THE COURT OF APPEAL
CIVIL

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Neutral Citation No. [2021] IECA 150
Court of Appeal Record No. 2019/393
High Court Record No.2018/154R

Costello J.
Murray J.
Collins J.

BETWEEN

NATIONWIDE CONTROLLED PARKING SYSTEMS LIMITED

Appellant

AND

REVENUE COMMISSIONERS

Respondent

JUDGMENT of Mr. Justice Murray and Mr. Justice Collins delivered on 21st May 2021

INTRODUCTION

1. Article 2(1)(a) of the Council Directive 2006/112/EC on the common system of value added tax ("*the VAT Directive*") provides that "*the supply of services for consideration within the territory of a Member State by a taxable person acting as such*" shall be

subject to VAT. Article 9 of the VAT Directive defines a taxable person as "*any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity*." These provisions are given effect to in Irish law by the Value-Added Tax Consolidation Act 2010 ("*VATCA*") and in particular s. 3 of that Act.

2. Nationwide Controlled Parking Systems Limited (*"NCPS*") provides car park management services to owners of car parks throughout the State. The nature of those services is described in detail below. Cars parked in such car parks without a required parking permit or ticket, or otherwise parked in breach of applicable parking rules, are liable to be immobilised by the attachment of a "*clamp*" by NCPS. The clamp is released by NCPS on payment of a stipulated charge by the motorist. The net issue presented in this appeal is whether the release of clamps by NCPS constitutes the supply of a service subject to VAT, so that VAT is chargeable on the clamp release fees.

3. NCPS accounts for VAT on revenue earned from the sale of parking permits and parking tickets. It also originally accounted for VAT on the clamping release fees received by it. However, in January 2014, it made a claim for repayment of VAT paid by it in respect of the periods from November to December 2009 to September to October 2013. Part of this repayment claim was refused by the Revenue Commissioners on the basis that it was excluded by s. 99(4) VATCA (which requires that a claim for a refund be made within 4 years after the end of the taxable period to which it relates). No issue arises in relation to that aspect of the Revenue Commissioner's decision. That part of the repayment claim made within time – totalling €1,778,458 – was refused by

the Revenue Commissioners on the basis that the clamping release fees were subject to VAT and thus no repayment was appropriate. NCPS disputed that aspect of the decision and duly appealed it to the Appeal Commissioners pursuant to s. 119(1)(h) VATCA.

4. NCPS's appeal against that decision was successful, for the reasons set out in the determination of Commissioner Gallagher dated 16 March 2018 ("*the Determination").*

5. By case stated dated 2 July 2018 (*"the Case Stated"),* the Commissioner stated and signed a case for the opinion of the High Court in accordance with section 949AQ Taxes Consolidation Act 1997 (TCA) in the following terms:

> *"Whether, upon the facts proved or admitted as above, I was correct in law to determine that clamping release fees are not subject to VAT in accordance with section 3 of the VATCA 2010 and Article 2 of Council Directive 2006/112/EC."*

6. The High Court (O'Connor J.) held that the Commissioner was incorrect in law in the determination she reached ([2019] IEHC 524). This is NCPS's appeal against that decision.

THE FACTS

7. It is the function of the Commissioner to make appropriate findings of fact. The scope of the power of the High Court or of this Court to review such findings is limited*: Mara (Inspector of Taxes) v. Hummingbird* [1982] ILRM 421, *Ó' Culacháin v. McMullan Brothers Ltd* [1995] 2 IR 217 and *MacCarthaigh v. Cablelink Ltd* [2003] 4 IR 510. Here, there does not appear to be any material dispute about the findings of primary fact made by the Commissioner, though the parties differ about the proper characterisation and status of certain of her conclusions.

8. As the Case Stated explains, NCPS operates pay and display and barrier-controlled car parks under licence from various landowners such as schools, third level institutions, hospitals, private residential developments and shopping centres. While the provisions of the specific agreements vary from location to location, they typically involve the payment to NCPS of a management fee (though in some instances the management fee is waived) and the granting to it of the entitlement to collect and retain some or all of the parking fees imposed on motorists using the relevant car-parking facilities.

9. Signage erected by NCPS advises motorists availing of these facilities of the terms and conditions of use (to which, for convenience, we shall refer as the "*parking rules*"). Depending on the specific location in issue, these may involve limitations on the periods of time for which vehicles may be parked and restrictions on the areas in which parking is permitted. Where parking is by permit, and subject to specific exceptions,

persons entering the properties are advised that they may only park a vehicle on which a valid permit is displayed.

10. As part of the parking control service it provides, NCPS agrees to monitor the premises and to clamp vehicles parked in breach of the parking rules, this being effected by means of the affixing of a clamp that immobilises the vehicle. NCPS releases the clamp upon payment of a fee. Prominent signs advise motorists entering the property that if they park in breach of the parking rules their vehicle may be clamped (e.g. *"Unauthorised or illegally parked vehicles will be CLAMPED")*, the clamp being removed only upon payment of a "*clamp release fee*" of a specified amount. Revenue place some reliance on this characterisation of the fee by NCPS. Motorists are also advised that their vehicles may be towed, with a further (and higher) fee charged for its return. In practice, according to the evidence of the Managing Director of NCPS, Mr. Ballard, towing away is "*very rare*" and clamping is the principal method of enforcement. It appears from the material provided to the Commissioner (which forms part of the Case Stated) that clamping release fees are frequently retained in full by NCPS, though in at least one of the contracts discussed there was a revenue-splitting arrangement which involved division of all income, including the revenue generated from clamping.[1]

[1] Determination, paragraph 15. Revenue placed some emphasis that under this contract no distinction was made between income from parking charges and income from clamping release fees. The Commissioner was not persuaded that it followed from this treatment that each income stream had the same character as far as VAT is concerned: Determination, paragraph 26.

11. The public has access to some of the car parks – such as those at shopping centres or train stations - managed by NCPS. At these locations, motorists may be required to pay for parking via "*pay and display*" or through the use of barrier controls. Parking permits may also be used. A failure to display an appropriate parking ticket or permit, or to display them in the correct manner, may result in the vehicle being clamped. The sample parking permit provided to the Commissioner warns expressly of this risk and states that a vehicle will only be declamped *"once full payment is received."* The sample parking ticket also warns that failure to display the ticket correctly "*may result in the vehicle being clamped."* In addition, parking inappropriately – such as parking in a disabled parking space without displaying the relevant permit, parking other than in a designated parking space, or parking in a manner that causes an obstruction – may also result in a vehicle being clamped.

12. Further, NCPS manages private car parks, such as car parks serving residential developments. Only permit holders are allowed to park in such car parks and any vehicle that does not display the relevant permit is liable to be clamped. In addition, breach of the parking rules applicable to such car parks may result in a vehicle being clamped.

13. Mr. Ballard explained in his evidence that NCPS does not issue "*penalty notices*" in relation to parking infractions because it does not have access to the national vehicle database and therefore has no means of ascertaining the identity of defaulting

motorists.[2] As the Commissioner noted, in England and Wales companies providing equivalent services do have access to the vehicle database and can collect unpaid parking charges by way of parking charge notices which, if unpaid, can be enforced by legal proceedings against the motorist.[3] Though not specifically referenced, that facility is provided for in that jurisdiction in the Protection of Freedom Act 2002 which also, in s. 56, criminalises the immobilisation of vehicles by private persons. In any event, Mr. Ballard stated that "*clamping was [NCPS's] preferred and most effective enforcement mechanism".* That is not in dispute.

14. Sample contractual documentation was furnished to the Commissioner. Many of the contracts are very short, comprising only a single page. Some make reference to general terms and conditions and an example of the standard terms and conditions is quoted at paragraph 8 of the Determination. They are not included in the documentation annexed to the Case Stated, however. With the exception of a lease of a car-park in Naas,[4] the documents appear to be silent as to what legal right or interest (if any) NCPS enjoy over the car-parks under their management. It would seem clear (though this is not expressly stated) that NCPS is entitled to enter onto the car-parks for the purposes of providing their services and are (*vis a vis* the car-park owner) permitted to attach clamps to vehicles that are parked without permission and/or in breach of applicable parking rules. However, none of the contractual documents (again with the obvious exception of the

[2] Determination, paragraph 14.

[3] Determination, paragraph 18.

[4] The relevance of which is somewhat unclear given that it does not make any reference to any car park management services being provided by NCPS who presumably operated the car-park in their own right as tenant.

lease) appear to give NCPS any right of possession or occupation of the car-parks or any general right to control entry into them and, so far as appears from the Determination, it does not appear that Mr. Ballard gave evidence to the effect that NCPS enjoyed any such rights.

THE DECISION OF THE COMMISSIONER

15. At paragraphs 16 and 17 of her Determination, the Commissioner identified the central contentions of the parties. According to NCPS, clamping release fees were not subject to VAT because "*such fees are generated outside the scope of contract, arising in the context of enforcement of the Appellant's rights against trespassing motorists."* The clamping release fee was, it argued, "*a payment in the nature of or in lieu of damages for trespass*" and, as such, did not constitute a taxable supply of services. On the other hand, Revenue submitted that "*clamping release fees arise pursuant to a contract to de-clamp, that [NCPS] provided a de-clamping service to the motorist, that the clamping release fee comprised consideration for the provision of that service*".

16. In the Commissioner's view, while there were different enforcement mechanisms (clamping and towing away in this jurisdiction, the service of parking charge notices in England and Wales), these differences were not significant as each '*generates money in the context of enforcement'*. She determined that where a motorist purchased a permit or a parking ticket, there was a contract formed between NCPS and the motorist. This conclusion was based on her view that the terms and conditions on which the permits were issued amounted to an offer and that the offer was accepted by the conduct of the motorist in entering the car park and parking his or her vehicle. She further determined that motorists who failed or omitted to purchase a ticket or permit and motorists who remained parked after the parking tickets or permits had expired or who otherwise parked in a manner prohibited by the ticket or permit '*became trespassers*

and that these motorists are parked in violation of the [NCPS]'s rights under the licence'. Citing *Inland Fisheries Ireland v. O' Baoill* [2012] IEHC 550, the Commissioner held that NCPS was entitled to enforce its rights as the licensee against such trespassers and that a Court had the power to grant a remedy which will protect but not exceed the legal rights granted by the licence. [5]

17. The case advanced by Revenue to the Commissioner was that de-clamping was a service for consideration within the meaning of s. 3 VATCA because (a) the car owner pays NCPS to remove the clamp, the consideration being agreed at the value shown on the notice *or* (b) NCPS provides a de-clamping service to the landowner whereby it is allowed to retain the clamping fee as payment for that service. Rejecting this claim, the Commissioner stated:

> *"The payment of a clamping release fee does not constitute acceptance of an offer in the context of contract law. The clamp has been applied to immobilise the vehicle (in the context of enforcement of the licensees' rights) so that the motorist has no option but to pay for it to be removed. The clamping release fee is not 'agreed' as submitted by the Respondent but is stipulated on the relevant signage. The motorist could choose to walk away from the clamped vehicle but if he does, his loss will presumably be much greater than the cost of paying for the clamp to be removed.* "[6]

[5] Determination, paragraph 24.

[6] Determination, paragraph 29

18. Having referred to a series of decisions of the Court of Justice emphasising the need for a '*direct link'* between a service and the consideration paid for that service before a transaction fell within Article 2 of the Directive and its predecessors, the Commissioner held that:

> *"41 The Respondent submitted that clamping release fees constituted consideration for the service of removal of a clamp in accordance with Article 2 of [the Directive]; however, at the time of the removal of the clamp there is no contract in existence between the motorist and [NCPS] because the motorist has become a trespasser. Contrary to the submission of the Respondent, de-clamping is not a commercial activity or commercial service in its own right and no new contract is entered into at the point of de-clamping. I am satisfied that there is no 'direct link' between the removal of the clamp and the payment of the clamping release fee as this action takes place in the context of enforcement by the Appellant of its rights as licensee and does not constitute the supply of a taxable service. As a result, I am satisfied that no consideration has been paid and no service has been supplied for VAT purposes in accordance with Article 2(1) of Council Directive 20-06/112/EC'*."[7]

19. While the Revenue Commissioners accepted that NCPS was entitled to be on the car parks being managed by it, it had submitted that NCPS was not in possession of the

[7] Determination, paragraph 41.

car-parks and therefore could not have any claim for trespass. However, the Commissioner was satisfied, having regard to *Inland Fisheries Ireland v. O Baoill*, that NCPS had the right to sue in trespass and was entitled to seek a remedy from the Courts to enforce its rights as licensee against trespassing motorists, though it relied on clamping as a more convenient enforcement mechanism. Having referred extensively to the decision of the Court of Appeal of England and Wales in *Vehicle Control Services v. Revenue and Customs Commissioners* ("*VCS*") [2013] EWCA Civ 186, [2013] STC 892 – in which the Court of Appeal held that certain parking penalty charges were not subject to VAT- the Commissioner expressed her conclusion as follows:

> *"60. By parking without ever purchasing a ticket or permit or by remaining parked after the ticket or permit has expired, the motorist becomes a trespasser. The remedy of an order for possession and/or damages to vindicate the right of the licensee (i.e. the Appellant) pertains at law. If it did not, the licensee would be unable to enforce its rights under the licence. In the within appeal, clamping was the Appellant's preferred enforcement mechanism. The monies generated on foot of clamping release fees were generated in the context of enforcement of the licensee's rights against trespassing motorists. It follows that these monies are in the nature of damages or a payment in lieu thereof and are not subject to VAT in accordance with s.3 VATCA 2010'. "*

THE JUDGMENT OF THE HIGH COURT

20. The Revenue appealed the Determination of the Commissioner pursuant to section 949AR and 949AQ TCA. It argued that the Commissioner erred in conflating the payment of a clamp release fee with a parking penalty charge and thus erred in relying on the Court of Appeal's decision in *VCS*. It also submitted that the Commissioner had wrongly imposed a requirement for there to be a contract. That was, it was said, a "*fundamental error of law*" as no contract was necessary. NCPS's clamping activities were clearly an economic activity for the purposes of Article 9 and involved the supply of a service to the motorist for consideration within the scope of Article 2. In response, NCPS did not dispute that it was engaged in economic activity but maintained its position that the clamp release fees were not consideration for a service but were a charge in lieu of liquidated damages for trespass or, as it might be viewed in the alternative, as penalty charge for trespassing. Either way, the charge was outside the scope of VAT.

21. The Judge concluded that the Commissioner was in error. That conclusion was based on the following reasoning. First, the Judge considered that it was wrong to root the analysis exclusively in possible remedies in contract and tort: '*the clamp release operation of NCPS should not be viewed wholly within the prism of trespass, breach of contract and the reliefs in common law therefor'* (at para. 53). Second, O'Connor J. attached significance to the economic activity involved in the payment and collection of declamping fees:

> *"NCPS in its business model recovers the clamp release fees; the licensor or management company has a contract with NCPS which takes account of the clamp release fees; and vehicle owners or users know the risk and cost for clamp release that follows from infringing parking rights or rules"* (at para. 56)

22. Third, the Court considered that its view that examination of the processes available in Irish law for enforcement of parking infractions did not necessarily support NCPS's argument that enforcement by clamping was not a service, was reinforced by the observations of the ECJ in *Town & County Factors Ltd. v. Commissioners of Customs & Excise*, Case C-498/99 [2002] ECR I-7173. There the Court made it clear that while Article 2(1) of the Sixth Council Directive 77/388/EEC (now contained in Article 2(1) of the VAT Directive) required the existence of a "*legal relationship*" between the parties to the transactions under inquiry before those transactions would be subject to VAT, this did not depend upon those obligations of the service provider being enforceable: to impose such a requirement would compromise the effectiveness of the relevant provisions as it would have had the consequence that transactions falling within that Directive could vary from one Member State to another because of differences between the various legal systems.

23. These considerations led O'Connor J,. fourthly, to two related conclusions. NCPS, he said, was engaged in an economic activity in clamping and in recovering release fees which generated a continuing income stream for NCPS. Furthermore, there were legal relationships and reciprocal performances in the arrangements – even if they were not, strictly speaking, contracts. These involved NCPS on the one part, defaulting motorists

on another, and those who contracted with NCPS for the management of the car parks on the third part (at para. 59).

24. The Judge, fifthly, expressed his disagreement with the conclusion of the Commissioner that payments made by motorists to NCPS to de-clamp their vehicles were in the nature of damages or a payment in lieu thereof. He held that recovering damages for trespass or breach of contract by way of court action requires third party adjudication. Clamp release fees, he said, can protect and secure rights and income. Remedies in contract or tort can protect but, he said '*the extent of securing income in that way has not been addressed by NCPS'*. Unlike damages awarded by a third party or agreed, the clamp release process '*is definitive and operates without the exercise of a discretion by a third party'*.

25. The Judge attached some significance to the decision of CJEU in Case C-295/17 *MEO — Serviços de Comunicações e Multimédia SA v. Autoridade Tributária e Aduaneira ("MEO")*. There, the Court held that amounts due under a contract for telecommunications services for early termination of that contract constituted a taxable supply for the purposes of the VAT Directive. In particular, and sixthly, the Judge emphasised statements by the Court of Justice to the effect that the fundamental criterion for the application of the common system of VAT were considerations of economic and commercial realities. He emphasised that in *MEO* the CJEU held that the amount due for non-compliance with the minimum commitment period must be considered an integral part of the total price paid for the services and, in particular, the fact that the early termination of the contract did not change the economic reality of the

relationship between MEO and its customer. The Judge clearly discerned a parallel with the instant case, as NCPS in its arrangements with the owners of car parking facilities factor income from the clamp release fees into their arrangements and contracts.

26. In this regard, the Judge particularly emphasised two aspects of the decision in *MEO*. First, the Court in that case adopted the position that the fact that the objective of the termination payment was to discourage customers from not observing the minimum commitment period was not decisive for the classification of the amount. This was so because the economic reality was that this amount aims to ensure that MEO, in principle, obtains the same income in principle as it would have obtained if the contract had not been terminated before the end of the minimum commitment period for a reason attributable to the customer. Second, it emphasised that it was irrelevant for the purposes of interpreting the provisions of the VAT Directive that the amount so charged would be regarded under national law as a right or remedy in tort or a contractual penalty or that it was characterised as a remedy, damages or remuneration in national law.

27. On the basis of this analysis, O'Connor J. drew the following conclusions:

> *"69. The context of the relationships between the owner or licensor, NCPS and the defaulting motorist leads this Court to find that the Commissioner could determine under the law as explained in this judgment that NCPS is engaged in an economic activity by recovering clamp release fees. There is a direct link*

between the payment of a specified release fee and the clamp release. Both the defaulting motorist and NCPS accede to the arrangement by virtue of the signs and conditions displayed. There is evidence that a management company acknowledges that NCPS retains the clamp release fees.

70. The fact that NCPS is enforcing rights does not allow it to escape the obligation to charge VAT. The payment of fines may well be categorised differently if the issue arises. NCPS may describe the clamp release fee as a penalty but a defaulting motorist has an offer from NCPS for the release of a clamp at a specified fee which is capable of acceptance by discharging same. "

THE APPEAL

28. In their written and oral submissions on appeal, the parties reprised the arguments made by them before the Commissioner and the High Court. An abundance of authority was discussed. For NCPS, Mr. Mitchell SC submitted that the national law label attached to clamping release fees was irrelevant, citing *MEO*. Even if the parties had expressly agreed that such fees were damages, or payment in lieu of damages, the Court would not be bound by such characterisation. To determine the proper VAT treatment of the fees, the Court had first to look at Article 2. Mr. Mitchell was critical of the Revenue's approach which, he said, involved looking at Article 9 first. That approach, he argued, generated a "*false positive"* which distorted the Article 2 analysis. Mr. Mitchell relied on the decision of the Court of Justice (Fifth Chamber) in Case C-520/14 *Borsele v. Staatssecretaris van Financiën* ("*Borsele*") as authority both for the proposition that the Article 2 and Article 9 analyses were separate and distinct and for his submission that the Article 2 analysis was to be conducted first. He cited *Wakefield College v. Revenue and Customs Commissioners* [2018] EWCA Civ 952, [2018] STC 1170 in support of this interpretation of *Borsele*.

29. As for the Article 2 analysis, Mr. Mitchell submitted that the authorities indicated that the Court should focus on the "*essential features*" and the "*commercial reality"* of the transaction(s) at issue, citing *Tesco plc v. Customs and Excise Commissioners* [2003] EWCA Civ 1367, [2003] STC 1561 and *MEO*. Here, he said, the proper analysis of the transaction was that the clamping release fee was a payment for an "*anterior parking infraction*" which was enforced *by* clamping but was not a payment *for* the release of

the clamp. Mr. Mitchell referred in this context to the decision of the UK Supreme Court in *ParkingEye Ltd v. Beavis* ("*ParkingEye*") which was heard and decided together with *Makdessi v. Cavendish Square Holding BV* [2015] UKSC 67, [2016] AC 1172. Mr. Mitchell did not accept that this analysis represented a departure from the reasoning of the Appeal Commissioner.

30. As regards Article 9, Mr. Mitchell argued that there was a lack of symmetry or "*genuine link*" between clamping/declamping and any economic activity on the part of NCPS. Mr. Mitchell also observed that NCPS was not (as regarding clamping of vehicles) operating in a market. He referred to the absence of any evidence that clamping generated profits for NCPS. However, while emphasising that he was not conceding that there was "*economic activity*" such as to satisfy Article 9, Mr. Mitchell accepted that this was really an Article 2 case.

31. Ms Clohessy SC, for the Revenue Commissioners, obviously supported the decision of the High Court. This was, in her submission, a clear and straightforward case. NCPS were clearly involved in the provision of commercial services for profit and were obviously engaged in an economic activity, namely a declamping service for payment. It kept the fees. Up until 2014 VAT had been paid on those fees and they were treated as constituting business income that was subject to tax in the ordinary way. She referred to the contractual documentation annexed to the Determination. The Court was, she said, in as good a position to interpret this documentation as the Commissioner. There was nothing in the documentation that suggested that the clamp release fee was a penalty for a parking breach or a fine. In any event, she agreed with Mr. Mitchell that

it was irrelevant whether the fees were described as damages, compensation or a penalty.

32. According to Ms Clohessy, NCPS effectively said to motorists *"we will take off the clamp if you pay us x amount of euro*". The contractual documentation said nothing about any *"antecedent financial obligation"* or suggest that the fee payable was related to any such obligation. Even if the purpose of clamping vehicles was to enforce parking regulations or deter their breach in the future, that "*mattered not a whit*". Analysed correctly, the payment made was in consideration of a declamping service. There was a direct link and the necessary reciprocity between the payment of the clamp release fee and the removal of the clamp. The position here was in contrast to that in Case C-36/16 *Posnania Investment SA* where there was no reciprocity in circumstances where the obligation to discharge tax due was unilateral in character and where no direct or specific benefit was provided to the taxpayer in return.

33. Ms Clohessy submitted that NCPS could not have maintained a claim for payment of damages. No basis on which such a claim could be brought was to be found in the contractual documentation. The fee was not a payment for a parking charge but for the release of the clamp. While she allowed that it might be possible for NCPS to structure its business so that the fees collected by it ought properly to be regarded as a contractual charge, the actual arrangements here did not involve any such contractual charge; rather payment was in respect of the release of the clamp and there was no other basis on which payment could be recovered. The "*economic and commercial realities*" here were that the payment was, as it was described in the contractual documentation, as a

clamp release fee, paid in consideration of provision of a service by NCPS. As regards Article 9 NCPS was obviously engaged in an economic activity. It's *raison d'être* was to provide parking-related services for profit.

ANALYSIS

The Statutory Framework

34. The VAT Directive repealed and replaced Directive 67/227 and Sixth Council Directive 77/388/EEC. It presents the starting point for the analysis of the issue arising from this appeal.

35. Article 2(1)(c) of the VAT Directive provides (*inter alia*) that "*the supply of services for consideration within the territory of a Member State by a taxable person acting as such*" is subject to VAT. Article 9(1) defines '*taxable person'* for this purpose:

> *"'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuous basis shall in particular be regarded as an economic activity."*

36. Article 14(1) provides that '*supply of goods'* means the transfer of the right to dispose of tangible property as owner. Article 24(1) provides that '*supply of services'* shall mean any transaction which does not constitute a supply of goods. Article 25(b) provides that a supply of services may consist of (*inter alia*) "*the obligation to refrain*

from an act, or to tolerate an act or situation." Article 73 provides that in respect of the supply of services (or goods), *"the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply."*

37. Irish VAT law is now provided for in VATCA, which repealed and replaced the Value Added Tax Act 1972 this, in turn, having been enacted in preparation for Ireland's accession to the European Economic Community on 1 January 1973. There was no suggestion from either party that VATCA has not faithfully and fully transposed the VAT Directive.

38. Section 3 VATCA provides that VAT is *"chargeable, leviable and payable on the following transactions: … (c) the supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State."* "*Taxable person*" is in turn defined in section 2(1) as meaning "*who independently carries on a business in the Community or elsewhere*".

Relevant Principles of VAT Law

39. The following principles are derived from the authorities opened to us and do not appear to be in dispute:

(i) First, and fundamentally, the VAT Directive establishes a common system of VAT based on, inter alia, "*a uniform definition of taxable transactions"* (Case C-653/11, *Newey*, at para 39; Case C-36/16 *Posnania Investment SA*, at para 25). That definition "*assigns a very wide scope to VAT*" (Joined Cases C-354/03, C-355/03 and C-484/03, *Optigen*, at para. 37)

(ii) Second, it is the *supply of services* (or goods) that is the subject of VAT, rather than the payments by way of consideration for such supply (Case C-520/10 *Lebara*, at para. 26).

(iii) The term *supply of services* is objective in nature and applies without regard to the purpose or results of the transaction, and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person (C-653/11 *Newey*, at para. 41; Cases C-250/14 and C-289/14 *Air France KLM*).

(iv) Whether particular transactions constitute a supply of goods or services for the purposes of these provisions requires regard being had to all the circumstances in which the transactions in question took place in order to identify their characteristic features (Case C-231/94 *Faaborg-Gelting Linien*, at para. 12).

(v) When categorising a transaction as a taxable transaction, consideration of "*economic and commercial realities*" is a "*fundamental criterion"* for the application of the common system of VAT (*MEO*, at paras. 43 and 44).

(vi) A supply of services is effected "*for consideration*" within the meaning of Article 2(1) only if there is a "*legal relationship*" between the provider of the service and the recipient pursuant to which there is *"reciprocal performance*", the remuneration received by the service provider constituting the value actually given in return for the service supplied (Case C-16/93 *Tolsma*, at para. 14). Some "*corresponding performance"* on the part of the taxable person is necessary (Case C-36/16 *Posnania Investment*, at para. 34)

(vii) The fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a "*transaction effected for consideration"*, which requires only that there be *"a direct link"* between the supply of goods or the provision of services and the consideration actually received by the taxable person (Case C-412/03 *Hotel Scandic Gåsabäck*, at para. 22)

(viii) Where a provider receives only one payment in the course of supplying a service, it cannot be treated as carrying out two supplies of services for consideration and it is necessary to identify the recipient of the sole supply of services (*Lebara*, at paras 31 to33).

(ix) The objective of the consideration is not decisive for its classification (*MEO*, at para. 62), nor is the characterisation by national law of such an amount as a

remedy, damages, penalty or remuneration relevant to the inquiry (*ibid.* at para. 68).

(x) The existence of binding and enforceable legal obligations between service supplier and recipient is not essential. The necessary legal relationship may arise even where it has been agreed that the provider is bound in honour only to provide the services (Case C-498/99 *Town & County Factors*, at paras. 20 to 24)

(xi) While there is a close relationship between Articles 2 and 9, these provisions nevertheless involve distinct inquiries and the existence of a supply of services for consideration within the scope of Article 2(1) is not, in itself, sufficient to establish the existence of an economic activity within the meaning of Article 9(1) (*Borsele*, at para. 28).

(xii) A taxable person acts as such only if he does so as part of his economic activity (C-291/92 *Armbrecht,* at para. 17). The concept of '*economic activities'* is very wide, and objective in character (Cases C-354/03, C-355/03, and C-484/03 *Optigen*). An activity is '*economic'* for these purposes where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (C-421/17 *Polfarmex*, at para. 38).

(xiii) The term '*exploitation'* in Article 9 refers to all transactions irrespective of their legal form by which it is sought to obtain income from the goods in question on

a continuous basis (Case C-263/15 *Lajvér Meliorációs Nonprofit*, at para. 24). It is irrelevant whether or not such exploitation is intended to make a profit (*ibid*, at para. 35)

The Taxable Supply of Services Contended for Here

40. It appears from the Determination and Case Stated that the Revenue Commissioners initially advanced arguments in the alternative as to the nature of the services at issue. Paragraph 27 of the Appeal Commissioner's Determination records that Revenue argued that the taxable service was provided *to the motorist*, involving the release of the clamp immobilising their vehicle in return for the payment by the motorist of the agreed consideration as per the notice *or*, in the alternative, that the declamping service a service provided *to the landowner* in consideration of which NCPS was allowed to retain the clamping fee.

41. This alternative argument appears not to have been pressed before the Appeal Commissioner and it is not addressed further in her Determination. Before this Court, in any event, Revenue's position was clear: the motorist pays NCPS to remove the clamp and the removal of the clamp was a "*service provided to the car owner"* in consideration of the payment of the release fee.[8] Whether or not that is correct as a matter of law is the principal issue on this appeal.

[8] Revenue's written submissions, para 3.9. See also para 3.55 where it is stated that "*If the car owner pays the fee NCPS will remove the clamp. If the car owner does not pay the fee NCPS will not remove the clamp. There is therefore a benefit (removal of the clamp) with a direct link to the payment (of the de clamp fee). The consideration*

The Clamping of Cars on Private Land

42. The sight of clamped cars on the streets of Dublin is, of course, a familiar one. The clamping of vehicles illegally parked on a public road in that City is provided for by s. 101B of the Road Traffic Act 1961 (inserted by s. 9 of the Dublin Transportation Authority (Dissolution) Act 1987). A new s. 101B was substituted by s. 32 of the Vehicle Clamping Act 2015. In the functional area of Dublin City Council, that service is provided for it by a third party contractor selected by a procurement process. Similar arrangements no doubt apply elsewhere in Dublin. Section 101B also provides for the towing away of illegally parked vehicles. Section 15 of the State Airports Act 2004 provides for the clamping of vehicles at State airports. The 2015 Act extends a public law power to use clamping to certain other public bodies such as CIÉ.

43. None of those provisions have any application to privately-owned car-parks. The Vehicle Clamping Act 2015 regulates clamping both in *"statutory clamping places*" (such as the public road) and "*non-statutory clamping places"* (such as private car-parks) – including by the imposition of a statutory ceiling on the level of the applicable *"clamp release charge"* that may be charged. A '*clamp release charge'* it might be noted is defined as "*a charge for the removal of a clamp fixed to an unlawfully or a*

for a service is a fixed amount and applies to all customers, therefore there is a link identified between the supply and the amount."

wrongfully parked vehicle" (our emphasis). However, the 2015 Act (which in any event post-dates the periods at issue in this appeal) does not confer any power on the owners or operators of such private car-parks to clamp or tow-away vehicles.

44. Given that NCPS has no *statutory* power to clamp a vehicle parked without permission and/in breach of parking rules in any privately owned car-park under its management, what then is the source of such power? This question is, in our view, central to the resolution of the issues in this appeal and warrants closer analysis that it appears to have received before the Commissioner or the High Court.

45. In *Arthur v. Anker* [1997] QB 564, Mr. Arthur's car had been clamped while parked in a private car-park. He had no permission to park in the car-park. Notices at the entrance indicated that it was a private car-park and that vehicles parked without authority would be clamped and that a specified release fee would be charged for the removal of the clamp. The car-park was under the management of the defendants and they had affixed the clamp. Mr. Arthur refused to pay the release fee. He and his wife then forcibly removed his car, along with the clamp and locks. The Arthurs then sued for (*inter alia*) tortious interference with their car. The defendants counterclaimed for assault and for the loss of the clamp and locks and asserted by way of defence that Mr. Arthur's trespass had entitled them to immobilise his car and to demand the release fee as the reasonable cost of destraint or, in the alternative, that since Mr. Anker was aware of the notices he was to be taken as having consented to their terms.

46. The County Court Judge held for the defendants on the basis that Mr. Arthur had been a trespasser and that the defendants were entitled to exercise the remedy of distress damage feasant, that the fee charged for removal of the clamp was reasonable and that Mr. Arthur had impliedly consented to the consequences of his trespass.

47. On the plaintiffs' appeal to the Court of Appeal, the principal judgment was given by Sir Thomas Bingham M.R. Addressing the defence of consent first, the Master of the Rolls expressed his views as follows:

> *"The judge found that Mr. Arthur knew of and consented to the risk of clamping, and counsel for the Arthurs conceded in his written argument on appeal that this was so. But counsel argued that the demand for payment amounted to blackmail and that the commission of this crime negated the effect of Mr. Arthur's consent. I give my reasons below for concluding that Mr. Anker's requirement of payment as a condition of declamping the vehicle did not amount to blackmail. It is enough at this point to say that by voluntarily accepting the risk that his car might be clamped Mr. Arthur also, in my view, accepted the risk that the car would remain clamped until he paid the reasonable cost of clamping and declamping. <u>He consented not only to the otherwise tortious act of clamping the car but also to the otherwise tortious action of detaining the car until payment</u>. I would not accept that the clamper could exact any unreasonable or exorbitant charge for releasing the car, and the court would be very slow to find implied acceptance of such a charge. The same would be true if the warning were not of clamping or towing away but of conduct by or on behalf of the*

landowner which would cause damage to the car. Nor may the clamper justify detention of the car after the owner has indicated willingness to comply with the condition for release: the clamper cannot justify any delay in releasing the car after the owner offers to pay, and there must be means for the owner to communicate his offer. But those situations did not arise here. The judge held that the declamping fee was reasonable. The contrary has not been argued. In my view the judge was right to hold that Mr. Arthur impliedly consented to what occurred, and he cannot now complain of it." (at p. 573A-D; our emphasis)

Neill and Hirst LJJ. agreed with this aspect of Bingham M.R.'s analysis.

48. As regards the remedy of distress damage feasant (which, if applicable, did not depend on the plaintiffs being on notice that they were trespassers or that their car was liable to be clamped), Bingham M.R. and Neill LJ. thought that the remedy had no application in the circumstances. In the first place, Bingham M.R. thought it anomalous that a self-help remedy *"should amount in effect to a self-inflicted wound."* In other words, far from bringing a trespass to an end, the clamping of a car continues such trespass. The clamping was effected as a deterrent but Bingham M.R. did not think that deterrence had much, if anything, to do with the remedy. Secondly, he took the view that actual damage was necessary if the remedy was to be available. A "*mere technical trespass",* even if actionable *per se,* did not suffice. Thirdly, Bingham M.R. considered that the release fee, which was a flat charge imposed regardless of the duration of the trespass or when it occurred, and which was paid not to "*the landowner who has suffered the damage but to augment the profit of an agent who has suffered no damage, had no*

compensatory element at all.*"*[9] Neill LJ. considered that in the absence of any evidence that the enjoyment of the car-park was interfered with, the use of the self-help remedy was not justified. More generally, he was of the view that application of the doctrine of *volenti* was the more satisfactory method of addressing the clamping of cars. Dissenting on this issue, Hirst LJ. thought that the self-help remedy was a potentially valuable one. Actual damage was not necessary in his opinion but, even if it was, the expense of clamping was sufficient damage and there was no barrier to the recovery of damages equivalent to the clamping charge.

49. Vehicle clamping returned to the Court of Appeal in *Vine v. Waltham Forest Borough Council* [2000] 4 All ER 169. There Ms. Vine had felt unwell while driving home from a hospital appointment. She pulled off the road and parked her car in a parking bay under a railway bridge, next to another vehicle. As it turned out, the parking bays were leased to a nearby college and parking by the public was prohibited. There was a sign indicating that cars parked would be liable to be clamped or towed away. However, the claimant did not see that sign and having left her car unattended for some three or four minutes returned to find it clamped (by the aptly named Mr. Parker, an employee of contractors engaged by the defendant council). She paid the Council the fee for the clamp to be released – a hefty £105 (split between the Council and the contractor) - and subsequently sued the council for wrongfully immobilising her vehicle. She also claimed that the fee charged was exorbitant. Her claim failed at trial but, for the reasons

[9] At 576A-B. Our emphasis.

set out in the following passage from the judgment of Roch LJ., she was successful on appeal:

> *"The act of clamping the wheel of another person's car, even when that car is trespassing, is an act of trespass to that other persons property unless it can be shown that the owner of the car has consented to, or willingly assumed, the risk of his car being clamped. To show that the car owner consented or willingly assumed the risk of his car being clamped, it has to be established that the car owner was aware of the consequences of his parking his car so that it trespassed on the land of another. That will be done by establishing that the car owner saw and understood the significance of a warning notice or notices that cars in that place without permission were liable to be clamped. Normally the presence of notices which are posted where they are bound to be seen, for example at the entrance to a private car park, which are of a type which the car driver would be bound to have read, will lead to a finding that the car driver had knowledge of and appreciated the warning. In this case the Recorder might have reached such a conclusion about the appellant's state of knowledge, but he did not do so. The Recorder made a clear finding of fact that the appellant did not see the sign.*
>
> *....*
>
> *The Recorder held, correctly, that the appellant by parking her car where she did was trespassing. Unhappily, the Recorder jumped to the conclusion that the appellant had consented to, or willingly assumed, the risk of her car being clamped. In making that leap the Recorder fell into error, in my judgment.*

Consequently I am of the view that the Recorder's decision on the basic issue in this case must be reversed.

It follows that the appellant is entitled to a return of the £108.68 or alternatively that sum by way of damages. This finding renders it unnecessary for this court to consider whether the charge which the respondents were levying was or was not exorbitant." (at p. 7; our emphasis)

Waller and May LJJ. agreed with Roch LJ.

50. Obviously, neither *Arthur v Anker* nor *Vine v Waltham Forest Borough Council* was concerned with any issue relating to VAT. It is notable, nonetheless, that in both cases the analysis of the Court of Appeal did not depend in any way on characterising the clamp release fee as damages. Indeed, the majority's rejection of the distress damage feasant argument in *Arthur v Anker* was based, *inter alia*, on the fact that no damages would be recoverable by the leaseholder (beyond nominal damages). The operative analysis is simpler and more straightforward. Mr. Arthur and Ms. Vine had each parked in a private car-park without permission. Mr. Arthur (but not Ms. Vine) did so on notice of the fact that it was a private car park. Mr. Arthur (but not Ms. Vine) did so on notice that, if he proceeded to park there, he was liable to be clamped and, in that event, he would have to pay the stipulated fee to have the clamp released. He thus consented to the attachment of a clamp to his car and, having attached it, the defendants were entitled to require payment of the stipulated fee before removing the clamp (or, put another way, were entitled to detain the vehicle until payment). It may seem counter-intuitive to speak of a motorist consenting to having their car clamped but that is clearly what

the analysis in *Arthur v Anker* and *Vine v Waltham Forest Borough Council* involves. If Mr. Arthur had tendered payment of the fee – which, of course, he did not do - then the defendants would have been obliged to release the clamp within a reasonable time. If they had failed or refused to do so, they would have been liable to Mr. Arthur in trespass (and, perhaps, in contract).

51. A common feature of *Arthur v. Anker* and *Vine v. Waltham Forest Borough Council* is that there was not at any point a contract between the vehicle owner on the one hand and the land-owner or car-park contractor in the other. The vehicle owners had never held a permit or parking ticket or been given permission park where they did.

52. Parking enforcement in private car-parks was obviously affected by the prohibition on private operator clamping introduced in England and Wales in 2002. *VCS* post-dates that change in the law. In *VCS*, the company provided car-park management services similar to the services provided by NCPS here. It erected warning signs indicating that, in the event of a contravention of the parking rules, VCS would be entitled to issue a "*parking charge notice"* requiring payment of a specified parking charge. The proceedings in *VCS* concerned payments arising from notices issued in respect of certain contraventions only (see para. 8 of the judgment of Lewison LJ.) and not with "*pure*" trespass (at para. 24). For the reasons set out in his judgment (with which Hallett and Treacy LJJ. agreed), Lewison LJ. concluded that such payments should be regarded as damages for trespass (at para. 44). He reached that conclusion even though VCS was a mere licensee of the car-park owners and did not enjoy any right to possession or occupation under the terms of its licences (at para. 35).

53. *VCS* was, of course, a VAT case and it will be necessary to return to consider the judgment of Lewison LJ. in more detail in due course. At this point, however, we turn to the decision of the UK Supreme Court in *ParkingEye*. ParkingEye was a provider of car-park management services. It managed a car-park in Chelmsford which was part of a retail park owned by a pensions fund. Customers of the businesses in the retail park were permitted to park, without charge, for 2 hours. If that limit was exceeded, or if there was non-compliance with other parking rules, a parking charge of £85 was payable. ParkingEye's revenue derived exclusively from such charges (and it in fact made weekly payments to the car-park owner). There were numerous signs both at the entrances to the car-park and within it warning of these rules. The issue before the Supreme Court was whether the parking charge was an unenforceable penalty. That issue is not material to the appeal here. However, the discussion of whether and to what extent the charge represented damages for trespass is highly relevant.

54. ParkingEye accepted that, as it was not the owner of the car-park, it could not recover damages for trespass unless it could be said to be in possession, in which case it might be able to recover "*a small amount of damages for trespass*"(at para 97). It does not appear that ParkingEye actually was in possession. In their joint judgment, Lord Neuberger and Lord Sumption make it clear that any claim in trespass lay with the owner, not ParkingEye, and was limited to the occupation value of the parking space (at para. 107). Lord Mance was of the same view. ParkingEye simply had a contractual entitlement to control parking at the site and was not capable of bringing proceedings for trespass(at para. 190). In any event, in his view, no ascertainable damage was

caused to ParkingEye *or* the car-park owner by individual episodes of overstaying or mis-parking (at para 199). That was because it suffered no loss arising from a motorist overstaying or otherwise parking in breach of the rules: Lords Neuberger and Lord Sumption (at paras. 99) and Lord Hodge (at para. 285) all agreed that ParkingEye suffered no loss and thus that it had no claim for damages.

55. The parking charge was nonetheless upheld (Lord Toulson dissenting). The charge was a contractual charge which the motorist had accepted by entering into and parking in the car-park. ParkingEye had a legitimate interest to protect (making efficient use of the available car parking spaces) and the charge was intended to deter overstaying motorists (and to produce an income stream for ParkingEye).

56. *ParkingEye* differs from *Arthur v. Anker* and *Vine v. Waltham Forest Borough Council* in that in *ParkingEye* the motorist was not a trespasser *ab initio.* The parking charge in *ParkingEye* was an agreed contractual charge, whereas there was no parking contract in *Arthur v. Anker* or *Vine v. Waltham Forest Borough Council*. Nonetheless the analytical framework in *Arthur v. Anker* and *Vine v. Waltham Forest Borough Council* also critically depends on consent, arising in circumstances very similar to the circumstances in which a contract was considered to arise in *ParkingEye.*

57. While the Court of Appeal's decision in *VCS* was not referred to in *ParkingEye,* the approach taken by the Supreme Court appears to be throw significant doubt on the characterisation of parking charges as damages in trespass that was so central to the

analysis in *VCS*. *ParkingEye* does not appear to have been opened to the Commissioner.

Damages for Trespass?

58. The consideration of the correctness of the analysis adopted by both the Court of Appeal for England and Wales in *VCS* and by the Commissioner in this case and directed to whether the charges paid by the owners of clamped vehicles are properly characterised as damages for trespass starts with *Inland Fisheries Ireland v. O' Baoill.* This case was concerned with fishing rights over non-tidal stretches of the Gweebara River in County Donegal. Inland Fisheries Ireland is a statutory body, which was established by the Inland Fisheries Act 2010 to replace the Central and Regional Fisheries Boards. It has extensive statutory functions and powers in relation to the management and control of inland fisheries. A large part of the Fishery was in State ownership and was effectively managed by Inland Fisheries Ireland.[10] It also held the rights under agreements that had been entered into by its statutory predecessor, the Northern Regional Fisheries Board (NRFB), with local riparian landowners (and in particular a Mr. McDonnell) under which it had sole and exclusive right and responsibility to manage, control, use and regulate the Fishery, including any possible private interests that the landowners enjoyed. Those agreements explicitly gave the NRFB the power to restrict the entitlement to fish and to require a permit for that purpose [11] This was, the Court

[10] Paragraph 54.

[11] At paragraph 10 and also at paragraph 52.

accepted, an exclusive licence to exercise such rights in relation to the riparian owner's portion of the Fishery as could have been exercised by that owner.[12] The NRFB had also entered into an agreement with the local fishing club to which Inland Fisheries Ireland had succeeded. There was, it seems, no doubt as to the entitlement of Inland Fisheries Ireland to maintain proceedings, including a claim for damages, as the holder of a *profit a prendre.*[13]

59. It was against the backdrop of these arrangements and agreements that Laffoy J. concluded that Inland Fisheries Ireland was entitled to seek the reliefs claimed by it, which included injunctions restraining the defendants from fishing without a permit as well as damages for trespass. As regards the State owned fishing rights, these were in the management of the plaintiff. As regards Mr. McDonnell's fishing rights, the plaintiff was contractually entitled to manage, control, use and regulate the Fishery and those contractual rights were enforceable by it. Accordingly, on the basis of the reasoning of Laws LJ. in *Manchester Airport plc v. Dutton* [2000] QB 133, [1999] 3 WLR 524, the plaintiff was entitled to seek equitable relief to restrain interference with Mr. McDonnell's interest in the Fishery, per Laffoy J at para. 82. Although the reliefs claimed by Inland Fisheries Ireland included damages for trespass, Laffoy J. did not expressly address the question of whether such a claim for damages could be maintained in the circumstances.

[12] Paragraph 53.

[13] At paragraph 26, citing *Gannon v. Walsh* [1998] 3 IR 245.

60. *Manchester Airport plc v. Dutton* was one of a number of authorities referred to by the Court of Appeal in *VCS*. The plaintiff had been given a licence to occupy a wood for the purpose of carrying out works connected with the construction of an airport runway. Shortly before the grant of the licence, the defendants (who opposed the works) entered the wood without permission, intending to frustrate the works. The plaintiff sought an order for possession. The order was granted in the court below and upheld by the Court of Appeal (Chadwick LJ. dissenting). Laws LJ. reasoned that, as the plaintiff would have been entitled to such order if it had been in actual occupation and control of the site, there could be an objection to the making of such order for the purpose of allowing the plaintiff to enter into occupation in accordance with its licence, Such a remedy was necessary to protect the rights of occupation granted to the plaintiff by the licence and did not exceed such rights. In a separate judgment, Kennedy LJ. considered that the licence had the effect of granting a right to possession, albeit not a right to exclusive possession such as would give rise to an estate in the land.

61. *Monsanto plc v. Tilly* [2000] Env LR 313 (also referred to in *VCS*) involved a claim for injunctive relief (no claim for damages was made) brought by Monsanto against environmental protesters who had committed themselves to pulling up genetically-modified crops being grown by a number of farmers on Monsanto's behalf. The crops were being grown as part of licensed trials. The agreement between Monsanto and the individual farmers provided that the seed was the property of Monsanto, that the drilling etc. of the seeds would be carried out by its contractor and, most significantly, that the crop resulting from the trials was the property of Monsanto. In these circumstances, it is not surprising that the Court of Appeal concluded that Monsanto was entitled to

maintain proceedings for trespass to goods (the crops) and trespass to land, the latter claim being supported by earlier 20th century authority referred to by Stuart-Smith LJ. who gave the principal judgment. Concurring, Mummery LJ cited *Crosby v. Wadsworth* 102 E.R. 1419, (1805) 6 East 602 as authority for the proposition that an action for trespass to land may be brought by a person who is entitled under an agreement with the landowner to exclusive possession of growing crops. Far from representing any dramatic extension of the circumstances in which a bare licensee may sue for trespass, *Monsanto* is thus firmly rooted in established precedent.

62. Shortly after the decision in *Monsanto*, another protest case came before the Court of Appeal in *Countryside Residential (North Thames) Ltd v. Tugwell* [2000] 2 EGLR 59. The plaintiff was a developer that held options to purchase two areas of woodland for residential development. The options gave the plaintiff permission to access the lands to carry out surveys and investigations. The plaintiff subsequently acquired an interest in both plots but the issue before the Court of Appeal was whether the licences granted by the option agreements entitled the plaintiff to an order for possession. Waller LJ. contrasted the licences with the terms of the licence considered in *Manchester Airport plc v. Dutton*. The licences given to the plaintiffs did not give it any right of possession or occupation and a mere right of access was not enough to trigger the application of *Dutton*. A right of access did not provide "*effective control*" over the land. In reaching that conclusion, Waller LJ. rejected the contention that terms could be implied into the licence so as to provide for control of the lands by the plaintiff.

63. *Alamo Housing Co-Operative Ltd v. Meredith* [2003] EWCA Civ 495 must next be considered. Alamo Housing Co-Operative (Alamo) was a housing association that had been granted a lease of a number of properties owned by Islington Council. The properties were intended to be used for temporary housing and it was envisaged that the Council would require the properties to be returned to it as a programme for estate development progressed. The lease was for a term of 2 years but with a power for earlier terminative given to the Council. Alamo granted sub-leases in respect of the individual properties to sub-tenants. The sub-leases entitled Alamo to terminate by 4 weeks' notice to quit in the event that the Council informed Alamo that it required vacant possession and had served notice to quit on it. The Council terminated the lease and Alamo duly served notice to quit on its sub-tenants. However, the sub tenants did not vacate and Alamo brought possession proceedings. At the time it did so, the notice to quit given by the council had expired. On that basis, it was argued on behalf of the sub-tenants that Alamo did not have any sufficient interest in the properties to entitle it to possession. The Court (which included Mance LJ., one of the judges in *ParkingEye*) rejected that argument, on the basis that the lease contained an express exception in the clause providing for its termination ("*.. except for the purpose of enabling eviction if required by the Council..")* the effect of which was to confer on Alamo a continuing right to possession for that purpose.

64. Finally, there is *Mayor of London v. Hall* [2010] EWCA Civ 817, [2011] 1 WLR 504, yet another protest case. Again, the facts are particular. The issue was whether the Mayor of London (on behalf of the Greater London Authority) was entitled to an order for possession of Parliament Square Gardens, as well as orders directing the defendants

to dismantle tents etc they had constructed there. The Gardens were, by statute, vested in the Crown but the care, control, management and regulation of them was vested in the Authority. The Court of Appeal (per Lord Neuberger M.R.) analysed the relevant statutory provisions, concluding that the Crown held only a "*bare ownership*" or *"bare title*" and the "*every aspect of ownership and possession"* was vested in the Mayor, as part of his own statutory duty and right. The Mayor had "*complete control and regulation*" of the Gardens and it was necessarily implicit in those statutory provisions that the Mayor was entitled to sue for possession in his own name.[14]

The decision in VCS

65. We discuss these cases in a little detail because they form the basis for the analysis in *VCS* which in turn appears to have had a significant impact on the Commissioner's assessment here. The clamp release fees payable to NCPS can properly be regarded as damages for trespass or payments in lieu of such damages - as the Commissioner characterised them at paragraph 60 of her Determination – only if NCPS had a sufficient interest in the car-parks under its management to sue for trespass. With respect to the Commissioner, this issue is not really addressed in her Determination, beyond the citation of *Inland Fisheries Ireland v. O' Baoill.* Further, and separately, even on the premise that NCPS is, in principle, entitled to maintain a claim for damages for trespass, a significant question arises as to what damages (if any) it might be entitled to recover above and beyond nominal damages.

[14]At paras. 28 to 33.

66. Though perhaps obvious, it bears repetition that, in contrast to the present appeal, VCS was *not* concerned with vehicle clamping. The Commissioner did not think that this was a difference of any significance as parking charges and clamping release fees (and towing fees) "*each generate money in the context of enforcement."*[15] We do not agree. This appeal is not concerned with parking "*enforcement*" in the abstract. The argument made by Revenue – that the release of a parking clamp by NCPS constitutes the supply of a service for consideration such as to bring it within the scope of Article 2 (and Article 9) of the VAT Directive - is one that could not be made, or certainly not made in the same way, in relation to the imposition of parking charges such as those at issue in *VCS*. Assessment of that argument necessarily requires engagement with the specifics of the actual dealings between NCPS and motorists here. That there may be a different method of enforcement open to NCPS (and the evidence of Mr. Ballard was, of course, that it could not pursue parking charges because it did not have access to the national vehicle database) and that such would or might not involve the supply of a vatable service by NCPS (if that be the case) does not provide the answer to the issue presented here, which is whether the declamping of vehicles is such a service.

67. Another notable feature of *VCS*, to which we have already alluded, is that the appeal concerned parking charges relating to certain contraventions only, such as parking in a disabled parking bay without displaying an appropriate permit and parking outside a marked parking bay. Parking charge notices issued for other contraventions, including

[15] Determination, at paragraph 20.

parking without displaying a valid ticket or permit, were not within the scope of the appeal and the charges levied for such contraventions were included in VCS' VAT return.[16]

68. It is thus important to appreciate the parameters of the argument in *VCS*. The First-tier Tribunal (FTT) had found for HMRC on the basis that the monies received by VCS in respect of parking charges were consideration for VCS' services to the landowner with which VCS had a contract to provide parking management services. On appeal to the Upper Tribunal, VCS argued that the payments were outside the scope of VAT either because they were a penalty or damages for breach of contract or because they were damages for trespass. In answer to those arguments, HMRC argued, firstly, that there was no contract between VCS and motorists and, secondly, that VCS had acquired no licence to occupy land such as gave rise to a right to sue for trespass.

69. The Upper Tribunal addressed the trespass issue first. Having referred to *Dutton*, *Countryside Residential* and *Alamo*, it concluded that VCS did not have any contractual right to occupy or have possession. It had a mere right of access which did not give it any right to bring an action in trespass against a mis-parking motorist.[17] As regards the contract issue, the FTT had found that there was a contract between VCS and the motorist but that income from payment of parking charges was not damages for breach of contract but was paid as a condition of the contract and *"therefore constituted*

[16] Paras. 9 to 11 of the decision of the Upper Tribunal (Tax and Chancery Chamber) [2012] UKUT 129 (TCC).

[17] UT, at paras. 27 to 29.

consideration for a supply of services."[18] Before the Upper Tribunal, neither party sought to support this aspect of the FTT's reasoning. HMRC argued that there was no contract between VCS and motorist. Critically, HMRC accepted that, if there was such a contract, the payment of parking charges would not have been payment for a supply of services made under that contract.[19] Whether there was such a contract was therefore the key issue before the Upper Tribunal. The Upper Tribunal found that there was no contract as VCS was not in a position, by virtue of its limited licence, to offer any right to park. That right to park had generally already been given by the landowner/client, by way of parking permit. The fact that such permits purported to be given by VCS did not alter the position in law. There being no contract between VCS and the motorist, the only relevant contract was between VCS and its client, under which VCS supplied parking control services to the client. In the view of the Upper Tribunal, the charges collected from motorists by VCS represented damages for trespass or breach of contract due to the client. By allowing VCS to collect and retain those charges, the client was giving consideration, or further consideration, to VCS for its parking control services under their contract and the supply of such services was therefore subject to VAT at the standard rate.[20]

[18] UT, paragraph 34, citing paragraph 27 of the FTT decision. The FTT decision does not expressly identify the "*services*" for which the parking charges were regarded as consideration but it seems clear that they comprised the provision of parking services to moto

rists.

[19] UT, at para. 37.

[20] UT, at paras. 46 to 49.

70. On further appeal to the Court of Appeal, the issues in dispute were narrow. Again, it was common case that, if there was a contract between VCS and the motorist, the appeal would have to be allowed.[21] That was, accordingly, the central issue. Lewison LJ. considered that there was a serious flaw in the reasoning of the Upper Tribunal, in that it confused the making of a contract with the power to perform it. Even if VCS did not have the power to grant a licence to motorists to park, it did not follow that it had not contracted to do so.[22] The appeal was concerned with charges levied on permit holders, not "*pure trespassers"* and the starting point was to consider the terms on which the parking permits had issued. The permit was, in law, an offer which was accepted by the motorist when they first parked. That was reinforced by the signage, which indicated that, by entering the car-park, the motorist was entering into a contract. The contract was between VCS and the motorist and VCS could in fact perform the contract because it was permitted by the landowner to do so. VCS contracted in its own right, as an independent contractor, not as agent of the landowner.[23] The argument that the payments made by motorists to VCS were to be treated as payments made by the landowner was *"very artificial."* The landowner did not receive any money or have any control over the amount received (or any right to know the amount) and no money passed from the landowner to VCS that was attributable to parking charges.[24]

71. Lewison LJ. expressed his conclusions on the contract issue in the following terms:

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[21] At para. 20.

[22] At paras. 21 and 22.

[23] At paras. 25 to 27.

[24] At paras. 28 to 29.

"30. Although Mr. Singh relied on clause 5 of the contract ("The Client request and authorise the Company to carry out its obligations hereunder") I do not consider that that single word will carry the weight that he suggests. It does not, to my mind, turn a contract for the provision of services into a contract of agency. Mr. Singh also stressed the expectation that VCS would be paid for the provision of its parking control services, and that one would expect the consideration to flow from the landowner. I accept, of course, that VCS is in business to make money. But it does not follow that VCS expected to make money by being paid by the landowner. What it obtained under the contract (apart from the small fees charged for permits and signage) was the right to exploit the opportunity to make money from the motorists. The fruits of that exploitation cannot, in my judgment, sensibly be described as payment by the landowner. Mr. Singh also accepted that if the contract between VCS and the landowner had given VCS the right to occupy the car park, then the penalty charges would not have been consideration for the supply of the parking services; and hence would have been outside the scope of VAT. But I do not see why that should make all the difference. Whether as occupier or merely as service provider, one of the rights that VCS acquired under the contract was the right to enforce parking restrictions and keep the proceeds.

31. I would hold, therefore, that the monies that VCS collected from motorists by enforcement of parking charges were not consideration moving from the

landowner in return for the supply of parking services. I would therefore allow the appeal on that ground."

72. Lewison LJ. then proceeded to consider the trespass issue. Noting that the traditional view was that a licensee cannot maintain an action for trespass, he observed that this principle had been modified in more recent times, citing *Dutton*. He felt that two principles emerged from *Dutton*, namely (i) the court has power to grant a remedy to a licensee which will protect but not exceed the legal rights granted by the licence and (ii) in every case the question must be what is the reach of the right and whether the defendant's acts violate its enjoyment. These principles were not, in his view, limited to cases where the licensee has a right to possession or occupation.[25] Having surveyed the subsequent authorities to which we have already made reference above, Lewison LJ. expressed his conclusions on the trespass issue as follows:

"44. In the present case the contract between VCS and the landowner gives VCS the right to eject trespassers. That is plain from the fact that it is entitled to tow away vehicles that infringe the terms of parking. The contract between VCS and the motorist gives VCS the same right. Given that the motorist has accepted a permit on terms that if the conditions are broken his car is liable to be towed away, I do not consider that it would be open to a motorist to deny that VCS has the right to do that which the contract says it can. In order to vindicate those rights, it is necessary for VCS to have the right to sue in trespass. If, instead of

[25] At paras. 34 to 35.

towing away a vehicle, VCS imposes a parking charge I see no impediment to regarding that as damages for trespass."

73. It is striking that at no point in the course of the judgment in *VCS* is any reference made to the provisions of any of the VAT directives or to any of the jurisprudence concerning their interpretation and application. As noted, the central issue was whether there was a contract between VCS and the motorists. HMRC did not contend that, if there was such a contract, payment of the parking charge by the motorist was to be treated as consideration for the provision by VCS of any reciprocal service to the motorist. Perhaps that is unsurprising: it is not apparent what service might be said to have been supplied by VCS in return for such payment. The parking charge was not a payment for parking. Insofar as the motorist was required to pay for parking, they had already done so by way of payment for their parking permit.

74. The position here, Revenue says, is materially different. Here, it says, NCPS provides a service in return for the payment of the clamp release fee – namely the service of releasing the clamp.

Application to the facts here

75. In our view, whatever may be the correct characterisation of the clamp release fee in issue in this case, it cannot properly be regarded as damages for trespass or a payment in lieu of such damages. As we read it, the decision of Laffoy J. in *Inland Fisheries Ireland v. O' Baoill* does not support such any such characterisation.

76. The contractual documentation produced to the Appeal Commissioner does not confer on NCPS any right or rights equivalent to the rights conferred on the plaintiff under the agreements with the riparian landowners and the arrangements with the State in *Inland Fisheries Ireland v. O' Baoill.* In contrast to the licence agreement at issue in *Manchester Airport plc v. Dutton,* none of the contracts here give NCPS any right to occupy the car-parks under its management, still less any right to possession of them.[26] The contractual right of occupation granted to the plaintiff was key to the analysis of Laws LJ. in *Manchester Airport plc v. Dutton* and it is clear that Kennedy LJ. regarded it as critical also: indeed he characterised the plaintiff's contractual right as a right to possession (albeit not exclusive possession) of the lands at issue there.

77. It is not necessary here to express any concluded view on whether a right of occupation is a pre-requisite to the maintenance of a claim for trespass by a licensee, though that appears to us to be the better view. Even if such right of occupation is not essential, and even if the governing principle is as Lewison LJ. suggests in *VCS,* namely that the court has power to grant a remedy to a licensee which will protect but not exceed the legal rights granted by the relevant licence, in our view nothing in the licence arrangements typically entered into by NCPS suggests that permitting NCPS a remedy in damages for trespass was within the contemplated scope of those arrangements *or* that such a remedy was or is necessary to protect the rights granted to it under the licences.

[26] Excepting again the lease of the car park in Naas.

78. Where a vehicle is parked without permission and/or in breach of the parking rules, the remedy provided by the licences is not a claim for damages for trespass (whether such claim is brought by the landowner or by NCPS) but the immobilisation of the offending vehicle by clamping or (at least in theory) the towing away of the vehicle. On NCPS's own evidence, clamping was its "*preferred and most effective enforcement mechanism".* That is a significant point of factual distinction from the position in *VCS,* where no power to clamp was available to the car-park operator.

79. On the basis of the licensing arrangements proved in evidence before the Appeal Commission, NCPS could not, in our view, have maintained a claim for trespass against the owner of a vehicle improperly parked in one of the car parks under its management and, even if it could maintain such a claim it is not evident on what basis it could recover anything more than nominal damages.

80. It follows that we respectfully disagree with the Appeal Commissioner's view that the clamp release fees at issue here are properly characterised as *"in the nature of damages [for trespass] or a payment in lieu"* of such damages. We would add that, even if such a characterisation was correct as a matter of national law, it is clear that it would not be decisive in assessing whether the payment of such fees was in consideration for the supply of a service for the purposes of Article 2 of the VAT Directive in light of the decision in *MEO.*

81. Nor does it seem to us to be correct to characterise such fees as a payment for "*an anterior parking infraction*" which is merely enforced by clamping, as Mr. Mitchell

argued. Such a characterisation is either no more than a different way of articulating the characterisation just rejected by us or else it is a new argument, advanced for the first time on appeal to this Court. Either way, we are not persuaded by it. It immediately begs the question: in respect of what *liability* is such payment for? It cannot be a liability in damages for trespass, for the reasons just discussed. Nor, in our opinion, can it be a liability such as arose in *ParkingEye*. In contrast to the position in *ParkingEye*, motorists parking in the car-parks operated by NCPS are not advised that they will be liable for a "*parking infraction payment*" in the event that they park without a permit or ticket or otherwise breach applicable parking rules. Rather, they are advised that, should they park unlawfully and/or in breach of the parking rules, their vehicle is liable to be clamped and, in that event, the clamp will be released only on payment of a "*clamp release fee*" of the specified amount.

82. The reality is that, however flagrantly a motorist may breach NCPS's parking rules, no liability to make a payment to NCPS arises unless and until their vehicle is clamped. Then, and only then, does a fee become payable by the motorist. If an unlawfully parked car is reported to NCPS and it dispatches a clamper to immobilise the vehicle but that clamper arrives as the offending vehicle is being driven away, the motorist concerned will have no liability to NCPS.

THE CORRECT VAT TREATMENT HERE

83. If the fee paid by errant motorists is not a payment "*in the nature of damages [for trespass] or a payment in lieu",* what is it a payment for?

84. In our opinion, the payment is clearly a payment for the release of the clamp. We note that this appears to be NCPS's understanding also, given that its documentation and signage refers variously to a "*clamp release fee"* and a "*declamp fee"* . It seems very likely that motorists required to pay such a fee have the same understanding.

85. From a legal perspective, a motorist who parks in one of NCPS' car-parks is taken to consent to the clamping of their vehicle by NCPS should it be parked without the necessary permission or is otherwise parked in breach of any applicable parking rules. That consent permits NCPS to clamp the offending vehicle and to demand payment of the stipulated release fee as a precondition of removing the clamp. On payment of that fee, the motorist is entitled to demand that the clamp be removed. If following payment NCPS was to refuse to release the clamp or fail to do within a reasonable time, it would be liable to the motorist in damages.

86. This analysis makes it clear that there is a "*legal relationship*" between NCPS and motorist and, in our view, that relationship clearly involves "*reciprocal performance*" (*Tolsma*). Arguably, the relationship is contractual in character, at least where the motorist is not a trespasser *ab initio*. But it is not necessary that there should be a contract following the decision in *Town and Country Factors*. Here, of course, the

mutual obligations between NCPS and motorist are not merely binding in honour. Even if not strictly contractual in character, those obligations are binding and enforceable, Once the motorist is parked in breach of an applicable parking rule, NCPS is *legally entitled* to clamp their vehicle and is *entitled* to *demand* payment of the clamp release fee as the price of releasing the vehicle (on the basis of the motorist's previous consent). On payment by the motorist, NCPS is *obliged* to release the clamp. Release of the clamp thus constitutes the necessary "*corresponding performance*" (*Posnania Investment*)

87. As is apparent from the authorities to which we have referred above, it is not necessary in this context to make any inquiry as to the relationship between the clamp release fee and the cost of providing the service: all that is required is that there should be a "*direct link*" between the provision of services and the consideration received (*Hotel Scandic Gåsabäck*). In circumstances where the release of the clamp is strictly conditional upon prior payment of the clamp release fee, such a "*direct link*" clearly exists here. Equally, whether, as a matter of Irish law, the clamp release fee is to be characterised as a "*penalty*" is irrelevant as per *MEO*.

88. In our view, therefore, all of the elements necessary to establish "*the supply of services for consideration"* are present here and Article 2 of the VAT Directive is satisfied.

89. As regards Article 9, there is little room for debate. While Mr. Mitchell did not concede that Article 9 was satisfied here, he fairly characterised the case as an Article 2 case. In our view, there is no doubt but that NCPS is a person that is, independently, carrying

out an economic activity. Its *raison d'être* is profit. Whether it can be said to operating in a market is, in our view, irrelevant to the application of Article 9. As regards Mr. Mitchell's other argument, namely that there was no evidence that clamping generated profits for NCPS, again that is beside the point in our view.

90. It follows that the removal of claims by NCPS is, in our view, a taxable transaction for the purposes of the VAT Directive and VATCA.

91. We are satisfied that we are entitled to reach this conclusion, which differs from that arrived at by Appeal Commissioner, within the confines of a case stated. Our conclusion does not involve any departure from the primary acts as found by the Commissioner. Insofar as the Appellant contended that the Commissioner's characterisation of the clamping release fee as "a payment in the nature of or in lieu of damages for trespass"- and thus outside the scope of VAT - was a primary finding of fact, we do not agree. The characterisation of such payment is, in our view, a matter of law: *MacCarthaigh v Cablelink Ltd*, at p. 518 to 520.

CONCLUSIONS

92. The centrepiece of the appellant's argument as to why the clamping fees the subject of these proceedings were not subject to VAT was that they were in the nature of damages for trespass and paid by vehicle owners to the appellant as such. The Commissioner erred in accepting this argument. The correct legal characterisation of the transaction whereby a motorist whose vehicle has been clamped pays NCPS to remove the clamp is that of a service provided by the latter to the former. Insofar as the decision of the Court of Appeal of England and Wales in *VCS* decides otherwise it is, in our view, confined to its own facts and context and in any event appears to have been overtaken by the decision of the United Kingdom Supreme Court in *ParkingEye.* The removal of the clamp was a "*service provided to the car owner"* in consideration of the payment of the release fee and that fee is properly regarded as subject to VAT.

93. It follows that this appeal should be dismissed. The appellant having been wholly unsuccessful in these proceedings it is our provisional view that it should bear the costs accordingly. If the appellant wishes to dispute this it should advise the Court of Appeal office within ten days of the date of this judgment whereupon the Court will direct a hearing on the question of costs.

94. Costello J. has read this judgment in draft and agrees with this judgment and the Order we propose.