note of Mr Nicholls' findings and agree with them. His remarks are entirely relevant to the issues in this case, in particular where he states, at paragraph 16:

870 *It is clear, therefore, that the regulations impose duties on the enforcement authority which require the making of discretionary decisions in the light of information and representations that the authority has received. Because the discretion rests only with the enforcement authority, this is not a function which the enforcement authority can delegate to any external body. There are special provisions in the Local Government Act 2000 which enable local authorities to form joint working groups or committees for similar functions, which enable individual local authorities to enter into "agency" agreements with each other in connection with the enforcement of parking contraventions, but those special statutory rules are not applicable to contracts with outside contractors. They do not apply to the contract between the Council and the company.*

880 Mr Nicholls was dealing with a case under the TMA 2004 and its Regulations, but the case concerned the civil enforcement scheme and the issue is identical: a council may not delegate their discretionary powers, save in very particular circumstances.

Section 101 of the *Local Government Act 1972* ("LGA 1972") provides:

885 *Arrangements for discharge of functions by local authorities.*

1. *Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions—*

890 *a. by a committee, a sub-committee or an officer of the authority; or*

b. by any other local authority.

895 There is no provision, in Section 101, for the delegation of powers to any other body except a committee, sub-committee, or an officer of the Council, or any other local authority.

900 There is no provision, in the TA 2000, the LTA 2008, or the 2013 or 2014 Regulations (*The Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) (Amendment) Regulations 2014*), for the delegation of powers to any other body. Indeed, there is no suggestion by the Council that there is any express or implied statutory power allowing delegation.

905 Emovis' Enforcement Policy, and a Governance Agreement between the Council and MGCBL, were submitted by the Council. They both demonstrate an understanding of the limits of delegation despite the assertions now made.

910

915 **Emovis Enforcement Policy**

The Emovis 'Enforcement Policy' (revision date 15 June 2017) supplied by the Council (Tab 79) contains the following remarks:

920 *2.1 PURPOSE AND SCOPE OF THIS DOCUMENT*

(1) *This document contains the Service Provider's intended Enforcement Policy under Free-Flow Charging. It defines the operational policies and rules applied to the Service Provider's Toll recovery processes.*

925

(2) *It focusses on the processes that are implemented following the identification of unpaid tolls by Registered Users and Unregistered Users. The starting point of the enforcement policy is the identification of an unpaid toll.*

930

...

(3) *The Service Provider intends to use the policies described in this document to devise and implement the organisation and business processes upon which the recovery of unpaid tolls is based. Where exceptional circumstances have been identified that require a response outside of standard policy, guidance¹ will be requested from HBC/MGCB. Given the high reputational risk involved with enforcement, the Service Provider will use its local experience to define the set of Business Rules, which will be continually updated and jointly reviewed with HBC/MGCB.*

935

940

(4) *In producing this document, the Service Provider intends to achieve consistent decision making in the management of PCNs, Representations and Appeals.*

945

¹ As a matter of public law, the Public Authority can delegate its powers to handle enforcement complaints to a private agency provided that the agency follows pre-defined rules to deal with enforcement complaints. Therefore, any discretionary decision in relation to enforcement can only be taken by HBC and not by the Service Provider or the Board

950

Note, in particular, the footnote and the words '*any discretionary decision in relation to enforcement can only be taken by HBC*' and not by Emovis or MGCBL

955

It is apparent that the author of this document understood that the Council may not, as a matter of public law, delegate discretionary decisions. It suggests that this will apply in 'exceptional circumstances', beyond the standard policies already issued, when guidance will be sought from the Council and or, potentially erroneously, MGCBL.

960

The details set out in the enforcement procedure show a good understanding of the enforcement process and it is not an unimpressive document. Nevertheless, the fundamental flaw remains.

965 **Governance Agreement**

I have been provided with a heavily redacted copy of the 'Governance Agreement' between HBC and MGCBL, dated 28 March 2014, which agreed various terms relating to the management of the construction, operation and maintenance of the Mersey Gateway Bridge and the tolling of both bridges by MGCBL on behalf of the Council. It includes the following:

6. Powers and Delegation

975 6.1 To the extent that such powers are required for the purposes of delivering the Services (including, but not limited to and requirements for the performance by the DMPA Company of obligations under the DMPA or the Project Company under the Project Agreement), the Council shall:

980 6.1.1 procure the renewal, replacement or extension of the RUCO on the same, or similar, terms prior to any expiry or termination of the RUCO, so as to ensure that the powers set out in the RUCO continue for the term of this Agreement;

985 6.1.2 procure the renewal, replacement or extension of the Toll Enforcement Regulations on the same or similar, terms prior to any expiry of termination of the Toll Enforcement Regulations, so as to ensure that the powers set out in the Toll Enforcement Regulations continue for the term of this Agreement;

990 6.6 For the Contract Period:

995 6.6.1 the Council undertakes to the Board to delegate to the Project Company in accordance with and pursuant to the terms of the Project Agreement;

6.6.2 the Council undertakes to the Board to delegate to the DMPA Company in accordance with and pursuant to the terms of the DMPA;

1000 6.6.3 the Council undertakes to the Board to delegate to any contractor replacing the Project Company or the DMPA Company, on similar terms to those specified in the Project Agreement or the DMPA (as the case may be),

1005 in each cases the relevant powers, rights and obligations under:

6.6.4 the Order;

1010 6.6.5 to the extent that they are capable of delegation, the powers under the RUCO;

6.6.6 to the extent that they are capable of delegation, the powers under the Toll Enforcement Regulations; and

1015 6.6.7 any other statutory powers that are capable of delegation.

6.7 To the extent that any delegation of power made pursuant to Clause 6.6 requires renewal of amendment during the Contract period in order to meet the requirements of Clause 6.6, then the Council shall either:

1020

6.7.1 *renew or amend such delegation of power; or*

6.7.2 *indemnify the Board in respect of all costs, losses or expenses arising from such failure to renew or amend such delegation.*

1025

6.8 For the Contract Period, the Council shall delegate, assign or otherwise transfer to the Board such powers, rights and obligations and shall do everything reasonably within its power (at all times in compliance with applicable Law) to enable the Board to efficiently and effectively perform its obligations under this Agreement, the Project Agreement, the DMPA and any other documents entered into by the Board pursuant to those agreements.

1030

1035 There is repeated reference to the delegation of powers, but always with the caveat that such delegation only occur '*in compliance with applicable law*', or '*to the extent that they are capable of delegation*' and expressly so in relation to the Charging Order and the '*Toll Enforcement Regulations*'.

1040 The Governance Agreement documents reflect a proper understanding of the law. A Council bylaw may not change that law.

Statutory Guidance

1045 While applicable to parking civil enforcement under the TMA 2004, the Secretary of State for Transport issued Statutory Guidance (*The Secretary of State's Statutory Guidance to Local Authorities on the Civil Enforcement of Parking Contraventions 2016* ["the Statutory Guidance"]) dealing with the underlying principles of civil enforcement by local authorities. Where a PCN is issued on-street, for example, a motorist may respond to it by way of informal representation, and these may be followed by formal representations in response to a Notice to Owner. There is no two-stage representation process for PCNs issued by post – the PCN is essentially the Notice to Owner, and it is against that document that formal representations may be made. Whilst the consideration of informal representations is regularly contracted out, the Government's Statutory Guidance reiterates that authorities '*should not contract out the consideration of formal representations*':

1050

1055

Formal representations

1060 *10.13 Many enforcement authorities contract out on-street and car park enforcement and the consideration of informal representations. Enforcement authorities should not contract out the consideration of formal representations. Enforcement authorities remain responsible for the whole process, whether they contract out part of it or not, and should ensure that a sufficient number of suitably trained and authorised officers are available to decide representations on their merits in a timely and professional manner.*

1065

Cross, again, says:

1070 *...where judicial functions are concerned any other body involved in the decision-making process may normally only be used for gathering information – and this information must be fully summarised for the benefit of the authority which is to make the final decision.*

1075 A Council may, broadly, delegate administrative functions, but it may not delegate its judicial functions. The consideration of representations is a discretionary decision, which is a judicial function. The Council were not entitled to delegate their power of discretion to Emovis or any other non-authority third party.

1080 Therefore, while there should be no objection to the gathering of information by a third party, the information must then be provided to the Council for the final decision. So, it would be acceptable for the representations to be directed to Emovis, but their consideration must be undertaken by the Council.

1085 It would also be acceptable for Emovis to 'collect' the charge and, providing the issue of each PCN were considered by the Council, it would also be acceptable for Emovis to send out those PCNs.

1090 But it is not acceptable for Emovis to consider representations against the charge. That duty lies solely with the Council and may not be delegated. There may be shorthand ways of dealing with the most common representations, but this does not mean that Emovis may take the decision, except on the express, individual, instruction of the Council. There may be business rules dealing with common representations, which is another area of discussion entirely; but, certainly, representations concerning compelling reasons require the exercise of discretion that may only be exercised by the Council themselves. Indeed, the very nature of Mr Curzon's original representations was such that they could not conceivably have fallen within any pre-prepared business rules.

1095
1100 Furthermore, a public authority may not enter into a contract or any other agreement which would be incompatible with the proper exercise of its duties or obligations. An agreement which purports to divest the authority of its discretion is likely to be held to be invalid. On this point, there is a distinct tension between the duty to consider compelling reasons and Emovis' stated aim of 'collecting 100% of due tolls' and to 'minimise revenue leakage'.

1105 Discretion must be exercised by the authority, not by a third party. The Council were not entitled to delegate the consideration of, and decision upon, Mr Curzon's representations to Emovis or any other third party. The Council's own evidence recognises this.

1110 I find that the failure of the Council to consider Mr Curzon's representations amounted to procedural impropriety.

1115 Further, the Council did not consider Mr Curzon's representations at all, and certainly not within 56 days, and I find that Regulation 8(10) deemed them to have been accepted and the PCNs should have been cancelled.

1120 I am in no doubt that the Council exceeded their powers in the total delegation of the powers and duties as a charging authority to Emovis. However, there is also the question of whether they could even delegate those powers and duties to MGCBL. While it may be a wholly owned company of the Council, it is nevertheless a different legal entity to the Council. If they were one and the same there would be no point in creating a company.

1125 MGCBL was properly created under the concessionaire arrangements in the 2011 Order. However, since the concessionaire arrangements cannot apply to the Council's powers and duties as the charging authority, any delegation of those powers and duties to MGCBL is also questionable.

1130 In the conduct of this appeal, some of the directions sent through the messaging portal of the Tribunal's online digital case management system were responded to by Mr Mike Bennett, the Chief Executive Officer of MGCBL. At no point, it seems, has an officer of the Council been involved in the conduct of the case.

1135 Because I have found that Mr Curzon's representations being considered by Emovis rather than the Council amounts to a procedural impropriety, I do not need to make a finding whether the additional delegation of powers and duties to MGBCL was also precluded by Article 42A(6). Since MGBCL and the Council are not the same legal entity, I am inclined to take that view, but it would be an issue for the higher courts to determine.

Conclusion

1140 The evidence leads me to conclude that there were numerous procedural improprieties by the Council, which are sufficient to render the PCNs unenforceable.

1145 The appeal is allowed and no payment is required from Mr Curzon. I direct the Council to cancel both PCNs.

M.F. Kennedy
Adjudicator

1150 11 March 2019

Abbreviations

Reference is made to the following:

- 1155
- Transport and Works Act 1992 ("TWA 1992")
 - The Transport Act 2000 ("TA 2000")
- 1160
- Local Transport Act 2008 ("LTA 2008")
 - The River Mersey (Mersey Gateway Bridge) Order 2011 ("the 2011 Order")
- 1165
- The Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013 ("the 2013 Regulations")
 - The Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) (Amendment) Regulations 2014 ("the 2014 Regulations")
- 1170
- The River Mersey (Mersey Gateway Bridge) (Amendment) Order 2016 ("the 2016 Order")
 - Mersey Gateway Bridge Byelaws 2016 ("the 2016 Byelaws")
- 1175
- The Mersey Gateway Bridge and the A533 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2017 ("the 2017 Order")
 - the A533 (Mersey Gateway Bridge) and the A577 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018 ("the 2018 Order");
- 1180
- The Secretary of State's Statutory Guidance to Local Authorities on the Civil Enforcement of Parking Contraventions 2016 ("the Statutory Guidance")