Upper Tribunal for Scotland

2024UT26
Ref: UTS/AP/23/0984

DECISION OF

Lord Lake

ON AN APPEAL
IN THE CASE OF

Glasgow City Council

Appellant

- and -

Mr Allan Hamilton

Respondent

FTS Case reference: LZ00036-2308

14 May 2024

Introduction and First Appeal

1. The issue in this appeal is whether a Low Emissions Zone Penalty Charge Notice is enforceable. The notice in question was sent by Glasgow City Council (the appellants) to Mr Hamilton (the respondent). It all alleged he had driven in a Low Emissions Zone in Glasgow in a vehicle that did not comply with the specified emissions standard. Mr Hamilton initially made representations to the Council and, when they were rejected, appealed the notice to the First-tier Tribunal. The Adjudicator considering the appeal was of the view that there was preliminary issue which he had to consider concerning the

validity of service of the PCN. He concluded that the PCN should have been served on Mr Hamilton by recorded delivery, that it had been sent only by ordinary post and that the consequence of that was that the Notice was invalid and could not be enforced. The Council have appealed against that decision. They have modified their position since the matter was before the First-tier Tribunal in that they now accept that the Notice should have been served by recorded delivery post and that, because it was sent by ordinary post, it was not validly served. They dispute that the result of this defect in service is that it is invalid and unenforceable.

2. The power to serve a PCN is conferred in the Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021, regulation 6(1). This states that the local authority "may serve a notice" but does not specify how it is to be served. That issue is determined by the Interpretation and Legislative Reform (Scotland) Act 2010, section 26. That states that where an Act of the Scottish Parliament or a Scottish instrument to which it applies uses the term "serve" in relation to a document, it may be served by being delivered personally or being sent to the person's proper address by a registered post service or by a postal service which provides for the delivery of the document to be recorded.

3. In relation to the issue of the effect of serving in a manner not specified in legislation, the Adjudicator approached the matter by considering whether the requirement in the legislation was to be regarded as mandatory or merely directory or permissive. If it was mandatory, a failure to comply would render the thing done invalid but if it was only directory or permissive, the thing done would be unaffected. By reference to *Liverpool Borough Bank* v *Turner* (1860) 30 LJ Ch 379, he considered that the issue of whether the matter as directory or mandatory was one of determining "the real intention of the legislature attending to the whole scope of the statute to be construed" (Campbell CJ at page 380). He had regard also to *Howard* v *Boddington* (1877) 2 PD 203, *London and Clydesdale*

Estates v *Aberdeen District Council* 1980 SC (HL) 1, *Robertson* v *Adamson* (1876) 3 R 978, *Cowper* v *Callender* (1872) 10 M 353, *Degan* v *Dundee Corpn* 1940 SC 457, *Mecca Bookmakers (Scotland) Ltd* v *East Lothian District Licensing Board* 1988 SLT 520 and *Patmor Ltd* v *City of Edinburgh District Licensing Board* 1988 SLT 850.

4. Having regard to these cases, the Adjudicator concluded that the service of a PCN was fundamental to the operation of the LEZ enforcement regime in that it notifies the recipient of the alleged contravention, it provides the recipient with the opportunity to pay within 14 days and thereby reduce the penalty by 50%, it notifies the recipient of their right to contest the charge, if a charge certificate is also served on the recipient following non-payment in the prescribed time the penalty is increased and the penalties imposed are escalated for second and subsequent contraventions. On that basis he considered that a verifiable method of service was crucial and that if postal service was used it was a mandatory requirement that it be effected by a registered postal service or one in which there is a record of delivery. This had not been done and the result was that the PCN was invalid and unenforceable.

Appeal to the Upper Tribunal

5. The Council have appealed to the Upper Tribunal. While now accepting that the PCN ought to have been served in accordance with the requirements of section 26 of the 2010 Act noted above, they contend that a failure to do so does not render the notice invalid where there has been substantial compliance with the procedural requirements and where no unfairness or prejudice has followed from the procedural defect. They contend that approaching the matter by considering whether the statutory requirement was mandatory or was permissive or directory is not the correct approach. By reference to *R* v *Soneji*, [2006] AC 230, and in particular the speech of Lord Steyn at paragraph 23, they frame the issue as

being, "whether Parliament can fairly be taken to have intended total invalidity as a consequence of the specific procedural defect in question".

6. When it comes to applying the test from *Soneji* to the present facts, they contend that is it apparent from the legislation that in circumstances in which it was sent to and received by the intended recipient Parliament did not intend the PCN to be invalid simply because the means of sending it out was not the one specified. They refer to four particular matters in support of this; (i) the terms of Transport (Scotland) Act 2019 under which the LEZ was created and that liability to pay is not linked to service of a PCN; (ii) the general purpose of a notice; (iii) that defective service is not identified in the legislation as a ground on which a PCN may be appealed; and (iv) the fact that the means of service has caused no substantive unfairness to the respondent.

7. Mr Hamilton has responded by adopting the reasoning of the adjudicator. He also notes that the Council's practice has now changed and that PCNs are sent by tracked post and sees this as an acknowledgement that there was a defect in the service of a notice on him.

Analysis and Decision

8. The difference between framing the issue in the form of whether Parliament intended that the requirement as to service to be mandatory so that strict compliance is required or asking what was the intention if there was not compliance is a very subtle. It might be expected that both ways of approaching the question would lead to the same result in many situations. However, as the most recent authoritative statement of the correct approach is that in *Soneji*, that is the approach I adopt. The issue of therefore whether Parliament intended that as failure to comply with the stated requirements as to service to be that the notice was invalid. As is generally the case when the issue of the intention of Parliament arises, the search is not for an actual intention but for one to be inferred from considering

the wording of all parts of the legislation in question and the operation of the scheme that is established by the legislation in question (*R* v *Environment Secretary, Ex p Spath Holme Ltd*, [2001] 2 AC 349, 388D and 396F-397D).

9. In support of their contention that liability to pay a penalty is not linked to the service of a PCN, the Council rely on the Transport (Scotland) Act 2019, section 6(2). This states that,

> (2) Where a person drives a vehicle on a road within a low emission zone in contravention of subsection (1), a penalty charge is payable in respect of the contravention.

Taken in isolation, this does appear to support the view that the trigger for liability to pay a penalty arises at the point at which the vehicle enters the LEZ, but it is necessary to consider the whole of the statutory scheme. Sections 7(3) and (4) are in the following terms,

> (3) Where a local authority considers that a penalty charge is payable under section 6(2) in respect of a low emission zone scheme it has made, it may issue, or make arrangements relating to the issue of, a penalty charge notice in accordance with regulations under section 8(1).
>
> (4) A penalty charge under section 6(2) is payable to the local authority which issued the penalty charge notice— …"

These are significant. As the penalty arising under 6(2) is payable to the issuer of the PCN, there is a clear implication that the service of the Notice is a prerequisite for the liability to arise as, until then, there is no party to whom the charge is payable. This is indicative of an intention that there must be a Notice for liability to exist.

10. There are other provisions of the statutory scheme that are relevant to intention. Section 8(1) of the 2019 Act empowers the Scottish Ministers to make Regulations making provision for *inter alia* penalty charge notices including the method of issue. This power was exercised to make the Low Emission Zones (Emission Standards, Exemptions and Enforcement)

(Scotland) Regulations 2021. The following parts of these are relevant to the issues in this Appeal.

(a) Regulation 4 makes provision for the charge that is to be payable in respect of a contravention. It includes the scheme whereby the penalty is increased for contraventions after the first. Where there is more than one contravention within a 90 day period, the charge for the second and subsequent contraventions is increased. When defining what is meant by "first contravention, "second contravention", "third contravention", "fourth contravention" and "fifth and any subsequent contravention", the Regulations consistently refer to the person becoming liable "liable to pay a penalty charge under sections 6(2) *and 7(4)* of the 2019 Act" (emphasis added). This too recognises that liability to pay is linked to both the contravention referred to in section 6(2) and the service of a notice referred to in section 7(4).

(b) Paragraph 4(8) says that if the penalty charge is paid within 14 days of the service of a PCN under regulations 6, the penalty charge is refused by 50%. This supposes that there a notice has been served to start the period for payment.

(c) Regulation 6 requires that a PCN must be served within 28 days of the contravention and specifies what must be contained in the Notice. These include details of the amount of the charge, the period within which it must be paid, the possibility of reducing liability by making payment within 14 days, the opportunity to make representations and to appeal if they are rejected and details of the date and time when the contravention occurred. All these matters but particularly the last one, are key elements of the liability and the ability to challenge it.

All these factors indicate that the PCN plays a key part in the enforcement regime. As it is important in all these respects it is understandable that Parliament would have wished to ensure that there was a way that the service could be proved. I therefore agree with the adjudicator that having a mode of service which means that both the fact of delivery and the date on which it was completed can be verified is crucial. That is borne out by the

methods specified in the 2010 Act. Parliament requires a method of service that, when taken with the presumption of regularity, mean that the service of the notice is verifiable.

11. In view of these factors, I reject the Council's contention that liability to pay a penalty is not linked to service of a PCN. There is a clear link in section 7(4) and this, together the extent to which it is apparent that the Notice and its contents play a key part in the enforcement notice and the means stipulated for service, support an inference that Parliament intended that the valid service of notice in accordance with these requirements is necessary if a penalty is to be enforced. The purpose of the Notice is not purely formal as the giving of noticed in relation to a current or previous contravention can make a material difference to the size of the penalty imposed. The Council are correct in stating that defective service is not one of the matters specified in Regulation 8 as to which representations may be made. Nonetheless, having regard to the factors noted above and applying the test from *Soneji*, I consider that when considering the legislation overall, it is clear that it must be inferred that there was an intention that there must be a valid service of a PCN for liability to exist. That there has been no substantive unfairness to Mr Hamilton is not a relevant consideration. The issue that has been raised is resolved by considering the intention of Parliament when the legislation in question was passed. The circumstances of service of a particular PCN sometime later have no bearing on that intention.

12. It follows from my conclusion that Parliament intended that a valid notice is required for a penalty charge to be imposed that, in the present circumstances, the PCN is unenforceable and I refuse the appeal accordingly.

*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.

Lord Lake
Member of the Upper Tribunal for Scotland