Upper Tribunal for Scotland

2023UT23
Ref: UTS/AP/23/0015

DECISION OF

Upper Tribunal Judge Pino Di Emidio

in an Appeal against a

Decision of the First-Tier Tribunal for Scotland
(General Regulatory Chamber (Parking and Bus Lanes))

The City of Edinburgh Council

Appellant

and

Mr Chris Sanderson

Respondent

FTS Reference: ED00063-2302

19 July 2023

Decision

The Upper Tribunal for Scotland Refuses the appeal against the decision of the First-tier Tribunal for Scotland dated 14 March 2023.

Note of reasons for decision

[1] The question raised in this appeal concerns an error by the respondent when he typed the figure "0" rather than the letter "O" when entering his car registration number into a parking App on his mobile phone. The appellant authority accepts that at the relevant time the respondent paid the correct parking fee to park in the designated space using the App but appeals against the cancellation of a Penalty Charge Notice by the First-tier Tribunal. It contends that the FTT erred in law, that the PCN was validly issued and that the respondent is liable to pay the charge.

Procedural History

[2] On 14 March 2023, the FTT (comprising the Chamber President sitting alone) allowed the respondent's appeal against the PCN. On 15 March 2023, an application for review on the ground of the interests of justice was refused by a second legal member (Judge P. McFatridge). On 14 April 2023, another Legal Member (Judge A. Devanny) granted the appellant permission to appeal on the two grounds discussed below.

Grounds of appeal

[3] The appellant contends that the First-tier Tribunal erred in law by failing to apply the relevant legislation when it upheld the respondent's appeal against the imposition of a PCN.

Submissions

[4] The appellant's Form UTS-1 states only that the appellant considers that the initial decision made by the legal member fails to adhere to and apply the relevant legislation applicable to the contravention. Judge Devanny's decision granting PTA discloses that the application for PTA was in the same terms as the appellant's application to review which Judge McFatridge had refused. The terms of the submission made in support of the review application were set out at paragraph 3 of the decision granting PTA. I have also had regard to the terms of the appellant's application for review. These documents comprise the appellant's main submissions in this appeal. The appellant's submission did not refer to any case law to support the interpretation it seeks to put on the applicable secondary legislation.

[5] The respondent provided a written submission to this Tribunal. He opposed the appeal and asserted that there was no error of law. The appellant had a period of 28 days to provide a reply, but opted to make no further submission. The respondent raised a number of additional grounds of opposition to the appeal in his written submission. These include points about the common law of contract and delict. This is a statutory appeal. I do not propose to comment on these additional common law submissions, which go beyond the points on which the FTT granted PTA. The respondent contends that the way in which the figure "0" displayed on the

App on his phone could not be distinguished from the way in which the letter "O" displayed. For the reasons set out below, the determination of this appeal does not turn on this point.

[6] Following receipt of the parties' written submissions, the Tribunal noticed a discrepancy in the documentary material submitted by the appellant. The appellant's second ground of appeal relied on Article 4-3 of *The City of Edinburgh Council (Traffic Regulation; Restrictions on Waiting, Loading and Unloading, Stopping and Parking Places) Designation and Traffic Regulation Order* 2018. The text of Article 4-3 quoted in the ground of appeal was not the same as in the print of the 2018 Regulation Order that the appellant produced both to the FTT and this Tribunal. There appeared to have been changes made after the original promulgation of the 2018 Regulation Order. I required to be satisfied that the terms of Article 4-3 as at the date of issue of the PCN were as relied on in the second ground of appeal. On 7 July 2023, the Tribunal made an order requiring the appellant to produce a certified copy of the version of the 2018 Regulation Order in force as at the date of the issue of the PCN.

[7] The appellant duly produced a certified copy of the 2018 Regulation Order, as subsequently varied by *The City of Edinburgh Council (Traffic Regulation; Restrictions on Waiting, Loading and Unloading, Stopping and Parking Places) (Variation No. 20) Order* 2022 (TRO/21/03A). This variation of the 2018 Regulation Order came into force on 8 August 2022. The appellant also produced a certified true copy print of the 2018 Regulation Order, as subsequently varied. Certification was by the appellant's Head of Legal Services. This showed that, as at the date of the issue of the PCN, the terms of Article 4-3 were as relied on by the appellant in the second ground of appeal.

[8] The parties agree that a hearing is not required. I have decided I can determine the appeal on the written submissions, after receipt of the version of the 2018 Regulation Order in force on the date of issue of the PCN.

Reasons for Decision

The first ground of appeal

[9] This ground concerns a challenge to a factual finding, set out at paragraph 10(d), which states:

> "Mr Sanderson's vehicle has a unique vehicle identification number."

The appellant challenges this factual finding without explaining why this has led to an error of law by the FTT. The original decision is said to rely on this finding. The appellant has not set out a line of argument to suggest that the decision of the FTT was erroneous in law because of this finding. It has submitted that there was no evidence for this finding in fact. The finding may arguably be within judicial knowledge. It may be superfluous. In any event, the nub of this appeal relates to the issue focused in the second ground. In so far as this point constitutes a separate ground of appeal, it is rejected in that it does not identify any error of law.

The second ground of appeal

[10] This ground proceeds on the basis that in respect of the issue of a PCN, a vehicle is identified by the registration number, not the VIN plate. The appellant relies on Article 4-3 of the 2018 Regulation Order. Article 4-3 refers to a "registration mark". The appellant's reference to a "registration number" is not strictly correct but nothing material turns on this. I have treated this as a minor or clerical error and substituted the word "mark" for "number". As the FTT explained, Article 4-2(a)(3) of the 2018 Regulation Order allows for cashless payment. In the absence of proof of payment, it is presumed that the motorist has not paid for their parking for the vehicle that is parked in a pay and display space. That is a rebuttable presumption, if the motorist can show that they have paid for their parking for the vehicle. The appellant does not challenge the FTT's finding in fact at paragraph 10(b) that the respondent paid for parking using the RingGo App, but entered the wrong registration number for his car. The FTT proceeded on the basis that as the respondent's car had a unique VIN, he had paid for his parking. It concluded that the respondent had rebutted the presumption.

[11] The crux of the matter is the interpretation of Article 4-3. So far as relevant to this appeal, Article 4-3(a) provides that:

> "…if at any time while a vehicle is left, during the permitted hours, in a pay and display parking place … the parking charge shall be deemed to have been paid, if …
>
> "(2) an indication appears on a hand-held device that the parking charge has been paid in respect of that vehicle, provided that:
>
> "the registration mark of that vehicle exactly matches the registration mark held on the electronic payment system;…".

The submission comes to be that as the registration mark of the respondent's car did not exactly match the registration mark held on the electronic payment system as required by Article 4-3(2)(i), the parking charge could not be deemed to have been paid under Article 4-3(a). Therefore, the appellant submits the FTT erred in law when it concluded that the presumption had been rebutted.

[12] The UK Supreme Court recently considered the treatment in case law of the nature of deeming provisions in statutes. In *Fowler v Revenue and Customs Commissioners* [2020] 1 W.L.R. 2227, Lord Briggs JSC (with whom Lord Hodge DPSC, Lady Black, Lady Arden and Lord Hamblen JJSC agreed) said at page 2236:

> "Deeming provisions
> 27. There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker of Gestingthorpe JSC in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2011] 1 WLR 44 , paras 37–39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637 , *Marshall v Kerr* [1995] 1 AC 148 and *Jenks v Dickinson* [1997] STC 853 . They include the following guidance, which has remained consistent over many years:
> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.

(2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
(4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
(5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109 , 133:
"The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.""

[13] The 2018 Regulation Order was made under primary regulation. The purpose of the deeming provision in Article 4-3(a) of the 2018 Regulation Order is to allow the presumption to be rebutted by use of cashless payment. In practical terms, the fiction created by the deeming provision allows motorists like the respondent to pay for parking in this location by use of the RingGo App. The appellant does not dispute that the respondent paid to park his car on this occasion. Its argument is that the presumption was not rebutted as a matter of law.

[14] The overall purpose of the 2018 Regulation Order is to ensure that the appellant receives payment for parking in controlled spaces. If the appellant's second ground were well founded, the respondent would be compelled to pay a penalty charge even though he paid to park his car in the space at the relevant time. That would be an unjust or absurd result. It is not necessary to apply the deeming provision under consideration in such a way as would produce an unjust or absurd result. The appellant achieved the overall purpose because it received the payment made by the respondent when he parked his car, even though he made a single typographical error when he inputted the registration number. The FTT was not compelled by the language of Article 4-3(2)(i) to produce such a result and has not erred in law.

[15] Separately, the provisions of the 2018 Regulation Order authorising the imposition of a PCN should be construed strictly, so that if there is ambiguity in expression the motorist should be given the benefit of the doubt (*Herron v The Parking Adjudicator* [2010] EWHC 1181 Admin). Article 4-3 seeks to ensure that the registration mark inputted into a parking App by a motorist should relate to the vehicle parked in the designated space. That is a sensible objective for the appellant to seek to achieve. A motorist who inputs the registration mark of a different car in error may find it difficult to argue that a PCN was not properly issued as a matter of law. The inputting error was a material one. The motorist who makes such an error may have the option of explaining the error in order to try to persuade the appellant to cancel the PCN in the proper exercise of its discretion. That is different from this case. The respondent's error when he inputted the figure "0" instead of the letter "0" was not a material error in this sense.

Conclusion

[16] These reasons go beyond and, to an extent, are different from those of the FTT, but the second ground of appeal is rejected. The appeal is refused.

[17] A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Sheriff Pino Di Emidio
Member