Traffic Penalty Tribunal
England and Wales

Adjudicator Decision

10 January 2022

Mr Damian Curzon – v – Halton Borough Council

Cases:

1. **XM01885-1906** (PCN XM3341644A)

Together with:

2. **XM02448-1907** (PCNs XM4310831A and XM4311765A)
3. **XM02461-1907** (PCNs XM42262744 and XM42268230).
4. **XM03506-1910** (PCNs XM5386947A and XM53870162).
5. **XM03890-1911** (PCNs XM57862530 and XM57858216).
6. **XM00352-2002** (PCN XM82280209).
7. **XM00441-2003** (PCN XM79578053).
8. **XM00030-2101** (PCN XM79617621).
9. **XM00377-2106** (PCN XM79620706).
10. **XM00435-2107** (PCNs XM82851547 and XM82850704).
11. **XM00477-2107** (PCNs XM83270040 and XM83309714).

Introduction from the Chief Adjudicator, Caroline Sheppard OBE

Mr Curzon has 11 appeals at the Traffic Penalty Tribunal. They all raise the same issues concerning the charging authority, Halton Borough Council ("the Council") and the arrangements they have put in place for the enforcement of road user charges at the Mersey Gateway Bridge and Silver Jubilee Bridge.

The enforcement and appeals process is governed by Paragraph 14 of the Schedule to *The Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013* [S.I.1783], which enables adjudicators to consolidate appeals where:

> (a) some common question of law or fact arises in both or all appeals; or (b) for some other reason it is desirable to make an order under this paragraph.

The parties have not expressly been given the opportunity to comment on the consolidation of the cases in this decision, but it is inconceivable that either party would object considering that Mr Curzon is making the same points in each appeal. His principal evidence and the authority's submissions are included with case XM01885-1906. Again, they all turn on the same points and the same evidence applies to them all. It would be disproportionate and impractical for each party to file the same evidence – 101 items in all – separately in each of the 11 cases.

Unusually, the 11 consolidated cases have been considered by a panel of two adjudicators. Adjudicator M.F. Kennedy, who decided Mr Curzon's first appeal before the Tribunal on 11 March 2019, will deal with the principal case XM01885-1906 and I will deal with the remaining 10 cases.

The other reason to consolidate the cases is because case XM01885-1906 is allowed on a factual issue that does not arise in any of the other cases.

Summary of findings:

This consolidated 11-case decision was decided by a panel of two Traffic Penalty Tribunal adjudicators, Adjudicator M.F. Kennedy and the Chief Adjudicator, Caroline Sheppard OBE.

All the appeals are allowed on the grounds that there was a procedural impropriety on the part of the charging authority, Halton Borough Council.

The decision follows and develops Adjudicator Kennedy's decision in XM01672-1807 ("Curzon 1" – see APPENDIX 1 for original decision and APPENDIX 2 for the subsequent Review Decision).

1. The Council and its agents are wrong to believe and state that an adjudicator's decision is specific to the case being considered, that any decision of an adjudicator only relates to that particular case and that a decision by the Traffic Penalty Tribunal does not have general effect nor carry any weight as precedent. While the decisions cannot be binding, tribunal law is clear that decisions of this Tribunal on points of law should be treated with great respect and considered as persuasive authority.

The Council was wrong to ignore Adjudicator Kennedy's decision in Curzon 1. If the Council does not agree with the adjudicator's decision and findings, it should challenge the decision in the High Court.

2. *The A553 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018* creates a valid road user charging scheme. It revoked *The Mersey Gateway Bridge and the A533 (Silver Jubilee Bridge) Road User Charging Scheme Order 2017*. The toll provision in *The Mersey Gateway Bridge Byelaws 2016* are of no effect because a road user charging scheme is in force.

Delegation

3. *The Local Government (Contracts) Act 1997* cannot and does not apply to the Council's contract with Emovis Operations Mersey Ltd ("Emovis").

4. The Council has delegated its functions as the charging authority to contractors (Emovis). The evidence shows that Emovis is, in effect, 'Merseyflow'.

5. The Council can no more delegate its functions as a charging authority to the Mersey Gateway Crossings Board Ltd ("MGCB") than it can to Emovis. MGCB is what is known as a Special Purpose Vehicle established to perform the Council's function as the 'undertaker' under *The River Mersey (Mersey Gateway Bridge) Order 2011*, which included a toll scheme for the Mersey Gateway Bridge Crossing. Although MGCB is a company wholly owned by the Council, this does not mean it is the Council. When the 2011 Order was amended in 2016, it provided that the functions of the Council as the charging authority (as opposed to 'undertaker') could not be transferred to an entity other than another highways authority.

6. The charging authority may outsource the supply of technical equipment and back-office support for the administrative functions of the enforcement process. Those tasks should be done in the name of the charging authority, however, not the contractor.

The enforcement process

7. The Penalty Charge Notice (PCN) was issued by the Council and sufficiently complied with the regulatory requirement. While the adjudicator did not expressly approve the content, she did not find the PCNs to be a procedural impropriety.

8. However, the delegation of the duty to consider representations to Emovis was a procedural impropriety.

9. The method by which representations are dealt with using the "Business Rules" does not amount to 'consideration' and constitutes a procedural impropriety.

10. The Council's submission that it is not required to give reasons in a Notice of Rejection of Representations (NoR) is wrong. Administrative law requires that reasons are given.

11. The costs information in the NoR was misleading, misrepresented the regulatory requirements and was a procedural impropriety.

Comparison with *The A282 Trunk Road (Dartford-Thurrock Crossing Charging Scheme) Order 2013*

12. The arrangements and governance applying to the Secretary of State for Transport and National Highways Dartford-Thurrock River Crossing road user charging scheme are different from those that apply to the Council and MGCB. The *Infrastructure Act 2015* applies to the performance of functions by National Highways in relation to the Secretary of State's trunk roads.

Case XM01885-1906
Adjudicator M.F. Kennedy

1. Introduction and basis of the appeals

1.1. This case, which I will refer to as "Curzon 2", is brought by the same appellant, Mr Damian Curzon, who successfully appealed against a Penalty Charge Notice (PCN) issued to him by Halton Borough Council ("the Council"), the charging authority, in case number XM01672-1807 ("Curzon 1" – see APPENDIX 1 for the original decision and APPENDIX 2 for the subsequent Review Decision). In this case, Mr Curzon appeals on similar and additional grounds to those raised in Curzon 1.

1.2. Following my decision in Curzon 1, the Council issued a press release, which contained the following points:

> "• *Adjudication by the Traffic Penalty Tribunal (TPT) cannot and does not, in law, invalidate or remove the powers in place from the 14 October 2017 to administer and enforce tolls on the Mersey Gateway Bridge.*
>
> • *Adjudication is specific to the case being considered, and any decision of an Adjudicator only relates to that particular case.*
>
> • *A decision of TPT does not have general effect nor carry any weight as precedent.*
>
> • *Any suggestion that the Council has no power to charge or enforce how it does this or that the Council's* [Sic] *is acting inappropriately or "illegally" is misleading, inaccurate and wrong in law.*
>
> • *The Adjudicator's decision in respect of signage contradicts the decision of the Adjudicator in the an* [Sic] *early case where the Adjudicator concluded signage is "large, well sited, in clear view, and to* [Sic] *communicate to a driver unfamiliar with the area that a payment was required and how to pay."*

1.3. My decision was upheld by the Deputy Chief Adjudicator, Mr Stephen Knapp, and the decision to allow the appeal was not revoked or varied. The Council did not seek Judicial Review of either Adjudicator Knapp's or my decision. Instead, they continued – and still continue – to contest every appeal where my findings in Curzon 1 are submitted by an appellant. My decision in Curzon 1 is appended to this decision.

2. The Law

2.1. The Council, the charging authority, has made three consecutive road user charging orders under the provisions of the *Transport Act 2000* ("TA 2000"), relating to the two bridges across the River Mersey from Widnes to Runcorn: the 'new bridge' – the Mersey Gateway Bridge – and the 'old bridge' – the Silver Jubilee Bridge.

2.2. This case and the other 10 subject to this consolidated decision concern road user charges imposed by the second charging order, *The A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2018* ("the 2018 RUCSO"), which came into force on 19 April 2018.[1]

Article 2 – the interpretation article – of the 2018 RUCSO defines the applicable roads:

> "scheme roads" means that part of (i) the road that approaches and crosses the new crossing and (iii) the A533 road that approaches and crosses the Silver Jubilee Bridge as are shown on the deposited plan.

This definition appears to be at odds with the title of the 2018 RUCSO, which names the A533 as being the road to and across the new bridge and the A557 as relating to the old bridge.[2] Mr Curzon seemingly makes this point (see below).

Article 6 deals with the imposition of the road user charge:

> 6 - a charge is to be imposed in respect of a vehicle where –
> (a) the vehicle has been used or kept on the scheme roads and
> (b) the vehicle falls within the class of vehicles in respect of which a charge is imposed by this Order

The remainder of Article 6 describes the amount of the charge and the classes of vehicles.

Article 7 deals with payment of charges:

> 7 – (1) Subject to paragraph (3) a charge imposed by this scheme, the amount of which is specified in article 6 paragraph (2) (imposition of charges), shall be paid no later than 23:59 hours on the day immediately following the day upon which the charge has been incurred by a means and by such method as may be specified by the Council on the website or in a document available on application from the Council or such other means or method as the Council may in the particular circumstances of the case accept.

[1] *The A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2020* ("the 2020 RUSCO") came into force on 7 December 2020

[2] The 2020 RUSCO corrected the definition:
"scheme roads" –"means those parts of:
(i) the road that approaches and crosses the new crossing; and
(ii) the road that approaches and crosses the Silver Jubilee Bridge, as are shown on the deposited plans"

(2) Subject to such regulations as the Secretary of State may make pursuant to section 172(1) of the 2000 Act, the Council may waive charges (or any part of such charges) and may suspend the charging of charges in whole or in part.

The remaining paragraphs of Article 7 deal with composition agreements.

Article 12 provides that:

12(1) A penalty charge is payable in respect of a vehicle upon which a charge has been imposed under this Order and where such charge has not been paid in full at or before 23:59 hours on the day immediately following the day on which the charge was incurred.

12(2) sets the penalty charge at £40 for each class of vehicle, subject to 12(3):

12(3) a penalty charge payable under paragraph (1) is –

(a) payable in addition to the charge imposed under article 6;

(b) to be paid in full within the period of 28 days beginning with the date on which a penalty charge notice relating to the charge that has not been paid in full is served;

(c) reduced by one half provided it is paid in full prior to the end of the 14th day of the period referred to in sub-paragraph (3)(b);

(d) increased by one half if not paid in full before a charge certificate to which it relates is served by on behalf of the Council (as the charging authority) in accordance with regulation 17 of the Enforcement Regulations.

The 'Enforcement Regulations' referenced in 12(3) refer to *The Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013* [S.I.1783] (referred to hereafter as "the 2013 Regulations")

The 2013 Regulations set out the enforcement framework for unpaid road user charges.

Regulation 6 provides that, subject to exceptions that do not apply in these cases:

6.—(1) Unless any of the circumstances in paragraphs (2) to (5) apply, road user charges and penalty charges imposed upon a relevant vehicle by a charging scheme are to be paid by the registered keeper of that vehicle

It is not in dispute that Mr Curzon is the registered keeper of the vehicle concerned in case XM01885-1906 and the other 10 cases.

Regulation 7 enables the charging authority to issue a PCN:

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").

Regulation 7 goes on to prescribe the basic information to be included in the PCN:

> (3) A penalty charge notice must state—
>
> (a) the date of the notice, which must be the date on which it is posted or sent by electronic transmission;
>
> (b) the name of the charging authority;
>
> (c) the registration mark of the motor vehicle to which it relates;
>
> (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;
>
> (e) the grounds on which the charging authority believes that the penalty charge is payable with respect to the motor vehicle;
>
> (f) the amount of penalty charge that is payable if the penalty charge is paid in full—
>
> (i) within 14 days of the day on which the penalty charge notice is served;
>
> (ii) after the expiry of such 14 day period but within 28 days of the day on which the penalty charge notice is served;
>
> (iii) after the service of a charge certificate;
>
> (g) the manner in which the penalty charge must be paid and the address to which payment of the penalty charge must be sent;
>
> (h) that the recipient of the penalty charge notice is entitled to make representations to the charging authority against the imposition of the penalty charge on any of the grounds specified in regulation 8(3);
>
> (i) the address (including if appropriate any email address or fax telephone number, as well as the postal address) to which such representations must be sent and the form in which they must be made;
>
> (j) that the charging authority may disregard any such representations received by it more than 28 days after the penalty charge notice was served; and
>
> (k) in general terms, the form and manner in which an appeal to an adjudicator may be made.

It is part of Mr Curzon's case that the PCNs sent to him do not comply with Regulation 7.

Regulation 8 enables the recipient of a PCN to make representations and the grounds and any compelling reasons to cancel it:

> 8.—(1) Where it appears to the person on whom the penalty charge notice is served ("the recipient") that—
>
> (a) one or more grounds mentioned in paragraph (3) apply; or
>
> (b) whether or not any of those grounds apply there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled,

the recipient may make representations in writing to that effect to the charging authority that served the penalty charge notice on the recipient.

(2) The charging authority may disregard any such representations which it receives after the end of the period of 28 days beginning with the date on which the penalty charge notice was served.

(3) The grounds are that—

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

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

(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.

(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;

(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);

(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;

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

(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—

(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

(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.

Regulation 9 states that the charging authority must cancel the PCN if any of the grounds in Regulation 8 have been established, and refund any sum paid with respect to the PCN.

Regulation 10 deals with the charging authority's duty if rejecting the representations:

> 10.—(1) Where a charging authority does not accept that a ground in regulation 8(3) has been established, nor that there are compelling reasons why the penalty charge notice should be cancelled, the notice served in accordance with regulation 8(9)(b) (a "notice of rejection") must—
>
> > (a) state that a charge certificate may be served under regulation 17(1) unless within the period of 28 days beginning with the date of service of the notice of rejection—
> >
> > > (i) the penalty charge is paid; or
> > >
> > > (ii) the person on whom the notice of rejection is served appeals to an adjudicator against the penalty charge;
> >
> > (b) indicate the nature of an adjudicator's power to award costs against any person appealing; and
> >
> > (c) describe in general terms the form and manner in which an appeal to an adjudicator must be made.
>
> (2) A notice of rejection may contain such other information as the charging authority considers appropriate.

Regulation 11 deals with the right to appeal to the adjudicator.

3. PCN XM3341644A

3.1. PCN XM3341644A was issued by the Council on 24 April 2019 and alleged that Mr Curzon's vehicle had crossed the Mersey Gateway Bridge, Southbound, on 12 April 2019 at 09:39:

> *"due to the use or keeping of the … motor vehicle on the designated road to which the Order applies at the time and location stated below, without payment of the required Charge (commonly termed as toll) in the time and manner specified under the Order and the Regulations".*

The vehicle it relates to is CK14JYJ. It is neither in dispute that Mr Curzon owns and keeps the vehicle, nor that it crossed the Mersey Gateway Bridge on the day.

3.2. The case history from the contractor's (Emovis Operations Mersey Ltd – "Emovis's") processing system shows that a representation was received about the PCN on 25 April, presumably because the PCN was delivered that day – the day after it was issued. The case report does not identify whether the representation was made online but presumably it was, bearing in mind when it was received.

3.3. Evidence relating to the representation has been produced by Merseyflow at Evidence Tab 9. It is an information download document, presumably from Merseyflow's processing system, showing the representations Mr Curzon made online. The document itself does not reproduce Mr Curzon's details, which he would have supplied during the online representations process. Under 'Contact Information' there is an email address and a phone number.

It is only because Mr Curzon added his name to the uploaded 'Explanation' that anyone working from this document can identify the representation as coming from him, because his name and address are otherwise hidden.

3.4. There is important information missing from the document. First, it does not show when the representation was made; and secondly, it does not indicate that Mr Curzon agrees to receive notice of the decision by email. In the absence of a date it is impossible to be sure from the document whether these are the representations Mr Curzon made online on 25 April 2019.

Mr Curzon said this:

"*The PCN is defective. It makes absolutely no sense whatsoever. "On the designated road to which the order applies". The 2018 Order (The A533 (Mersey Gateway Bridge) and the A557 (Silver Jubilee Bridge) Roads [plural i.e. with an 's' on the end of it] User Charging Scheme Order 2018) cited on the PCN says "Scheme Roads". There is no mention in the 2018 Order of a singular designated 'road'. The order says ""new crossing" means the bridge and other roads and structures built pursuant to the River Mersey (Mersey Gateway Bridge) Order 2011". It then goes on to say ""Scheme roads" [plural i.e. with an 's' on the end of it] means that part of (i) the road that approaches and crosses the 'new crossing' and (ii) the A533 road that approaches and crosses the Silver Jubilee Bridge…". The PCN then goes on to say Location: Mersey Gateway Bridge Southbound. The Mersey Gateway Bridge is the A 533. So where the hell was I supposed to be and what time is April past 9? Damian Curzon"*

3.5. The final sentence sums up his representation that the PCN did not convey where his vehicle was and that, wherever it was, under the terms of the charging order it was not subject to the road user charge.

3.6. Merseyflow's case history report shows an entry on 8 May described as 'General Letter 01'. The report does not show how this letter was sent.

3.7. Evidence at Tab 10 is the content of a letter dated 8 May, reproduced on a blank document without formal heading, showing from whom it has come. It says:

"*Dear Damien Curzon,*

Thank you for making contact with our team.

Though we do appreciate your points made. This is by no means a representation on why you feel you should have not have not had [sic] *to pay a penalty for none* [sic] *payment of the charge (commonly termed as toll).*

Please note this correspondence is not a rejection to your communication to us, as there is simply no representation for us to accept or reject.

If you feel you have a complaint or a misunderstanding to the wording on the PCN, then please contact our complaints department via email

info@merseyflow.co.uk or Halton Borough Council for any further queries regarding the scheme and scheme roads.

If you do feel you have grounds to make a representation, then please follow the guidelines on the back of the PCN. This includes the grounds that you may make to challenge a Penalty Charge for non-payment of the charge (commonly termed as toll).

Yours sincerely Representations Team

PCN Amount Owed (Penalty Charge and Road User Charge)

XM3341644A £22.00

3.8. It is not clear who read Mr Curzon's representation and decided to send this letter. For the reasons set out in the rest of this judgment, it was unlikely to be anyone from the Council. It is apparent from the bulk of the evidence provided that the 'Representations Team' are Emovis staff, which are called 'agents' in their case history reports.

3.9. Whoever did draft or authorise this letter, it makes it clear that the Council does not accept that a ground of appeal has been established. Even though it may not use those words, the letter nevertheless constitutes a Notice of Rejection of Representations (NoR) under Regulation 10 of the 2013 Regulations. The letter does not, however, contain any of the prescribed information required by Regulation 10. The letter therefore constitutes a procedural impropriety within Regulation 8(4).

3.10. Accordingly, on that ground, the appeal against PCN XM3341644A must be allowed and the Council is directed to cancel the PCN.

3.11. The Council did follow up the letter with a subsequent NoR, which contained the prescribed information.

3.12. The finding of procedural impropriety on the facts is fatal to the Council's case. However, Mr Curzon has made a number of other points in his submissions and the Council, their agents and legal representations have gone to great lengths to deal with those submissions. There are 101 items of evidence in the case file. The further points of this judgment of case XM01885-1906 apply to the other 10 appeals subject to this consolidated decision, so I will proceed to consider them.

4. Delegation

4.1. *Local Government (Contracts) Act 1997*

4.1.1. The Council says that Curzon 1 was wrongly decided, not least in relation to the absence of any discussion regarding *The Local Government (Contracts) Act 1997* ("the 1997 Act") which, at section 1, provides (with my emphasis):

1. Functions to include power to enter into contracts

(1) Every statutory provision conferring or imposing a function on a local authority confers power on the local authority to enter into a contract with another person for **the provision or making available of assets or services**, or both, (whether or not together with goods) for the purposes of, or in connection with, the discharge of the function by the local authority.

...

(4) In this Act "assets" means assets of any description (whether tangible or intangible), including (in particular) land, buildings, roads, works, plant, machinery, vehicles, vessels, apparatus, equipment and computer software.

4.1.2. The Council's case, essentially, is that they are entitled to sub-contract the discharge of their statutory function in relation to the road user charge by entering into a contract for the provision of assets and or services. To this end, they assert that the consideration of representations is an administrative task, not a quasi-judicial one.

4.1.3. Those representing the Council insist that the Tribunal case of *Fosbeary*, as discussed in Curzon 1, does not apply because of their arguments in relation to the 1997 Act.

4.1.4. The functions and duties of the charging authority as an enforcement entity imposing penalties cannot be described as providing or making available assets or services. The charging authority is prosecuting a regulatory civil enforcement process prescribed by the 2013 Regulations.

4.1.5. While the contract with Emovis for supplying technical equipment and collecting and processing the charges may be described as a 'service', I reject the argument asserted by those representing the Council that the 1997 Act applies to the contract that would appear, essentially, to empower Emovis to undertake the functions of the charging authority created by the 2013 Regulations.

4.1.6. There is no objection to the contracting out of some of the administrative functions and the provision of the equipment; for example, including:

- the provision of cameras
- the erection and maintenance of authorised signage
- the receipt of road user charge and penalty charge payments
- the making of VQ4 requests on behalf of the charging authority to the Driver and Vehicle Licensing Agency (DVLA) for details of the registered keepers of vehicles whose vehicles have used the bridge but road user charges have not paid as required
- the issuing of PCNs under clear and unambiguous instructions from the charging authority
- the investigation of representations (for example regarding payment or the functioning of the payment website) to enable the

charging authority to decide whether to accept or reject the representations
- the sending of a NoR as expressly authorised by the charging authority.

4.1.7. These functions may only be performed as a contractor in the name of the charging authority. They may not be performed in the name of the contractor, or some created brand, as this masks the public nature of the road user charging scheme.

4.1.8. Where a contractor is suggesting a draft response to representations based on investigation, this must be subject to the approval of the charging authority.

4.1.9. Concerning the charging authority's duties as respondent to appeals to the adjudicator:

- A contractor could perform the administrative task of uploading evidence to the Tribunal system, on the clear instructions of the charging authority.

- A contractor may not address messages or directions from an adjudicator, and these must be dealt with by the charging authority.

4.1.10. It follows that the only functions that may be contracted out are basic technical and administrative tasks, which may be performed by the contractor in the name of, and under the meaningful supervision of, the charging authority.

4.1.11. If I am wrong in this regard, the Council may seek Judicial Review.

4.2. *Case Law*

4.2.1. I am directed by those representing the Council to the case of *Noon v Matthews* [2014] EWHC 4330 (Admin). This case discusses a number of other cases in relation to delegation, including another one referenced by those representing the Council, *Director of Public Prosecutions v Haw* [2007] EWHC 1931 (Admin).

4.2.2. *Noon v Matthews* expressly distinguishes delegation in the realm of local government from the other scenarios considered in the case, and is clear that local government law does not readily imply authority to delegate.

4.2.3. It does note, however, that: *"in determining the extent of implied authority to delegate, the fact that the opinion of the rating assistant was not conclusive, and that there was an appeal against any notice, is helpful."*

4.2.4. The case goes on to discuss other factors which *might* assist a finding of an implied authority to delegate including:

- court oversight; and
- the decision being administrative only (non-judicial).

4.2.5. As discussed elsewhere, the Council or their representatives have created distinct barriers to the oversight of the Tribunal:

- The repeated denial, in correspondence and on the Merseyflow website, of the Tribunal's relevance; and

- The apparent reluctance to issue a NoR to Mr Curzon, thereby precluding his ability to appeal to the Tribunal; and

- The failure of the subsequent NoR letter issued, at least in this case, to provide a PIN code to enable straightforward use of the Tribunal's online appeal process; and

- The provision in the NoR of misleading information regarding Tribunal costs.

4.2.6. As discussed at length in Curzon 1, it is not arguable that the proper consideration of a motorist's representations is anything other than a quasi-judicial decision involving discretion. I reject entirely the suggestion that it is a mere "binary" process.

4.2.7. In response to Directions those representing the Council submitted:

> *"2.25 The Council's position is that the Local Government (Contracts) Act 1997 at section 1 enables a local authority such as the Council, to enter into a contract with another person for the provision or making available of assets (defined in the 1997 Act to include roads) for the purposes of, or in connection with, the discharge of the function by the local authority. Nevertheless and without prejudice to the Council's position, in providing the above response to directions, the Council has addressed the point again that discretionary function is actually discharged by the Council. It should be emphasised that the Council remains of the opinion that provisions within the Local Government (Contracts) Act 1997 and specific powers under the River Mersey (Mersey Gateway Bridge) Order 2011 are relevant to the discharge of functions and that the decision in case XM01672-1807 is incorrect in respect of this matter insofar as it mentions the decision in the case of Fosbeary but disregards the effect of the 1997 Act.*
>
> *2.26 The Council has put this position forward to the Traffic Penalty Tribunal in previous appeals and reviews and no finding has been made by an adjudicator to the effect that the 1997 Act does not apply to the Mersey Gateway Scheme. As such, the decision in Fosbeary can be distinguished and the Council has not acted improperly in the delegation of its functions. To the extent that*

adjudicators have made no findings in relation to the application of the 1997 Act, the Council cannot be acting in contravention of any purported findings of administrative law duties.

2.27 The principle of delegation and/or contracting of services appears to have been accepted by the Tribunal in determining appeals raised in connection with the only other comparable road user charging scheme at Dartford. The Council is unaware of any finding of procedural impropriety on the part of the Secretary of State on the basis that the consideration of representations has been delegated to an agent as opposed to by the Secretary of State himself as charging authority. As a general principle, the Council remains concerned as to why this should be the case in apparent inconsistency with the view of the adjudicator in this case."

4.2.8. I am not aware that any appellant in a Tribunal case relating to a PCN issued from the Dartford-Thurrock River Crossing ("the Dartford Crossing") scheme has ever submitted that their representations were not considered by the charging authority. Had that submission been made, the adjudicator would have asked for evidence of the arrangements for considering representations and decided the appeal accordingly. Mr Curzon has expressly raised the arrangements at Merseyflow (again) and his main ground of appeal is that his representations were not considered by the charging authority, which he says amounts to a procedural impropriety.

There is a degree of irony in the suggestion that the alleged absence of any decisions of this Tribunal on the 1997 Act point means that the Council "cannot be acting in contravention of any purported findings of administrative law duties". Apart from the 1997 Act having no relevance; elsewhere, the Council makes submissions in cases to the Tribunal and publicly that the determinations of the Tribunal are case specific, carry no element of precedent, and do not require the Council to act in any particular way, or alter their behaviour, as a result of them.

4.2.9. Indeed, Emovis's own Business Rules state expressly (at Rep182) that any representations made on the basis of Curzon 1 must be rejected:

"***Scenario***

Customer makes a represe ntation [sic] *or appeal quoting or making reference to the adjudicators decision for case XM01672-1807 (Curzon) or rely upon any of the 3 specific issues associated with it, namely i) The use of the word 'toll' on PCN forms or any other standard documents or online information ii)The charging authority (HBC) not being entitled to delegate discrestionary* [sic] *power to Emovis (or any other party) and that all representations should be considered directly by HBC iii) The signage used on the highway network is based on the employment of the word 'toll' and*

is therefore not authorised to convey liability to pay a road user charge

Action

Any representations or appeal received on this basis are to be rejected, using the explanation as provided by HBC.

Outcome

Reject representation"

4.2.10. This Tribunal's findings in one case are not binding on another adjudicator in another case, but it is well established in administrative law relating to tribunals that such findings are likely to be persuasive to other adjudicators when considering similar cases. This is one of the purposes of creating specialist tribunals dedicated to citizens' challenges to the decisions of a particular department of public administration. Indeed, a fully reasoned decision, the outcome of which is not changed on review or upon Judicial Review, will be followed by other adjudicators unless there is a reason not to do so. Furthermore, as Mr Curzon so clearly states, "Adjudicators' decisions do have general effect when general principles are at issue".

4.2.11. In *North Wiltshire DC v Secretary of State for the Environment [1992] 65 P&CR 137*, Mann L.J. stated:

"In this case the asserted material consideration is a previous appeal decision. It is not disputed in argument that the previous appeal decision is capable of being a material consideration. The proposition is, in my judgment, indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way, am I necessarily agreeing or disagreeing with some critical aspect of the decision in a previous case? The areas for possible agreement or

disagreement cannot be defined but they would include an interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

4.2.12. It is notable that numerous adjudicators at this Tribunal have found that the Council's delegation of its public law duties in relation to the consideration of representations is a procedural impropriety.

4.2.13. It is equally notable that, despite scores of Tribunal cases to this effect, the Council have declined to ask the High Court to reconsider the point.

4.2.14. In declaring that they will not be bound by the decisions of this Tribunal, save in those individual cases that make their way to the Tribunal, the Council – while continuing to unsuccessfully argue the same points – appear to me to be perilously close to an abuse of process. Their defence of every case on the same, unsuccessful grounds is likely "frivolous" in a costs sense, likely to lead at some point to application for a prerogative order from the High Court.

4.2.15. At Evidence Tab 70 Mr Curzon produces an extraordinary analysis of the interaction of the various bodies involved in the "Merseyflow" operation. As he says "complex and convoluted do not even begin to describe it". It is apparent, however, that the operation is a business process, which excludes any meaningful involvement of the Council and ignores their fundamental public law obligations.

4.2.16. The Council have made it clear that they have delegated the road user charging operation to the Mersey Gateway Crossings Board Limited ("the MGCB"). There are also contracts between the MGCB, the Council and Emovis. Essentially, Emovis is Merseyflow. This is apparent from the Merseyflow website as well as the presentation of notices and documents: the PCN, for example, has the Emovis name and business address printed prominently at the top under the name "Merseyflow"; press releases refer to "Neil Conway, Chief Executive of Merseyflow"; and the website copyright notice reserves all rights to "Emovis Operations".

4.2.17. I recognise that the Council and the MGCB appear to hold an honest belief that the delegation to the MGCB is proper and lawful; although, following Curzon 1, one might have hoped the Council would reconsider the position, with competent advice. I understand that the Council and the MGCB made arrangements for Emovis to operate the toll scheme under *The River Mersey (Mersey Gateway Bridge) Order 2011* ("the 2011 Order") before the decision was made not to charge tolls at all (but to instead introduce a road user charging scheme under the TA 2000).

4.2.18. However, the Council and the other two entities should not have proceeded as if the two schemes were interchangeable without considering the impact of Article 42A introduced into the 2011 Order by *The River Mersey (Mersey Gateway Bridge) Amendment Order 2016* ("the 2016 Amendment Order"). This oversight was apparent in *The Mersey Gateway Bridge and the A533 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2017* ("the 2017 RUCSO"), which appeared to be largely copied from an earlier draft tolling order. As Mr Curzon submits, the powers in the 2011 Order relied upon were expressly excluded by Article 42A (6) of that Order, as analysed at length in Curzon 1.

4.2.19. I reiterate my findings in Curzon 1 that the Council, as the charging authority that made the 2018 Order, had and have no power or authority to delegate their functions to either the MGCB or Emovis.

4.3. *Dartford Crossing*

4.3.1. At the time of making the 2016 Amendment Order, the Secretary of State for Transport had made *The A282 Trunk Road (Dartford-Thurrock Crossing Charing Scheme) Order 2013*. It is surprising that when the decision was made to introduce road user charging for the new bridge that the Secretary of State's charging order was not used as a model.

4.3.2. However, and importantly, at the Dartford Crossing the Secretary of State for Transport is the charging authority for the purposes of *The A282 Trunk Road (Dartford-Thurrock Crossing Charging Scheme) Order 2013*. The functions of the charging authority are carried out by Highways England (now named National Highways). This is a statutory arrangement created by *The Infrastructure Act 2015*. This contains express powers concerning delegation and National Highways exercising the functions of the Secretary of State.

4.3.3. It is worthy of note that the name 'Dart Charge' given to the Dartford Crossing and the information about the scheme and how to pay are produced on the GOV.UK website, leaving users of the scheme in no doubt that it is a public, government scheme. The Merseyflow website makes no mention of the Council being the charging authority with responsibility for the charging scheme.

4.3.4. So, while the arrangement between the Council and the MGCB may appear to be similar in nature to the Dartford scheme, it is not in law, because it is not expressly provided for by legislation.

4.3.5. The 1997 Act does not assist the Council. The Council may not contract away its public law obligations. The Council's attempt to do so is an abdication, and fettering, of its public law obligations, including discretion in the consideration of representations, and it amounts to procedural impropriety.

5. Consideration of representations using 'Business Rules'

5.1. Contrary to the findings in Curzon 1, and the numerous cases which were allowed following it, those representing the Council state that even if the individuals tasked with reading and responding to motorists' representations were directly employed by the Council, they would be required to follow the same process as the non-Council staff who presently undertake the work.

5.2. In their initial representations to the Tribunal in this case, made in or about June 2019, the Council stated that there was "a comprehensive guidance" for the consideration of representations:

> *"Halton Borough Council is the charging authority and has established a comprehensive guidance. Any decision in respect of PCN issue, representations or appeals is carried out within the framework of the Council's guidance.*
>
> *The Council considered and decided upon the comprehensive guidance, which cover most foreseeable and/or common circumstances and the outcomes that the Council has decided should arise in those situations.*
>
> *The decision is entirely fact-based and does not require the exercise of any discretion. The Council's guidance is clear that any decision which does not fall within it, (constituting a discretionary decision) is to be referred back to the Council and this is done through an escalations panel which sits on a weekly basis (should it be required) and comprises a Senior Council Manager and the Board's Executive Management Team.*
>
> *When the guidance is applied, it represents the decision of the Council to treat certain representations and appeals in particular ways and Emovis are simply giving administrative effect to that decision, whether by confirming the validity of PCN issue or other prescribed outcome."*

5.3. Directions were issued requiring the production of the "comprehensive guidance". The Council declined to produce the information, with the following remarks:

> *"2.1 Enclosed at Annexure 1 with this Response is a copy of the relevant parts of the Council's Business Rules which pertain to the issues raised by the Appellant in this appeal. As the adjudicator will be aware, the appeal relates to a specific set of facts and the comprehensive guidance relevant to those facts is enclosed.*
>
> *2.2 The comprehensive guidance (of which the Business Rules form part) contains a large amount of information that is not relevant to this appeal since it is not germane to the factual matrix. The Council is sure that the Adjudicator understands the sensitive nature of this information and appreciates that the Council is only disclosing what is necessary to*

determine the appeal at hand. The information would be similarly redacted if an FOIA request was made for the information.

2.3 By way of further explanation, the comprehensive guidance extends beyond the matters relevant to these directions. For example, there is guidance and Business Rules which comprise extensive guidance on account management which are not being provided. Some of the information provided as being relevant to the appeal has also been redacted because it is commercially sensitive. There is a decision tree in the guidance and Business Rules that still results in a yes/no decision requiring no exercise of discretion by Merseyflow ("agent").”

5.4. In response to my Directions, a tabular document was provided which was described as the Council's "Business Rules". I understand that these comprise only part of the "comprehensive guidance".

5.5. The Business Rules are described as a set of pre-defined responses, purportedly intended to answer most representations made by motorists in receipt of a PCN. The redaction of information in the document provided to the Tribunal is less than satisfactory.

5.6. The Emovis "Enforcement Policy", produced in Curzon 1, used the expression "Business Rules". The Business Rules were not, however, produced in evidence for Curzon 1.

5.7. I am troubled by the expression "Business Rules":

- The word "business" contradicts the essentially non-business nature of the Council's duty to consider representations, and
- The word "rules" suggests inflexibility, again in contrast to the Council's Regulatory duty; and
- The document produced in response to my Directions was redacted because the items were apparently "commercially sensitive".

5.8. I am told that the Business Rules were "considered and decided upon" by the Council for the use of Emovis staff when considering motorists' representations. It is asserted that the staff operate an entirely administrative function, with no discretion whatsoever, merely following the Business Rules.

5.9. I gather that the Emovis operative, when receiving a representation, types key words or phrases from the representations into a bespoke search engine, which then provides one or more responses, from the Business Rules "matrix", which may be relevant to the case under consideration. The operative has to choose one and include it in the written response, the NoR for these purposes. The Council say that all questions, and outcomes, are "binary". They say that no discretion is involved and that the operative simply chooses the relevant predetermined response. It is stated that the operative: *"…does not make qualitative decisions (which are by nature discretionary)”*. If there is no predetermined response then

the individual case is referred to the "Escalation Panel" for further consideration.

5.10. The version of the Business Rules produced in response to Directions was unlikely to have been in existence at the time of Mr Curzon's crossing, or his representations, because it contains a Rule, "Rep184", which seems to have been drafted specifically in response to his representations.

5.11. "Rep184" appears sequentially within the Business Rules, unlike other entries which appear to have been added to the matrix and appear as (for example, after "Rep183") "Rep183b", "Rep183c".

5.12. If, as seems likely, Business Rule "Rep184" did not exist at the time Mr Curzon made his representations, and was created in response to Mr Curzon's representations, then one can only infer that the Escalations Panel was not consulted, or did not exist, when the non-NoR letter was sent on 8 May 2019.

5.13. It is unclear when the Escalations Panel was established, but I understand from a Freedom of Information response provided to Mr Curzon that, as at 1 October 2019, it had met some seventeen times. It has been stated that the Escalations Panel meets weekly, if required.

5.14. The Escalations Panel is made up of seven individuals from the MGCB and sometimes one member of the Council, Mr Jim Yates. Surprisingly, the Financial Director of the MGCB is one member of the Escalations Panel. Financial considerations should never be part of the process of considering the use of discretion (as emphasised in the Secretary of State for Transport's 2020 *Statutory Guidance for local authorities on enforcing parking restrictions* ("the 2020 Statutory Guidance") about their civil enforcement functions).

5.15. The Council produces an example of a case which did not fit within the Business Rules and which was therefore sent to the Escalations Panel for consideration and its ultimate conclusion. That outcome formed another Business Rule to be applied in future cases. It is a surprising example as it is a far from unusual, often seen by adjudicators in the parking and bus lane jurisdictions, being a request for leniency based upon mental health issues. It is difficult to fathom how a panel of people were required to decide whether discretion should be applied favourably, or that this had not arisen before, or that any two cases are so similar that they should be considered in an identical way. This is contrary to the fundamental principle that each case should be considered on its own merits. It is also disturbing that, had that same motorist been unable to produce "evidence" of his illness, the representations would simply have been rejected.

5.16. The whole point of having an experienced person dealing with representations is that they can form a view from what the motorist has described, how they have described it, and taking into account other factors that provide context, all of which enables them to use their experience to form a fair judgment.

5.17. *Content of Business Rules*

5.17.1. Mr Curzon has provided numerous examples of how poorly the use of the Business Rules addresses representations made by himself and others.

5.17.2. Adjudicators have seen numerous cases where the NoR does not address the representations made. They have frequently remarked upon, and allowed appeals on the grounds of, procedural impropriety on the basis that the representations could not have been considered given the unrelated reason given for rejecting them.

5.17.3. Therefore, not only is this system no substitute for reading what the motorist has said and responding appropriately, adjudicators have noted that it gives rise to numerous inconsistencies. They have seen examples where an identical representation has been made to a number of PCNs, with the same factual points applying to them all, but because different operatives have selected a different word to trigger the formula, it resulted in some representations being accepted and others rejected; and the rejected ones gave significantly different reasons.

5.17.4. Adjudicators have been particularly concerned about the rejection of representations where a motorist did pay on time to cross the bridge but the payment was instead applied to a different crossing.

5.17.5. The following Business Rules appear to relate to this scenario:

> *"Rep 138c Made X crossings, paid for Y (FOLLOW UP)*
> *Road user claims paid but payment(s) is/are outstanding. Road user has made a number of crossings and has paid for some, but not all of them.*
> *Review payments received - sufficient funds received*
> *Cancel PCN(s) and advise road user*
>
> *REP138d Made X crossings, paid for Y (FOLLOW UP)*
> *Road user claims paid but payment(s) is/are outstanding. Road user has made a number of crossings and has paid for some, but not all of them.*
> *Review payments received - insufficient or no funds received*
> *(Consideration should initially be given to Business Rules: First Crossing (Rep181), First PCN (Rep186))*
> *Reject representation"*

5.17.6. The rule itself is false and misleading. It is unlikely that the representations will have been framed on the basis that the vehicle had made a specific number of crossings, but a different number of payments have been made. So far as I am aware, representations in those terms have never been seen by adjudicators. The usual representation is that the crossing subject to the PCN was paid in time, and usually proof has been provided with the representation. Therefore, as a matter of fact, the ground in Regulation 8(3)(d) of the 2013 Regulations has been established. Leaving aside that the PCN

should never have been issued, the representation must be accepted and the PCN cancelled. A penalty charge is payable only in relation to a specified crossing where payment has not been made on time: the Council have no power to reallocate or move a liability to a different crossing.

5.18. *'Binary' process*

5.18.1. Consideration of individual Business Rules demonstrates that the process is far from a "binary" process.

For example, "Rep04", which is categorised as a "compelling reason" and sub-categorised as "Advice", presents the "Scenario" that the motorist, without supporting evidence: "*States that they received incorrect advice from either Contact Centre or Retail Service Provider".*

The operator's required "Action" is stated as:

"*1. Ask for further information*
2. Perform investigation if reason is said to be contact centre advice. Reject if no internal evidence can be found to support.
3. Reject if retail service advice no evidence."

5.18.2. The "Outcome" is "Reject Representations". The mirror of that scenario, where evidence is provided or there is a known issue, is that the representation will be accepted. What evidence is envisaged? How does the agent decide if the evidence supports the submission or is not material?

5.18.3. The Business Rules also appear to apply a transactional process to each PCN. They do not appear to take into account that in many cases the person making representation has received a number of penalty charges. A typical example that adjudicators frequently see relates to the status of motorists' accounts when they have not received an email saying the account is closed. Their representations apply to all the PCNs and it is incumbent on the charging authority to consider them all together and decide whether, in the circumstances of an account holder, it is proportionate to pursue each and every penalty charge.

5.18.4. In many of the cases that come before adjudicators the appellant has raised a number of issues, each of which needs to be considered, as well as deciding if any of them amounts to a compelling reason to cancel the PCN. The evidence at Tab 17, produced by Mr Curzon, shows that the Merseyflow online representations process has 'radio buttons' so only allows the recipient of a PCN to select one ground. This is despite Regulation 8(1) of the 2013 Regulations specifying that the recipient of a PCN may make representations on:

> "(a) one or more grounds mentioned in paragraph (3)".

Furthermore, Mr Curzon points out in his comment on the evidence

that the ground of appeal "No 'user charge' or penalty is payable" has been omitted.

5.18.5. In fact it appears not to matter to the Council or its agents which ground has been selected by the motorist because the representations document download at Evidence Tab 9 displays the representation without showing which ground the person making the representations has selected. I must infer that this document reflects the view of the screen that the Emovis agent is working from. So how can they be considering whether the ground selected by the motorist – or if they have clicked compelling reasons – is made out if they cannot see which it was? This adds an additional level of randomness to the process. It is often clear to adjudicators that the application of the Business Rules has led to an agent selecting one 'issue' and producing an inappropriate NoR.

5.18.6. This is not, and cannot be, a process absent of discretion. The Business Rules process as presented is fundamentally flawed and, in its application to this and other cases, amounts to procedural impropriety. The process would be flawed even if the 'agents' were employees of the council.

5.18.7. The Council are obliged, by the Regulations, to "consider" the representations made by a motorist in response to a PCN, together with any supporting evidence. Consideration is not an algorithm, and it is not a blind process operated by rigidly following a strictly defined process.

5.18.8. There is no objection to developing policies to foster consistent decision making; in fact most civil enforcement authorities have their own policy document, often published. But policies are there for guidance only and there will always be exceptional cases. Every representation will be different, nuanced, and even if similar to another, may not simply be squeezed into a generic type, for; example, by identifying a particular word like 'signs', with a pre-defined outcome.

5.18.9. I reject entirely the propriety of using these Business Rules in place of consideration as required by the 2013 Regulations. I reject entirely the establishment of the Escalations Panel as a remedy to the inadequacy of the Business Rules.

5.18.10. As discussed in Curzon 1, the Council are aware of the 2020 Statutory Guidance issued by government that applies in parking and bus lane cases: different jurisdictions, yes, but an identical process not least regarding the required approach to individual representations. It is not arguable that the following does not apply:

> 10.4 Enforcement authorities have a **duty*** not to fetter their discretion, so should ensure that penalty charge notices, Notices to Owner, leaflets and any other advice they give do not mislead the public about what they may consider in the way of representations. They should approach the exercise of discretion objectively and without regard to any financial interest in the

> penalty or decisions that may have been taken at an earlier stage in proceedings. Authorities should formulate (with advice from their legal department) and then publish their policies on the exercise of discretion. They should apply these policies flexibly and judge each case on its merits. An enforcement authority should be ready to depart from its policies if the particular circumstances of the case warrant it.
>
> *Failure to act in accordance with the general principles of public law may lead to a claim for a decision to be judicially reviewed.
>
> 10.5 The process of considering challenges, representations and defence of appeals is a legal process that requires officers dealing with these aspects to be trained in the relevant legislation and how to apply it. They should be well versed in the collection, interpretation and consideration of evidence; writing clear but concise case-specific responses to challenges, enquiries and representations; presenting the authority's case to adjudicators.
>
> 10.6 Authorities should ensure that their legal departments are involved in establishing a processing system that meets all the requirements of the law. They should also consult them about complex cases.

and:

> 10.8 The consideration should take into account the grounds for making representations and the authority's own guidelines for dealing with extenuating, or mitigating, circumstances. … the authority should ensure that … there is an adequate audit trail of the case, showing what decision was taken and why.

5.18.11. I am aware that it has been suggested by those representing the Council that there is no need to explain to a motorist why representations were rejected. Point 10.11 from the Statutory Guidance should be sufficient to remind them:

> 10.11 If the enforcement authority considers that there are no grounds for cancellation, it should tell the vehicle owner and explain its reasons.

5.18.12. The whole point of authorities having been granted discretion is to account for human frailty, simple errors, and the qualitative difference between those who flout and those who attempt to observe the rules. Consideration of the circumstances is a skill, acquired through training and experience, and it may not, in any reasonable sense, be turned into a robotic, algorithmic, process.

5.18.13. At Evidence Tab 26 there is an email, dated 29 March 2019 (before Mr Curzon's crossing), produced by the Council. It is to Mr Bennett from Ian Leivesley, the Council's "Strategic Director Enterprise, Community and Resources". This email addresses the Council's involvement in, and authorisation of, the Business Rules. Mr Leivesley suggests that power has been delegated to him by the Council, and he in turn purports to delegate it to the MGCB and Emovis. Bearing in mind I issued my decision in Curzon 1 on 11 March 2019, it would appear that following that decision the Council was asked to approve the Business Rules – some eighteen months and, apparently, four versions ("version 4.6" is said to be appended) after they were first put to use when the scheme started in

September 2017. Mr Leivesley says he has read them, but given that he has made no modifications or comments it seems unlikely that thorough consideration could have been given to their content and application.

5.18.14. In Curzon 1, I addressed, at length, the procedural impropriety of delegation to Emovis, and likely the MGCB. For the reasons given, the Council may not delegate its functions as the charging authority to the MGCB. Therefore, Mr Leivesley acted beyond his powers to delegate approval of the Business Rules to the MGCB. It follows that the approval is void, with the effect that the Council has not in fact approved the Business Rules (even if they are a valid and justifiable method of dealing with representations, which, as I have found, they are not).

5.18.15. I reject the assertion that the Council makes, or even lawfully authorises, discretionary decisions, either by reference to the inappropriate Business Rules or to the Escalations Panel, which is essentially not the Council at all.

5.18.16. I find, on the basis of the clear evidence, that:

1. neither the Council, nor Mr Yates nor Mr Leivesley, have any meaningful involvement in the consideration of representations; and

2. the Business Rules procedure for the purported consideration of representations is, in any case in which it is used, a procedural impropriety. It is flawed in concept, content, and implementation.

6. The Penalty Charge Notice

6.1. *Date and time of crossing*

6.1.1. Mr Curzon asserts that his PCN stated he crossed the bridge at "April past 9". That would have been nonsense, of course, and would have rendered the PCN immediately unenforceable. I have not seen any evidence, however, showing this precise point, with the crossing time described in quite that way.

6.1.2. Mr Curzon produces evidence, from other cases, showing that in some circumstances the number of minutes past the hour may reflect the month, instead of the minutes past the hour. So, a crossing made in April will erroneously be shown at a particular hour and four minutes: the four reflecting April as the fourth month. I understand that the Council withdrew from those cases and there is no submission from them on the precise issue. Examples of other motorists' crossing times, particularly in November and December are produced, each showing either 11 or 12 minutes past the hour for each crossing, together with other examples for May showing 5 minutes past the hour. There is a table produced by Mr Curzon

showing an example of each month, with the crossing time showing the month number as the minutes past the hour in each case.

6.1.3. Mr Curzon produces a printout, at Evidence Tab 45, showing this crossing, Southbound, at 09:39 on 12 April 2019. That same entry shows the Notice of Rejection date as 11 April 2019, the day before the crossing, which is plainly an error.

6.1.4. Mr Curzon also describes, with evidence showing nonsense information, the difficulties he encountered in obtaining a PIN code to make his appeal to the Tribunal.

6.1.5. So, while I cannot find that the PCN stated "April past 9", Mr Curzon's submissions on what he believes went wrong, with anecdotal examples, cause me to accept that, on the balance of probabilities, there are aspects of the Council's system that lead to errors. It is not impossible that the error arises simply as a result of using or modifying the American date system.

6.2. *Address for payment*

6.2.1. The 2013 Regulations, at Regulation 7(3), set out the information that a PCN must contain including:

> (g) the manner in which the penalty charge must be paid and the address to which payment of the penalty charge must be sent;

And, in relation to representations:

> (i) the address (including if appropriate any email address or fax telephone number, as well as the postal address) to which such representations must be sent and the form in which they must be made;

6.2.2. The PCN as produced provides payment information:

HOW TO PAY

You can pay for this penalty charge by credit or debit card by visiting the merseyflow website: *www.merseyflow.co.uk* ***or you can scan this QR code using your smartphone [QR code]***

Alternatively, call ***01928 878878*** *and select the option to pay a Penalty Charge Notice. Please wait for your receipt number to ensure your payment has been processed successfully.*

6.2.3. The 2013 Regulations require "the address" for payment to be provided on the PCN which, in context and in particular having regard to paragraph (i), must mean a physical address. No physical address for payment is provided.

6.2.4. The only available method of payment appears to be online or by telephone, and by card, rather than by cash or cheque, for example.

6.2.5. This appears to anticipate that all motorists using the bridge, and not having an account, will have the ability to pay in this way. While many people would use either of these methods easily, there will be

some who are unable or reasonably unwilling to do so.

6.2.6. The crossing charge itself is intended to be paid online, of course, but it is also possible to pay at a walk-in centre and at Payzone centres. It is unclear how many of these physical locations exist, or if they accept cash or cheques, for example, but they are presumably places broadly accessible to all and do not require internet access or skills.

6.2.7. The absence of a physical address on the PCN is a technical procedural impropriety but I do not find it to be necessarily fatal to its enforcement. I recommend, however, that the Council consider providing the walk-in centre address to remedy the defect.

7. The Notice of Rejection.

7.1. I have already indicated that this appeal must be allowed because the Council did not accept that Mr Curzon's representations established a ground of appeal because the letter they sent did not conform with the requirement for a NoR. After receiving that letter, Mr Curzon emailed Merseyflow and they then sent him what purported to be a NoR, this time containing the statutory information.

7.2. *PIN Code*

7.2.1. There is an agreement between the Traffic Penalty Tribunal and all respondent enforcement and charging authorities that their NoRs will contain a 'PIN Code' enabling the recipient of the NoR to lodge an appeal online at the Tribunal.

7.2.2. Mr Curzon had to write again, more than once, to request that the PIN that should have appeared on the second page of the NoR (but did not) be issued. It was never issued, says Mr Curzon, and he resorted to using a PIN from another case in order to make his appeal to the Tribunal.

7.2.3. Where the PIN Code should have appeared in the NoR, there was instead the following:

Appeal Code:
<<additionalmergefields.appealwebcode>>

7.2.4. The non-issue of a PIN Code could not be a procedural impropriety as it is not required by the 2013 Regulations. However, it suggests that Mr Curzon is differently treated to other recipients of PCNs, and Merseyflow's correspondence with him is not in the usual format.

7.3. *Tribunal costs information*

7.3.1. I have dealt with this issue before, including in case number XM00860-1904, for example (decided on 26 July 2019), and in relation to three crossings in March 2019.

7.3.2. The NoR contains the following description of the costs position if a case is taken to appeal at the Tribunal:

> *"Costs*
>
> *If your appeal is successful, adjudicators will not normally award costs against Halton Borough Council unless they consider the decision to reject your representation was wholly unreasonable. Costs may be awarded against you if an adjudicator considers your appeal frivolous or vexatious or the making or pursuing of the appeal was wholly unreasonable.*
>
> *If you do not pay the amount due or enter an appeal within 28 days of the date of service of this Notice, a Charge Certificate may be issued. This increases the penalty charge to £60. If the increased penalty charge is not then paid, Halton Borough Council will apply to the County Court to recover the unpaid Toll and the penalty charge, which will incur a further charge to you of £8 per Penalty Charge Notice."*

7.3.3. Paragraph 13 of the Schedule to the 2013 Regulations provides rather differently:

> Costs
>
> 13. (1) The adjudicator is not normally to make an order awarding costs and expenses, but may, subject to sub-paragraph (2) make such an order_
>
> 1. against a party (including an appellant who has withdrawn an appeal or a charging authority which has consented to an appeal being allowed) if the adjudicator considers that the party has acted frivolously or vexatiously or that their conduct in making, pursuing or resisting an appeal was wholly unreasonable; or
>
> 2. against the charging authority where the adjudicator considers that the decision made by it giving rise to the appeal was wholly unreasonable.

7.3.4. So, according to the 2013 Regulations, this Tribunal will not normally make any award of costs but may award them against either party (that is, including the Council) if that party has acted "frivolously or vexatiously", or their conduct in relation to the appeal was "wholly unreasonable". Costs may also be awarded against the Council if the adjudicator finds that the rejection of the representation was wholly unreasonable.

7.3.5. The NoR suggests, wrongly, that costs for frivolous or vexatious behaviour may only be awarded against the appellant. Costs for frivolous or vexatious behaviour may be awarded against the Council

where evidence of such behaviour is found.

7.3.6. Furthermore, the NoR also suggests that costs against the Council will only be made where the Tribunal finds that the decision to reject the motorist's representations was wholly unreasonable. The 2013 Regulations actually provide that an award of costs may also be made against the Council where it is found that the Council's conduct in pursuing or resisting an appeal was wholly unreasonable.

7.3.7. The misstatement of the costs rules is, in my view, a significant procedural impropriety. The information provided to the appellant is not only wrong but also gives the impression that an award of costs against that appellant is a possibility for several reasons, whereas the phrasing concerning costs against the Council reflects only the position in Paragraph 13(1)(b) and ignores Paragraph 13 (1)(a).

7.3.8. It could well be argued that the Council's conduct in persisting in their unlawful delegation of the consideration of representations – but maintaining the same, repeatedly rejected, arguments in relation thereto – amounts to a frivolous defence of each case brought before the Tribunal where this regime has been applied. There is a real risk of costs being awarded against the Council in these circumstances, which the description applied in the NoR fails, egregiously, to recognise.

7.3.9. Indeed, I understand from the Tribunal that some 31 costs awards have been made against the Council since 2017.

7.4. *Fettering discretion (representations through the website)*

7.4.1. I understand that the preferred method of making representations against the PCN is by online form, although they may be made by post.

7.4.2. I have already referred to the evidence at Tab 17 where Mr Curzon has produced screenshots of the online process, including the section relating to "Compelling Reasons", or mitigation:

> *"Compelling reasons*
>
> *In the next screen we will ask you to explain what these compelling reasons are and provide any evidence applicable.*
>
> *The following reasons will not be considered and we may reject your representation.*
>
> - *Inadequate Signage: The signs across the bridge and road route are sufficient to meet the requirements of the Mersey Gateway Bridge Byelaws 2016 and the Transport Act 2000 and have been authorised by the Department for Transport (DfT).*

- *No Toll Booths: The Mersey Gateway Bridge is a toll bridge that is a free-flowing operation to ensure journeys are quicker, easier and more reliable. Installing toll booths would create congestion.*
- *Sat Nav / Traffic Diversion: Mapping data for satnav systems is provided by Ordnance Survey or the system provider and not by merseyflow.[sic] All road user charges are payable regardless of the reason for crossing."*

7.4.3. It is true that the Department for Transport ("the DfT") authorised the signs for the tolling scheme which would have been introduced in *The Mersey Gateway Bridge Byelaws 2016* ("the 2016 Byelaws"). It is extraordinary that they 2016 Byelaws are referred to because, of course, the tolling provisions were never applied.

7.4.4. The bridge is not a "toll bridge" at all. Tolls are not payable: a road user charge is payable.

7.4.5. Representations about signage and toll booths may well fall within the regulatory grounds of appeal, and should not be treated as mere mitigation.

7.4.6. Also, despite the website information above, the Business Rules (at REP012 and REP013) do allow for the favourable consideration of a diversion.

7.4.7. The words "will not be considered" make plain that certain representations will not be taken into account. This is clear fettering of discretion and is a breach of the Council's obligation to consider the representations made by a motorist. The statement should not be made at all as it may deter those who wish, and who are entitled, to make representations on those very grounds.

7.4.8. More importantly, regardless of whether their practice is stated, the Council may not exclude certain types of representation from their regulatory obligation to consider them.

8. The Charging Orders

8.1. *Toll or Charge?*

8.1.1. I found in Curzon 1 that the *charging* of both tolls and road user charges would be prohibited, but that the mere existence of the 2016 Byelaws imposing a toll that is not charged is not fatal to the validity of the road user charge imposed under the then current 2017 RUCSO.

8.1.2. I have modified my view and consider that the 2016 Amendment Order removed the power to charge tolls under the Byelaws. Article 42A (5) provides:

> 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) the charging scheme has effect in substitution for 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.

8.1.3. Article 41 dealt with the power to charge tolls. Article 42A (5) expressly substitutes the road user charging scheme for Article 41, thereby nullifying the power to charge a toll.

8.1.4. The road user charging scheme and the tolling scheme are not both extant. Only the road user charging scheme prevails.

8.1.5. This further emphasises why the word "toll" should not be used; not on signs, correspondence, or notices in the enforcement process. Tolls are not only different to road user charges, there are no tolls applicable to this crossing.

8.1.6. Mr Curzon's new point is that the 2018 RUCSO did not effectively revoke the 2017 RUCSO so that there are two live Orders, both imposing charges.

8.2. *The 2017 and 2018 Charging Orders*

8.2.1. The 2018 RUCSO purported to revoke the 2017 RUCSO:

> Revocation
>
> 3. The Mersey Gateway Bridge and the A533 (Silver Jubilee Bridge) Road User Charging Scheme Order 2017 is hereby revoked.

8.2.2. But the name of the 2017 RUCSO was misdescribed by missing out the "s" at the end of "Road", as may be seen by comparing the name of the Order to be revoked with the actual title of the 2017 Order (my emphasis):

> *"The Mersey Gateway Bridge and the A533 (Silver Jubilee Bridge) Road**s** User Charging Scheme Order 2017"*

8.2.3. Mr Curzon refers me to the case of *Sebry v Companies House and another [2015] EWHC 115 ("Sebry")* which involved Companies House publishing the winding up of the wrong company because of a failure to notice the difference an "s" made between the names of two distinct entities. The case went to negligence and duty of care, and substantial loss was caused to the wrongly identified company. Companies House was found to be liable.

8.2.4. I prefer the Council's submissions on this point. The missing "s" in the 2018 Order may be distinguished from the "s" discussed in *Sebry*. In *Sebry* there were two existing companies with similar names and the

use of the wrong name caused loss to the other one. The absent "s" in the 2018 Order did not revoke a different Order. The error is subject to statutory interpretation and it is plain that it was the 2017 RUCSO that was to be revoked by the 2018 RUCSO.

8.2.5. It was an error but, in my view, not a fatal one. I find that the 2017 RUCSO was revoked by the 2018 RUCSO.

9. Signage

9.1. Mr Curzon says there have been new signs installed, including variable message signs which do not operate correctly and flicker. He provides a photograph of one such sign which shows letters missing so that the intended:

"NO BARRIERS
PAY
TOLL/CHARGE
ONLINE"

instead reads something like:

"I BARRIERS
PAY
I L/CHARGE
ONLINE"

9.2. The Council say that still photographs of such signs are not a true representation of what the sign actually indicates to motorists and that the absent words in the image are not necessarily absent in reality. There is no further evidence of the variable signs, or expert evidence of their photographic representation.

9.3. However, in case number XM01450-1905, the Chief Adjudicator rejected a review application by the Council and stated:

"The variable message sign on the bridge is not an authorised sign and is there for advisory purposes only. In any event, the point of variable message signs is that the message can be changed to provide other current or emergency advisory information so it is unlikely that there will be evidence of what the message said at the time of the crossing being considered."

9.4. The word "online" does not, as far as I am aware, have any legal meaning, and its vernacular meaning is widely understood. Use of the word "online" in itself should not cause any confusion but context is, of course, crucial.

9.5. Mr Curzon suggests otherwise, but I will presume that the new signs authorised by the DfT on 26 June 2019 had not been installed at the time

Mr Curzon crossed the bridge in April, and to that extent the authorisation is not relevant to this case. I note, however, as pointed out by Mr Curzon, that the drawings attached to the DfT authorisation are still entitled "Tolling Signing".

9.6. I note also the photographs of signs submitted by Mr Curzon, described as near to the bridge crossing, all of which reference "toll" in some manner. I do not know the dates that these photographs were taken, whether those signs were in place at the time of this particular crossing, or if they have remained in place.

9.7. I make no fixed findings regarding the signage in place when Mr Curzon crossed the bridge. If the signs in Mr Curzon's photographs were in place when Mr Curzon crossed then they were unlawful; if they were not then it is difficult to understand why they have now been installed when the Council are well aware that they do not reflect the road user charging scheme in place. Those signs are not suitable for use with a road user charging scheme and, if used, would fail to convey the necessary information to a motorist.

9.8. The difference between tolls and road user charges was discussed at length in Curzon 1 and I need not rehearse it here. The drawings themselves refer to a "charge" and carry the familiar "C" (indicating a charge, as in the London Congestion Charge). One anticipates arguments over the use of the word "toll" will be rendered redundant when the new signs are in use, and in particular that it will no longer persist in the Council's unnecessarily convoluted correspondence.

9.9. I should not need to address this further but will clarify to the Council that while my decision in Curzon 1 did not contradict Mr Solomons' earlier findings that the signs were "large, well sited, in clear view, and communicate to a driver unfamiliar with the area that a payment was required and how to pay", neither did it endorse or approve, expressly or tacitly, the use of the signs: quite the contrary. The point, in Curzon 1, and which was not known to Mr Solomons, was that the signs were not authorised for use with a road user charging scheme but instead for a tolling scheme, and were therefore unlawful as used.

9.10. It matters not how large or clear a sign is if it provides the wrong information. That was my conclusion in Curzon 1: the information provided was wrong, and for that reason the signs were inadequate.

9.11. To the extent that the signs in place at the time of Mr Curzon's crossing on this occasion were as those previously discussed in Curzon 1, or otherwise contained the word "toll", they were inadequate.

10. Enforcement through TEC

10.1. Mr Curzon produces evidence at Tab 22 to suggest that it is not the Council engaging with the Traffic Enforcement Centre (TEC) at the County Court, and that "Mersey Gateway Bridge" is stated to be the Local

Authority.

10.2. Only the Council may engage with TEC to enforce a penalty charge. This is beyond my jurisdiction but is a matter the High Court may consider in due course.

Chief Adjudicator Caroline Sheppard OBE

11. Introduction

11.1. First, I agree with Adjudicator Kennedy's reasoning above and I apply it to Mr Curzon's other ten cases, with which I shall deal.

11.2. Mr Curzon relies, at least in part, on the decision of Adjudicator Kennedy in the case of Curzon 1, which was allowed on the ground that there were numerous procedural improprieties by the Council. He says the same issues identified in that case remain. The Council argues the decision in Curzon 1 is of no relevance, in part because they say that the adjudication of an appeal under the 2013 Regulations is specific to the case being considered. Consequently, they argue that any decision of an adjudicator only relates to the particular case and does not have any general effect.

12. The impact and weight of an adjudicator's decision

12.1. The Council's approach is misconceived because it is over-simplistic. It fails to take account of the fact that a decision of an adjudicator, particularly on an issue of law, has value as a precedent even though it is not binding on another adjudicator.

12.2. An adjudicator determining an appeal under the 2013 Regulations is determining an appellant's legal position in relation to liability to pay a civil penalty charge for alleged non-payment of a road user charge. In doing so an adjudicator exercises a judicial function – see Paragraph 26 of the judgment of Hickinbottom J in in *The Queen on the Application of Stephen Fitzgerald Deeds and the Parking Adjudicator [2011] EWHC 1921 (Admin),* a case concerning a parking adjudicator appointed pursuant to the *Civil Enforcement of Parking Contraventions (England) General Regulations 2007* who, by virtue of Regulation 12 of the Appeals Regulations are also appointed as the adjudicators for the purposes of the Appeals Regulations). The *Deeds case* identified the close parallels between the functions of the parking adjudicator (and by extension of the adjudicator determining appeals under the 2013 Regulations) and the tribunals within the scope of *The Tribunals, Courts and Enforcement Act 2007* ("the 2007 Act"). As with the tribunals within the scope of the 2007 Act, the adjudicator is an expert, independent standing statutory body available to deal with all cases within

its jurisdiction.

12.3. A decision of an adjudicator that there has been a procedural impropriety on the part of the Council, the charging authority, involves a decision on an issue of law. The Appeals Regulations define "procedural impropriety" as: "*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…*" It is a question of law whether a particular act or omission on the part of a charging authority constitutes a procedural impropriety as so defined.

12.4. As has been observed in "Tribunal, Practice and Procedure Fifth Edition" ("Jacobs 2019", published by the Legal Action Group): "*Every decision that decides or discusses an issue of law relevant to a case has value as a precedent. As a precedent, it may be binding, presumptive, persuasive or indicative.*" (Para 13.13). The author identified the value of precedent in the judicial process as follows: "*If every case had to be decided afresh without reference to previous decisions and the analysis in those decisions, the burden on the time and intellect of the judges would be intolerable…It is a means by which consistency of and discipline in, decision-making is enhanced.*" (Para 13.4). As Jacobs 2019 explains, while a First-Tier Tribunal within the tribunal structure created by the 2007 Act (and by analogy, the adjudicator determining appeals under the 2013 Regulations) is not bound by its own decisions, those decisions have the status of persuasive precedent (Para 13.68), which means that such a decision "*…is potentially relevant.*" (Para 13.16).

12.5. In *West Midland Baptist (Trust) Association (Inc) v Birmingham Corporation [1967] 2 QB 188 at* 210*,* Salmon LJ stated:

> "*No doubt previous decisions of the tribunal on points of law should be treated by the tribunal with great respect and considered as persuasive authority,…But they should never be treated as binding. It is important that such decisions should be carefully scrutinised and if necessary rejected…"*

12.6. In short, although an adjudicator is not bound to follow the decision of another adjudicator on a question of law, it is wholly wrong to say, as the Council do, that such a decision "*…only relates to the particular case and does not have any general effect*." This fails to take account that such a decision is a persuasive precedent. A subsequent adjudicator is not bound to adopt unquestioningly the same reasoning, but must have regard to it. The adjudicator does not approach a subsequent case on the same question of law afresh, without any regard to the previous decision on that question. If in agreement with the reasoning in a previous decision, an adjudicator may decide a case by reference to the previous decision and the analysis in that decision; if not, the adjudicator may reject that reasoning and reach a different decision, but only after having "*carefully scrutinised"* the previous decision. Furthermore, the Council has the benefit of previous decisions to which it was a party concerning its acts and omissions which adjudicators have found to constitute procedural impropriety (and the opportunity to change their conduct in light of such decisions), whereas an appellant, the vast majority of whom are not legally represented, is far less likely to do

so. It is part of the enabling approach and the inquisitorial approach which adjudicators (along with tribunals generally) are required to take in each appeal (see Paras 1.42 to 1.73 of Jacobs 2019) that an adjudicator should have regard to previous decisions on the same point of law.

12.7. Adjudicator Kennedy referred to *North Wiltshire DC v Secretary of State for the Environment [1992] 65 P&CR 137*.

12.8. This fundamental misunderstanding of the judicial process may be another indication that appeals are being dealt with by the contractors, since the Council's legal advisers must be familiar with these principles. Adjudicators have had to deal with the same points over and over again, pointing out that the Council's persistent denial of points of law is misguided. For example, in case XM02223-1906, Adjudicator Solomons – in dismissing the changing authority's application for a review of an allowed appeal where the adjudicator had found that the rejection decision had been made by the contractors – said:

> *"The application for this review appears to accept that the decision was made by the company rather than by the Authority, and seeks to justify this. Essentially, it is said that the council has set out the circumstances in which challenges should be accepted or rejected and therefore there is no exercise of discretion. I am unable to accept this proposition, as a matter of law. Numerous decisions of the Administrative Court have made clear that it is appropriate for councils to have policies in order to improve consistency of discretionary decision-making, but nevertheless each set of circumstances must be considered individually as to whether it would be justified to depart from the policy.*
>
> *It is apparent that the Authority does not accept the rulings by a number of adjudicators as to the law in this respect. In those circumstances it would be appropriate for it either to refer the legal issue to the High Court for guidance, or to accept the rulings by the adjudicators.".*

12.9. In not recognising these principles, the Council, and their agents, are undermining the appeals process. It characterises a transactional approach to the enforcement process and lack of understanding of the civil enforcement framework. It is enforcement that lies at the heart of the difference between a tolling operation and a road user charging scheme.

13. The word 'toll' versus the word 'charge'

13.1. While the differences and semantics of the words toll and charge have been exhaustively examined, for the purposes of these further 10 appeals, and the understanding of the road user charging scheme, the fundamental difference between a "toll" and a "charge" is liability for payment and enforcement. The functions, duties, and accountability of the respondent Council, as the charging authority for the road user charging scheme, are wholly different from its function as the undertaker for the purposes of a tolling scheme.

13.2. While Adjudicator Kennedy has covered this ground in both Curzon 1, and the subsequent decision set out above in XM01885-1906, I will explain the history and background of the road user charging scheme.

13.3. Toll roads – in the UK, at any rate – are roads where the tolls are paid on site at toll booths or toll plazas, the modern equivalent of the old turnpikes. There are advance signs indicating the amount of the toll to be paid for each class of vehicle.

13.4. In law, a tolling scheme can be operated through a private/public joint venture. Any offences arising from evasion of the tolls can be prosecuted as a criminal offence in a magistrates' court.

13.5. Road user charging schemes created under Sections 163-175 of the TA 2000 are wholly public schemes. Charging orders can only be made by one of the public bodies detailed in Sections 164 – 167.

13.6. In a document dated 4 June 2008, headed "TOLLS AND ROAD USER CHARGES EXPLANATION", the Mersey Gateway project lawyers explain that the initial plan was to charge tolls for using the new Mersey Gateway bridge and road user charges for using the existing Silver Jubilee Bridge. Paragraph 5.6 of the document states:

> *"The most appropriate method to secure the imposition of a toll on the Silver Jubilee Bridge is by use of road user charging pursuant to the Transport Act 2000. This is not exactly the same regime as will apply to the new bridge, but it will be very similar. One difference is that the sums payable for the use of the new bridge will be called "tolls", whilst those applying to the Silver Jubilee Bridge are called "charges". Nevertheless, the Council is seeking to ensure that the regimes applying to the two bridges are as close as possible to being the same - the amount of tolls/charges should be the same as well."*

13.7. This was written in 2008, before the 2013 Regulations had been issued to provide for the civil enforcement of charges at the Dartford Crossing. It was therefore unable to deal with the fundamental differences in enforcement.

14. Civil Enforcement Schemes for minor traffic contraventions

14.1. To put the 2013 Regulations into context, it is helpful to consider them as part of a distinct civil enforcement regime for minor traffic contraventions enforced by local authorities and, at the Dartford Crossing, by the Secretary of State for Transport and National Highways, as well as Halton Borough Council at the Mersey Crossings. The new Clean Air Zones now being implemented across the country are all TA 2000 road user charging schemes enforced by the local authorities through the 2013 Regulations.

14.2. Civil enforcement has been developed from the original decriminalised parking enforcement introduced by *The Road Traffic Act 1991* ("RTA

1991"), which enabled local authorities to enforce parking contraventions instead of the police. This meant that parking ceased to be a criminal offence but enabled the local authority to issue PCNs for parking contraventions in their area. The schemes are unusual from a constitutional point of view because the authorities make the traffic orders, enforce contraventions of those orders by imposing penalties (which are fixed by regulation), deal with representations against the penalties and retain the penalty charges to cover the cost of enforcement. Because the contraventions and penalties are not criminal, appeals against rejected representations were made to independent, arms-length adjudicators – lawyers with the same qualifications and appointed by the same process as a tribunal judge, with the Lord Chancellor consenting to each appointment. Since 1991, the variety of traffic contraventions subject to what is now known as civil enforcement has widened, with adjudicators dealing with an increasingly varied jurisdiction.

14.3. When the Dartford Crossing became subject to a TA 2000 road user charging scheme, the Secretary of State for Transport introduced *The Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013* ("the 2013 Regulations"). These adopt the process and procedure for civil enforcement contained in *the Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007* [SI 3482] ("the 2007 Civil enforcement Regulations") issued under the *Traffic Management Act 2004* ("TMA"). These had repealed and improved the decriminalised parking enforcement scheme introduced in the RTA 1991. The TMA created a coherent regime enabling local authorities to enforce minor traffic contraventions – parking, bus lanes and minor moving traffic - in their areas.

14.4. The 2007 Civil Enforcement Regulations revised the grounds for making representations and subsequently appealing against a penalty charge by introducing the ground that there had been a procedural impropriety on the part of the enforcement authority, and separately, making it an express duty for the authority to consider compelling reasons why the penalty should not be paid. The 2007 Civil Enforcement Regulations also introduced enforcement using approved devices and the process whereby the authority may send PCNs by post to the registered keeper of the vehicle. The Welsh Government has also issued their own civil enforcement regulations under the TMA applying the same principles.

14.5. The process and procedure for civil enforcement follows a common framework:

- The enforcement/charging authority makes the byelaws creating the conditions and restrictions for using the road.

- The owner of the vehicle is liable for charges and penalty charges, regardless of who was driving at the time.

- The authority may impose a penalty charge on the registered keeper for contravention of the order.

- The authority must accept 50% of the penalty if paid in 14 – or in some regimes, 21 – days.

- The recipient may make representations, essentially on the similar grounds for each scheme.

- The authority has an express duty to consider representations.

- If the representations are rejected, there is a right to appeal to an independent adjudicator on the same grounds as representations.

- After this process has been exhausted, if the penalty has not been cancelled or paid the authority may increase the penalty by 50%.

- If the increased penalty is not paid, the authority may apply for an order for recovery at the Traffic Enforcement Centre at Northampton County Court.

14.6. The grounds of appeal for all the schemes are broadly the same.

14.7. The 2013 Regulations applied the 2007 civil enforcement process to the enforcement of unpaid road user charges. Consequently, the 2013 Regulations do not stand alone; they should be applied and interpreted in accordance with the best practice that has emerged through experience of the civil enforcement regime.

14.8. There is a helpful explanatory note to the 2013 Regulations – the 'Policy Background' at Paragraph 7 explains that the purpose of the enforcement provisions is to encourage road users to be compliant and to increase awareness of the requirement to pay:

> Enforcement provisions are considered necessary in order to ensure that road users continue to pay the specified road user charge under a barrier-free, free-flow operation. Currently there is no legal mechanism to enforce non-payment where the use of barriers is dispensed with. Provision to enforce against non-payers using free-flow is necessary to encourage road users to be compliant, and active enforcement serves as a mechanism for increasing awareness of the requirements of the road user charging scheme.

14.9. Like other civil enforcement penalties, enforcement is not a fund-raising exercise – penalties are imposed to achieve the purpose of compliance and awareness and the approach to dealing with representations should be focused on those purposes.

14.10. As Adjudicator Kennedy has pointed out, The Secretary of State for Transport has issued Statutory Guidance to local authorities undertaking civil enforcement. For TMA process, the authorities are under a duty to have regard to the Guidance. Because it deals with general principles, it has clear application to similar civil enforcement traffic schemes.

14.11. It is, nonetheless, common practice for council enforcement authorities to contract-out the back-office support for their enforcement activities. This was explained in the Traffic Penalty Tribunal case, *Fosbeary*[3], to which Adjudicator Kennedy referred. However, these are under the close supervision of council officers and the notices and correspondence are issued on the council's headed documents. It is council officers who deal with appeals to the Tribunal, not the contractors.

14.12. It is noteworthy that the Council is one of the very few English local authorities that has never embarked on civil parking enforcement. Apparently, the police still enforce parking offences in the Council's local authority area. It is significant because had they been undertaking civil parking enforcement throughout the decade before the Mersey Gateway Bridge and Silver Jubilee Bridge scheme opened, they would have gained some experience of the civil enforcement process and the principles embodied in the Secretary of State's Statutory Guidance, would have had an experienced team established to deal with the civil enforcement process embodied in the 2013 Regulations.

14.13. Because charging authorities are public bodies, their functions and duties are governed by the rules of accountability, transparency and adherence to public law. They are subject to the duties of public bodies, the rights of citizens, and above all, the democratic process. This is of particular importance in Halton, where the Mersey Gateway and Silver Jubilee Bridge crossings between Runcorn and Widnes divide the borough and a significant proportion of the traffic across the bridges is local (less than 25% of the traffic at the Dartford Crossing is local). The Mersey charging order is a local order, whereas the Dartford charging order is a trunk road order.

15. The River Mersey (Gateway Bridge) Order 2011

15.1. The *River Mersey (Mersey Gateway Bridge) Order 2011 {S.I. 41]* ("the 2011 Order") made under the *Transport and Works Act 1992*, envisaged that the new bridge would be tolled. The order set out arrangements for the construction of the bridge. For the purpose of the 2011 Order, Halton Borough Council is the "undertaker".

15.2. The undertaker may enter into concession agreements, defined as:

> "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;

And, accordingly:

> "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;

[3] Fosbeary v Gloucestershire County Council [Tribunal case number GD 05067G]

15.3. 'Operation' would include the toll system provided for in the 2011 Order.

15.4. The MGCB was incorporated in 2013 as a wholly owned company of Halton Borough Council. It is what is known as a Special Purpose Vehicle ("SPV"). It is not a department of the Council.

15.5. Both the Council and MGCB entered into a Demand Management Participation Agreement ("DMPA") with Emovis before the decision was made – under the provisions of the 2011 order that enabled the Council as undertaker – to transfer its undertakings to another entity, and, no doubt, in the light of Article 40(6) of the 2011 Order, enabling the undertaker to:

> "appoint any person to collect tolls or charges as its agent.".

15.6. *The Effect of the Amendment Order*

15.6.1. *The River Mersey (Mersey Gateway Bridge) (Amendment) Order 2016* [S.I. 851) amended Article 42 enabling the undertaker, the Council, to make a road user charging order under Part 3 of the TA 2000 with respect to the old and new bridge, instead of applying tolls to the new bridge. It inserts a new Article 42A into the 2011 Order. The main effect is to remove the provisions that apply to charging tolls if a TA 2000 road user charging order is made.

15.6.2. It is not clear why this date and provision are included, but it is important to note that Article 42A(4) applies only:

> "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—"

15.6.3. The first charging scheme did not come into force until 17 October 2017. It follows that since the charging scheme was not in force on 14 September 2016, none of the provisions of 42A(4) apply, including 42A(4)(c), that "the undertaker may appoint any person to act as its agent to collect charges and other sums as provided for within sub-paragraph (b)".

15.6.4. 42A(5) disapplies Articles 41, 42, and 46 of the 2011 Order:

> (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) 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.

15.6.5. Article 41 dealt with power to charge tolls, 42 set out complex arrangements for payment of tolls and 46 dealt with the application of Section 173 of the TA 2000. It follows that all those

provisions cease to apply. It is noteworthy that the payment arrangements for tolls set out in Article 42 has been carried across from the redundant toll order to the three subsequent road user charging orders, notwithstanding that concepts such as a 'composition order' have no place in a road user charging scheme. This is another indication of the lack of consideration given to the impact and effect of the two regimes.

15.6.6. Article 42A(6), stipulates:

> "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

15.6.7. Therefore, the amended 2011 Order expressly precludes the Council from transferring the powers, and, accordingly, the duties, of the charging authority. The Council is wrong to suggest that the 42(6) is restricted to the making of the order. The powers and duties embodied in the 2013 Regulations attach to the public body that made the charging order, therefore if the order-making power cannot be transferred, nor can the powers and duties that stem from it be transferred.

15.6.8. The statutory duties of the charging authority also extend to complying with the financial provisions in Schedule 12 of the TA 2000, which deals with "Road user charging and workplace parking levy: financial provisions":

Paragraph 1(2) states:

> 2) In this Schedule—
>
> "the relevant authority", in relation to a relevant scheme made by one authority, means the authority by which the scheme is made, and

Paragraph 6 requires that:

> 6(1) An account relating to a relevant scheme which is not a trunk road charging scheme shall be kept for each financial year by the relevant authority or jointly by the relevant authorities.
> (2) A statement of every such account shall be prepared for each financial year by the relevant authority or authorities and published in the annual accounts of the relevant authority, or of each of the relevant authorities, for the financial year.

15.6.9. Had the Council produced the annual accounts of the scheme in accordance with Paragraph 6 of Schedule 12, it would be likely that one or other of the parties to these cases would have referred to them. Without that evidence, I infer that the Council has not produced the accounts. If the Council had produced accounts

similar to the Dartford Crossing accounts[4] for the Mersey Gateway scheme, it would have been compelling evidence of the Council's ownership of the scheme and obligations.

15.6.10. This tends to indicate that all the entities involved are operating the charging scheme as if it were part of the SPV arrangements applied to the construction of the new bridge. However, for the purposes of the charging scheme and the enforcement regulations the MGCB is not a traffic authority to whom the powers can be transferred, and financial provisions applying to SPVs do not apply to the charging and enforcement regime.

This is further evidence that the road charging scheme is being operated under an SPV arrangement.

15.6.11. In fact, there is no convincing evidence in any of Mr Curzon's cases that the Council has any involvement in the enforcement process, supervisory or otherwise. As a respondent to these cases, and many more where the same point has been raised by an appellant, no evidence has been produced to show any oversight or policy setting – had there been such evidence it would surely have been produced by now?

15.6.12. Another example of lack of transparency and accountability in decision-making is the requirement for disabled people with a Blue Badge to pay £5 for their vehicle to be registered for an exemption from paying the charge. The three successive charging orders each contained a Schedule 2 listing vehicles which may register for an exemption. There is no requirement in the charging order for the registration to be subject to a charge. Yet the holder of a Blue Badge wishing to exercise their regulatory right is required to pay an annual £5 registration fee.
Paragraph 4 of Schedule 2, states,

> 4 - Registration of a vehicle upon the register, and the use to which that vehicle must be put to qualify as exempt from charges, shall be subject to the imposition of such further conditions as the Council may reasonably impose.

Paragraph 5 goes on to explain what further conditions are envisaged:

> 5- the Council may require that an application to enter particulars of a vehicle on the register or to renew the registration of a vehicle –
> (a) shall include all such information as the Council may reasonably require, and
> (b) shall be made by such means as the Council may accept.

15.6.13. Paragraph 5 does not suggest that a charge is one of the conditions the authority can require. Did the Council, the MGCB or

[4] The latest Dartford-Thurrock River Crossing Charging Scheme Accounts (for 2019-20) can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954527/2019-20_Dartford-Thurrock_River_Crossing_Charge_Scheme_Accounts_-_Final_120121_.pdf

Emovis decide that it is reasonable to impose the extra payment condition on people exercising a right conferred by the charging order? Who retains the £5 registration payments? Apart from any discriminatory considerations, in a high proportion of the cases the Council will have issued the Blue Badge. I am of the view that it is unlikely that it was the Council that decided to impose this condition.

16. The Mersey Gateway Crossings Board (MGCB)

16.1. Mr Curzon has, in so many words, maintained throughout that the Council cannot delegate its enforcement functions to either Emovis or the MGCB.

16.2. Notwithstanding that the MGCB is owned by the Council, it is not the Council and for the purposes of the charging scheme and duties it is in no different position to Emovis.

16.3. I appreciate that, in practice, the MGCB personnel could otherwise be council officers in a department set up to undertake the functions of the Council with respect to the 2013 Regulations. I must emphasise that these observations about their employment status is not a criticism of their actions. But they are not council officers, and, in any event, their principal remit must be to deliver the Mersey Gateway project, not to oversee representations and the enforcement process. Even if it may seem reasonable that they are employed by a different entity, it does not change the legal position that the MGCB is not the Council, it is an SPV. Not only do the MGCB personnel have no role in considering representations, they do not have any status in monitoring Emovis as contractors for administrative functions in the enforcement process.

16.4. There is no objection to Emovis patrolling the use of the bridge and collecting the charges. Section 176(1) of the TA 2000 expressly enables the charging authority to authorise the installation and maintenance of any equipment:

> (1)The charging authority, or any of the charging authorities, in relation to a charging scheme under this Part may—
>
> (a) install and maintain, or authorise the installation and maintenance of, any equipment, or
>
> (b) construct and maintain, or authorise the construction and maintenance of, any buildings or other structures, used or to be used for or in connection with the operation of a charging scheme under this Part.

16.5. Of course, the sensible intention at the time the DMPAs were entered into was that Emovis should operate the bridge tolls under the supervision of the Board. As the 2011 Order provides, it is usual nowadays to use an SPV for a tolling regime. This is the arrangement at the Tyne Tunnel and the Humber Bridge. Neither of these schemes are, nor can be under the present arrangements, subject to a road user charging order that engages with the 2013 Regulations, because the respective SPVs cannot be a

charging authority.

16.6. Of the three entities – the Council, the MGCB and Emovis – Emovis was the only one with experience of tolling systems (as it proudly proclaims on the Merseyflow website) so it would not be surprising if the tolling operation was to be the responsibility of Emovis. But the 2016 decision to make a single road user charging order meant that the Council had taken on the additional and far different responsibilities as the charging authority, and in consequence could not delegate those responsibilities to either the MGCB or Emovis. Emovis could only perform administrative tasks as a contractor in the name of the Council, not under its own banner. It appears that this was not considered by any of the entities or the Council. It would not have been difficult – and still is not – for the Council to establish a small team of experienced civil enforcement practitioners (with advice from another council, if necessary) to oversee the enforcement process and, in particular, set the standards and processes for the charging authority to consider representations.

17. Reasons in Notice of Rejection of Representations

17.1. The Council argues that all that is required of a NoR is that it gives notice whether they accept one of the grounds for representations against a PCN has been established or whether there are compelling reasons for cancellation of the PCN. They say that neither regulation 8(9) or 10 of 2013 Regulations requires the NoR to include any reasons as to why the representations are rejected. Consequently, they say the absence of reasons from a NoR cannot constitute a procedural impropriety for the purposes of the 2013 Regulations.

17.2. The 2013 Regulations provide that a procedural impropriety on the part of the charging authority is a ground for representations against a PCN and a ground on which an adjudicator must allow an appeal against the charging authority's decision to reject representations (regulations 8(3)(g) and 11(6) of the 2013 Regulations).

17.3. Regulation 8(4) of the 2013 Regulations defines "procedural impropriety" as follows:

> " (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 –
> (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
>
> (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."

17.4. Regulation 8 of the 2013 Regulations sets out the circumstances in which the recipient of a PCN may make representations against it, and the duty on the charging authority on receipt of representations. Regulation 8(9) provides that:

> "(9) It is the duty of the charging authority to whom representation are duly made under this regulation –
>
> (a) to consider them and any supporting evidence which the person making them provides; and
> (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–
> (i) 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."

17.5. Regulation 10 of the 2013 Regulations deals with cases where the charging authority rejects representations against the PCN pursuant to regulation 8(9) as follows:

> "10 (1) Where a charging authority does not accept that a ground in regulation 8(3) has been established, nor that there are compelling reasons why the penalty charge notice should be cancelled, the notice served in accordance with regulation 8(9)(b) (a "notice of rejection") must-
>
> (a) state that a charge certificate may be served under regulation 17(1) unless within the period of 28 days beginning with the date of the service of the notice of rejection–
> (i) the penalty charge is paid; or
> (ii) the person on whom the notice of rejection is served appeals to an adjudicator against the penalty charge;
> (b) indicate the nature of an adjudicator's power to award costs against any person appealing; and
> (c) describe in general terms the form and manner in which an appeal to an adjudicator must be made;
>
> (2) A notice of rejection may contain such other information as the charging authority considers appropriate."

17.6. As Adjudicator Kennedy pointed out above, the consideration of representations is a quasi-judicial duty placed on the charging authority. It is implicit in the duty imposed on the charging authority by regulation 8(9)(a) to consider the representations and a matter of fairness that the charging authority must have reasons for rejecting representations. If a decision is taken without reasons then it is arbitrary.

17.7. The charging authority is right that the 2013 Regulations do not impose an express duty on the charging authority to state the reasons for its decision to accept or reject representations against a PCN. Nevertheless, the law may impose a duty to give reasons in the absence of an express

requirement. The techniques by which this is done were set out by the Privy Council in *Stefan v General Medical Council [1999] 1 WLR 1293* ("*Stefan*"):

"*This may arise through construction of the statutory provision as a matter of implied intention. Alternatively it may be held to exist by operation of the common law as a matter of fairness." (paragraph 10).*

17.8. The value of giving reasons was identified by the Court of Appeal in *Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377* at paragraph 381:

"*The duty* [to give reasons] *is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party- should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know …whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not."*

17.9. The Privy Council also observed in *Stefan* that:

"*The advantages of the provision of reasons have often been rehearsed. They relate to the decision-making process, in strengthening that process itself, in increasing the public confidence in it, and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases, and to facilitate appeal where that course is appropriate. But there are also dangers and disadvantages in a universal requirement for reasons. It may impose an undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense."(paragraph 21)"*

and

"*The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. The trend is consistent with current developments towards an increased openness in matters of government and administration.*" (paragraph 22)"

17.10. The question arises whether there is an obligation to give reasons for a charging authority's decision pursuant to regulation 8(9) implied in the 2013 Regulations. In considering this question, I am persuaded that there is for the following six reasons.

17.11. Firstly, the civil obligations of the recipient of the NoR are in issue. The framework in which the charging authority serves a NoR pursuant to the 2013 Regulations is concerned with the imposition of a civil financial penalty. Although an individual penalty charge is a relatively modest sum (£40), it can be a significant financial burden on the recipient of the PCN. Furthermore, appeals to the adjudicator frequently involve large numbers of PCNs (for example, where a vehicle owner has made multiple crossings

of the bridge subject to the road user charge in reliance on the road user charges being made from a pre-paid account, but the charging authority says the account was suspended for some reason), so that the amount in issue is commonly in the hundreds, and can be in the thousands, of pounds. The significance of what is in issue for the recipient of a NoR, in my view, points to the need to give at least a brief statement by the charging authority of its reasons for rejecting the representations.

17.12. Secondly, there is nothing in the 2013 Regulations which requires reasons not to be given. Furthermore, in broadly the same process relating to PCNs served by local authorities for alleged parking and bus lane contraventions, involving penalty charges ranging from £50 to £70, local authorities give reasons in the NoR as a matter of course, although there is no express duty in the relevant regulations to do so.

17.13. Thirdly, the 2013 Regulations provide a right for the person making representations to appeal to an adjudicator where the charging authority serves a NoR. Regulation 11 provides as follows:

> "11 (1) Where a charging authority serves a notice of rejection under regulation 10(1) in relation to representations made under regulation 8, the person making those representations may appeal to an adjudicator against the charging authority's decision…
>
> …
>
> (4) An appeal pursuant to this regulation must be determined by an adjudicator in accordance with the procedure set out in the Schedule.
>
> (5) On an appeal under this regulation the adjudicator must consider the representations in question and any additional representations which are made by the appellant together with any representations made to the adjudicator by the charging authority.
>
> …"

The Schedule referred to at Regulation 11(4) is the Schedule to the 2013 Regulations, which sets out the procedure in adjudication proceedings. This imposes the following duty, at Paragraph 3(4) of the Schedule, on the charging authority upon receipt of a copy of a notice of appeal made to the adjudicator:

> "(4) Upon receipt of a copy of a notice of appeal served on it under sub-paragraph (2) the charging authority must within 14 days serve on the proper officer copies of -
>
> (a) the penalty charge notice giving rise to the appeal;
> (b) the original representations; and
> (c) the relevant notice of rejection."

There is no duty on the charging authority to do anything else in response to the appeal, although it may serve representations on the proper officer at any time before the appeal is determined and the adjudicator may invite it to make representations dealing with matters relating to the appeal (and the adjudicator may draw such inference as appears proper if it fails to

respond).

In the *Stefan* case, the Privy Council noted that the provision of a right of appeal against a decision, which is provided by Regulation 11 of the 2013 Regulations, is a factor which may operate in different directions in determining whether there is an implied duty to give reasons for the decision. Nevertheless, it stated:

"*These considerations may mean the existence of a right of appeal may not present so compelling a necessity for the stating of reasons as that which is presented by the absence of a right of appeal. But the consideration that the reasons are useful to enable the prosecution of the right of appeal still remains valid and the presence of the right in the present case is at least one indication from the statutory provisions pointing to the existence of such an obligation."* (paragraph 20)."

17.14. Fourthly, in this case the right of appeal provided by the 2013 Regulations to an adjudicator against a NoR is accompanied by the duty on the charging authority to provide copies of the representations and, more particularly, the NoR in response to the notice of appeal. In my view, the duty to provide a copy of the NoR together with the representations is a further indication from the 2013 Regulations to the existence of an obligation of a duty on the charging authority to give reasons for its decision in a NoR. If a NoR need contain no more than a bare statement that the charging authority did not accept one of the grounds in regulation 8(3) had been established, or that there were compelling reasons why (in the particular circumstances of the case) the PCN should be cancelled, there would be no purpose in requiring the charging authority to provide a copy of the NoR. The content of the NoR, if it is only a notice of outcome without reasons, could be taken as read in each appeal. In those circumstances, it would be a redundant administrative burden on the charging authority and proper officer to have to provide and receive a copy of the NoR in each case. The requirement to provide a copy of the NoR evidently has a purpose.

17.15. Fifthly, I also take into account that Paragraph 2 in the Schedule to the 2013 Regulations provides that the appellant may, but is not required to, in a notice of appeal make representations in addition to the original representations (the representations made to the charging authority against the PCN). Similarly, the charging authority may, but is not required to, make representations in response to an appeal. In my view, this is an indication that the representations and NoR, respectively, are intended to serve as a statement of the respective parties' cases on appeal, although either party may add to it if they wish. I consider this to be a further indication that the 2013 Regulations require the NoR to give reasons for the decision.

17.16. Finally, in my view the adjudicator's power to award costs, at Paragraph 13 of the Schedule to the 2013 Regulations, is a further such indication. Paragraph 13 provides that the adjudicator is not normally to make an order awarding costs and expenses, but may make such an order in the circumstances specified in that paragraph. This includes a power to

award costs: "*against the charging authority where the adjudicator considers that the decision made by it giving rise to the appeal was wholly unreasonable* (sub-paragraph 13(1)(b)). This requires the adjudicator to assess the reasonableness of the charging authority's decision to reject the representations made to it against the PCN. It is difficult to see how an adjudicator could meaningfully assess this if the NoR contained no reasons for the decision. The charging authority may, of course, make representations in response to an appeal setting out its reasons for opposing the appeal, but it does not follow that any reasons given at that stage were necessarily the reasons for its decision to reject the representations against the PCN. The adjudicator's power to award costs if the decision to serve a NoR was wholly unreasonable points to the need for transparency about the reasons for that decision at the time the decision is made.

17.17. For these reasons, I conclude that there is an implied obligation in the 2013 Regulations for the charging authority to state reasons in a NoR it serves pursuant to regulation 8(9)(b) of the 2013 Regulations.

17.18. In turn, this means that where the charging authority serves a NoR which does not state reasons for its decision to reject the representations it constitutes a procedural impropriety on the part of the charging authority, as defined at Regulation 8(4) of the 2013 Regulations. This is a ground in Regulation 8(3) of those regulations for representations against a PCN and, in accordance with Regulation 11(6) of the 2013 Regulations, if an adjudicator concludes that this ground applies the adjudicator must allow the appeal.

18. The 10 other cases

18.1. I now turn to Mr Curzon's other appeals:

- **Case XM02448-1907**
  There are two PCNs in this case: PCN Number XM4310831A was issued on 28 June 2019 in respect of a crossing on the 18 June 2019 (Mersey Gateway Bridge, southbound); PCN Number XM4311765A was issued on 28 June 2019 in respect of a crossing on the 18 June 2019 (Mersey Gateway Bridge, northbound).

- ***Case XM02461-1907***
  There are two PCNs in this case: PCN Number XM42262744 was issued on 24 June 2019 in respect of a crossing on 13 June 2019 (Mersey Gateway Bridge, southbound); PCN Number XM42268230 was issued on 24 June 2019 in respect of a crossing on 13 June 2019 (Mersey Gateway Bridge, northbound).

- ***Case XM03506-1910***
  There are two PCNs in this case: PCN Number XM5386947A was issued on 18 September 2019 in respect of a crossing on 7 September 2019 (Mersey Gateway Bridge, southbound); PCN Number XM53870162 was

issued on 18 September 2019 in respect of a crossing on 7 September 2019 (Mersey Gateway Bridge, northbound).

- ***Case Number XM03890-1911***
  There are two PCNs in this case: PCN Number XM57862530 was issued on 11 October 2019 in respect of a crossing on 1 October 2019 (Mersey Gateway Bridge, northbound); PCN Number XM57858216 was issued on 11 October 2019 in respect of a crossing on 1 October 2019 (Mersey Gateway Bridge, southbound).

- ***Case Number XM00352-2002***
  PCN Number XM82280209 was issued on 25 February 2020 in respect of a crossing on 10 February 2020 (Mersey Gateway Bridge, southbound).

- ***Case Number XM00441-2003***
  PCN Number XM79578053 was issued on 24 February 2020 in respect of a crossing on 31 January 2020 (Mersey Gateway Bridge, southbound).

- ***Case Number XM00030-2101***
  PCN Number XM79617621 was issued on 10 November 2020 in respect of a crossing on 20 October 2020 (Mersey Gateway Bridge, southbound).

- ***Case Number XM00377-2106***
  PCN Number XM79620706 was issued on 11 May 2021 in respect of a crossing on 30 October 2020 (Mersey Gateway Bridge, northbound).

- ***Case Number XM00435-2107***
  There are two PCNs in this case: PCN Number XM82851547 was issued on 8 June 2021 in respect of a crossing on 26 May 2021 (Silver Jubilee Bridge, northbound); PCN Number XM82850704 was issued on 8 June 2021 in respect of a crossing on 26 May 2021 (Mersey Gateway Bridge, southbound).

- ***Case Number XM00477-2107***
  There are two PCNs in this case: PCN Number XM83270040 was issued on 28 June 2021 in respect of a crossing on 13 June 2021 (Mersey Gateway Bridge, southbound); PCN Number XM83309714 was issued on 29 June 2021 in respect of a crossing on 15 June 2021 (Mersey Gateway Bridge, northbound).

18.2. In most of his cases, Mr Curzon has made the same submission concerning what he considered to be errors on the face of the PCN. I will deal with each of his points:

"The PCN was not served by a charging authority"

The PCN stated it was issued by Halton Borough Council. It also described "we" as being Halton Borough Council.

By 28 June 2019 (case XM02448-1907), Emovis had added the name and registered address of their company to the heading of the PCN under the name 'Mersyflow'. There is no explanation why. There is no minute to show that this addition to the PCN was approved by the Council. I have never seen the name and registered office of a contractor be present at the top of a PCN. The effect of giving the Emovis details under the name Mersyflow supports Adjudicator Kennedy's finding that Emovis, for all intents and purposes, is Merseyflow. That said, while the PCN may have been printed and posted by contractors, I accept that it was issued on the authority of the charging authority.

"The PCN was not served by the "Council"

See above. Although posted by a contractor, that arrangement is permitted – it was served on behalf of the council.

"The PCN has errors on its face:

> *"The date of issue on the PCN is not the date on which it was 'issued' or sent by post."*
>
> The contractor's case report for XM79578053 shows that on 21 April the date of issue and posting was set to 24 April. It seems to me that this amounts to an instruction to the contractor to print and post it on that day. No evidence has been produced to show that the PCN was not printed and posted on that day.
>
> "*The location on the PCN is not defined in the "Order" so is not "the designated road", nor is it a designated road under the "Order""*
>
> The 2018 RUCSO defines "scheme roads" – it "means that part of (i) the road that approaches and crosses the new crossing…". I am satisfied that the Mersey Gateway Bridge Crossing Northbound and Southbound, where Mr Curzon's car was detected, is covered in the term "scheme roads".
>
> "*The PCN does not fully state the manner in which the penalty charge must be paid and the address to which payment of the penalty charge must be sent*."
>
> Adjudicator Kennedy has addressed this point. She did not find that the PCN was defective in the information about how to pay but recommended that the PCN gives an address where payment can be sent (which in itself includes the Council making proper provision for accepting payment in the post).
>
> "*The PCN fails to state that the recipient of the penalty charge notice is entitled to make representations to the charging authority*

against the imposition of the penalty charge on any of the grounds specified in the "Regulations" regulation 8(3)"

The PCN does not need to use the precise wording of the 2013 Regulations. It should describe the grounds in Regulation 8(3) in a comprehensible way. In my view the table on the reverse of the PCN adequately explains the grounds set out in Regulation 8(3) (a-g).

"*The PCN states "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 road user charge (commonly termed as toll) in the time and manner specified under the Order and the Regulations". Neither the "Regulations" nor the "Order" Specify the 'manner of the payment' of a road user charge (commonly termed as toll)."*

Article 7 of the 2018 charging order deals with payment of the charge. It states:

> "… A charge imposed by this scheme, the amount of which is specified in article 6 paragraph (2) (imposition of charges), shall be paid no later than 23:59 hours on the day immediately following the day upon which the charge has been incurred by means by such method as may be specified by the Council on the website or in a document available on application from the council or such other means all method as the Council may in the particular circumstances of the case accept".

Regulation 8(3)(g) describes the ground of appeal as: "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"

It may be in issue that the website is a Merseyflow/Emovis website and that the time for and method of payment have not been described on the Council website, but those are arguments for the recipient of a PCN to make in their representations. While the wording of the reason why the PCN has been issued could be improved, I am satisfied that it does sufficiently indicate that the road user charge has not been paid by the time required in the 2018 RUCSO.

18.3. Without giving express approval to the detail, I nevertheless dismiss all Mr Curzon's submissions about the content of the PCNs.

18.4. That leaves the point of whether the representations in each case were considered by the charging authority. Adjudicator Kennedy essentially made findings that:

- the contractors, Emovis using the name Mersyflow, are dealing with representations, not the Council

- the 'Business Rules' methodology applied by the contractors does not amount to consideration of representations

- that Emovis is, for all intents and purposes, Merseyflow.

18.5. I agree with those findings. They mean that in his other 10 cases I agree that Mr Curzon's representations were not considered and rejected by the Council, but by the contractors under the name Merseyflow. I find that in each case there has been a procedural impropriety on the part of the charging authority, namely that it failed to consider Mr Curzon's representations and any supporting evidence, because they were considered and rejected by Emovis, the contractors acting as Merseyflow.

18.6. Having found that there was a procedural impropriety, I must allow all the appeals against each PCN and they all must be cancelled.

18.7. I will deal with the detail of case XM00441-2003 below because there is an important factual difference between this case and case XM01885-1906.

18.8. *Case XM00441-2003*

18.8.1. As his representation, Mr Curzon attached a document setting our his usual list of issues:

"This Statutory Representation is based upon a number of grounds. Unfortunately the on line submission portal is unfit for purpose. It has radio selection buttons. I was only able to make one choice. There is no road user charge or penalty due under 2018 RUCSO. There is no liability to pay a toll since there was nobody on the road to collect a toll before the crossing was completed. The entire charging regime is unlawful and all the issues in the Curzon case XM01672-1807 are still live. There is no liability to pay a "road user charge" or a penalty charge for a crossing over the 'Mersey Gateway Crossing'. The 2018 Charging Order is invalid and unenforceable because it has errors on its face. This is expressed as ground E on the PCNs served by CAPITA on behalf of Emovis Operations Mersey Ltd who are unlawfully operating the entire charging regime on behalf of Halton Borough Council -the Charging Authority. At this point in time the only legitimate way any payment can be demanded is by the operation of the tolling regime as set out in the TWA Order and the 2016 Byelaws. Halton Council have stated on numerous occasions that they are not demanding payment of tolls under the TWA Order and 2016 Byelaws (which would need to be demanded before a crossing is completed by the driver of a vehicle). It follows therefore that Halton Council are placing reliance on a defective RUCSO -The 2018 Charging Order. The 2018 RUCSO (as is the 2017 RUCSO) is of no legal effect. It is mere scrap paper. No payment of a Road User Charge or penalty charge is due, nor will it be until the charging authority remedy all the legal issues at fault. The signage is unauthorised, unlawful and

renders the entire scheme unlawful and unenforceable. This also is expressed as ground E on the PCNs served by CAPITA on behalf of Emovis Operations Mersey Ltd who are unlawfully operating the entire charging regime on behalf of Halton Borough Council -the Charging Authority. There has been a mass of procedural improprieties. That is expressed as ground G on the PCNs served by CAPITA on behalf of Emovis Operations Mersey Ltd who are unlawfully operating the entire charging regime on behalf of Halton Borough Council -the Charging Authority. The Charging Authority Halton Borough Council is acting inappropriately and illegally. It has entered into an unlawful contract with a third party private limited company (Mersey Gateway Crossings Board Limited) and abdicated its public law duties. The third party contractor has itself entered into a contract with another third party contractor (Emovis Operations Mersey Limited), which in turn has a number of sub-contractors working on its behalf. The law is clear in that it must be the Charging Authority (Halton Borough Council) that carry out the statutory duties as set out in the Transport Act 2000 and the supporting Regulations and Statutory Guidance for a Charging Authority. PCNs should be issued by the charging authority. That is not the case here. PCNs are issued in automatic fashion well before the issue date used by CAPITA on the printed PCNs. Damian Curzon 03/03/2020 [his formatting]*"*

18.8.2. On this occasion, he was sent a NoR, again without a heading showing from whom it was from and signed 'Representations Team'. However, the content is more considered than usual:

"Dear Damien Curzon,

Notice of Rejection

Thank you for your recent representation against the issue of the above mentioned Penalty Charge Notice(s) (PCN(s)).

In your representation you state that you are exempt from paying the charge on legal grounds.

The Council had in place a valid and legal power to charge and enforce charges (commonly termed as tolls) on the Mersey Gateway Bridge from 14 October 2017 to the 18 April 2018. All vehicles that used the Mersey Gateway Bridge on or after the 14 October 2017 were required to pay and liable to enforcement of a charge (commonly termed as toll) if no charge (commonly termed as toll) was paid, unless exempt or they benefited from the Halton Local User Discount Scheme (LUDS).

The 2018 Order provides a valid and legal power to charge and enforce charges (which are described here as "tolls") on the Mersey Gateway Bridge from 19 April 2018. All vehicles using the Mersey Gateway Bridge on or after the 19 April 2018 are required to pay a charge (commonly termed as toll) unless exempt or they benefit

from the Halton Local User Discount Scheme (LUDS).

Halton Borough Council has been made aware of the Traffic Penalty Tribunal adjudicator's decision in a recent appeal case and the further decision by the same organisation to deny the Council a review of the decision. The Council is currently reviewing its position. In the meantime the Council is clear that:
• Adjudication by the Traffic Penalty Tribunal (TPT) cannot and does not, in law, invalidate or remove the powers in place from 14 October 2017 to administer and enforce charges for using the Mersey Gateway Bridge.
• Adjudication is specific to the case being considered, and any decision of an Adjudicator only relates to that particular case.
• A decision of TPT does not have general effect nor carry any weight as precedent.
• Any suggestion that the Council has no power to charge or enforce how it does this or that the Council is acting inappropriately or "illegally" is misleading, inaccurate and wrong in law.
• The Adjudicator's decision in respect of signage demonstrates the inconsistency of TPT in determining Mersey Gateway cases as it contradicts the decision of a different Adjudicator some time ago who concluded signage to be "large, well sited, in clear view, and to communicate to a driver unfamiliar with the area that a payment was required and how to pay"

It's business as usual at the Mersey Gateway - please continue to pay to use Mersey Gateway Over 97% of our users are paying for their crossings on time, experiencing quicker, easier and more reliable journeys across the river.

You can pay online at www.merseyflow.co.uk, over the telephone on 01928 878 878 or in person at the Runcorn walk-in centre and at Payzone outlets.

The signs in place when the new bridge opened to traffic were sufficient to meet the requirements of the Mersey Gateway Bridge Byelaws 2016 and the Transport Act 2000 and have been authorised by the Department for Transport (DfT).
These signs indicated: - The last point of exit on the highway to avoid bridge charges. - The point on the highway from which charges are applicable. - The level of the bridge charge fees for different vehicle classifications. - Information on how and when to pay.

Please note that in extensive discussions with DfT, they would not agree to telephone numbers or website addresses being displayed on any road signs.

Grounds for representation have not been established and there are no further compelling reasons which would lead the charging authority to cancel the penalty charge notice. Therefore, this letter is issued as a formal notice of Rejection under Regulation 10 of the Road User Charging Schemes (Penalty Charges, Adjudication and

Enforcement) (England) Regulations 2013 (as amended).

You should now make payment for the outstanding amount which is listed at the foot of this Notice or make an appeal (see below for information on how to appeal). The outstanding amount you have to pay is determined by the date we received your representation. If we received your representation within 14 days of the issue of the PCN(s) then the amount owed that is stated at the foot of this Notice will be the discounted penalty charge amount £20 + Charge (commonly termed as toll). This should be paid within 14 days of service of the PCN after which time the amount owed will revert to the full penalty charge amount £40 + Charge (commonly termed as toll) and you will have a further 14 days to make this payment. If we received your representation after 14 days of issue of the PCN(s) then the amount owed that is stated at the foot of this Notice will be the full penalty charge amount £40 + Charge (commonly termed as toll), and this must be paid within 28 days of service of this Notice. Service of this Notice of Rejection is deemed to have been effected on the third working day after the date of the Notice."

18.8.3. To be fair to whoever sent this, it does address the points made by Mr Curzon. However, the difficulty is that there is still no evidence that this response was referred to anyone in the Council before sending it. Agent 2 is shown as rejecting the representation and it is signed off by the 'Representations Team' whom I, in accordance with Adjudicator Kennedy, find to be Emovis staff.

18.8.4. Therefore, while the NoR gives reasons that deal with the representations, there is no evidence, either specifically in the case, or generally in the description of the enforcement operations, of any oversight or involvement by the charging authority, the Council. In the circumstances I find that the charging authority failed in its duty to consider the representations, which amounts to a procedural impropriety. The appeal is allowed.

18.9. All the other appeals are allowed for the same reason.

19. The Dartford Crossing Scheme

19.1. In their submissions, the Council complains that adjudicators do not take these points against the charging authority in appeals relating to the Dartford Crossing. This is not a point the Council makes against Mr Curzon. For the record, when road user charging was first introduced at the Dartford Crossing in late 2014 it was a new scheme and the first use of the 2013 Regulations, produced for that scheme. There were considerable difficulties early on, which emerged in appeals to the Tribunal. This culminated in 2016 with a significant number of appeals where Adjudicators regularly found against the charging authority, on the grounds of procedural impropriety in particular. It seems that Highways England (as they were then called) – who are for the purposes of the Secretary of

State’s trunk roads, the highway authority and therefore undertake the enforcement duties as the charging authority – reviewed its processes and made a number of changes. The difficulties up until 2016 were addressed in the audited reports for that year, which showed that a significant number of PCNs were written off. These including Highways England personnel being helpful and responsive to adjudicators when directions were sent through the Tribunal case messaging facility. Since then, the number of appeals dropped and adjudicators have not seen the same difficulties replicated case after case.

APPENDIDIX 1

Traffic Penalty Tribunal
England and Wales

ADJUDICATOR DECISION:

Mr Damian Curzon – v – Halton Borough Council

Case: XM01672-1807

Adjudicator: M.F. Kennedy

Contents

Summary

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.

I find that:

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*;

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.

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;

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;

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.

Introduction

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

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).

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.

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.

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").

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.

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.

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

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").

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 the following day, 8 June 2018.

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

> 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—*
>
> > *(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*
> >
> > *(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 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").*

The PCN further stated:

> *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:-*
>
> *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-*

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—*

(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;

(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.

(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;

(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);

(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;

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

(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—

(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

(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.

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

(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

(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—

(i) 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.

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

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

    - *(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;*

    - *(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.*

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

The Charging Order(s) and the Byelaws

Toll or Road User Charge?

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").

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.

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:

> *"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 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:

> *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.*

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

> *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:

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

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.

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

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:

> *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…*
>
> *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.*

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;*

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

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.

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.

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.

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.

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:

> *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.*

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:

> *"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*

Regulation 4 provides:

> *Imposition of penalty charge*
>
> *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;*
>
> *(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.*

Regulation 7 states:

> *Penalty charge notice*
>
> *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").*
>
> *...*
>
> *(3) A penalty charge notice must state—*
>
> *...*
>
> *(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;*

…

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.

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.

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

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:

> *(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.*

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.

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.

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.

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.

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)

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 -*
>
> > *(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:

> *4. This Order shall remain in force indefinitely.*

Article 4 of the 2017 Scheme Order provided similarly.

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

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

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.

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.

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.

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:

> *"…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.*
>
> *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."*

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

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.

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 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.

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.

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.

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.

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.

Duty to consider representations

Regulation 8(9) of the 2013 Regulations provides:

> *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*
> >
> > *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-*
> >
> > > *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:

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

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.

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.

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.

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.

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.

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.

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*).

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.*
>
> *(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—*
>
> *(a) charges to be levied for any services or facilities provided in connection with the new crossing and the Silver Jubilee Bridge; and*
>
> *(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—*
>
> *(a) the undertaker may levy charges for any other services or facilities provided in connection with the new crossing or the Silver Jubilee Bridge;*
>
> *(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;*
>
> *(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*
>
> *...*
>
> *(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)*

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.

(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

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):

(5) In this Part—

(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

(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.

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.

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.

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.

(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.

(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.

(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.

The 2011 Order also includes various definitions, including:

> *"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;*
>
> *"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;*
>
> *"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;*

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'*.

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.

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,

> *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.*

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:

> *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."*

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 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:

> *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.*

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:

> *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—*
>
>   a. *by a committee, a sub-committee or an officer of the authority; or*
>
>   b. *by any other local authority.*

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.

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.

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.

Emovis Enforcement Policy

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

> *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.*
> >
> > *(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.*
> >
> > *...*
> >
> > *(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, guidance[1] 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.*
> >
> > *(4) In producing this document, the Service Provider intends to achieve consistent decision making in the management of PCNs, Representations and Appeals.*
> >
> > ***[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***

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
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.

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.

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

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:

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;

6.1.2 procure the renewal, replacement o 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;

6.6 For the Contract Period:

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;

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),

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

6.6.4 the Order;

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

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:

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.

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.

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'*.

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

Statutory Guidance

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'*:

Formal representations

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.

Cross, again, says:

…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.

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.

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.

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.

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.

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'.

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.

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

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.

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.

MGBCL 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.

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 MGBCL. At no point, it seems, has an officer of the Council been involved in the conduct of the case.

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

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

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

M.F. Kennedy
Adjudicator

11 March 2019

Abbreviations

Reference is made to the following:

- Transport and Works Act 1992 ("TWA 1992")
- The Transport Act 2000 ("TA 2000")
- Local Transport Act 2008 ("LTA 2008")
- The River Mersey (Mersey Gateway Bridge) Order 2011 ("the 2011 Order")
- 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")
- The River Mersey (Mersey Gateway Bridge) (Amendment) Order 2016 ("the 2016 Order")
- Mersey Gateway Bridge Byelaws 2016 ("the 2016 Byelaws")
- 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");
- The Secretary of State's Statutory Guidance to Local Authorities on the Civil Enforcement of Parking Contraventions 2016 ("the Statutory Guidance")

APPENDIX 2

Traffic Penalty Tribunal
England and Wales

ADJUDICATOR DECISION:

Review Request:

Mr Damian Curzon – v – Halton Borough Council

Case: XM01672-1807

Adjudicator: S. Knapp

(original Adjudicator: M.F. Kennedy)

1. The Council has made application for a review of the decision by the Adjudicator Ms Kennedy to allow Mr Curzon's appeal and direct cancellation of the Penalty Charge Notice.

2. The Council has requested a hearing to determine the application.

Relevant Law

3. The Adjudicator's decision is made under the terms of the Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013 ("the 2013 Regulations").

4. Paragraph 12 of the Schedule to the 2013 Regulations provides: -

> *'12(1) The adjudicator may, on the application of a party, review*
>
> *(a) Any interlocutory decision; or*
> *(b) Any decision to determine that a Notice of Appeal does not accord with paragraph 2 or to dismiss or allow an appeal…on one or more of the following grounds*
>
> *(i) The decision was wrongly made as a result of an administrative error;*
> *(ii) The adjudicator was wrong to reject the Notice of Appeal*

(iii) The party who failed to appear or be represented at a hearing had and good sufficient reason for failing to appear
(iv) Where the decision was made after a hearing, new evidence has become available since the conclusion of the hearing, the existence of which could not reasonably have been known or foreseen
(v) Where the decision was made without a hearing…
(vi) The interests of justice require such a review.

(2) An application under subparagraph (1) must: -

(a) Be served on the proper officer within the period of 14 days, beginning with the date on which the decision is given to the parties and
(b) State the grounds in full.

(3) The parties must have the opportunity to be heard on any application for review under subparagraph 1. The adjudicator considering the application may direct the means which that hearing will be conducted.

(4) *Having reviewed the decision, the adjudicator may direct that it be confirmed, revoked or that it be varied.*

(5) If having reviewed the decision, the adjudicator directs that it be revoked, the adjudicator must substitute a new decision or order a redetermination by that adjudicator, the original adjudicator or a different adjudicator.

(6) …'

5. Insofar as these or similar provisions have been considered by the appellate courts, the following principles have been determined.

<u>*DK (Serbia) v Secretary of State for the Home Department[(2007] 2 ALLER 483*</u>

`The jurisdiction is one which is being exercised by the same tribunal conceptually, both at the first hearing of the appeal and then at any reconsideration. That seems to me to be the key to the way in which reconsideration should be managed in procedural terms.

As far as what has been called the second stage of reconsideration is concerned, the fact that it is, as I have said, conceptually a reconsideration by the same body which made the original decision, carries with it a number of consequences. The most important is that a body asked to reconsider a decision on the grounds of an identified error of law will approach its reconsideration on the basis of any factual

findings and conclusions or judgements arising from those findings which are unaffected by the error of law need not be revisited. It is not a re-hearing…'

The Queen, on the application of *Steven Deeds v The Parking Adjudicator [2011] EWHC 1921 (Admin)*

`30. Even if the adjudicator on the review application had been satisfied the Appellant had good cause for not attending the original hearing, the adjudicator on the application for review was not bound to review the earlier decision. Regulation 12 gives a discretion to do so. It uses the word 'may'. Again, the parking adjudicator must exercise that discretion judicially. If there has been no notification of the hearing but the appeal is in any event patently meritless, the adjudicator is still not bound to allow the review. Indeed, again, because of the principle of proportionality, which is a strand of justice in the manner I have described an adjudicator will be bound to refuse a review in those circumstances'.

6. The Queen, on the application of *Alexander v The Parking Adjudicator [2014] EWCA 560 (Admin)*

`36. …The adjudicator's decisions are subject to review on normal public law grounds in summary that they involved an error of law or were irrational in the result or that adjudicators took into account relevant matters or failed to take into account relevant matters or that the procedure by which they were reached were unfair…'

58. Appeal decisions of adjudicators do not have the force of precedent, apparently inconsistent decisions may be made on the facts of particular cases…the decisions of other adjudicators in other appeals, even if in apparent conflict…are relevant only if and insofar as they suggest… (the adjudicator) made an error of law or reached an irrational conclusion'.

Background

7. The appeal was one of a significant number of challenges made by recipients of PCNs follows the alleged non-payment of a charge for crossing the Mersey Gateway Bridge. Ms Kennedy's decision refers to an earlier case decided by the adjudicator, Mr Solomons, in May 2018. Neither party to Ms Kennedy's appeal had requested a hearing and both had made detailed written submissions in support of their respective submissions. These are carefully summarised in Ms Kennedy's judgement.

The Decision

8. It is clear from the terms of the decision that Ms Kennedy has given careful consideration to the arguments put forward by both parties and she has based her decision to allow the appeal on three clear findings of fact; namely: -

    - (Paragraph 490) 'A PCN must state the grounds on which the charging authority believe that a penalty charge is payable…therefore the PCNs issued did not comply with Regulation 7 of the 2013 Regulations. That non-compliance amounts to a procedural impropriety on the part of the charging authority…'

    - (Paragraph 625) 'I find that these signs are not adequate to allow motorists to know the nature of the fee the Council wish them to pay'.

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

9. Any one of these grounds is a sufficient reason for her to allow the appeal under the provisions of Regulation 8 of the 2013 Regulations.

The Application for Review

10. The submission is that Ms Kennedy has misdirected herself in relation to: -

    - The legal effect of signage (and specific wording on signage) on the underlying powers to charge…

    - The Council's ability to delegate or otherwise instruct processing of representations to Emovis Operations Mersey Limited and

    - The use of the word 'toll' on the face of the PCN's leading to a finding of procedural impropriety.

Findings

11. I am satisfied that the provisions of Paragraph 12 of the Schedule to the 2013 Regulations (which are in, essentially, the same terms, as those in the Schedule to the Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007), must be interpreted as meaning that a review is a two-stage process.

12. Firstly, assuming the application complies with the procedural requirements as to time and form, which is not an issue in this case, the applicant has to establish that in principle one of the limited grounds for review is established. In this case, the Council presumably relies on the interests of justice ground and must therefore establish that the adjudicator's decision is an error of law because it must be regarded as perverse or irrational.

13. It is only if a ground for review is arguably established that the regulations give a right to a hearing. Were it otherwise, an appeal about a PCN could result in two hearings by the same or different adjudicators only because the losing party disagrees with the outcome. That would be a wholly disproportionate process.

14. On the facts of this case, neither party asked for a hearing but instead made detailed written submissions which, as far as the Council is concerned, were essentially in the same terms as their reasons for review. There is nothing new in the Council's request for review which is essentially a restatement of their original case. Insofar as they rely on suggested inconsistencies with the decision of adjudicator Mr Solomons, Ms Kennedy has explained her consideration of that decision and further I note that as part of the evidence submitted by the Council for this appeal, there was a statement issued by them following Mr Solomons' decision which, expressed the view that insofar as it found against the Council, it was wrongly decided and in any event, only applied to the particular appeals being considered.

15. Ms Kennedy has given admirably clear reasons for her findings and I am entirely satisfied they cannot be described as perverse or irrational and do not amount to an error of law. I find that the Council has not established a proper reason for review under Paragraph 12, with the result that there is no right to a hearing and the review request must be refused.