

Dear Sir/Madam,

REF: 243979/994435

POPLA: 6062149390

I received a letter dated 14/06/2019 acting as a notice to the registered keeper. My appeal to the operator - ParkingEye - was submitted and acknowledged by the operator on 13/07/2019 but subsequently rejected via an email dated 02/08/2019. As the registered keeper, I contend that I am not liable for the alleged parking charge and wish to appeal against it on the following grounds:

- 1) Notice to Keeper (NtK) is not compliant with the Protection of Freedoms Act (PoFA) 2012 due to the dates and wording used
- 2) The operator has not shown that the individual who it is pursuing is in fact liable for the charge
- 3) Non-compliance with the British Parking Association's (BPA) Code of Practice re: grace periods
- 4) The signs in this car park are not prominent, clear or legible from all parking spaces and there is insufficient notice of the sum of the parking charge itself
- 5) No evidence of landowner authority

Please see below for further details.

1) Notice to Keeper (NtK) is not compliant with the Protection of Freedoms Act (PoFA) 2012 due to the dates and wording used

Paragraph 9(2)(a) of the Protection of Freedoms Act states that the notice to keeper must:

“specify the vehicle, the relevant land on which it was parked and **the period of parking to which the notice relates**”

The Notice to Keeper received from ParkingEye includes the information below on the front page, alongside two small photographs of the vehicle concerned:

Welcome Break Birchanger Green - Bishops Stortford

Time in Car Park: 2 hours 17 minutes

Arrival time: 02/06/2019 15:46:36

Departure time: 02/06/2019 18:04:24

On the reverse of the notice, under the heading Parking Charge Information, it states:

“On the 02 June 2019 vehicle CE12XRZ entered the Welcome Break Birchanger Green-Bishops Stortford car park at 15:46:36 and departed at 18:04:24 on 02 June 2019.”

At no point in the Notice to Keeper is a 'period of parking' specified or evidenced by ParkingEye. By virtue of the nature of an ANPR system recording only entry and exit times, ParkingEye are not able to definitively state the period of parking.

In order to satisfy the requirements of Schedule 4, Paragraph 9(2)(a), ParkingEye need to provide evidence to show the vehicle in question was physically parked at the location on the date, at the time and most importantly **for the duration claimed** in the NtK. This is particularly important as it also relates to appeal point 3 (Non-compliance with BPA Code of Practice re: grace periods).

Under Schedule 4, paragraph 4 of the Protection of Freedoms Act (PoFA), an operator can only establish the right to recover any unpaid parking charges from the keeper of a vehicle **if certain conditions are met as stated in paragraphs 5, 6, 11 & 12**. ParkingEye have failed to fulfil the conditions which state that the keeper must be served with a compliant NtK in accordance with sub-paragraph 9(4), which stipulates a mandatory timeline and wording:

*"The notice must be given by— (a) handing it to the keeper, or leaving it at a current address for service for the keeper, within the relevant period; or (b) sending it by post to a current address for service for the keeper so that **it is delivered to that address within the relevant period.**"*

The applicable section here is (b) because the NtK was delivered by post. Furthermore, paragraph 9(5) states:

"The relevant period [...] is the period of 14 days beginning with the day after that on which the specified period of parking ended."

According to the NtK, the alleged 'period of parking' ended on Sunday 2nd June 2019. The relevant period is therefore the 14 day period from Monday 3rd June 2019 to Sunday 16th June 2019 inclusive. Paragraph 9(6) states:

*"A notice sent by post is presumed, unless the contrary is proved, to have been delivered (and so "given" for the purposes of sub-paragraph (4)) on **the second working day after the day on which it is posted**; and for this purpose "working day" means any day other than a Saturday, Sunday or a public holiday in England and Wales."*

The issue date stated on the NtK is Friday 14th June 2019 and in accordance with paragraph 9(6) is presumed to have been "given" on Tuesday 18th June 2019 - 16 days since the alleged 'period of parking' occurred and therefore **outside of the relevant period outlined in paragraph 9(5)**. Furthermore, it is clear that ParkingEye know this because they have used the alternative version of their template PCN, in which there is **no reference to 'keeper liability' or the PoFA**.

This is a charge that could only be potentially enforced against a known driver. Whilst I was an occupant of the car, the driver has never been admitted and there is no evidence as to the identity of that individual.

2) The operator has not shown that the individual who it is pursuing is in fact liable for the charge.

In cases with a keeper appellant, yet no PoFA 'keeper liability' to rely upon, POPLA must first consider whether they are confident that the Assessor knows who the driver is, based on the evidence received. No presumption can be made about liability whatsoever. A vehicle can be driven by any person (with the consent of the owner) as long as the driver is insured. There is no dispute that the driver was entitled to drive the car and I can confirm that they were, but I am exercising my right not to name that person.

Where a charge is aimed only at a driver then no other party can be told to pay, not by POPLA, nor the operator, nor even in court.

I am the appellant throughout (as I am entitled to be), and as there has been no admission regarding who was driving, and no evidence has been produced, it has been held by POPLA on numerous occasions, that a charge cannot be enforced against a keeper without a PoFA-compliant NtK. Only full compliance with Schedule 4 of the PoFA (or evidence that a keeper was the driver) can cause a keeper appellant to be deemed by POPLA to be the liable party. The burden of proof rests with the Operator, because they cannot use the PoFA in this case, to show that (as an individual) I have personally not complied with terms in place on the land and show that I am personally liable for their parking charge.

The vital matter of full compliance with the PoFA was confirmed by parking law expert barrister, Henry Greenslade, the previous POPLA Lead Adjudicator, in 2015:-

Understanding keeper liability

"There appears to be continuing misunderstanding about Schedule 4. Provided certain conditions are strictly complied with, it provides for recovery of unpaid parking charges from the keeper of the vehicle.

There is no 'reasonable presumption' in law that the registered keeper of a vehicle is the driver. Operators should never suggest anything of the sort. Further, a failure by the recipient of a notice issued under Schedule 4 to name the driver, does not of itself mean that the recipient has accepted that they were the driver at the material time. Unlike, for example, a Notice of Intended Prosecution where details of the driver of a vehicle must be supplied when requested by the police, pursuant to Section 172 of the Road Traffic Act 1988, a keeper sent a Schedule 4 notice has no legal obligation to name the driver. [...] If {PoFA 2012 Schedule 4 is} not complied with then keeper liability does not generally pass."

No lawful right exists to pursue unpaid parking charges from a keeper, where an operator is NOT attempting to transfer the liability for the charge using the PoFA. This exact finding was made in a very similar case with the same style NtK in 6061796103 v ParkingEye in September 2016, where POPLA Assessor Carly Law found:

"I note the operator advises that it is not attempting to transfer the liability for the charge using the Protection of Freedoms Act 2012 and so in mind, the operator continues to hold the driver responsible. As such, I must first consider whether I am confident that I know who the driver is, based on the evidence received. After considering the evidence, I am unable to confirm that the appellant is in fact the driver. As such, I must allow the appeal on the basis that the operator has failed to demonstrate that the appellant is the driver and therefore liable for the charge. As I am allowing the appeal on this basis, I do not need to consider the other grounds of appeal raised by the appellant. Accordingly, I must allow this appeal."

3) Non-compliance with the BPA Code of Practice re: grace periods

The BPA's Code of Practice (Section 13) states that there are two grace periods: one at the end (of a minimum of 10 minutes) and one at the start.

Section 13.1 of the BPA's Code of Practice states that:

"Your approach to parking management must allow a driver who enters your car park but decides not to park, to leave the car park within a reasonable period without having their vehicle issued with a parking charge notice."

BPA's Code of Practice (13.2) states that:

"You should allow the driver a reasonable 'grace period' in which to decide if they are going to stay or go. If the driver is on your land without permission you should still allow them a grace period to read your signs and leave before you take enforcement action."

BPA's Code of Practice (13.4) states that:

"You should allow the driver a reasonable period to leave the car park after the parking contract has ended, before you take enforcement action. If the location is one where parking is normally permitted, the Grace Period at the end of the parking period should be a minimum of 10 minutes."

BPA's Code of Practice (18.5) states that:

"If a driver is parking with your permission, they must have the chance to read the terms and conditions before they enter into the contract with you. If having had that opportunity, they decide not to park but choose to leave the car park, you must

provide them with a reasonable grace period to leave, as they will not be bound by your parking contract.”

The BPA Code of Practice (13.4) clearly states that the Grace Period to leave the car park should be a **minimum of 10 minutes**. it is reasonable to suggest that the **minimum of 10 minutes** grace period stipulated in 13.4 is also a “reasonable grace period” to apply to 13.1 and 13.2 of the BPA’s Code of Practice.

As Kelvin Reynolds, Head of Public Affairs and Policy at the British Parking Association (BPA) states:

“The BPA’s guidance specifically says that there must be sufficient time for the motorist to park their car, observe the signs, decide whether they want to comply with the operator’s conditions and either drive away or pay for a ticket.”

“No time limit is specified. This is because it might take one person five minutes, but another person 10 minutes depending on various factors, not limited to disability.”

Additionally, on 30th July 2015, the minutes of the Professional Development & Standards Board meeting show that it was formally agreed by the Board (of BPA members and stakeholders) that the minimum grace period would be changed in 13.4 of the BPA Code of Practice to read ‘a minimum of eleven minutes’:

*“Implications of the 10 minute grace period were discussed and the Board agreed with suggestion by AH that the clause should comply with DfT guidelines in the English book of by-laws to encourage a single standard. Board agreed that as the guidelines state that grace periods need to exceed 10 minutes clause 13.4 should be amended to reflect a **mandatory 11 minute grace period.**”*

The recommendation reads:

*“Reword Clause 13.4 to “if the location is one where parking is normally permitted, the Grace Period at the end of the parking period should be a **minimum of 11 minutes.**”*

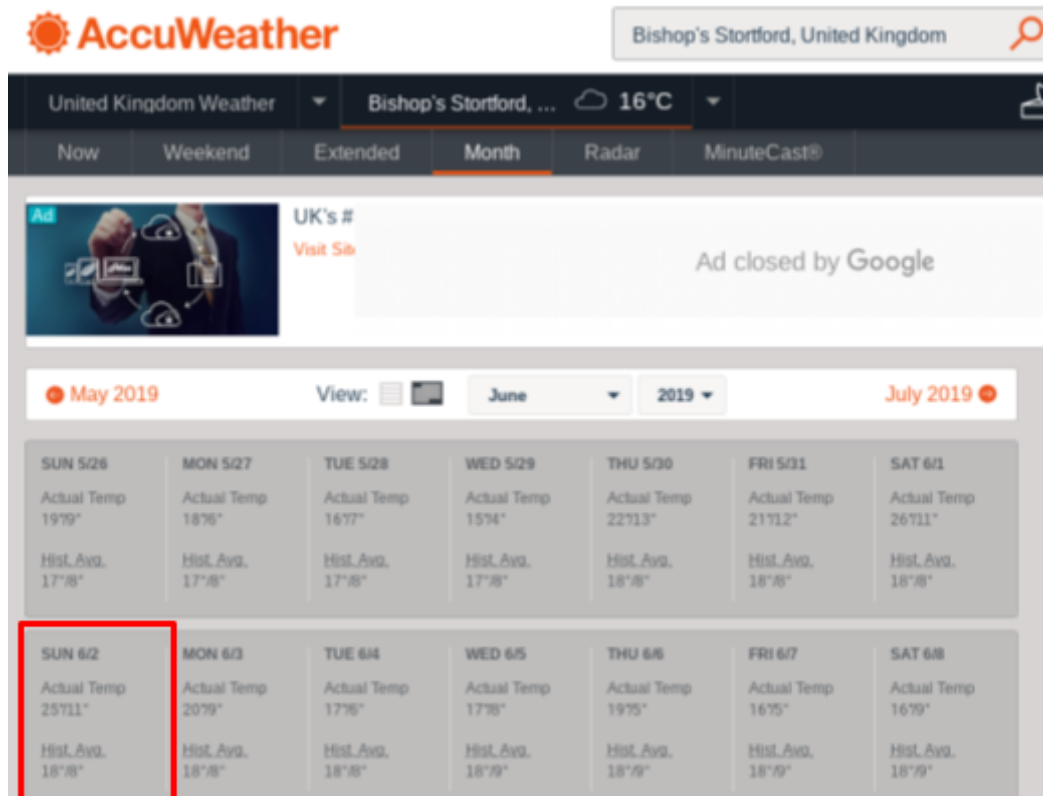
[Source:

http://www.britishparking.co.uk/write/Documents/Meeting%20Notes/Governance/20150730_PDandS_Board_Action_Notes.pdf]

It is not unreasonable to suggest that clarification of this time period in relation to 13.4 also goes some way to clarifying the terms “reasonable period” and “reasonable grace period” stated respectively in 13.1 and 13.2 of the BPA’s Code of Practice.

If the BPA feel “**a minimum of 11 minutes**” is a reasonable time period to leave a car park after a period of parking, it stands to reason that at least the same period of time is reasonable to also enter a car park, locate (and read) terms and conditions and decide whether or not to enter into a contract.

The driver was travelling with a 10 month old baby and was unable to leave the baby unattended in the vehicle, particularly as 2nd June was a very hot day (<https://www.express.co.uk/news/weather/1133497/uk-weather-forecast-weekend-map-chart-bbc-met-office-news-latest-england-wales-june-2019>). As shown in the image below, the average outdoor temperature in the Bishop's Stortford area was 25°C, which means the in-car temperature would undoubtedly have been higher, rendering it unsafe for a young baby to be left inside.



As **no signage was visible from the vehicle**, the driver had no choice but to remove the baby from the car, along with a pushchair, and hunt around the car park for a legible sign before deciding whether to park or not. As Kelvin Reynolds states about grace periods above:

"No time limit is specified. This is because it might take one person five minutes, but another person 10 minutes depending on various factors, not limited to disability."

Clearly in these circumstances, the time taken prior to the parking period commencing would likely have been at least the minimum period of 10 minutes.

This also applies at the end of the parking period; the driver was not able to simply get into their vehicle and drive away. They needed to take time to ensure that the car seat was correctly secured in the vehicle, that the baby was correctly strapped into their car seat and wearing appropriate clothing for the ongoing journey in the hot weather, as well as collapsing the pushchair and safely stowing it in the boot of the car. The amount of time it would take to

do this would be lengthier than if the driver were a lone traveller, but still well within the minimum 10 minutes grace period outlined above.

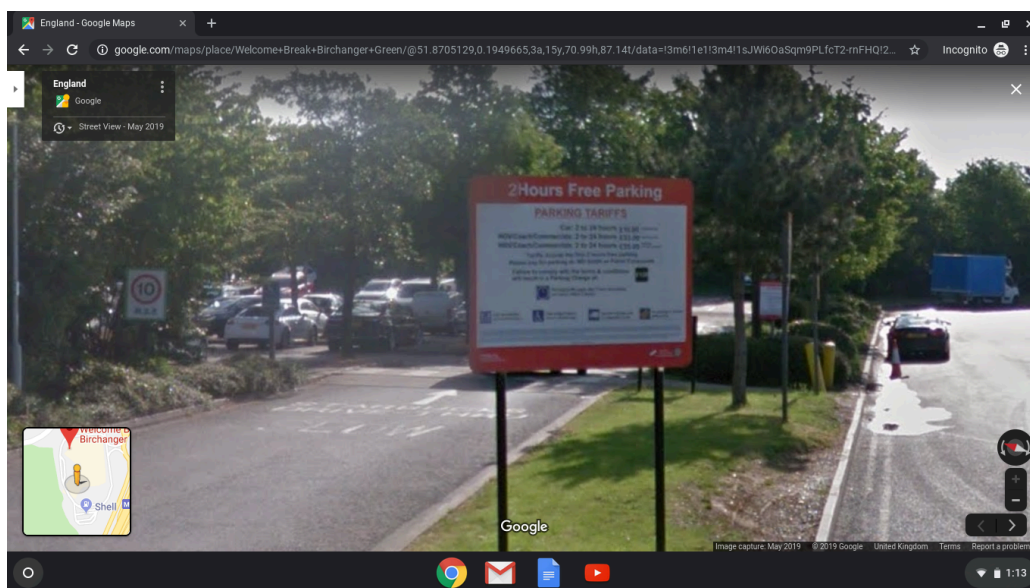
It is therefore argued that the 'overstay' of the visit in question (which ParkingEye claim was a total of 17 minutes) is not an unreasonable grace period, considering the circumstances.

4) The signs in this car park are not prominent, clear or legible from all parking spaces and there is insufficient notice of the sum of the parking charge itself

I note that within the Protection of Freedoms Act (PoFA) 2012 it discusses the clarity that needs to be provided to make a motorist aware of the parking charge. Specifically, it requires that the driver is given 'adequate notice' of the charge. PoFA 2012 defines 'adequate notice' as follows:

"(3) For the purposes of sub-paragraph (2) 'adequate notice' means notice given by: (a) the display of one or more notices in accordance with any applicable requirements prescribed in regulations under paragraph 12 for, or for purposes including, the purposes of sub-paragraph (2); or (b) where no such requirements apply, the display of one or more notices which: (i) specify the sum as the charge for unauthorised parking; and (ii) are adequate to bring the charge to the notice of drivers who park vehicles on the relevant land".

Even in circumstances where PoFA 2012 does not apply, I believe this to be a reasonable standard to use when making my own assessment, as appellant, of the signage in place at the location. Having considered the signage in place at this particular site against the requirements of Section 18 of the BPA Code of Practice and PoFA 2012, I am of the view that the signage at the site is NOT sufficient to bring the parking charge (i.e. the sum itself) to the attention of the motorist.



As is apparent in the image on the left, the sign is tilted away from oncoming motorists entering the car park on the left and towards those

entering the lorry park on the right, making it impossible to see clearly; this contravenes the guidance outlined in Appendix B of the BPA's Code of Practice, which states:

"The sign should be placed so that it is readable by drivers without their needing to look away from the road ahead."

There was no contract nor agreement on the 'parking charge' at all. It is submitted that the driver did not have a fair opportunity to read about any terms involving this huge charge, which is out of all proportion and not saved by the dissimilar 'ParkingEye Ltd v Beavis' case.

In the Beavis case, which turned on specific facts relating only to the signs at that site and the unique interests and intentions of the landowners, the signs were unusually clear and not a typical example for this notorious industry. The Supreme Court were keen to point out the decision related to that car park and those facts only, as shown in the image below:



In the Beavis case, the £85 charge itself was in the largest font size with a contrasting colour background and the terms were legible, fairly concise and unambiguous. There were 'large lettering' signs at the entrance and all around the car park, according to the Judges.

Here is the 'Beavis case' sign as a comparison to the signs under dispute in this case:



This case, by comparison, does not demonstrate an example of the 'large lettering' and 'prominent signage' that impressed the Supreme Court Judges and swayed them into deciding that in the specific car park in the Beavis case alone, a contract and 'agreement on the charge' existed.

Here, the signs are sporadically placed, indeed obscured and hidden in some areas. They are unremarkable, not immediately obvious as parking terms and the wording is mostly illegible, being crowded and cluttered with a lack of white space as a background.

It is indisputable that placing letters too close together in order to fit more information into a smaller space can drastically reduce the legibility of a sign, especially one which must be read BEFORE the action of parking and leaving the car.

It is vital to observe, since 'adequate notice of the parking charge' is mandatory under the PoFA Schedule 4 and the BPA Code of Practice, these signs do not clearly mention the parking charge which is hidden in small print (and does not feature at all on some of the signs). Areas of this site are unsigned and there are no full terms displayed at the entrance either, so it cannot be assumed that a driver drove past and could read a legible sign, nor parked near one.

This case is more similar to the signage in POPLA decision 5960956830 on 2.6.16, where the Assessor Rochelle Merritt found as fact that signs in a similar size font in a busy car park where other unrelated signs were far larger, was inadequate:

"the signage is not of a good enough size to afford motorists the chance to read and understand the terms and conditions before deciding to remain in the car park. [...] In addition the operators signs would not be clearly visible from a parking space [...] The appellant has raised other grounds for appeal but I have not dealt with these as I have allowed the appeal."

From the evidence I have seen so far, the terms appear to be displayed inadequately, in letters no more than about half an inch high, approximately. I put the operator to strict proof as to the size of the wording on their signs and the size of lettering for the most onerous term, the parking charge itself.

The letters seem to be no larger than .40 font size going by this guide:

<http://www-archive.mozilla.org/newlayout/testcases/css/sec526pt2.htm>

As further evidence that this is inadequate notice, Letter Height Visibility is discussed here:

<http://www.signazon.com/help-center/sign-letter-height-visibility-chart.aspx>

*"When designing your sign, consider how you will be using it, as well as how far away the readers you want to impact will be. For example, if you are placing a sales advertisement inside your retail store, your text only needs to be visible to the people in the store. 1-2' letters (or smaller) would work just fine. However, if you are hanging banners and **want drivers on a nearby highway to be able to see them, design your letters at 3' or even larger.**"*

...and the same chart is reproduced here:

<http://www.ebay.co.uk/gds/Outdoor-Dimensional-Sign-Letter-Best-Viewing-Distance-/10000000175068392/g.html>

*"When designing an outdoor sign for your business keep in mind the readability of the letters. **Letters always look smaller when mounted high onto an outdoor wall**".*

"...a guideline for selecting sign letters. Multiply the letter height by 10 and that is the best viewing distance in feet. Multiply the best viewing distance by 4 and that is the max viewing distance."

So, a letter height of just half an inch, showing the terms and the 'charge' and placed high on a wall or pole or buried in far too crowded small print, is woefully inadequate in an outdoor car park. Given that letters look smaller when high up on a wall or pole, as the angle renders the words less readable due to the perspective and height, you would have to stand right in front of it and still need a stepladder (and perhaps a torch and/or magnifying glass) to be able to read the terms.

Under Lord Denning's Red Hand Rule, the charge (being 'out of all proportion' with expectations of drivers in this car park and which is the most onerous of terms) should have been effectively: 'in red letters with a red hand pointing to it' - i.e. VERY clear and prominent with the terms in large lettering, as was found to be the case in the car park in 'Beavis'. A reasonable interpretation of the 'red hand rule' and the 'signage visibility distance' tables above and the BPA Code of Practice, taking all information into account, would require a parking charge and the terms to be displayed far more transparently, on a lower sign and in far larger lettering, with fewer words and more 'white space' as background contrast. Indeed in the Consumer Rights Act 2015 there is a 'Requirement for transparency':

- (1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.
- (2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

The Beavis case signs not being similar to the signs in this appeal at all, I submit that the persuasive case law is in fact '*Vine v London Borough of Waltham Forest [2000] EWCA Civ 106*' about a driver not seeing the terms and consequently, she was NOT deemed bound by them.

This judgment is binding case law from the Court of Appeal and supports my argument, not the operator's case:

<http://www.bailii.org/ew/cases/EWCA/Civ/2000/106.html>

This was a victory for the motorist and found that, where terms on a sign are not seen and the area is not clearly marked/signed with prominent terms, the driver has not consented to - and cannot have 'breached' - an unknown contract because there is no contract capable of being established. The driver in that case (who had not seen any signs/lines) had NOT entered into a contract. The recorder made a clear finding of fact that the plaintiff, Miss Vine, did not see a sign because the area was not clearly marked as 'private land' and the signs

were obscured/not adjacent to the car and could not have been seen and read from a driver's seat before parking.

So, for this appeal, I put this operator to strict proof of where the car was parked and (from photos taken in the same lighting conditions) how their signs appeared on that date, at that time, from the angle of the driver's perspective. Equally, I require this operator to show how the entrance signs appear from a driver's seat, not stock examples of 'the sign' in isolation/close-up. I submit that full terms simply cannot be read from a car before parking and mere 'stock examples' of close-ups of the (alleged) signage terms will not be sufficient to disprove this.

5) No evidence of Landowner Authority

As ParkingEye Ltd does not have a proprietary interest in the land then I require that they produce an unredacted copy of the contract with the landowner. The contract and any 'site agreement' or 'User Manual' setting out details including exemptions - such as any 'genuine customer' or 'genuine resident' exemptions or any site occupier's 'right of veto' charge cancellation rights - is key evidence to define what ParkingEye is authorised to do and any circumstances where the landowner/firms on site in fact have a right to cancellation of a charge. It cannot be assumed, just because an agent is contracted to merely put some signs up and issue Parking Charge Notices, that the agent is also authorised to make contracts with all or any category of visiting drivers and/or to enforce the charge in court in their own name (legal action regarding land use disputes generally being a matter for a landowner only).

Witness statements are not sound evidence of the above, often being pre-signed, generic documents not even identifying the case in hand or even the site rules. A witness statement might in some cases be accepted by POPLA but in this case I suggest it is unlikely to sufficiently evidence the definition of the services provided by each party to the agreement.

Nor would it define vital information such as charging days/times, any exemption clauses, grace periods (which I believe may be longer than the bare minimum times set out in the BPA CoP) and basic information such as the land boundary and bays where enforcement applies/does not apply. Not forgetting evidence of the various restrictions which the landowner has authorised can give rise to a charge and of course, how much the landowner authorises this agent to charge (which cannot be assumed to be the sum in small print on a sign because template private parking terms and sums have been known not to match the actual landowner agreement).

Paragraph 7 of the BPA CoP defines the mandatory requirements and I put this operator to strict proof of full compliance:

7.2 If the operator wishes to take legal action on any outstanding parking charges, they must ensure that they have the written authority of the landowner (or their appointed agent) prior to legal action being taken.

7.3 The written authorisation must also set out:

a) the definition of the land on which you may operate, so that the boundaries of the land can be clearly defined

b) any conditions or restrictions on parking control and enforcement operations, including any restrictions on hours of operation

c) any conditions or restrictions on the types of vehicles that may, or may not, be subject to parking control and enforcement

d) who has the responsibility for putting up and maintaining signs

e) the definition of the services provided by each party to the agreement