THE DISTRICT JUDGE:

1. So far as this is concerned, I do not intend to reiterate at any length the evidence that I have heard. It is in accordance largely with the statements that have been filed. I will deal with the evidence further below, but let me deal with the substance of the case first.

2. It is asserted by the claimants - of course, I remind myself that the burden of proof is on the claimants in these cases; the claimants are the ones who have to satisfy me on the balance of probability that they can make out their case - but it is asserted by the claimants that this defendant parked her vehicle at Portland retail park on three separate occasions; on 9th September 2006, on 7th October 2006 and on 4th November 2006. Miss Hetherington-Jakeman quite honestly tells me in her evidence that she cannot remember what days she parked there. She was quite honest and told me that she has used that car park. She does not use it, she said, on a frequent basis but she does use it. She is not able in those circumstances to deny that she used her car on those particular occasions. However, the claimants go on to say that she exceeded the two hour timeframe that was allowed. The two hour timeframe is clearly marked, and I am satisfied that it is clearly marked and in fact Miss Hetherington-Jakeman to her credit accepts that she knew this anyway, it is clearly marked and there is no argument about that. It says, "Welcome to the Portland retail shoppers' car park. Two hour maximum stay, no return within one hour." It clearly says that and this lady understood that she was not supposed to be there for more than two hours. It is the claimants' case that on each of those three occasions she was there for more than two hours and they say, therefore, subsequently they sent out parking charge notices which required payment of a set sum because of a breach of that timeframe. With regard to the parking charge notices there has been some difficulty in the sense that I am told by the claimants that some of the notices appear to have been lost in the post.

3. The procedure that should be followed - and I accept this is what normally happens - is that a parking charge notice is sent out to the person whose vehicle has been identified (the registered keeper of that vehicle). There will inevitably, because of the way the system was run, that is an automated system, with numberplate recognition rather than a little man in a peaked cap going round sticking things on people's windows, which is the old-fashioned way of doing it, although I suspect an incredibly expensive way of doing it, in this particular system that is used, the automatic recognition, obviously there is a delay in sending something out because all that the claimants originally have is a numberplate. They have therefore to approach the DVLA and obtain, as one can if they are able to satisfy the DVLA that they have a right to have this information, details of who the registered keeper is.

4. That is what happened here. What would normally happen is that the registered keeper would therefore, within a relatively short time, and we are talking of a few weeks, the registered keeper receives the parking charge notice and has an opportunity of paying it and, if they pay within so many days, they get a reduced and discounted figure. If they paid within seven days it was £40, if they paid within 14 days it was £60. Unfortunately in this case, the situation was that these notices appear to have got lost in

the post. If, of course, they have not paid after about three weeks, the evidence I have is that a demand will be sent out requesting or requiring payment of £100. What appears to have happened in this case is that the original notifications were lost in the post, and I am willing to accept that is what happened, subsequent notices were sent out and, rather unfortunately, within a matter of days, and certainly not two weeks later, a requirement for the £100 was issued. I mention all that, although I do not think it is hugely relevant to this case because the issue is not that this lady wanted to pay within seven days and did not have an opportunity, and to that extent therefore it is perhaps not really hugely relevant, but it is important for me just to set out what I understand the parties' cases are.

5. The claimants' case is that there is in effect a contract, and that when one enters into this car park it is on the basis of leaving within a set period of time and that, in the event the time limit is exceeded, they are entitled to recover the £100. They rely upon the cases of Vine v. London Borough of Waltham Forest [2000] EWCA Civ 106 and Arthur and another v. Anker and another [1997] QB 564, both Court of Appeal cases.

6. The defendant's case in short is this, that, firstly, they say there is no contractual relationship and that, at best, the defendant has a bare licence to occupy the land, and so they deny that the money should be paid in any event because, in short - and I am going to paraphrase dreadfully the defendant's case - the claimants are not entitled pursuant to a licence to recover any monies because any such monies would only be recoverable by way of an action in trespass, and that action would only lie, they say, with the landowner, and the landowner has to show some sort of injury to the land. That is the thrust of it. They deny that there is a contract at all.

7. However, they go further than that. The defendant says that, even if there is a contract, which they do not admit, that, if one looks at the actual notice, the charge is irrecoverable. If one looks at the exhibit DVHJ1 in the bundle I have, which is a copy of the notice displayed, it says that there is a two hour maximum stay and then it goes on to say, "Failure to comply with the following will result in a parking charge notice being issued ..." it then lists certain defined acts which give rise to a charge. Nowhere in that list does it say, "Breach of two hour maximum stay" gives rise to a charge. Therefore, they argue that, even if this lady, as she does not accept she did, but even if she had breached the 2 hour time limit, it is irrelevant because it is not one of the defined matters which would enable a charge to be levied.

8. They then take it further: even if, they say, that is wrong and the claimants are entitled to levy this charge, the reality of the situation is that it is a penalty clause and, as such, it is irrecoverable in law, and I am referred to the case of Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited [1915] AC 79, a longstanding House of Lords case from 1915, so it is coming up for its hundred year anniversary, but there we are, it has been long settled law. That is effectively the defendant's case.

9. In support of both parties there have been statements filed, as I have already touched upon. The statement from Mr Atwood and his evidence today is, in short, this, that they were authorised to manage this site, that they were authorised to use this automated numberplate recognition system, that it is accurate and it records and has recorded the

defendant's vehicle on three occasions breaking the two hours limit, and that accordingly they are entitled to be paid the monies that they seek. Mrs Price gives a similar statement, albeit it is more to do with the mechanics of the notices being sent out.

10. The statement of Miss Hetherington-Jakeman develop, I suppose, the points being made in the skeleton argument in some more detail. She denies that she was there for longer than two hours, but admits she cannot say what day she was there. She was prepared to concede that she knew it was a two hour limit anyway. She says that she disputed the charges by sending emails, and I have seen those emails which were produced by the claimants. She tells me that on at least one occasion she made multiple visits to the car park. She also refers to a letter from Mr Toulson of Knight Frank dated 26.1.07. Knight Frank are the managing agents for the landlords, and effectively manage this contract, albeit that the contract is between Excel and the landowners, not between Excel and Knight Frank; Knight Frank merely managed it on behalf of the landowners. There is a letter from Mr Toulson dated 26.1.07 which refers to cancellation of the charges. Mr Atwood in cross-examination had that point drawn to his attention and his answer was simply this: firstly, he said what was said in the letter was out of context. I do not think it is. The letter is quite clear. The letter says, and I quote, "Any outstanding charges for the period September to December 2006 will be cancelled." There is no doubt about that. It goes on to say, "Will be cancelled by Excel upon request, irrespective of the circumstances of the incident." It then goes on to say, "Any of your customers or members of the public who approach you should be referred to us ..." etc., etc. Mr Atwood says to me that it is out of context. He does not accept it says that any charges issued to the public will be cancelled, although I beg to differ, in my view, that is what it does say, but, more importantly - and this is where he may have a better argument - he says that there was no right on the part of Knight Frank to say this; they are not entitled to make those comments. In fact, there is some evidence in support of that stance that I have seen in these bundles, because there is a letter from Knight Frank dated 18th June 2007 sent to Mr Meale, who I gather is a local MP, and it says this: "It is essential that in future our clients and ourselves should have the ultimate right to require cancellation of PCNs. We are therefore giving Excel notice terminating their contract. Our intention is to procure a parking management service which provides such a control mechanism thereafter." So, I am satisfied, in so far as it is necessary for me to make a finding at this stage, I am satisfied that at the time that Knight Frank's letter was sent out in January 2007, Mr Toulson, I suspect under a misapprehension of the position, but Mr Toulson did not actually have the authority to say what he said in that letter. It is unhelpful that he perhaps said it, and he was, in my view, mistaken to have said it, but he did not have the authority to say that the charges would be cancelled and that is demonstrated by his subsequent letter of 18th June 2007. So, on that minor point, and it is a minor point, I would agree with the claimants. I do not, however, agree with their interpretation of the words "customers" and "members of the public" and the spin that Mr Atwood attempted to put on it, but I do accept that Knight Frank did not have the authority to effectively make that promise to cancel, as set out in the letter of the 26.1.07 and, therefore, that does not end the case.

11. However, there are other points that are made in this lady's statement and in her evidence today, and let me quickly just run through them. She has concerns about the timings for the vehicles entering and leaving the car park and she says it is possible to

alter the information on a computer as set out in paragraph 20 of her statement. That was never challenged by Mr Atwood. He did not ask any questions about that. I have to say I am somewhat surprised that he never sought to ask any questions about that, but he did not. I have the evidence from Miss Hetherington-Jakeman that apparently this information is capable of being adjusted, amended, altered

12. Somewhat surprisingly I do not really have any particular evidence from anyone who has knowledge of the system, other than from Mr Atwood. Mr Atwood told me in his statement that the devices are approved (see para 9 of his statement). In cross-examination, to questions that were put by Mr Lee, Mr Atwood said that the systems involve cameras that are approved devices under statutory instrument 2005 2756, that not only are they synchronised, they are required to be synchronised only every 14 days, but in fact their system allows synchronisation every 60 seconds, which is clearly much better, and he tells me that they automatically update the date and time and insert that on the appropriate photographs. He told me that the cameras were checked every 24 hours automatically by the back office server, so one computer is checking another computer. There is nothing wrong with that, of course, it is quite permissible.

13. He then went on to say to me that there has been occasions where there have been what he described as "drop out". He accepted this had happened in fact on the three days when these tickets were issued. He accepted 'drop out' occurred on 9th September 2006, and he could not say whether or not it had occurred on 7th October 2006 or 4th November 2006, to be pedantic and correct, but he could not deny it either. What he says, however, is that if there had been such a drop out, that in fact this would have assisted Miss Hetherington-Jakeman because, in order for the parking notice charges to be issued, the system has to take a photo of the car numberplate going in and a photo of it coming out, and the times are recorded and that is what tells them that it is more than two hours. That is a simplistic way of explaining the system. What he says is, quite simply, "If we haven't got one of her going out, then we can't send the notice."

14. The flaw in that, of course, is this, as he accepted, when giving evidence, the only exception is if someone is going in and out on more than one occasion. That self-evidently must be the case. If someone goes in - I will pick a day at random on this - on 1st September at 9 o'clock in the morning and the system goes down shortly after and they leave whilst the system is down, they come back whilst the system is down and then they leave again, the system will think they have been there all the time. Self-evidently, they have not and so that is the flaw in all of that, and that is accepted by Mr Atwood, but he said in his submissions initially, "Well, this lady never said she went in multiple times", but that is not the case. On one occasion she said, "I may have made multiple visits to the car park." That was never challenged in cross-examination. I accept her evidence. She was an honest witness. I accept that she may well have gone backwards and forwards on at least one occasion to the car park. It may well have been on these dates. It is for the claimant to prove its case, I keep reminding myself. The burden of proof is on the claimant. There is a significant doubt, in my mind, on the facts here as to whether or not there was any breach of the 2 hour time limit. The defendant has maintained in her statement and in her evidence today that she has never stayed beyond 2 hours (see for example para 6 and 20 of her statement). It is for the

claimants to prove on the balance of probabilities that is wrong and she has stayed for longer than 2 hours.

15. I turn now to the main thrust of the defence. The main thrust of the defence is a legal one. Is there a contract? I hear the argument made by Mr Lee and it is an interesting one. I am not with him on this point as to a contract, I must say. It seems to me that, if one goes back to basics, and if Mr Lee will forgive me for doing it in this way, but it is important that I explain my rationale: what is a contract? A contract is effectively, I suppose one could describe it, as an agreement giving right to obligations which are enforceable or recognised by law. That is what a contract is. Normally, a contract involves offer, acceptance and consideration, and I think this is mentioned in Mr Lee's client's statement. Normally, that does not pose a problem. If you have got a car park where one pays to park, there is not a problem at all. You divide it up into its constituent parts. There is an offer: "You may park here within time limits but on condition you pay." There is an acceptance of that by parking your car. The consideration is that you put your 50p into the meter or whatever. There can be no argument about a contract, and Mr Lee accepts that. This case is different because in this case there is not actually any, on the face of it, consideration, in the sense that this is a free car park. However, nothing in life is free. How often have we heard that? And how true it is. It is not free. Car parks are hugely expensive things to create and to run, I have no doubt. I know they are hugely expensive to create. I was horrified when I was chairman of an NHS Trust, and we put in a car park in place, as to how much it cost. It was a thousand pounds a space to build. It was hugely expensive and that was not an unusual figure. Car parks are expensive to build and maintain and, in my view, whilst this free parking is described as "free," it is on the basis that it is encouraging people to use the shops in the area, particularly, in this case, to use the shops on the retail park. That is what it is designed for and that is what it is intended to do.

16. In my view, that amounts to consideration because it is giving something of value - it is free parking, you are not paying for the privilege of being there - to the consumer and it is superficially to the detriment, I suppose, of the landowners, because the landowner is aware that he is not receiving any payment from the consumer directly. In my view there is consideration. I think it falls within that class of consideration that is not in money but is in money's worth in the sense that it is anticipated that people will go into the shops, the landowner does not own the shops but he rents the shops out and, obviously, if it is a successful site, then the amount of rent is reflected in that. So, it is basically a win-win for all concerned. The consumer gets free parking, which is valuable to them, the landowner attracts customers to the development and reaps higher rents. So, I am not of the view that there is not any value in this. There is, in my view, value.

17. We therefore have the constituent parts of a contract; we have an offer, we have acceptance and we have consideration. So, I am not with the defendants when they say that there is not a contractual claim. There is. It seems to me that the contract quite simply was that this lady was allowed to park within time limits at this site, she agreed to do it by parking and, as I say, the consideration was that she would use the shops, hopefully spend some money in those shops, generate profits for the shopkeepers and therefore they would be able to pay their rents. That is the theory. It does not always

work, I know, but that is the theory. That, I think, disposes of that first point. It is a contract. I do not think I need to consider licences and whether or not it is a bare licence or whether or not it is recoverable. It is, in my judgment, a contract.

18. The second point then relates to whether or not this lady was there for two hours or more. She says that she was not there for two hours or more. The evidence from the claimants would say that she was there. However, they do accept that there have been problems, albeit rare, but there have been problems with their line drop outs and, of course, it is for the claimants to satisfy me on the balance of probabilities - and I do not mean by that beyond all reasonable doubt. The balance of probabilities means more likely than not. They have to satisfy me that it is more likely than not that she was there for longer than she thought or has admitted. The difficulty I have with such an argument by the claimants, as outlined previously, is that some of the evidence from the defendant was simply not challenged; there was no challenge to the fact that she may have, on at least one occasion, have gone backwards and forwards more than once. It was not challenged that these figures, dates and times, were capable of being amended or altered on the computer. Clearly, there have been internal problems in the sense that the system has gone down. On that basis, I would have some hesitation in finding that this lady has been there more than two hours. However, in a sense I do not think that I actually need to determine whether she has been there for more than two hours or not, because we go on to the next point that is being raised by the defendant, and that relates to the question as to whether or not the charge is recoverable.

19. This boils down to how one interprets the signage. There is no dispute as to the signage there, there is no dispute that this lady saw it. She cannot say she saw it on the particular days, but she knows it is there and she knew parking was limited to two hours. However, what the sign says, and it is at DVHJ1 - that is the one in front of me but I have seen several in the claimants' bundle, and it is not in dispute - what it says quite clearly is this: "Failure to comply with the following results in a parking charge notice" and then it lists them. So, if you have got a lorry, you are going to get a notice. Fair enough. It is a car park, not a lorry park. If you are inappropriately parking in a disabled bay, then quite rightly that attracts a notice, and I wish more people got notices for that because I find it very irritating when one sees that happening. Buses and caravans, not parking properly in the marked bay, obstructing other vehicles are all set out as reasons for a charge being levied. For some reason it says, "Failing to comply with locking your car" attracts a notice. I think that is just encouragement to tell people to lock their cars rather than anything else. I would be surprised if anyone got a parking ticket for not locking their own car, but there we are.

20. It then goes on to tell visitors that the claimants do not accept any liability if you park your car and it is damaged or broken into. It says it is monitored by parking wardens, but obviously at the time that was not the case, but it does say that parking enforcement is in operation, and then it tells you how much is to be paid. It also says about photographs being taken and enforcement cameras.

21. The point that is made, and I think a valid point, is this: nowhere does it say in the list - and I have gone through them - failure to comply with the time limit will result in a parking charge. I am being asked to infer that that must be the case, and Mr Atwood

says, "Well, you've got to look at the whole of the notice" and I understand that point, but one has to look at the plain English language used. It says, "2 hours maximum stay" - that is agreed, that is what it should be. "No return within 1 hour." That is agreed. It then goes on to say, "Failure to comply with the following ..." All the claimants had to do was to put a little box in, with a little clock in (or similar motif), saying, "Failure to comply with the 2 hour maximum stay as set out above" or even, "Failure to comply with the 2 hour maximum stay" and that would have been sufficient. But it does not say that. The penalty is clearly being indicated as being leviable - and I use "penalty" in the loose sense - if you do one of a certain class of things. That does not include exceeding the two hour stay. It therefore seems to me - I agree with what is set out in the defendant's skeleton - that there are defined acts which give rise to a charge, that does not include the charge for parking in excess of two hours and, therefore, in my view, they are not entitled on this particular notice or signage to recover anything at all. It is, in my view, perhaps an omission, an oversight, but that is what the sign says and that is the nature of the agreement between the parties. It is a contract, after all, and it is not for me to re-write the contract in these circumstances. So, it seems to me therefore that I do not actually have to decide whether or not this lady stayed for more than two hours. The reality of the situation is that the claim must fail because the notice does not say breach of the two hour waiting results in a charge.

22. In any event, even if I was wrong on that and I should have construed it to read that the two hours is a term which is enforceable by way of the charge, we then come to the argument: is this a penalty? Very helpfully, Mr Lee has provided me with the case of Alfred McAlpine Capital Project Services v. Tilebox Limited [2005] EWHC 281. In so far as that is concerned - I do not intend to go through the detail of it - what is very helpful in that case is that there is a useful resume of the law relating to penalty cases by Jackson J. In that case Jackson J draws attention to a case that is no doubt going to be pored over by the higher courts on the collection of bank charges, namely the case of Dunlop Pneumatic Tyres, a 1915 case. What is said in Dunlop Pneumatic (per Lord Dunedin at pages 86-88) is this: (1) "The court has to decide whether or not the payment is a true penalty or liquidated damages, (2) that the essence of a penalty is a payment of monies stipulated as in terrorem of the offending party, the essence of liquidated damages, is a genuinely covenanted pre-estimate of damages. (3) The question whether the sum stipulated is a payment of liquidated damages is a question of construction to be decided upon the terms and the circumstances of each particular contract ... at the time of making the contract, not at the time of the breach ..."
Lord Dunedin in the Dunlop case in the House of Lords goes on to say:

> "To assist in this task of construction various tests have been suggested, such as: (a) it would held to be a penalty if the sum stipulated for is extravagant and unconscionable amount in comparison to the greatest loss that could conceivably be proved to have followed from the breach. There is a presumption, but no more, that it is a penalty where a single lump sum is made payable by way of compensation on the occurrence of one or more of several events, some of which on occasions are serious and others but trifling damage."

That was the quotation. Jackson J in the McAlpine case then went on to say (at para 48):

"In some cases judges consider whether there is an unconscionable or an extravagant disproportion between the damages stipulated and the true amount of damages likely to be suffered. Looking at the bundle of authorities provided in this case, I note only four cases where the relevant claim has been struck down as a penalty. In each of these four cases there was in fact a very wide gulf between, (a) the level of damages likely to be suffered, and (b) the level of damages stipulated in the contract."

23. That is all very interesting to lawyers, but what it boils down to is this: do I have any evidence that this is what one can say is a genuine pre-estimate of damages? It might be wrong. That does not matter. Is it a genuine pre-estimate of damages or is it in reality a penalty? In dealing with that, Mr Atwood tells me that the whole of the hundred pounds received is payable to Excel, nothing goes to anyone else, that he believes it will cover the costs and the overheads to operate the system and that sort of thing, but he cannot give any breakdown; he has no idea as to how the monies received can be distributed in terms of what is the cost of the various elements of work required (e.g. sending out letters, and the collection system generally). In his evidence he referred me to the cases of Vine v. Waltham Forest London Borough Council and Arthur and another v. Anchor. Let me just touch upon those. Arthur v. Anchor is all about someone parking a car without authorization and being clamped. It is dissimilar to this case. This is not a case where someone has parked without authorization. They had authorization; there was a contract between the parties and I have found that there was a contract. They were authorised to park. What Arthur says is this: a vehicle is parked without authorization on private land, there are warning signs, you take a risk if you do that that you will be clamped and that you will have to pay the reasonable costs of the clamping and removal. That is all that says, no more than that. That is not disputed by the defendants, they accept that that is the case for clamping. In so far as it is helpful to the claimants, I suppose it says that one can recover a reasonable cost - it says of clamping, but other enforcement also would apply in my view, - and I suppose that ties in with whether or not it is a penalty because, obviously, if it is a penalty, inevitably it cannot be reasonable. If it is a penalty it is not a reasonable cost and it is not a genuine pre-estimate of damages. So, to that extent I suppose I see where the claimants are coming from, but I do not think it is a hugely helpful case.

24. The other case that they refer me to, Vine v. Waltham Forest London Borough Council, is the same sort of scenario: someone parks where they should not park. This case actually is slightly different from Arthur, in that the appellant Vine said he did not actually see the signs, but it is really applying the same principles as Arthur v. Anchor. There seemed to be some suggestion from Mr Atwood that the Vine case was authority for the view that £105 was a reasonable sum, and that is because that is the sort of level of costs that were being charged. However, there are several points about that sum. The first is that in the Vine case the £105 did not go entirely to one body. In fact, if one reads through the judgment (see in particular Roch LJ) one can see that the money was in fact split between various different bodies. That is the first point. The second point is that, in clamping, there inevitably is some work being done; someone has to be contacted and asked to come back on site and remove the clamp, so someone is doing something. Contrast that with this case I am trying. No-one is doing anything here. All

we have got is a photograph being taken. Well, I suppose they are sending a few letters out but that is about the limit of it. They are not going out to unclamp a vehicle. They are posting some letters out. I accept that there is an appeal process, and I cannot ignore that, but it seems to me that a hundred pounds is an awful lot of money for what is being done by the claimants.

25. Going back to Vine, what is interesting is that if one reads the judgment, Roch LJ, having decided that the appellant had not seen the signs and that therefore the recorder was in error, said this:

> "The appellant is entitled to the return of the £108.43, or alternatively that sum by way of damages.
>
> This finding renders it unnecessary for this court to consider whether the charge that the respondents were levying was or was not exorbitant."

It seems to me that the Court of Appeal were making it clear that they were not saying that £105 was an appropriate figure, (or £108 because there was a £3 charge for using a credit card.) They were not saying that at all and, if that is what Excel think it says, as appeared to be advanced by Mr Atwood then they are sadly mistaken. It is not authority for the proposition that £105 is a reasonable fee. It is clear that the Court of Appeal declined to say such a sum was reasonable or that it was not reasonable.

26. So, the position I am in today is this. I have already decided that the charges are not recoverable anyway, but it is important I think for me to say whether I think it is a penalty, and I think it is a penalty. It seems to me that it is not a pre-estimate of damages. It is a payment of a sum of money that is intended to effectively frighten or intimidate someone into making a payment promptly. It is a figure that is far beyond any costs that could realistically or reasonably be incurred by the claimants in trying to run this system. The reality is, yes, there are overhead costs, I accept that, there are costs of maintaining the cameras, there are the costs of people to send out letters, there are costs with an appeal system, but in the absence of details of what those costs are and in the absence of any explanation as to how the figure of £100 has been arrived at, other than a mis-reading of the case of Vine, it seems to me that the claimants fail to make out that it is not a penalty and that in fact, in my judgment, it is a penalty. I am satisfied, therefore, that, even if I was wrong on my earlier finding as to whether or not the charges are recoverable at all - as I have already said, I do not think they are recoverable - then I am satisfied that this was a penalty and therefore irrecoverable in law. Accordingly, I dismiss the claim.

The claim is dismissed. Anything else, Mr Lee?

MR LEE: No, sir.

THE DISTRICT JUDGE: Thank you. Mr Atwood, I should have asked you as well.

MR ATWOOD: No, sir.

THE DISTRICT JUDGE: Thank you very much.
