SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 2
XA38/24

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in an appeal to the Court of Session

by

GLASGOW CITY COUNCIL

Appellant

against

a decision of the Upper Tribunal for Scotland dated 14 May 2024

Appellant: Crawford KC, Blair; Harper Macleod LLP
***Amicus Curiae*: Welsh; Faculty Services Limited**

16 January 2025

Introduction

[1] This is an appeal on a point of law from an Upper Tribunal decision concerning whether a penalty charge notice for a contravention of the Glasgow Low Emission Zone is enforceable despite the fact that it was not served by registered or recorded delivery post. The tribunal granted permission to appeal.

[2] The risks relating to air pollution arising from fine particulate matter and gases such as nitrogen oxide are well-known. As part of the Scottish Government's strategy to tackle this problem, the Scottish Parliament passed the Transport (Scotland) Act 2019. Part 2 of the Act introduces low emission zone schemes. These are schemes under which persons driving vehicles which fail to meet specified emission standards can be prohibited from driving such vehicles within a designated geographical area. Where a person breaches this rule, a penalty charge will be payable unless the vehicle is exempt. So far, low emission zone schemes have been introduced in Edinburgh, Glasgow, Aberdeen and Dundee.

[3] Glasgow's LEZ came into force on 1 June 2023. On 11 August 2023 Glasgow City Council (the appellant) sent a motorist, Mr Allan Hamilton, a penalty charge notice for contravening the zone. The appellant accepts that the notice was not validly served on Mr Hamilton. It should have been sent to him by registered post or recorded delivery, but it was mistakenly sent in the ordinary post. The appellant made the same error in other cases in the early days of the scheme. These initial difficulties have now been resolved so that penalty notices are served in the prescribed way. (A statutory time limit on the service of a notice after contravention prevents re-service of those subject to the incorrect procedure.)

[4] Mr Hamilton does not dispute that he received the notice. Indeed he responded to it by sending representations to the appellant in the space provided for this purpose on the notice. He said that he had inadvertently driven into the zone, having got lost in a part of the city with which he was unfamiliar; he had been heading home to Ayrshire in a newly purchased vehicle. He had not noticed the LEZ warning signs. Mr Hamilton said that it would be unfair in these circumstances to make him pay the charge. The appellant rejected

Mr Hamilton's representations. He then exercised his right to appeal to the First-tier Tribunal.

[5] The chief adjudicator in the tribunal (Mr Alexander Green) identified a preliminary point. Was the notice valid in view of the fact that it had not been served in the prescribed way? He allowed the appellant and Mr Hamilton to make submissions on the point. The appellant said that the notice was effective. Mr Hamilton disagreed. The adjudicator held that the rules on service were mandatory. They had not been followed. So the notice was unenforceable. He allowed Mr Hamilton's appeal.

[6] The appellant took the case to the Upper Tribunal. The judge, Lord Lake, refused the appeal. It was irrelevant that there had been no substantive unfairness to Mr Hamilton. For the notice to be effective and to create a liability to pay the charge it had to be served in the way laid down in the legislation. That must have been what Parliament intended.

[7] The appellant now asks this court to overturn the Upper Tribunal. As Mr Hamilton chose not to take part in the appeal we appointed Mr David Welsh, Advocate, to act as an *amicus curiae*. The court is grateful to Mr Welsh for the assistance he provided in making submissions to contradict those advanced for the appellant.

[8] At the hearing on the Summar Roll senior counsel for the appellant informed the Court that there are understood to be between thirty and forty similar cases currently before the FtT in which the PCN was served by ordinary post and where the motorist has challenged the imposition of a penalty by making timeous representations, which the appellant has rejected.

The Transport (Scotland) Act 2019

[9] Section 6(1) provides that a person may not drive a vehicle within a low emission

zone in contravention of the terms of a low emission zone scheme unless the vehicle meets the specified emission standard or the vehicle is exempt. Where a person drives a vehicle on a road within a low emission zone in contravention of subsection (1), a penalty charge is payable (section 6(2)). Under subsection (4) the Scottish Ministers may, by regulations, make provision for or in connection with the specification of the emission standard, specify the vehicles or types of vehicles which are exempt, and provide for the amount that may be imposed as a penalty charge (which may include provision for discounts and surcharges).

[10] Section 7 deals with proof of contraventions and issuing of PCNs. Subsection (3) empowers a local authority where it considers that a penalty charge is payable under section 6(2) to issue, or make arrangements relating to the issue of, a PCN in accordance with regulations under section 8(1). Under subsection (4) of section 7 a penalty charge is payable to the authority by the registered keeper of the vehicle or such other person as regulations may specify.

[11] Section 8 covers enforcement. Subsection (1) enables the Scottish Ministers by regulations to make provision for or in connection with the enforcement of LEZs. The regulations may, in particular, make provision for the form, content and method of issue of PCNs, the timing and manner of payment of a penalty charge, reviews and rights of appeal, the manner in which a PCN may be enforced and other matters (subsections (2) and (3)).

The Low Emission Zones (Emission Standards, Exemptions and Enforcement (Scotland) Regulations 2021 (SSI No 177)

[12] In exercise of the powers conferred by the 2019 Act the Scottish Ministers made the 2021 Regulations. The regulations were laid before and approved by resolution of the Scottish Parliament. They contain detailed provision governing emission standards and

exemptions. They set out the amount of penalty charges payable for first and subsequent contraventions and the discount available for prompt payment. The PCN is required to contain notice that the penalty charge must be paid before the end of the payment period (28 days beginning with the date of service of the PCN) unless representations are made and that if the penalty charge is paid before the end of the period of 14 days beginning with the date of service, the charge will be reduced by 50 per cent.

[13] Regulation 6 specifies the details which the PCN must contain, such as the vehicle's registration mark, the detection date and time of the alleged contravention, the amount of the penalty, that representations may be made to the local authority, that the authority may issue a charge certificate if the penalty is not paid, and that there is a right of appeal to the FtT. Regulation 7 provides for the issuing of charge certificates; if these are not complied with the authority may recover the increased charge as if it were payable under an extract registered decree arbitral bearing a warrant for execution issued by a sheriff (regulation 7(4)). Senior counsel for the appellant informed the court that the appellant had not served any charge certificates on persons who had been sent PCNs in the ordinary post. Regulation 8 governs representations and sets out the grounds on which they may be made. Regulation 9 provides the procedure for the authority to respond to representations. In regulation 10 provision is made for a right of appeal to the FtT.

Interpretation and Legislative Reform (Scotland) Act 2010

[14] Section 26 applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression "serve", "give", "send" or any other expression is used). Subsection (2) provides as follows:

> "The document may be served on the person—

(a) by being delivered personally to the person,

(b) by being sent to the proper address of the person—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c. 26)), or

(ii) by a postal service which provides for the delivery of the document to be recorded, or

(c) where subsection (3) applies, by being sent to the person using electronic communications."

The Penalty Charge Notice

[15] On 11 August 2023 the appellant sent Mr Hamilton a PCN by standard Royal Mail post. The PCN stated that the date of posting was 11 August 2023 and that the date of service was 16 August 2023. The PCN alleged that Mr Hamilton had contravened section 6(2) of the 2019 Act because a vehicle for which he was responsible had been driven on a road within a low emission zone in Broomielaw on 7 August 2023. The vehicle did not meet the specified emission standard of the zone and was not exempt. The PCN incorporated photographs showing the contravention. The penalty charge was specified as £60.00 and was to be payable within 28 days from the date of service, being 13 September 2023, unless representations were made. If payment was made within 14 days from the date of service the charge would be reduced to £30.00. A charge certificate could be issued increasing the penalty to £90.00 if the charge was not paid and no representations were made before the end of the payment period.

[16] Having set out his brief representations in the space contained in the PCN, Mr Hamilton signed the declaration confirming that the details were correct to the best of his knowledge. He dated his representations as being made on 16 August 2023, which it may be noted was the same date as that specified in the PCN as the date of service.

First-tier Tribunal

[17] The adjudicator concluded on the preliminary point that the PCN should have been served by registered post or recorded delivery, that it had been sent only by ordinary post and consequently was invalid and could not be enforced. He approached the issue by considering whether the requirement in the legislation was mandatory or merely directory or permissive. He referred to a number of authorities in which that distinction was recognised, including *Liverpool Borough Bank* v *Turner* (1860) 30 LJ Ch 379; *Howard* v *Bodington* (1877) 2 PD 203; and *London and Clydesdale Estates Ltd* v *Aberdeen District Council* 1980 SC (HL) 1. Service of the PCN was fundamental to the operation of the LEZ enforcement regime: it notified the recipient of the alleged contravention and the charge payable; it provided the option of paying a reduced penalty; it gave notice of the right to contest the charge and of the relevant time limits for so doing; it explained the effect of a charge certificate and the enforcement process with surcharges for multiple contraventions. It followed that a secure and verifiable method of postal service was crucial for the effective and fair operation of the LEZ enforcement regime so that the recipient could take advantage of paying a reduced charge or submitting representations or avoiding a charge certificate.

[18] The 2010 Act permitted different methods of serving a document, including postal service. Where postal service was chosen, this had to be effected by registered or recorded delivery. There was no option for ordinary postal service. The wording of section 26 was clear and unambiguous. The requirement to serve by one of the two prescribed means was mandatory and not permissive or directory. Where the statute was held to be mandatory, failure to comply with it would invalidate the thing done under it. Accordingly, the PCN

sent by ordinary post to Mr Hamilton had not been served correctly. Service having been defective, the PCN could not be enforced.

Upper Tribunal

[19] The UT judge took a somewhat different approach. He sought to follow *R* v *Soneji* [2006] 1 AC 340. The question was whether Parliament intended that a failure to comply with the prescribed requirements for service should invalidate the notice. The search was not for an actual intention, but for one to be inferred from all parts of the legislation and the operation of the scheme it established. Section 7(3) and (4) of the 2019 Act were significant. As the penalty arising under section 6(2) was payable to the issuer of the PCN, there was a clear implication that service of the notice was a prerequisite for liability to arise as, until then, there was no party to whom the charge was payable. This was indicative of an intention that there must be a notice for liability to arise. Regulations 4 and 6 indicated that the PCN played a key part in the enforcement regime. It was understandable that Parliament would have wished to ensure that there was a way in which service could be proved. Having a mode of service which meant that the fact of delivery and the date on which it was completed could be verified was crucial. This was borne out by the methods specified in the 2010 Act. There was a clear link in section 7(4) of the 2019 Act between liability to pay a penalty and service of a PCN. It could be inferred that Parliament intended that service which complied with the prescribed requirements was necessary if a penalty was to be enforced. The purpose of the notice was not merely formal as the giving of notice in relation to a current or previous contraventions could make a material difference to the amount of the penalty. Applying the guidance in *Soneji* and considering the legislation overall, it was clear that it must be inferred that it had been intended that there had to be

valid service of a PCN for liability to exist. That there had been no substantive unfairness to Mr Hamilton was not a relevant consideration. What mattered was Parliament's intention at the time when the legislation was passed, not the circumstances of service of a particular notice sometime later.

Appellant's submissions

[20] The appellant no longer sought to argue that the FtT did not have jurisdiction to consider the validity of the PCN or that defective service could be cured by the recipient electing to participate in the case.

[21] The appellant accepted that receipt of a PCN was an important part of the statutory scheme. While there might be situations in which a defect in the formal requirements for service would cause unfairness to the recipient such that it should not be enforced, this was clearly on the facts not such a case. The manner of service had plainly caused no prejudice to the recipient. Parliament cannot have intended a person who had breached the 2021 Regulations to escape liability on a purely technical point. The central question was whether Parliament intended a failure to comply with the procedural requirements to result in no penalty charge being payable. To answer that question, the court required to focus intensely on the specific statutory scheme and the specific facts of the case (*Soneji*). The court was no longer in the territory of assessing whether a statutory provision was mandatory or simply directory or permissive. The 2021 Regulations were made under the affirmative resolution procedure. Thus, the court could quite properly impute an intention to Parliament when it created the 2019 Act, the 2021 Regulations and the 2010 Act. Those three instruments, taken together, formed the relevant statutory scheme.

[22] The statutory scheme served two purposes. The first was to promote the public interest, in that there is a general public interest in ensuring the reduction of unwanted emissions by virtue of enforcement of the LEZ. The second purpose was to protect the private interests of individuals, who had apparently contravened the LEZ, by giving fair notice of (i) the basis of the alleged contravention; (ii) the charge to be levied; (iii) the grounds on which liability could be disputed; and (iv) the opportunity to pay a lesser sum by paying within 14 days. The requirement to provide an individual with a written notice detailing those matters served that private interest.

[23] It could not be said that the protection of public and private interests necessitated an absolute requirement of notice by way of recorded or registered delivery. While the statutory purpose would clearly be undermined if the courts were to forgive an absolute failure to deliver a PCN, there was nothing within the statutory scheme which suggested that verified delivery by some other means ought to result in the PCN being unenforceable. That would undermine the public interest in deterring contravention of the LEZ.

[24] The Upper Tribunal erred in deciding that prejudice to the intended recipient of a PCN was irrelevant. Prejudice, or lack thereof, was entirely relevant: *A1 Properties (Sunderland) Ltd* v *Tudor Studios RTM Co Ltd* [2024] 3 WLR 601. Securing compliance with the statutory requirements of service was of less priority than enforcement when the individual concerned suffered no prejudice. It was not disputed that Mr Hamilton had demonstrably and verifiably received the PCN. There had been substantial compliance with the statutory scheme: *Soneji* at para 67. Mr Hamilton had been able to exercise his right of appeal. There was no question of his having incurred a higher penalty due to a delay in paying. The manner of service caused him no prejudice whatsoever. He had been given all the requisite

information. To find the PCN to be unenforceable did nothing to protect Mr Hamilton's interests.

Submissions by the *amicus curiae*

[25] The court had to determine what Parliament intended would happen where a document did not conform to a statutory requirement. The approach to this question could be divided into three stages. First, the court required to determine whether there had been a failure to comply with the statutory requirement. If there had been such a failure, the court should consider whether the consequence was intended by Parliament to be automatic unenforceability. Only if the court determined that automatic unenforceability was not to follow failure could the court go on to consider whether the actions taken by the appellant constituted substantial compliance. The approach advanced by the appellant failed to consider whether Parliament intended there to be automatic unenforceability before considering the question of substantial compliance.

[26] There had been a failure on the part of the appellant to comply with the provisions of the statutory scheme. The appellant had undeniably delivered the PCN to Mr Hamilton; it had not, however, served the PCN in accordance with the provisions of section 26 of the 2010 Act.

[27] Turning to the second stage, there required to be a purposive interpretation of the statutory scheme and a balance struck between any prejudice and concerns of the public interest: *Soneji.* The question was whether the prescribed method of service was of critical importance in the context of the legislative scheme: *Osman* v *Natt* [2015] 1 WLR 1536 at paras 33-34. There could be cases where Parliament envisaged that compliance with a statutory provision was so central to the operation of the statutory scheme that the issue of

substantial compliance should be ruled out: *A1 Properties* at para 61. In other words, there could be some "bright line" cases. The more important a statutory provision was to the operation of the scheme as a whole, the closer to the "bright line" one would be. It was necessary to determine the purpose served by the procedural requirement in light of a detailed analysis of the legislation, having regard to any prejudice that might arise if the validity of the process was nonetheless affirmed: *A1 Properties* at para 61. When considering a purposive interpretation, the court was required to look, in a realistic manner, at whether the relevant statutory provisions were intended to apply to the facts: *Balhousie Holdings Ltd* v *Commissioners for HM Revenue and Customs* 2021 SC (UKSC) 15 at para 24.

[28] In light of the applicable authorities, it was necessary to consider what role was played by service in relation to the PCN. For the reasons highlighted by the UT judge, service was a matter of critical importance in the context of the legislative scheme. By carrying out an intensive review of the operation of the statutory scheme, it was not clear that Parliament's intention was for service of the PCN to be regarded as an ancillary matter. The opposite was likely to have been Parliament's intention, having regard to the statutory scheme as a whole. The purpose of the statutory scheme was to levy charges for the LEZ. Regulation 4(10) in its definitions of first and subsequent contraventions made it clear that regard is to be had to when "a person is liable to pay a penalty charge under sections 6(2) and 7(4)" of the 2019 Act. Section 7(4) only became engaged when the PCN was properly served under the 2021 Act. Thus, liability to make payment of a penalty charge only arose upon service. This was made clear by regulation 6(1). Service was the manner in which a person knew (i) to whom a charge was payable, (ii) how much was payable, (iii) by when the charge was payable (and when a discount on the charge could be acquired), (iv) by when

representations were required to have been made in order to challenge the charge, and (v) the deadline for taking an appeal. Those were essential matters for the enforceability of the PCN. The 2021 Regulations provided for increased penalty charges in respect of contraventions subsequent to the first one (regulation 4 and schedule 4). It was therefore important to know the order in which alleged contraventions were said to have occurred. The failure to comply with the statutory methods of service denied the recipient a proper basis on which to determine all these matters. Service, therefore, was of such central importance to the statutory scheme that no derogation from the provisions of the 2010 Act could possibly have been intended. It was open to the Scottish Ministers to provide for any method for the issuing of PCNs. It was not necessary, under the 2019 Act, for the Scottish Ministers to have chosen for PCNs to be formally served. That was, however, the choice that they made. The decision to use a registered or recorded delivery post service was a deliberate choice not to permit the use of other postal services. This was a "bright line" case. Parliament's intention was for an invalidly served PCN to be unenforceable.

[29] Given the unenforceability of the PCN, there was no requirement to consider whether there had been substantial compliance with the statutory scheme. In any event, there had been no substantial compliance. For there to have been substantial compliance, there ought to have been delivery of the PCN by a method which would have recorded the date of delivery and show to whom the PCN was delivered. When, where and to whom a PCN was served were of critical importance. First class post does not record these critical facts. Service by first class post, even where delivery could be demonstrably verified, was not sufficient for substantial compliance.

[30] The power balance between a local authority and individual motorists was such that requiring strict compliance with the statutory scheme, particularly as a precursor to the imposition of a financial penalty, was proportionate.

Analysis and decision

[31] Over the years the courts have often been called on to consider the consequences of failure to comply with procedural requirements laid down in statutes for the exercise of powers which the statute confers. The issue can arise in the sphere of public law and also in the private law domain. Often the legislation does not provide expressly for what the legal consequences of such a failure are to be. Difficult questions can then arise. Can strict compliance with the requirement be overlooked in some circumstances and, if so, how are such circumstances to be identified? Or is non-compliance fatal to the lawful exercise of the power – always or only sometimes? Does it matter that the failure to comply has made no practical difference to the interests of the person affected by the exercise of the power? These questions arise sharply in the present case where there has been admitted non-compliance by a public authority with the procedure created by Parliament for the imposition of a financial penalty on the citizen.

[32] It is convenient to begin by considering the leading authorities.

R* v *Soneji

[33] In *R* v *Soneji* [2006] 1 AC 340 the House of Lords held that a failure to comply with a statutory requirement concerning the making of confiscation orders pursuant to the proceeds of crime legislation was not fatal to the validity of the orders. There had been a failure by the sentencing judge in the Crown Court to follow the procedure laid down in

section 72A of the Criminal Justice Act 1988 for postponing consideration of whether to impose confiscation orders. Lord Steyn (with the substance of whose speech the other members of the appellate committee agreed) explained that the dichotomy which had evolved over the preceding 130 years between mandatory and directory requirements (the former requiring strict compliance and the latter generally not) was no longer seen as providing a useful framework for addressing the issue of the consequence of non-compliance (*ibid* para 14). The new perspective on the matter had been elucidated by Lord Hailsham of St Marleybone LC in *London & Clydesdale Estates Ltd* v *Aberdeen District Council* 1980 SC (HL) 1, in terms which became highly influential. The Lord Chancellor said this (pp 30-31):

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the right of the subject viewed in light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences on himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like "mandatory, " "directory," "void, " "voidable, " "nullity " and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on

> a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

[34] As Lord Steyn explained (para 15), Lord Hailsham's dictum was important. It led to the adoption of a more flexible approach of focussing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it was necessary to have regard to the fact that Parliament *ex hypothesi* did not consider the point of the ultimate outcome. This meant that inevitably the courts would have to consider objectively what intention they should impute to Parliament.

[35] Lord Steyn noted that similar developments had taken place in the courts of New Zealand, Australia and Canada. In *New Zealand Institute of Agricultural Science Inc* v *Ellesmere County* [1976] 1 NZLR 630 Cooke J (subsequently Lord Cooke of Thorndon) speaking for the court said (p 636):

> "Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance."

[36] In *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 the Australian High Court addressed the same problem. In the joint judgment of McHugh, Kirby and Hayne JJ the court stated at para 93:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."

[37] Having reviewed the issue in detail, Lord Steyn concluded (para 23) that the rigid mandatory and directory distinction, and its many artificial refinements, had outlived their usefulness. Instead the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament could fairly be taken to have intended total invalidity. The question was ultimately one of statutory construction.

[38] Lord Rodger of Earlsferry took the view (para 40) that Parliament could not have intended that the confiscation orders should be invalid merely because the sequence of events required by the statute had not been followed. The purpose of the sequence was to ensure the effectiveness of the sentencing procedure, not the effectiveness of the procedure for making a confiscation order. There was no reason to suppose that Parliament would have intended that the court's statutory duty to consider making a confiscation order should be limited so that the court could no longer discharge it if, with his consent, the defendant had been sentenced first.

[39] Lord Carswell, while agreeing with Lord Steyn, referred (para 67) to the doctrine of substantial compliance; this might offer some assistance. One should ask if there had been substantial observance of the time limit. What would constitute substantial performance would depend on the facts of each case, and it would always be necessary to consider whether any prejudice had been caused or injustice done by regarding the act done out of time as valid.

Osman* v *Natt

[40] In *Osman* v *Natt* [2005] 1 WLR 1536 the Court of Appeal considered the validity of a notice served by tenants of a property on the freehold owners pursuant to section 13(1) of

the Leasehold Reform, Housing and Urban Development Act 1993 claiming the right to acquire the freehold of the property pursuant to the collective enfranchisement provisions of that Act. The notice failed to comply with section 13(3)(e) because it did not state the full names of one of the qualifying tenants, the address of her flat or the particulars of her lease. The court held that where a statute conferred a property or similar right on a private person, and the issue was whether non-compliance with a requirement of that statute precluded that person from acquiring the right in question, the proper approach was to determine the legislator's intention as to the consequences of non-compliance as an ordinary issue of statutory interpretation; that such an exercise invariably involved, among other things, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole, and did not turn on the particular circumstances of the parties, such as the actual prejudice caused by non-compliance in that case.

[41] At para 33 of his judgment, Sir Terence Etherton C (with whom Patten and Gloster LJJ agreed) observed that in some cases the court had held in favour of invalidity where the notice or the information missing from it was of critical importance in the context of the scheme; for example in *Burman* v *Mount Cook Land Ltd* [2002] Ch 256 where Chadwick LJ (with whom Sir Murray Stuart-Smith agreed) described the landlord's counter-notice under the 1993 Act as "integral to the proper working of the statutory scheme" (para 17). By contrast the court had held in favour of validity where the information missing from the statutory notice was of secondary importance or merely ancillary (para 34).

A1 Properties (Sunderland) Ltd* v *Tudor Studios RTM Company Ltd

[42] More recently in *A1 Properties (Sunderland) Ltd* v *Tudor Studios RTM Company Ltd* [2024] 3 WLR 601 (issued after the Upper Tribunal decision in the present case) the Supreme

Court considered the consequence of a failure by a "right to manage company" formed by tenants of the flats in a large block to serve a claim notice on an intermediate landlord as required by section 79(6)(a) of the Commonhold and Leasehold Reform Act 2002. The court held that in the circumstances of the case it could not be inferred that Parliament had intended that the RTM company's failure to comply with the statutory requirement would invalidate its claim to acquire the right to manage. The intermediate company had lost nothing of value by the RTM company's failure to give it a claim notice as required by section 79(6)(a) since an issue as to the substantive validity of the right to manage scheme had made its way to the First-tier Tribunal by a route sanctioned under the statutory framework, namely the RTM company's application for approval of the scheme following service on it of a counter-notice by another landlord.

[43] The Supreme Court ruled that the starting point for analysis was the guidance given in *Soneji*. Lord Briggs and Lord Sales (with whom Lord Hamblen, Lord Leggatt and Lord Stephens agreed) explained that that the point of adoption of the revised analytical framework in *Soneji* was to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in the light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement (*ibid* para 61). The Court of Appeal's decision in *Osman* v *Natt* needed to be considered and applied with some caution, particularly in its suggestion that cases where it became necessary to infer the intended consequences of non-compliance could for that

purpose be divided into distinct and watertight categories and its apparent suggestion (para 31) that in the second category (where the statute conferred a property or similar right on a private person) the possibility of a middle position as identified in *Soneji* between outright validity or outright invalidity was excluded. Instead, it was appropriate to go back to the basic principled approach as explained in *Soneji*, as applied in light of the particular statutory context and the specific facts of the case.

[44] This approach did not mean that application of procedural rules in every statutory context would turn on detailed examination of the consequences arising from the particular facts of the case. Nor did it mean that a test of substantial compliance had to be applied in relation to every procedural rule. Examination of the purpose served by a particular statutory procedural rule might indicate that Parliament intended that it should operate strictly, as a bright line rule, so that any failure to comply with it invalidated the procedure which ensued (para 62).

[45] Lord Briggs and Lord Sales continued thus (para 63):

> "Often, however, analysis according to the *Soneji* approach does not lead to such a clear-cut result. The statutory regime may reflect, and balance, a number of intersecting purposes, both as to substantive outcomes and as to the procedural protections inherent in the regime. In that situation, a more nuanced analysis may be called for. *Soneji* itself is an example of this. The purpose of depriving convicted offenders of the proceeds of their crimes had to be balanced against sufficient compliance with procedural protections available to them before they could be deprived of their property. A test of substantial compliance with a procedural rule may be an appropriate way to allow for such a balance to be struck between competing purposes. If there has been substantial compliance with the rule, so that the purpose served by it has largely (if not completely) been fulfilled, it may more readily be concluded that fulfilment of the competing substantive purpose of the legislation should be given priority. But we would observe that reference to "substantial compliance" begs the question of what purpose was supposed to be served by the rule and expresses a conclusion arising from the relevant analysis, rather than stating a test in itself. Statutory regimes involving procedural obligations are many and are highly varied, and there is no simple shortcut which avoids the

> need to undertake the analysis referred to in *Soneji* having regard to the particular provisions, scheme and purposes served by the statute in question."

[46] The Supreme Court concluded (para 68) that the correct approach in a case where there was no express statement of the consequences of non-compliance with a statutory requirement was first to look carefully at the entirety of the structure within which the requirement arose and ask what consequence of non-compliance best fitted the structure as a whole. The Court then proceeded to carry out a detailed examination of the statutory scheme and its application in the particular facts of the case.

[47] Two of the landlords had been given a claim form, but the third, the appellant, had not. One of the notified landlords had raised objections by way of a counter-notice, in response to which the RTM company had applied to the tribunal for a determination that it was entitled to acquire the right to manage the flats. The tribunal ruled against the objection; leaving aside the failure to serve a claim form on the appellant there was no other objection to the scheme's validity. The Supreme Court posed the question (para 83) whether it could have been Parliament's intention that a scheme which the tribunal had in fact scrutinised and approved could be invalidated (with the consequence that the RTM company was required to pay costs and start again, or simply give up) merely because the appellant had been deprived of the opportunity to give a counter-notice, which could not have included a valid objection to the scheme?

[48] The Supreme Court observed (para 85) that if the failure to give a claim notice to a landlord in the position of the appellant was always fatal to the validity of the scheme, then a scheme would founder for the purely procedural reason that a landlord had been deprived of the valueless opportunity to make a hopeless objection to the validity of a scheme which had in fact been tested by the tribunal and found to be compliant. Such an outcome would

be contrary to the approach laid down in *Soneji*. The position would be different in the case of a landlord who was entitled to receive a claim notice and who was deprived thereby of the right to make a valid objection and to have the tribunal rule on it. The critical difference between the two scenarios was that in the former the issue of the substantive validity of the scheme had made its way to the tribunal by a route sanctioned under the statutory framework, and then been determined in favour of validity; in such a case the landlord had lost nothing of value. The intermediate landlord had had the same opportunity of participation in the tribunal proceedings which it would have had if it had been given a claim notice in the first place in accordance with section 79(6). It is important to note that the court's reasoning did not, however, depend on the feature last-mentioned (para 86). That feature merely reinforced the reasoning

[49] The Supreme Court said (para 87) that the simplest way to provide a legal formula to give effect to Parliament's intention as to the consequences of the failure to give a claim notice was to say that the failure rendered the transfer of the right to manage voidable at the instance of the relevant landlord or other stakeholder, but not void. It was voidable unless, or until, the tribunal approved the transfer scheme, as the outcome of the resolution of the dispute as to entitlement caused by a counter-notice by a person actually given a claim form, or as a result of an application by the RTM company.

[50] The Supreme Court continued (para 91) as follows:

> "In our view, in evaluating whether a procedural failure under the regime has the effect of invalidating the process, the question to be addressed is whether a relevant party has been deprived of a significant opportunity to have their opposition to the making of an order to transfer the right to manage considered, having regard to (a) what objections they could have raised and would have wished to raise and (b) whether, despite the procedural omission, they in fact had the opportunity to have their objections considered in the course of the process leading to the making of the order to transfer the right to manage. If there was no substantive objection which

> they could have raised or would have wished to raise, they have lost nothing of significance so far as the regime is concerned and the inference is that Parliament intended that the transfer of the right to manage should be effective notwithstanding the omission. If their objection has in fact been considered in the process, even though the claim notice was not served at the proper time, again they have lost nothing of significance so far as the regime is concerned and the inference as to Parliament's intention is the same."

[51] The Supreme Court stated (para 92) that the focus should be on the position of the party directly affected by the procedural omission.

The present case

[52] Applying the guidance given in the case law, the first question is whether examination of the purpose of the procedural rule, which has admittedly been breached in the present case, shows that Parliament intended that the rule should operate strictly, as a bright-line rule (*A1 Properties* para 62). If that question falls to be answered in the affirmative, other issues such as whether there has, in any event, been substantial compliance with the rule and whether non-compliance has given rise to any concrete prejudice do not arise for consideration; on this hypothesis Parliament intended in such a case that failure to comply with the procedure would nullify the purported exercise of the statutory power, to which it was intended to be an essential and inescapable prerequisite.

[53] In support of the contention that strict compliance with the rules as to service was necessary and that this was a bright-line case, the *amicus curiae* argued that it was service of the PCN which created the obligation to pay the penalty and accordingly service by a valid method should be inferred to be central to the statutory scheme; service was not merely ancillary to the legislative purpose. This could be seen, in particular, from the terms of section 6(2) read with section 7(4) of the 2019 Act and from regulation 6(1).

[54] The court considers that this approach to interpretation of the legislative scheme reads too much into the terms of sections 6(2) and 7(4) and regulation 6(1). Section 6(2) provides the basis for liability to pay a penalty charge: liability arises when a person drives a non-compliant vehicle on a road within an LEZ. It says and implies nothing about service of a PCN. It does not contain any indication that liability is to depend on a particular method of service. Section 7(4) provides that a penalty charge under section 6(2) is payable to the local authority which issued the PCN, but again it is silent as to the means by which a PCN is to be issued. Regulation 6(1) confers power on a local authority to serve a PCN where it believes that a penalty charge is payable under section 6(2), but it does not say or imply anything about what the consequences are to be where informal service has achieved the same practical outcome as service by one of the prescribed methods.

[55] Turning to consider the legislative scheme more generally, there is no doubt, as the *amicus curiae* emphasised, that the PCN has to contain important information and guidance for the person to whom it is sent. It requires to include all the information set out in detail in regulation 6(5). Without such information there is no guarantee that the recipient will have been made aware of his alleged liability to pay a penalty, its amount, by when it is due and how and within what timescales he is entitled to challenge it. But again, all this says and implies nothing about the method of service of the PCN and whether it must be served in a particular way in order to be effective. In addressing the first question one must look more deeply into whether the purpose served by the procedural rule indicates that Parliament intended the rule to work strictly in every case, whatever the factual position might be. The question then comes to be whether the statutory scheme yields the inference that Parliament must have intended the PCN to be unenforceable on account of its having been invalidly

served, even in circumstances where there is no doubt that a properly framed PCN has in fact been timeously received by the person to whom it was issued. This seems an inherently unlikely interpretation of Parliamentary intention. It would mean that Parliament intended in every case to put the procedural cart before the substantive horse to such an extent that an inconsequential lapse in procedure would inevitably defeat the substantive purpose of the legislation; form would be allowed always to triumph over substance. In cases where it is undisputed that the purpose of serving the PCN has in fact been fulfilled, there seems no reason to suppose that Parliament would nonetheless have intended the PCN to be unenforceable, essentially on the basis of a technicality. The court is not able to identify any bright-line rule to that effect from a reading of the 2019 Act, the 2021 Regulations and the 2010 Act. The first question accordingly falls to be answered in the negative.

[56] The position in the present case is, therefore, the more usual one where the statutory scheme reflects and balances a number of intersecting purposes, both as to substantive outcomes and as to the procedural protections inherent in the regime (*A1 Properties* para 63). A nuanced approach is therefore called for. The *amicus curiae* submitted that the failure to comply with the statutory methods of service denied the recipient a proper basis on which to determine important matters relevant to his or her liability and rights of challenge. On the facts of the present case that is not the position. There is no dispute that Mr Hamilton was made fully aware of everything that he needed to know in connection with his alleged infringement of the Glasgow LEZ, including the date of service of the PCN. The date of service was stated on the face of the notice. The date had evidently been calculated by adding on five days from the date of posting. There is nothing inherently objectionable in that. Mr Hamilton was, in particular, advised of his right to challenge the penalty and duly

did so in accordance with the prescribed procedure. There is no doubt that the PCN was served at the latest on the date on which it states that service took place; that was the date on which Mr Hamilton submitted his representations. His representations having been rejected, Mr Hamilton exercised his right of appeal, again in line with the statutory scheme.

[57] In the context of the more nuanced approach it is necessary in order to discern the consequence of non-compliance with a statutory requirement to consider the purpose of the requirement in the context of the statutory scheme as a whole. The purpose of requiring service of a PCN by registered or recorded delivery is plainly to ensure that there is a verifiable way of proving, should it be necessary so to do, that the errant motorist has been advised of all the relevant information – the alleged contravention, his right to challenge it, the amounts of the full and discounted penalties, the time limits, and the authority's rights to enforce payment. Verification is not important or relevant in the present case, however. This is because Mr Hamilton has all along accepted that he duly received the notice. Indeed he responded to it promptly by submitting that the contravention was excusable in the particular circumstances. The purpose of the rules governing service has accordingly been fulfilled. Mr Hamilton's interests have not been adversely affected to any extent. He was timeously informed of everything that he needed to know. In terms of the approach set out in *A1 Properties*, the substantive outcome of the scheme has been achieved because Mr Hamilton has been advised of all the relevant information and has had the opportunity to challenge the PCN in the manner envisaged by the legislative scheme. On any realistic view, the procedural protections inherent in the scheme have been entirely satisfied in Mr Hamilton's case.

[58] All that being so, can it be inferred that Parliament must be taken to have intended that the PCN sent to Mr Hamilton should nonetheless be treated as a legal nullity? The court considers that such an intention cannot realistically be imputed to Parliament. The issue should be addressed not just by considering the purpose of the rules as to service but also by taking into account the fundamental purpose of the legislative scheme: to tackle the problem of air pollution in cities. It is unrealistic to suppose that Parliament, having resolved to tackle an issue of such importance through legislation to promote low emission zones, would have wished that objective to be undermined by an insistence on strict compliance with a procedural rule in circumstances where there has been substantial observance of it and no detriment whatsoever to the interests of the particular motorist. In terms of the flexible approach approved in *Soneji* and endorsed in *A1 Properties* there have been no meaningful consequences of non-compliance so far as Mr Hamilton is concerned. That being so, it is most improbable that Parliament would have intended the outcome to be total invalidity. In an abstract sense the submissions of the *amicus curiae* are correct: the motorist needs to be fairly informed about the alleged contravention, as to his rights to challenge it, and about the penalties and time limits. But in a concrete sense these submissions are beside the point. On the facts of the case there is no live issue about any of these aspects. None of them needs to be proved because Mr Hamilton accepts that the purpose of the procedural requirements has been satisfied. Like the intermediate landlords in *A1 Properties*, Mr Hamilton has lost nothing of significance so far as the statutory regime is concerned and the inference is that Parliament intended that service of the PCN should be effective notwithstanding the omission to comply with the prescribed procedure. It follows that the appeal succeeds.

[59] The court would emphasise that its decision is based on the particular facts of the present case in which Mr Hamilton accepted that he received the PCN and where it is clear that he challenged it timeously. The facts of Mr Hamilton's case may not be materially different from those in the other cases currently before the Upper Tribunal, but the court does not have sufficient information to express any confident view on that matter.

Disposal

[60] We shall allow the appeal, set aside the judgments of the First-tier and Upper Tribunals, and remit the case to a freshly constituted First-tier Tribunal so that it can address Mr Hamilton's appeal on its merits. We shall reserve all questions as to expenses.