[2012] UKUT 129 (TCC)
Appeal number: FTC 51/2011

VAT – supply of parking control services – whether parking charges collected and retained by operator were consideration for a supply – whether outside the scope of VAT as damages for trespass or damages for breach of a contract between the operator and the motorist – whether additional consideration payable by landowner for provision of parking control services – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

VEHICLE CONTROL SERVICES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE NICHOLAS ALEKSANDER

Sitting in public at 45 Bedford Square, London WC1 on 6 March 2012

Timothy Brown, instructed by Barber Harrison & Platt, Chartered Accountants, for the Appellant

Sarabjit Singh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Vehicle Control Services Limited ("VCS") appeals against the decision of the First-tier Tribunal (Judge King and Mr Barrett) dismissing VCS's appeal to that Tribunal against a decision of H M Revenue and Customs ("HMRC") that certain charges levied by VCS on motorists were subject to VAT and associated assessment for periods 04/05 to 10/09.

2. VCS argues that the First-tier Tribunal was wrong, and that the correct position in law is that the payments received by VCS in respect of the charges are outside the scope of VAT either because they are a penalty or damages for breach of contract ("the contract issue") or because they are damages for trespass ("the trespass issue"). HMRC argue, first, that there is no contract between VCS and the motorists that can be subject to a breach, and secondly that VCS acquired no licence to occupy land which was capable of giving it rights to sue for trespass. HMRC submit that the First-tier Tribunal was right to find that the monies received and retained by VCS in respect of the penalties are consideration for VCS's services to the landowner with whom VCS has a contract to provide a parking control service.

The facts

3. The facts may be simply stated as follows.

4. VCS's clients ("clients") are owners or lawful occupiers of car parks or land. VCS enters into a contract on standard terms and conditions with each of the clients under which VCS agrees to provide the client with "parking control services".

5. Under the contract each of VCS and the client has certain obligations. VCS agrees to:

(1) erect and maintain warning signs at the car park which indicate that the car park is private property for the use of valid permit holders only, and that vehicles not clearly displaying valid permits will be liable to parking enforcement procedures including the issue of parking charges, vehicle immobilisation and towing away, with consequent fees for release;

(2) supply the client with parking permits for issue to authorised vehicles at a cost of £2 per permit and £2.50 per book of 50 guest permits, and a permit instruction sheet giving details on how to complete and display the permits;

(3) inspect the car park at such intervals as VCS in its discretion thinks necessary from time to time and to take such action in respect of vehicles found there in breach of the restrictions, including the enforcement measures referred to above;

(4) Collect and retain all parking enforcement charges.

6. Under the contract the client agrees to:

(1) pay a registration fee (plus VAT) on signing the contract, and to pay an annual fee (again plus VAT) for each of the warning signs;

(2) ensure that all vehicles authorised to use the car park clearly display the permits on their windscreens.

7. In addition, the client requests and authorises VCS to carry out its obligations under the contract.

8. The warning sign sets out the requirement for valid permits or tickets to be displayed, various other rules and the charges that are imposed for failure to comply with the rules. It states "You are entering into a contractual agreement. Do not park in this area unless you fully understand and agree to the above contractual terms."

The scope of the appeal

9. If a car is parked in contravention of the car park's rules, VCS may issue a "parking charge notice" which is placed on the windscreen of the car. The notice sets out, through the use of a code, the nature of the contravention, and makes demand for payment to VCN. Pursuant to the terms of its agreement with clients, VCN enforces collection of such payments, which it retains. This appeal concerns payments arising from some only of the contravention codes (24 – Not parked correctly within the markings of the bay or space; 40 – Parked in a disabled space without clearly displaying a valid disabled person's badge; 81 – Parked in a restricted area of the car park; and 86 – Parked beyond the bay markings).

10. The question before the Tribunal is whether VCN is liable to account for VAT in respect of such payments.

11. Parking charge notices issued for other contraventions, including parking without displaying a valid ticket or permit, and the charges levied for such contraventions were included in VCN's VAT return and are not the subject of this appeal,.

The trespass issue

12. In its decision the First-tier Tribunal dealt first with the trespass issue. Having considered the Court of Appeal judgment in *Manchester Airport Plc v Lee Dutton and others* [2000] QB 133, [1999] 2 All ER 675, it concluded (at [13]) that no right to occupy had been granted in the licence given by the clients to VCS. VCS had been given a right to enter the land in order to inspect the car park and to take enforcement actions. A vehicle that was parked in breach of the terms for parking did not prevent VCS from entering onto the land for those purposes. VCS was thus able to give effect to the terms of its licence. VCS was not being given any rights of possession in order to carry out the terms of the contract. VCS was thus not in a position to bring actions for trespass as principal but could only do so as agent for the client.

13. The First-tier Tribunal referred to *Seagar Enterprises Limited t/a Ace Security Services v Customs and Excise Commissioners*, VAT Tribunal, LON/97/1190 and in particular to the finding of the tribunal (at [10]) there that as the appellant in that case did not have exclusive possession of the land it could not claim damages for trespass

in its own right, but only on behalf of the landowner. In that case the VAT Tribunal concluded (at [12]):

> "By allowing the Appellant to retain the fee the landowner has notionally paid the fee back to the appellant as a fee for carrying out its services to the landowner of carrying out parking control. That transaction is liable to VAT as payment for a standard-rated service."

14. Mr Brown submitted that *Seagar* should not be regarded as correct law, since it was decided before a number of cases, including *Dutton*, along with *Countryside Residential (North Thames) Ltd v Tugwell and others* [2000] 2 EGLR 59 and *Alamo Housing Co-operative Ltd v Meredith and others* [2003] EWCA Civ 495. He submitted that it was not necessary to have exclusive possession of the land in order to take an action for trespass. Mr Brown accepted that none of the cases were on the same facts as in this case; his argument was based on the principles established by those cases. He accepted that VCS had no right of possession nor of occupation of the car parks, but submitted that the law now looked to effective control of the land in question in order to found an action in trespass, and that VCS had such control.

15. We consider this argument to be misconceived. It is founded on a misunderstanding of the case law to which Mr Brown referred.

16. In *Dutton* the National Trust had granted to the airport company – the airport operator – a licence to enter and occupy property known as Arthur's Wood. The purpose was to enable certain agreed works to be carried out, namely lopping and felling of trees in preparation for the operation of a second runway nearby. The case concerned possession proceedings brought by the airport company against a number of individuals who had, prior to the company taking occupation under its licence, set up various encampments in Arthur's Wood.

17. The question at issue in the case, as summarised by Laws LJ who with Kennedy LJ found in favour of the airport company (Chadwick LJ dissenting) was as follows (at p 147):

> "In those circumstances, the question which falls for determination is whether the airport company, being a licensee which is not de facto in occupation or possession of the land, may maintain proceedings to evict the trespassers by way of an order for possession. Now, I think it is clear that if the airport company had been in actual occupation under the licence and the trespassers had then entered on the site, the airport company could have obtained an order for possession; at least if it was in effective control of the land."

18. One can see here a reference to effective control, but it does not have the effect that Mr Brown claims for it. It is clear that Laws LJ recognises that for an action in trespass to be founded there must be effective control, but that is not the sole condition. There must first be actual occupation, or, as was found, the right to actual occupation. The principle is set out by Laws LJ at p 150:

> "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."

19. There was thus held to be no distinction between the case of an occupier in possession, and one who had the right to occupy but was not in possession.

20. *Dutton* was considered in *Countryside Residential*, another Court of Appeal case concerning a protest camp in an area of woodland. A claim for possession had been brought by a developer who had an option to purchase the land and licences permitting access to carry out surveys and investigations. It was held that the developer did not have a contractual right to occupy or have possession with the effective control that was necessary if *Dutton* were to apply. It simply had a contractual right to access, which was not sufficient.

21. For the developer it was argued that it had right to occupy in as full a sense as those in *Dutton*. The developer's right was to occupy for the purpose of carrying out the tasks envisaged by the licence. The right to exclude anyone who interfered with the carrying out of the developer's lawful rights must carry with it at least that much possession. For Miss Tugwell, the respondent in that case, it was submitted that the developer did not have effective control of the land in that the licence did not give the developer that right of possession or occupation that entitled it to eject trespassers. Not every licensee who has some right of access to land had the right of possession required to eject trespassers. The only licensee who had that right was the licensee who had the right of possession required to eject trespassers, namely one who had the right of occupation in that sense.

22. In giving the leading judgment, Waller LJ (with whom Aldous LJ and Rougier LJ agreed) accepted the submissions for Miss Tugwell. He said (at p 60):

> "In my view it is important not to confuse contractual rights, in relation to which the developers may well have rights against any person who seeks to interfere therewith, with the right of possession, which is the foundation of an Ord. 113 remedy."

23. Lord Justice Waller referred also to what Kennedy LJ had said in *Dutton*, namely that in that case the airport company had the right of possession granted to it by the licence. It was entitled to enter *and occupy* (his emphasis) the land in question. Lord Justice Waller then concluded (at p 61):

> "[Lord Justice Kennedy] places emphasis on the fact that the right is to enter and occupy. It seems to me that there is a clear difference

> between a licence granted for the purpose of access, which does not provide effective control over the land, and a licence to occupy which does. In the instant case, if the developers had occupied the land prior to protest camps being set up, they might have been able to argue that as a fact they did occupy and have effective control so as to bring themselves within that concept as recognized by Laws LJ. However, it does not seem to me that it was in any way legitimate to imply terms into the licence or to construe the licence, clause 6, so as to provide for that degree of control by contract. In my view, the first appeal should be allowed. The developers did not have a contractual right to occupy or have possession with the effective control that is necessary if Dutton is to apply. They simply had a contractual right to access which is not sufficient for Ord 113 purposes."

24. It can be seen from this that the question of effective control is not a free-standing one, but is inextricably linked with the right of occupation or possession. A mere right of access is not sufficient to allow an action for trespass.

25. The third of the cases, once more from the Court of Appeal, is *Alamo*. There the essential question was whether a housing association, which had a lease of certain properties from Islington Borough Council and had granted sub-leases to sub-tenants, remained entitled to bring possession proceedings after a notice to quit in respect of its own lease had expired. Having considered the authorities, Schiemann LJ, giving the judgment of the court, said (at [41] -[42]):

> "41. It is clear that the Council wished, when it executed the Lease, to rid itself of the burden of managing these premises but, in effect temporarily to hand them over to Alamo. The Council wished to be able to recover possession of parts of the property bit by bit as expedient. Various clauses were inserted in the Lease and the Sublease appended to it to protect existing and potential subtenants.
>
> 42. The situation must be judged as at the time when the Council's Notice to Quit had taken effect. At that time Alamo no longer had an estate in the land. However, since the Council had, as is conceded, required Alamo to take proceedings to evict the tenants so as to be able to hand over the properties with vacant possession, it seems to us that the effect of the Exception was to confer on Alamo a continuing right to possession for that purpose and therefore the situation is exactly as that described in paragraph 39 above. That was the evident intention behind its inclusion in the Lease, against the background of the decisions in Dutton and Countryside. Had the Council intended to grant Alamo any lesser right it would have been ineffective for the very purpose which the Council wished Alamo to achieve."

26. *Alamo* was thus also a case in which the right to take action in trespass derived from a right of possession, in that case a continuing right for the purpose of being able to obtain and hand over vacant possession.

27. We conclude that in this case VCS did not have a contractual right to occupy or have possession with the effective control that is necessary if *Dutton* is to apply. The mere right of access afforded under the contract by the client to VCS did not give

VCS any right to bring an action in trespass against the motorists who parked their vehicles in breach of the relevant restrictions.

28. Even if it had been the case that VCS had rights of occupation or possession sufficient to found an action in trespass, it is clear from *Dutton* that there are limits on the application of such a remedy. The remedy must protect, but not exceed, the legal rights granted by the licence. In this case the limited rights afforded to VCS under the contract do not require protection from motorists who park their cars in breach of the relevant restrictions. Indeed, such behaviour is of the very essence of the arrangements between the client and VCS. We agree therefore with the conclusion of the First-tier Tribunal in this respect.

29. We agree that the reference in *Seagar* to the requirement for exclusive possession is no longer correct following *Dutton*. But that does not mean that the conclusions of the VAT Tribunal in that case can be criticised for that reason as not being good law. The conclusions were based on there being no right of action in trespass, and not on the reason why no such right could arise. We too have decided, on the basis of the law as it is now understood and accordingly for different reasons than those expressed by the Tribunal in *Seagar*, but with the same result, that VCS in this case has no right to claim in trespass.

30. Mr Singh also argued that VCS did not, as a matter of EU law, have a relevant interest in the land in question. In the light of our conclusions by reference to the domestic law of trespass we do not need to consider those arguments in detail. But because Mr Singh pressed them before us, we should just make a few observations.

31. The burden of Mr Singh's argument was that the term "licence to occupy land" appears in Item 1 of Group 1 of Schedule 9 of the Value Added Tax Act 1994, which provides for an exemption for the grant of such an interest. That term derives from what is now Article 135(1)(l) of Council Directive 2006/112/EC which refers, amongst other things, to "the … letting of immovable property". Mr Singh referred us to a number of ECJ cases that have established the characteristics of such a letting. In *Belgian State v Temco Europe SA* (Case C-284/03) [2005] STC 1451, the ECJ held that those characteristics were essentially the conferring of an exclusive right to occupy property, a passive activity linked simply to the passage of time and not generating any significant added value.

32. *Temco* drew a distinction between something that was best understood as the provision of a service and the mere making available of property. That distinction had earlier been drawn in *Sinclair Collis Ltd v Customs and Excise Commissioners* (Case C-275/01) [2003] STC 898, where it was held that the right to occupy an area or space for a period of time may not be a letting of immovable property if it is merely the means of effecting the supply which is the principal subject matter of the relevant agreement.

33. With respect to Mr Singh's argument, we consider it to be misplaced in a case of this nature. This is not a case where the meaning attributed to a term relevant to a VAT exemption can assist. The issue in this case is whether certain payments are

consideration for a supply. If those payments are for something else, such as in the nature of damages for trespass, they will not be consideration for a supply. Although it is possible to envisage damages for trespass being payable in circumstances which could constitute a "letting of immovable property" within the meaning of the directive, they are not limited to such circumstances. The scope of the right to claim damages for trespass is a matter of domestic law, and is not limited to cases falling within the particular meaning given to a specific term in the directive. That issue is not one that can be determined by reference to the meaning of "letting of immovable property".

The contract issue

34. The First-tier Tribunal found that the arrangements constituted a contract between VCS and the motorist, but that the income from payment of the parking charges as set out in the notices was not damages for breach of contract but was paid as a condition of the contract and therefore constituted consideration for a supply of services (Tribunal decision, at [27]).

35. VCS submits that the Tribunal was correct to find that there was a contract, but wrong to conclude that the parking charge was consideration for the supply of a service. Instead, VCS says, the charges should properly be regarded either as a penalty or as damages for breach of such a contract, and accordingly as outside the scope of VAT. (The fact that penalties may not be enforceable as a matter of English contract law, as will become apparent, was not material to our decision.)

36. HMRC's argument, on the other hand, is that the Tribunal was right to reject VCS's argument that the charges were not damages for breach of contract, but that the Tribunal's reasoning in arriving at that conclusion was in error. HMRC submit that there was no contract between VCS and the motorist.

37. There was no dispute between the parties that, if there had been a contract between VCS and the motorist, the payment of parking charges would not have been payment for a supply made under that contract. To that extent, therefore, neither party supported the Tribunal's decision in that respect. We were referred to a decision of the VAT Tribunal, *Bristol City Council* (No 17665, 15 May 2002), in which, on the facts of that case, a contract between the Council and motorists entering a Pay and Display car park had been held to have been created, but that the excess charges in that case were not consideration for the supply of parking services under that contract. The excess charge did not arise until the right to park had been lost.

38. The question in this appeal resolves around whether, as the Tribunal found and VCS asserts, there was a contract between VCS and motorists using the car park, or, as HMRC argues, there was not. At one point Mr Brown was disposed to argue that this was a question of fact, the consequence of which would be that the decision of the Tribunal in this respect could not be overturned, unless no reasonable Tribunal, properly directed on the law, could have reached that conclusion (see *Edwards v Bairstow and Harrison* [1956] AC 14), but he accepted that this was at least a mixed question of fact and law. In our judgment the conclusion that in given circumstances

a contract has been made is a pure question of law; the underlying circumstances are questions of fact, but those factual matters are not in issue in this appeal.

39. We find that there was no contract between VCS and the motorist. Any contract requires there to be an offer and acceptance. In *Bristol City Council*, in the circumstances of that case, the presence of the car park and the signage were found, following *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, to constitute an offer by the Council to provide a right to park on those premises on the stated conditions. The purchase of a ticket from the machine was the acceptance. In this case the First-tier Tribunal found likewise. They concluded (at [19]) that what was being offered by VCS was a right to park in accordance with the signs without fear of an action for trespass being brought by the private landowner. Parking was an acceptance of the offer.

40. In our judgment that was an error of law. On the facts of this case we do not consider that any offer was made by VCS that was capable of forming the basis for a contract between it and the motorist. VCS was not in a position, by virtue of its limited licence, to make any offer of a right to park. The ability to offer such a right was not conferred by the contract with the client, either expressly or by virtue of the nature of the interest in the car park conferred on VCS. That interest did not amount to a licence to occupy, or give VCS any right to possession. It merely conferred a right of entry to perform VCS's obligations under the contract.

41. The warning signs erected in the car park do not assist VCS in these circumstances. The reference in those signs to the fact that the motorist is entering into a contractual agreement cannot create a contract where there is no relevant offer from VCS that can be accepted.

42. We agree with Mr Singh that no right to park could have been, or was, offered by VCS to the motorist. Motorists who parked in the car park were generally already permitted to park by the client, the landowner, to whom permits had been given. Those motorists already had the right to park, subject to the permit conditions, without fear of an action for trespass by the landowner in any event. We were referred to the parking permit itself. Although the terms and conditions of use are in the form of a letter from VCS to the user, and the permit itself is titled "Parking Permit VCS", this does not show that it was VCS, as opposed to the client, who made any offer of the right to park. VCS had no right to make any such offer, and accordingly could not have made it. In this context we note that the contract between VCS and clients requires VCS to issue parking permits to clients on request. It is the client that determines the number of permits that are in issue and the motorists to whom they are issued.

43. Nor does the fact that the permit conditions may be altered by VCS without prior notice assist VCS's case. Such a provision is not inconsistent with the right to park on the relevant conditions having been conferred by the client. It is perfectly possible for a right to be granted by one person on terms that may be set by another person, acting on behalf of the first.

44. We accordingly find that, contrary to the finding of the First-tier Tribunal in this respect, there was no contract between VCS and the motorist.

Conclusions

45. We have found, firstly, that VCS had no right to claim damages in trespass against motorists who parked in breach of the relevant restrictions, and accordingly that the penalty charges did not constitute, in VCS's hands, such damages. Secondly, we have found that there was no contract between VCS and the motorist, and that accordingly the penalty charges could not constitute damages for breach of such a contract.

46. In our view the only relevant contract to which VCS is a party is that between VCS and the client. Under that contract VCS provides parking control services, which amount to the management and operation of the parking sites on behalf of the landowner. VCS is permitted under the contract to collect and retain all fees and charges from parking enforcement action.

47. We agree with the VAT Tribunal in *Seagar* (at [12]) that there are two sets of obligations that are being "triangulated". The first set of obligations is between the client (acting through its agent, VCS) and the motorist, and the second is between VCS and the client.

48. The legal analysis is that VCS collects the various parking charges as agent for the client, which represents damages for trespass, or for breach of a contract between the landowner and the motorist. Such payments are outside the scope of VAT.

49. By allowing VCS to collect and retain the charges, the client was giving consideration, or further consideration, to VCS for its parking control services under the contract. That was consideration for standard-rated supplies by VCS to the client.

Decision

50. For the reasons we have given, we dismiss this appeal.

ROGER BERNER
UPPER TRIBUNAL JUDGE

NICHOLAS ALEKSANDER
UPPER TRIBUNAL JUDGE

RELEASE DATE: 02 May 2012