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Case No: C1/2010/1928

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION, DIVISIONAL COURT
(Pitchford LJ and Maddison J)
Ref No: CO27752010

Royal Courts of Justice
Strand, London, WC2A 2LL

19 April 2011

Before :

LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division
LADY JUSTICE SMITH
and
LORD JUSTICE MOORE-BICK

Between :

DJANOGLY **Appellant**
- and -
WESTMINSTER CITY COUNCIL **Respondent**

Mr Philip Coppel QC and Ms Heather Emmerson (instructed by Khakhar & Co) for the
Appellant
Ms Nathalie Lieven QC and Ms Jacqueline Lean (instructed by Head of Council Legal
Services) for the Respondent

Hearing dates : 14 and 15 March 2011

DRAFT JUDGMENT

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Lord Justice Maurice Kay :

1. This case is concerned with charges for roadside parking of motorcycles within the City of Westminster. Until quite recently it was possible for them to be parked without incurring a charge. This was not the result of an express right but derived from an exemption from waiting and loading restrictions which apply to cars and other vehicles in “yellow line” areas. The City of Westminster (Waiting and Loading Restrictions) (No.1) Order 2002 permitted marked bays to be used by motorcycles during the hours of parking control in such areas. By 2006 there were spaces for about 4500 motorcycles in such bays. It is common ground that there was a need for more spaces by reason of increased demand, particularly following the introduction of congestion charging. Motorcycles are exempt from the congestion charge. Initially, additional spaces were created by adding bays pursuant to the Waiting and Loading Order. However, Westminster City Council (the Council) introduced a new scheme on an experimental basis in 2008 pursuant to the City of Westminster (Motorcycle Parking Places) (No.1) Experimental Traffic Order 2008 (the Experimental Order). It took the regulation of motorcycle parking out of the Waiting and Loading Restrictions Order and provided designated parking places in roadside bays and in off-street car parks. Henceforth, roadside parking was subject to charging. The general daily rate was £1.50. There was no legal challenge to the Experimental Order.
2. In January 2010, the Experimental Order was replaced by a permanent scheme contained in the City of Westminster (Motorcycle Parking Places) (No.1) Order 2010 (the 2010 Order), the City of Westminster (Parking Places) (Further Provisions) (No.1) Order 2010 and the City of Westminster (Waiting

and Loading Restrictions) (Amendment No.108) Order 2010. The 2010 Order provides for roadside parking at a general daily rate of £1, with provision for discounted weekly, monthly and annual rates. The charges are a fraction of those for roadside parking by cars which are calculated by the minute. Moreover, whereas the system for cars is based on “pay and display”, a different system had to be devised for motorcycles because they lack the facility of secure, internal ticket display. A motorcyclist generally has to pay by way of a telephone transaction completed with a call centre. Since the introduction of the Experimental Order, the number of roadside spaces for motorcycles has been increased, as has the number of off-street spaces. In all there are now about 6500 spaces, of which some 400 are in off-street car parks. The latter are free of charge but are not always in locations convenient for users.

3. Mr Warren Djanogly is a motorcyclist. He is also chairman of the campaign group “No to Bike Parking Tax” which has over 7000 members. By these proceedings, which are brought pursuant to paragraph 35 of Schedule 9 to the Road Traffic Regulation Act 1984 (the 1984 Act), he seeks to challenge the validity of the 2010 Order or at least its charging provisions. His challenge was rejected by the Divisional Court (Pitchford LJ and Maddison J) : [2010] EWHC 1825 (Admin). He now appeals to this Court, permission having been granted on all proposed grounds save for one upon which permission was refused. A renewed application for permission in relation to that ground is also before us. Before turning to the issues raised, it is necessary to set out the relevant statutory provisions.

The statutory framework

4. The primary statutory provisions relating to parking control are contained in Part IV of the 1984 Act which is titled “Parking Places”. Under the heading “Parking on highways for payment” and the side-heading “Designation of Parking Places on highways”, section 45 provides

“(1) A local authority may by order designate parking places on highways ... in their area for vehicles or vehicles of any class specified in the order; and the local authority may make charges (of such amount as may be prescribed under section 46 below) for vehicles left in a parking place so designated.”

Section 46(1A) provides that charges must be prescribed by the designation order or by a separate order.

5. A local authority is required to keep an account of its income and expenditure in respect of parking places (section 55(1)). At the end of each financial year any deficit in the account has to be made good out of its general fund and any surplus has to be applied for all or any purposes specified in section 54(4). In so far as it is not so applied, it must be appropriated to the carrying out of some specific project falling within those purposes and carried forward until applied to carrying it out (section 55(2)). The list of purposes specified in section 54(4) includes the making good of amounts charged to the general fund above under section 54(2) in the previous four years, the provision and maintenance of off-street parking, public passenger transport services, highway improvement, environmental improvement and any other purposes for which the authority may lawfully incur expenditure. In the case of a London authority, it may also meet all or any part of the cost of doing anything in its area which (a) facilitates the implementation of the London

transport strategy and (b) is for the time being specified in that strategy as a purpose for which a surplus may be so applied. Thus, there is no requirement of revenue neutrality, merely provision as to how a deficit or surplus must be dealt with.

6. Section 122, which lies at the heart of this case, provides (as amended):

- “(1) It shall be the duty of every local authority upon whom functions are conferred, by or under, this Act, so to exercise the functions ... as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway ...
- (2) The matters referred to in subsection (1) above as being specified in this subsection are –
- (a) the desirability of securing and maintaining reasonable access to premises;
 - (e) the effect on the amenities of any locality affected ... ;
 - (bb) the strategy prepared under section 80 of the Environment Act 1995 (national air quality strategy);
 - (c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and
 - (d) any other matters appearing to the local authority to be relevant.”

The aims referred to in section 122(1) are generally known as “traffic management benefits”.

7. The statutory right to challenge a designation order is governed by Part VI of Schedule 9 as follows:

- “35. If any person desires to question the validity of, or any provision contained in, an order ... on the grounds –
- (a) that it is not within the relevant powers, or
 - (b) that any of the relevant requirements has not been complied with in relation to the order, he may, within 6 weeks from the date on which the order is made, make an application for the purpose to the High Court ...
- 36 (1) On any application ... the court –
- (a) [interim orders], and
 - (b) if satisfied that the order, or any provision of the order, is not within the relevant powers, or that the interests of the applicant have been substantially prejudiced by failure to comply with any of the relevant requirements, may quash the order or any provision of the order.”

The 2010 Order

8. In addition to designating the many parking places by location, the 2010 Order prescribes the tariff of charges, provides an exemption for electrically propelled motorcycles, establishes the telephone payment parking system, provides for penalty charges in relation to contraventions, enables Westminster residents to obtain exemption permits on payment of a fee and makes various ancillary provisions. Although the application to the High Court was in terms a challenge to the 2010 Order as a whole and the hearing in the Divisional Court appears to have reflected that, in this Court Mr Phillip Coppel QC has focused on those provisions in the Order which relate to charging. It is those alone that he now seeks to quash. It seems that Mr Djanogly is content with the provisions as to designation. His complaint is simply about charging.

The decision of the Divisional Court

9. The decision of the Divisional Court was explained in the careful judgment of Pitchford LJ with which Maddison J agreed. For the purposes of this appeal, the material parts of the judgment are contained in the following extracts:

- “44. It seems to me almost self-evident that there will be a need to designate spaces for on-street parking in a London borough with a profile such as Westminster’s. The evidence is overwhelming that on-street parking in Westminster requires rationalisation ... The underlying policy justification for introducing a charge to motorcycle users for the improved provision of on-street parking, namely that there was a need to strike an equitable balance between vehicle users, seems to me to be utterly unexceptional. There was a finite capacity for kerb-side parking. Motorcyclists needed more space. That space would be provided partly by re-assigning bays formerly used by motor cars and partly by extending them. While there were traffic management and environmental arguments for an against treating motorcyclists as a special case it does not seem to me reasonably arguable that the Authority acted outside its statutory powers by resolving that all road users should pay their fair share for on-street provision of spaces.
45. ... In my view, the evidence demonstrates two clear objectives the Authority sought to achieve by the introduction of the parking orders. The first was to improve on-street parking availability for motorcyclists in order to meet actual increased demand and anticipated increased demand. The existence of that need cannot, in my view, be seriously challenged. The evidence was overwhelming ...
46. The second objective ... was the termination of discriminatory treatment between motorcycles and cars. Pressure on kerb-side space was created both by motorcycles and cars. The Authority considered it right to balance the interests of both by introducing charges for motorcycles while, at the same time, providing free off-street parking on its secure parking sites ...

47. ... I accept both the existence of increased demand and the need to level the playing field between motorcyclists and other vehicular traffic.”

The grounds of appeal

10. There are six grounds of appeal in respect of which permission has been granted. They fall into two groups. The first group, comprising grounds 1-4, is concerned to attack the findings about the objectives sought to be achieved by charging. The underlying submission is that in the 2010 Order, charging did not have the aim or effect of achieving a traffic management benefit. The second group, comprising grounds 5 and 6, is in the form of an attack on the findings in relation to the analysis of the income from and the cost of the scheme and its alleged cost-neutrality. In addition, there is a renewed application for permission to pursue a seventh ground of appeal which seeks to take issue with the consultation process.

Grounds 1 – 4: objectives and benefits

11. I propose to deal with these grounds of appeal compendiously. In a nutshell, the submission is as follows. The challenge is to the 2010 Order above, or to parts of it. It is not to the Experimental Order. The focus is therefore limited to the 2010 Order. Although there were costs incurred in relation to the implementation and administration of the Experimental Order, they were more than recouped by the income generated by it which exceeded expectations – hence the reduction in the daily rate from £1.50 to £1 in the 2010 Order. By January 2010 the set-up costs had been incurred and recouped. No additional kerbside spaces were created by or pursuant to the 2010 Order. The Council’s statutory power to charge (section 45(1)) is subject to the duty “to secure the

expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway” (section 122(1)). The charging element in the 2010 Order does nothing to secure these traffic management benefits or either of them. The benefits had been achieved in the period of the Experimental Order’s operation – all the designated spaces and the hardware in the form of markings, signage and the like. Thus, as charging now did nothing to assist in the attainment of the traffic management benefits, it was *ultra vires*. To the extent that the Council sought to justify it by avoiding or reducing the discrimination against car drivers, that was not a lawful objective under section 122.

12. It is fair to say that the Council has not always been entirely consistent about the objective sought to be achieved by charging. For example, an internal report of 12 May 2009 stated:

“The current approach to charging for motorcycle parking reflects the demands made on Westminster’s infrastructure by the increasing numbers of people using motorcycles and scooters. It was not an explicit aim of the pilot to address environmental or congestion related concerns ... Rather, the approach attempted to fairly balance the finite amount of kerbside provision between all the different motorist types and uses. Moreover, it is also the case that as the volume of motorcycle traffic grows the wider issues of environmental and congestion will increasingly come to the fore. The City Council’s policy on motorcycle parking reflects their use of these limited resources and their increasing demand for them: overall we believe the policy is fair, reasonable and informed.”

13. Seventeen pages later in the same report it is stated:

“... the ever-increasing demand from motorcyclists for kerbside space remains and coupled with environmental issues, the fundamental recommendation upon balance is that the scheme be made permanent but with modifications.”

14. A further report dated 1 October 2009 followed the period of consultation.

The response to objections based on “no traffic management benefit” was put as follows:

“The purpose of the experimental scheme was to attempt to balance the ever-increasing demand for Westminster’s kerbside space between all road users ... The City Council’s policy on motorcycle parking therefore reflects motorcyclists’ use of these limited resources and their increasing demand for them.”

15. Following the commencement of proceedings, the Council’s pleaded response stated:

“The primary purpose of the Scheme was to regulate and balance the demand for on-street parking facilities in Westminster between all road users ... The need to provide additional parking facilities for motorcycles, regulate the use of new and existing facilities, and balance demand for such facilities against the demands of other road users in organising ... finite kerbside resources is a clear theme running through [the Council’s] consideration of the Scheme ... The various reports also identify further justifications ... [including] ... the use of charging to help fund the costs of providing and enforcing the additional parking facilities, and of funding trials of devices designed to improve those facilities, but also of making parking policy fair throughout the City, regardless of vehicle type.”

The skeleton argument on behalf of the Council in the Administrative Court expressly disavowed environmental justification.

16. Although Mr Coppel seeks to make great play about inconsistency, it does not seem to me that he gains any ultimate benefit from it. I say this for two reasons. First, in the period leading to the making of the 2010 Order, the Council did at various times have regard to both the “increased demand” and the “fairness” points. It cannot be said of either that it did not play a part in the subjective reasoning or justification. Secondly, if the scheme does in fact

secure either or both of the benefits referred to in section 122, it cannot be said to be *ultra vires*.

17. As I see it, there are three important questions: (1) Was there a basis for reliance on increasing demand? (2) Was the “fairness” consideration a relevant matter under section 122? (3) Is it permissible, when considering these points, to have regard to the whole history going back to the introduction of the Experimental Order or do we have to focus exclusively on the making of the 2010 Order? As I have concluded that the answers to questions (1) and (2) are affirmative, (3), although in some way logically prior to them, recedes in importance and I shall consider it last.

(1) Increasing demand

18. It is common ground that increasing demand, if evidentially well-founded, would justify charging. It is the obvious way to dampen excess demand. Mr Coppel’s submission is that although increasing demand had been a relevant consideration at the time of the Experimental Order, particularly because of the introduction and anticipated extension of the congestion charge zone, it had fallen out of the picture as an evidence-based consideration in relation to the 2010 Order. The Divisional Court emphatically rejected this submission.
19. The case for Mr Djanogly is that, notwithstanding assertions of increasing demand at the time when the 2010 Order was under consideration, hard evidence is conspicuously lacking and when it has been requested in correspondence nothing has been forthcoming. A chart showing the number of permits issued during the period of the Experimental Order is fairly flat at

about 6000, save for a Christmas and one other (probably weather-related) dip.

The last report to the Cabinet Member before the 2010 Order was made stated:

“The uptake currently does not justify commissioning on-street studies to identify any potential new on-street space.”

As against this, the Council point to Mr Djanogly’s first witness statement:

“The impact of the [Experimental] Scheme on motorbike users has been considerable. A large number of parking spaces have been taken away, as now motorbikes are only allowed to park on-street in designated bays. This has meant that motorbike users often have a wasted journey as they cannot find somewhere to park, or have to park a considerable distance away which is inconvenient and time-consuming. Even if you buy a permit before you leave the house ... you are not guaranteed a parking space. Often motorbike users waste money by buying a permit before they have left the house and then find that there are no spaces to park in ...” (My emphasis).

20. In his second witness statement Mr Djanogly described a one-day survey which he had conducted among the members of his association on 8 June 2010. It invited comparison of various periods. It supported the proposition of increased demand between the twelve months prior to the introduction of the Experimental Order and the seventeen months of the Experimental Order. Mr Djanogly attributed it to the reduction in available spaces. In any event, in response to the Council’s consultation exercise, several hundred objections referred to an insufficiency of spaces. The Council’s evidence is that, as a general proposition, it aims for an occupancy of designated parking spaces that does not exceed 85%, so that users have a reasonable chance of finding a space. The response to the consultation was that

“Occupancy levels City-wide since the Scheme was introduced have been in excess of 90%.”

21. It is unrealistic to expect that the statistical evidence (to dignify it) would be scientific. There are a number of reasons why it should be seen as limited. For one thing a bald calculation of the number of permits sold is not in itself a precise reflection of demand. For example, it takes no account of motorcyclists who wanted to park in a particular area at a particular time but were unable to find a space and had to park elsewhere. In this way, it also conceals the likelihood of excess demand at particular times of the day. The fact is that actual occupancy exceeded the 85% which underlay the Council's working assumption and there was anecdotal evidence, not least from objectors, of "actual increased demand and anticipated increased demand" (per Pitchford LJ at paragraph 45). In my view there was a rational basis for this analysis. If it is a permissible analysis, as I consider it to be, then the use of charging is justified as a demand-suppressant pursuant to section 122(1).

(2) Fairness

22. If and to the extent that the 2010 Order secured a traffic management benefit by reference to actual and anticipated increased demand so that charging was *intra vires*, the question of fairness between motorcyclists and car drivers was plainly a matter of legitimate concern on the part of the Council. However, even if the increasing demand benefit had not been established, I would still hold that the charging provisions of the 2010 Order are *intra vires* on the basis of a desire to achieve fairness between the two groups. Section 122(1) prescribes the aim of securing "the provision of suitable and adequate parking facilities on and off the highway". The Council is under a duty to exercise its powers under section 122(1) "so far as practicable having regard to the matters

specified in subsection (2)”. They include “any other matters appearing to the local authority to be relevant”. That must mean “rationally relevant” but it is not otherwise restricted.

23. Underlying Mr Coppel’s submissions is the assertion that, by the time of the making of the 2010 Order, there was no ongoing cost to the Council of the on-street motorcycle parking scheme save for the cost of administering the charging system. I do not accept this submission. Although the hardware (signage etc) was in place and paid for and no further bays were designated, there would inevitably be some ongoing cost in relation to maintenance and enforcement. There is evidence of vandalism to signs and enforcement (for example, ensuring orderly and permitted parking) depends upon the employment of traffic wardens. Their main task no doubt relates to overstaying and illegal car parkers, but they undoubtedly have a function to discharge in supervising the parking of motorcycles in designated bays.

24. In these circumstances, it seems to me that the Council was entitled to see the spreading of cost between the two groups of users on a fair basis as a legitimate consideration under section 122.

(3) Is it permissible to consider the 2010 Order in the context of the previous history?

25. The case for Mr Djanogly is that the 2010 Order, if it is to be justified, must be considered standing alone. Charging cannot be justified simply on the basis that it was justified under the Experimental Order which involved incontrovertible set-up costs. Mr Coppel appears to concede that if the Council had proceeded by way of a temporal extension of the Experimental Order rather than choosing to make a new Order which was not experimental

or limited in time, his challenge could not succeed. His submission is that by opting for a new Order the Council disabled itself from relying on the previous history. The justification or *vires* clock had to be reset. The focus must be on the circumstances in January 2010.

26. Having concluded that the Council has succeeded in establishing its *vires* as at January 2010, it is not strictly necessary to determine this issue. I accept that it is incumbent upon the Council to establish its *vires* as at January 2010. It is possible that a scheme or a part of it that was justified in 2008 would not be so in 2010. On the other hand, it is equally plain that the experience and information about the earlier scheme may properly inform the approach to the later one. That happened here. It explains why the daily charge was reduced from £1.50 to £1. I do not think it is necessary or appropriate for me to say more.

Grounds 5 – 6: income and expenditure

27. It is instructive to view these grounds of appeal in context. In the Divisional Court the primary case for Mr Djanogly was that the 2010 Order had been made for an ulterior purpose, namely the generation of a revenue surplus, rather than to achieve a traffic management benefit. This case failed. Indeed, it seems from the judgment of Pitchford LJ that, in the course of the hearing, it mutated into a narrower submission which is now reflected in these grounds of appeal. It is apparent from the statutory provisions that there is no requirement of revenue neutrality but that, when a surplus arises in an accounting period, there are restrictions on the ways in which the surplus can be used: section 55.

28. Mr Coppel seeks to tread a narrow path in this Court. His point is that in the various reports which preceded and influenced the making of the 2010 Order, the Council consistently overstated the projected cost of the scheme and understated the projected revenue. He stops short (just) of alleging impropriety. His submission is that, one way or another, the 2010 Order is vitiated by reason of being based on flawed figures. It seems to me that if this is to sustain a public law challenge it would have to be on the basis of either the taking into account of tainted considerations or a mistake of fact along the lines of *E v Secretary of State for the Home Department* [2004] QB 1044. The latter is a complete non-starter. It presupposes that the operative mistake relates to an “established fact”. The figures with which we are concerned were no more than estimates or projections.

29. The same point impacts upon the alternative analysis. It is true that there has been a history of underestimating income. It began during the period covered by the Experimental Order when, contrary to reasonable expectation, the great majority of motorcyclists chose to pay the daily rate even when they could have obtained a reduction by paying on a weekly, monthly or annual basis. It is also true that, when the introduction of the permanent scheme was under consideration, some of the reports submitted by officials to the Cabinet Member contained errors or miscalculations in the forecasts. However, for the most part these were subsequently corrected and explained. Another aspect with which Mr Coppel seeks to take issue is the figure included in past and projected expenditure for “parking services client overhead”: £335,790 for 2009/10. This item was excluded from earlier forecasts. Its inclusion was explained in the report of 1 October 2009. It is based on the assumption that

7% of the time of certain employees is being based on work associated with the motorcycle scheme. It is by its nature an approximation but it seems to me to be a rational and permissible forecasting or accounting consideration. To the extent that someone in the position of Mr Djanogly would have difficulty in analysing the figures as they were communicated, much of that difficulty was or ought to have been assuaged by a letter written to his solicitors by the Council's Head of Legal Services on 25 February 2010, soon after the 2010 Order came into force. The important point is that, in my judgment, the ultimate decision-maker, the Cabinet Member, was not materially misled by the information with which he was provided. If it now transpires that the net revenue is significantly higher than was anticipated, it is open to the Council to reduce the charges. That is not a matter for us. As I have said, there are restrictions on the ways in which revenue surpluses can be expended.

30. I conclude that the financial material in the relevant reports was no more and no less than forecasting, assembled in good faith. When errors occurred and were realised, they were rectified. If others remained, they were not of a nature or quality with the potential to vitiate the 2010 Order. In truth, there was nothing in these grounds of appeal once the original allegation of ulterior purpose failed.

The renewed application for permission: consultation

31. It is common ground that there was a consultation process and that Mr Djanogly and his group participated in it, as did many others representing motorcycling interests. Pitchford LJ described the consultation issue in these terms (at paragraph 54):

“It is conceded on behalf of the claimant that the Authority provided him and those whom he represents with proper opportunities to make representations to them. The complaint is that they failed to deal adequately with the objections advanced. In practice, Mr Coppel submitted, the City Council failed to have regard to the fact that the overwhelming response to consultation was objection by the motorcycle lobby. Secondly, the City Council failed to identify any substantial grounds upon which the objections raised could be rejected.”

32. The Divisional Court had no difficulty in rejecting that challenge. Pitchford

LJ said (at paragraph 60):

“Far from ignoring the responses received, appropriate concessions have been made and the scheme amended. The arguments for and against the scheme were painstakingly analysed. It was ultimately for the Cabinet Member to make a judgment on the competing arguments ... That the objections have not in the end prevailed does not ... demonstrate a failure of the consultation process.”

33. In my view that reasoning is completely unassailable. In this Court, Mr Coppel has also submitted that the consultation process was skewed by the way in which the predicted income and expenditure was presented to the consultees, essentially repeating his arguments in relation to grounds 5 and 6. Having rejected those grounds, I do not think that the arguments breathe life into the proposed consultation challenge. I adjudge it to have no real prospect of success.

Conclusion

34. It follows from what I have said that I would dismiss the permitted appeal and I would refuse permission to appeal on the proposed consultation ground.

Lady Justice Smith:

35. I agree.

Lord Justice Moore-Bick:

36. I also agree.