03TACD2018

BETWEEN/

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against the refusal of a repayment claim made by the Appellant on 16 January 2014 in relation to VAT paid on clamping release fees in respect of the periods November-December 2009 to September-October 2013. The claim was refused by the Respondent on the basis that the clamping release fees were subject to VAT in accordance with section 3 of the Valued Added Tax (Consolidation) Act, 2010 ('VATCA2010') and Article 2 of Council Directive 2006/112/EC and that, as a result, a repayment of VAT did not arise.

2. Part of the claim related to VAT for the period of assessment November-December 2009, which was refused by the Respondent on the basis that it fell outside the four-year statutory limitation period contained in section 99 VATCA2010. The Respondent's refusal in relation to this aspect of the repayment claim was not contested by the Appellant. The contested claim in relation to clamping release fees related to the claim made within the statutory four-year period and this claim totalled €1,778,458.

Background

3. The Appellant operates pay and display and barrier-controlled car parks under licence from various landowners including churches, schools, universities, hospitals

and management companies. The Appellant accounts for VAT on the receipts from the operation of these car parks.

4. Signage in the car parking area displays the Appellant's contact numbers and serves to warn motorists that if they park in the wrong area or in excess of the permitted time, they will be liable to be clamped and that there will be a clamp release fee payable for the removal of the clamp. In general, the Appellant may patrol the car park or make a number of visits for the purpose of clamping and de-clamping.

5. The Appellant submitted that most of the signage expressly refers to clamping because clamping is generally a more effective and cost-deterrent remedy than tow away. The Appellant submitted that if a vehicle was parked in an area which obstructed an entrance, which obstructed other vehicles or which caused a hazard, it would be towed. The Appellant submitted that the sticker which is placed on a clamped vehicle provides *'The Company also reserves the right to remove the vehicle at the owner's expense'*.

6. The Appellant provided examples of some of the signage as follows

   At a train station;

   > *'Warning! Private Property. A valid parking ticket must be displayed on the dashboard. No parking on yellow lines, footpaths, verges or outside of a parking space. Unauthorised or illegally parked vehicles will be clamped! Clamp release fee €120 per 24 hours or part thereof. For a de-clamp please contact :08XXXXXXXX'*

   At a hospital;

   'Welcome to **[NAME REDACTED]** Hospital [picture of a clamp and tow away] Parking controls and enforcement in operation. Please park legally.'

   > *''Warning! Set down max stay 20 minutes. No return within 2-3 hours. Unauthorised or illegally parked vehicles will be CLAMPED! Clamp release fee €100 per 24 hours or part thereof. Tow away fee €120. Vehicles will be immobilised or removed 24/7. For a de-clamp please contact; 08XXXXXXXX.'*

   At an apartment block;

'Warning! Private property. Parking in designated space only. No parking in common areas. Unauthorised or illegally parked vehicles will be CLAMPED! Clamp release fee €90 per 24 hours or part thereof. For a de-clamp please contact: [X]'

7. The Appellant stated that standard terms and conditions which apply to contracts with any car park owner provide for vehicle removal but that a vehicle would be removed only if the vehicle had been abandoned, was creating a hazard, a safety concern or was causing a significant obstruction to other users of the facility.

8. The Appellants submitted that an example of the standard terms and conditions (with the qualification that the below terms are not specifically applicable to all contracts) provides as follows;

'Vehicle Penalties and Immobilisation

- *A wheel clamp or removal shall be issued to all vehicles on the Site(s) not displaying:*
- *A valid parking permit*
- *A valid parking voucher (if applicable)*
- *Parked after the expiry of paid for time*
- *Parked in a parking space displaying an expired permit/voucher or ticket*
- *Parked in a restricted area without authorisation*
- *Parked outside the markings of a parking bay*
- *Parked in a prohibited area*
- *Parked without the landlord's authority*
- *Parked in such a way as to cause an obstruction or danger*
- *Parked in contravention of any other regulation specified on site.*

The fee for removing a wheel clamp shall be €120. All payments shall be payable by the registered owner of the vehicle by means of cash or credit/debit card payable directly to the Contractor. No cheques will be accepted for payments. Receipts will be provided by the Contractor for all payment received.

Vehicle Removal

The following charges will apply throughout the term of the Contract;

Removal Charges shall be: €350 per vehicle from surface areas and €500 per vehicle from underground areas. This charge includes disposal of the vehicle. The

Contractor reserves the right to reasonably increase its charges during the term of the Contract by providing reasonable notice to the client.

Abandoned vehicles

The Contractor's charge for the removal of abandoned vehicles on the Site(s) shall be as above.'

9. The Appellant submits that clamping release fees are not subject to VAT on the basis that a clamping release fee is a payment in the nature of or lieu of damages for breach of contract and/or trespass and as a result is not subject to VAT in accordance with section 3 VATCA2010 and Article 2 of Council Directive 2006/112/EC.

Legislation

10. The relevant legislation is Section 3 VATCA2010 and Article 2 of Council Directive 2006/112/EC.

Section 3 VATCA2010 - Charge of value-added tax.

Except as expressly otherwise provided by this Act, a tax called value-added tax is, subject to and in accordance with this Act and regulations, chargeable, leviable and payable on the following transactions:

(a) the supply for consideration of goods by a taxable person acting in that capacity when the place of supply is the State;

(b) the importation of goods into the State;

(c) the supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State;

(d) the intra-Community acquisition for consideration by an accountable person of goods (other than new means of transport) when the acquisition is made within the State;

(e) the intra-Community acquisition for consideration of new means of transport when the acquisition is made within the State.

Article 2 of Council Directive 2006/112/EC

Article 2

1. The following transactions shall be subject to VAT;

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such.

…

Evidence

11. Mr. A, Managing Director of the Appellant company, gave evidence on behalf of the Appellant. Mr. A. detailed the history and operations of the company, the landowners with whom the Appellant entered into licences (hospitals, management companies, churches, universities, etc.) and the use and operation of wheel clamps as a means of enforcement in respect of defaulting and trespassing motorists.

12. Under cross-examination Mr. A. accepted that there was no reference to '*trespass*' or '*damages*' in the contracts with the landowners. He stated that he considered these references unnecessary because the rules and penalties for non-compliance were clear from the signage.

13. While there is reference to '*tow away*' in some of the signage, Mr A. stated that tow away is '*very infrequent*' and '*very rare*' and that it may have arisen in relation to abandoned vehicles previously but that he wasn't sure if it had actually ever occurred.

14. He accepted that there was no reference to '*penalty notices*' in the contract between the Appellant and the landowners and that in 2010 to 2013 there were no parking charge notices issued by the Appellant. He stated that the Appellant did not use parking charge notices because the Appellant does not have access to the national vehicle file in Ireland and thus has no means of ascertaining the identity of a defaulting motorist.

15. The Respondent put it to Mr. A. that the tender document for **[NAME REDACTED]** Institute of Technology (which later became the contract between **[X].**I.T and the Appellant) provides for a 70:30 split of '*gross revenue'* between the Institute and the Appellant in circumstances where that '*gross revenue'* includes clamping release fees from motorists using the car parking area. The Respondent emphasised that the contract made no distinction between income received from pay and display parking and income received from clamping release fees and the Respondent submitted therefore that monies generated on foot of clamping release fees comprised service income bearing the same legal characteristics as pay & display income and was subject to VAT.

Submissions in brief

16. The Appellant submitted that clamping release fees are not subject to VAT on the basis that such fees are generated outside the scope of contract, arising in the context of enforcement of the Appellant's rights against trespassing motorists. The Appellant contended that a clamping release fee is a payment in the nature of or in lieu of damages for trespass, and as such, does not constitute a taxable supply of services in accordance with section 3 VATCA2010 and Article 2(1) of Council Directive 2006/112/EC.

17. The Respondent submitted that clamping release fees arise pursuant to a contract to de-clamp, that the Appellant provided a de-clamping service to the motorist, that the clamping release fee comprised consideration for the provision of that service and is therefore a taxable supply of services for the purposes of section 3 VATCA2010 and Article 2(1) of Council Directive 2006/112/EC.

ANALYSIS

Methods of enforcement

18. In the UK, companies that supply parking services enforce parking through the use of, *inter alia,* parking charge notices as was the case in *VCS Ltd. v Revenue and Customs Commissioners* [2013] STC 892. A parking charge notice informs the motorist that he is liable to pay a parking charge within a specified time period and if the motorist does not pay within the time specified, the motorist will be pursued through the courts.

This is possible in the UK because the parking company has access to the national database of drivers and is in a position to ascertain the identity of a defaulting motorist.

19. The Appellant stated that a parking charge notice as a method of enforcement is ineffective in this jurisdiction because the Appellant does not have access to the national vehicle file and therefore cannot identify and pursue motorists. The Appellant submitted that for this reason, such notices are not used. The Appellant stated that clamping was its preferred and most effective enforcement mechanism.

20. The Appellant does not issue parking charge notices and stated that tow away rarely arises but that tow away could be effected if necessary in the event of a vehicle causing an obstruction or a hazard. The Respondent emphasised the differences between parking charge notices, clamping and tow away and stated that the Appellant does not use either parking charge notices or tow away but that it confines itself to clamping and that, as a result, the within appeal can be distinguished from the UK case of *VCS Ltd. v Revenue and Customs Commissioners*. Whatever enforcement mechanism is used, I do not regard the differences as significant for VAT purposes. A parking charge notice, clamping release fee or tow away fee each generates money in the context of enforcement.

21. The Respondent submitted that *VCS Ltd. v Revenue and Customs Commissioners* could be distinguished from the within appeal as it related primarily to parking charge notices with different charges applying in relation to different types of parking contravention, i.e. parking outside the markings, parking in a disabled bay without authorisation, parking in a restricted area of the car park etc. However, in order to ascertain whether there has been a '*supply for consideration of services by a taxable person'* for the purposes of section 3 of the VATCA2010, it is important to focus on the origin of the mechanisms of parking charge notices, clamping and tow away and the legal context in which they arise.

22. The Court of Appeal in *VCS* found that where the motorist purchased a permit, there was a contract between the licensee and the motorist, that the terms and conditions on which the permits were issued amounted in law to an offer and that the offer was accepted by the conduct of the motorist in entering the car park and parking his/her vehicle. In the within appeal the Appellant stated that signage prominently displayed

next to ticketing machines provided that :*'If you do not accept the terms and conditions applicable you may exit the car park immediately without charge'*. I am satisfied that in cases where a motorist purchased a permit or a parking ticket, there was a contract in existence between the Appellant and the motorist.

23. Where a motorist has purchased a parking ticket, the ticket will expire after a period of time and if the motorist remains parked after this period has expired the motorist no longer holds a valid contract and thus the motorist becomes a trespasser. The same rules apply where a permit expires. In addition, a motorist who holds a valid ticket or permit could park in a manner prohibited by the ticket or permit, in which case he will not be covered by the terms of the ticket or permit and will be trespassing. Alternatively, the motorist could have neglected to purchase a ticket/permit in the first instance, in which case he will be a trespasser from the beginning.

24. In short, motorists who failed or omitted to purchase a ticket or permit and motorists who remain parked after their parking tickets or permits have expired, become trespassers. These motorists are parked in violation of the Appellant's rights under licence. The Appellant is entitled to enforce its rights as licensee against such trespassers in accordance with *Inland Fisheries v O'Baoill and others [2012] IEHC 550* and a Court has power to grant a remedy which will protect but not exceed the legal rights granted by the licence.

25. Mr. A. in evidence accepted that the license between the Appellant and the aforementioned Institute of Technology in terms of remunerating the Institute makes no distinction between income received from pay and display parking and income received from clamping release fees. The Respondent suggested that this demonstrated that a clamping release fee was service income bearing the same legal characteristics as pay & display income and was therefore subject to VAT.

26. In my view, the fact that the Appellant is obliged to pay his licensor a percentage of service fees generated from pay and display fees together with a percentage of clamping release fees, does not characterise these monies as service fees subject to VAT. The contract provides for a specified percentage of gross revenue (less VAT) to be paid to the land owner and in the context of returning these monies the contract does not distinguish between monies generated on foot of pay and display and monies generated on foot of clamping release. It simply provides that 70% of all

income received be returned to the licensor. It does not follow that because the landowner receives 70% of both pay and display and clamping release fees that each income stream bears the same legal characteristics. The income must be examined in the legal context in which it arises.

Consideration

27. The Respondent submitted that de-clamping is a service for consideration within the meaning of section 3 of the VATCA2010 on the following basis;

    - The car owner pays the Appellant to remove the clamp. The consideration is agreed at the value shown on the notice. The de-clamping service is provided to the car owner.

      Or

    - The Appellant provides a de-clamping service to the land owner wherein it is allowed to retain the clamping fee as payment for that service.

28. The Respondent submitted; *'If I clamp you, you will have to avail of my service to take the clamp off'* and *'If someone is clamped and is de-clamped for a fee, we have a service*'. The Respondent contended that there is a new contractual relationship in place when the Appellant removes the clamp and the motorist agrees to pay the clamping release fee. The Respondent stated that if the Appellant refused to remove the clamp, the motorist would be entitled to sue the Appellant for breach of contract. The Respondent's submission in this regard is based on the assumption that there is a contract in existence at this point in time; however, this assumption is incorrect.

29. 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 licensee's 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.

30. Senior Counsel for the Appellant stated that the submission that a motorist is entering into a contract to have a clamp removed, is a submission which is '*starting one step too late*'. The Appellant stated that the Respondent, by narrowing the analysis to commence once the clamp is applied, is creating what looks like a service contract but that this approach ignores the circumstances which brought about clamping in the first place. Senior Counsel for the Appellant stated: ' *.... In order for .... Revenue's position to make any sense, we have to ignore the obvious, that a clamp has been put on a vehicle. Was it illegally put on? In which case there can be no contract. Was it lawfully put on? Was it invited? Did I ask to have my car clamped? How did this happen? It's simply ignored.'*

31. The Appellant is correct in its submission that payment of monies for removal of the clamp is not the starting point in the analysis. The matter of removal of the clamp begs the question of how the clamp came to be fixed to the vehicle in the first place and clamping release fees must be examined in that context. If I immobilise your car and charge you a fee to mobilise it again, it does not follow that I am involved in the provision of a service for consideration. One must ask what legal authority I had to immobilise the vehicle in the first place. The Appellant in this case was authorised to clamp trespassing motorists by reason of its rights under licence in relation to the relevant car parking areas.

European law

32. The concept of the supply of services effected for consideration within the meaning of Article 2(1) of the Council Directive 2006/112/EC presupposes the existence of a direct link between the service provided and the consideration received. The Respondent submitted that there was a direct link between payment of the money by the motorist and provision by the Appellant of a service namely, the service of de-clamping, and that this direct link demonstrated that the de-clamping fee constituted consideration for the supply of a service within the scope of VAT.

33. The Appellant submitted that the de-clamping fee was in the nature of a payment in lieu of damages for trespass and that it did not constitute consideration for the supply of a service subject to VAT. The Appellant submitted that at the point of de-clamping, there was no contract in existence between the clamped motorist and the Appellant

and that the clamp was applied to enforce the Appellant's rights against the trespassing motorist.

34. In *Staatssecretaris Van Financien v Association Cooperative 'Cooperatieve Aardappelenbewarrplaats' GA*, Case C-154/80, commonly referred to as the 'Dutch potato case', the question was whether a reduction in the value of shares held by a co-operative constituted consideration for the warehousing of potatoes which, incidentally, was provided free of charge. The CJEU ruled that for the provision of services to be taxable within the meaning of the Directive, there must be a direct link between the service provided and the consideration received. The CJEU held that there was no direct link and stated at paragraph 12: '*So a provision of services is taxable within the meaning of the Second Directive when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service. There must therefore be a direct link between the service provided and the consideration received which does not occur in a case where the consideration consists of an unascertained reduction in the value of the shares possessed by the members of the cooperative and such a loss of value may not be regarded as a payment received by the cooperative providing the services.*'

35. In *Apple and Pear Development Council v Commissioners of Customs & Excise,* Case C-102/86, the question was whether mandatory charges imposed on fruit growers for the purposes of enabling the Apple and Pear Development Council to carry out its functions, constituted consideration for the supply of services within the meaning of the Sixth Directive. The CJEU held that the charges lacked a direct link with the benefits accruing to individual growers and therefore did not constitute a supply of services effected for consideration within the meaning of article 2 of the Sixth directive.

36. In the case of *BAZ Bausystem AG v Finanzamt Munchen fur Korperschaften*, Case C-222/81, the CJEU ruled that the concept of consideration for the purposes of the VAT directive does not cover interest awarded to an undertaking by a judicial decision where such interest has been awarded to it by reason of the fact that the balance of the consideration for the services provided has not been paid in due time.

37. In *R J Tolsma v Inspecteur der Omzetbelasting Leeuwarden,* Case C-16/93 the CJEU found that the payment made by passers-by to a musician in Amsterdam did not constitute consideration for the supply of a service because the payments were made voluntarily and there was no necessary link between the payments made and the supply of the music. At paragraph 17 the CJEU stated: '*Firstly there is no agreement between the parties, since the passers-by voluntarily make a donation whose amount they determine as they wish. Secondly, there is no necessary link between the musical service and the payments to which it gives rise.'*

38. In *Societe Thermale D'Eugenie-Les-Bains v Ministere de L'Economie des Finances et de L'Industrie and National Car Parks Limited,* Case C-277/05, the CJEU considered whether a forfeited hotel deposit fee constituted consideration for the supply of a reservation service which would be subject to VAT or whether it comprised fixed compensation for cancellation in which case it would not be subject to VAT. The CJEU held that no service had been supplied for VAT purposes on the basis that the sums paid did not constitute genuine consideration for an identifiable service supplied in the context of a legal relationship in which performance is reciprocal.

39. On foot of the above cases, the Appellant submitted that there was no '*direct link*' in the within appeal between the removal of a wheel clamp and the payment by a motorist for the removal of that clamp. The Appellant submitted that the removal of a clamp does not constitute the provision of a service but is an action carried out in the context of enforcement of the Appellant's rights as licensee, against a trespassing motorist. The Appellant submitted that the payment is in the nature of or in lieu of damages for trespass and cannot be described as consideration.

40. The Appellant submitted that in the within appeal there is no reciprocity re removal of the clamp from the vehicle of a trespassing motorist since the motorist has no option but to pay the clamping release fee in order to regain use and control of his vehicle. In addition, the motorist cannot negotiate the price as the clamping release fee is stipulated on the signage.

41. The Respondent submitted that clamping release fees constituted consideration for the service of removal of a clamp in accordance with Article 2 of Council Directive 2006/112/EC; however, at the time of removal of the clamp there is no contract in existence between the motorist and the Appellant 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 2006/112/EC.

Remedies of the Appellant as licensee

42. The parties accepted that while the Appellant was a lessee in some cases, in the majority of cases the Appellant was a licensee and the Respondent did not contest the Appellant's entitlement to be on the owner's land in its capacity as licensee. However, the Respondent submitted that there was no trespass in this case on the basis that the Appellant was not entitled to possession of the land. In response, the Appellant stated that if the Appellant had no remedies against defaulting and trespassing motorists there would be no deterrent for failing to have a parking ticket and this would render its business uneconomic.

43. The Appellant submitted that as licensee, it was entitled to enforce its contractual rights against trespassers and in this regard the Appellant relied on the Irish case of *Inlands Fishery v O'Baoill* [2012] IEHC 550 where, at paragraph 82 of the judgment, Laffoy J. affirmed the reasoning of Laws LJ in *Manchester Airport plc v Dutton* [2000] QB 133, as follows;

> *'By virtue of the 2008 Agreement with Mr McDonnell, the Plaintiff's predecessor, NRFB, became contractually entitled to manage, control, use and regulate the Fishery, including the interest of Mr McDonnell therein. I am satisfied that the contractual rights of NRFB under the 2008 Agreement are now vested in the Plaintiff by virtue of s 52 of the Act of 2010 and enforceable by the Plaintiff. Accordingly, the Plaintiff is entitled to seek equitable relief to restrain interference with Mr McDonnell's interest in the Fishery, on the basis of the reasoning of Laws LJ in the court of Appeal in Manchester Airport plc v Dutton. Accordingly, I find that the Plaintiff has the right to restrain the Defendants from fishing Mr McDonnell's interest in the Fishery and having access to it, provided*

the Defendants have not established any equal or superior right to that of Mr McDonnell.'

44. In *Manchester Airport plc v Dutton* the plaintiff was granted a licence by the landowner to occupy a wood for the purpose of carrying out works in connection with the construction of an airport runway. The works involved the felling of trees. The defendants, who were opposed to the works, entered the wood without permission in order to impede the works. The Court held that a licensee with a right to occupy land, whether or not he was in actual occupation, was entitled to bring an action for possession against a trespasser in order to give effect to the rights under the licence. Laws L.J stated as follows;

> *'…I think there is a logical mistake in the notion that because ejectment was only available to estate owners, possession cannot be available to licensees who do not enjoy de facto occupation. The mistake inheres in this; if the action for ejectment was by definition concerned only with the rights of estate owners, it is necessarily silent upon the question, what relief might be available to a licensee. The limited and specific nature of ejectment means only that it was not available to a licensee. It does not imply the further proposition that no remedy by way of possession can now be granted to a licensee not in occupation. Nowadays there is no distinct remedy of ejectment; a plaintiff sues for an order of possession, whether he is himself in occupation or not. ….*
>
> *I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history …… does not stand in the way.*
> *…*
> *In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, the plaintiff's remedy is strictly limited to what is required to make good his legal*

> *right. The principle applies although the licensee has no right to exclude the licensor himself. Elementarily he cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser.*
>
> *In this whole debate, as regards the law or remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the Latin maxim… 'ubi jus, ibi sit remedium'.*

45. Based on *Inland Fisheries v O'Baoill,* which affirmed the reasoning of Laws LJ in *Manchester Airport plc v Dutton,* I am satisfied that the Appellant in the within appeal has the right to sue in trespass and is entitled to seek a remedy from the Courts to enforce its rights as licensee, against trespassing motorists.

46. The Appellant submitted that instead of litigating actions seeking orders for possession, it relied on clamping, which it found to be an effective enforcement mechanism because it immobilises the vehicle and compels the motorist to pay the release fee in order to regain use and control of the vehicle.

47. In *Vehicle Control Services v Revenue and Customs Commissioners* [2013] STC 892, Vehicle Control Services ('*VCS*') entered into contracts with various landowners to provide 'parking control services'. These services included parking charge notices, vehicle immobilisation (clamping) and tow away. The warning signs in the parking areas set out the requirement for valid permits/tickets to be used together with the charges for failure to comply with those rules. The issue between the parties was whether VCS was liable to pay VAT on the parking charge notices.

48. The Court of Appeal held that there was a contract between VCS and the motorist and that VCS as licensee of the landowner was entitled to a remedy against the motorist which would protect but not exceed his legal rights under licence. In *VCS*, the licence

between VCS and the landowner expressly granted VCS the right to tow away vehicles and to eject trespassers. The contract between VCS and the motorist provided for tow away in the event of breach. The Court held that in order to vindicate those rights, it was necessary for VCS to have the right to sue in trespass. The Court also held that if VCS imposed a parking charge as opposed to towing away, there was no impediment to regarding that as damages for trespass. The UK Upper Tribunal in a case of the same name, citation: [2017] STC 11, cited the Court of Appeal judgment in *VCS,* in their recent decision on the issue of input tax apportionment, see paragraph 19.

49. On the question of trespass, Lewison L.J. at paragraphs 32-35 stated as follows;

> ***'[32]*** *The traditional view is that a licensee cannot maintain an action for trespass. In the well known case of* Hill v Tupper *(1863) 2 H & C 121, 159 ER 51 Mr Hill was the tenant of land adjoining the Basingstoke Canal. His lease granted him 'the sole and exclusive right or liberty to put or use boats on the said canal, and let the same for hire for the purpose of pleasure only'. The owner of a pub on the other side of the canal began to let out boats for hire. But when Mr Hill sued for disturbance of his right his claim was roundly rejected by the Court of Exchequer Chamber. The court held that since he had no proprietary right in the canal, any action had to be brought in the name of the proprietors of the canal.*
>
> ***[33]*** *This principle has, to some extent, been modified in more recent times. In Dutton v Manchester Airport plc [1999] 2 All ER 675, sub nom Manchester Airport plc v Dutton [2000] QB 133 the National Trust had granted the airport company a licence to 'enter and occupy' a wood, for the purpose of lopping and felling trees which would obstruct a proposed second runway. The issue was whether the airport company could maintain proceedings under RSC Ord 113 against protesters who had set up camp in the wood. The Court of Appeal, by a majority, held that it could. Giving the leading judgment for the majority Laws LJ said .... :*
>
> > *'I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way ...*
> >
> > *In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and*

give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, the plaintiff's remedy is strictly limited to what is required to make good his legal right. The principle applies although the licensee has no right to exclude the licensor himself. Elementarily he cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser.

In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the Latin maxim (for which I make no apology) "ubi jus, ibi sit remedium." '

[34] *Although Kennedy LJ delivered a judgment of his own, he said that he agreed with the reasons given by Laws LJ. In my judgment the two principles that emerge from this case are:*

(i) The court has power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence; and

(ii) In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment.

[35] *The House of Lords dismissed a petition for leave to appeal. It is true that* Hill v Tupper *was not cited, but in* Mayor of London v Hall *[2010] EWCA Civ 817, [2011] 1 WLR 504 this court held that that omission did not impugn the validity of the decision. I do not consider that these two principles are limited to cases in which the licensee has a right to possession or occupation. In my judgment Laws LJ makes it clear that the extent of the remedy is commensurate with the right.'*

50. At paragraph 44 Lewison L.J. concluded 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 towing away a vehicle, VCS imposes a parking charge I see no impediment to regarding that as damages for trespass.'*

51. In relation to *VCS*, the Court held that '*VCS has the right to do that which the contract says it can'* and that *'in order to vindicate those rights, it is necessary for VCS to have the right to sue in trespass.'*

52. The Respondent submitted that in *VCS*, trespass was founded on the right to tow away which was specified in the licence with the landowner and in the contract with the motorist and that *VCS* can be distinguished from the within appeal because, the Respondent submitted, the same express provisions were not contained in the documentation in this appeal.

53. The Appellant stated that standard terms and conditions which apply to contracts with land owners provide for vehicle removal, but that this route would only be taken if the vehicle had been abandoned or was causing a significant obstruction to other users of the facility. For ease of reference, the relevant standard terms are set out hereunder as follows;

> *'Vehicle Penalties and Immobilisation*
>
> *....*
>
> *The fee for removing a wheel clamp shall be €120. All payments shall be payable by the registered owner of the vehicle by means of cash or credit/debit card payable directly to the Contractor. No cheques will be accepted for payments. Receipts will be provided by the Contractor for all payment received.*
>
> *Vehicle Removal*

The following charges will apply throughout the term of the Contract;

Removal Charges shall be: €350 per vehicle from surface areas and €500 per vehicle from underground areas. This charge includes disposal of the vehicle. The Contractor reserves the right to reasonably increase its charges during the term of the Contract by providing reasonable notice to the client.

Abandoned vehicles

The Contractor's charge for the removal of abandoned vehicles on the Site(s) shall be as above.'

54. The standard terms and conditions specify fees for the removal of the vehicle in the event of tow away in anticipation of the fact that tow away may occur in some cases. The Appellant in evidence made clear its preference for clamping as an enforcement mechanism and stated that tow away rarely occurred.

55. In my view it is difficult to see how a licence to provide car parking services to a landowner could include clamping but completely exclude tow away. If the Appellant could clamp defaulting and trespassing motorists but could not tow away a clamped vehicle which a motorist had abandoned, the Appellant would be compromised in its ability to enforce. Similarly, if the Appellant could not tow a vehicle that was obstructing an entry or exit to the car park, its ability to operate and control the car park for other motorists and for the licensor would be impaired.

56. The car parking services provided by the licensee (the Appellant) to the licensors (the land owners) use clamping as the principal method of enforcement, with tow away available in cases of hazard and obstruction. I am satisfied that the standard terms and conditions of the licence are sufficient to provide the licensee with authority to tow away in such circumstances.

57. As regards the contract with the motorist, the Appellant stated that the hospital signage specifically quoted €120 for tow away and that in other situations and in general, motorists were on notice of the Appellant's right to tow away as the sticker placed on a clamped vehicle provided: *'The Company also reserves the right to remove the vehicle at the owner's expense'*.

58. There was no dispute between the parties in relation to whether the licence granted the right to immobilise vehicles by clamping as the parties accepted that this was expressly provided in the licences and in the contracts between the Appellant (the licensee) and the motorist. In accordance with *Manchester Airport, VCS* and *Inland Fisheries*, a Court has power to grant a remedy to a licensee which will protect but not exceed his legal rights under the licence, including an order for possession.

59. Even if I were to accept the Respondent's submission that the licences did not grant a right of tow away but provided merely a right to clamp the trespassing motorist, the Appellant is nonetheless entitled to a remedy at law which will make good the legal title he has in respect of his entitlement to clamp and that remedy would be vindicated in a successful court action by an order for damages and/or possession against the trespassing motorist.

60. By parking without ever purchasing a ticket or permit or by remaining parked after a 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.

61. For the reasons set out above and taking into account the relevant case law, I determine that clamping release fees paid to the Appellant comprise payments in the nature of or in lieu of damages for trespass. These monies fall outside the scope of VAT and do not comprise a supply for consideration of services by a taxable person for the purposes of section 3 VATCA 2010.

Conclusion

i. In accordance with *Manchester Airport, VCS* and *Inland Fisheries*, a Court has power to grant remedies to a licensee which will protect but not exceed his legal rights under the licence and these remedies may include an order for possession.

ii. By parking without ever purchasing a ticket or permit, or by remaining parked after a ticket or permit has expired, the motorist becomes a trespasser. The Appellant is entitled to pursue the remedy of a Court order for possession and/or damages to vindicate its rights as licensee. The Appellant's preferred enforcement mechanism was to immobilise the vehicles of trespassing motorists by applying a wheel clamp.

iii. At the point of application of the wheel clamp, there is no longer a contract in existence between the Appellant and the motorist because, either the contract has expired or the motorist is parked in breach of its terms. Either way, the motorist has become a trespasser.

iv. In other instances, there was no contract between the Appellant and the motorist to begin with as no ticket or permit was ever purchased and in this situation the motorist was a trespasser from the outset.

v. The monies generated on foot of clamping release fees are generated in the context of enforcement of the Appellant's rights as licensee against trespassing motorists. It follows that these monies are in the nature of damages for trespass or a payment in lieu thereof and fall outside the scope of VAT.

vi. I determine that clamping release fees paid to the Appellant comprise payments in the nature of or in lieu of damages for trespass. These monies do not comprise a supply of services for consideration and are not subject to VAT in accordance with section 3 of the VATCA 2010 and Article 2 of Council Directive 2006/112/EC.

vii. This appeal is hereby determined in accordance with s.949AL TCA 1997.

APPEAL COMMISSIONER

March 2018

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.