THE HIGH COURT

[2018 No. 154 R]

BETWEEN

NATIONWIDE CONTROLLED PARKING SYSTEMS LIMITED

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 16th day of July, 2019

Table of contents

1. Introduction

1. This judgment considers whether value added tax (**"VAT"**) applies to clamping release fees charged by the appellant (**"NCPS"**), who manages car parks and controls other privately owned spaces. It arises from a case stated on 2nd July, 2018, by Commissioner Gallagher of the Tax Appeals Commission (**"the Commissioner"**), at the request of the respondent (**"Revenue"**), pursuant to s. 949AQ of the Taxes Consolidation Act 1997, (**"TCA"**), in relation to her determination dated 16th March, 2018.

2. The specific question is:-

> "*Whether, upon the facts proved or admitted,* [as described at para. 4, with the documents listed at para. 7 and exhibited in the case stated], *I was correct in law to determine that clamping release fees are not subject to VAT in accordance with* [s. 3 of the Value-Added Tax Consolidation Act 2010 (**"the 2010 Act"**) and Article 2 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax O.J. L347/1 11.12.2006 (**"the 2006 Directive"**)]."

2. Background

3. NCPS appealed the refusal by Revenue of a repayment claim on the 16th January, 2014, for VAT paid on clamping release fees in respect of the periods November-December, 2009, and September-October, 2013. Revenue refused the repayment claim on the basis that the clamping fees were subject to VAT in accordance with s. 3 of the 2010 Act and Article 2 of the 2006 Directive. The total claim in contest is €1,778,458.00.

3. The Determination

4. The Commissioner in her determination concluded in favour of NCPS as follows on p. 23:-

> "*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 motorists become 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 enforcing 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. Those monies do not comprise a supply of services for consideration and are not subject to VAT in accordance with section 3* [of the 2010 Act and Article 2 of the 2006 Directive]."

4. Jurisdiction of the High Court on an appeal by way of case stated

5. Section 949AQ of the TCA (as inserted by Finance (Tax Appeals) Act 2015, which came into operation on the 21st March 2016) provides for how a case stated is prepared and what it should contain.

6. Section 949AR(1) of the TCA provides that the High Court:-

"*(a) shall reverse, affirm or amend the determination of the* [Commissioner],

(b) shall remit the matter to the [Commissioner] *with its opinion on the matter, or*

(c) may make such other order in relation to the matter as it thinks just,

and may make such order as to costs as it thinks fit."

7. There is little controversy between the parties about how a judge should approach this case stated. Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Ltd* [1982] ILRM 421 at p. 426 explained:-

> "*A case stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayers purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences on these primary facts. These are mixed questions of fact and law and the court should approach these in a different way.* ***If they are based on interpretation of documents****, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw.*" (emphasis added).

8. Blayney J. in *Ó Culachain v. McMullan Brothers Ltd* [1995] 2 I.R. 217, cited by the Supreme Court in *Mac Cárthaigh v. Cablelink Ltd* [2003] 4 I.R. 510, further summarised as follows at pp. 222-223:-

> "*(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
>
> *(2) Inferences from primary facts are mixed questions of fact and law.*

(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.

(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.

(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."

9. Reference to "*judge*" in the above extract applies equally to the Tax Commissioner.

5. Facts and documents

10. In summary, this Court appreciates the uncontroversial facts as found. Paragraph 4 of the case stated headed "*Facts proved or admitted*" includes the following:-

(i) NCPS operates pay and display and barrier controlled car parks under licence from various landowners including churches, schools, universities, hospitals and management companies.

(ii) For the period 2009-2013, NCPS accounted for VAT on clamping release fees. In January 2014 NCPS requested repayment of VAT.

(iii) Signage in car parking areas display the contact numbers of NCPS and serve 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 clamping release fee payable for the removal of the clamp. NCPS patrols or visits the car park for the purpose of clamping and de-clamping.

(iv) Most of the signage used by NCPS expressly refers to clamping as the main method of enforcement. 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*".

(v) NCPS removes vehicles if they are abandoned, create a hazard, constitute a safety concern or cause a significant obstruction to other users of the facilities.

(vi) Removal charges are specified and can depend on hours of unauthorised or legal parking.

(vii) Examples of signage in train stations, hospitals and apartment blocks and the terms and conditions which apply to contracts with car park owners are set out in s. 4 of the case stated.

11. A sample parking permit and ticket, a contract for parking controls in a scenic amenity area and correspondence with education and shopping centres, which appear to be a contract with NCPS, together with a sample lease were listed in para. 7 of the case stated and subsequently exhibited.

6. Relevant Statutory Provisions

12. Section 3(c) of the 2010 Act provides that VAT is leviable and payable on "*the supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State*". No issue arises in this appeal about whether the 2010 Act properly transposed the 2006 Directive into Irish law.

13. Section 25 of the 2010 Act further provides:-

"*(1) In this Act 'supply', in relation to a service, means the performance or omission of any act or the toleration of any situation other than—*

(a) the supply of goods, and

(b) [not relevant]"

14. Section 37(1) of the 2010 Act elaborates as follows:-

"*The amount on which tax is chargeable by virtue of* section 3 (a) *or* (c) *shall, subject to this Chapter, be the total consideration which the person supplying goods or services becomes entitled to receive in respect of or in relation to such supply of goods or services, including all taxes, commissions, costs and charges whatsoever …*" (emphasis added).

7. Relevant Articles of the 2006 Directive

15. Article 9(1) of the 2006 Directive states:-

"*'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 continuing basis shall in particular be regarded as an economic activity."

16. Finally, Article 73 of the 2006 Directive states:-

"*In respect of the supply of goods or services, other than as referred to in Articles 74 to 77* [not relevant], *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.*"

8. Submissions for Revenue

(i) *VAT has a wide scope and covers activities of an economic nature*

17. Ms Clohessy, counsel for Revenue, submits that the Court must first determine whether the clamping release operation falls within the concept of an economic activity as defined in Article 9(1) of the 2006 Directive. Emphasis is laid on behalf of Revenue on the phrases "*whatever the purpose or results of that activity*" and "*... obtaining income therefrom on a continuing basis*". Relying on the cases of *Optigen & Ors v. Commissioners of Customs & Excise (Joined Cases C-354/03, C-355/03 and C-484/03)* [2006] E.C.R. I-483 (**"*Optigen*"**) and *Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV) (Case C-263/15)* [ECLI:EU:C:2016:392] (**"*Lajvér*"**), Revenue argues that "*economic activity*" is defined objectively and it must be engaged in for the purposes of obtaining income on a continuing basis.

18. In *Optigen*, the Court of Justice (**"ECJ"**) was asked to consider whether first transactions, which were not themselves vitiated by VAT fraud (and the trader had no knowledge of fraud) but which formed part of a chain of supply involving carousel frauds, constituted "*economic activities*" and thus whether there was a right to deduct VAT on such transactions.

19. The Court noted as follows at paras. 43-44:-

> "*As the Court held in paragraph 26 of its judgment in Case C-260/98* Commission v Greece *[2000] ECR I-6537, an analysis of the definitions of taxable person and economic activities shows that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results ...* .

> *In fact, that analysis and that of the definitions of 'supply of goods' and 'taxable person acting as such' show that those terms, which define taxable transactions under the Sixth Directive, are all objective in nature and apply without regard to the purpose or results of the transactions concerned.*" (emphasis added).

20. The Court held that having regard solely to the objective nature of the transactions, they constituted a supply of services and an economic activity within the meaning of the relevant directive. Furthermore, the intention of traders, other than the taxable person involved, in the same chain of supply was irrelevant. Each transaction had to be regarded on its own merits and the character of a particular transaction in the chain could not be altered by earlier or subsequent events.

21. *Lajvér* was a request for a preliminary ruling on whether works executed by a contractor for a non-profit organisation, which were not intended to make a profit, allowed VAT to be deducted by the non-profit organisation. The Court held that when considering whether the economic activity is carried out for the purpose of obtaining income, it is irrelevant whether or not it is intended to make a profit.

22. As per para. 29 of *Lajvér*, Revenue notes that the question about whether an activity is designed to obtain income on a continuing basis is an issue of fact that must be assessed having regard to all the circumstances of the case. Revenue submits:-

> "*It is clear that NCPS provide a clamping release service and charge for it. It is therefore submitted clear* (sic) *that they are engaging in the clamping release operation for the purposes of obtaining income. Further it is evident that they planned to charge this fee for an indefinite period and can be regarded as falling* [within] *the scope of "a continuing basis". This analysis is not effected* (sic) *by the fact that the customer may not like paying the fee for the service.*" (submissions, para. 3.32).

23. It is also submitted that the Commissioner in her determination (para. 41) erred in applying the notion of a commercial activity whereas she should have considered the economic nature of the activities.

24. Revenue does not dispute that NCPS clamps in order to enforce parking controls. The key issue is whether NCPS makes money from this activity. Revenue also submits that this analysis is not affected by the argument that the clamping release service is ancillary to the primary activity of parking services.

(ii) *The removal of a clamp is a supply of services effected for consideration within the meaning of s. 3(c) of the 2010 Act and Article 2(1)(c) of the 2006 Directive*

25. Revenue submits that the questions about whether something is a service and whether it is for consideration are two legal issues to be determined by reference to EU law. It is submitted that "*supply of services*" is a broad concept, objective in nature and applies without regard to the purpose or result of the transaction. Therefore, the argument for NCPS about whether the clamping release fee is a penalty or not is irrelevant.

26. Revenue places particular reliance on para. 31 of the judgment of the ECJ in *Air France-KLM & Anor v. Ministère des Finances et des Comptes publics (Joined Cases C-250/14 and C-289/14)* [ECLI:EU:C:2015:841] (**"*Air France-KLM*"**), which reiterated that the intention of the taxable person is irrelevant:-

> "*The term 'supply of services', within the meaning of the Sixth Directive and the amended Sixth Directive, must, in the light of its objective nature, be interpreted without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person ….*"

27. Furthermore, for a supply of a service to be subject to VAT there must be consideration. This requires the existence of a direct link between the service provided and the consideration received. In *Air France-KLM*, the Court was concerned with whether a VAT rate of 5.5% on supplies of domestic passenger air transport services should apply to the sale of tickets issued but not used, and for which no refund was given. The Court held that the payment by a passenger, in the context of a legal relationship constituted by the transport contract, was directly linked to the service provided by the airline despite the fact that the passenger did not in fact benefit from the service. The Court concluded that "*the sum retained by the airline companies is not intended to compensate for possible harm suffered by them as a result of a passenger's 'no-show', but constitutes remuneration, even where the passenger did not benefit from the transport*." (para. 34).

28. Counsel for Revenue, in written submissions, referred to *Apple and Pear Development Council v. Commissioners of Customs and Excise (Case C-102/86)* [1988] E.C.R. 1443, which concerned mandatory charges imposed on all members of the Council (commercial growers of apples and pears in England and Wales) irrespective of the benefit received by them. There the ECJ found that there was not a sufficiently direct link with the services provided by the Council to amount to consideration for supply of services as there was no relationship between the level of benefits obtained and the amount of the mandatory charges.

29. Revenue submits that the removal of a clamp is a supply of services effected for consideration: the motorist pays NCPS to remove the clamp and the consideration is agreed at the value shown on the notice. There is an enforceable agreement and the fact that the motorist is trespassing is irrelevant. Furthermore, Revenue argues that the Commissioner's view that there was an insufficient link between the payment and the de-clamping due to it

being in the context of enforcement, was incorrect. In fact, there is a clear link between the clamping and the remuneration.

(iii) *No requirement for there to be a contract*

30. This 'direct link' between the service supplied and the consideration received amounts to a "*legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient ….*" (*Lajvér*, para. 26, emphasis added).

31. One of the principal and ultimate differences between counsel for each of the parties related to the use of the words "*reciprocal performance*" and whether that entailed the necessity for what might be considered a contract in common law parlance. Revenue urges this Court to find that there is no requirement for there to be a contract, as the Commissioner mentioned in her determination.

32. The judgment of the ECJ in *R. J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden (Case C-16/93)* [1994] E.C.R I-743 found that payments made by passers-by to an organ grinder 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. The relevance of that judgment related to the question of a legal relationship and Revenue emphasises that in that case there was no agreement between the passers-by who voluntarily made a donation and the organ grinder, unlike the arrangement between NCPS and a motorist with a clamped car.

33. Revenue also cites the judgment in *Town & County Factors Ltd v. Commissioners of Customs & Excise (Case C-498/99)* [2002] E.C.R. I-7173, (**"Spot the ball judgment"**),

(which was about a "*Spot the ball*" competition that bound the organisers in honour only to give a prize) and particularly para. 24 which reads as follows:-

> "… *Article 2(1) of the Sixth Directive is to be interpreted as meaning that a supply of services which is effected for consideration but is not based on enforceable obligations, because it has been agreed that the provider is bound in honour only to provide the services, constitutes a transaction subject to VAT.*"

34. Both counsel rightly indicate to this Court that the ECJ judgments in *Minister Finansów v. Stowarzyszenie Artystów Wykonawców Utworów Muzycznych I Słowno-Muzycznych SAWP (Case C-37/16)* [ECLI:EU:C:2017:22] and *European Commission v. Republic of Austria (Case C-51/18)* [ECLI:EU:C:2018:1035] add little more to the principles about "*legal relationship, reciprocal performance, direct link between service supplied and the consideration received*" and "*fair compensation*".

(iv) *Questions to be asked by the Court*

35. Thus, Revenue submits that the correct analysis of a transaction, as well established by the case law of the ECJ, is as follows:-

(i) Does the activity fall within the concept of an economic activity? I.e. is the taxable person engaged in an activity for the purposes of obtaining income on a continuing basis?

(ii) Is the activity a supply of services effected for consideration?

(a) Is there a direct link between the service supplied and the fee received?; and

(b) Does the fee constitute the value actually given in return for the service supplied?

(v) *The Tax Appeal Commissioner erred in her reasoning and in her over-reliance on UK case-law*

36. The Commissioner relied on the Court of Appeal of England and Wales judgment in *Vehicle Control Services Ltd v. Revenue and Customs Commissioners* [2013] EWCA Civ 186; [2013] STC 892, (**"*VCS*"**). In that case, the appellant entered into contracts with the owners or lawful occupiers of car parks or land to provide parking control services. VCS undertook parking enforcement procedures including the issue of a parking charge notice, vehicle immobilisation and towing away. The question before the Court of Appeal was whether VCS was liable to pay VAT on parking penalty charges.

37. The Upper Tribunal had held that there was no contract between VCS and the motorist. Before the Court of Appeal, it was agreed by the parties that if the Court found that there was a contract between VCS and the motorist then the payment of parking penalties would not have been consideration for the supply of parking services. The Court of Appeal held that there was a contract between VCS and the motorist and that in order to vindicate its rights it was necessary for VCS to have the right to sue in trespass. Thus, a parking charge could be considered damages for trespass.

38. Revenue distinguishes this case on the ground that the Court of Appeal considered parking penalties and not clamping release fees. The fact that these both achieve the same purpose is, according to Revenue, irrelevant. Thus, Revenue submits that the fundamental error by the Commissioner is that she confuses the payment for removal of a clamp with a parking penalty charge. Furthermore, the Court of Appeal did not refer to the EU legislation or cases, instead focussing on whether or not there was a contract between VCS and the motorist.

(vi) *Application to the facts of this case*

39. Paragraphs 3.46, 3.49-3.51 of the written submissions on behalf of the Revenue encapsulate the basis of this appeal:-

"*3.46 The Appeal Commissioner accepted the position of* [NCPS] *that because the car owner has no option but to pay NCPS for the removal of the clamp that this is not a service. However, it is submitted this does not follow and it is open to the High court to make the opposite finding. Whether or not a person has an option about who removes the clamp, the removal of the clamp is a service and the amount paid is the consideration for which that service is effected. 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 for a service is a fixed amount and applies to all customers, therefore there is a link identified between the supply and the amount.*

…

*3.49 The fundamental issue here of whether removing a clamp for a de clamp fee is a service for consideration and vatable <u>as such</u> was not really considered by the Appeal Commissioner. Rather she focussed on the way the vehicle got clamped in the first place and found that as that was a process of enforcement (*in the eyes of [NCPS]*) it could not be a service for consideration. Her finding that de-clamping is not a commercial activity or commercial service in its own right is not one based on any legal case rather it comes from her analysis that if the service is provided in the context of enforcement (as she considers the transaction to be) it cannot be a vatable service.*

3.50 It is submitted that whether something is a service for VAT purposes must be capable of objective determination or put another way – was there a service and was it for payment. Whether the person wanted to pay or had to pay because of circumstances they found themselves in should not per se *determine if or if not there is a service. Following the established case law it is submitted that it is clear that the Appeal Commissioner was incorrect and that the correct position is that the Determination is wrong in law and that properly considered based on the facts as found the clamping release fees were subject to VAT in accordance with section 3 of the* [2010 Act] *and Article 2 of the* [2006 Directive].

3.51 If NCPS wishes to enforce its rights as licensee, it is respectfully submitted that they should seek the appropriate remedy at the Courts. Instead, it has chosen to operate a clamping and release operation that is within the scope of VAT."

9. Submissions for NCPS

(i) *Clamping release fees are generated in the context of enforcement and outside the scope of contract*

40. NCPS submits that the existence of a legal relationship, i.e. a contract, between the parties is a fundamental necessity when determining whether a service is being provided. NCPS argues 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 rights against trespassing motorists. NCPS thus emphasises that there is no legal relationship between itself and the motorist and therefore the act of de-clamping cannot constitute a supply of services.

At its heart, contract is a consensual relationship and there can be no consent in these circumstances where one party is a trespasser.

41. NCPS notes that Revenue begins its analysis at the point when the clamp is on the car. Therefore, the payment for the release of the clamp has all the *indicia* of a contract or a legal relationship. However, NCPS relies on the Commissioner's finding that Revenue's submission was not the proper analysis because it denied the context and created a legal relationship where there was none. NCPS argues that the transaction must be considered in its totality and that the context is significant, describing it as follows:-

> "*The context is that a party is trespassing on the property of the tax payer and the tax payer is lawfully entitled to and is enforcing its property right. This enforcement is achieved (and in fact can only practicably be achieved) by extracting money from the trespasser. This is achieved by immobilising the offending vehicle so that the motorist is, in effect, forced to pay over monies to the property owner.*
>
> *In the absence of a system to enforce its property right the taxpayer's business of operating carparks would be rendered impossible. And, as a matter of fundamental legal principle, the tax payer is entitled to enforce its property right*." (legal submissions, paras. 8-9).

42. NCPS states that "[b]*y shutting its eyes to how and why the clamp got there in the first place, Revenue seeks to create a fanciful or fictional situation of a contract for the service of removing a clamp existing, for which the fee is consideration*." (legal submissions, para. 34).

43. NCPS explains that its de-clamp fees can be separated into three categories: private car park enforcement; non-payment in public car parks *simpliciter*; and breach of parking contract in public car parks.

(a) Private car park enforcement

44. NCPS operates private car parks at offices and residential complexes where certain people (employees and residents) are permitted to park. The public cannot enter upon the car park. If a member of the public or somebody who does not have a permit drives into the car park NCPS claims that they are trespassing *ab initio*. There is no offer made to these motorists and furthermore, NCPS does not consent to non-permit holders entering onto the car park. NCPS notes that offer and consent are at the heart of the concept of contract, or a legal relationship, and the Court cannot infer or imply the existence of a contract or legal relationship where one party has specifically, and from the outset, declined to be in a legal relationship with the other.

45. Therefore, NCPS submits that the absence of a legal relationship in this context results in the motorist being a trespasser and thus, NCPS has a right to damages for that trespass, which it executes by extracting monies from the motorist via a clamping process.

(b) Non-payment

46. This scenario occurs where NCPS operates a pay and display car park. Where a motorist parks but does not pay, NCPS submits that there is no contract because there has been no acceptance of the offer and no consideration has passed. As there is no contract there is no legal relationship and the motorist is trespassing on private property. Thus, clamping is an enforcement against a party who is trespassing and the fee is in lieu of damages for trespass.

(c) Breach of parking contract

47. NCPS acknowledges instances of a contract between the motorist and NCPS which is broken, for example, by reason of overstaying. (NCPS notes that in the case of a motorist parked in breach of the offer to park, i.e. parked across two bays, there has been no acceptance of the offer in the first place and the motorist is a trespasser from the outset.)

However, NCPS submits that in this situation the motorist has gone from having a right to be on the property to being a trespasser. Thus, clamping is the method used to extract money in lieu of damages for trespass. It could also be considered as a remedy for breach of contract but such a penalty is not subject to VAT.

48. NCPS submits that the essential elements of a contract, or a quasi-contract, as per the Spot the ball judgment, are clearly absent in these scenarios. The payment is instead liquidated damages for trespass or a penalty for trespass.

49. NCPS also notes that the motorist can appeal to NCPS or bring a statutory appeal under the Vehicle Clamping Act 2015. In that case the motorist is not appealing on the basis of bad service or failure to deliver a de-clamp service. The motorist is appealing against the fact of being clamped in the first place and is seeking to recover the damages paid.

(ii) *There is no fundamental difference between the different methods of enforcement*

50. Revenue does not dispute the fact that NCPS has a right to enforce but it asserts that it is the method of enforcement, i.e. clamping, that gives rise to a service. NCPS disputes this, arguing that enforcement is the extraction of a sum of money in lieu of damages for trespass and is thus not subject to VAT. Revenue agrees that VAT would not apply if NCPS used parking penalties instead of clamping. In this context, NCPS argues that the application of a clamp as a means of securing a remedy for trespass is analogous to towing or applying a penalty charge notice. NCPS stresses the Commissioner's determination that "*the differences between the relevant enforcement mechanisms (whether parking charge notices, clamping or tow-away) are not significant for VAT purposes as each enforcement mechanism generates money in the context of enforcement of the Appellant's rights as licensee.*" (para. 11 of the case stated) and notes that this issue is a red herring.

51. NCPS relies on the Court of Appeal judgment in *VCS*, arguing that it is not distinguishable. The Court of Appeal held at para. 44; pp. 904-905:-

> "*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 rights. 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*."

52. NCPS notes that the Court of Appeal determined that the way VCS enforced their remedy was open to them. There is provision at certain NCPS sites for trespassing vehicles to be towed, however NCPS chooses to operate a clamping system as it does not have recourse to the Vehicle Driver database, as is available in England and Wales.

10. Decision

(i) *Common law remedies*

53. Counsel engaged with this Court about whether the tort of trespass, breaches of contract law and the common law remedies therefor are rather constraining when considering whether enforcement using clamps and the payment of a fee for the release of a clamp is an "*economic activity*" and a supply of services. It is this Court's view that 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.

(ii) *Tripartite choices*

54. NCPS generates income from clamping and releasing clamps. The alternative to enforcement by clamping is to proceed with a court or administration system for the recovery of fines. An administrative system for the recovery of fines is not used in this State by NCPS.

55. The issue of voluntary payments, as arose in *National Car Parks Limited v. HMRC* [2015] 666 UKFTT (TC); [2015] WL 848 9243 (First Tier Tribunal Tax Chamber decision released on 15.12.2015), does not arise in the same context in this appeal. National Car Parks Ltd argued before the Tribunal that overpayments made at its pay and display car parks (where the customer did not have the correct change to pay the exact amount due and where no change was available from the machine) should be treated as *ex gratia* payments and outside the scope of VAT. It was argued that the customer had a choice to overpay or to get change; the customer was not obliged to make the overpayment. The Tribunal rejected this argument stating that "[a] *gratuity is "voluntary" because it does not impact the validity or otherwise of the underlying contract*" and noting that the customer who does not have the correct change has the choice of overpaying and receiving the service, or not paying at all and not receiving the service.

56. Yes, those who use car parks managed by NCPS chance not getting clamped if the rules are not followed and in that way they may appear to act voluntarily. However, those motorists have notice that on payment of a release fee their vehicles will be released, which is a defined process. Economic decisions are taken by NCPS, the licensor or management company which contracts with NCPS and the defaulting motorists at the clamp release stage. 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.

(iii) *Whether the rule for de-clamping is binding?*

57. In the Spot the ball judgment, the ECJ considered that there was a supply of services involved in an arrangement whereby a customer paid an entrance fee for the chance to win a prize that was invariably awarded. There the question posed was premised on the agreement between the parties, for the purpose of the ECJ judgment, that the organiser of the Spot the ball competitions "*… is bound in honour only to provide the services…*" (para. 16). Likewise, in the facts appearing in this appeal, NCPS releases a clamp upon payment of the clamp release fee. NCPS does not pursue trespass or breach of contract claims instead of releasing a clamp.

58. Furthermore, para. 21 of the Spot the ball judgment:-

> "*It is clear, next, that adopting the approach of making the existence of a legal relationship in the* Tolsma *sense depend on the obligations of the provider of the service being enforceable would compromise the effectiveness of the Sixth Directive, in that it would have the consequence that the transactions falling within that directive could vary from one Member State to another because of differences which might exist between the various legal systems in this respect.*"

copper-fastens the view of this Court that an examination of the processes under Irish law does not necessarily avail NCPS in its argument that its selection of enforcement by clamping is not a service.

59. This Court, taking account of the binding judgments of the ECJ as cited by Revenue, detailed above, cannot but find that:-

(i) NCPS is engaged in an economic activity in clamping and recovering release fees which generates a continuing income stream for NCPS; and

(ii) there are legal relationships and reciprocal performances in the arrangements (if strictly speaking the arrangements cannot be called "contracts") involving NCPS on one part, defaulting motorists on another part and those who contract with NCPS for the management of car parks on the third part.

The Court elaborates further to underscore its findings of an economic activity and link between the various arrangements which have a consequence for VAT.

(iv) *Economic Activity*

60. The claim for the four-year period totalling €1,778,458, in this appeal gives a *prima facie* appearance of an economic activity. This is further supported by having regard to the general contract terms and conditions of NCPS for the provision of services to their clients, being owners or licensors of the relevant parking areas. So, for example, NCPS contracted with a management company for a picturesque landmark to erect parking control signs at a specified cost, to patrol and then enforce those controls identified on those signs. The contract exhibited at Tab C to the case stated refers to the full list of terms and conditions available on the website of NCPS, which the Court has accessed and to which it has had regard. The contract with NCPS has clear terms about the release of clamps which are further elaborated upon in the general contract terms and conditions. Those terms provide for payment by the client of NCPS for signs and recovery by NCPS for itself of clamp release fees paid by defaulting motorists. Similar terms and references can be found in other exhibited contracts between NCPS and other management companies for residential, educational and shopping centre establishments.

(v) *Trespass*

61. Despite the submissions of counsel for NCPS that the analysis of Revenue denies the context of property rights and the ability to enforce property rights, this Court respectively disagrees with the determination of the Commissioner. Recovering damages for trespass or breach of contract by way of court action requires a third party to adjudicate. Clamp release fees can protect and secure rights and income. Remedies in contract or tort can protect but the extent of securing income in that way has not been addressed by NCPS. A court can award damages or a party may voluntarily agree to pay damages if a claim is made for trespass or breach of contract. That involves a procedure with a third party such as a court whereas the clamp release process is definitive and operates without the exercise of a discretion by a third party.

62. Economic activity is factored into or appears in the arrangements between NCPS, its licensors or customers, such as the heritage-type site manager, and motorists who can rely on the signs to know about the cost for clamp release if caught infringing the controls imposed by NCPS in conjunction with its customers or licensors.

(vi) *Economic and commercial realities*

63. This Court, before reaching its conclusions, read the judgment of the ECJ in *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade Tributária e Aduaneira (Case C-295/17)* ECLI:EU:C:2018:942 (**"*MEO*"**). *MEO* concerned minimum commitment periods for telecommunication contracts and more specifically the payment of VAT on amounts due for early termination of services where such services are not supplied to the customer up to the end of that minimum commitment period. MEO argued that the amount due under the contract for early termination of the services constituted compensation which was not subject to VAT because it was not intended to pay for any services supplied.

64. Paragraph 43 of *MEO* is rather instructive:-

"*As regards the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT ….*"

65. *MEO* persuades this Court particularly on the link between the income generated for NCPS and the clamp release fees. Paragraphs 50-51 read as follows:-

"*Thus, 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 … … in particular the fact that the early termination of the contract does not change the economic reality of the relationship between MEO and its customer …*"

66. The circumstances in this appeal show that NCPS in its arrangements with the managers of car parking facilities factor income from the clamp release fees into their arrangements and contracts.

67. The following quote at para. 62 in *MEO* resonates with the circumstances and context which are the subject of this appeal:-

"*Consequently, the objective of that amount, namely to discourage customers from not observing the minimum commitment period, is not decisive for the classification of that amount, in so far as, according to the economic reality, the same amount aims to ensure that MEO, in principle, obtains the same income 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.*"

68. Even more apposite is the following quote from paras. 68-69 which endorsed the observation of the Advocate General:-

"*... it is irrelevant for the purposes of interpreting the provisions of the VAT Directive that that amount is to be regarded, under national law, as a right to a remedy in tort or a contractual penalty, or that it is characterised as a remedy, damages or remuneration.*

The assessment of whether payment of a fee is made as consideration for a supply of services is a question of EU law which needs to be determined independently of the assessment made under national law."

(vii) *Context*

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.

(viii) *Other points made by NCPS*

71. The description of the clamp release fee by NCPS as damages or a penalty for trespass is not an accurate description; damages for trespass are awarded by a court. A

defendant may agree to pay damages for trespass but that occurs where proceedings are brought or are threatened. There is a difference between enforcement methods which allow a party like NCPS to factor into its economic model the income from clamp release fees and a party which relies on a court or administration process for the imposition of fines. The discretion of a third party is involved in the latter process as para. 61 above explains.

72. Appeals to NCPS or under the Vehicle Clamping Act 2015 may allow for recovery of a clamp release fee after it has been paid; that is different to an appeal from a fine imposed by an adversarial or quasi-adversarial procedure with a third party.

11. Conclusion

73. For all of these reasons, the Court finds that the Commissioner was incorrect in law to determine that all clamping release fees which are relevant to this appeal are not subject to VAT in accordance with s. 3 of the 2010 Act and Article 2 of the 2006 Directive. The Commissioner did not address the context of all the legal relationships and the reciprocal performance by the relevant parties to the arrangements which lead to the generation of significant income for NCPS. It is proper to acknowledge that the Commissioner's attention may not have been drawn to issues arising from the documents and conditions mentioned in this judgment. Therefore, the Court now invites Counsel for both parties to reflect and obtain instructions before a final order is made herein. Counsel are asked to identify at some stage next week a convenient date for the Court to hear the parties before making a "*just*" order within the meaning of s. 949AR of TCA.

12. Postscript

74. On the 24th July, 2019, the Court was informed that all matters ventilated before this Court had been ventilated before the Commissioner and no remittal was required.