

Discussion Paper for Consumer Forum on 17 July 2014

Failure of Popla to cite 'genuine pre-estimate of loss' as an appeal ground

Issue

GPEOL has repeatedly proved a successful ground of appeal for motorists when they use it at Popla. However, Popla itself does not advertise this as a ground of appeal and the parking companies are not required to advertise it as a reason for challenge. Therefore only a handful of knowledgeable people put it forward. I have appended an email chain in which Popla steadfastly refuses to put GPEOL on its website as a ground of appeal.

Background

A company has recently begun offering a service whereby, in return for a fee, they will take an appeal to Popla or put a challenge to a parking company (or both) and, if they lose at Popla, they will pay the parking charge themselves. So far they have used only GPEOL as a ground of appeal or challenge. And so far they have won every Popla-decided case.

So it cannot be right that Popla persists in keeping quiet about GPEOL as an appeal ground.

Action

The DVLA should write to Popla requesting Popla to cite GPEOL as a ground of appeal on its website.

The DVLA should write to the trade associations requesting them to require their members to cite GPEOL on PCNs as a ground of challenge when GPEOL is a feasible ground of challenge.

Martin Cutts

Independent Representative on the DVLA Consumer Forum on Private Parking

1 Plain Language Commission (PLC) to Popla, 20 January 2014

Dear Mr Greenslade [Popla's lead adjudicator]

There seems to be a serious omission from the list of appeal grounds on the Popla website, namely a statement that people can both challenge the parking company and appeal to Popla if they believe an amount claimed as damages is not a genuine pre-estimate of loss (GPEL).

Obviously Popla would need to explain this legalistic term in plain language with, perhaps, a list of possible heads of claim so that drivers could assess whether what was being claimed was genuine or bogus. But that should not be difficult, and the risk of confusing a few people is much less than the risk of not informing them at all.

I have attached a screenshot from the Popla website. I do not believe GPEL is covered by the 'appropriate amount' bullet point on the 'challenge the company' page or the 'appeal to Popla' page. Most people do not know about GPEL and those who appeal to Popla about it have almost always been prompted by online forums and other sources of expertise. It is good that on a few occasions your assessors have imputed this as a person's appeal ground even if they have not explicitly stated it.

Given that parking companies commonly claim the extraordinary sum of £100 as their 'loss' for, for example, an event of overstaying in a free-for-the first-two-hours situation, it is crucial that GPEL is in your list. Calculating the GPEL is an essential element of compliance with the BPA's code of practice.

There is serious imbalance between the parties in nearly all parking disputes, so most drivers simply do not know that GPEL exists. The BPA Ltd and the legal departments of rapacious companies are not likely to tell them, which is why Popla should.

Would you please let me know:

- 1 why GPEL is not listed, and
- 2 whether you will add it to the list and when.

It is very important to Popla's status as a genuinely independent assessor that people know you are not being dictated to by the BPA Ltd and the big parking companies on this or any other questions.

I understand that ParkingEye has lost more than 100 cases at Popla on GPEL alone. I have read your decision in a ParkingEye case dated 18 November 2013, and other similar decisions drafted by your assessors before that date. Will you please let me know whether that particular company has defended an appeal using the same or similar rationale since 18 November.

As a lawyer, you will know whether or not ParkingEye's approach is likely to be illegal under trading standards law and, if you suspect an offence is being committed, whether or not you have a duty to report it to the prosecuting authorities.

For reference, I have attached below an item from Popla's newsletter about GPEL.

Popla newsletter, May 2013

Genuine pre-estimate of loss

If the motorist claims that the parking charge is 'disproportionate' or similar, or quotes the Unfair Contract Terms Act 1977 or other legislative provisions, then the operator must, as always, address the issue. If they do not then, as with any issue not addressed, the appeal is likely to be allowed.

The amount sought as the parking charge may be a term of the contract, rather than a sum for breach of it. If this is the case then reference to the signage may be sufficient. Some signs make it very clear, for example: 'The tariff for overstaying or parking outside the bay markings is £100' or 'This is a Blue Badge bay. You may park here without a Blue Badge but if you do the charge is £100'.



If the signage appears effectively to indicate that the amount is damages then, where the issue is raised, the operator must clearly state that it is indeed a genuine pre-estimate of loss, always assuming that it is.

If, in whatever way, a motorist actually explains why they think the amount of the parking charge is not a 'genuine pre-estimate of loss', which is not common, then the operator may be able to deal with it by briefly explaining what it is. If nothing is said then the issue has not been dealt with.

2 Popla (Richard Reeve) to PLC, 13 Feb 2014

Further to your email [...] of 20 January [...], marked for the attention of the Lead Adjudicator, Mr Greenslade has asked me to reply as follows:

"Different issues are prominent in appeals at different times. There are no immediate plans to change the current grounds of appeal, although this is an area I have no doubt the Independent Appeals Service Board will look at in due course. The Office of Fair Trading, I believe amongst others, were mindful that examples of what would not amount to a valid ground of appeal might be confusing and even put off potential appellants. However, an appeal will not be rejected simply because the wrong ground, no ground or all of the grounds are indicated.

"It is not necessary for an appellant to use any specific form of words when making their appeal. As the website makes clear, if an appellant is not sure which ground applies, then they should just explain their case fully. Assessors are well used to determining what issues are actually being raised by an appellant who may not be used to any form of appeal process.

"As I have stated elsewhere, POPLA decisions are alternative dispute resolution by way of arbitration and are thus confidential between the two parties concerned. We cannot therefore disclose the information about particular parties as you request. Obviously you can approach the Operator you are particularly interested in, who may be able to assist you further.

"I can tell you that some appeals have been won by appellants who raise the issue of the charge amounting to damages which do not represent a genuine pre-estimate of loss."

I hope that [t]his clarifies matters for you.

3 PLC to Popla, 14 February 2014

I was not asking you to set out on your website a ground for appeal that is NOT valid, but a major ground for appeal that is valid.

Since people, having read your website grounds, may decide not to appeal at all if they simply think the level of charge is too high, there will be no appeal text from which Popla can infer a successful ground of appeal.

I believe Popla is making a serious mistake and potentially compromising its apparent independence in not advertising the fact that a firm's charge must be a genuine pre-estimate of loss, and explaining that phrase. You are, I feel, ignoring the imbalance of power and information between the typical driver and the parking company.

4 Popla (Richard Reeve) to PLC, 19 Feb 2014

Thank you for your email. However, I should advise you that it is not correct that a parking charge must always represent a genuine pre-estimate of loss.

5 PLC to Popla, 20 Feb 2014

Thank you for the advice. It seems somewhat disingenuous because the BPA Code (Feb 2014) states:

'[section]19.5 If the parking charge that the driver is being asked to pay is for a breach of contract or act of trespass, this charge must be based on the genuine pre-estimate of loss that you suffer. We would not expect this amount to be more than £100. If the charge is more than this, operators must be able to justify the amount in advance.'

Most parking charge notices seem to be based on 19.5, as far as I know, so the parking charge should indeed represent a genuine pre-estimate of loss (GPEL).

Your website is simply wrong as to the grounds of appeal as it purports to set out the ONLY grounds of appeal by introducing the list of grounds with the words:

'The grounds under which you can appeal the parking charge notice are as set out below.'

I have attached a screenshot showing this.

Grounds of appeal

The grounds under which you can appeal the parking charge notice are as set out below. If you are not sure which ground applies then just explain your case fully but remember that the Assessor cannot allow an appeal solely because of mitigating circumstances.

- **The vehicle was not improperly parked:** e.g. that the vehicle was not parked where stated on the parking charge notice; that you believe you were still within the time you paid for; that the voucher was clearly displayed or that the conditions were not properly signed.
- **The parking charge (ticket) exceeded the appropriate amount:** e.g. that you are being asked to pay the wrong amount for the parking charge or that the charge has already been paid.
- **The vehicle was stolen:** e.g. that the vehicle was improperly parked after being stolen. However, the fact that someone else was driving your vehicle, for example a family member, friend or colleague, is not in itself a valid ground of appeal. The fact that you told the driver that they could only use your vehicle on condition they did not get any parking tickets is not a valid ground of appeal.
- **I am not liable for the parking charge:** e.g. that you had sold the vehicle before, or bought it after, the alleged improper parking. However, the fact that you had paid to park the vehicle in the first place (even if, for example, the voucher was not clearly displayed) is not in itself a valid ground of appeal.

It is very bad that Popla does not adequately cover one of the main grounds for appeal. Most people without specialist knowledge would not imagine the 'appropriate amount' heading would stretch to cover GPEL.

Popla seems to be taking refuge in the fact that GPEL is a bit difficult to explain. Therefore, the only people who will quote GPEL as an appeal ground are those who are well versed in the law or the BPA code or have seen advice on the various internet forums. So your website is discriminatory against the vast majority of people, who don't understand the issues in any depth and don't read up about the subject. The parking companies don't feel inclined to inform them, naturally. Popla is thus reinforcing the imbalance of power and knowledge between the motorist and the parking companies.

Popla repeats the error under the 'Making representations' section, which applies to the keepers' rights to appeal to the companies. This is an even worse error because it is the first part of supposedly impartial Popla advice to which keepers are likely to turn when they hear about Popla.

Your website is therefore creating a hurdle of misinformation over which only a tiny minority who can see what's on the other side will bother to jump.

As things stand, Popla is complicit in the [redacted text] being committed by many parking companies who claim to have suffered an amount of loss that they have not suffered, and go to Popla and the courts asserting that loss. In the latter case, if they make their claims as statements of truth they are committing perjury. By threatening consumers with penalties they are not entitled to even if they don't go to court, they are also arguably in breach of the criminal law.

Popla is not stupid. It knows that it is acting wrongfully by publishing misleading information. So the questions Popla needs to answer are:

- 1 Why are we, and why have we been, misinforming the public as to their possible grounds for appeal?
- 2 Who told us to do this and why did we choose to comply with that direction?
- 3 What have been the consequences for tens of thousands of registered keepers who didn't know about this ground of appeal because we didn't tell them?
- 4 What have been the consequences for the parking companies?
- 5 What can we do to put things right for the future, as quickly as possible?
- 6 How can we put right the past consequences set out in Q3?
- 7 How should we best apologize for the gross error of judgment we made by our compliance in Q2?
- 8 As this is such a gross error of judgment, who should resign from their position at Popla?

Please let me have your responses to those questions as soon as you can.

Thank you.

6 Popla (anonymous author) to PLC, 3 March 2014

In response to your latest email to the Service Manager, the Lead Adjudicator has asked me to inform you:

- POPLA is not responsible for the British Parking Association (BPA) Code of Practice. You may wish to contact the BPA direct if you have queries about their Code.
- The POPLA website states, as regards grounds of appeal: 'If you are not sure which ground applies then just explain your case fully but remember that the Assessor cannot allow an appeal solely because of mitigating circumstances.'
- The Independent Scrutiny Board has indicated that, whilst not questioning the decision of the Lead Adjudicator regarding a parking charge claimed as damages amounting to a genuine pre-estimate of loss, they were of the view that they should obtain an Opinion from a retired High Court Judge on this issue, and are seeking an increase in funding for it. The Lead Adjudicator has indicated that he would carefully consider any such Opinion.
- 'Representations' (however called) are what a motorist makes to the issuer of a parking charge notice, not an appeal to POPLA. The issuer can cancel a PCN for reasons of mitigation, or anything else. That is a matter for the issuer.
- As previously explained, it is not correct that a parking charge must always represent a genuine pre-estimate of loss.
- POPLA does not provide legal advice.
- It is not appropriate Mr Reeve to be cross-questioned by email and it is not going to continue.
- POPLA has neither the time nor resources to deal with third party requests for views and opinions, even if [sic: read 'if it'] were appropriate.

Thank you for your interest in POPLA.