Neutral Citation Number:

Case No: 8MA91364

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE COURT

Manchester Civil Justice Centre
1, Bridge Street West
Manchester
M60 9DJ

Date: Friday 18th March 2011

Before :

His Honour Judge Hegarty QC

- -

Between :

ParkingEye Limited	**Claimant**
- and -	
Somerfield Stores Limited	**Defendant**

- -
- -

Mr Chaisty QC (instructed by **Pannone**) for the **Claimant**
Mr Fealy (instructed by Clarke Willmott LLP & Myles Bailey, Legal Department, Somerfield Stores Ltd) for the **Defendant**

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JUDGMENT

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PART I
INTRODUCTION

1. In this action, ParkingEye Limited ("ParkingEye") claims damages against Somerfield Stores Limited ("Somerfield") for breach of an agreement in writing dated 19th August 2005 ("the Agreement").

2. ParkingEye was incorporated on 17th September 2004 for the purpose of exploiting a car park monitoring and control system based upon an automated number plate recognition system ("ANPR"). The man behind this business concept was Mr Andrew McKerney, who has been managing director of ParkingEye from the outset and who appears to have played an active executive role in its affairs.

3. As is now, I think, widely known, ANPR technology automatically photographs vehicle registration plates and reads and records the registration number. In this way, it is possible to determine the precise time at which any particular vehicle has passed through any point at which the system is programmed to operate. Mr McKerney seems to have been one of the first persons within the United Kingdom to recognise the potential of ANPR technology for monitoring and controlling car parking facilities. The concept is, in essence, very simple. Suitable equipment is installed at the entrance and exit points of a car park and records the time at which each vehicle enters and leaves the car park. In this way, it can determine how long a vehicle has been present within the car park and whether, therefore, it has exceeded any designated time limit for the use of the car parking facilities.

4. A further advantage of the system used by ParkingEye is that it has the facility to generate an automatic parking charge notice in the event that a vehicle exceeds any designated time limit for the use of the car park and the driver thereby becomes liable to pay a charge for the use of the facilities. The notice is sent to the registered keeper of the vehicle, whose details are obtained from the Driver and Vehicle Licensing Agency. This process is carried out automatically through ParkingEye's central computer server. But the actual collection of the charges was, at the material time, sub-contracted to a concern known as Commercial Collection Services Ltd ("CCS") which also provided a call centre facility to deal with enquiries or complaints.

5. This system offers certain advantages when compared with rival systems involving the manual supervision and operation of car parks. It is likely to be less labour intensive and therefore cheaper; and it is also likely to be more efficient. On the other hand, however, it is likely to be less flexible than a manual system; and the parameters within which it is designed to operate in any specific situation will have to be set with some care.

6. In addition to public car parks, Mr McKerney also saw a potential market in the retail sector. He realised that many supermarkets and convenience stores had their own car parking facilities, the operation of which was

commonly contracted out to one of a comparatively small number of companies which provided the personnel and any necessary ancillary services. He was well aware that the cost of services of this kind was likely to be substantial for any retail business with a significant number of customer car parks. His idea was to approach such retailers with an offer to provide the ParkingEye system at some or all of their car parks at no cost to the retailers. This could be achieved quite simply if ParkingEye were able to collect and retain any parking charges levied on motorists, provided, of course, that these were set at a level which would cover ParkingEye's costs and enable it to make a profit on its investment.

7. One of the smaller supermarket chains which Mr McKerney targeted for the purposes of this scheme was the Defendant, Somerfield, which, at that time, operated several hundred stores under the names "Somerfield" and "Kwik Save". In general, these stores were somewhat smaller than those operated by some of their larger rivals. Most were what might be termed "convenience" outlets, rather than "destination" stores which a customer was likely to visit in order to do an entire week's shopping. So the cost of the average "basket" during the period with which I am concerned was only about £8.80; and the time which most customers would need to spend at the stores would be corresponding limited, though each customer would, on average, visit one of the stores about three times a week.

8. Many of Somerfield stores had their own car parking facilities which were manned and serviced by Euro Car Parks Limited. The annual cost of these services to Somerfield was, it seems, in excess of £1m.

9. So, from Somerfield's standpoint, the replacement of this manual operating system by ParkingEye's automated system must have seemed to offer the prospect of very substantial cost savings. But there was a further advantage which must also have seemed attractive to Somerfield. Whilst it was in its own commercial interests to offer free car parking to genuine customers for a sufficient period to enable them to visit their local Somerfield or Kwik Save store, it was manifestly not in its interests to allow persons to park their cars on its car parks for longer than was reasonably necessary to enable them to visit the store and make any necessary purchases. There was an obvious danger that, unless proper controls were in place, individuals might park on the car park and make a token visit to their local store and thus hope to obtain free parking for many hours whilst they went elsewhere. Indeed, in some cases, it would seem, not even a token visit to a Somerfield store might be made.

10. In common with other supermarkets, therefore, Somerfield allowed its customers free parking for a limited period only. A charge would then be levied on anyone who overstayed beyond the prescribed time limit. It seems that at least some of its store managers felt that the process of imposing and collecting parking charges was not being carried out in an efficient and effective manner so as to deter those who might be tempted to abuse the system and take up car parking spaces which would otherwise be available for genuine customers. One of the particular attractions of the

ParkingEye system was, of course, that it was particularly efficient at detecting over-stayers and sending out the appropriate parking charge notices.

11. After some discussions and negotiations between Mr McKerney and Mr Mark Ogden of Somerfield during the early part of 2005, it was agreed that the system should be installed at Somerfield's Blackpool store on a trial basis. The trial was successful and after a number of drafts had been exchanged the Agreement was eventually signed and dated 19th August 2005. It provided for the installation of the system at 25 of Somerfield's stores and was to continue for a period of 15 months from 1st September 2005. The system was to be installed and operated at no cost to Somerfield; but ParkingEye was entitled to retain the full amount of any revenue derived from the parking charges generated by the system.

12. These charges or "fines" were set at an initial level of £37.50, reflecting a discount for prompt payment, increasing in the first instance to £75 and ultimately to £135. A series of four standard letters was to be sent out to the keeper of the offending vehicle requiring payment of these charges. The nature, form and content of these letters formed the basis of a number of different defences to the claim which were raised and pursued by Somerfield at trial. It was contended that there could be no contractual liability on the part of any motorist to pay any such charge or fine; and that, even if there was, the amounts sought to be recovered constituted penalties and were therefore unenforceable.

13. But it was also alleged that the letters incorporated various false representations which were known to be false so that ParkingEye was guilty of the tort of deceit, insofar as it sought to extract payment from any motorist by means of these letters. Furthermore, the use of the letters, it was alleged, constituted a criminal offence, namely the unlawful harassment of a debtor contrary to section 40 of the Administration of Justice Act 1970. Accordingly, it was contended that the Agreement was tainted by illegality and could not be enforced by ParkingEye. No concerns of this kind were, however, raised at the time, though there is an issue as to whether Somerfield ever saw and approved the form and content of the letters.

14. Be that as it may, 19 stores (including Blackpool) were initially identified as suitable for the system and it was agreed that it should be installed at those sites. However, the installation was cancelled at two of the stores in question so that the installation was eventually completed at only 17 stores (including Blackpool).

15. In each case, the installation appears to have been completed before the Christmas and New Year period though it does not seem to have "gone live" at some stores until after the New Year. Indeed the question of "go live" dates has given rise to various disputes between the parties. It is contended on behalf of Somerfield that the system went live at certain stores and charge letters started to be issued on dates earlier than those

which had been notified to the managers of the stores in question by ParkingEye. This led to requests by Somerfield for the charge letters to be held back until after the New Year or for the charges themselves to be cancelled.

16. Various other problems began to manifest themselves once the system was in operation. The most troublesome of these was to do with time limits. Some of Somerfield's managers expressed dismay and dissatisfaction with the time limits which were initially programmed into the system, though it is ParkingEye's case that these had, in fact, all been agreed with the local management. Nonetheless a considerable number of complaints or representations were made about these time limits, coupled with requests for increases in the free parking time.

17. Another problem which emerged was as to the cancellation of charges. Provision was made in the Agreement for various "Exemptions" which covered, for example, disabled motorists or those who could show that on any particular occasion they had purchased goods at the store in excess of a specified amount. So any parking charge levied against such a motorist ought to have been cancelled rather than processed in the usual way. But difficulties arose as to how these arrangements operated in practice.

18. But, regardless of these specific Exemptions, some managers expressed serious concerns about the overall impact that the operation of the ParkingEye system was having on the reputation and goodwill of certain stores. So they wanted to be able to cancel fines where they felt that Somerfield's reputation was in jeopardy, even if the circumstances were not such that any of the contractual Exemptions applied.

19. It is ParkingEye's case that an agreement was reached between Mr McKerney and Mr James McDonald of Somerfield that, if Somerfield wished to cancel a charge in such circumstances, it would pay ParkingEye 65% of the amount of the charge payable by the motorist as discounted for prompt payment. But Somerfield denies that any such agreement was reached and invokes a contractual right under the agreement to alter and extend the Exemptions.

20. An associated dispute has since arisen in relation to staff or visitor permits. It was envisaged that each store would be entitled to nominate a number of permit holders who would be entitled to park at its car park without charge. In essence, it is ParkingEye's case that such permits should be issued only to bona fide employees and visitors and that the number issued by each store should be limited to 25; whereas Somerfield contends that there were no such restrictions. The relevant contractual provisions are, it has to be said, far from clear; and the situation is complicated by the fact that the contractual Exemptions include employees or visitors whose vehicles were not registered in the list of permit holders.

21. During the period before and after the installation of the system at the selected stores, Mr McKerney dealt principally with Mr McDonald who

was then Somerfield's Head of Customer Services. He was the main recipient of the various complaints or requests made by some of the store managers and their superiors; and he in turn passed many of these on to Mr McKerney who almost invariably responded promptly and constructively. In many instances, the free parking time limits were extended at the request of those responsible for the management of individual stores.

22. But some store managers and their superiors remained strongly opposed to the system, even though others appear to have seen it in a positive light. As a result of these pressures, in January 2006 Mr McDonald sought assistance and support from Mr Paul Wilson, Somerfield's Head of Property and Store Service Procurement, who embarked on a review of the system. A meeting was held between Mr McKerney, Mr McDonald and Mr Wilson on 25th January 2006 at which a number of issues were discussed.

23. But this meeting does not seem to have been followed up with any obvious sense of urgency on Somerfield's part. Mr Wilson delegated the matter to Mr Colin Halsall, a Procurement Manager, who was asked to review the situation and report back to himself and Mr McDonald. He in turn held a meeting with Mr McKerney on 15th February 2006 at which various further matters were discussed and Mr McKerney was asked to respond to a number of issues raised by Mr Halsall. Further issues were raised by Mr Halsall by e-mail on the following day; and Mr McKerney was asked to respond by 20th February 2006.

24. Though Mr McKerney did in fact respond by 20th February 2006, it seems that his response was considered unsatisfactory by Somerfield. Mr Halsall submitted a report to Mr Wilson and Mr McDonald putting forward a number of options, one of which was the termination of the Agreement. At some stage it was decided to adopt this option and on 7th March 2006 Mr McKerney was informed of Somerfield's decision by way of a letter attached to an e-mail of that date from Mr Halsall. Neither the e-mail nor the letter suggests that the termination of the Agreement was based upon or justified by any breach of contract on the part of ParkingEye; and no such suggestion was made in the exchange of e-mails which followed over the next week or so. On the contrary, Somerfield seems to have accepted at the time that ParkingEye was entitled to some form of compensation.

25. But no agreement was reached between the parties and the present action was therefore commenced on 15th October 2008. By its Amended Particulars of Claim, ParkingEye alleges various breaches of the Agreement by Somerfield prior to 7th March 2006, namely a failure to agree or nominate the full complement of 25 stores at which the system could be installed, the issue of parking permits to persons who were not "genuine permit holders" and the cancellation of parking charges in circumstances which did not fall within the contractual Exemptions.

26. In addition, however, it is alleged that the termination of the Agreement on 7th March 2006 amounted to a repudiatory breach of contract on the part of

Somerfield which was accepted by ParkingEye by deactivating and removing its equipment from the sites at which it had been installed. In those circumstances ParkingEye claims damages for its loss of profit which it quantifies in the Particulars of Claim in the sum of £1,546,885, though by the time the expert accountancy evidence had been finalised, this had been reduced to £750,484 or alternatively £470,975.

27. In the alternative, it seeks a restitutionary remedy in the event that it was not entitled to recover any monies from motorists by way of parking charges or if the Agreement were to be held to have been tainted by illegality.

28. In its Amended Defence, Somerfield alleges that it was lawfully entitled to treat the Agreement as terminated and discharged by reason of a repudiatory breach of contract on the part of ParkingEye. This alleged breach of contract is said to have been a refusal on its part to comply with Somerfield's instruction to vary the free parking time limit at a number of its stores. This allegation was specifically based upon the alleged refusal of Mr McKerney to comply with instructions given to him by Mr Halsall in the course of the meeting on 15th February 2006 or in a subsequent letter dated 22nd February 2006 which, however, ParkingEye denies ever having received.

29. In the alternative, it is alleged that Somerfield was entitled to terminate the Agreement in accordance with the provision of clause 11.1.5 thereof and that it did so by its letter dated 7th March 2006 or by a subsequent e-mail dated 14th March 2006. Clause 11.1.5 allowed termination by notice in writing if ParkingEye did any act which brought the reputation or goodwill of Somerfield into disrepute or otherwise adversely affected its trading connection or business. One of the supporting allegations was that, contrary to Somerfield's instructions as set out in its letter dated 22nd February 2006, ParkingEye had continued to levy charges on customers who had parked for periods less than the free parking time limits previously insisted upon by Mr Halsall. But reliance was primarily placed upon the form and content of the parking charge notices and letters. Indeed, as previously noted, it raised a defence of illegality based on the form and content of those documents.

30. Furthermore, it is alleged that on the true construction of the Agreement, Somerfield was entitled to authorise any person it wished to park on any of the car parks in question and nominate them as permit holders without any limitation or restriction and was entitled to cancel any charge which fell within the contractual Exemptions or to make changes to the Exemptions at its absolute discretion. Yet further, it is alleged that it was under no duty to nominate or agree 25 car parks at which the system could be installed and that, in any event, it did not fail to do so.

31. At paragraph 40 of the Amended Defence, Somerfield also raised an issue as to its entitlement to terminate the Agreement in part pursuant to clause 11.2.1 which provided for termination on notice in respect of any

individual store for "operational reasons" in various defined circumstances. It was, in effect, pleaded that it would have been entitled to do so in relation to four of the stores at which the system was installed. But it is not alleged that it did in fact purport to terminate on those grounds. The point is, however, raised in connection with the issues of causation and quantum at paragraph 51 of the Defence in which it is alleged that, if the Agreement had not been terminated, Somerfield would nonetheless have invoked clause 11.2.1 in relation to six of the stores, so that ParkingEye cannot claim any loss of profits in respect of those stores.

32. The Defence also joins issue more generally on ParkingEye's claim for loss of profits. A number of specific challenges are made to the basis and manner of computation of the loss alleged; and Somerfield also contends that, even if the Agreement had not been terminated, it would have exercised what it claims to have been its contractual right to extend the free parking time limits or change the Exemptions so as to allow its customers, in effect, to park all day without any charge. It is yet further alleged that ParkingEye had no legal right to recover parking charges from any of the motorists using any of the car parks in question, either because there was no contract with the motorists or, even if there was, any such charge was a penalty and was therefore irrecoverable. It was and remained Somerfield's case at trial that ParkingEye is unable to prove that it has suffered any loss whatsoever in consequence of the termination of the contract. It is also denied that ParkingEye is entitled to any restitutionary remedy.

PART II
THE FACTUAL BACKGROUND

33. I will now analyse the evidence and set out my principal findings of primary fact in a broadly chronological order.

The Witnesses

34. But I will start by saying something about nature of the evidence which I heard and my assessment of the witnesses. Each side called a number of factual witnesses of whom all but one gave oral evidence. The evidence of these witnesses was given over a period of nine days in two widely separated instalments. Two further days were taken up with oral submissions several weeks after the conclusion of the evidence.

35. The main factual witness for ParkingEye was Mr McKerney himself. His principal witness statement was full and detailed and in cross-examination he demonstrated an assessment and command of the facts which I found impressive. His evidence also fitted in well with the contemporaneous documentation, comprising for the most part exchanges of e-mails between himself and various representatives of Somerfield. Some of the witnesses called on behalf of Somerfield criticised or questioned his attitude and motives. By way of example, Mr Halsall described him as aggressive and arrogant, though he found it difficult to identify when and how this manifested itself when asked about it in cross-examination, and it is not

apparent on the face of the many e-mails which he sent to various representatives of Somerfield over the relevant period.

36. But I had some reservations about one or two aspects of his evidence. Thus I found it difficult to see how he could have adopted and verified a claim initially quantified in a sum in excess of £1.5m which bore little relationship to ParkingEye's reported gross profits on all of its activities over the period in question and which was eventually shown to be flawed and unsustainable. I accept, however, that this claim was initially supported by ParkingEye's accountancy expert. I was also somewhat sceptical of his evidence that he had simply overlooked a request from Mr Halsall of Somerfield in mid February 2006 to send him copies of the standard notices and letters which were being sent out to motorists, even though he had fairly promptly passed on this request to CCS and received copies from it. But in general, I nonetheless took the view that he was a broadly reliable witness whose testimony I could and should accept in the absence of clear indication to the contrary.

37. I need say little about the other witnesses called on behalf of ParkingEye, Mr David Waterson, now its technical director and formerly managing director of Waterson Consulting Limited, and Ms Georgina Roberts, formerly operation co-ordinator and now an accounts manager. Neither of them was seriously challenged in cross-examination and I have no reason not to accept their evidence. ParkingEye's other witness, Mr Ben Johnson, who had been its director of sales and marketing since the latter part of 2008, was not called to give oral evidence, and his witness statement remained unchallenged insofar as it was material to the issues to be resolved on the litigation.

38. The main witnesses for Somerfield were Mr James McDonald, formerly Head of Customer Services, Mr Paul Wilson, Head of Property and Store Services Procurement, and for Mr Colin Halsall, a self-employed consultant working as a Procurement Manager. Mr Mark Ogden, who was heavily involved in the initial negotiations with Mr McKerney was not, however, called as a witness. He left Somerfield's employment shortly after his involvement in these matters came to an end; and no serious attempt seems to have been made to trace him. Another notable absentee from Somerfield's original list of witnesses was Ms Marisa Taylor, who took over responsibility for this contract from Mr Ogden. But at a very late stage, long after all the other witnesses save for Mr McDonald had given their evidence, an application was made for permission to adduce evidence from her; and I granted the application subject to certain conditions limiting its scope.

39. I found the witness statements of Mr Wilson and Mr Halsall to be unsatisfactory in a number of respects. Each contains virtually identical passages commenting on the parking charge notices and letters; and much of Mr Halsall's statement deals with documents and events which pre-dated his involvement. The statements were clearly drafted for them, though they, of course, took responsibility for their contents by signing

and verifying them. But I very much doubt if all or even most of the contents reflects the witnesses' own words; and I am not at all sure that quite the same impression would have been created if their evidence had been given orally in the witness box.

40. So, whilst I do not for one moment think that either Mr Wilson or Mr Halsall sought to give a misleading impression when they signed or verified their witness statements, I approach their statements with some degree of caution. Both of them of course, gave oral evidence and were cross-examined at some length. Though I am not prepared to hold that either of them was being deliberately untruthful, I did not think that I was able to obtain from their evidence a clear and complete picture of how the decision to terminate the Agreement was reached and how far other individuals within Somerfield had been involved in the process.

41. Much the same might be said of Mr McDonald's evidence. Though he is more obviously independent, in the sense that he is no longer employed by Somerfield, his witness statement displays many of the same characteristics as those of Mr Halsall and Mr Wilson and incorporates a very similar commentary on the parking charge notices and letters. So I formed a similar view of the weight to be given to his witness statement as in the case of Mr Wilson and Mr Halsall. Nor did I feel that in his oral evidence he was able to give a clear and complete account of his involvement in the matters which have given rise to this litigation. But I am prepared to accept that this is likely to be attributable to the time which has elapsed since he was involved and the inevitable toll which it takes upon a person's memory.

42. In general, therefore, I am inclined to prefer the evidence of Mr McKerney where it differs from the testimony of these three witnesses. But, in the end, I doubt if this comparative assessment is likely to matter a great deal. There was only a limited number of issues where there appeared to be a serious conflict of evidence; and, for the most part, the contemporaneous documents and inherent probabilities provided a good indication as to which account should be preferred.

43. My assessment of Ms Taylor's evidence was rather different. Her witness statement was heavily edited in the light of the directions which I gave when granting permission to call her as a witness. But, on its face, it does not give rise to the sort of concerns which I have referred to in relation to the other three major witnesses called on behalf of Somerfield. Nor did I have any real reservations about her oral evidence. She had no obvious axe to grind, having left Somerfield in about September 2005; but by the same token, she was trying to recollect events which had taken place some five years ago after a considerable interval during which she would have had no obvious reason to reflect upon such matters. Subject to that caveat, I regarded her as a truthful and broadly reliable witness.

44. I will add one further observation, however, about the evidence of these witnesses. None of them was directly involved throughout the entire

history of the events which have given rise to the present litigation. Mr McDonald came closest, having taken over responsibility for certain aspects of the contractual relationship with ParkingEye towards the end of September 2005, and continuing to do so until March 2006. But he had not been involved in the initial discussions and negotiations, which had been conducted by Mr Ogden (who was not called as a witness) and Ms Taylor (who was belatedly called to deal with certain limited aspects of the dispute). Mr McDonald was the main channel of communication between ParkingEye and the local and senior management of Somerfield during most of this period. But, though it is quite obvious that some of these managers expressed serious concerns about the ParkingEye system to Mr McDonald (and, it may be, to others within Somerfield), none was called to give evidence to explain or justify their concerns. The involvement of Mr Wilson and Mr Halsall was even more limited. Mr Wilson was asked for support and assistance by Mr McDonald in or about the middle of January 2006 but handed over responsibility to Mr Halsall shortly after a meeting with Mr McKerney on 25th January 2006. It does, however, seem that he was a party to the subsequent discussion to terminate the contract.

45. So there was a lack of continuity on the part of Somerfield in its dealings with ParkingEye; and each of its witnesses was able to deal only with certain aspects of the relationship between the parties whilst other witnesses who might well have been able to cast further light on aspects of the dispute, such as Mr Ogden and some of the local managers, were not called at all. The somewhat disjointed and fragmentary nature of Somerfield's evidence meant that I did not have any great confidence that any of its witnesses was able to give a full and fair account of all potentially relevant developments leading up to the eventual termination of the Agreement. In the circumstances, I am disinclined to draw inferences favourable to Somerfield where there is no direct evidence upon which it can rely.

46. I need say very little about the other factual evidence adduced on behalf of Somerfield. Mrs Wendy Standerwick, a human resources manager, made two witness statements for the purpose of producing and verifying certain facts and figures as to employee numbers. But it is apparent that she had no direct personal knowledge of these matters; and the information provided in the Schedule exhibited to her first witness statement had to be revised and corrected by her second statement. The other witness for Somerfield was Mr David Edmeades, who was employed by Town and City Parking Limited ("TCP") which manages a number of car parks for Somerfield including those attached to several of the stores at which the ParkingEye system had formerly been employed. He provided certain information to Somerfield's accountancy expert the substance of which was set out as Appendices V and VI of his expert report. These facts and figures were not challenged and Mr Edmeades was not required to attend for cross-examination.

47. In addition, both sides adduced evidence from an expert accountant: Mr Robert Parry of Tenon Forensic Accountancy for ParkingEye; and Mr

Roger Isaacs of Milsted Langdon for Somerfield. I will deal with their evidence separately later in this judgment.

Initial Contacts

48. The first contact between ParkingEye and Somerfield took place in early January 2005, when Mr McKerney spoke to Mr Mark Ogden of Somerfield. He followed up their conversation with an e-mail dated 4th January 2005 in which he briefly summarised the nature and advantages of ParkingEye's ANPR system. As he put it, ParkingEye's system would reduce, if not eliminate, enforcement costs, increase the efficiency of enforcing parking regulations and add value through ensuring that all those who parked at one of Somerfield's car parks would either shop within its stores or pay for their parking. He proposed a trial of the ANPR system at one of the stores so as to enable Somerfield to assess the potential of the system. Any such trial would be entirely free of charge to Somerfield as, indeed, would be the entire system if it was ultimately installed.

49. Mr Ogden was clearly attracted by the proposal and Mr McKerney carried out surveys at a number of stores in order to find a suitable site for the purposes of the proposed trial. After some further discussions, it was agreed that a trial of the system would be carried out at the Somerfield store in Blackpool. A detailed written proposal for the trial was prepared by Mr McKerney and submitted to Mr Ogden on 7th February 2005. Subsequently, on 1st March 2005, he sent him some proofs of the artwork and wording of the signs which he suggested should be erected at the car parks. These incorporated the logos of both ParkingEye and Somerfield, stated that it was a "customer only" car park with a one hour maximum stay and made it clear that a failure to comply the time limit might result in a "£50 penalty ticket". But, in his covering e-mail of 1st March 2005, Mr McKerney advised Mr Ogden not to pay any attention to the amount of the "fine" as he was taking advice about setting it at such a level as to constitute a "deterrent in its own right".

50. On 28th April 2005, Mr McKerney sent a further e-mail to Mr Ogden with a number of attachments. These attachments comprised the text and layout of what Mr McKerney referred to in his covering e-mail as the "fine letters" to be sent out to motorists, though the expression "penalty charge" was employed in the documents themselves. The first notice incorporated the logos of both ParkingEye and Somerfield. It provided for a charge to be levied in the sum of £75 upon any motorist who had parked his vehicle in excess of the stipulated period, though this was discounted by 50% to £37.50 if it was paid promptly, namely within 14 days after the date of the initial penalty charge notice. If this reduced amount was not paid within 14 days, the penalty charge notice required payment of the full amount of £75 within 28 days; and if it was not paid within that period, an "administration charge" of £60 might be added so as to bring the total amount payable up to a total of £135.

51. If no payment was made within 28 days of the issue of the first penalty charge notice, a reminder notice would be sent out giving a further

opportunity to pay at the discounted rate of £37.50 if payment was made within 7 days and, in default, requiring payment of the full amount of £75 within 21 days. Only if no payment was received within this extended period of 21 days was the amount of the charge increased to £135. Like the first notice it incorporated both the ParkingEye and Somerfield logos; and it included photographs of the vehicle in question on its arrival and departure from the car park, together with details of the dates and times. If no payment was received in response to this reminder notice, two further letters would be sent out threatening legal proceedings and other dire consequences if no payment was received.

52. In his covering e-mail, Mr McKerney briefly summarised the nature and purpose of these notices and letters. He then added a comment about the "next stage" if no payment had been received in response. He suggested that a collector could then be sent to the motorist's door; and if this did not succeed, the next stage would be formal proceedings. But he recommended that, in the first instance, they should just send out the four notices and then see what percentage payment ratio was achieved and how many offences were recorded for each car park.

53. Mr McKerney then addressed the question of exemptions. He pointed out that agreement would have to be reached as to the circumstances in which Somerfield would be willing to let a motorist off paying a parking charge. He gave three "standard reasons" for such exemptions. The first was where the motorist had spent a minimum sum of, say, £50 at the relevant store on the occasion in question. A receipt would have to be produced and the time on the receipt could then be checked against the time when the car left the car park. The second standard reason was where the driver was a disabled person. He suggested that double the normal time limit should apply in such cases. Finally, there was a miscellaneous category to cover circumstances such as, for example, where a motorist had collapsed and had to be taken to hospital.

54. The next point raised by Mr McKerney in this e-mail related to time limits. He asked Mr Ogden how much time he would allow to a motorist beyond the one hour time limit before a charge was levied. He suggested a period of 15 minutes but asked Mr Ogden to let him know his preferences.

55. Finally, he made some brief comments about the web-site and indicated that a formal monthly report would be sent to Somerfield providing certain types of information about the operation of the system. He added that, once the points raised in his e-mail had been addressed, the system could be put into operation at Blackpool.

56. It seems that Mr Ogden did not respond to Mr McKerney's e-mail of 28th April 2005 and did not comment in writing upon any of the draft documents attached to it. But, in his principal witness statement, Mr McKerney stated that Mr Ogden had "fully approved" these documents; and in cross-examination he said that in a subsequent discussion between

the two men, Mr Ogden had told him that there would be no problem at all with the notices and letters.

57. Now, Mr McKerney's evidence on this point was challenged on the footing that he had not specifically referred to any such oral approval in his witness statement. But Mr Ogden was not called as a witness; and it seems quite clear to me that he must have received the drafts as attachments to Mr McKerney's e-mail. So I infer that he is likely to have seen and read them; and it seems clear that he did not, in fact, require any changes of substance to their form of content. Given my overall impression of Mr McKerney as a witness, I think it is more likely that not that, as he says, Mr Ogden indicated to him, in positive terms, that he saw no problem or difficulty with the form and content of the drafts. But be that as it may, I am satisfied that Mr Ogden must have approved the drafts at least in the sense that he did not object to them and was prepared to allow them to be used for the collection of the charges. Indeed, as I have already noted, the drafts incorporated Somerfield's standard logo which could hardly have been used without its permission.

58. It seems that agreement was eventually reached as to the terms upon which the Blackpool trial would proceed. The necessary equipment and signage was installed at the car park and the system went "live", at least for testing purposes, in the latter part of May 2005 and appears to have been regarded as successful by both sides. However, no charge notices were issued until after the formal Agreement between ParkingEye and Somerfield had been agreed and signed.

59. In the meantime, Mr McKerney had attempted to identify a number of further stores which would be suitable for a more extensive trial of the system. As a result of an initial telephone survey, he was able to produce a list of about 187 Somerfield or Kwik Save stores with parking problems of which 46 were currently managed by Euro Car Parks Limited. He then attempted to winnow this list down so as to find those whose car parking facilities were likely to be suitable for the purposes of the ANPR system. The point of the exercise was to eliminate those stores where the car parks were leasehold or were shared with other users or did not have single defined entrance and exit points. This left a total of 88 stores which looked as if they might be suitable.

60. However, before the matter could be taken any further, Mr Ogden left his position with Somerfield and was replaced by Miss Marisa Taylor, who took over from him shortly before the end of May 2005. On 31st May 2005, Mr McKerney met Miss Taylor at Somerfield's offices in Bristol; and, later on the same day, he sent an e-mail to her attaching a list of 190 "problem" stores identifying the 88 which might be suitable for the installation of the ANPR system. He also proposed some form of contract for a more extensive trial of the system extending over a period of 12 months and involving at least 25 stores.

61. Miss Taylor worked as a self-employed consultant within the procurement team and was not, therefore, directly involved in the activities of any of the individual stores. When she took over from Mr Ogden, she discussed the ParkingEye project with him, but only, it would seem, at a fairly high level of generality. She did not have direct access to his files and she did not specifically ask for copies of all relevant documents. Her primary responsibility seems to have been to deal with any contractual issues in relation to the proposed trial. But she had no authority to approve the trial on behalf of Somerfield. That would have been a matter for Mr James McDonald, who was then head of Customer Services.

The Agreement

62. Mr McKerney sent Miss Taylor a draft contract as an attachment to an e-mail dated 24th June 2005. Discussions and negotiations over the terms of the proposed contract took place over the weeks which followed between Mr McKerney and Miss Taylor with the assistance of Somerfield's legal department. They went through six drafts; but all terms were finally agreed on 28th July 2005. On that date, Miss Taylor informed Mr McKerney by e-mail that she now had the "go ahead", seemingly from Mr McDonald. But she also pointed out that the parties had not yet identified the 25 stores which it was envisaged would be the subject of the extended trial. The Agreement itself was finally signed and dated on 19th August 2005.

63. I will have to consider the terms of the Agreement in some detail later in this judgment. At this stage, therefore, I need only pick out one or two of its salient features. It was formulated as an agreement for the supply and purchase of the ParkingEye car park monitoring and management system. It was to be installed in the first instance in 25 "Preliminary Stores" selected from a list of 190 "Additional Stores" which were said to have been identified by the parties for that purpose. Once the system had been installed in the 25 Preliminary Stores and was operational, Somerfield would consider permitting its installation in the rest of the Additional Stores.

64. The agreement was to commence on 1st September 2005 and was to continue for a period of 15 months. At the expiration of that period, however, it would continue if Somerfield chose to retain the system in relation to the Preliminary Stores or wanted it to be supplied and installed in any of the Additional Stores.

65. The system was to be supplied by ParkingEye free of charge. But, at least during the initial 15 month period, ParkingEye was entitled to retain the full amount of all "Parking Fines" generated by the system and levied in accordance with the detailed provisions set out in Schedule 2. This right was, however, expressed to be subject to the Exemptions, which were the subject of specific provisions set out in Schedule 4, though it was expressly provided in the body of the Agreement that Somerfield might make any changes to the Exemptions "at its absolute discretion". However, if the Agreement continued after the initial 15 month period,

there were further specific provisions which, in effect, guaranteed a minimum income which ParkingEye would be entitled to receive from each car park and provided for any excess above this specified amount to be shared between Somerfield and ParkingEye.

66. Schedule 2 to the Agreement dealt with the parking fine process. In accordance with earlier discussions, this provided for an initial fine of £75 where a vehicle had overstayed the maximum free parking time limit for the car park in question, subject to a 50% discount for prompt payment, but an increase to £135 if payment was delayed. It was envisaged that four "Fine Letters" should be issued but that no action would normally be taken if the registered keeper chose not to pay after the fourth letter. However, there was provision for records were to be kept of all "non-payers and persistent offenders"; and it was specifically provided that court proceedings could be started to recover outstanding parking fines. I will have more to say later in this judgment about those provisions relating to legal proceedings.

67. The maximum parking limit for each car park was not specifically identified in the Agreement. However, Somerfield was entitled to choose the maximum period for free parking in its car parks after consultation with ParkingEye. In addition, of course, no parking fine would have to be paid where an Exemption applied; and any fine levied in those circumstances would be cancelled. In practice, it was envisaged that each store manager would provide a "staff permit list" giving the registration numbers of vehicles used by employees who worked at the store in question. But, in many cases, an Exemption would depend upon the individual circumstances of the case, so that a specific request would have to be made in order to ensure that no fine letters should be issued or should be cancelled if already issued.

68. In essence, therefore, the Agreement was to operate for a minimum period of 15 months; and it was anticipated that it would cover 25 of Somerfield's stores. Somerfield could determine the maximum free parking period at any store, albeit in consultation with ParkingEye; and once that period was exceeded, ParkingEye would issue four successive parking fine notices directed to the registered keeper of the vehicle in question, unless a relevant Exemption applied or was invoked. Whilst ParkingEye was obliged to provide the system free of charge to Somerfield, it was entitled to retain all parking fines levied during the initial 15 month period.

The Selection of the Stores

69. However, despite the fact that the Agreement envisaged that there would be 25 "Preliminary Stores" which would be governed by its provisions, no stores other than Blackpool had, in fact, been selected for this purpose by the time the Agreement came into force. According to Mr McKerney, the initial contractual period of 15 months was specifically chosen on the assumption that the 25 Preliminary Stores would be identified and agreed within a very short period of time so as to allow the necessary equipment to be installed and tested within the first three months and to be fully

operational at all 25 stores over the remaining 12 months. In cross-examination, Miss Taylor agreed that the choice of a 15 month initial period, rather than 12 months, was to enable the parties to identify 25 stores for the trial.

70. But it proved a slow process. In the period after the agreement was signed, Somerfield put forward one or two suggestions, such as the stores at Levenshulme, West Didsbury and Borrowash, the last of which was eventually chosen for the trial. But each possible candidate for selection had to be vetted by Somerfield's property department to see whether it was suitable from their standpoint. Furthermore, Miss Taylor seems to have been of the view that the selection of stores was essentially a matter for Mr McDonald as Head of Operations, rather than for the procurement section. Yet further, she was expecting a child at the time and was due to take maternity leave. In fact, she left on 23rd September 2005, though she returned in the middle of 2006 for about 15 months. Mr McDonald then took over responsibility for the operation of the agreement and made contact with Mr McKerney on or about 30th September 2005.

71. On the same day, 30th September 2005, Mr McKerney sent Mr McDonald an e-mail setting out a list of 15 stores which ParkingEye had visited and considered suitable and which had also been cleared by Somerfield's property department. He also provided details of a further 24 stores which had not been visited by ParkingEye or cleared by Somerfield but which he considered to be "good prospects". He sent the same list of 24 prospects to Mr Price of Somerfield's property department by way of e-mail of the same date, asking whether there were any problems with any of them. Thereafter, Mr McKerney pressed Mr McDonald and Mr Price for a decision as to which sites should be the subject of the trial, so that the equipment could be installed by the beginning of December. Eventually, on 17th October 2005, he sent an e-mail to both of them listing 19 stores at which he was planning to install the ParkingEye system; and on 24th October 2005, he wrote a further e-mail suggesting two further stores as suitable candidates.

72. It seems that Mr McKerney or other representatives of ParkingEye had already had discussions with many of the store managers or their assistants in order to determine whether their car parks would be suitable candidates for the trial. It was no doubt in the light of these discussions that he felt able to propose the initial list of 19 stores set out in his e-mail of 17th October 2005. Indeed, in that e-mail, he also raised two further "key questions" for Mr McDonald and Mr Price. The first of these arose from the fact that the car parks at some of the stores under consideration were currently managed by Euro Car Parks Limited, so that the existing contracts with that company would have to be terminated. The other question related to the maximum free parking time. Mr McKerney pointed out that this varied between one and two hours at the various stores on the list; and he enquired whether it would be practicable to impose a standard one hour time limit, followed by 30 minutes grace, as appears to have been the case at Blackpool.

73. At first, Mr McDonald seemed perfectly content with the 19 stores initially proposed by Mr McKerney in his e-mail of 17th October 2005. On the same day, he sent a circular e-mail to the managers of the stores involved, with copies to various members of Somerfield's higher management, informing them they had been chosen for a trial of the system. However, a couple of hours later, he realised that, if the current contracts with Euro Car Parks Limited were to be terminated, Somerfield might become responsible for its staff as a result of the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Accordingly, he asked Mr McKerney to remove three of the stores from the list, though he suggested four other possibilities in their place.

74. Over the following weeks, ParkingEye put in hand the arrangements for the installation of the equipment at those stores for which approval seems to have been given. It appears that these comprised the 19 stores proposed by Mr McKerney on 17th October 2005, less the three which were currently managed by Euro Car Parks Limited, plus the two additional stores proposed by Mr McKerney on 24th October 2005, making 18 stores in all in addition to Blackpool. For his part, Mr McDonald accepted that he had initially signed off "about 19 stores" at which the installation proceeded.

Installation

75. The equipment to be supplied and installed required a suitable power supply and a broadband connection as well as, at least in some cases, ancillary works such as a speed ramp and lane dividers. In addition, of course, suitable signs had to be erected notifying anyone entering the car park of the time limit after which charges would be levied and the amount of those charges. It appears to have been envisaged that work would be completed at the selected stores by about the end of November or the beginning of December 2005. On 8th November 2005, Mr McKerney sent an e-mail to Mr McDonald informing him that all of the store managers involved had been informed of the installation programme and stating that, once the installation was complete, the managers or their deputy would be told how to update staff and visitor number plate details and how to contact the call centre in order to cancel any parking fines.

76. Furthermore, from time to time, as the installation proceeded, Mr McKerney provided Mr McDonald with a series of schedules indicating the anticipated dates of completion for each store, the date when testing could commence and the "go live" dates. By way of example, Mr McKerney referred to the schedule which he had sent to Mr McDonald on 2nd December 2005 showing the projected completion dates and indicating that two stores would "go live" on 5th December 2005 and a further eight on 12th December 2005.

77. But, during the course of the installation process, various problems were revealed which meant that the ParkingEye system might not be suitable for use in some of the car parks. Thus, it turned out that the entrance to the

car park at the Newcastle store also provided access to a large number of parking spaces used by other shops; and a similar problem arose at the Cheadle store. Mr McKerney, therefore, cancelled the installation at Newcastle, apparently before it had started; but the same could not be done at Cheadle, since the installation had been completed before the problem became apparent, though it never became operational. Mr McKerney pointed out that these problems had not previously been picked up either by Somerfield's property department or the local management of the stores in question. A number of other sites were also considered; but, for one reason or another, they also proved unsuitable.

Time Limits

78. But a further problem of a somewhat different nature also emerged as the installation process continued. Even though, according to Mr McKerney, the manner in which the system operated had been explained to the individual store managers or their deputies, it seems that only when the signs went up at their car parks that some managers began to express concerns as to the length of time allowed to a motorist before a parking charge would be incurred. As initially installed, the signs stated that parking was limited to one hour with no return within four hours and that a failure to comply with the time limits might result in a £75 penalty ticket. The 50% discount for prompt payment was mentioned in small print at the bottom of the sign. But it seems that, in fact, the system was set up so as to trigger the issue of a parking charge only after a further period of grace of 30 minutes had expired.

79. There seems little doubt on the evidence before me that these notices corresponded with what had been agreed and understood between ParkingEye and Somerfield. In his e-mail dated 17th October 2005, Mr McKerney had specifically proposed a one hour time limit with a further period of grace of 30 minutes in place of the times then allowed at various individual sites, which varied between one hour and two hours. This was in accordance with the way in which the system had been operating at the Blackpool store. Furthermore, Mr McKerney specifically asked whether there was "anything from a Property or Operations perspective that might put a block on this." But when Mr McDonald replied, he did not raise any objection to Mr McKerney's proposal. Indeed, in cross-examination, he accepted that there did not seem to have been any serious problems arising from the operation of the Blackpool pilot; and he also accepted that he had no reason to think that there would be any problem with a time limit of 1½ hours.

80. Furthermore, according to Mr McKerney, all the time limits had been specifically agreed with the individual store managers or their deputies prior to the installation. It is true that some of the e-mails disclosed by Somerfield suggest the contrary. But none of the store managers was called to give evidence at the trial; and, at paragraph 26 of his witness statement, Mr McDonald accepted that ParkingEye had spoken to the store managers about the standard time limit and that most of them had accepted the advice, albeit "on the basis that they had no frame of reference".

Furthermore, in cross-examination, Mr McDonald stated that he could only presume that he would have asked each individual store manager whether there was any problem with the proposed time limit and that he would not have approved installation at any particular store without confirming everything. But he could not recall precisely what he did or did not do at the time.

81. Be that as it may, on 28th November 2005, Mr McDonald e-mailed Mr McKerney stating that several stores had expressed concern that a one hour time limit was too short for destination shoppers and asking how easy it would be to change the time limit to 1½ or 2 hours and put some over-stickers on the signs. He somewhat apologetically added that he appreciated that this should have been highlighted at the start. In his response of the same date, Mr McKerney responded by pointing out that the time limit was one of the key matters discussed with each of the stores before installation and that, in each case, the signs accorded with what had been agreed. However, he proposed that the signs should be changed to show a time limit of 1½ hours for those stores which were concerned about the one hour time limit. But, as he conceded, that would not reflect a change of substance, in view of the existing 30 minute period of grace.

82. In the late afternoon of the same day, he sent a further e-mail to Mr McDonald attaching a spreadsheet showing the current time limits at each store, the proposed amended time limits and the times after which fines were actually issued. There was no actual change in the overall time which would elapse before parking charge notices were to be issued, but in six cases, the time limits, as displayed, would be increased from one hour to 90 minutes, albeit without any further period of grace. It should, perhaps, be noted that, in one particular case, namely the Louth store, the time limit had apparently already been agreed as 2 hours.

83. In his e-mail, Mr McKerney specifically asked Mr McDonald to confirm these time limits; and Mr McDonald did so a few minutes later, albeit with some proposed additional changes which he set out in an amended version of the spreadsheet which was attached to his e-mail. The two amendments related to the Borrowash and Cheadle stores. In each case, he asked for an extended time limit of 2 hours; and in relation to Borrowash he also requested that the prohibition on returning within four hours should not be enforced. Mr McKerney responded shortly afterwards agreeing to the proposed changes and indicating that they would be implemented before the "go live" dates. Though, in his witness statement, Mr McDonald suggested that it was difficult to persuade Mr McKerney to agree to changes of this kind, he conceded in cross-examination that, at least at this stage, Mr McKerney seemed to have acted entirely reasonably in response to his request.

84. But despite this apparent agreement between Mr McKerney and Mr McDonald, the issue did not go away. Almost immediately, Mr McDonald made a number of further requests for an extension of time limits as a result of complaints made by a number of store managers. On 29th

November 2005, he asked for a 2 hour time limit at Okehampton and, indeed, asked that, in future, this should be the default setting unless there was some particular reason for anything different. In his e-mail, he also referred to what he called a "communications breakdown" in relation to time limits.

85. In his e-mail in response dated 30th November 2005, Mr McKerney expressed some degree of frustration about these changes, pointing out once again that this had been one of the key issues discussed with the stores and that ParkingEye had made commercial decisions based on a one hour time limit. Indeed, he described the issue as one of "massive concern" for ParkingEye, emphasising that a lot of time had been spent discussing a range of issues with the stores, and that the time limit for parking had been a "key" issue. All store managers or their deputies had, he insisted, been fully aware of all that had taken place.

86. He went on to suggest a compromise under which the general limit would be 1½ hours with an initial period of grace of 30 minutes which could gradually be reduced if the parking problem remained. He asked whether this was an acceptable compromise for Oakhampton. It is unclear whether what was being suggested was a 90 minute time limit with a further 30 minute period of grace or simply an overall period of 90 minutes.

87. But Mr McDonald persisted in his request and asked for the timings at Okehampton to be changed to 2 hours plus 30 minutes as a period grace. He also made the same request in relation to the Stamford store and forwarded to him an e-mail from the manager of the Stamford store in which he stated that one hour was totally insufficient for his customers' needs, since Stamford was a destination store. The manager in question stated that the one hour time limit had not, in fact, been agreed with ParkingEye; and he referred to various unsuccessful requests made directly to ParkingEye for an extension of the time limit. It seems, however, that he had managed to get it extended to 1½ hours with an additional 30 minutes period of grace. He was also critical of the 4 hour "no return" rule, since several of his customers did the shopping for a number of individuals or households.

88. Mr McKerney initially responded on 30th November 2005 by informing Mr McDonald that he had spoken with the manager of the Stamford store and had agreed to remove the "no return" from the sign and to increase the time limit to 90 minutes with a further 30 minutes of grace. But, on the following day, Mr McDonald asked for the observations of Mr Alan Rowe, the Divisional Executive responsible for the Stamford store, and was told that he ought to press for 2 hours plus 30 minutes grace. After receiving this advice, Mr McDonald e-mailed Mr McKerney asking for a time limit of 2 hours, but with a period of grace of only 10 minutes. He also added the comment that, for the future, it should be the Divisional Executive, rather than the store manager who should sign off any agreement as to parking times. Mr McKerney responded on the following day, 2nd December 2005, stating that, so far as ParkingEye was concerned,

there would be no problems about the request and that the appropriate amendments would be made to the system and the times. Once again, Mr McDonald accepted that this was an entirely reasonable response on his part.

89. These representations from some of the store managers involved seem to have caused Mr McDonald to send a circular e-mail to all managers in question on 1st December 2005 in which he referred to differences of opinion which appeared to have arisen as to what, if any, parking times had been agreed with ParkingEye. He asked them to ensure that agreement had been reached before the signs went up. But he concluded by emphasising the advantages which were expected to flow from the use of the ParkingEye system.

90. The store manager at Beverley sent three successive e-mails in response to Mr McDonald's circular message. In the first of these, he expressed himself as being entirely content with the initial time limit. However, it seems that he subsequently received a number of complaints and that, on reflection, he thought that 2 hours would be more practical. He did not, however, suggest that he had not agreed to the original time limit proposed by ParkingEye. These e-mails were forwarded to Mr McKerney who, on 9th December 2005, replied to Mr McDonald stating that, once the management at Beverley had decided what they wanted to do, ParkingEye would take the appropriate action. He went on to comment that it was obvious that they would have to listen to and act upon any feedback from the customers.

91. On 10th December 2005, Mr McDonald received a further complaint about time limits from the manager of Stewarton store. The car parking arrangements at this site seem to have been somewhat unusual in that it seems to have been widely used, without objection, as a communal car park by persons having no business to transact at the local Somerfield store. So the new system appears to have excited a good deal of opposition from local residents which led to representations being made by a local councillor. In his e-mail to Mr McDonald dated 10th December 2005, the store manager at Stewarton referred to a number of complaints from customers and to a letter he had received from the local councillor and asked Mr McDonald if he could draft a reply. This e-mail was copied to a Mr Duncan Maurer, who appears to have been the Divisional Executive with overall responsibility for Stewarton.

92. Mr McDonald did, in fact, prepare and send a reply to the local councillor involved, explaining and justifying the system but stating that Somerfield was reviewing the situation with the store manager with a view to seeing whether the time limit should be extended a little. But, quite apart from a possible extension of the time limits, it seems that Mr McDonald had already reached agreement with Mr McKerney that no parking charges should be levied in respect of vehicles entering the Stewarton car park after 7pm on weekdays and Saturdays and after 6pm on Sundays.

93. There was a further request from the manager of the Malmesbury store on 16th December 2005 which Mr McDonald forwarded to Mr McKerney on 19th December 2005 asking him to take the appropriate action. The request was for an extension of the time limit to 1½ hours with a further period of grace of 30 minutes. There is nothing to suggest that this was not, in fact, acted upon. But on 28th December 2005, despite his apparent earlier agreement as to the time limits at the Stamford store, Mr McDonald sent a fairly terse e-mail to Mr McKerney stating that he "needed" the period of grace at the store to be 30 minutes rather than 10 minutes. This e-mail was copied to Mr Alan Rowe, to whom, it would seem, representations had already been made by the store manager and whose opinion had been sought by Mr McDonald himself. Though Mr McDonald denied in cross-examination that he had been under pressure from Mr Rowe to insist on an overall time limit of 2½ hours, it is difficult not to infer that his change of stance was not unconnected with Mr Rowe's involvement.

94. There were also some negotiations as to how the system should be implemented over the Christmas and New Year period. That is a matter which I shall return to in due course. Otherwise, apart from certain immaterial teething troubles, there appear to have been no further significant difficulties arising out of the implementation of the Agreement before the end of 2005. Indeed, though he was perhaps a little reluctant to concede the point, Mr McDonald accepted that he had had a reasonable working relationship with Mr McKerney and that any problems had been resolved by discussions and negotiations between the parties.

95. Early in the New Year, there was an exchange of e-mails between Mr McKerney and Mr McDonald in relation to the Thetford store which had been suggested as a suitable site for the installation of the ParkingEye system. But it seems that there were a number of problems which, at least from ParkingEye's standpoint, made it unsuitable. I mention it only because of an e-mail from Mr McKerney dated 5th January 2006 in which he pointed out, amongst other things, that, since the car park was locked outside trading hours and the proposed time limit on parking was 2½ hours, there would only be a very limited opportunity for ParkingEye to make any money from the operation of the site. The point that was made to Mr McDonald in cross-examination was that, from a commercial standpoint, there would inevitably be a "tipping point", at which any extension of the time limits would make any particular car park no longer viable for ParkingEye in financial terms. Mr McDonald seemed willing to accept this proposition as a matter of principle, although he did not necessarily accept that this would, in fact, have been the case at Thetford.

96. A further problem over parking times surfaced on 5th January 2006 when Mr McDonald forwarded to Mr McKerney an e-mail of the same date which he had received from the manager of the Louth store. The principal point of concern raised by the manager was as to when the system was to go live. In his own e-mail to Mr McKerney, Mr McDonald said that it had been agreed that the system would not, in fact go live until after Christmas.

That is something to which I shall have to return in due course. For present purposes, however, what is of particular interest is that the manager of Louth attached to his e-mail to Mr McDonald of 5th January 2006 a copy of an earlier e-mail from him to Mr McDonald dated 20th December 2005. In this e-mail, he had referred to the fact that a time limit of 2 hours had been agreed but that Mr Alan Rowe had asked that there should be a further 30 minute period of grace before any parking charge notices were issued. Mr Alan Rowe appears to have had overall responsibility for Louth as well as Stamford; and it was he, of course, who had also apparently requested a total period of 2 hours 30 minutes for the Stamford store.

97. But there is no evidence that this earlier e-mail was ever forwarded to Mr McKerney; and in his response on 5th January 2006, he stated that he could not recall having had any communication from Mr McDonald about these matters and asked him to re-forward any e-mail which he had sent. But Mr McDonald replied by saying that there had been no e-mail and that the matter had been discussed in the course of a telephone conversation whilst he was in his car. In his response, later on the same day, Mr McKerney addressed the complaints about the implementation of the system over the Christmas and New Year period, but did not address the question of time limits. Nor did he challenge Mr McDonald's assertion that there had been a telephone discussion about these matters.

98. Be that as it may, on 10th January 2006, the manager at Louth e-mailed Mr McDonald once again stating that ParkingEye had still not reset the time limit to 2½ hours as requested and asking him to arrange for any notices to be cancelled if a time limit of 2½ hours had not been exceeded. Mr McDonald passed this on to Mr McKerney on the same day emphasising the need for a "sensible resolution" asking whether tickets could be cancelled locally or whether this would have to be done centrally. But, of course, as Mr McDonald had to accept in cross-examination, Mr McDonald had himself approved a time limit of 2 hours for the Louth store and the signs would no doubt have been erected on that basis. Despite Mr McDonald's e-mail of 10th January 2006, that appears to have been how matters were left, at least at this stage.

Christmas and New Year

99. In the meantime, as I have previously indicated, there had also been various discussions between Mr McDonald and Mr McKerney as to how the system was to operate over the Christmas and New Year period. On 9th December 2005, Mr McKerney sent an e-mail to Mr McDonald to which was attached an updated version of the installation schedule. It showed a "go live" date of 12th December 2005 for 11 stores and 19th December for another five. In the case of Wallasey, no specific date was indicated; and, of course, the installation had been cancelled at Cheadle and Newcastle.

100. But Mr McDonald seems to have had some anxieties about the effect of launching the system just before Christmas. On the same day, he replied

to Mr McKerney expressing his concerns and asking whether the launches scheduled for the week commencing 19th December could be deferred until after the New Year. He also emphasised the need for "real care" to be taken with the launches scheduled for the week commencing 12th December 2005 and asked whether the first tickets could simply be treated as warnings. He emphasised the need to protect Somerfield's Christmas business and commented that its general policy was not to introduce any changes during the month of December.

101. It seems that the two men then met to discuss these matters on 13th December 2005 and reached an agreement as to how to proceed. In cross-examination, Mr McDonald accepted that there had been no lack of co-operation on the part of Mr McKerney during the course of these discussions and that the outcome was accurately set out in an e-mail from Mr McKerney dated 16th December 2005. That e-mail seems to have taken into account a request, in an e-mail from Mr McDonald dated 14th December 2005, for certain further modifications to what had been agreed the previous day and what had apparently been discussed in a later conversation between the two men on 16th December 2005.

102. The e-mail from Mr McKerney to Mr McDonald dated 16th December 2005 copied an e-mail which he had previously sent to his technical staff. It deals with certain specific matters relating to the stores at Stewarton and Diss. But more pertinently, for present purposes, it specifically states that data only was to be gathered on Christmas Day, Boxing Day and New Year's Day and that no fines should be issued in respect of any parking on those dates. Furthermore, at all stores, the time limit should be set at 3 hours during the period from 17th December 2005 to 2nd January 2006 inclusive, though there would be no period of grace. In his covering e-mail to Mr McDonald, Mr McKerney referred to his instructions to his technical team; and he added a separate comment to the effect that nothing would be done in relation to the Calne and Stamford stores until after the New Year.

103. That was not quite the end of the matter. Later on the same day, no doubt after further discussions with Mr McDonald, Mr McKerney issued a further instruction to ParkingEye's technical team indicating that Somerfield would permit parking charge notices to be issued with effect from the week commencing 3rd January 2006. He also advised that, if by that date a motorist had incurred more than three charges, no more than three notices should be issued and the earliest or shortest instances should be disregarded.

104. These e-mail exchanges are entirely consistent with Mr McKerney's evidence that what was discussed and agreed was that the system would still go live, as appropriate, before Christmas, but that no parking charge notices would be issued until after 2nd January 2006 where the charge had been incurred during the period from 17th December 2005 to 2nd January 2006. In addition, the general time limit would be extended to 3 hours and there would be free parking on certain specified days. There also seems to

have been some agreement, or at least discussion as to how to deal with motorists who had incurred multiple fines over the relevant period though Mr McKerney subsequently seemed unsure about this.

Go-Live Dates

105. On 13th January 2006, Mr McKerney sent an e-mail to Mr McDonald suggesting some dates for a proposed review meeting later in the month. But he also made a comment to the effect that fine notices were now starting to be sent out and that performance figures would have to be reviewed and consideration would have to be given to identifying further stores at which the system could be installed. But, at or about the same time, no doubt in response to the issue of parking charge notices, complaints had been received from store managers at Louth and Stewarton, both of whom asserted that they had understood that the system would not go live at their stores until after Christmas (in the case of Louth) and until after 2nd January (in the case of Stewarton).

106. It will be recalled from my earlier discussion about time limits that on 5th January 2006, Mr McDonald had forwarded to Mr McKerney an e-mail of the same from the manager of the Louth store to which was attached a copy of an earlier e-mail from the same manager dated 20th December 2005 in which he asked for a further 30 minutes grace after the expiration of the agreed two hour time limit. The same e-mail had referred to the fact that the system was due to go live in January; and his point was taken up by the manager in his subsequent e-mail to Mr McDonald dated 5th January 2006. In essence the manager appears to have been complaining that he had been led to believe that the system would not go live until after Christmas and that he had made certain arrangements on that basis so as to allow a neighbouring occupier to continue to use the car park for a further two weeks. But fine notices had nonetheless been issued which he wished to have cancelled.

107. The wording of the e-mail strongly suggests that it was Mr McDonald who had given the assurances that the system would not go live until after Christmas and that he had authorised the cancellation of the charges in question. But ParkingEye had apparently informed the manager that it had had no such contact from Mr McDonald. It will also be recalled that when Mr McDonald forwarded these e-mails to Mr McKerney he asserted that it had been agreed that the system at Louth would not go live until after Christmas, but that Mr McKerney responded by saying that he had no recollection of any such discussion.

108. But in a further e-mail dated 5th January 2006, Mr McKerney responded in more detail to the complaint from the store manager at Louth. He asserted that ParkingEye had been in contact with the store since September, that the staff had been given training about the system in early December and that they had been told that the system was about to go live. Final changes in relation to all sites had been discussed and agreed with Mr McDonald himself in December and confirmed by e-mail, though he did not identify any specific date or dates. But, according to Mr McKerney's e-mail, there

had been no mention of any problem with the adjoining occupier until 22nd December 2005 when the store contacted Parking Eye to discuss the situation. That was too late, since the system had already been set up prior to Christmas as agreed. The fine notices had already been sent out and could not be recalled.

109. There does not seem to have been any specific response or challenge to Mr McKerney's assertion as set out in these e-mails, though the store manager subsequently sent a further e-mail dated 10th January 2006 repeating his request for the cancellation of any fines which had been issued where the car had been on the car park for less than 2½ hours. In all the circumstances, I am not persuaded that there had, in fact been any agreement between ParkingEye and Somerfield that the system would not go live until after Christmas.

110. In relation to Stewarton, Mr McDonald sent an e-mail to Mr McKerney dated 16th January 2006 in which he stated that the launch date for the store in question was 2nd January 2006 but that about 120 charges had been levied in December causing major upset to customers, including some who were disabled. He asked him to revoke these charges and asked him to contact him as soon as possible. But it seems that he was unable to contact Mr McKerney until the following day when the two men seem to have spoken.

111. In the light of their discussion, on 17th January 2006, Mr McDonald sent a further e-mail to Mr McKerney asking him to confirm various points arising out of their discussions. He set out five points in all, of which only the last is directly material to the topic with which I am dealing in this section of my judgment. But the others are also of some importance, so I will briefly mention them at this stage.

112. The first of Mr McDonald's points was that store managers should be entitled to cancel fines in respect of "bona fide customers", even if they were unable to produce a receipt. He pointed out that some of these dated from December 2005. This appears to have been accepted by Mr McKerney, at least provided that it was in line with the "agreed Exemptions within the contract and training manual".

113. The second point raised by Mr McDonald was that store managers should also be entitled to cancel any fines where there appeared to have been a system malfunction. Once again, Mr McKerney appears to have accepted this in principle, stating that the store manager or the motorist could contact ParkingEye's call centre and explain the position. The matter would then be investigated and if it was established that a motorist had entered the car park several times on the same day, or if there was a reasonable doubt, the ticket would be cancelled. Mr McDonald's third point was to the effect that some store managers were experiencing difficulties in contacting and dealing with the call centre. Mr McKerney agreed that he would speak to the call centre about these matters.

114. Fourthly, Mr McDonald referred to a potentially important issue about the cancellation of charges where they would cause damage to Somerfield's business and reputation. He confirmed that; where charges were cancelled for these reasons, ParkingEye could charge Somerfield at the rate of 65% of the discounted charge of £37.50. This was undoubtedly agreed in principle by Mr McKerney, as is apparent from his e-mail in reply later the same day, though he emphasised the need for careful administration of the process so as to create a proper audit trail. Cancellations of this kind were subsequently given the code "NP", standing for "Negative Publicity"; and charges in respect of such cancellations form part of the claim made by ParkingEye against Somerfield in the present proceedings.

115. The fifth and final point raised by Mr McDonald in his e-mail of 17th January 2006 was a request that charges incurred before the "go live" dates set out in ParkingEye's installation schedule of 9th December 2005 should be cancelled. He said that he had spoken to a number of store managers the previous evening and at least some of them were seeking the cancellation of all charges incurred before 3rd January 2006. He stated that earlier charges should be cancelled since neither the stores nor Mr McDonald himself were aware that the sites had gone live before the dates in question. In effect, therefore, charges incurred from 2nd December 2005 at sites which were due to go live later in December would have to be cancelled. He added the observation that the combination of the cancellation of such fines and the "Negative Publicity" arrangements constituted a "fair balance" from the standpoint of both parties.

116. Mr McKerney replied shortly afterwards on the same day. I have already sought to summarise his response to the first four points raised by Mr McDonald. But, as he himself accepted in his witness statement, he rejected the fifth point out of hand, stating that, in his opinion, it showed "an almost breathtaking arrogance" on Somerfield's part, having regard to the basis of their contract and the outlay which ParkingEye had incurred, without any charge to Somerfield, on the footing that its financial reward would be in the form of the parking charges which it collected. He gained the impression that, by this time, Somerfield might not be willing to abide by the contract and that, at some stage, ParkingEye would have to put its foot down and show that it was not willing to be "bullied".

117. Be that as it may, in his e-mail of 17th January 2006, he pointed out that the installation schedule was purely a "rough guide" supplied to ParkingEye by its installation engineers and that it had been made clear to the stores that the systems were live. Signs had been erected at all the stores in question in November, and the cameras had been installed by the end of November or early December 2005. During the same period, all the stores were trained in the use of the internet system and were "categorically informed" that the system should be assumed to be live from that time.

118. He also pointed out, as appears to have been the case, that he and Mr McDonald had then negotiated and agreed that parking charge notices

should be held back and issued only during the week commencing 2nd January 2006 in order to avoid damage to pre-Christmas trading. He suggested this may have been the reasons why some stores might have assumed that the system would only go live with effect from 2nd January 2006. In those circumstances, he asserted that it was completely unreasonable to ask ParkingEye to carry the cost of cancellation attributable to "store confusion" or perceived potential damage to Somerfield's business. He added that it had been his understanding, in the course of their discussion about these matters the previous evening, that all cancellations on these grounds would be charged to Somerfield at 65% of the discounted parking charge.

Problems at Stewarton

119. On the following day, 17th January 2006, the problems affecting the store at Stewarton resurfaced. On that date, a local councillor, Mr O'Neill, sent a further e-mail to Mr McDonald complaining yet again of the imposition of charges, particularly over the Christmas period, and asking for them to be withdrawn. He also raised a further query as to whether such charges were recoverable under Scottish law. Mr McDonald forwarded this e-mail to Mr McKerney on the same day and asked him to reply to the councillor with particular reference to the recoverability of the charge. It seems that Mr McKerney was able to speak to the councillor on Friday 20th January 2006 and briefly reported his conversation to Mr McDonald by way of an e-mail dated 23rd January 2006.

120. A meeting had already been planned for the latter part of January 2006 between representatives of ParkingEye and Somerfield; and this was eventually fixed for Wednesday 25th January 2006 at Somerfield's offices in Bristol. During the week or so prior to the meeting, complaints about the impact of the system at the Stewarton store in particular continued unabated. On 18th January 2006, one of the managers at the Stewarton store sent a further e-mail to Mr McDonald referring to an intense local reaction to the introduction of the system which was becoming difficult to manage at store level. She asked whether the time limit could be extended to 2 hours, whether the system could be switched off overnight from 8pm until 8am, the prohibition on return within 4 hours could be removed from the signs and the signs themselves could be lit up in order to have a bigger impact.

121. This e-mail was copied to Mr Duncan Maurer, who seems to have been the Divisional Executive with responsibility for the Stewarton store; and it was forwarded by Mr McDonald to Mr McKerney with a request for him to look at it urgently. He commented that this seemed to be "quite a balanced request" which would defuse some of the objections and should not be "too detrimental" to ParkingEye's income.

122. On 19th January 2006, Mr McDonald sent a further e-mail to Mr McKerney referring to the fact that Somerfield was getting what he described as "real flack" at Stewarton and that it was necessary to defuse the problems as much as possible. He also asked whether he would be

able to arrange for fines to be revoked or whether it would have to be done by the management of the stores. Mr McKerney's response was that this could be done either directly or via the call centre. But the reasons for any cancellation would have to be provided in order to provide an audit trail. Later on the same day, after referring back to the earlier e-mail exchange of 17th January 2006, Mr McKerney sent an e-mail to Mr McDonald in relation to the cancellation of parking fines on "Negative Publicity" grounds. It seems that ParkingEye's call centre had confirmed that plenty of these were coming through the system and were being identified by the code "NP". He indicated that he would bring definitive figures for such cancellations to the meeting on 25th January 2006.

123. Eventually, on Monday 23rd January 2006, Mr McKerney responded to a request from Stewarton which Mr McDonald had forwarded to him on 18th January 2006. He pointed out that the key request, namely that the system should not operate overnight, had already been agreed and had been in place since early December 2005. In substance, that appears to be correct, though it is true to say, I suppose, that the agreed hours were slightly different from those proposed by the store manager, since the system was switched off earlier in the evening but switched on again earlier in the morning than the hours proposed in the manager's e-mail of 18th January 2006. Mr McKerney also pointed out that this had been done in order to provide free car parking facilities as a service to the community. He went on to comment upon certain difficulties about the "no return" prohibition but suggested that this could be discussed at the meeting. The same would apply to any increase in the time limit from 1 hour 30 minutes to 2 hours. As for further illumination, he suggested that this must be an issue for Somerfield itself to address.

124. But the local manager of Stewarton responded on 23rd January 2006, stating that there had been instances of customers being charged when leaving the store at 10.00pm after a two hour stay. So, it was suggested, the system could not have been switched off overnight. It was also suggested that the prohibition on any return within 4 hours was more likely to catch genuine local shoppers than those who were abusing the system by leaving cars on the car park for lengthy periods. The manager also stated that a 2 hour time limit with a 30 minute period of grace was the minimum that was required. In fact, earlier on the same day, the same manager had sent two e-mails to Mr McDonald referring to one or more individual complaints from customers where arrangements had been made to have the fine cancelled only for the customer in question subsequently to receive a reminder notice. The e-mail commented on the apparent incompetence of ParkingEye and stated that the customer was now demanding a personal written apology. All these e-mails were copied to Mr Maurer.

125. By this time, it seems that Mr Maurer himself had intervened personally. It appears that he had paid a visit to the Stewarton store on Saturday 21st January 2006 and had asked for a written summary of the main issues which had given rise to concern on the part of the local management. This

request elicited quite a lengthy e-mail in which a variety of complaints was recorded. I do not propose to summarise the entire catalogue. There were criticisms about a lack of consultation by ParkingEye, a failure or refusal to listen to the concerns of the local management, misleading information as to when the system would go live and the issue of fines to disabled customers, parents with young children and other local residents who were all "genuine customers". So far, 135 fines had been issued, dating back to 12th December 2005, at least 10 of which were said to be cases where genuine customers had returned to the store; and some were issued where a motorist had strayed over the 90 minute time limit by only a minute or so. As a result, the store had been swamped with complaints, staff had been harassed, there had been adverse publicity in the local newspaper and it was understood that a picket had been planned for later in the week.

126. Mr Maurer forwarded this e-mail to Mr McDonald on 23rd January 2006 together with a covering letter in which he expressed his dismay that the management of the store was having to spend a great deal of time in trying to appease customers and hold on to Somerfield's reputation. He commented that there appeared to have been no support whatsoever from ParkingEye and expressed his astonishment that they were referring customers to the store itself. He noted that the car park was "visibly quieter" and that he was sure that the store would lose further customers, goodwill and reputation as a result of the installation of the system. Mr Maurer's e-mail concluded as follows:

> "It is important that this is addressed with absolute urgency to put in place alternative timing arrangements for the parking or the removal of this company. I would also be interested in what Parking eye (*sic*) will be doing to rebuild the goodwill of our customers in this store."

Problems at Louth and Stamford

127. During the same period, Mr Alan Rowe, the Divisional Executive responsible for Louth and Stamford, took up the cudgels on behalf of both of those stores. On 21st January 2006, he e-mailed Mr McDonald to complain about the "underhand methods" used by ParkingEye. This appears to have been based upon several instances at Louth where customers who had paid their fine had received a reminder a few days later. In one case, it was said that when the customer complained to ParkingEye, she was told to ask the store for a refund.

128. Mr Rowe followed this up on 23rd January 2006 with an e-mail to one Roger Marston referring to difficulties at Stamford. What was said was that ParkingEye would only accept two cancellations and would do so only if the store was persistent. He raised the question as to whether they really did cancel tickets when they said they would; and he suggested that what they were telling Mr McDonald was different from the way in which they spoke to the stores. This e-mail was forwarded to Mr McDonald for his attention, with a copy to Mr Wilson.

129. These were followed, on 24th January 2006, by two e-mails to Mr McDonald from, it would seem, the local management at Louth. One of

these complained about the issue of two tickets to the same disabled customer. The first of these had, in fact been paid but a refund was sought; but the second had been cancelled by agreement. It was asserted that ParkingEye's response to a request for a refund was that there was no contractual arrangement under which they were obliged to make a refund once the charge had been paid. The other e-mail raised the cases of two customers. One had paid the charge, even though she had exceeded the time limit by one or two minutes; and the other was a case in which a charge had been incurred on 16th December 2005, before the "go live" date. In fact, however, ParkingEye's installation schedule indicated a "go live" date of 12th December 2005 for the Louth store. In both instances, it seems that the charge had, in fact, been paid.

Problems at Other Stores

130. Though the most vociferous complaints seem to have emanated from those with responsibility for the stores at Stewarton, Louth and Stamford, some issues were also raised in connection with other stores at which the ParkingEye system had been installed. Thus, on 18th January 2006, Mr McDonald passed on a request from the new manager at Tonypandy that the time limit should be extended to two hours plus a 30 minute period of grace. He observed that no fine notices had yet been issued, so that it should be possible to resolve this before the system went live. But, in his response of the same date, Mr McKerney pointed out, in effect, that the system had already gone live but that the charge notices had not been issued but had been held back until after 2nd January 2006. He added that there were 520 in total which were "stacked up and ready to go". He also said that the issue of such notices had been staggered in order to prevent large amounts of customer feedback arriving within a very short period. If Somerfield nonetheless wished to write these charges off, he would expect them to pay 65% of the discounted rate in each case which would amount in total to £12,675. Mr McDonald's response was to the effect that some of these notices might have been incorrectly issued, since there was a problem about cars driving through the car park in order to gain access to the shops beyond.

131. Mr McKerney responded in turn by pointing out that the store had been cleared by both the Property and Operations Departments of Somerfield and that the store manager had accompanied the engineers on the site assessment and during the installation. "Permit details" had been put into the system by the store and the system had gone live. In the circumstances, he considered that if Somerfield did not wish the notices to be issued on grounds of negative publicity, it would have to meet the cost of cancellation. That appears to have been how it was left at that stage; and, in cross-examination, Mr McDonald accepted that this was not an unreasonable response on Mr McKerney's part.

132. A further problem appears to have arisen in relation to the Wallasey store because of the problem of shared access. On 19th January 2006, Mr McKerney e-mailed Mr Price in the Property Department asking how things stood in relation to this problem and stating that Mr McDonald had

asked ParkingEye to hold off sending out any parking charge notices until January and that he had a number "stacked up" ready to send out.

133. On 23rd January 2006, there was a request from the local management at Calne asking for an extra half hour in addition to the current 90 minute time limit, since the vast majority of offences were committed within that period. This was followed up on 20th January 2006 by a further e-mail to Mr McDonald stating that the local management had had to cancel over 50 fines since the beginning of the week for various reasons, in many cases because of confusion over the start date. It was said that they had been informed that this would be 1st January 2006, though the installation schedule sent to Mr McDonald on 9th January 2006 indicated a "go live" date of 12th December 2005. The e-mail also stated that many of the charges arose where a customer had exceeded the time limit by only a few minutes and, once again, a request was made for a further period of grace.

134. A similar request for a short additional period of grace was made by the management of the Torquay store in an e-mail to Mr McDonald dated 21st January 2006. Both this e-mail and the previous one from the management at Calne were forwarded to Mr Wilson but do not seem to have been sent on to Mr McKerney.

135. Finally, on 24th January 2006, Mr McDonald sent an e-mail to Mr McKerney informing him of a problem which had apparently arisen at the Borrowash store. This involved a customer who had been given an exemption to park at the car park but was using a hired car in consequence of an accident in which he had been involved. This led to nine parking charges being levied between 29th December 2005 and 4th January 2006 which were, of course, directed to the hire company. That company paid the charges and then debited the amount to the customer's credit card account, together with administration charges. Not unsurprisingly in the circumstances, Mr McDonald asked how all this could be sorted out and the fines refunded.

Preparation for the Meeting with Mr McKerney

136. Some time in January, Mr McDonald had asked for assistance and support in connexion with these problems from Mr Paul Wilson who was at the time Somerfield's Head of Property and Store Service Procurement. The reason given by Mr Wilson himself for his involvement was that Mr McDonald had told him that their "colleagues in the retail stores" were very unhappy, that he had been "inundated" with complaints about the system and that it was causing Somerfield to be the subject of negative reports in the press.

137. In his witness statement, Mr Wilson suggested that this request for assistance had been made some time in early January, though in cross-examination he said that it would probably have been in the second week of the month. But, so far as I can tell, the first occasion on which he appears to have been involved in any e-mail traffic about these matters was on 18th January 2006, when Mr McDonald copied him into two e-mails

dealing with problems at the Stewarton and Tonypandy stores. Furthermore, the reference to press reports rather suggests that it was the problems at Stewarton in particular which led to his involvement. Be that as it may, Mr Wilson played an important part in relation to the meeting on 25th January 2006, though it seems that he ceased to be directly involved in these matters by the end of the same month.

138. As Head of Property and Store Service Procurement, Mr Wilson was at the same level of seniority as Mr McDonald. He reported to the Procurement Director who occupied a position in the hierarchy immediately below Board level. But Mr Wilson had the authority to approve contracts on behalf of Somerfield, subject to legal clearance and compliance with the approved signing off process. He also had the power to terminate contracts without reference to the Procurement Director, though he would normally keep him informed about such matters. But, in cross-examination, he said that both he and Mr McDonald would have had the authority to terminate the Agreement with ParkingEye if that had become necessary. He explained that his particular field of expertise was of a commercial nature involving contracts and expenditure, whereas Mr McDonald was essentially involved in operational matters. He understood that it was his experience in commercial matters which had led Mr McDonald to ask for his support.

139. Mr Wilson initially had a briefing meeting with Mr McDonald during the course of which Mr McDonald explained the nature of the problems which had arisen in connection with the ParkingEye contract. He then looked through a file kept by Miss Taylor prior to her departure. At some stage he also looked at the Agreement itself; and he believed that he had seen a copy of the installation schedule dated 9th December 2006. Furthermore, of course, much of the e-mail traffic passing between Mr McDonald, various managers and Mr McKerney had been copied to him from about 18th January 2006. But, as he accepted, he would not have seen most of the earlier e-mails to which I have referred.

140. Prior to the meeting on 25th January 2006, Mr Wilson had also sought advice about the contract from Somerfield's internal legal department and had discussed the issues with at least one Regional Director, though he was unable to identify the individual in question. But it also seems that he had been told by Mr McDonald that he had had feedback from various "regional operational people" who were concerned about the rising level of customer complaints. He assumed that the individuals in question were either Regional Managers or, possibly, Regional Directors. Regional Managers were responsible for a group of stores, usually between 12 and 15 in number; and they reported to a Regional Director of whom there were, in all, about 5.

141. In a note which he prepared in readiness for the meeting on 25th January 2006, Mr Wilson had recorded that there were "senior executives" who were "demanding removal of the system". When asked about this in cross-examination, he said that he did not think that all of the Regional

Managers involved were of this opinion. But he conceded that this was the view of the Regional Director with whom he had spoken. Though he obviously had no personal knowledge about such matters, he agreed that it was quite possible that there had been no consultation with the senior executives prior to the execution of the Agreement with ParkingEye.

142. According to Mr Wilson's witness statement, the particular concerns reported to him by Mr McDonald were six in number. Firstly, he was told that ParkingEye did not appear to have adhered to an agreement for a free parking period of three hours during the period from before Christmas to the end of the year. The e-mails to which I have previously referred clearly show that there had been such an agreement; but the evidence of any breaches is exiguous.

143. Secondly, it was said that there had also been breaches of the agreement that no fines were to be issued prior to January 2006. Once again, it is quite clear that there was such an agreement; but, as was acknowledged by Mr Wilson in his witness statement, this meant that parking charges incurred prior to that date would simply be held back until after the New Year. Once again, the evidence of any actual breaches of this agreement is minimal.

144. The third point raised by Mr McDonald with Mr Wilson was to do with "multiple fines". In his own witness evidence, Mr McKerney seemed uncertain as to what this referred to. But it seems to me that it must be connected with the arrangement that, in the case of multiple offenders, all but three of the charges incurred over the festive season would be cancelled. Mr Wilson was led to understand that this arrangement had also been broken by ParkingEye, even though, as previously noted, Mr McKerney had given appropriate instructions to his technical staff.

145. The fourth issue raised with Mr Wilson by Mr McDonald was connected to the "go live" dates. According to Mr Wilson, he was told that some of the systems had been switched on earlier than had been expected and at a time when appropriate notices had not been erected in order to warn customers that they would be charged. Insofar as this relates to the notices erected by ParkingEye's sub-contractors in the car parks themselves, I have seen no reference to this in the e-mail traffic to which I have previously referred.

146. The fifth point about which Mr McDonald raised his concerns with Mr Wilson was to do with time limits. According to Mr Wilson, Mr McDonald's complaint was that these "free of charge periods" had been negotiated locally with store managers rather than centrally. This, it was suggested, was contrary to Mr McDonald's expectations; since he had expected them to be approved centrally. Now, the e-mail traffic to which I have referred clearly shows that a good number of the store managers were concerned about the comparatively short time limits originally put in place by ParkingEye. In some cases, it was suggested that these had not been specifically agreed; and in other cases, it was suggested that, in the light of

experience, they had proved too short. But, of course, I heard no evidence from any of the store managers in question. Furthermore, Mr McDonald had not been involved in the early stages of implementation; and he had only raised the issue of central control over such matters with Mr McKerney in early December 2005.

147. The sixth and final concern expressed by Mr McDonald according to Mr Wilson, was to the effect that ParkingEye had continued to pursue a large number of fines which Somerfield had asked to be cancelled. Particular reference was made to 90 such instances which were said to have occurred at the Stewarton store. It is clear that such complaints had, in fact, been made to Mr McDonald. But it should not be overlooked that an issue had also been raised by Mr McKerney as to who should be responsible for bearing any loss incurred as a result of such cancellations.

148. Mr McDonald summarised his concerns somewhat differently in his own witness statement. He mentioned only three, namely: the time limit for free parking, the "go live" dates and the process for the cancellation of charges. So far as the first of these was concerned, he commented that ParkingEye had pushed very hard for a standard time limit of 1 hour with a 30 minute period of grace, which was not suitable for all stores, though it maximised ParkingEye's revenue. He went on to say that the attempt to alter these times encountered considerable resistance from ParkingEye, as a result of which he was asked to intervene. He himself found it difficult to persuade ParkingEye to make any necessary changes; and he referred to various objections raised by Mr McKerney.

149. He also commented critically on the arrangements in relation to Stamford, where, he suggested, a time limit of 2½ hours had been agreed only for Mr McKerney to re-negotiate it directly with the store manager and reduce it to 2 hours 10 minutes. He also noted that, on 29th November 2005, he had requested a general 2 hour limit; and he pointed out that, on 1st December 2005, he had suggested that these time limits should be negotiated with the Divisional Executives.

150. Now, this does not entirely tally with the picture presented by the e-mail exchanges to which I have previously referred. It may well have been the case that Mr McKerney was not too keen on extending time limits, having regard to the revenue implications for ParkingEye. Indeed, that was a consideration which Mr McDonald himself acknowledged. But, in fact, he seems to have been perfectly willing to discuss individual requests for an extension of time and almost invariably agreed to the request. In relation to the time limit at Stamford, Mr McDonald is demonstrably wrong, since it was he who proposed the 2 hour 10 minute time limit, contrary, it would seem, to the wishes of the Regional Executive; though he subsequently went back on this and asked for an extension to an overall limit of 2½ hours, including the 30 minute period of grace.

151. The second concern specifically referred to by Mr McDonald in his witness statement related to the "go live" dates. The particular problem

which he identified was that these had been altered from those set out in the original installation schedules. He added that parking charge notices were being sent out before store managers were aware that the system had gone live; and he specifically instanced the case of Louth. He suggested that the problem was particularly acute because customers were receiving parking charge notices under the new system over the Christmas period, which was very bad for customer relations.

152. Now, of course, Mr McKerney insisted that the management of the individual stores had, in fact, been notified as to when the system would come into operation. That contention was supported by Miss Georgina Roberts who was, at that time, ParkingEye's operations co-ordinator. It was her unchallenged evidence that she regularly spoke to the various store managers, keeping them up to date with the installation process, explaining how the system operated and taking them through the user manual which had been supplied to them. More particularly for present purposes, it was her evidence that, when the system was being switched on at any particular store, she would call the manager in order to inform him or her that the system was going live that day. On the other hand, at the risk of repetition, I heard no evidence from any of the individual store managers involved. Furthermore, Mr McDonald did not mention in his witness statement the fact that agreement had been reached to hold back the issue of parking charge notices until after the New Year.

153. In relation to the cancellation of fines, the substantive point made by Mr McDonald in his witness statement was that where a store manager had agreed to cancel the fine for good reason, ParkingEye regularly continued to send out parking charge notices and reminders, despite having received instructions to cancel the fine in question from Somerfield. The particular instance he gave, however, does not seem to have been directly in point. This was the case of the customer at Borrowash who had used a hire vehicle on a number of occasions with the result that the hire company had received the charge notices and had debited them to his credit card account together with various administration charges. Quite how ParkingEye could have been expected to know that this car was being used by a customer to whom Somerfield had granted a parking permit was never revealed.

154. Furthermore, this particular case was raised by Mr McDonald with Mr McKerney only on the late afternoon of 24th January 2006, the day before the meeting on 25th January 2006, and his e-mail of that date was very much in the nature of an inquiry as to how this particular problem could be dealt with. But Mr McDonald did not, in this section of his witness statement, make any reference to the discussions as to who should bear the losses involved. Later in his witness statement, however, he referred to the exchanges which had taken place about cancellation on the grounds of "Negative Publicity", though the particular point which he sought to make was that these discussions had never matured into a binding agreement.

155. In his witness statement, Mr McDonald also briefly stated the reasons why he had approached Mr Wilson for his assistance. Procurement, he said, was the "owner" of the contract; and Somerfield was, he suggested, facing a refusal on the part of ParkingEye to honour obligations under the contract. He identified this specifically as a refusal on its part to extend the time limits for free parking. Leaving aside, for the moment, the contractual basis for this assertion, it is very difficult to see how, in the light of the e-mail exchanges to which I have referred, it could fairly be said that Mr McKerney had refused any or any reasonable request for an extension of time, whether at the time when Mr Wilson first became involved in these matters or at any time prior to the meeting on 25th January 2006. Nor, indeed, was Mr McDonald able to point to any such refusal when he was taken through many of these e-mails in the course of cross-examination.

156. Mr McDonald, like Mr Wilson, was also asked about the attitude of "senior executives" to the installation of the ParkingEye system. He explained that the management structure was as follows: the store manager would report to a Divisional Executive (subsequently termed an Area Manager); the Divisional Executive would report to Regional Directors who would, in turn, report to the Retail Director who was a member of the main Board. Mr McDonald's own line manager on the operations support side was Mr Martin Langdon, Head of Retail Change, later the Retail Services Director. He, in turn, reported, once again, to the Retail Director.

157. Mr McDonald identified two Regional Directors who appear to have taken a direct interest in the ParkingEye contract. One was Mr Chris McKendrick, who had overall responsibility for Stewarton, and the other was Mr Roger Marston who covered the Eastern region and who would therefore have been responsible for the stores at Louth, Borrowash, Diss and, no doubt, Stamford. They were both asserting that the level of complaints about the system was unacceptable and that something had to change. Mr McDonald nonetheless considered that Mr Wilson was wrong to say that they were "demanding removal of the system". He did not think that there was a fundamental objection in principle to it on their part. They were simply concerned about the level of complaints and other aspects of the way in which the system operated. Indeed, in cross-examination, he accepted that, though the level of complaints had been higher than expected, he could not say that ParkingEye had done anything differently from what had been agreed.

158. After what he described as an "internal review", which seems simply to have been a discussion with Mr McDonald, Mr Wilson identified a number of issues which he described at paragraphs 9 to 11 of his witness statement. Whilst Somerfield, he said, wished to retain a surveillance system and make it work, it had been experiencing an "unacceptable and unmanageable" number of complaints from Regional Directors, store managers and customers, which had resulted in harassment of staff by disgruntled customers and unacceptable levels of involvement by public

relations officers. All of this was taking up a large amount of time and attention from Somerfield staff at all levels.

159. What was wanted was access to a list of people who had received parking charge notices so that complaints could be anticipated and customers concerns promptly managed. He added, at paragraph 11, that his "retail colleagues" were "desperate" to resolve negative publicity issues and had imposed a deadline on Mr McDonald to arrange for an extension of the free parking permits. When asked about this in cross-examination, he said that he thought that the only "retail colleague" referred to in this paragraph would have been Mr Martin Langdon, the Retail Services Director and Mr McDonald's immediate superior. He was unable to identify precisely when and in what terms Mr Langdon might have imposed such a deadline, though he assumed that it must have been some time between the date when he first became involved and the meeting on 25th January 2006. But there was nothing in the contemporaneous documents which, directly or indirectly, refers to any such demand from Mr Langdon.

160. In the light of his discussions with Mr McDonald and a review of the other material available to him, Mr Wilson then prepared a note of the matters which he wished to raise at the meeting with Mr McKerney. As to Somerfield's own position, he noted that it wanted to continue to manage problem car parks but that it could not continue to live with the unexpected level of complaints being generated and the impact these were having. He then summarised the way in which these complaints were affecting management and employees and commented on the public relations damage which was being suffered, particularly at the local level. It was at this point that he noted that there were "senior executives demanding removal of the system".

161. He continued by setting out four "must haves". There had to be immediate action to review parking conditions at each store, as appropriate; there must be a decisive response to complaints about unjustified fines; and Somerfield's response must be communicated at local level, "quickly" and "today", both of which words were set out in capital letters. Finally, he observed that in order to deal with these matters swiftly and effectively, Somerfield needed and expected assistance from ParkingEye; and that this was a "given" if the trial was to continue. He added a question, in bold type, asking whether ParkingEye was prepared to work with Somerfield in order to achieve these objectives.

162. Next, he dealt with Somerfield's concerns. These were three in number and corresponded in substance with some of the issues mentioned in the witness statements of both Mr Wilson and Mr McDonald. The first related to the "go live" dates which, he noted, would require an investigation of ParkingEye's installation schedule. The second was connected with the first and raised a question as to how fines which had accumulated between the "go live" date and 31st December 2005 had been dealt with. He added a reference at this point to the question of multiple fines. The third and final concern which he noted was as to how the cancellation process

worked in practice. The particular issue which he noted under this head was whether reminders were being sent out where the charges had been cancelled. He also noted that this issue was having an impact on Somerfield's reputation.

163. He then made a note of various courses of action which would or might be open to Somerfield. The first was to provide "store specific" parking conditions. I rather assume that this is directed to the time limits issue, though it does not expressly say so. The second was to identify any stores which were proving unsuitable for the system and offer an alternative site. Under this bullet point, he made a note in italics to the effect that the removal and installation costs could be shared between Somerfield and ParkingEye. The next point which he noted was that Somerfield could consider paying ParkingEye a fixed fee for managing the car parks whilst Somerfield itself retained control over the parking conditions. Finally, he added a reminder of the need to gain some understanding of ParkingEye's investment levels to date.

The Meeting on 25th January 2006

164. The meeting duly took place on 25th January 2006 and was attended by Mr Wilson and Mr McDonald on behalf of Somerfield and Mr McKerney and a Mr Ian Hepworth on behalf of ParkingEye. In addition to the document which he had prepared prior to the meeting, Mr Wilson also made some manuscript notes during the course of the meeting itself. On the following day, he prepared a draft e-mail addressed to Mr McKerney setting out, or purporting to set out what had been agreed during the course of the meeting. A copy of this draft e-mail was subsequently shown to Mr Halsall who made some brief manuscript annotations upon it. But it seems unlikely that it was ever sent. Mr McKerney himself had no recollection of ever having received it; and he expressed his disagreement with at least one of the points which it purported to record. More importantly, perhaps, no copy of the draft, as sent, seems to have been located; nor is there any sign of any e-mail response from Mr McKerney or, indeed, any other reference to it in the contemporaneous e-mail traffic. Nonetheless, there is no reason to suppose that it does not reflect the nature of the topics which were discussed, even if there may be doubts as to the accuracy of some of the details.

165. Mr McKerney, Mr Wilson and Mr McDonald all gave evidence about these matters, though I did not hear from Mr Hepworth. Whilst I doubt if any of them had any very clear recollection of the precise course of the discussions, the three documents to which I have referred provide a good deal of further information; and, in the end, it does not seem to me that there was, in reality, any substantial degree of disagreement about what took place.

166. In cross-examination, Mr McKerney himself described the meeting as "cordial", though he stated in his witness statement that he had begun to suspect that, by this time, Somerfield was trying to get out of the contract. That was why he asked Mr Wilson directly whether this was, in fact, the

case and received assurances to the contrary. But it is of some interest to note that, in his own witness statement, Mr McDonald said that, at the time of the meeting, he and Mr Wilson saw their potential options as "re-negotiation or termination". He said that he did not remember the meeting as being very co-operative and that he could not see how the relationship could work if ParkingEye "would not move" on the issues that they had raised. But, in cross-examination, he described the meeting as "workmanlike" and stated that he and Mr Wilson had gone into the meeting on the basis that they could make the business model work if they could resolve certain problems. He went on to say that they did not intend to terminate the contract at that stage. Mr Wilson, for his part, in the course of cross-examination, said that he felt that the meeting had stabilised the position and clarified each parties' objectives.

167. In fact, it seems that a number of issues were discussed but that no final resolution was achieved. It appears that Somerfield expressed its concerns as to the impact of the new system on its customer base; and Mr McKerney, in his turn, pointed out the financial implications for ParkingEye of any further alterations to the way in which the system had been set up. He emphasised the considerable investment which ParkingEye had already made in installing the system and he may have given an estimate of the costs involved, though there appears to be some dispute on this particular point. According to Mr Wilson, Mr McKerney proposed persevering with the system for another three months in order to assess progress. That accords with one of his contemporaneous notes, and I have no reason to think that Mr McKerney did not say something to that effect.

168. The meeting then went on to consider a number of individual "problem stores". The major ones were said to be Stewarton, Borrowash, Tonypandy and Wallasey. It was suggested that one possible course of action would be to remove the system from these stores; and, at least in the case of Stewarton and Borrowash, to cancel all outstanding fines but "NP" them, save insofar as they fell into the "genuine customer" category.

169. There was some further discussion as to the costs of removing the system from these stores. In the notes which Mr Wilson made during the course of the meeting, the suggestion seems to have been made that these costs should be shared. But in his draft e-mail of 26th January 2006, Mr Wilson stated that any removal costs were to be borne by ParkingEye. Mr McKerney, however, disputed any suggestion that ParkingEye should bear any of the costs incurred unless a suitable replacement site could be found and agreed. This issue about removal costs remained unresolved and contentious over the weeks which followed; and I do not think that Mr McKerney would, in fact, have agreed that ParkingEye would accept responsibility for the costs involved, come what may.

170. It also seems fairly clear that there was some discussion about the possibility of adjusting the time limits at some of the sites. Four of them were specifically identified by Mr Wilson in the notes which he made

during the meeting, namely Calne, Diss, Louth and Stamford. In only one of these was any specific time mentioned, it being suggested that the time limit at Colne would be extended from 1.5 to 2 hours. In his notes, Mr Wilson referred to "tweaking" these time limits. This rather suggests some fairly modest modifications, though Mr Wilson was not willing to accept that the word he used had this connotation.

171. A further point which was clearly discussed was the apparent discrepancy in some cases between the "go live" dates set out in ParkingEye's installation schedule and the actual date upon which the system began to generate parking charge notices. It is somewhat unclear, however, from Mr Wilson's notes whether this concern was limited to the principal problem stores or ranged more widely. As I have already pointed out, of course, Mr McKerney strongly challenged any suggestion that the store managers had not been made aware of the actual dates upon which the system had gone live. Nonetheless, it seems that he agreed to provide some further information about the charges incurred during the relevant periods.

172. A further question was discussed in relation to multiple fines. In his witness statement, Mr McKerney expressed some uncertainty as to what these were. But it seems fairly clear that the issue was whether only one or more charges would be levied or pursued where a number of charges had been incurred prior to the New Year. In view of the instructions that Mr McKerney had given to his technical staff on 16th December 2005, I find it a little surprising that Mr McKerney should profess uncertainty about this issue. But the point was not investigated further in cross-examination, so I need say nothing more about it.

173. One or two further matters were raised during the course of the meeting. Mr McDonald proposed that a process should be agreed for identifying and signing off any future stores at which the system was to be installed, whether as an additional site or by way of replacement for any of the problem stores. Specific reference was also made, it would seem, to problems which had arisen in relation to hired vehicles and disabled shoppers.

174. Finally, at some stage during the course of the meeting, there was a discussion about other ways in which Somerfield might make use of the advantages of the ParkingEye system whilst avoiding many of the problems which it considered had arisen under the current Agreement. One of these would have involved an outright sale of the system by ParkingEye to Somerfield; and another would have been for ParkingEye to charge a fixed fee to operate the system on behalf of Somerfield in accordance with its instructions.

175. So it seems quite clear that Mr Wilson and Mr McDonald were concerned about the impact which the ParkingEye system appeared to be having on Somerfield's commercial interests, at least in relation to a number of individual stores, and that they wanted significant changes in the

subsisting arrangements in order to redress the situation as they perceived it. What they appear to have envisaged is that the system should be removed in its entirety from certain of these stores, that some of the charges already incurred should be cancelled and that there should be some adjustment to the time limits for free parking at a number of stores. One or two other matters were also raised, such as the difference of opinion about "go live" dates.

176. Mr McKerney, on the other hand, was obviously concerned about the potential financial impact of any of these proposed changes upon ParkingEye; and he seems to have been of the view that Mr McDonald, in particular, was showing weak management skills by not giving his full support to the implementation of the system, particularly in the initial phase when any problems were likely to be at their most acute.

177. But it is also quite clear that no agreement was reached about any of these matters. In particular, I do not think that there was any agreement as to who should bear the costs incurred in removing the system from any of the stores at which it had been installed. Nor was any form of ultimatum delivered by the Somerfield representatives and no deadline was sought to be laid down in relation to any of the matters which had been discussed. All these issues remained open for discussion and negotiation; and Somerfield seems to have accepted that it should take a "reasonable approach" to any further review of the time limits at individual stores. Mr Wilson said as much at paragraph 4 of his draft e-mail following the meeting; and that would obviously reflect at least some degree of appreciation of ParkingEye's financial interests.

The Aftermath of the January Meeting

178. At some stage after the meeting, Mr Wilson handed over responsibility for the procurement aspects of the Agreement to Mr Colin Halsall who had been engaged by Somerfield since the previous October as a self-employed procurement consultant under the title Procurement Manager. But he reported to Mr Wilson, who clearly retained an interest in the matter; and, of course, responsibility for the operational aspects of the Agreement remained primarily with Mr McDonald.

179. When Mr Wilson instructed Mr Halsall to deal with the ParkingEye Agreement, he provided him with some notes of the meeting which had taken place on 25th January 2006. These would probably have been in the form of the draft e-mail which Mr Wilson had prepared the day after the meeting and which bore some brief annotations in Mr Halsall's handwriting. He also looked at what he described as a "file" which had been kept by Miss Taylor together with documentation stored electronically on Somerfield's computer system. But he conceded that he had only seen some of the e-mail traffic to which I have already referred in the course of this judgment. In fact, it became quite evident during the course of cross-examination that Mr Halsall had read few if any of the e-mails passing between Mr McKerney and Mr McDonald prior to the meeting on 25th January 2006.

180. The documents which he saw did not include any copies of the parking charge letters which had been copied to Mr Ogden as an attachment to Mr McKerney's e-mail of 28th April 2005, though at paragraph 13 of his witness statement, he made specific reference to the e-mail in question. Nonetheless, in cross-examination, he said that he had never seen it at the time when he was actively involved in these matters. At some stage, he also obtained a copy of the Agreement itself in order to familiarise himself with its terms; and he had some discussions, it would seem, with Mr McDonald, though he could not specifically recall when they took place and how long they lasted.

181. In his witness statement, and indeed, in cross-examination, Mr Halsall stated that his role was to try to get the contract "back on track". His first priority was to arrange a further meeting with Mr McKerney. But this does not seem to have been pursued with any real sense of urgency and it eventually took place only on 15th February 2006. In the meantime, Mr McDonald continued to play the major role, though Mr Halsall may well have been kept informed of developments. But the e-mail traffic generated in the immediate aftermath of the meeting does not seem to have been directly copied to him. Indeed, the earliest e-mail referred to at the trial which was clearly copied to him seems to have been one dated 7th February 2006 from Mr McDonald to various store managers informing them that Mr Halsall would now be managing Somerfield's contractual relationship with ParkingEye. So, as Mr Halsall himself accepted, it rather looks as if he only became involved some time during the second week in February 2006.

182. In the meantime, Mr McDonald embarked upon a review of the matters discussed during the course of the meeting. On 26th January, he wrote to Mr McKerney by e-mail confirming the request to remove the system from the stores at Stewarton and Borrowash and asking him to turn the system off with immediate effect. He added that he was still waiting for confirmation in relation to the stores at Tonypandy and Wallasey. Mr McKerney responded on the same day. He referred in positive tones to the meeting on the previous day and confirmed that the systems had been turned off at both Stewarton and Borrowash. He also said that he had "frozen" all of the offences, so that no more parking charge notices would be sent out to any motorist who had already incurred such a charge. Perhaps slightly prematurely, he also informed Mr McDonald and Mr Wilson that the same action had been taken in respect of Wallasey and Tonypandy. But he added the following observation:

> "We just need to agree a total number of offences to be paid by Somerfield, along with any other costs, and then we can write off these sites."

183. On the following day, 27th January 2006, Mr McDonald sent out a circular e-mail to the local managers at 12 of the stores at which the system had been installed. The circulation list did not include Stewarton, Borrowash, Wallasey, Louth or Blackpool; but both Stamford and Tonypandy were on

the list. It referred to the meeting on 25th January 2006 and stated that it had been agreed that there would be a review of the times and conditions applicable to the car parks at each of the stores in question. It asked the store manager to review the basic time limit for free parking, any additional period of grace (which might be 5 or 10 minutes rather than 30 minutes), the prohibition on any return within 4 hours and whether the system should operate in the evenings or weekends after trading hours. But each store manager was reminded that, if all stores asked to change to a system involving extended parking without any restrictions, the financial model would not be viable and it would not be possible to make the change. He also pointed out that a change from one hour to two hours would mean a 50% reduction in income for ParkingEye, so he asked them to be realistic in any recommendations. He also reminded them that Somerfield should not be providing free parking for motorists who might simply spend £5 in a Somerfield store and £50 with other retailers.

184. Four stores responded on the same day. The manager at Torquay said that the system had generally worked well but that he felt that there should be a 10-15 minute period of grace on top of the time limit of 1hour 30 minutes. The manager of the Calne store said that the only change that he was looking for was an extension of the period of grace, so as to give a total of 2 hours. The response from Tonypandy was that there should be a 2½ hour time limit with a further period of grace of 10 minutes, that the prohibition on any return should be restricted to 2½ hours and that no charges should be levied in the evenings after trading hours. The store manager at Okehampton asked for a further 10 minute extension to the current 10 minute period of grace and for the cameras to be switched off between 6pm and 8am.

185. The store manager at Consett responded on 1st February 2006, asking for an extension of the free parking time limit to 2 hours; and on 7th February 2006, the manager of the Pontefract store asked for an extension from one hour to 2 hours. The management of the Calne store seem to have chased Mr McDonald for a response and on 12th February 2006 asked him to inform them of the current situation in relation to the request for a further period of grace after the 1½ hour limit. If this could not be done, the manager threatened to switch off the system.

186. Unsurprisingly, representations continued to be made on behalf of the management of Stewarton, Louth and Stamford, though this does not seem to have been in direct response to Mr McDonald's circular e-mail. On 28th January 2006, Mr Rowe forwarded to Mr McDonald a further e-mail from the manager at Stamford and asked what was happening at Louth. He asked, amongst other things, whether the ParkingEye system could be removed from both Louth and Stamford, as he understood to have been the case at other stores. This was followed by an e-mail from the manager at Louth complaining about the number of fines which had been issued at the store and commenting critically on the revenue which they were generating for ParkingEye. Further representations about the problems which had arisen at Stewarton were also sent to Mr McDonald in the form

of a report attached to an e-mail dated 30th January 2006, though the writer of the e-mail commented that the problem seemed to have been resolved, presumably because the system had already been turned off. But he added the comment that the contents of the report might be "worth bearing in mind" for the purposes of "challenging future management and implementation support" by ParkingEye.

187. It was no doubt in view of the further representations from or on behalf of Tonypandy, Louth and Stamford that, on 30th January 2006, Mr McDonald wrote to Mr McKerney referring to the returns which he had been getting from various stores and thanking him for confirming that the system would be suspended and removed from Stewarton and Borrowash. But he said that the management at Tonypandy wished to retain the system in place with "a couple of modifications" so that the system could go live again, once these matters had been resolved and they had agreed a new start date. He added that he was still waiting for a return from Wallasey, so he asked Mr McKerney to leave the system switched off until he had heard from the store manager. However, he went on to say that, as a result of "excessive publicity and bad feeling" it would be necessary to suspend the operations at Stamford and Louth and "relocate to better sites". He asked him to confirm when he had been able to do this.

188. Just before he sent this e-mail to Mr McKerney, Mr McDonald had e-mailed some comments about the current situation to his superior, Mr Langdon. He informed him that he had asked for the stores' comments on parking periods and had suspended operations at Stewarton, Borrowash, Tonypandy and Wallasey. But he added that the feedback from the stores had been "surprisingly positive" apart from Borrowash, Stewarton, Louth and Stamford. In the circumstances, he indicated that he would be proposing the withdrawal of the system from Louth and Stamford in addition to Borrowash and, of course, Stewarton, since Tonypandy had asked to retain the system in place with modifications and he had not yet heard from Wallasey. Nor, at that stage, had he heard from Consett, Diss, Middlesbrough, Pontefract or Wallasey; though, as has already been seen, he did subsequently receive returns from two of those stores. He noted that there had been positive responses from seven stores. These included Beverley, Blackheath and Blackpool in addition to Torquay, Okehampton and Calne. So it seems that some of the store managers must have responded by telephone. Finally, he noted that he had received a request from the Garstang store to have the ParkingEye system installed.

189. Mr Langdon then forwarded this e-mail to Mr Roger Marston, telling him that he would copy him in on the trial results "in a couple of months". He added the comment that, though it was early days, it looked as if Somerfield could make the system work in certain stores and that what had been learned to date would enable it to be launched with fewer problems in the future. So it does not seem that Mr Langdon was intent, at that time, on terminating the contract, though he does not seem to have given any thought to the contractual implications of the suspension and removal of the system from a number of the stores in which it had been installed. But

it seems likely that it was assumed the time that replacement stores would be found for those from which the system was to be removed.

190. On 2nd February 2006, Mr McKerney sent an e-mail to Mr McDonald and to Mr Wilson dealing with a number of points arising out of the meeting on 25th January 2006. He set out in an attachment his estimate of the costs which would be involved in removing the system from Stewarton, Borrowash, Tonypandy and Wallasey. It is unnecessary to examine these figures in detail. But they range from a little over £8,000 to a little over £20,000 and it seems that they included provision for writing off fines which had already been levied. In addition, they included the costs of removing the equipment, of cancelling the broadband subscription and sub-contractors' costs. But in his covering e-mail, he said that ParkingEye would be comfortable with the costs laid out, it would seem, in supplying the equipment, since it could be used at another store. He also added that he would do a similar computation in respect of Louth and Stamford in the light of Mr McDonald's request that the system should be removed from those stores. Once a formula had been agreed, it could then, if necessary, be applied elsewhere, including the Newcastle and Cheadle stores where, it will be recalled, the installation was either called off or cancelled. In cross-examination, Mr McDonald accepted that he understood that compensation would have to be paid to ParkingEye for the costs of removing and re-installing the system but that it was Somerfield's view that the figures put forward by Mr McKerney were "very very high".

191. Mr McKerney also provided summary figures for the purchase of the system by Somerfield at 19 stores, together with the monthly running costs, and for the monthly cost of leasing the equipment at 19 stores. He also provided an updated installation schedule showing what he believed to have been the actual "go live" dates in respect of each of the stores at which the system had been installed.

192. On 3rd February 2006, Mr McDonald sent an e-mail to Mr McKerney reminding him not to remove the system from Tonypandy and Wallasey but to do so at Louth and Stamford instead. He asked him to confirm that the appropriate action had been taken. Unsurprisingly, perhaps, Mr McKerney was becoming concerned and "somewhat exasperated", as he put it in his witness statement, with the course which events seemed to be taking. He responded to Mr McDonald's e-mail later on the same day pointing out that the request for the removal of the system from Louth and Stamford meant that it would be removed from six sites in all; and he pointed out that, taking into account the initial decision not to proceed with the installation at Cheadle and Newcastle, the system would remain in operation at only 11 stores out of the original 19. He added the observation that matters were in serious danger of getting out of hand.

193. In fact, however, as Mr McDonald reminded him shortly afterwards, the request for the removal of the system from Louth and Stamford was instead of the previous request relating to Tonypandy and Wallasey. So, in fact, only four stores were involved, rather than six, in addition to

Newcastle and Cheadle. Be that as it may, in his initial e-mail in response, Mr McKerney emphasised the need to agree the compensation structure for the removal of the system from Somerfield stores before any were actually removed or any request was made for the system to be turned off at any more stores. He indicated that he would be available all that day for a conference call with Mr Wilson and Mr McDonald in order to finalise the issue of compensation.

194. Mr McDonald responded by reminding Mr McKerney that he had already asked him to arrange for the system to be removed from Louth and Stamford instead of from Tonypandy and Wallasey. Mr McKerney replied, in his turn, saying that if the compensation structure could be agreed, he could take the necessary action to turn off and remove the system from whatever stores Mr McDonald might like. He again asked for the matter to be discussed that same day by way of a conference call. But Mr McDonald's response was that he could not do so, as he was on holiday, and was simply clearing his e-mails. He was happy, however, for him to speak to Mr Wilson. Mr McKerney's final e-mail on 3rd February 2006 was to the effect that he would telephone Mr Wilson to discuss a possible meeting. But I do not know whether he actually did so or what sort of response he may have received.

195. Later on the same day, Mr Rowe sent an e-mail to Mr McDonald forwarding several other e-mails passing between himself and the store manager at Louth and asking whether a date had been set for the removal of the system. But I have not seen any response to that e-mail.

196. On 6th February 2006, Mr McKerney again sent an e-mail to Mr McDonald and Mr Wilson asking them whether they would be available for a conference call that day or during the early part of that week in order to finalise arrangements in relation to ParkingEye's costings, the removal of the system and other matters. Mr Wilson's response, later on the same day, was that it would be "more productive" to meet, rather than try to resolve these matters on the telephone. He suggested that a meeting be arranged some time during the course of the current week. Mr McKerney responded by suggesting the following Wednesday, 8th February 2006, as a suitable date. However, according to Mr Wilson, that was not convenient for himself and Mr McDonald, though he did not suggest any specific alternative date. Mr McKerney, therefore, sent a further reminder on 8th February 2006, pointing out that once the "financials" had been agreed, he would arrange for the removal and relocation of the system from the six stores at which its operation remained suspended.

197. In the meantime, Mr McDonald sent a further circular e-mail to the local managers at 16 of the stores where the system had been installed. He said that he was discussing changes with ParkingEye and that this was "nearly complete". But he asked for one further piece of information for the purposes of Somerfield's "review", namely the date on which fines started to be issued at each of the stores in question, and for the details to be sent

to Mr Halsall who would now be managing Somerfield's contractual relationship with ParkingEye.

198. On 9th February 2006, Miss Roberts of ParkingEye sent an e-mail to Mr McDonald raising a query about refunds. She attached a list of cases in which ParkingEye had received a request for refund from individual stores or from Head Office and she expressed the view that most of these appeared to be offences that should be logged under the "Negative Publicity" code. She asked how Somerfield would like to be invoiced for these requests so that they could be refunded. She sent a reminder on 13th February 2006, but there does not seem to have been any response to the request. On 11th February 2006, Mr Rowe forwarded yet another e-mail to Mr McDonald from the store manager at Louth and asked for an update since he had been told that Mr McDonald would be pulling ParkingEye out of the Louth and the Stamford stores.

The Meeting on 15th February 2006

199. By this time, of course, Mr Wilson had handed over the immediate responsibility for handling the contractual issues to Mr Halsall. A meeting between him and Mr McKerney was eventually arranged to take place on Wednesday 15th February 2006. On 14th February 2006, Mr Halsall sent Mr McKerney an e-mail with an attachment setting out the issues which he wished to discuss at the meeting. These were based upon the contents of a number of e-mails which he had seen from a number of store managers and, at least in one case, from the Divisional Executive, Mr Rowe. The issues were set out in the form of an agenda, though he was uncertain whether this was in the form in which it appeared in the trial bundles. That version appears to have been sent out as an attachment to an e-mail dated 15th February 2006 which was sent to Mr McKerney by Mr Halsall after the meeting on that date. It incorporated a column indicating how the particular issue was or might be resolved; and Mr Halsall accepted that this may have been added after the meeting.

200. Only Mr McKerney and Mr Halsall attended the meeting. Mr McDonald could not recall why he was not present. In his witness statement, Mr McKerney had comparatively little to say about the nature of the discussion, though he accepted that, amongst other things, they discussed changes to the parking periods at particular stores. He said that Mr Halsall had actually been very complimentary about the system and commented that it had been very badly managed internally within Somerfield. Only a limited number of questions were put to him about the meeting during the course of cross-examination. He accepted that the agenda document, in its final form, reflected the matters which Mr Halsall had wanted to discuss and his view of what was achieved at the meeting. But he did not accept that it was a full and accurate record of what had actually been agreed. He said that it was a two-way discussion which he described as "cordial".

201. But it was suggested to Mr McKerney that the changes to the free parking time limits at various stores as set out in the agenda document constituted "unequivocal requests" for the implementation of those changes and that

these had not been accepted by Mr McKerney. Indeed, it was suggested to him in cross-examination that he fully understood that, by asking for these changes, Somerfield was exercising its contractual rights under clause 2.9 of the Agreement between the parties and that Mr McKerney refused to do so unless Somerfield agreed to compensate ParkingEye. But Mr McKerney insisted that it was an amicable discussion about a number of issues and that there was no suggestion that Somerfield was seeking to enforce its contractual rights. He insisted that Somerfield did not at any time refer to its contractual rights or put ParkingEye on formal notice that it required certain changes. If anything of that kind happened he said it would have been "quite a major issue".

202. Mr Halsall also dealt with the meeting itself fairly briefly at paragraphs 58 to 62 of his witness statement. He said that he went through the specific issues on a store by store basis, explaining what Somerfield "needed to happen in order to continue a trial at each of those sites." Various options were discussed as to how the problems could be resolved. He added that, at this stage, Somerfield was still committed to making the trial work. The main changes that he requested were for increases in the free parking time limits or period of grace at Calne, Pontefract, Consett, Beverley, Okehampton, Tonypandy and Torquay, the provision of free parking overnight at "Linthorpe" and Okehampton and the immediate removal of the system from Stamford and Louth. He emphasised that he made this request clearly and unequivocally, because it was of great importance to Somerfield if the trial was to continue.

203. But, according to Mr Halsall, the changes which he was proposing appeared to cause difficulties for ParkingEye. There was resistance to them from Mr McKerney because of the impact that it would have on ParkingEye's income from the trial; and he expressed dissatisfaction about the situation. Mr Halsall concluded by saying that he found Mr McKerney "aggressive, self contradictory and arrogant" in his approach and that the meeting was not productive as he refused to honour ParkingEye's obligations to increase time limits at Somerfield's discretion unless Somerfield first agreed to pay compensation in relation to the stores at which the installation had been cancelled. He added that Mr McKerney had also threatened to switch the system back on at Stewarton and Borrowash.

204. These concluding remarks do not seem to have been fully reflected in the e-mail which Mr Halsall sent to Mr McKerney later on the same day. After a reasonably cordial greeting, he said that he felt that they had found "some common ground to move the contract forward". He referred to the attached agenda document, apparently in its final form, which set out details of the issues raised by Somerfield and to the changes it wanted in relation to parking times. He asked him to come back to him with answers by Monday of the following week, namely 20th February 2006. Furthermore, it was never put to Mr McKerney in cross-examination that he had threatened to turn the system back on at Borrowash and Stewarton; and there is no reference to any such threat in any of the contemporaneous

documents. But, in cross-examination, Mr Halsall insisted that something to that effect had been said by Mr McKerney in the course of a telephone conversation.

205. Furthermore, in cross-examination, Mr Halsall agreed that the meeting had been constructive and that Somerfield was sympathetic to ParkingEye's request for compensation. Indeed, he accepted that he had asked for figures to be submitted by ParkingEye so that they could be considered and discussed. Yet further, he appeared to accept that, at least during the course of the meeting, Mr McKerney was not aggressive and arrogant, though he remained of the view that that was the way in which he appeared to conduct business.

206. Mr Halsall was also asked about some of the individual issues which were discussed, by reference to his agenda document in its final form. He accepted that the meeting constituted a further stage in a series of discussions which had been taking place over a period of weeks and in which he himself had not been involved. The majority of the specific issues mentioned in the agenda document related to extensions to the time limits at various stores; and he insisted that he required a resolution of those issues by 20th February 2006. But he accepted that there was never any ultimatum given to Mr McKerney during the course of the meeting requiring him to implement these changes by a specified date or any threat to terminate the contract if he failed to do so. Indeed, for his part, he could not recall any such ultimatum ever having been given at any time.

207. In addition, Mr Halsall accepted that some of the other issues referred to in the agenda document required further discussion. For example, it was noted that the system had by that time been removed from Stewarton; and a question was raised as to whether all outstanding issues had been resolved and whether there had been a reconciliation of the monies owed. In addition, the document referred to a series of general issues, including one relating to the procedure to be adopted in cases of cancellation of parking charges on the grounds of negative publicity. It was noted by Mr Halsall that ParkingEye would have to come up with a process which would enable Somerfield to be satisfied that all cases of this kind were bona fide and that there would have to be further discussions on the point. He also noted, albeit with a query against it, that it appeared to have been agreed that there should be a formal contractual amendment to cover such cases. In cross-examination, he accepted that it was his understanding that there had been an agreement in principle for payment by Somerfield to ParkingEye in such cases and that Mr McDonald had told him that Somerfield was to pay 65% of the discounted parking charge.

208. There also seemed to have been one or two other matters which required further discussions. One was as to the actual "go live" dates at individual stores; and another was as the likely cost of removing the system from all of the sites. In addition, of course, as already noted, it seems that Mr Halsall also asked for figures for the cost of removing the system from the sites from which its removal had already been requested. So it seems

fairly clear that there were a number of matters which required further discussion between the parties.

The Aftermath of the February Meeting

209. It would seem from Mr Halsall's evidence, however, that he had asked Mr McKerney to respond to various matters as set out in the final version of his agenda document by 20th February 2006 and in particular to the proposed changes in parking times. But on the following day, 16th February 2006, he sent a further e-mail to Mr McKerney raising a number of additional queries. These were grouped into three categories. The first comprised those which were said to arise out of the minutes of a meeting on 24th January 2006. That appears to be a mis-dated reference to the document prepared by Mr Wilson after the meeting of 25th January 2006 which does not seem, in fact, to have been sent to Mr McKerney. Mr Halsall asked for confirmation of the actual "go live" dates for each store, as set out in a schedule which was not, in fact, attached, and for Mr McKerney's agreement to the cancellation of any charges levied between those dates and the dates upon which it was said that individual store managers understood that the system would go live. In addition, he asked for a detailed analysis of "triple fines" issued prior to the beginning of 2006 and a summary spreadsheet, store by store, of the "numbers and status of fines".

210. He then dealt with various further issues which were said to have arisen out of the meeting on 15th February 2006. He asked for personal access for himself to ParkingEye's website. In addition, he indicated that agreement would have to be reached as a matter or urgency on a refund process for fines which had been cancelled by the stores. But he added that Somerfield would be unable to deal with this internally and that the refund would have to come from ParkingEye. He also observed that there would have to be a renegotiation on the cost implications in relation to the stores from which the system had been removed.

211. Finally, he referred to two points which he had raised by telephone with Miss Roberts earlier that day. He requested copies of "all letters sent out to customers", since Somerfield's press officer was now dealing with an issue relating to a "threatening letter" sent to a customer. Somerfield would not wish to be associated with CCS or any other debt collection agency. Finally, he once again referred to the issue of refunds.

212. The request for copies of these letters seems to have been triggered as a result of his attention having been drawn to a copy of the fourth letter which had been sent to Somerfield by a customer of the Louth store. The accompanying letter of complaint has, apparently, been mislaid. In his witness statement, Mr Halsall indicated that he had received this on 15th February 2006, though in cross-examination he seemed less certain about this. But it seems to me that he must have received it by the time he raised the matter with Miss Roberts and Mr McKerney on the following day. But, apart from asking for copies of the letters, this was not a matter which

Mr Halsall or anyone else at Somerfield seem to have followed up with ParkingEye at any time before the contract was terminated.

213. Mr Halsall concluded this e-mail by saying that all these matters would have to be resolved before the parties could go forward; and he said that he would have to set an end date of the following Tuesday, namely 21st February 2006, as he thought they would all agree that matters had remained unresolved for too long. Later on the same day, he sent Mr McKerney a copy of the "go live" spreadsheet, which he had failed to attach to his earlier e-mail.

214. On 20th February 2006, Mr McKerney sent two e-mails to Mr Halsall dealing with most of these matters. In his earlier e-mail, he provided details enabling Mr Halsall to access ParkingEye's website and call centre. He also attached an invoice for the closure and removal of the ParkingEye system from eight stores, including Wallasey, Tonypandy, Cheadle and Newcastle, in addition to Stewarton, Borrowash, Stamford and Louth. The total amount, inclusive of VAT, was £96,198.

215. But he also raised a new issue. He referred to the fact that during their discussions it had become apparent that a very large number of staff permits had been issued at certain stores. He commented that issuing such permits to people who were not members of staff was contrary to the agreement between the parties and that in order to implement the system effectively, it was necessary to ensure that permits were not being abused. He attached a brief summary of the number of permits issued at 11 of the stores.

216. Later on the same day, he sent a further e-mail dealing with nine points which he understood to have been raised by Mr Halsall. As regards the "go live" dates, he adhered to ParkingEye's position that the individual store managers knew or ought to have known when the system was about to go live. He repeated, as on earlier occasions, that he remained uncertain as to precisely what was meant by "triple fines" or the action that ParkingEye was being asked to take. He also attached to his e-mail a summary of fines to date, broken down store by store and commented that additional information about fines generated by the system could be found on the appropriate page on ParkingEye's website.

217. Mr McKerney then went on to deal with the negative publicity coding. Such coding, he suggested, was applicable where Somerfield had requested the cancellation of a charge in cases which did not fall within the contractual Exemptions. He referred to the earlier exchange of e-mails between himself and Mr McDonald in January in which, he suggested, it had been agreed that store managers could cancel the charges where it would cause damage to Somerfield's business and reputation. In such cases, it was agreed that ParkingEye could charge Somerfield at a rate of 65% of the discounted charge of £37.50.

218. He then went on to deal with refunds. He accepted that where a charge had been levied on a customer who fell within the agreed Exemptions, ParkingEye would itself make the appropriate refund, provided that it was satisfied that the case did indeed fall within the Exemptions. But in cases where Somerfield had requested the cancellation of a charge in circumstances where the negative publicity coding would be applicable, he contended that the responsibility for making the refund should rest with Somerfield. Otherwise, as he pointed out, Somerfield would have to pay ParkingEye at 65% of the discounted charge and ParkingEye would then, in turn, have to refund the full amount of the charge to the customer.

219. Mr McKerney then turned to the request for copies of the "fine letters" and for alterations in the time limits at various stores. As to the former, he said that he would send copies to Mr Halsall on the following day; and, as to the latter, he suggested that he and Mr Halsall should discuss time limits over the telephone once agreement had been reached about the removal of the system from those stores at which it had been requested.

220. Mr Halsall accepted that he had received these two e-mails from Mr McKerney, though he was uncertain whether the invoice and analysis of the charges had, in fact, been attached. But he accepted that he must have seen both of these documents at some stage. He responded on 21st February 2006, simply thanking Mr McKerney and commenting that he could not access the website for some reason. Mr McKerney, in his turn, had apparently asked CCS to provide copies of the parking charge notices and letters; and these were sent through to him on the afternoon of 21st February 2006. But he did not forward these to Mr Halsall; nor did he inform him that Mr Ogden had approved them on an earlier occasion.

221. It was suggested to him that this was a deliberate decision on his part as he must have anticipated trouble if he had sent Mr Halsall copies of the letters in question. But he rejected the suggestion, saying that it had probably slipped his mind as he was dealing with a considerable number of other queries raised by Mr Halsall at the time. It was not uncommon for clients to raise queries about these letters. But he commented that it was absurd to suggest that Somerfield had not, in fact, "cleared" the letters at some stage. He added that ParkingEye had to comply with the requirements of the British Parking Association and consumer protection legislation. For my part, however, I thought that Mr McKerney was somewhat defensive in his answers to these questions and I think it is quite likely that he did not want to send copies to Mr Halsall at this rather difficult time in the relationship between the parties.

222. At paragraph 67 of his witness statement, Mr Halsall said that he regarded Mr McKerney's response, as set out in his two e-mails of 20th February 2006, as a "clear refusal" of the request which he had made on 15th February 2009. He referred specifically to Mr McKerney's suggestion that any alterations to the time limits should be linked with an agreement as to the removal costs. This was directly challenged in cross-examination, it being suggested to him that Mr McKerney's response simply marked a

further stage in the discussions and negotiations over various issues which had arisen between the parties. But Mr Halsall denied the suggestion and insisted that he had taken it as an outright refusal. He did, of course, accept that in his second e-mail, Mr McKerney had specifically suggested that they should continue to talk about time limits; and he seemed to find it difficult to deal with counsel's question as to whether he believed that Mr McKerney was genuinely prepared to talk about these matters.

223. But there was no further immediate response from Mr Halsall. On 22nd February 2006, Mr McKerney forwarded to him a number of earlier e-mails dealing with other stores at which it had been suggested that the system could be installed. This was presumably with a view to seeing whether any replacement or additional stores could be identified at which the system could be installed.

The Draft Letter of 22nd February 2006

224. But it seems that further discussions were taking place within Somerfield as to how to resolve the issues which had arisen between the parties. It appears that Mr Halsall had discussed these matters further with Mr McDonald and Mr Wilson and had also taken some advice from Somerfield's legal department. In the light of those discussions and advice, a draft letter to ParkingEye was prepared and dated 22nd February 2006. But ParkingEye denies ever having receive any such letter and it seems unlikely that it was ever sent. The copy produced at trial was on Somerfield's letterhead and was apparently intended to be posted. Mr Halsall could not specifically recall having posted it, though he assumed that he would have done so. But there is no other contemporaneous evidence that it was, in fact, posted. Nor was a copy sent to Mr McKerney as an attachment to an e-mail, by contrast with all other correspondence between the parties. Nor is there any reference to the letter in any of the subsequent e-mail exchanges or in the final termination letters.

225. So I treat the letter as no more than a draft which was never sent to Mr McKerney. Nonetheless its terms are of some interest. It refers to the fact that Mr Halsall had taken legal advice and went on to say that he was keen to resolve all issues for the mutual benefit of the parties. But two specific requirements were then set out. These were as follows:

> "1. I require the parking times to change at the sites mentioned on our recent correspondence. It is our right as the customer under clause 2.9 to choose the parking time.
>
> 2. We require a detailed break-down of the capital and installation costs for the 6 stores (Stewarton, Borrowash, Stamford, Louth, Wallasey and Tonypandy) where we have asked for the system to be removed and the installation cost break-down only for 2 stores (Newcastle and Cheadle)".

226. He continued by saying that if Mr McKerney could deal with these two issues then they would be in a position to discuss re-launching the system. Mr Halsall concluded by saying that he would like to thank Mr McKerney for the service and support he had given to Somerfield over recent times

and wished him all the best for the future. That, as counsel suggested, has a clear note of finality. Furthermore, as counsel also pointed out in cross-examination, the letter does not refer to any prior refusal on Mr McKerney's part to alter time limits or to his insistence that they should be linked to compensation where Somerfield was requesting the removal of the system from individual stores.

Mr Halsall's Memorandum

227. At some stage, apparently with the assistance of Somerfield's legal department, Mr Halsall also prepared a memorandum for consideration by Mr McDonald and Mr Wilson. It is headed "ParkingEye - Contractual Issues February 2006" but is otherwise undated. It was Mr Halsall's evidence, however, that it would have been produced in late February or early March. Interestingly, perhaps, it identifies the "stores involved" as being eight in number, namely Stewarton, Borrowash, Stamford, Louth, Wallasey and Tonypandy (which can, I think, be regarded as the major "problem stores"), all of which were or had been the subject of a request for the removal of the system, together with Newcastle and Cheadle, at which the installation had been stopped at an early stage.

228. The document then went on to identify five issues. These are worth quoting in their entirety. They are as follows:

> "1. The delay in reaching a settlement figure has resulted in ParkingEye refusing to honour clause 2.9 of our agreement whereby we reserve the right to alter/amend parking times in consultation with the supplier.
>
> 2. ParkingEye are threatening to turn systems back on at Stamford and Louth, Wallasey and Tonypandy and start issuing fines, this would be against our instruction.
>
> 3. Dispute over Negative Publicity/Exceptions - ParkingEye are trying to place the burden of proof on Somerfield for customer exemptions that store managers corroborate and ask ParkingEye to cancel/refund. A clear process was agreed with ParkingEye by James McDonald via e-mail on 17th Jan. Clause 2.8 of the contract stipulates that the customer can make changes to exceptions.
>
> 4. Multiple fines issued in December were to be quashed down to 1 and sent out in January - proof that this has happened.
>
> 5. Wording of letters to customers, too aggressive. Have requested copies but so far none have been sent."

229. The memorandum then referred to the financial dispute between the parties. Mr Halsall noted that ParkingEye was seeking compensation for the cancellation or removal of the system from eight of Somerfield's stores, quantifying its investment in the sum of £400,000. It was noted that, by clause 2.5 of the Agreement, the product was to be supplied free of charge. Mr Halsall also noted that Somerfield had asked for a complete break-down of capital and installation expenditure but that this had not yet been forthcoming. And finally, he recorded that ParkingEye had provided a break-down of costs for the eight sites in question but that it was seeking

a settlement figure based on lost revenue from fines as well as the installation costs.

230. Finally, Mr Halsall's memorandum put forward three possible solutions. These were as follows:

> "1. Agree to pay ParkingEye a sum for consequential loss, not based on projected revenue lost.
>
> 2. Install removed equipment from eight stores and agree to pay reasonable removal and re-installation costs.
>
> 3. Terminate entire agreement for material breach.
>
> - Refusal to change parking times - clause 2.8
> - Not allowing changes to schedule 2, exceptions.
> - Clause 11.2.1 - 28 days notice if for operational reasons etc."

231. The first of the issues is said to have been ParkingEye's refusal to comply with Somerfield's request to alter the time limits at various stores contrary to clause 2.9 of the agreement between the parties. Mr Halsall acknowledged, in cross-examination, that this was based upon what Mr McKerney had said in his second e-mail of 20th February 2006. In cross-examination, he could give no adequate explanation as to why he had not then gone back to Mr McKerney to discuss the matter further and, if necessary, to point out any misunderstanding of the position on his part or, I suppose, to issue an ultimatum requiring him to put in hand the necessary changes within a specified timetable. The best he could do was, rather lamely, to say that he did not do so because he did not do so. It is also of some interest to see that Mr Halsall himself seemed to accept that this was connected with "the delay in reaching a settlement figure", though this was not a matter which was pursued in cross-examination.

232. The second issue raised by Mr Halsall was the threat to turn the system back on at four of the stores. When challenged in cross-examination, Mr Halsall insisted that such a threat had indeed been made, albeit in the course of a telephone conversation rather than in writing. But this was never put to Mr McKerney, even though Mr McDonald, in the course of cross-examination, suggested that this was an important consideration in Somerfield's ultimate decision to terminate the contract. Nor was it mentioned in any subsequent exchanges between the parties. Yet further, though it is a matter which is raised in Somerfield's Amended Defence, it is alleged that the threat was made during the course of the meeting between Mr McKerney and Mr Halsall on 15th February 2006, rather than in the course of some separate telephone conversation.

233. In the circumstances, though I cannot rule out the possibility that Mr McKerney may at some stage have said something to the effect that he might or was entitled to switch the system back on at some of these stores, I am not prepared to make any positive finding to that effect, still less that it was or was understood to have been a serious threat on his part. So it is unnecessary for me to consider whether ParkingEye would have been within its contractual rights to have done so.

234. The third issue identified by Mr Halsall related to the Negative Publicity coding. But he linked this with the issue of "exceptions". So there appear to have been two aspects to the problem, as perceived by Mr Halsall. One seems to have been an apparent reluctance on the part of ParkingEye to accept decisions by local store managers as to whether in any particular case, one of the Exemptions set out in Schedule 4 to the Agreement between the parties was applicable. In addition, however, the reference to clause 2.8 suggests that he considered that there was also a linked problem arising out of Somerfield's contractual right to alter the list of Exemptions. But, if so, this does not seem to have been specifically raised with or communicated to Mr McKerney. Be that as it may, the particular point that was raised with Mr Halsall during cross-examination related to a comment in his memorandum in relation to Negative Publicity charges that a "clear process" had been agreed. He confirmed that it was indeed his understanding that this was so. Likewise, in the course of cross-examination, Mr McDonald agreed with counsel that there was no disagreement in principle over NP charges but that Somerfield simply wished to be sure that they were genuine.

235. I need say little about the other two issues raised by Mr Halsall, namely multiple fines and the wording of the fine letters, save that Mr Halsall does not seem to have followed up his request for copies of the letters or even raised with Mr McKerney any concerns which he had about the tone of the letter which he had seen. Nor do I think it is necessary to deal in any further detail with what he had to say about the financial dispute between the parties.

236. The three options with which he concluded his memorandum were, of course, the payment of compensation to ParkingEye, presumably in conjunction with a termination of the entire Agreement, the re-installation of the system at a number of other stores by way of replacement for those from which it was to be removed, together with the payment of the reasonable costs of removal and the installation, or termination for material breach. When Mr Halsall was asked in cross-examination about the grounds upon which he had suggested that the Agreement might be terminated, he stated, for the very first time so far as I can tell, that there had been some further telephone discussion with Mr McKerney about Somerfield's request for a change in the time limits. But his evidence on the point was challenged and he did not provide any further details. But, whether or not there were any further discussions between the two men after 20th February 2006, I am not prepared to hold that anything was said by either of them which has any material bearing on the issues to be resolved in this litigation. Indeed, in the same passage in cross-examination, Mr Halsall accepted that this allegation of breach of contract was based solely upon what Mr McKerney had said in his second e-mail of 20th February 2006.

237. As to the second bullet point, suggesting a material breach of contract on ParkingEye's part in not allowing any changes to the contractual

exceptions, Mr Halsall was unable to recall any occasion on which this had been discussed with ParkingEye. He was not asked any further questions about what he meant by the words which he chose to use in this part of his memorandum where he referred to "schedule 2 exceptions", as this Schedule deals with the parking fine process, whereas Exemptions (rather than "exceptions") are dealt with in Schedule 4. But the reference earlier in the memorandum to clause 2.8 in this context seems to show that he must have been referring to Schedule 4.

238. As to the observation at the very end of his memorandum to the effect that Somerfield might be entitled to terminate the agreement under clause 11.2.1, Mr Halsall accepted that this provision was never, in fact, invoked by Somerfield.

Termination

239. At some stage, probably in early March 2006, Mr Halsall had a meeting with Mr Wilson and Mr McDonald to consider how to proceed in the light of his memorandum. It was his evidence that they discussed all the points raised in his memorandum and that they agreed that Mr McKerney's response to Somerfield's request for changes in the time limits, as set out in his second e-mail of 20th February 2006 constituted a clear referal to comply with the request. There was also, he said, a discussion about Mr McKerney's failure to agree to changes in the Exemptions, though he could not recall whether he had pointed out to Mr McDonald and Mr Wilson that he had not actually discussed this issue with Mr McKerney.

240. Mr Halsall, Mr McDonald and Mr Wilson all agreed that Mr Halsall had recommended that the third option should be accepted and that the Agreement should be terminated for material breach. But Mr Wilson had very little more to say about the meeting and its outcome in his witness statement; and Mr McDonald did not deal with it at all. Mr Wilson observed that, it had become apparent that ParkingEye was not prepared to honour its obligations under the Agreement, referring, in particular, to its refusal to alter the free parking time limits unless Somerfield first agreed to pay compensation for the removal of the system from four stores. After referring to Mr Halsall's recommendation that the contract should be terminated, he said that he and Mr McDonald had authorised him to do so "in view of the disruption and difficulties that this breach of contract was causing Somerfield, not to mention the reputational damage that Somerfield was suffering."

241. In cross-examination, Mr McDonald was unable to recall precisely when the decision to terminate had been taken. Whilst he could remember a meeting between himself, Mr Halsall and Mr Wilson, he could not really remember what had been discussed. But he went on to say that he could recall that they had been advised that they were grounds for termination and that it was agreed that Mr Halsall should go ahead and terminate the Agreement. But, at the outset of his cross-examination, he had said that the matter had been referred to his line manager Mr Martin Langdon who apparently agreed with the decision. When asked about the reasons which

justified the termination, he said that they all felt that they were not receiving full co-operation from ParkingEye in relation to the proposed changes in time limits or requests for cancellation of fines.

242. But at the very end of his witness statement, he summarised the reasons for the breakdown in the relationship between the parties in very general terms, saying that it was the result of ParkingEye's unwillingness to work with Somerfield in order to make the project work. In response to a question from me towards the end of his oral evidence, he said that he would pick out in particular the fact that charges had been levied at some stores before the store managers were aware that the system had gone live and that ParkingEye was reluctant to cancel them when asked to do so. He also added that they regarded the threat to turn the system back on at stores where its operation had been suspended as a matter of serious concern.

243. Mr Wilson was also cross-examined about the decision to terminate. He was asked about the attitude of the "senior executives" who had apparently been demanding the removal of the system, as recorded in the document which he had prepared in anticipation of the meeting with Mr McKerney on 25th January 2006. He said that the matter had been left to himself and, it would seem, Mr McDonald, with a view to resolving it satisfactorily. But he had not seen anything in writing at which any of the regional managers or directors had expressed particular views about the removal of the system. But, as he added rather wryly, managers at that level tended to do everything verbally without committing themselves in writing on matters of this kind.

244. But it was also suggested to Mr Wilson that, at the time of the meeting with Mr McDonald and Mr Halsall, all of them were aware that Mr McKerney's accepted that there were matters which needed to be discussed and that he was perfectly happy to talk about them. Mr Wilson agreed that Mr McKerney might well have had issues of his own which he wished to pursue with Somerfield but stated that there had been no satisfactory resolution of the matters which were regarded as important by Somerfield. What he was told at the time was that those particular issues were not moving towards resolution and that obstacles were being put in the way of achieving any such resolution. But he accepted that he had probably not been told in terms that Mr McKerney had informed Somerfield that he was no longer prepared to discuss the question of free parking time limits. He added that resolution of this particular problem seemed to be difficult, since it was being linked to other matters.

245. So the evidence of what actually occurred at this meeting and how the decision to terminate was actually taken is really very tenuous indeed. One might nonetheless have thought that further light might be cast upon these matters by subsequent events. But, in fact, matters appeared to have proceeded for some time in much the same manner as before, with various minor matters being discussed in the course of e-mail exchanges.

246. As it happens, Somerfield was in the process of disposing of a number of its stores at this time, including, some of which the ParkingEye system had been installed. A standard form letter notifying Mr McKerney of this disposal was sent to him on 28th February 2006, but it was denied that this disposal had anything to do with the decision to terminate.

247. According to Mr Halsall, once the decision had been taken, he called Mr McKerney by telephone and informed him of the decision. Though he could not recall the precise nature and content of the conversation, he said that Mr McKerney did not seem to be particularly upset. But, whether or not Mr Halsall informed Mr McKerney of the decision informally in this way, formal notification was given to him on 7th March 2006 by way of a letter expressed to be without prejudice. It reads as follows:

> "I refer to recent correspondence between us regarding the ParkingEye system that was installed on a trial basis in 17 of our stores.
>
> As indicated to you earlier we wish to withdraw from this trial. The reason for this is the continuing operational issues we are experiencing in stores where the system has not been well received which is having an adverse effect on trade within those stores.
>
> We trust that all systems will not be in operation as from today.
>
> I will be grateful if you could submit a settlement figure for the removal of the systems from all sites and confirm the proposed timetable to achieve this.
>
> We will require a full and detailed breakdown of all costs including invoices paid etc.
>
> I look forward to receiving your proposal."

248. There is no reference in this letter to any previous telephone conversation. More importantly, however, there is no indication whatever that Somerfield was terminating the Agreement on the grounds of any breach of contract on ParkingEye's part. On the contrary, it appears simply to have contemplated further discussions about a settlement figure. But the use of the phrase "operational reasons" is reminiscent of the use of the same expression in Mr Halsall's memorandum in connection with the reference to clause 11.2.1 of the contract.

249. After some further brief exchanges of e-mails, Mr McKerney responded on 10th March 2006. He expressed his surprise and disappointment that Somerfield had indicated a wish to withdraw unilaterally from the contract before the expiration of the contract period. He said that, so far as he was aware, Somerfield had never previously made any complaint about the service provided by ParkingEye. However, he confirmed that if it was Somerfield's wish, ParkingEye would be prepared to agree to release it from its contractual obligations provided that it was properly compensated for the early termination of the Agreement. He said that he would get back to him on the issue of compensation with a view to agreeing it as soon as possible and that he would then arrange to remove the system from the stores. In the meantime, the system would remain live but no further parking charges would be sent out.

250. On 14th March 2006, Mr Halsall replied thanking him for his response and confirming that Somerfield wished to withdraw from the contract. He asked if ParkingEye could submit its proposals for Somerfield's consideration.

251. When questioned about these exchanges, Mr Halsall accepted that he personally had not made any previous complaints about the service provided by ParkingEye. He also accepted, as was plainly the case, that he had not alleged any breach of contract on ParkingEye's part. On the contrary, he agreed that the decision to terminate had been one which had been taken for Somerfield's own commercial reasons and that he had recognised that the parties should try to reach agreement as to the amount of compensation payable to ParkingEye. But unhappily, of course, no such agreement was reached and the dispute falls to be resolved in the present proceedings.

PART III
THE AGREEMENT

252. Against that factual background I must now go on to consider the terms and conditions of the Agreement insofar as they are or may be material to the contractual issues raised by the parties. Some of those issues are directly relevant to the allegations and counter-allegations of breach of contract. But others are relevant only to issues of causation and quantum.

253. I have already summarised what appear to be the salient features of the Agreement which governed the relationship between the parties. But I make two further general observations about the nature of the contract and its commercial objectives. Mr Chaisty QC, on behalf of ParkingEye emphasised that the system was to be supplied to Somerfield free of charge. Indeed, that was expressly enshrined in clause 2.5 of the Agreement. But it was plainly well understood and accepted on both sides that it was to be indirectly remunerated by the collection and retention of the charges which were to be levied on motorists for parking for periods in excess of the specified time limits.

254. So it would be in ParkingEye's commercial interests for the time limits to be comparatively short so as to "catch" a greater number of motorists. But that is not to say that it was in Somerfield's commercial interests for the time limits to be unduly generous, since the entire purpose of having such a system in place was to ensure that the use of the car park was limited to those who could fairly be regarded as genuine shoppers. What Somerfield may not, of course, having anticipated was the efficiency of the ANPR system in detecting and pursuing motorists who had strayed beyond the limit.

255. Mr Fealy, on the other hand, on behalf of Somerfield, emphasised that the Agreement provided the framework for a trial of the system at a number of Somerfield stores and that the parties could not have anticipated in advance precisely how the system would work in practice. In particular, he suggested that this meant that both parties must have appreciated that

there would be some degree of uncertainty as to which stores the system would prove be suitable for and what time limits would turn out to be appropriate. There had, of course, already been an apparently successful trial of the system at Somerfield's Blackpool store. But I accept that what was envisaged when the Agreement was entered into was a more extensive trial covering 25 stores over a period of 15 months which might, however, be extended to other stores over a longer period if it proved satisfactory.

256. Mr Fealy submitted that the provisional nature of the project was reflected in the fact that, at the time when the Agreement came into force, the parties had not reached agreement as to the identity of the 25 stores at which the system was initially to be installed and, indeed, never did so. He also submitted that this fundamental aspect of the project explained the purpose of certain specific provisions of the Agreement itself. He referred, in particular, to the provisions of clause 2.8 (which dealt with Exemptions), clause 2.9 (which dealt with time limits) and clause 11.2.1 (which allowed Somerfield to terminate the Agreement in relation to any particular store for "operational reasons").

The Supply of the Products

257. I will now set out or summarise those express terms of the Agreement which may be material to the issues to be resolved in this litigation.

258. After the initial recitals, various definitions were set out in clause 1 of the Agreement. I will refer back to these as may be necessary. Clause 2 deals with the supply of the "Products". Mr Fealy appeared to suggest in argument that the system was limited to monitoring the car parks in question rather than managing them. But that cannot be correct. The term "Products" was defined in clause 1.1 in the following words:

> "Products" means the ParkingEye system consisting of parking space monitoring software, hardware and accessories including installation, maintenance, signage, twenty four hour car park management, fine processing and on-line statistics more specifically detailed in Schedule 1."

259. Schedule 1, in its turn, expressly included 24 hour car park management within a somewhat more extensive summary of the Products in question.

260. By clause 2.1, these Products were to be supplied by ParkingEye to Somerfield for the purpose of managing the car parks at the "Preliminary Stores" and any "Additional Stores" on behalf of Somerfield; and Somerfield was, of course, obliged to accept the installation of the products by ParkingEye, albeit as licensee only. The expression "Preliminary Stores" was a defined term, meaning: "twenty five of the Customer's stores selected from the Additional Stores list, which have been identified by the parties to be installed with the Products in the first instance".

261. The expression "Additional Stores" was also a defined term, the definition being in these words:

"**Additional Stores** means the Customer's additional stores, as detailed within Schedule 3 to be installed with the Products pursuant to Clause 2.11, which have been identified as having car park problems, by the Supplier conducting a survey of the entire Customer's stores and the Customer making recommendations, or as varied from time to time by the Customer."

262. So the Agreement pre-supposed that the parties had decided upon the identity of the 25 stores at which the system was initially to be installed. But, of course, that did not occur. In fact, the process of selection extended over several weeks after the Agreement had been signed and, even then, only 19 stores were identified for that purpose and, of these, the system was only effectively installed in 17.

263. Clause 2.2 provided that before the installation of the Products, the parties should meet to agree the location of the Products to be installed at the Preliminary Stores or the Additional Stores. In the absence of agreement, the location for the installation was to be at Somerfield's absolute discretion. Further provisions dealing with the installation of the system were set out at clauses 2.3, 2.4 and 2.6. But I doubt if any of these provisions are material to the issues which I have to resolve save perhaps for clauses 2.3.2 and 2.6 which, in effect, required all necessary planning permissions and other consents to be obtained before the installation could proceed.

264. In addition to the installation at the 25 Preliminary Stores in accordance with these provisions of the Agreement, clause 2.11 allowed for the installation of the system in the rest of the Additional Stores identified in Schedule 3 and, indeed, in Somerfield's other stores in the United Kingdom. But it was entirely a matter for Somerfield whether it was willing to proceed with the project in any other stores; and nothing turns upon these provisions for the purposes of the present litigation.

265. Clause 4 was headed "Delivery". It provided that if Somerfield refused or failed to allow the supply and installation of the Products in accordance with the Agreement, or failed to take any action reasonably necessary on its part for the installation of the Products, ParkingEye would be entitled to recover from it any loss or additional costs incurred as a result of such failure and refusal.

Parking Fines

266. Clause 2.5 was the provision which required ParkingEye to supply the system to Somerfield "free of charge". Clause 2.7, however, made it clear that ParkingEye was entitled to receive remuneration from the fines or charges levied on motorists using the car parks. It is in these terms:

"The Supplier shall be entitled to the aggregate sum of all of the Parking Fines generated by the Products and levied in accordance with the provisions of Schedule 2, without exception, subject to the Exemptions."

267. The expressions "Exemptions" and "Parking Fine" are both defined terms. The definitions are set out in clause 1.1 and are in the following words:

> "**Exemptions** means the circumstances when it is agreed that the Parking Fine should be cancelled as set out in Schedule 4;
>
> **Parking Fine** means the monetary penalty fee agreed from time to time between the parties and which is issued and required by the Supplier against any vehicles parked in contravention of the terms and conditions of use of the car parks at the Customer's Preliminary Stores or any Additional Stores."

268. In view of the substantive provisions of clause 2.7 and these definitions, it is necessary to consider the contents of Schedule 2 and Schedule 4.

269. Schedule 2 deals with the Parking Fine Process. It sets out the way in which the system was to operate by photographing each vehicle as it entered and left the car park, sending the relevant information to ParkingEye's servers for processing and generating and recording an "offence" if it overstayed the maximum parking limit for the car park in question. It then provides that this "offence" was to be converted into a parking fine and issued to the vehicle's registered keeper. This process is set out at paragraph 5 of the Schedule in these terms:

> "The offence is converted into a Parking Fine and issued to the vehicle's registered keeper, under the following process:
>
> (a) Using the registration details, taken from the photographic evidence, the registered keeper's details are sought from the DVLA.
>
> (b) A maximum of four Parking Fine letters are then generated and issued, explaining that the vehicle committed a parking offence on private land and as such a charge is now due (the number of Parking Fines sent is entirely dependent on when the registered keeper of the vehicle chooses to pay the Parking Fine).
>
> (c) Issue of fines and amounts:
>
> i) Parking Fine 1, Day 1: £75 fine payable in next 28 days, reduced by 50% to £37.50, if paid in next 14 days, but increased to £135 if not paid in 28 days
>
> ii) Parking Fine 2, Day 7: £75 fine payable in next 21 days, reduced by 50% to £37.50, if paid in next 7 days, but increased to £135 if not paid in 21 days.
>
> iii) Parking Fine 3, Day 14: £75 fine payable in next 14 days, but increased to £135 if not paid in 14 days.
>
> iv) Parking Fine 4, Day 28: £135 fine due.

(d) If the registered keeper chooses not to pay after the 4th Fine, no further action is taken, but detailed records of all non payers and persistent offenders will be stored. Should the Customer wish the Supplier to take the matter further, court proceedings can be started at the expense of the parties to be agreed from time to time."

270. There was a further reference to court proceedings at paragraph 6 of the Schedule which was in these terms:

"In the event that the Customer wishes to commence court proceedings in order to recover outstanding parking fines levied at the car parks, the Supplier shall afford the Customer all reasonable assistance, advice and documentary evidence as shall be necessary for the furtherance of such court proceedings."

271. In view of the allegations of illegality made by Somerfield, it should be noted that neither the final words of paragraph 5(d), which refer to the cost of court proceedings, nor any of what is now paragraph 6 appeared in the initial draft of Schedule 2. They were incorporated in a revised draft subsequently prepared by a Mr Stuart Marriner, an assistant solicitor within Somerfield's legal department and were expressly stated to be subject to any comments from Miss Taylor who was, by this time, dealing with the contract after the departure of Mr Ogden. In cross-examination, Miss Taylor could not recall whether the initiative for including these further provisions came from her or from Mr Marriner. But she accepted that she was responsible for agreeing the commercial terms of the contract on behalf of Somerfield. She also accepted, perhaps inevitably in the circumstances, that Somerfield wanted to reserve the right to take legal proceedings against motorists if they needed to do so, though she expressed the belief that Somerfield had no real intention of taking such proceedings, though it remained a possibility that it might wish to do so.

Exemptions

272. ParkingEye's right to retain the proceeds of all Parking Fines generated by the system was, in fact, subject to two qualifications, despite the use of the expression "without exception". One of these, was, of course, where any of the Exemptions applied, as is apparent on the face of clause 2.7 itself.

273. I have already referred to the definition of this expression in clause 1.1 of the Agreement which, in turn, refers to Schedule 4. It is as well to refer to the terms of this Schedule in its entirety. It reads as follows:

"The following is a list of reasons for a registered keeper of a vehicle not to have to pay a Parking Fine:

1) The motorists is actually a staff member of the Customer who failed to register his/her vehicle in the Staff Permit list.
2) The motorist is a visitor to the Store who failed to register his/her vehicle in the Visitor Permit list.
3) If the motorist is able to produce a receipt proving purchase of goods or services from the customer in excess of:

(i) £15, they will be allowed to park for up to a maximum of 2 hours, though any longer than this and the parking fine stands.

(ii) £50, they will be allowed to park until midnight on the day they entered the car park, though any longer than this and the parking fine stands.

4) Disabled motorists will not have to pay the Parking Fine upon receipt of a photocopy/fax of their Blue Badge.

5) Any common sense issue which is verified by the Store Manager, i.e. a motorist collapses in the store and has to be taken to hospital, etc."

274. But there is a further substantive provision relating to Exemptions in the body of the Agreement itself which is potentially of some considerable significance in view of the issues which require resolution in these proceedings. Clause 2.8 is in the following laconic terms:

> "The Customer may, at its absolute discretion, make any changes to the Exemptions."

Permit Holders

275. But it also seems quite clear that the Agreement provided for a further exception in relation to what were termed Permit Holders. This was, once again, a defined expression; and the definition is in the following terms:

> "**Permit Holder** means a person or persons authorised by the Customer from time to time and notified to the Supplier to park a vehicle or vehicles at the Preliminary Stores (or any Additional Store) without committing a contravention to the terms and conditions of use at the car parks at such sites."

276. Accordingly, a Permit Holder would not contravene the terms and conditions of use by parking his car at the car park in question; and, since according to the definition of the expression "Parking Fine" such a fine could be issued only where a vehicle was parked in contravention of the terms and conditions of use of the car park, no such fine could be levied against a Permit Holder.

277. Further provisions relating to Permit Holders were to be found in clause 9 which governed access to ParkingEye's website. By clause 9.5, it was provided that Somerfield should input and update, via the website, the names and vehicles of the Permit Holders and of any "daily visitors" to the store who were to be permitted to park their vehicles on the car parks without the imposition of a parking fine. ParkingEye was to provide training about these matters for each store at the time of installation. It was expressly stated that it was Somerfield's responsibility to keep these "staff and visitor details" up to date on ParkingEye's website. Clause 9.5 concluded with these words:

> "As each offence and Parking Fine costs money to generate and issue, each Store is allowed a maximum of 25 offences that fall into this category to be cancelled each year. Beyond this, a charge of £10 per offence cancellation will be made to the Customer."

278. By clause 9.6, ParkingEye was required to ensure that all data relating to Permit Holders should be updated immediately following receipt of the relevant information from Somerfield so as to ensure that Parking Fines were not issued to Permit Holders. Clause 9.12 required ParkingEye to maintain a telephone customer help desk by means of which Somerfield could obtain and exchange information and issue instructions to ParkingEye on certain specific matters including the names and vehicle details of Permit Holders and the cancellation of individual Parking Fines.

Time Limits

279. A further highly significant provision appears at clause 2.9. This deals with the question of time limits. It reads as follows:

> "The Customer may, following consultation with the Supplier, choose the maximum period for motorists to freely park in its car parks, after which time Parking Fines may be issued."

280. It is the alleged refusal of ParkingEye to accept Somerfield's instructions to alter the time limits at certain stores after the meeting between Mr Halsall and Mr McKerney on 15th February 2006 which constitutes the basis of Somerfield's primary case that it was entitled to terminate the Agreement because of a repudiatory breach of contract on the part of ParkingEye.

Duration and Termination

281. Clause 2.12 and clause 3 deal with the duration of the Agreement. The commencement date was 1st September 2005; and by clause 3 it was provided that it should continue for an initial period of 15 months from that date and, if not terminated on 14 days' written notice, would thereafter continue in force on the same terms and conditions unless subsequently terminated on three months' written notice or in accordance with the provisions of clause 11. I am not concerned with the slightly odd provisions as to notice set out in clause 3 itself, since it is accepted on behalf of ParkingEye that any damages to which it is entitled should be assessed by reference to the fixed term of 15 months. But I will have to consider the provisions of clause 11 in due course.

282. Nor does any question directly arise in relation to clause 2.12. This deals with the income derived from Parking Fines in the event that Somerfield elected to continue with the Agreement after the expiration of the initial fixed period of 15 months. But, having regard to the emphasis placed by Mr Fealy upon the trial nature of the project and in view of the amounts claimed by ParkingEye in the present proceedings, it is of some interest to note the way in which the provisions of clause 2.7 were to be modified during any such continuance of the Agreement. In effect, ParkingEye was to be guaranteed a minimum income of £120 per week per store after allowing for its reasonable costs and expenses. Any additional income above this level was to be shared equally between Somerfield and ParkingEye.

283. As previously indicated, clause 11 deals with termination. Clause 11.1 sets out five sets of circumstances in which Somerfield would be entitled to terminate the Agreement forthwith by notice in writing. The only two which are or might be in point for present purposes are to be found at clauses 11.1.1 and 11.1.5. The first of these is in these terms:

> "If the Supplier commits a material breach or persistent breaches of this Agreement and, in the case of a breach capable of being remedied, shall have failed to remedy the breach within twenty-eight (28) days of the receipt of a request in writing from the Customer to remedy such breach."

284. And clause 11.1.5 reads as follows:

> "If the Supplier does any act (not including the issue of Parking Fine in accordance with this Agreement) which brings the reputation or goodwill of the Customer or its Associated Companies into disrepute or otherwise adversely affects trading connections with, or the business of the Customer or its Associated Companies."

285. Clause 11.2 embodies certain further rights of termination on the part of Somerfield. But these rights apply to individual stores rather than to the Agreement as a whole; and there is an express proviso to the effect that any exercise of the rights conferred by clause 11.2 should be without prejudice to the remaining stores in respect of which the Agreement should remain in full force and effect. The only one of the three sets of circumstances set out in clause 11.2 which is likely to be material to the issues in the case is to be found in clause 11.2.1 which allows termination in relation to any of the stores:

> "…by giving no less than 28 days' notice in writing to the Supplier in respect of those stores which are to be refurbished, redeveloped, cease trading at, sold or otherwise disposed of by the Customer or which the Customer decides for operational reasons the Products are no longer necessary to be located at that particular store."

286. It is in fact alleged at paragraph 39 of the Amended Defence that Somerfield terminated the Agreement under clause 11.1.5 though it was not, I think, suggested that it expressly invoked this power at the time of termination or served any written notice to that effect. Though the point was raised by Mr Fealy in his written opening submission, it was not specifically pursued in closing. On the contrary, Somerfield justifies its decision on the grounds of a repudiatory breach or breaches of contract on the part of ParkingEye rather than on any such contractual right; though there may be a question as to whether such a common law right could be exercised where the breach was capable of remedy, having regard to the provisions of clause 11.1.1.

287. But, be that as it may, Somerfield relies upon clause 11.2.1 as a partial defence on the issues of causation and quantum, since it asserts that it would have invoked this right of termination in respect of some of the stores for "operational reasons". It was not specifically alleged that it might have been entitled to invoke the same sub-clause in the light of the

sale of the Kwik Save stores which took place at or about the same time as the decision to treat the Agreement with ParkingEye as having come to an end. Nonetheless, Mr Fealy rather faintly submitted, in the course of his closing arguments, that, in view of this disposal, reliance could also be placed upon the first part of clause 11.2.1. But no application was made to amend and it seems to me that any such argument was deployed at far too late a stage in the proceedings and I am not minded to entertain it.

288. Clause 12 deals with the consequences of termination. It is unnecessary to set out its terms in full. Clause 12.1 provides that all rights and obligations of the parties shall cease to have effect immediately upon termination save in respect of accrued rights and obligations or any express obligations of a continuing nature. Clause 12.2 requires ParkingEye to remove its equipment from the store or stores in question within 14 days of termination. There is no provision for the payment of removal costs or compensation, even in cases where Somerfield has terminated the Agreement in respect of one or more stores for "operational reasons" under clause 11.2.1.

Miscellaneous Provision

289. Mr Fealy emphasised certain provision of the Agreement which, he submitted, highlighted the fact that Somerfield retained ultimate control of its sites. Thus clause 10 laid down and regulated the circumstances in which ParkingEye should have access to the stores. In particular, clause 10.1 provided that it should grant ParkingEye and its personnel a "non-exclusive licence" to enter the Preliminary and Additional Stores to the extent that Somerfield should deem necessary to enable ParkingEye to deliver, properly install or remove the system. It also expressly provided that nothing in the Agreement should be construed as creating any relationship of landlord and tenant between the parties.

290. Clause 16.2 expressly recorded that each party was entering into the Agreement for its benefit and not for the benefit of another person; and clause 25 provided that nothing in the Agreement was intended to create a partnership or joint venture or similar legal relationship. It went on to provide that, unless otherwise expressly stated, neither party should have authority to make any representations or act in the name or on behalf of or otherwise bind the other. Like clause 10.1, clause 24 embodied an agreement that no relationship of landlord and tenant was intended or deemed to be created in relation to the operation of the Agreement.

291. Clause 26 provides, with an immaterial exception, that no variation or alteration of any of the provisions of the Agreement could be effective unless it was in writing and signed by or on behalf of each party. Finally, clause 28 embodied an entire agreement provision. It is in these terms:

> "28.1 This Agreement constitutes the entire agreement and understanding between the parties in respect of the matters dealt with in them and supersedes any previous agreement between the parties relating to such matters.

28.2 Each of the parties acknowledges and agrees that in entering into this Agreement it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) other than as expressly set out in this Agreement. The only remedy available to either party in respect of any such statement, representation, warranty or understanding shall be for breach of contract under the terms of this Agreement.

28.3 Nothing in this Clause 28 shall operate to exclude any liability for fraud."

PART IV
CONTRACTUAL ISSUES
Negative Publicity

292. I refer to the provisions of clauses 26 and 28 since it was suggested that they might prevent ParkingEye from relying on any subsequent Agreement by which Somerfield was to pay a percentage of the discounted amount of any fine which was cancelled on grounds of "negative publicity". But, in my judgment, neither of the clauses in question can prevent the parties from reaching a subsequent agreement even if it might amount to a variation of the Agreement itself.

293. It is convenient, therefore, at this point to go on to consider ParkingEye's contention that a separate agreement was reached between Mr McKerney and Mr McDonald under which Somerfield was to have the right to cancel any parking fine on the grounds of "negative publicity" but was obliged to pay ParkingEye 65% of the discounted parking fine of £37.50 where a fine was cancelled on those grounds. The point is, I think, relevant only to the issues of causation and quantum. But Mr Fealy, on behalf of Somerfield, took both a procedural and a substantive objection to any claim under this head.

294. The procedural objection was that it was never pleaded. But Mr Chaisty QC, on behalf of ParkingEye, made it perfectly clear from the outset of the trial that he would seek permission to amend if he was required to do so; and a draft amendment in the form of a new paragraph 17A of the Amended Particulars of Claim was set out in his opening skeleton argument. In the end, Mr Fealy did not oppose the proposed amendment insofar as it formed the basis of a claim for a liquidated sum which was said to have accrued due as at the date of termination. But he persisted in his objection insofar as ParkingEye sought to carry it forward as an additional head of damages in its claim for future loss. He submitted that this had not been incorporated within the expert evidence as it stood at the outset of the trial but arose only in the course of cross-examination of Somerfield's accountancy expert. He opposed the amendment, therefore, on the grounds that it was both insufficiently particularised and raised too late in the day to enable Somerfield fairly to meet it.

295. But I have come to the conclusion that I should allow the amendment and permit ParkingEye to incorporate it as part of the computation of its claim

for future loss. Whether or not there was such an agreement is a simple issue of fact which was fairly clearly flagged up from the outset of the trial. It may well be that the implications of any such agreement for the computation of damages was not considered until a very late stage. But, on the face of it, its impact on damages should be comparatively easily capable of calculation. Indeed, the accountancy experts had no apparent difficulty in agreeing the appropriate computation. Furthermore, any consequences in relation to costs can properly be considered at the conclusion of the proceedings. In the circumstances I propose to grant permission to amend as necessary.

296. I turn, therefore, to the substantive issue as to whether any such agreement was in fact reached. In my judgment, the evidence on the point is all one way. The exchange of e-mails between Mr McKerney and Mr McDonald dated 17th January 2006 seems to me to record in the clearest terms an agreement between the parties by which Somerfield was entitled to cancel charges where it would cause damage to its business and reputation and would pay ParkingEye in respect of each such cancelled charge at the rate of 65% of the discounted charge of £37.50. It is true that there was some continuing debate as to precisely how these arrangements were to be implemented in practice. But the parties' subsequent conduct is entirely consistent with such an agreement having been reached; and it was never suggested by Mr McDonald, or, for that matter, by any of the other witnesses called on behalf of Somerfield, that no agreement to this effect had been reached, at least in principle. So I conclude that an agreement of the kind contended for by ParkingEye was reached on or about 17th January 2006. The financial implications of such an agreement for the quantification of ParkingEye's claim will have to be considered at a later stage.

The 25 Preliminary Stores

297. It is quite clear that the Agreement envisaged that ParkingEye's system would be installed at 25 of Somerfield's sites in the first instance. These stores were defined as the "Preliminary Stores". They were to be selected from the list of 190 stores annexed to the Agreement as Schedule 3. But it is also fairly clear that the Agreement was couched in terms which assumed that these 25 Preliminary Stores would already have been identified by the time the Agreement was executed and came into force. I refer to the definition of the expression "Preliminary Stores", which specifically states that such stores "have been identified by the parties".

298. As a matter of fact, however, with the single exception of Blackpool, none of the Preliminary Stores had been identified and agreed prior to the date of the Agreement itself, 19th August 2005, or, for that matter, the commencement of its 15 month term on 1st September 2005. Nor did the Agreement provide any machinery for the identification of these stores if that had not already been done prior to the execution of the Agreement.

299. Now, there was some evidence to the effect that the initial 15 month period was chosen so as to allow the parties to set up the system in all of the

Preliminary Stores over the first three months, allowing a full 12 months for the trial itself. But there is nothing to that effect in the Agreement; and there is no suggestion that there was any collateral contract between the parties to that effect.

300. Nonetheless, the parties were able to identify 19 stores in all (including Blackpool) at which the system could be installed, though it soon turned out that the car parks at the Cheadle and Newcastle stores were unsuitable, so that the system was fully installed only at 17 stores. I have set out the history of the discussions between the parties about these matters in somewhat greater detail earlier in this judgment. But it should be noted that a number of other stores, in addition to those actually selected, were considered but appear to have been regarded as unsuitable for one reason or another.

301. It is ParkingEye's pleaded case that Somerfield was in breach of its contractual obligations under the Agreement by failing to agree or nominate a further six stores at which the system could be installed. Insofar as the allegation is based upon a breach of the express terms of the Agreement, it is said to arise out of clauses 2.1, 2.2 and 4. But for my part I cannot see that clauses 2.1 or 2.2 can be construed so as to impose any relevant obligation on the part of Somerfield. The first of these simply provides that ParkingEye should provide the system and ancillary services to Somerfield for the purposes of managing the car parks at the Preliminary Stores and any Additional Stores and requires Somerfield to accept the installation of the system, albeit only as licensee. It is quite plain that Somerfield was under no obligation to find or nominate any Additional Stores; and there is nothing in the wording of these provisions which suggests that it was under some other contractual obligation to find and nominate any further stores to bring the number of Preliminary Stores up to its full complement of 25. Clause 2.2, for its part, is clearly intended to regulate the installation at the selected stores rather than to create some form of obligation on Somerfield to select the stores themselves.

302. There is perhaps a little more substance in the case founded upon the provisions of clause 4. This was in these terms:

> "If the Customer refuses or fails to allow the supply and installation of the Products in accordance with this Agreement or fails to take any action reasonably necessary on its part of the installation of the Products, the Supplier is entitled to recoup from the Customer any loss and additional costs incurred as a result of such refusal or failure."

303. It might be said that, if Somerfield simply refused to discuss the installation of the system at a sufficient number of other stores to bring the full complement up to 25, it would either be refusing or failing to allow the supply and installation of the Products in accordance with the Agreement or, at least, failing to take any action reasonably necessary on its part for that purpose. But it seems to me that this provision is clearly directed at ensuring that Somerfield would take any necessary action to facilitate the

installation of the system at any car parks in which it was to be installed and not at the selection or nomination of further suitable sites.

304. But reliance is also placed by ParkingEye on an implied term which is pleaded at paragraph 10 of the Amended Particulars of Claim. This is to the effect that the parties would co-operate with each other and that neither would prevent performance by the other. This is said to be necessary in order to make the Agreement commercially effective.

305. Now, I was not treated to any detailed examination of the jurisprudence on the topic of implied terms. But Mr Fealy cited to me the observations of Lord Clarke of Stone cum Ebony MR in **Mediterranean Salvage and Towage Limited -v- Seamar Trading and Commerce Inc** [2010] 1 All ER (comm.) 1 at paragraphs 8-18. The passage in question relies heavily on the authoritative exposition of the relevant principles in **Attorney General of Belize -v- Belize Telecom Limited** [2009] 1 WLR 1988. In his judgment in that case, Lord Hoffman referred to the various way in which the relevant test had been formulated in the past. But he summarised the test in these words at paragraph 21:

> "It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean."

306. But in his own discussion of these principles, Lord Clarke MR emphasised at paragraph 15 of his judgment that it is not sufficient that the proposed term be reasonable; it must be necessary to imply such term. But "necessary" in this context must be understood as meaning one which is necessary to make the contract work as a commercial bargain.

307. Now, it is clear that, on many occasions, the courts have shown themselves willing to imply a term requiring the mutual co-operation of the parties in order to achieve some clearly defined contractual objective. I refer, for example, to the discussion of the topic at paragraph 13-011 of Chitty on Contracts, 30th edition (2008) and the cases briefly referred to in the notes. Immediately thereafter in the same work, at paragraph 13-012, there is also to be found a summary of the circumstances in which it might be held that a party may be subject to an implied obligation not to do anything which would prevent a contract into which he has entered from becoming operative and effective.

308. But I am not persuaded that the implication of a term of this kind in the present case is necessary to make the Agreement work. It seems to me that both parties must be regarded as having entered into the Agreement in the full knowledge that, notwithstanding its terms, there had not in fact been any agreement as to the stores at which the system should be installed with the apparent exception of Blackpool. No doubt they assumed that discussions would continue, as was indeed the case; and they probably had no reason to think that they would be unable to reach agreement. But they

must each also have appreciated that finding a sufficient number of stores which were suitable and acceptable to both of them would not necessarily be a simple and straightforward process which could be brought to a conclusion by the application of a simple set of criteria.

309. Some car parks were unsuitable because of shared access, multiple exits and entrances or the need for the landlord's consent. Even if they seemed suitable to Somerfield, after proper consideration by its property department, any particular site might prove unacceptable to ParkingEye if, for example, it was considered that it would produce an inadequate financial return, as appears to have been the case at Thetford.

310. All these considerations, which must have been known to both sides when the Agreement was entered into, demonstrate, in my judgment, the need for detailed and unconstrained discussions for the purposes of reaching agreement on the identity of a suitable number of stores of a kind which could not readily be reduced to a simple duty to "co-operate" as set out in the implied term proposed by ParkingEye. I do not overlook the fact that Mr McDonald acknowledged in cross-examination that he had no doubt that they would have found the full complement of 25 stores, if the Agreement had proceeded. But it had, in fact, already proved a somewhat more difficult and time consuming process than this would suggest.

311. In my judgment, both parties must be regarded as having accepted the commercial risk that they would not, in fact, be able to reach agreement for the installation of the system at a suitable number of further stores within a commercially acceptable time frame. If they were unable to do so, neither side would be able to point the finger of blame at the other. The process of negotiation and agreement required no collateral support from the implication of vague and general obligations of the kind contended for by ParkingEye. I can see no necessity for the implication of such terms in order to make the contract work. If and when the parties were able to agree on the identity of any further suitable stores, having regard, no doubt, to their own commercial interests, the Agreement would apply to those stores (as was clearly common ground) and the contractual machinery would thereafter operate perfectly satisfactorily. In the circumstances, I decline to hold that there was any implied term of the kind alleged at paragraph 10 of the Amended Particulars of Claim, at least in relation to the selection of a sufficient number of further stores to bring the total number up to its full complement of 25.

312. Even if there had been some obligation on the part of Somerfield of the kind contended for in these proceedings, I cannot see any satisfactory evidence of breach on Somerfield's part. The process of discussion and negotiation simply petered out once the various other problems began to surface after the installation went live at the selected stores. There was no failure or refusal by Somerfield to permit the installation of the system at any other stores; nor was there any want of co-operation or prevention of performance on its part in relation to the selection of any further stores. Nor, in my judgment, can ParkingEye claim damages on the footing that it

lost the opportunity to earn profits on the full complement of 25 preliminary stores in the absence of any obligation on the part of Somerfield to nominate or concur in the selection of any further stores.

Parking Permits

313. It will be recalled that ParkingEye's general right to retain the proceeds of the Parking Fine process conferred by clause 2.7 of the Agreement was subject to two related exceptions. Clause 2.7 itself specifically provided that this right was subject to certain Exemptions, as defined in clause 1.1 and set out in detail in Schedule 4. Where any of the circumstances set out in the Schedule were applicable, any parking fine levied on the keeper of the vehicle was to be cancelled. But in addition, there was to be a list of "Permit Holders" who were authorised to park a vehicle or vehicles at any particular site without committing any contravention of the terms and conditions of use of the car park in question so as to give rise to a parking fine. That is apparent from the definition of the expression "Permit Holder" in clause 1.1 of the Agreement. So, provided that the parties complied with their mutual obligations to input and update the necessary information on ParkingEye's website in accordance with clauses 9.5 and 9.6 of the Agreement, no charges would or should be levied on any Permit Holder.

314. But the Agreement also attempted to cover individuals whose details ought to have been included amongst the Permit Holders but, for whatever reason, had not been so recorded. Thus, clause 9.5 itself allowed each store to cancel a maximum of 25 offences of this kind each year, with a £10 cancellation charge in respect of any additional cancellations. Furthermore, paragraphs 1 and 2 of Schedule 4 provided that any "staff member" of Somerfield or any "visitor" to one of its stores should be included within the list of Exemptions, if they had not been registered as Permit Holders, so that any fine levied against them would be cancelled. The relationship between these paragraphs of Schedule 4 and the provisions for cancellation at clause 9.5 are not easy to reconcile. But I was not addressed on this particular aspect of the inter-relationship between the two sets of provisions.

315. But there are two important issues arising out of these provisions which require detailed consideration. At paragraph 8 of the Amended Particulars of Claim it is alleged that on the true construction of the Agreement, in the light of the definition of "Permit Holders" and the provisions of Schedule 4, Somerfield was only to nominate as "Permit Holders" members of staff or visitors (other than store customers) who legitimately needed to park at the store for extended periods of time. These were somewhat tendentiously referred to as "genuine permit holders". Further or alternatively it was alleged at paragraph 9 that there was an implied term to the like effect. These allegations are denied in the Amended Defence; and at paragraph 20 it is specifically alleged that on the true construction of the Agreement Somerfield was entitled to authorise any person it wished, including store customers, to park a vehicle on its property and to nominate such persons as Permit Holders.

316. The potential importance of these cross-allegations was far from clear on the face of the pleadings. At paragraph 12 of the Amended Particulars of Claim it was alleged on behalf of ParkingEye that, in breach of the terms alleged at paragraphs 8 and 9, Somerfield had issued Parking Permits to persons other than "genuine permit holders"; and at paragraph 20 there was a general allegation that in consequence of this and other breaches of contract ParkingEye had suffered a loss of revenue at those stores which went live. No further particulars were provided and no reference was made on the face of the pleadings to the impact of any such breach on the computation of ParkingEye's alleged post-termination loss of profits.

317. There is, however, an express reference in the Amended Particulars of Claim to ParkingEye's accountancy expert's report dated 14th April 2008. It is apparent from this report that the potential impact of this allegation on the quantum of its claim was substantial and far-reaching. But it is only from the report that it is possible to glean the fact that it is ParkingEye's case that a maximum of 25 permits could lawfully have been issued at any individual store so that the issue of any additional permits constituted a breach of contract on Somerfield's part. The implications of this issue for the quantum of ParkingEye's claim, as developed in the expert's report were, however, not lost on Somerfield; and at paragraph 46 of its Amended Defence it took issue with this aspect of ParkingEye's case in terms which clearly anticipated the relevant passage in its own expert's report.

318. But before dealing with the legal aspects of this dispute, it is necessary to consider the factual background. On 20th February 2006, not long before the commercial relationship between the parties finally broke down, Mr McKerney sent an e-mail to Mr Halsall raising, for the first time, it would seem, an issue as to the number of parking permits authorised by Somerfield. He said that during the course of their discussions, it had become apparent that "huge numbers of staff permits" had been issued at certain stores. He suggested that authorising persons who were not members of staff to hold parking permits was contrary to the Agreement between the parties. But in any event, if the use of the car parks was to be effectively controlled, it was necessary to ensure that the permit system was not being abused. He attached a list of 11 stores giving the number of permits authorised in each case.

319. Some of them seem extraordinarily high, notably Diss, where 153 permits had been issued, and Beverley, where there were 115 permits. Remarkably, according to paragraph 130 of Mr McKerney's witness statement, there were only 85 parking spaces at the Diss car park, and a mere 34 at Beverley. In his witness statement, Mr McKerney, unsurprisingly, expressed considerable scepticism about the number of permits issued at these various stores; and stated that, in the course of his dealings with Mr Ogden and Miss Taylor, he had been told that, on average, there would be only about five members of staff within any of the stores at any one time.

320. After allowing for shift work and also for the fact that some members of staff would probably not bring their own car to work, Mr McKerney estimated that no more than 10 to 15 permits would be required at each store. But for the purposes of quantifying the loss said to have been sustained by ParkingEye, he was willing to proceed on the assumption that 25 parking permits would legitimately be available for use at any time at each store. This was the assumption on which ParkingEye's expert evidence was based; and it capped the number of cases in which what would otherwise have been a contravention of the time limits would not have generated a charge for the benefit of ParkingEye.

321. Now, factually, Somerfield did not directly challenge the figures set out in Mr McKerney's e-mail of 20th February 2006 or his evidence as to what he had been led to believe by Mr Ogden and Miss Taylor, though these matters were not, I think, put directly to Miss Taylor when she eventually came to give evidence. It did, however, call Miss Wendy Standerwick to give evidence on its behalf. She was a human resources services manager with Somerfield and made two witness statements to which she exhibited various lists of the individuals employed at each of the relevant stores between 19th August 2005 and 7th March 2006. But, as she freely admitted in her second witness statement, the details set out in the lists exhibited to her first witness statement had simply been extracted from the records of the company which provided payroll and associated services for Somerfield, that she had not herself checked or verified the information in question and that it was inaccurate in various respects. She attempted, therefore, to correct the position in the lists exhibited to her second statement.

322. In cross-examination, Miss Standerwick was unable to provide much in the way of further enlightenment as to the content of these lists. She simply managed the contract with the payroll company and had no direct dealings with the employees. So she could not, from her own personal knowledge, say how many people were employed at any time at each store or what they did or what the shift pattern was or anything else which might cast light on these matters. The lists were simply a report extracted from the computer database maintained by the payroll company to which she had access. She did, however, accept that Somerfield employed a lot of part-time employees and that some might work on a shift system.

323. These lists were provided as a result of a request for the relevant information by ParkingEye's solicitors, who made it clear that they did not wish Somerfield to be put to the time and expense of extracting the individual files of each employee. But I am bound to say that I found the lists themselves to be of little assistance. At Diss, for example, they seemed to show that there were, I think, 97 employees who received some payment during the relevant period. Though large, that number is, of course, substantially lower than the number of staff permits apparently issued at that store. Furthermore, though the lists purport to show the date upon which the employee left, I very much doubt if this gives any safe

guidance as to when any of the individuals named actually carried out any work at the store in question. At most, it may indicate when, if at all, the individual in question was formally removed from Somerfield's records.

324. So the evidence about staff numbers is really very thin. But there was no challenge to the estimates given by Mr McKerney on the basis of information provided by Somerfield itself; and I bear in mind that many of the stores in question were smaller "convenience" stores. On the face of it, furthermore, Mr McKerney's scepticism about the number of permits issued at such stores as Diss and Beverley seems well-founded; and Mrs Standerwick's lists do not provide any satisfactory foundation for an inference that his doubts were unjustified. Nor, as I have said on a number of occasions, did I hear any evidence from any of the store managers involved. In all the circumstances, albeit with some hesitation, I am prepared to accept that Mr McKerney's estimate should be regarded as a fair and reasonable one and that, at any time, no more than 25 Parking Permits should have sufficed to cover any members of staff who were actually working at the store together with any persons visiting the store on what might be termed official business. I suspect, though I cannot make any positive finding to that effect, that the large number of permits apparently authorised at some of the stores simply reflects a failure on the part of the management of those stores to keep the information on the website updated.

325. It is against that background that I must attempt to resolve the legal questions arising in connection with the right to issue Parking Permits. The definition of this expression in clause 1.1 of the Agreement envisages that Somerfield might authorise an individual, from time to time, to park freely at any of the car parks in question, provided that this had been notified to ParkingEye. The notification procedure is governed by clauses 9.5 and 9.6 which provides for the necessary details to be held on ParkingEye's website and requires both Somerfield and ParkingEye to ensure, in effect, that those details are kept up to date.

326. But, apart from the definition of the expression itself and the clauses regulating these procedural matters, there is no substantive provision in the Agreement governing the issue of Parking Permits. So one looks in vain for any express limits on Somerfield's power to issue such permits.

327. Nonetheless, it seems to me that some clear indications can be gleaned from the express words of the Agreement as to the classes of persons to whom such permits could properly be issued. Clause 9.5 expressly refers to the procedure for inputting and updating "the names and vehicles of the Permit Holders and any daily visitors to the store"; and it subsequently provides for Somerfield to keep "staff and visitor details" up to date. The wording is neither clear nor precise. But it seems to me that it contemplates only two classes of individuals who would be entitled to park free of charge as Permit Holders, namely members of staff (whose permit could be expected to be fairly long-term) and daily visitors (whose permit could normally be expected to be valid only for a specific day or days).

328. This distinction is also clearly made at paragraphs 1 and 2 of Schedule 4 which, it will be recalled, deals with Exemptions. It allows such an Exemption in cases where the motorist upon whom the charge was levied was either a member of staff or a visitor who had failed to register his or her vehicle in the "staff permit list" or the "visitor permit list" as the case may be.

329. Now, I heard no evidence as to how the system of Parking Permits operated in practice; and any such evidence would, in any event, almost certainly be irrelevant to the issues of construction and implication of terms. But, on the face of the provisions to which I have referred, it seems to me that the Agreement contemplated only two categories of persons to whom Parking Permits might be issued, namely staff members and "visitors". There is no reference to any power to issue such permits to customers, for example; and disability is dealt with expressly elsewhere, by way of an Exemption under paragraph 4 of Schedule 4.

330. In his opening written submissions, Mr Fealy sought to argue that any limitation on Somerfield's power to issue Parking Permits was inconsistent with what he contended was its unrestricted right to alter the Exemptions. The extent of that latter right is a matter which I shall deal with in the next section of this judgment. But it seems to me that it cannot be entirely unrestricted; and in any event, the power to change the Exemptions is in principle, quite separate from any power to decide who should be issued with Parking Permits.

331. In those circumstances, I have come to the conclusion that the contention enshrined at paragraphs 8 and 9 of the Amended Particulars of Claim is correct. It seems to me that it would have been commercially absurd for the power to issue Parking Permits to be wholly unrestricted; and I do not think that this could have been within contemplation of the parties at the time when the Agreement was entered into. Any such unrestricted right could be invoked so as utterly to frustrate the obvious commercial expectations of the parties by which ParkingEye would operate a car park monitoring and management system free of charge to Somerfield on the basis that it would receive remuneration in the form of parking charges.

332. It seems to me that the appropriate limit on the exercise of the power to issue Parking Permits is to be found in the express references to staff and visitor permits. I take the view that the obvious meaning to be extracted from these words is that Somerfield was entitled to issue Parking Permits to its own employees and to persons who could fairly be regarded as "visitors" to the store in question. The expression "visitors" is not, of course, defined. But it seems to me that it cannot possibly apply to persons who were simply using the car park as customers of the store in question.

333. It follows, in my judgment, therefore, that Somerfield was entitled to issue Parking Permits only to persons who were, in truth, members of staff or

visitors to the store in question. That conclusion arises from the express language adopted by the Agreement against the background of what I consider to be its obvious commercial purpose. It seems to me, therefore, that it is, in effect, a conclusion arising out of a process of construction rather than implication. But, as Lord Hoffman observed at paragraphs 18 and 19 of his judgment in **Attorney General of Belize -v- Belize Telecom Limited** [2009] 1 WLR 1988 at page 1993, "…the implication of the term is not an addition to the instrument. It only spells out what the instrument means."

334. If it had been necessary to do so, therefore, I would have implied a term to the like effect. So Somerfield was not entitled to issue Parking Permits to persons who were not, at the material time, either a member of staff or a visitor to the relevant store. Furthermore, by virtue of clause 9.5 of the Agreement, it was under a positive obligation to keep all the necessary details up to date. So, any visitor permits would be valid only for the day or days of the visit; and any permit issued to an individual who had ceased to be employed by Somerfield would have to be withdrawn. I heard no submissions as to whether a member of staff would be entitled to take advantage of a staff permit on occasions other than when he or she was actually at work; so I make no finding on the point.

335. It follows that, in my judgment, there could be no question of Somerfield issuing "blanket" Parking Permits to all its customers. In contrast to its pleaded case in connexion with the Exemptions, it is not, in fact, alleged on behalf of Somerfield that damages should be assessed on the footing that it could and would have issued Parking Permits to all its customers and other users of its car parks. But my findings on this issue mean that the Parking Permit procedure could not be invoked to reduce or even eliminate ParkingEye's claim for damages. Even if I am wrong in that conclusion, there would still remain a question as to whether, as a matter of fact, Somerfield would have exercised its powers in this way or whether damages should be assessed on the assumption that it would have done so. That is a matter to which I shall return when I deal with the question of Exemptions.

The Exemptions

336. As I have already explained, the provisions governing the Exemptions are quite separate from those dealing with Parking Permits, even though paragraph 1 and 2 of Schedule 4 helped to cast light upon the extent of the power to issue Parking Permits. In relation to the Exemptions, the principal issue between the parties arises out of the provisions of clause 2.8, which I have already mentioned and which, it will be recalled, was in these terms:

> "The Customer may, at its absolute discretion, make any changes to the Exemptions."

337. The Exemptions themselves were, of course, set out in Schedule 4 which itself appears to have allowed some modest degree of discretion on the part of store managers under paragraph 5, which permitted the cancellation of a

fine on the basis of "any common sense issue" such as a case where a motorist collapsed in the store and had to be taken to hospital.

338. It was Somerfield's case that the power conferred upon it by clause 2.8 allowing it to change the Exemptions was wholly unfettered. The emphasis was, of course, placed upon the express words referring to its "absolute discretion" in deciding whether to make such changes. But notwithstanding those words, it was ParkingEye's case, as set out in its Reply, that neither clause 2.8 nor the "common sense issues" referred to at Schedule 4 extended so as to allow Somerfield to exempt "non-visitors" from paying fines or to allow it to introduce specific Exemptions for specific stores or simply because it had changed its mind about enforcing parking restrictions at any particular store. It is also alleged that any changes under clause 2.8 would have to be the subject of express written notification to ParkingEye and that no such notification was ever given by Somerfield. But the precise basis of the case set out in the Reply was not made clear.

339. Now, I accept that any effective exercise of the general power set out in clause 2.8 (whatever other limitations there may be upon it) would require proper notification of the change to be given to ParkingEye. That is not stated expressly; but since the purpose of such provision is, on the face of it, to vary the mutual rights and obligations of the parties, it must necessarily be implicit that the party affected by the exercise of the power must be informed of it before any change can come into effect. Whilst it would no doubt be desirable for notification to be given in writing, in order to avoid uncertainty or ambiguity, I can see no basis for inferring that written notice would be a necessary pre-requisite for the exercise of the power.

340. In the present case, there is no indication whatever that any decision had ever been taken by Somerfield to make any changes to the Exemptions prior to the termination of the Agreement; and, even if that had been Somerfield's intention, there is no suggestion that any notification of any such changes had ever been given to ParkingEye. So, I am quite satisfied that no generic changes could have been made to the Exemptions by virtue of clause 2.8 prior to the termination of the Agreement.

341. Similarly, any invocation of the right of cancellation under paragraph 5 of Schedule 4 would necessarily require a request for cancellation from Somerfield to ParkingEye; and, in the light of the express wording of the paragraph, the circumstances would have to be verified by the store manager. There were undoubtedly many requests for the cancellation of charges, some of which were acceded to by ParkingEye and others of which were not. But I have not been asked to consider or resolve any dispute as to whether any individual charge should or should not have been cancelled by virtue of these provisions. What I have, of course, been asked to do is to decide whether there was a separate agreement governing the cancellation of fines on the grounds of negative publicity; and I have already set out my reasons for holding that there was such an agreement.

342. Though the argument about negative publicity was not developed in this way, it seems to me that my finding that there was an agreement by which Somerfield would make payments to ParkingEye at a reduced rate in such cases necessarily precludes it from asserting that it was entitled to cancel the charges in question under paragraph 5 of Schedule 4. Indeed, it seems to me that the agreement in relation to cancellations on these grounds would also be incompatible with any assertion on the part of Somerfield that it would be entitled to change the Exemptions under the general powers conferred by clause 2.8 so as to allow it to cancel in such cases without making any payment whatever to ParkingEye. But I did not understand any such argument to have been advanced on behalf of Somerfield.

343. So, in reality, the issue only seems to be relevant in relation to ParkingEye's claim for damages. The point was raised at paragraph 50 the Amended Defence. That was pleaded in these terms:

> "Further or in the alternative, if the Supply Agreement had not been terminated then the Defendant would have been entitled under clause 2.8 to change the Exemptions to allow its customers free all day parking and the Defendant would have made that change in March 2006. Accordingly, damages fall to be assessed on the basis that, from or about March 2006, the Claimant would not have been entitled to issue a Parking Fine to any of the Defendant's customers."

344. That would, of course, have had the effect of wholly or largely eliminating any anticipated revenue stream to which ParkingEye would otherwise have been entitled under clause 2.7 of the Agreement and rendering its claim for damages practically illusory.

345. Though the Defence was verified by Mr Wilson, he did not address the point in his witness statement though he was briefly cross-examined upon it. Now, there is little in the way of evidence that Somerfield would, in fact, have attempted to exercise its powers under clause 2.8 of the Agreement in this manner. It would have been commercial absurd for it to have done so; and it would, in my judgment, manifestly subvert the overall commercial purposes of the Agreement. Insofar, therefore, as I have to decide on the balance of probabilities, in order to resolve the issues of causation of quantum, how Somerfield would have acted in these hypothetical circumstances, I would have little hesitation in rejecting any suggestion that it would have acted or purported to act in the manner alleged at paragraph 50 of the Amended Defence.

346. But, as I understood Mr Fealy's argument on the point, though it was hardly developed in detail, it was Somerfield's contention that damages would have to be assessed on the basis that it must be assumed that Somerfield would exercise any contractual rights or powers which would reduce the burden of its contractual obligations. Mr Fealy referred to the relevant principle at paragraph 133 of his opening written submissions, citing paragraph 26-048 of Chitty on Contracts, 30th edition (2008). The

relevant paragraph appears in a section dealing with the causation of damages; and it reads as follows:

> "**The contract breaker's opportunity to minimise the cost of performance**.
>
> A contingency may depend on whether the contract breaker would have acted in a certain way. If the defendant fails to perform, when he had an option to perform the contract in one of several ways, damages are assessed on the basis that he would have performed in the way which would have benefited him most, e.g. at least cost to himself. So damages were assessed against charterers on the basis that they would have used their contractual entitlements to produce the least profitable result for the owners. A similar situation arises where the contract-breaker had an option to terminate the contract: if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract, but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for the breach on the assumption that the defendant would have exercised the option."

347. But apart from this reference, I receive no further detailed submissions on the principle sought to be invoked. Indeed, Mr Fealy did not refer to it in his closing submissions, whether written or oral. In those circumstances, I do not think that it is necessary for me to deal with the point at length. The principle referred to in Chitty is not absolute; and I do not believe that it requires the court to assume that the party in breach would have acted uncommercially, having regard to its own interests, simply to spite the other party. I refer to the new text added at the end of paragraph 26-048 in the second cumulative supplement to Chitty, citing the observations of Patten LJ in **Durham Tees Valley Airport Limited -v- bmibaby Limited** [2010] EWCA Civ 485 at paragraph 79. Indeed, I note that Mr Fealy accepted that the relevant power would have to be exercised in good faith; and it is difficult to see how that would be so if the power were to be exercised in such a way as to ensure that ParkingEye could earn little or no revenue from the operation of the system which it was obliged to install and operate free of charge to Somerfield.

348. So, I am not prepared to hold that there is any principle which requires me to assume, contrary to the commercial probabilities, that Somerfield would have exercised its power under clause 2.8 in such a way as to allow it to cancel all charges which would otherwise have been levied in accordance with the terms of the Agreement. In the circumstances, therefore, it is unnecessary for me to consider whether, as a matter of strict construction, it would have been open to Somerfield to exercise the power in this way. I merely observe that, despite the use of the expression "at its absolute discretion", I rather doubt if such a power could lawfully be exercised in an entirely arbitrary manner or in such a way as to frustrate the commercial purpose of the Agreement. Furthermore, as I have already pointed out, Mr Fealy himself accepted that it would have to be exercised in good faith.

349. I conclude, therefore, that, if it is liable to ParkingEye for a repudiatory breach of the Agreement, Somerfield cannot invoke the provisions of clause 2.8 so as to require damages to be assessed on the footing that it would have exercised its power under this clause in such a way as to allow all parking charges to be cancelled. Furthermore, no arguments were advanced as to why damages should be assessed on the basis of some more limited exercise of these powers. I conclude, therefore, that any assessment should proceed on the assumption that there would have been no changes to the Exemptions set out in Schedule 4.

Time Limits

350. From a commercial standpoint, the choice of the appropriate time limits after which parking fines would be levied lay at the very heart of the Agreement. It would reflect a balance between the various interests of both parties. It was in Somerfield's interests to ensure that the time limits were short enough to prevent the abuse of its car parks but not so short as to penalise genuine shoppers. But it was also in ParkingEye's interests for the limits to be set at a level which would generate a sufficient number of parking fines to give it a return on its investment.

351. But the issue of time limits also lies at the heart of the present litigation. It is Somerfield's case that it was entitled to require ParkingEye to comply with its instructions as to the appropriate time limits at individual stores and that ParkingEye was in repudiatory breach of the Agreement by its refusal or failure to comply with those instructions. Somerfield also contends that any damages to which ParkingEye might be entitled must be assessed on the basis that it would have exercised its contractual right under clause 2.9 to increase the free parking time at its car parks to between 6 and 8 hours a day. The relevant allegation is to be found at paragraph 49 of the Amended Defence and is obviously very similar in its scope to the allegation set out at paragraph 50 in which it was asserted that it would have exercised its powers under clause 2.8 so as to grant Exemptions, in effect, to all its customers.

352. The provisions of clause 2.9, it will be recalled, are in these terms:

> "The customer may, following consultation with the Supplier, choose the maximum period for motorists to freely park in its car parks, after which time Parking Fines may be issued."

353. I was not, in fact, addressed in any detail as to the construction of this clause; and ParkingEye did not raise any point of construction on the face of the pleadings. Nor was any specific allegation made on its behalf that the express provisions of clause 2.9 were to be qualified by the implication of any additional terms or conditions. There was, however, a general allegation at paragraph 10 of the Amended Particulars of Claim that it was an implied term of the Agreement that the parties would co-operate with each other and that neither would prevent performance by the other. But the real thrust of ParkingEye's case, as developed in the course of the evidence and submissions, was that, whatever the extent of the powers conferred upon Somerfield by clause 2.9, ParkingEye had never failed or

refused to comply with any instructions given by Somerfield; and that even if it had failed or refused to do so, any breach of contract on its part was not sufficient to allow Somerfield to treat itself as discharged from its obligations under the Agreement. Those are matters to which I shall return in due course.

354. But at this stage, I need to address the prior question as to whether the provisions of clause 2.9 are apt to confer upon Somerfield the unrestricted right to determine the appropriate time limits at individual stores and require ParkingEye to comply with its instructions. That is essentially a question of construction, though issues as to the implication of the term alleged at paragraph 10 of the Amended Particulars of Claim may also arise.

355. Now, one might have expected a provision of this kind to have embodied an express mechanism for balancing the various interests of the parties to which I have previously referred. But all it requires is "consultation" with ParkingEye. On the face of it, once it has carried out any such consultation, Somerfield would be entitled to choose the time limit for free parking at any of its car parks. But it seems to me that the requirement of consultation necessarily means that, before making any such choice, Somerfield must engage in appropriate discussions with ParkingEye and take into account any representations made on its behalf. But, on the face of the wording adopted at clause 2.9, if no agreement could be reached after this process of consultation, Somerfield would be entitled to determine any relevant time limit, provided at least that it did so in good faith.

356. That analysis may still leave other potential issues unresolved. One which has rather troubled me is whether Somerfield's right to choose the appropriate parking times could be exercised on more than one occasion during the subsistence of the Agreement. On the basis of the evidence which I heard, it seems really quite clear that the time limits originally adopted had been agreed between ParkingEye and the individual store managers, though Mr McDonald subsequently considered that the right course would have been for them to have been centrally approved. There was subsequently a good deal of debate between Mr McKerney and Mr McDonald which resulted in a number of agreed changes to the time limits at various stores.

357. But it was not specifically alleged or contended on behalf of ParkingEye that Somerfield would be precluded from invoking clause 2.9 merely because a time limit had previously been discussed and agreed. So I do not think it is appropriate for me to express any view on this particular point. But the fact that time limits had been discussed and agreed at an earlier stage only serves to emphasise the need for proper consultation with ParkingEye before any subsequent alterations were made.

358. That leaves the question raised at paragraph 10 of the Amended Particulars of Claim as to whether Somerfield's right to choose the appropriate time

limits under clause 2.9 of the Agreement was also constrained by an implied term that the parties would co-operate with each other and that neither would prevent performance by the other. Terms of this kind might well be implied in appropriate circumstances. See Chitty on Contracts, 30th edition (2008) at paragraphs 13-011 and 13-012. But I was not treated to any further examination of any relevant authorities; and the terms alleged do not seem to be specifically directed towards the exercise by Somerfield of its powers under clause 2.9 of the Agreement. In particular, the express requirement of consultation would seem to cover much the same ground as any implied obligation of co-operation. Nor is it very clear to me how any alleged duty on the part of Somerfield not to prevent performance by ParkingEye would bear upon the exercise of the power in question. So I do not readily see how either of the terms in question should be implied so as to constrain the exercise of Somerfield's power under clause 2.9.

359. In reality, as it seems to me, the question as to whether there should be any implied qualifications or restrictions on the exercise of this power is material only to the rather extravagant allegation set out at paragraph 49 of the Amended Defence to the effect that damages are to be assessed on the footing that Somerfield would have set the free parking time limits at each of its car parks between 6 and 8 hours each day. I have already dealt with the very similar allegation at paragraph 50 which advances the proposition that damages should likewise be assessed on the basis that Somerfield would have invoked clause 2.8 and altered the Exemptions so as to allow all of its customers free parking at all of its stores. I rejected that contention as commercially absurd, improbable and unfounded as a matter of law.

360. I take precisely the same view in relation to the allegation that Somerfield would have invoked clause 2.9 to achieve the same result. Once again, Mr Wilson made no reference to these matters in his witness statement, even though it was he who had verified the pleading. Furthermore, there is no suggestion in any contemporary documentation that Somerfield ever contemplated adopting such an approach. On the contrary, all it was seeking to do in the period prior to the termination of the Agreement was to "tweak" some of the time limits (to use the expression which Mr Wilson himself adopted at paragraph 23 of his witness statement). He was nonetheless asked about the allegations set out at paragraph 49 of the Amended Defence on the course of cross-examination and insisted, rather unconvincingly and with the benefit of hindsight, that Somerfield would indeed have exercised its powers in this way if the Agreement had not been terminated in early March 2006. Any such purported exercise of its powers under clause 2.9 would, in my judgment, have frustrated the entire commercial purpose of the Agreement; and if it had been necessary to do so I would have been willing to imply a term to the effect that it was not entitled to do so.

Rights of Termination

361. It will be recalled that clause 11 of the Agreement sets out a number of grounds upon which Somerfield might terminate the Agreement in whole or in part. These have given rise to a number of issues which must be resolved.

362. It is important to recall that Somerfield did not purport to terminate on any of these grounds. Indeed, there is nothing to suggest that consideration was ever given to the invocation of clause 11.1.5 at the time when discussions were taking place within Somerfield as to whether to terminate the Agreement. By contrast, the possibility of invoking clause 11.2.1 was clearly set out in the memorandum which Mr Halsall prepared for the purposes of those internal discussions. This suggests that, at the time, it was not thought that any circumstances had arisen which would have permitted Somerfield to rely on the provisions of clause 11.1.5.

363. It is clause 11.2.1 to which I must now turn. It will be recalled that this allows termination by Somerfield on 28 days' notice in writing in relation to individual stores where they were to be refurbished, redeveloped, cease trading, sold or otherwise disposed of or where Somerfield decided for "operational reasons" it was no longer necessary for the system to be located at that particular store. At paragraph 51 of the Amended Defence it is alleged on behalf of Somerfield that, if the Agreement had not been terminated, it would have served notice under clause 11.2.1 in respect of six supermarkets, namely those at Stamford, Louth, Borrowash, Wallasey, Calne and Stewarton. Accordingly, it is contended that there could be no claim for damages in respect of those stores after March or April 2006. It will also be recalled that, at the very end of the trial, Mr Fealy suggested that clause 11.2.1 could also have been invoked in relation to those Kwik Save stores which had been disposed of by Somerfield towards the end of February 2006. But, as I have already stated, no application was made to amend; and it seems to me to be far too late for such an allegation to be raised.

364. No particulars were provided by Somerfield of the "operational reasons" which would have entitled it to give notice to ParkingEye to terminate in respect of these six stores in accordance with the provisions of clause 11.2.1. Nor was I provided with any real assistance as to the meaning to be attributed to the expression "operational reasons".

365. I was, of course, made very well aware of the impact which the operation of the system was said to have had at some of these stores, particularly Stewarton, Louth and Stamford. But those problems seem to have flowed simply from the fact that the system was put into operation at those stores in accordance with the Agreement. I do not readily see how the implementation of the Agreement according to its terms and tenor could constitute sufficient "operational reasons" for terminating the Agreement in relation to all or any of the stores at which it had been agreed that it should be installed.

366. The very fact that Somerfield could not terminate under clause 11.5.1 where the circumstances relied on simply arose from the issue of parking fines tends to underline the point. The burden of proof on this issue clearly lies upon Somerfield; and I remain unpersuaded that circumstances had or would have arisen which would have enabled it to terminate the contract in relation to any of these stores under the provisions of clause 11.2.1. I do not, therefore, accept that ParkingEye's claim for damages falls to be assessed on the basis set out at paragraph 51 of the Amended Defence.

367. I turn next to clause 11.1.5 of the Agreement. It is Summerfield's pleaded case that it terminated the Agreement in accordance with provisions of this clause which, it will be recalled, allowed termination forthwith by notice in writing if ParkingEye did any act which brought the reputation or goodwill of Somerfield into disrepute or otherwise adversely affected its trading connections or business. But the clause also incorporated a parenthetical exception which rendered it inapplicable where the act which was said to have affected its reputation, goodwill, trading connections or business was the issue of Parking Fines in accordance with the Agreement itself.

368. The grounds set out at paragraph 39 of the Amended Defence for the alleged termination of the Agreement under clause 11.1.5 are three in number. The first is said to have been the fact that, despite the instructions contained in Somerfield's letter dated 22nd February 2006, ParkingEye continued to issue parking fines to motorists who had parked for periods shorter than the free of charge parking limits set out in Mr Halsall's e-mail of 15th February 2006. The second is essentially an elaboration of the first, it being alleged that this had the effect of bringing Somerfield's reputation or goodwill into disrepute or otherwise adversely affecting its trading connections or business. The third pleaded ground for the exercise of the relevant power is said to be ParkingEye's unlawful conduct in performing the Agreement as subsequently set out at paragraphs 62 to 64. This refers to the various allegations of deception and harassment based upon the form and content of the parking fine notices themselves.

369. Though the point was raised in Mr Fealy's opening written submissions in virtually the identical terms to those pleaded, it was not specifically raised in either his written or oral closing submissions. As a matter of fact, it is quite plain that the case as pleaded cannot succeed. No written notice purporting to terminate the Agreement on these grounds was ever sent or received, though this was clearly required by virtue of the opening words of clause 11 itself. Furthermore, as I have already pointed out, there is no evidence that termination on these grounds was ever considered by those responsible for the decision to terminate. There was no mention of it in the memorandum prepared by Mr Halsall in late February 2006; and there is no suggestion that its invocation was considered at the subsequent meeting between Mr Wilson, Mr McDonald and Mr Halsall at which the decision to terminate appears to have been taken. Nor was it mentioned in Somerfield's termination letter dated 7th March 2006 or its subsequent e-

mail dated 14th March 2006. Nor was the letter dated 22nd February 2006, which is alleged to have contained the instructions to alter the free parking time limits, ever sent or at least received.

370. It seems to me, therefore, that, as a matter of fact, Somerfield never purported to exercise the power of termination under clause 11.1.5, whether in accordance with its terms or at all. Yet further, in view of my finding that the letter of 22nd February 2006 was never received, the first two grounds relied on to justify the exercise of the power, as set out at paragraph 39 of the Amended Defence are not made out. Nor was there any application to amend. That leaves only the third ground, namely the alleged effect of the fine notices and letters. Their terms and effect are the subject of serious allegations set out subsequently in the Amended Defence and briefly referred to at paragraph 39.3.

371. Now, there was a fair amount of evidence that some store managers and senior executives considered that the issue of fine notices was having an adverse impact on some of the Somerfield stores at which the ParkingEye system had been installed. But there was a dearth of any evidence to show that this was attributable to the form and content of the notices and letters rather than to the simple fact that they were being issued at all. But, provided that they were being issued in accordance with the Agreement, that could not be a ground for invoking clause 11.1.5. Even if there had been a breach of the terms of the Agreement by ParkingEye, by reason of its alleged failure to comply with Somerfield's instructions as to free parking time limits, there is no direct evidence that this in itself had any of the consequences which would have been required for the exercise of the power of termination under clause 11.1.5. As I have pointed out on a number of occasions, none of the store managers or senior executives who might have had something to say about these matters was ever called to give evidence.

372. I conclude, therefore, that Somerfield's pleaded justification of the termination of the Agreement in reliance on clause 11.1.5 fails on the facts. I have dealt with it a little more fully than might strictly have been required in the light of counsel's closing submissions. But it might, I suppose, have been contended that the provisions of the clause in question might have some bearing on the basis on which damages were to be assessed in the same way as reliance was placed upon clause 11.2.1 for that purpose. It was not, however, contended that Somerfield could and would have terminated the Agreement in any event under clause 11.1.5 so as to entitle ParkingEye to no more than nominal damages it if succeeded in its claim for breach of contract. But, if it had, it seems to me that any such contention would have faced the same evidential difficulties in establishing the grounds for termination under these provisions as, in my judgment, was the case in relation to the pleaded allegation that it did, in fact, terminate on those grounds.

373. There remains, however, one further point arising out of the provisions of clause 11 of the Agreement. It will be recalled that clause 11.1.1 allowed

Somerfield to terminate the Agreement forthwith in certain circumstances where there had been a breach of contract on the part of ParkingEye. The right arose only in the event of any "material" or "persistent" breach or breaches of the Agreement. Furthermore, where the breach was capable of being remedied, the right could be exercised only in the event of a failure by ParkingEye to remedy the breach or breaches within 28 days after receipt of written notice from Somerfield requiring it to remedy the breach or breaches in question.

374. Mr Fealy, on behalf of Somerfield contended that this did not in any way oust or restrict any right which Somerfield would have had at common law to treat itself as discharged from its obligations in the event of a repudiatory breach. In effect, he submitted that, in the event of such a breach, there was no obligation on Somerfield's part to serve notice requiring the breach to be remedied. He cited a passage from the speech of Lord Diplock in the case of **Gilbert-Ash (Northern) Limited -v- Modern Engineering (Bristol) Limited** [1974] A.C. 689 at 717. That was a case which raised an issue of a very different kind, namely whether a right of set-off could be excluded by express agreement between the parties. Lord Diplock observed that, in construing any such contract, "one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."

375. No other authority on the point was cited to me. But it is not suggested that there is any rule of law which prevents the parties to a contract from excluding or restricting by agreement any right of the kind with which I am concerned in this case. It seems to me to be quite clear that the question is one of construction.

376. For my part, I see no difficulty in interpreting the words used at clause 11.2.1 in a way which is entirely consistent with the common law principles referred to by Mr Fealy. Any "material" or "persistent" breach or breaches of the Agreement must, in my judgment, be construed as covering much the same territory as the legal concept of a repudiatory breach. To that extent, therefore, the clause re-states the common law principle that, in those circumstances, Somerfield could treat the Agreement as having been discharged by ParkingEye's breach or breaches of contract.

377. But the clause also confers a more extensive right of termination in the event of a failure to remedy a breach of contract which would not, in itself, have been either "material" or "persistent" so as to allow immediate termination. That confers a right wider than the common law principle referred to by Mr Fealy. Accordingly, I agree with his submission in the sense that clause 11.2.1 expressly allows termination in circumstances where there would have been a repudiatory breach giving rise to such a right at common law. It also confers more extensive rights of termination on notice, even where there would otherwise be no such repudiatory breach.

378. But the wording of the clause draws a helpful distinction between "material" or "persistent" breaches, on the one hand, and breaches capable of being remedied on the other. A breach which is capable of being remedied may not be either "material" or "persistent". I will, of course, have to consider the distinction between those breaches which are repudiatory in nature and those which are not when I come to consider Somerfield's case on termination in the next section of this judgment.

Repudiatory Breach of Contract

379. The fundamental issue of liability in this case turns on the question whether Somerfield was entitled to terminate the Agreement on 7th March 2006. It did not purport to do so in reliance on any of the express provisions of the Agreement itself. Nor, at the time, did it claim to be entitled to treat itself as discharged by reason of a repudiatory breach or breaches of contract on the part of ParkingEye. Indeed, it appears to have contemplated that some form of compensation would have to be paid to ParkingEye as a result of the early termination of the Agreement.

380. But it was not suggested that, as a matter of law, Somerfield would be precluded from relying upon any alleged repudiatory breach of contract by ParkingEye, even though it did not expressly rely upon it at the time. So the substantive issue to be resolved is whether such a repudiatory breach of contract on ParkingEye's part has been established so as to justify the termination. If so, it must follow that the contract was lawfully terminated and that ParkingEye can have no claim for damages for breach of contract arising out of the termination. But by the same token, if a repudiatory breach on ParkingEye's part is not made out, Somerfield's purported termination of the Agreement must itself have amounted to a renunciation or repudiation of the Agreement so as to give rise to a right of action for damages on the part of ParkingEye.

381. The only ground upon which Somerfield relies to establish a repudiatory breach of contract on the part of ParkingEye is its alleged failure to comply with its instructions to extend the free parking time limits at four of the car parks at which its system was in operation. Those instructions are said to have been given either in the course of the meeting between Mr Halsall and Mr McKerney on 15th February 2006 or in the course at subsequent discussions and correspondence; and it is alleged that Mr McKerney simply failed to comply with those instructions. No other repudiatory breach is alleged in the Amended Defence, though Somerfield's witnesses referred to other grievances in their evidence, such as the problem over "go live" dates or the alleged threat to turn the system back on at those stores at which its operation had been suspended - a point upon which Mr McDonald placed particular emphasis.

382. I have already considered the relevant provisions of the Agreement governing parking time limits and, in particular, those contained in clause 2.9. I have assumed, in the absence of arguments to the contrary, that this clause would have enabled Somerfield to change the time limits even after

agreement as to the periods involved had been reached between the parties. But the power to change the time limits could only properly be exercised in good faith and after consultation with ParkingEye; nor could it be used to frustrate the obvious commercial purposes of the Agreement itself. Furthermore, sufficient notice would have to be given to ParkingEye of any decision to change the relevant time limits.

383. Now, I entirely accept that Mr Halsall asked Mr McKerney to agree to various extensions of the free parking time limits at a number of the stores at which the ParkingEye system had been installed. But I do not think that he put forward these proposed changes in an unequivocal or peremptory fashion or that he gave instructions to Mr McKerney that he was contractually required to implement the changes in question.

384. In the past, Mr McKerney had proved himself invariably willing, so far as I can tell, to make any changes of this kind at Somerfield's request, whatever may have been previously agreed. He had also been pressing, for some time, for a further meeting to discuss various issues which had arisen between the parties; and I think it is likely that, by this time, his patience was beginning to wear rather thin in the light of the many requests which were being made by Somerfield, extending to the entire removal of the system from some of the stores at which it had been installed. I think it is likely that he wanted to resolve all of these issues and that he regarded the discussions with Mr Halsall at their meeting on 15th February 2006 as part of a continuing process of negotiation.

385. Mr Halsall followed up their discussions at that meeting with an e-mail to Mr McKerney later on the afternoon of 15th February 2006. It attached a document dealing with the issues raised by Somerfield and setting out "what we want to change in terms of parking times". The language of the e-mail is far from peremptory. The attachment itself, it will be recalled, appears to have been a version of the agenda which he had prepared prior to the meeting and had apparently sent to Mr McKerney, updated so as to include some further comments. It dealt with a number of issues in addition to time limits, ranging from such apparently trivial matters as the positioning of a dividing pole between the lanes in the Blackheath car park to such important questions as the removal of a system in its entirety from certain stores. There is no indication in this document that the extension of time limits was an unequivocal requirement on the part of Somerfield. Indeed, in some cases, such as Tonypandy and Okehampton, the "resolution" noted by Mr Halsall is the one word comment "agreed?". In relation to Torquay, his note is in the form of a more general question: "should we have a standard grace period?"

386. This was followed by a further e-mail from Mr Halsall dated 16th February 2006 referring to various other matters which were said to have arisen out of the meeting on 15th February 2006, as well as from the earlier meeting between Mr McKerney, Mr Wilson and Mr McDonald on 25th January 2006 and in the course of a subsequent telephone conversation between Mr Halsall and Miss Roberts earlier on 16th February 2006 itself. This e-mail

refers to problems over "go live" dates, the cancellation of fine notices and the cost implications of removing the system from certain stores. But it does not make any express mention of any extensions to free car parking times. It does, however, indicate that Mr Halsall wished to set an "end date" for all the matters referred to in his e-mail, namely the following Tuesday, 21st February 2006.

387. Mr McKerney, as will be recalled, responded by way of two e-mails dated 20th February 2006. He dealt with most of the points raised by Mr Halsall in his e-mail of 16th February 2006, albeit comparatively briefly. But he did not address the specific proposals for the extension of the time limits at a number of the stores which were referred to during the course of the meeting on 15th February 2006 and set out in the attachment to the e-mail which Mr Halsall sent to him later on the same day. What he said was this:

> "Re the changes to the timings to the stores, lets talk these through over the phone once we reach agreement on the extraction of the systems from the other 7 stores."

388. There was no immediate response to this proposal. A letter was apparently prepared by Somerfield's in-house legal department for Mr Halsall to sign and send to Mr McKerney. What appears to be the draft dated 22nd February 2006 was produced at trial. But I am not persuaded that it was ever sent or at least received. That draft letter set out two requirements: one related to the free parking time limits; and the other sought a detailed breakdown of the capital and installation costs for the six stores from which Somerfield had asked for the system to be removed. The time limits issue was dealt with in these words:

> "I require the parking times to change at the sites mentioned on our recent correspondence. It is our right as the customer under clause 2.9 to choose the parking time."

389. One can only speculate why this letter was not sent. Though it was not specifically put to Mr Halsall in these terms, I suspect that it was because Somerfield wished to consider immediate termination rather than continuing with the Agreement if the two requirements set out in the draft letter were complied with.

390. Be that as it may, no clear written requirement to change the time limits at any of the car parks, of the kind set out in this draft letter, was ever made by Somerfield. I am certainly not prepared to hold that any unequivocal requirement of a similar kind was ever made orally. Even Mr Halsall, despite referring to his requests at the meeting of 15th February 2006 as "unequivocal", accepted that no ultimatum had ever been given requiring ParkingEye to comply with any explicit instructions to alter the time limits in the way proposed.

391. I can see nothing in these oral and written exchanges which amounted to an assertion by Somerfield of any contractual right to require changes in the time limits, or any clear instructions to extend them by specified

amounts and by specified dates, or any refusal on the part of ParkingEye to comply with any such instructions. It was contended by Mr Fealy that such an unequivocal refusal was to be found in the way in which Mr McKerney, in his second e-mail of 20th February 2006, sought to link further discussions about time limits with negotiations about the costs of removing the system from certain stores. It was also suggested in some of the evidence that Mr McKerney may have been playing for time and drawing discussions out so as to maximise revenue prior to any change. But this was not pursued evidentially or forensically.

392. For my part, I do not think that any connection between the two issues is sufficient to bear the weight that Mr Fealy seeks to put upon it. As I have already indicated, clause 2.9 of the Agreement envisages consultations between the parties. Insofar as Somerfield regarded the extension of parking times as a separate issue which had to be resolved independently of any other matters, it had not made that clear to Mr McKerney. I can well see why he might have wished to resolve other issues at the same time. Indeed, it was never made clear to me on what grounds Somerfield considered that it was entitled to require ParkingEye to remove the system from any of the car parks at which it had been installed. But if Somerfield had made it crystal clear to Mr McKerney that it was invoking its contractual rights and insisting on these extensions of time, regardless of any other matters which were under discussion or negotiation, I think it is likely that Mr McKerney would have complied, albeit with some reluctance. That would have been consistent with the way in which he had previously dealt with requests of a similar kind, though he must have been increasingly frustrated by the series of alterations which Somerfield had sought to make, notwithstanding any prior agreement.

393. I conclude that Somerfield has failed to establish any breach of contract on the part of ParkingEye in failing or refusing to comply with any instructions from Somerfield to alter the free car parking times at any of its stores. Even if there had been a breach of contract in failing to comply with a request from Somerfield to that effect, I doubt if that could properly be regarded as a repudiatory breach, in the absence of an outright refusal. The obvious course for Somerfield to have adopted, in those circumstances, would have been to have served a notice under clause 11.1.1 requiring ParkingEye to remedy the breach. As I have already said, I think that ParkingEye would have complied with such a notice; and, of course, Somerfield would have had a cross-claim for damages in respect of any prior breach.

394. In the circumstances, I am satisfied that Somerfield cannot justify its decision to terminate the Agreement by reference to the alleged repudiatory breach of contract on the part of ParkingEye. It follows that ParkingEye is entitled to damages for Somerfield's breach of contract as a result of the termination of the Agreement.

Pre-Termination Breaches

395. I do not overlook the fact that ParkingEye also alleges various breaches of contract prior to the termination of the Agreement. These are set out at paragraphs 11, 12 and 13 of the Amended Particulars of Claim; and all three arise out of the provisions of the Agreement which I have considered earlier in this section of my judgment.

396. At paragraph 11 of the Amended Particulars of Claim, it is alleged that Somerfield was in breach of contract by failing to agree or nominate six further stores so as to bring the number of "Preliminary Stores" up to its full complement of 25. For reasons which I have already sought to explain, I have reached the conclusion that there was no relevant obligation on the part of Somerfield. Furthermore, even if there were some such obligation, I do not consider that ParkingEye has established any case of breach on Somerfield's part.

397. Paragraph 12 of the Amended Particulars of Claim alleges a breach of contract on Somerfield's part in issuing parking permits to persons who were not entitled to them. This is said to rise out of the implied obligation set out at paragraph 9 of the pleading. I have found that there was an implied term to the effect that parking permits could be issued only to members of staff at the store in question and to visitors other than customers. I have also concluded that the number of permits issued at some stores is sufficient to warrant the inference that some permits were issued to persons who were not members of staff or visitors to the store in question.

398. Furthermore, in the absence of evidence to the contrary, I have found that the figure of 25 permits per store put forward by ParkingEye represents a fair estimate of the maximum number of such permits which could have reasonably have been expected to have been in use at any store at any one time. Insofar, therefore, as ParkingEye is able to establish that the number of parking permits issued by the management of any individual store exceeded 25 in number at any one time prior to the termination of the Agreement, a breach of the implied obligation in question would be made out.

399. The final allegation of pre-termination breach of contract on Somerfield's part is to be found at clause 13 of the Amended Particulars of Claim. It is alleged that in breach of clause 2.7 and Schedule 4 of the Agreement or of the implied term alleged at paragraph 10 of the pleading, Somerfield cancelled parking fines in circumstances which did not fall within the Exemptions set out in Schedule 4. I have previously attempted to analyse the various provisions governing the Exemptions, which set out the circumstances in which Somerfield was entitled to cancel a charge which would otherwise have accrued to ParkingEye. Whatever the extent of its power to change the Exemptions under clause 2.8 of the Agreement, there is no evidence that any such changes had been implemented prior to the date of termination.

400. Accordingly, any cancellation in circumstances which did not fall within the various paragraphs of Schedule 4 would not be effective so as to deprive ParkingEye of its right to levy a charge and retain the proceeds. So ParkingEye could simply have disregarded any such cancellation. But no implied term is alleged to the effect that Somerfield would not ask ParkingEye to cancel charges where the circumstances did not come within any of the prescribed Exemptions. So I do not see how I can conclude that there was any breach of contract on Somerfield's part as a result of any such unwarranted cancellations. Furthermore, no particulars whatever of any such cancellations are provided in the pleadings or, indeed, in any of the evidence.

401. In reality, as it seems to me, the dispute over cancellations which arose between ParkingEye and Somerfield during the subsistence of the Agreement was intended to be resolved by the subsequent agreement by which Somerfield agreed to pay a percentage of the discounted charge where the fine was cancelled on grounds of negative publicity. This appears to have covered most, though perhaps not all cases of cancellation in circumstances which were not warranted by the provisions of Schedule 4. As a result of the amendment to the pleadings for which I have given permission, ParkingEye now seeks to recover a sum in respect of the fines cancelled on grounds of negative publicity prior to the date of termination. It also, of course, claims an amount in respect of such cancelled charges as a head of damages consequent upon the wrongful termination of the Agreement itself.

PART V
THE RELATIONSHIP WITH THE MOTORIST

402. As I explained earlier in this judgment, ParkingEye's remuneration for providing and operating the system at Somerfield's car parks was in the form of the charges which it was authorised to levy on motorists who parked for periods in excess of the free parking time limits. Notwithstanding that the procedure for levying and collecting these charges was set out in Schedule 2 of the Agreement and ParkingEye's right to retain the proceeds was enshrined in clause 2.7, Somerfield raised various challenges to ParkingEye's right to collect the charges in question and to the manner in which it went about doing so. The principal challenge raises a defence of illegality which I will deal with in the following section of my judgment. But Somerfield also raises issues as to ParkingEye's right to recover the stipulated charges from the motorist. It is with those aspects of the dispute which I shall address at this stage.

403. The first question is whether there was any form of contract between ParkingEye or Somerfield on the one hand and the motorist on the other. The issue was raised at paragraphs 67 and 68 of the Amended Defence and was dealt with briefly in Mr Fealy's opening written submissions. But it was not pursued with any real vigour thereafter.

404. As a matter of principle, there can be no difficulty in applying the ordinary rules of contract to the use of automated car parking facilities. The

proprietor or operator of the car park can lay down the terms and conditions upon which a motorist may make use of the facilities. Provided he does what is reasonably sufficient to bring those terms and conditions to the attention of any motorist before he enters and makes use of the car park, he will be regarded as making an offer to permit any motorist to use those facilities in accordance with those terms and conditions. If a motorist then enters and parks his car, he will be regarded as having accepted the offer with the result that a contract will come into being under which he is granted a licence to use the car park in return for observing the terms and conditions in question. If, therefore, those terms and conditions require payment for the use of the car park, the motorist will be contractually obliged to make the appropriate payment to the owner or proprietor. Such a charge may be graduated, depending on the length of time for which the motorist parks his car; and there may be an initial period, or specific times of the day, when no charge is payable.

Was there a Contract?

405. In the present case, it is accepted by Somerfield at paragraph 67 of the Amended Defence that, at each of the car parks in question, ParkingEye erected signs specifying a maximum parking time, though the pleading mis-states the amount of the "penalty ticket" which might result from exceeding the specified time limit. In his witness statement, Mr McKerney referred to the nature and content of the signs which were erected, noting that their position and wording was generally agreed with the store managers.

406. Mr McKerney referred a coloured copy of the standard sign which was used for these purposes. It has the ParkingEye logo at the top; and the main text is set out in large print, in black on a yellow background. In the particular example referred to, the wording was as follows:

> "1 Hour maximum stay
> Customer only car park
> Failure to comply with the following may result in a £75 penalty ticket.
> Parking limited to one hour (no return within 4 hours)
> Park only within marked bays
> Disabled badge holders only in disabled bays".

407. Against each of the three circumstances which might result in a penalty ticket were set an appropriate sign to provide a visual cue for the written message.

408. Below the main text, albeit in much smaller letters, was some further text headed "Important user notice". This reads as follows:

> "ParkingEye Ltd is solely engaged to provide a traffic space maximisation scheme. We are not responsible for the car park surface, other motor vehicles, damage or loss from motor vehicles or users safety. The parking regulations for this car park apply 24 hours a day all year round irrespective of the store opening hours. Penalty Ticket Information: Initial Fine £75: Reduction to £37.50 if paid within 14 days: Surcharged if referred to debt collectors solicitors £135 (penalty

ticket £75+ £60 surcharge) together with liability for further costs. For all enquiries contact ParkingEye Ltd help desk".

409. A telephone number was also provided by which a motorist could contact the help desk. Finally, at the bottom of the sign the names of both ParkingEye and Somerfield were set out. On the left, it was stated that the car park was managed by ParkingEye, giving the same telephone number as that of the help desk, albeit in much larger print; and on the right there appear the words "on behalf of: Somerfield". The word "Somerfield" is in large print and is in the form of Somerfield's standard logo.

410. Mr McKerney, in his witness statement, went on to state that he did not believe that there could be any doubt but that individual motorists would have been aware of these signs. It was standard practice for signs to be provided at the entrance of the car park and every 10 or 15 bays. None of this evidence was challenged. Even if it might have been suggested (which it was not) that the motorist would already have been committed to entering the car park by the time he was in a position to read the signs, the initial free car parking period would simply have allowed him to drive through and out again without incurring any charge.

411. On the face of it, therefore, I am satisfied that a contract would have been created between ParkingEye and Somerfield (or one or other of them), on the one hand, and any motorist who entered and made use of any of the car parks in question. It does not really matter, for present purposes, whether it was ParkingEye or Somerfield or both which were the contracting parties, since ParkingEye was clearly authorised under the terms of the Agreement to levy, collect and retain the parking fines, though strictly it was only Somerfield, as the owner or occupier of the car parks in question, which could have granted the necessary licence to the motorists.

412. The contractual terms upon which the motorist was permitted to use the car park were those set out on the signs to which I have referred. Where the time limits were subsequently altered, it appears that suitable stickers were placed on each of the signs. Accordingly, any motorist who parked for a period longer than the stipulated maximum period (or otherwise contravened the specified conditions), would have become potentially liable to a "penalty ticket" requiring him to pay a "fine" of £75. The issue of such a penalty ticket was not mandatory and the motorist might well have been unaware of the additional period of grace agreed from time to time between ParkingEye and Somerfield. But I can see no obvious reason why, on the face of it, once the penalty ticket was issued, the motorist would not be under a contractual liability to pay the specified sum.

413. I appreciate that the terminology adopted in the signs erected at each of the car parks, as well as in the Agreement between ParkingEye and Somerfield and in the parking fine notices and letters subsequently sent out to the motorist, uses expressions such as "fines" and "penalties". It is of course common ground that neither ParkingEye nor Somerfield had any right to

levy such fines or penalties otherwise than by contract. Insofar as it was suggested that the language used was, in some way, incompatible with the existence of any contract with the motorists, I would reject any such argument. It does not matter, in my judgment, whether the sum payable in specified circumstances under a contract is referred to as a "parking charge" (as was, in fact, the terminology adopted in the notices and letters sent out the motorists, at least in their final form) or as a "fine" or "penalty".

Were the Charges Penalties?

414. That conveniently leads to the other major point taken by Somerfield in connection with ParkingEye's right to recover these charges from the motorist. It is alleged at paragraphs 68 and 69 of the Amended Defence that any requirement to pay a sum in excess of the headline amount of the charge would constitute a penalty which would therefore be irrecoverable. The pleading proceeds on the footing that the amount of the charge was £50, rather than £75, but the argument remains the same notwithstanding this error. In effect, the pleaded case is not that the charge of £75 itself is a penalty but only the enhanced amount payable in default.

415. Once again, the point was pursued in Mr Fealy's opening written submissions but was not subsequently elaborated upon. I was referred to various passages in the current edition of Chitty on Contracts. But there did not seem to be any dissent from the formulation cited by Mr Fealy from the judgment of Colman J. in **Lordsvale Finance -v- Bank of Zambia** [1996] 1 QB 752 at 762, which was in these terms:

> "Whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party from breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred."

416. Mr Fealy also referred me to the transcript of an unreported decision of District Judge Wall in the Mansfield County Court, namely **Excel Parking Services Limited -v- Hetherington-Jakeman** (18th March 2008). The factual background was not dissimilar to that with which I am concerned in the present case. The Claimant operated an automated car park and claimed a parking charge of £100 from the Defendant for having parked her vehicle for a period in excess of the specified time limit. The charge in question represented an enhanced sum. The initial amount of the charge to which, it was said, she was liable was £60, which was discounted to the lower figure of £40 in the event of prompt payment. The higher sum of £100 was then demanded after she had failed to pay either of these sums. It was her case, it would seem, that she had not received any of the earlier notices.

417. The District Judge accepted that there would have been a contract when the motorist entered the car park on the terms set out on the signs which she would have seen. But, remarkably, it seems that there was nothing on any of the signs to inform a motorist that a charge or fine would be payable if a specified time limit was exceeded. Accordingly, the claim failed. So the facts of that case are, of course, very different from those with which I am presently concerned, where the signs, as it seems to me, made the position quite clear.

418. But the District Judge also went on to consider whether the charge sought to be recovered was to be treated as a penalty. The relevant passage in his judgment is strictly obiter. But, in any event, it is not binding upon me and simply represents an application of the law to the facts of the case, and does not purport to lay down any relevant legal principles. In the event, he held that £100 charge was a penalty. But it seems quite clear to me that he was principally concerned with the increase from £60 to £100. The way in which he put it at paragraph 26 is that it was a sum which was "intended to effectively frighten or intimidate someone into making a payment promptly." He went on to note that there were undoubtedly overhead costs, not merely in operating the car parking system itself but also in collecting the charges. But he noted that he had no details of these costs and it seemed to him that the amount claimed was far beyond any costs which could realistically or reasonably have been incurred.

419. It seems to me that, in the present case, it would be difficult for ParkingEye to justify, as against any motorist, a claim for payment of the enhanced sum of £135 if the motorist took the point that the additional £60 over and above the original figure of £75 constituted a penalty. It might be possible for ParkingEye to show that the additional administrative costs involved were substantial, though I very much doubt whether they would be able to justify this very large increase on that basis. On the face of it, it seems to me that the predominant contractual function of this additional payment must have been to deter the motorist from breaking his contractual obligation to pay the basic charge of £75 within the time specified, rather than to compensate ParkingEye for late payment. Applying the formula adopted by Colman J. in the **Lordsvale** case, therefore, the additional £60 would appear to be penal in nature; and it is well established that, in those circumstances, it cannot be recovered, though the other party would have at least a theoretical right to damages for breach of the primary obligation.

420. That deals with the only point expressly raised by Somerfield in its Amended Defence. But, in his opening written submissions, Mr Fealy sought to extend the argument further. He submitted that basic charge of £75 was itself a penalty. He contended that the purpose of setting the charge at that level was to deter motorists from acting in breach of the parking regulations and to make a profit from any such breaches. This argument appears to be based on the proposition that the primary obligation was to comply with the specified time limits and that the charge

of £75 was disproportionate to any damages which ParkingEye or Somerfield might suffer in the event of such a breach.

421. Mr Fealy did not pursue or develop this argument in the course of closing submissions; nor was it specifically addressed by Mr Chaisty QC in his opening or closing submissions. Nonetheless, I will briefly set out my views on the issue.

422. The point is by no means straightforward, but I have reached the conclusion that Mr Fealy's argument should be rejected. The contract in question is formed when a motorist enters and uses the car park after having had notice of the terms and conditions on which he is entitled to use it. Those terms and conditions are set out on the signs to which I have already referred and are to be construed as they would reasonably have been understood by any such motorist in the light of the surrounding circumstances.

423. Applying the formulation adopted by Colman J. in the **Lordsvale** case, it is necessary to determine, as a matter of construction, whether the predominant contractual function of the £75 penalty ticket is to deter the party from committing a breach of the contract. In essence, Mr Fealy's argument is that the primary obligations imposed upon the motorist are negative in nature, most notably not to stay for more than one hour. If he parks for longer than one hour, he is in breach of his contract and liable in damages. Those damages, it is suggested, will be small or nominal. Accordingly, any obligation to pay £75 in the event of such a breach must be regarded as a penalty and unenforceable.

424. This approach gains some support from the wording of the signs and in particular the statement that a "penalty ticket" might result from a "failure to comply" with the prohibitions which are then set out. But, as Mr Fealy himself acknowledged, the terminology, and in particular the use of the word "penalty", is not conclusive.

425. It seems to me that it is particularly important in the case of such an informal contract to see how the message on the signs would reasonably be interpreted, from an objective standpoint, by the ordinary motorist who wished to make use of the parking facilities. Any such motorist would be well aware that charges were normally made for the use of such car parks; and that those charges were commonly graduated, depending upon the time for which he parked. In this particular case, I think that the ordinary user of the car park would see the £75 "penalty ticket" as the price which he would or might have to pay if he used the car park for longer than a period of one hour.

426. If this is the price payable for the privilege, it does not seem to me that it can be regarded as a penalty, even though it is substantial and obviously intended to discourage motorists from leaving their cars on the car park for any lengthy period of time. I accept that this analysis is a little more difficult to apply to the other prohibitions set out on the signs. But those

are very much subsidiary to the charges for exceeding the time limit; and, as it happens, there appears to have been no procedure for levying charges for a failure to park within the marked bays or for the improper to use a bay reserved for disabled users.

427. I make two further observations about this particular issue. Firstly, I assume that Mr Fealy is correct in his contention that any damages incurred as a result of a breach of the terms and conditions are likely to be comparatively modest. But it is only an assumption; and I can only speculate as to what might have been said had the point been specifically pleaded. Secondly, no reliance was placed by Mr Fealy on the fact that a very substantial discount was offered for prompt payment. But, as it seems to me, such a discount cannot in itself mean that the undiscounted payment must be a penalty.

428. In relation to these various contractual issues affecting the users of the car parks, therefore, I conclude that any motorist using the car park would be contractually bound to pay the charge of £75 if he exceeded the specified time limit and a demand for payment was made upon him. Whilst he might argue that the charge in question amounted to a penalty and was therefore irrecoverable, I think he would probably fail in that contention. But it seems to me, on the limited material presently before me, that he would probably succeed in any argument that the increase to £135 in the event of a failure to pay within the specified period did amount to a penalty.

Consequential Matters

429. But one is bound to ask where all this may lead. I think that the question whether there was or was not a contract of this kind may be material to the fundamental allegation of illegality which I shall deal with in the next section of this judgment. But the argument was essentially deployed by Mr Fealy as part of his attack on ParkingEye's claim for substantial damages. It was submitted, in effect, that, if there was no contract with the motorist, ParkingEye had no legal right to recover any of the charges and so could not claim damages from Somerfield on the basis that, but for Somerfield's breach of contract, it would have continued to receive revenue as a result of the imposition of these charges. The same argument was advanced in relation to the contention that all or part of the charges in question constituted a penalty.

430. In my judgment, there is no merit in this argument. Once a breach of contract is established on Somerfield's part, the court is simply concerned to ascertain the loss which ParkingEye has suffered as a result of the breach. Whether or not any individual motorist could have successfully raised any defence to a claim to recover a parking charge is beside the point. The question is whether, as a matter of fact, some of the motorists would have continued to pay the charges if the contract had not been terminated, and if so, how many. There is no suggestion that, in fact, any had refused to do so on any of the grounds suggested by Mr Fealy; and

there is no reason to think that the position would have been any different in the future.

431. Of course, on any claim for loss of profits, allowances would have to be made for bad debts. But it cannot seriously be suggested that the court should consider each and every individual contract underlying such a claim in order to see whether the other party would or might have some form of legal defence. Accordingly, even if I were wrong in my conclusions about the enforceability of the charge against the motorist, it would not have any bearing on the assessment of damages. I leave entirely on one side, the consequences which might follow if the process of levying and collecting the charges was tainted with illegality. That is the issue to which I must now turn.

PART VI
ILLEGALITY

432. Somerfield makes a number of serious allegations against ParkingEye which are most conveniently summarised at paragraph 60, 61 and 62 of the Amended Defence. It is alleged that the use of the notices and letters sent to the motorists by or on behalf of ParkingEye constituted the tort of deceit, the offence of obtaining a money transfer by deception under the Theft Act 1968 or, after 15th January 2007, the offence of fraud under the Fraud Act 2006, and the offence of unlawfully harassing debtors contrary to section 40 of the Administration of Justice Act 1970.

433. The allegations of criminal offences under the Theft Act 1968 or the Fraud Act 2006 were, in the event, not pursued on behalf of Somerfield. Furthermore, despite the reference to coercion in the pleading, no independent argument was based upon it, though it is an element in any offence under section 40 of the Administration of Justice Act 1970. But the allegations of deceit and harassment were pursued with vigour and were supported by extensive passages in the witness evidence adduced on behalf of Somerfield, much of which seems to me to be of doubtful relevance.

434. The allegations of deceit and harassment are, of course, raised with a view to demonstrating that the Agreement was tainted by illegality and that ParkingEye cannot therefore recover damages for breach. The plea of illegality is based solely on the form and content of the letters and notices used by ParkingEye and CCS for the purposes of collecting the charges levied on motorists in accordance with the Agreement. So it is necessary first of all to consider the contents of these documents as well as how they came into being.

Background Matters

435. It will be recalled that drafts of the four notices and letters were sent by Mr McKerney to Mr Ogden of Somerfield by way of an attachment to his e-mail of 28th April 2005. These drafts are very similar to the documents which were subsequently used by CCS, though there appear to have been some modifications to the drafts. Thus, the heading of the first notice

refers to itself as a "Parking Charge Notice" rather than "Penalty Charge Notice"; and a similar alteration appears to have been made to the second notice. Another example is to be found in the first paragraph of the final letter, as actually sent out, which is in a slightly different form from the original draft, with some alterations to the wording. But most of the wording is identical; and it was not suggested that there was any difference of substance between the versions.

436. So, whatever the allegedly objectionable features of these notices and letters, they were clearly sent in draft to Mr Ogden; and I am satisfied, on the balance of probabilities that he must have seen and approved them. So, if, as Somerfield now alleges, their content is such as to taint the entire Agreement with illegality, Somerfield must itself have been a party to that illegality. I should say that the possibility that I might reach such a conclusion was met with a quite remarkable degree of insouciance on the part of Somerfield.

437. But it may also be of some importance to bear in mind the state of the discussions between the parties at the time when these drafts were sent by Mr McKerney to Mr Ogden. In addition to making various recommendations as to the number and nature of the notices and letters to be sent out to motorists, (including the use of Somerfield's logo on the first and second notices) Mr McKerney's e-mail also addressed the question of what should happen if no payment was made in response to the fourth letter. What he suggested was this:

> "The next stage will be to send an actual collector to the motorist's door with the four letters, as part of the civil claim, prior to any court proceedings. After this, the next stage would be formal proceedings, but I'd suggest that we just send up to the four letters for each offence and then see what percentage payment ratio we achieve and what the number of offences within the car park looks like."

438. It appears that this "wait and see" approach was eventually adopted during the course of the negotiations leading up to the execution of the Agreement in its final form. But it is quite clear, on the face of the Agreement, that Somerfield wished to reserve the right to take legal proceedings for the recovery of outstanding charges; and appropriate provisions were incorporated in Schedule 2. It will be recalled that paragraphs 5d and 6 of Schedule 2 were in these terms:

> "5d If the registered keeper chooses not to pay after the 4th Fine, no further action is taken, but detailed records of all non payers and persistent offenders will be stored. Should the Customer wish the Supplier to take the matter further, court proceedings can be started at the expense of the parties to be agreed from time to time.
>
> 6. In the event that the Customer wishes to commence court proceedings in order to recover outstanding Parking Fines levied at the car parks, the Supplier shall afford the Customer all reasonable assistance, advice and documentary evidence as shall be necessary for the furtherance of such court proceedings."

439. Furthermore, this final version had been amended so as to include the last part of paragraph 5d and the entirety of paragraph 6 at the behest of Somerfield itself. Unsurprisingly, Miss Taylor, who was dealing with the matter at the time on behalf of Somerfield, accepted that she must have approved these alterations and that Somerfield would have wished to retain the right to take such proceedings, albeit as a last resort.

440. Mr McKerney, for his part, stated that, whilst he had made it clear to Mr Ogden that ParkingEye was prepared, if necessary, to take steps to recover charges by way of formal legal process, he had also told him that he did not think that there would be a great deal of commercial logic in pursuing an individual through the courts in order to recover a very modest charge. There was no commercial logic in issuing proceedings as a matter of course, in view of the time and, no doubt, the cost involved. That advice was, of course, reflected in his e-mail of 28th April 2005. But he went on to say that legal proceedings might be pursued, at least in the case of repeat or serial offenders. That was why the provisions to which I have already referred were incorporated within Schedule 2 of the Agreement.

441. But Mr McKerney insisted that, whatever the commercial considerations, it would have been a matter for Somerfield to decide whether proceedings should be taken in any particular case; and if it wished to do so ParkingEye would provide the necessary assistance. But he acknowledged in cross-examination that none of ParkingEye's supermarket clients had ever asked it to take proceedings against any customer.

The Form and Content of the Documents

442. It is against that background that I turn to consider the various notices and letters themselves. The first and second were, apparently, generated by ParkingEye's own computer system. The first in the series is headed "Parking Charge Notice" and the logos of both ParkingEye and Somerfield appear at the top. It is addressed to the registered keeper of the vehicle in question and it identifies the registration number of the vehicle, the date on which the penalty was incurred and the date on which the notice itself was issued. It then sets out details of the circumstances which are said to have led to the imposition of the penalty and requires payment within 28 days, with a 50% discount if payment is received within 14 days. Finally, it refers to the fact that any further delay in payment would cause an "administration charge" of £60 to become payable. All of this part of the notice is set out within a chequered border. Beneath this border, at the bottom of the page there is a bank giro credit slip already made out in the sum of £37.50; and further information is provided on the back of the notice. This further information tells the recipient how to pay and suggests how he should respond if he is unable to pay in full as a result of financial difficulties. But it also sets out brief reasons why the recipient should respond to the notice. What it says is this:

> "If you fail to respond to this notice, legal proceedings may be issued against you in the County Court/Sheriffs Court. This may result in:
>
> 1. You having to pay more in the end because of Court costs

2. A Court Judgment/Decree
3. Your possessions being seized."

443. I have to say that, on first reading, save perhaps for the chequered border, this document seems fairly innocuous and typical of the sort of demands for payment which are now common within our consumer society. The second notice also appears fairly inoffensive. It is headed "Parking Charge Reminder" under the logos of both ParkingEye and Somerfield; and, once again, it sets out the vehicle registration number, the date of the incident giving rise to the notice and the date of the notice itself. But it anticipates any further dispute by incorporating what appear to be photographs of the vehicle arriving and departing from the car park in question together with the arrival and departure times.

444. The notice then refers to these photographs and timings, suggesting that in the light of this evidence, there could be little or no question as to the recipient's liability for the charge. Accordingly, it asserts that a penalty of £75 is now payable. This section of the notice concludes that these words:

> "Any dispute will be considered carefully but any frivolous challenge will be dismissed. Should you wish to avoid ACTION, you should make payment WITHOUT DELAY BY ONE MEANS OR ANOTHER, as set down below and **overleaf**."

445. The notice then refers to the amount of the charge and the discount for prompt payment. But it also states that if payment is not made within the next 21 days "the first of many additional charges" would be made. So the total amount payable if the charge was not paid within 21 days would be £135. A payment slip was, once again attached; and the back of the notice appears to be in precisely the same form as on the initial notice.

446. It appears that it was at this stage, if no payment was received, that the matter was placed in the hands of CCS which was responsible for issuing the third and fourth documents in the series. They are both in the form of a debt collector's letter under the CCS letterhead. The first of the letters refers to a debt of £75 owing to ParkingEye. In its final form (which differs only in immaterial respects from the draft), it reads as follows:

> "My client is determined to protect the interests of their genuine customers, so they are therefore prepared to "all the way". The cost of the issue of proceedings for what you might regard as a rather small amount is irrelevant to them, as you will understand. Customers are of paramount importance.
>
> As ParkingEye have explained to you already, their objective is to deter the dishonest, the people who are not their genuine customers.
>
> You may choose to ignore this demand but that approach will not succeed. ParkingEye **will issue legal proceedings** and will instruct us to prepare the documentation. The consequences of legal proceedings are, that you would receive a Claim, and if you ignore that, a bailiff will attend your address to remove goods.
>
> "If you prefer to avoid all the hassle and the cost (which will become substantial if our clients are obliged to go that far), the means of

payment are set out below and overleaf. We take 1000's of payment calls, so please be a little patient if we don't connect your call immediately. **If you're short of funds call the same number for help**."

447. The letter is signed by someone apparently named R Watson; and, once again, a payment slip is attached.

448. The final document in the series is in the form of a debt collector's letter from CCS. It appears to pre-suppose that there had been some communication with the recipient of the earlier letter, though it seems unlikely that this would often have been the case. Once again, it differs slightly from the draft, and in its material parts it reads as follows:

> "Your case has been assigned to me. Well, I've read it and I have to say that it is difficult to understand your reasoning [*and your refusal to pay the debt, detailed above, based on the photographic evidence against you and my client's desire to take legal action for the outstanding debt.*]
>
> The issue of civil proceedings, judgment and its enforcement can only bring problems for you. Quite apart from the great cost to you but potentially the removal and sale of personal possessions.
>
> You may not have considered also the implications of a judgment being recorded against you. Such as credit becoming more expensive. **For you, with a judgment against you, interest rates could become very high,** if you are able to obtain credit at all. I invite you to reflect upon even the things we take for granted, like electricity and gas. Prepayment may be required, even for water. So, please think again!
>
> Avoid all the problems that might otherwise follow non-payment and pay now!"

449. The words in italics do not appear in the draft or the specimen letter produced at trial. But they are included in a copy apparently sent to the customer in Louth on 9th February 2006 which subsequently came into the hands of Mr Halsall.

450. The letter concludes by indicating how the payment could be made over the telephone and stating that this was the recipient's "last chance". Yet again, it is signed or purports to be signed by R Watson; and a payment slip is, yet again, attached.

Evidential Matters

451. On behalf of Somerfield, Mr McDonald, Mr Wilson and Mr Halsall all referred to these various notices and letters and commented upon them in passages in their witness statements which were largely identical in each case. It seems that only Mr Halsall had actually seen any of these documents prior to the termination of the Agreement, though Mr McDonald said in cross-examination that he thought he had seen one or more of them in the latter part of February 2006. But they all expressed various degrees of shock and concern about their form and content. Thus Mr McDonald said that he would never have sanctioned threats of

proceedings against a customer and opined that to have attempted to enforce any charges by means of court proceedings would have been disastrous from a customer relations perspective. If he had been aware that threats of this kind had been made in any of the documents, he would have required changes to the wording on the basis that they were likely to cause damage to Somerfield's image. He also expressed the opinion that the terms of the letters were very aggressive and likely to cause upset to older customers; and he thought that most people who had paid would have done so in order to avoid court proceedings.

452. Mr Wilson referred to his initial reaction as one of shock and expressed the view that if he had been a genuine customer who had simply overstayed, he would have been angry and concerned about the allegations and threats set out in the documents. For his part, he would never have sanctioned them in that form and, if he had seen them during the operation of the Agreement, he would have required changes.

453. Mr Halsall, for his part, stated that, if he had seen any of the documents he would have requested amendments because, in his view, they were misleading, and would have been likely to have caused "great distress" to the recipients. He also expressed the opinion that they were likely to frighten people into paying money where they were not obliged to do so, that they created a "very unsavoury association" between Somerfield and debt collectors and that they flew in the face of Somerfield's public image. He went on to say that the store managers experienced a "barrage of complaints and dissatisfaction" from members of the public in relation to the system and the letters which were being received. He was particularly concerned about the threat to sue customers and put their gas, electricity and water supplies at risk.

454. But when these witnesses were asked in cross-examination as to precisely what changes they would have required to these documents, no very clear and consistent response was elicited. They all would have wanted their tone to be softened and for the threat of legal proceedings and its consequences to be removed or toned down. They all considered that it was highly unlikely that Somerfield would ever have sanctioned legal proceedings against its customers save perhaps as a last resort. So, even if it had been appropriate to make any mention whatever of such proceedings, it should have been referred to only as a possibility.

455. But whatever the relevance of the largely retrospective expressions of opinion by these witnesses, there is surprisingly little contemporaneous evidence of a similar response either from the recipients of the documents or from Somerfield itself. Not only, as I have found, were the drafts seen and approved by Mr Ogden but no complaints about their form or contents were ever made to ParkingEye by any of the senior management of Somerfield, even at the time of termination. Nor was any request for changes ever made by Somerfield. But I accept that this may have been because it would only have been fairly shortly before the relationship between the party's broke down that CCS would have started to issue the

third and fourth letters, which were the main focus of criticism. Furthermore, Mr Halsall was obviously concerned about the form and contents of the documents, as is apparent from his e-mail dated 16th February 2006 in which he called for copies of all of the documents and referred to a "threatening letter" which had been sent to a customer and which was being considered by Somerfield's press officer. But, as I have already noted, no copies were in fact sent to him by Mr McKerney even though he himself had asked for and received copies from CCS.

456. Furthermore, though many of Somerfield's customers complained about the charges which were levied upon them under the new system, there is virtually no evidence that any of these complaints were directed to the form or contents of the letters as opposed to the fact that a charge was being levied at all.

457. It is true that Mr McDonald, in his witness statement, set out a number of instances to illustrate the general proposition that store managers had received a number of complaints or queries from members of the public who had paid the fine in order to avoid the threatened consequences or who had been sufficiently distressed to take other steps in relation to them. But with one, or at most two, possible exceptions, neither the brief particulars given by Mr McDonald in relation to any of these cases, nor the documentation to which he referred, provides any clear basis or justification for this general assertion.

458. The first possible exception is in the case of a disabled 80 year old woman who had apparently received two parking tickets after visiting the store at Louth. Mr McDonald obviously had no personal knowledge of the circumstances of the case, but he referred to an e-mail from the store manager dated 24th January 2006 in which he asked for a refund. The primary basis of the request seems to have been that she was disabled and was, in any event, unable to complete her shopping within the relevant time limit. But the e-mail also commented on the fact that she was apparently "distressed" and had been "frightened by the consequences of not paying".

459. This e-mail had, in fact, been copied to Mr Rowe who, it will be recalled, was the executive with general responsibility for Louth and Stamford. As it happens, the other example given by Mr McDonald in his witness statement which might be said to provide at least some limited support for his general observation about the effect on customers was a case referred to in an e-mail from Mr Rowe to Mr McDonald dated 3rd February 2006. Mr Rowe referred to customer with a disabled badge who had received a reminder and a letter from a "cash collection company" which contained a "threat of bailiff action". But Mr Rowe did not express any concern or indignation about a threat of this kind, simply contenting himself with a rather sarcastic comment to the effect that it was a strange coincidence that the debt collection company had the same address as ParkingEye itself.

460. Furthermore, despite the importance placed by Somerfield on the form and content of these letters and their effect upon its customers, no evidence was called from any of its store managers or customers.

461. Mr McKerney did not have a great deal to say about the form and content of these documents in his witness statement. He emphasised the fact that Mr Ogden had approved the drafts and that Somerfield must have been well aware that they were being sent out. But he accepted that it was not ParkingEye's commercial intention to issue proceedings for relatively modest sums unless there were serial offenders or some other pressing reason for doing so. He specifically referred to the advice he had given to Mr Ogden about the commercial logic of pursuing proceedings for comparatively small sums.

462. When Mr McKerney was cross-examined about these matters, he emphasised that it was ParkingEye's practice to do what its customers wanted it to do. So, if a client said that it did not want to pursue court action against a motorist, it would not do so. As a matter of fact, ParkingEye had never taken such proceedings on behalf of a client though that was not a matter which it was inclined to publicise.

463. So, when it was suggested to Mr McKerney that, despite the wording on the back of the first and second notices, there was not the slightest prospect that any proceedings would in fact be taken against the motorist, he insisted that this would be a matter for Somerfield rather than for ParkingEye. If it had decided that court proceedings should be pursued, ParkingEye would have taken the necessary action. For his part, he did not know whether it was, in fact, Somerfield's policy never to take people to court. When specifically asked about some of the wording in these documents, he likewise pointed out that they had been approved by Somerfield.

464. Mr McKerney accepted that the words "will issue legal proceedings" in the two letters were unequivocal. But he would not agree that they were untrue or that the costs of any proceedings were, in fact, highly relevant. Once again, he insisted that it would be for Somerfield, rather than ParkingEye, to decide whether to take proceedings. The purpose of the exercise was to prevent the abuse of Somerfield's car parking facilities and not simply to extract payment. The letters were drafted in the early stages of the relationship and he did not know what view Somerfield might take about these matters in the light of experience. He pointed out that Somerfield had insisted on reserving its right to take proceedings as was recorded in the Agreement itself.

465. He was questioned in a similar manner about other passages in both the third and fourth letters; and his answers were substantially to the same effect. He did, however, accept that letters of this kind had to "have teeth" if they were to be effective, and that Somerfield no doubt agreed to "strong letters" in order to achieve their own commercial objectives. He continued to resist any suggestion that he knew that any of the statements in these

documents were false; and he rejected counsel's suggestion that ParkingEye was acting dishonestly by the standards of ordinary decent people.

Deceit

466. Against this background I must now go on to consider the allegations of deceit and harassment. I start with the tort of deceit. It is trite to say that an allegation of fraud must be distinctly alleged and distinctly proved. The basis of Somerfield's case, as pleaded, is to be found at paragraphs 54, 56, 57 and 58 of the Amended Defence. It is alleged that, by issuing these documents, ParkingEye, both by itself and its agent, repeatedly stated that it "would issue proceedings against them if they did not make the payment requested and warned in lurid terms of the potential consequences of a judgment being obtained." It is said that these assertions amounted to a representation of fact to the recipients of the documents that ParkingEye "had the right to issue proceedings against them and/or had a present intention to issue such proceedings if the requested payment was not made."

467. But such a representation, it is said, was false, since, in fact, ParkingEye had no right to issue proceedings and/or no present intention of doing so. Reliance was placed in particular on the wording of paragraph 5d of Schedule 2 to the Agreement to the effect that no further action was to be taken if the registered keeper chose not to pay after the final letter had been despatched. But no mention was made of the further provisions which expressly reserved the right to take legal proceedings. Finally, at paragraph 58, it is alleged that ParkingEye, in the person of Mr McKerney, knew that these representations were false.

468. The tort of deceit is committed when one party makes a false representation to another, knowing it to be untrue, or being reckless as to whether it is true or false, and intending the other party to act in reliance upon it. If the other person acts in reliance on the misrepresentation and suffers loss in consequence, the party making the misrepresentation will be liable to him in damages.

469. Mr Fealy cited several short passages from Clerk and Lindsell on Torts, 19th edition (2006) in support of Somerfield's case on deceit. These were intended to establish certain fundamental principles of the relevant law. The first of these was to be found at paragraph 18-09, (paragraph 18-11 of the 20th edition) where the following proposition is set out;

> "It is clearly established that a representation of present intention, whether the intention be that of the representor or of a third party, is a sufficient representation of an existing fact to form the foundation of an action for deceit."

470. Secondly, Mr Fealy cited paragraph 18-18 of the work in question (now paragraph 18-20 of the 20th edition) which is in these terms:

> "**Motive irrelevant** It should be noted that if the requisite degree of knowledge or recklessness is shown, the defendant's motive in making

the representation is immaterial: "If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made." The fact that the representor was not actually dishonest, or acted with the aim of facilitating a bona fide business transaction, is irrelevant (though of course lack of dishonest intent may be powerful evidence of a bona fide belief in the truth of the facts asserted by the defendant)."

471. Finally I was referred to paragraph 18-28 (now paragraph 18-30 of the 20th edition), where the following passage appears:

"**Representation must be intended to be acted on by claimant** In order to give a cause of action in deceit, not only must the statement complained of be untrue to the defendant's knowledge, but it must in addition be made with intent to deceive the claimant: with intent, that is to say, that it shall be acted upon by him. It seems that intent, for these purposes, includes not only the case where the defendant actually desires the claimant to rely on what he says, but also where he appreciates that in the absence of some unforeseen intervention he will actually do so."

472. Mr Chaisty QC, on behalf of ParkingEye, did not challenge any of these principles; nor did he seek to advance any further legal arguments on the issue save to point out that the cause of action can only arise if damage is suffered by the party to whom the representation is made. But he nonetheless contended that, as a matter of fact, Somerfield had not established either that any misrepresentation had been made, or, if it had, that it was made fraudulently or that any person had relied upon it or suffered any loss or damage.

473. I come back to the case advanced by Somerfield. It is that ParkingEye falsely represented to the recipients of the various charge notices and letters that it had the right to issue proceedings against them and that it had a present intention to issue such proceedings if the requested payment was not made.

474. Now, I do not consider that either the initial charge notice or the reminder can reasonably be regarded as involving any representations of the kind alleged. The only reference to proceedings in the initial charge notice is to be found on the back of the document which, it will be recalled, states merely that, if the recipient failed to respond, legal proceedings "may" be issued against him and that this "may" result in additional costs, judgment and the seizure of possessions. It does not say that proceedings would be taken or that ParkingEye itself would be entitled to take any such proceedings. Furthermore, it is no more than a statement of what might happen in the future rather than a statement of present fact; and there was at least the possibility that Somerfield might wish to take legal proceedings in the future, no matter how unlikely that might have been.

475. The reminder notice contained precisely the same information on the back as the earlier notice; and my observations about it remain the same. It is

true that, on its face, it states that payment should be made without delay if the recipient wished to avoid "action" (which word was set out in capital letters). But that does not, in my judgment, amount to a statement that legal proceedings would be taken or even that ParkingEye itself was, at that time, authorised to take such proceedings on behalf of Somerfield. Furthermore, this statement must be read in context. It does not say, in terms, that the recipient must inevitably be held liable to pay the charge. It goes no further than to say that, in view of the photographic evidence, there can be "little or no question" as to liability; and it states specifically that any dispute over liability would be carefully considered.

476. But the third document in this series, the first of the two letters from CCS is of a different kind. It is specifically stated that, if the demand is ignored, "ParkingEye will issue legal proceedings and will instruct us to prepare the documentation." The context of this statement is also very different. Earlier in the letter it states that its "client" was prepared to go "all the way". Furthermore, it is asserted that the cost of issuing proceedings for what might be regarded as a rather small sum of money was "irrelevant" to its client.

477. I cannot see any answer to the contention that these statements constitute false representations of fact. For my part, I consider that the meaning is quite unequivocal, namely that, at the time the letter was despatched, ParkingEye had both the authority and the intention to commence legal proceedings if payment was not received within the stipulated time limit, and that the cost of such proceedings was not a factor which might prevent it from doing so.

478. Furthermore, it is really quite clear on the evidence that those representations were untrue. Though Somerfield had reserved the right to require proceedings to be taken, if necessary, it was clearly recognised that it was highly unlikely in practice that it would ever have chosen to do so; and it had never authorised ParkingEye to take any such proceedings in any individual case or to give instructions to anyone else to take proceedings on its behalf. Nor, of course, had it decided to do so for itself. Furthermore, as Mr McKerney himself acknowledged, the cost of such proceedings was itself a major factor underlying this general policy, though Somerfield itself may also have wished to avoid any adverse publicity involved in pursuing any actual or potential customer. There was no such intention to institute proceedings and ParkingEye did not have any authority to do so.

479. The question then arises as to whether ParkingEye, in the person of Mr McKerney, actually knew that these representations were false, or that they were made without any real belief in their truth or recklessly, careless whether they were true or false. I adopt that formulation from the speech of Lord Herschell in **Derry -v- Peek** (1889) 14 App. Cas. 337 at 376.

480. For my part, I am quite satisfied that Mr McKerney must have been perfectly well aware that it was highly unlikely that Somerfield would ever

have taken legal proceedings to recover any of these charges from anyone using their car parks, that it was equally unlikely that ParkingEye would ever be instructed to take such proceedings on its behalf and that cost considerations played at least a part in determining its attitude to such matters. He himself accepted that there was no commercial logic in pursuing individuals through the courts and had recommended this approach to Mr Ogden in his e-mail of 28th April 2005. The contract itself expressly provided at paragraph 5d of Schedule 2 that no further action would be taken after the final letter had been sent out, though Somerfield reserved the right, if necessary, to take legal proceedings or to instruct ParkingEye to do so on its behalf.

481. Nothing which he said in cross-examination in any way contradicted or qualified his evidence about these matters. He referred to Somerfield's reservation of its rights under the Agreement; and he emphasised the fact that Somerfield's attitude and instructions might change. So they might. But they did not change and had not changed at any time prior to the termination of the Agreement. Nor did Mr McKerney suggest that he was unaware of, or had overlooked the relevant passages in this letter or seek to suggest that he had understood or intended them to bear a meaning other than that which seems obvious on their face. I did not, in fact, receive a detailed account of how precisely these letters came to be drafted and what part in the process, if any, was played by CCS. But it was not suggested that Mr McKerney did not read and understand them, whatever part he personally might have played in the drafting; and given the extent of his personal involvement in these matters, it seems to me to be highly unlikely that he did not. Not was it suggested that he did not authorise their use.

482. The next question is whether these representations were intended to be acted upon. In my judgment it is clear beyond any possible doubt that they were intended to induce the recipients to pay the charge in order to avoid legal proceedings and all the consequences of a judgment. It will be recalled that there was specific reference in the letter in question to the possibility of a bailiff attending to remove the recipient's goods. Insofar as may be material, Mr McKerney accepted in cross-examination that, at least in part, the purpose of sending out letters of this kind was to persuade them to make a payment, though it was also intended to prevent abuse of the car parks.

483. Furthermore, it is really quite plain that at least some of the recipients must have responded by making the payments demanded of them. I was referred to some helpful figures at Appendix 5 of ParkingEye's expert's report in which were set out the number of notices and letters sent out in respect of each of the sites at which the ParkingEye system was operative. Of the total number of charges actually paid in response to these requests and demands, it appears that 96% were at the discounted rate of £37.50 (which appears to suggest a payment in response to the initial charge notice or the reminder); 3% at the full rate of £75 and 1% at the enhanced rate of £135. Though the amounts involved are comparatively small, it

seems to me that all or most of those who paid at the full or enhanced rates must have done so in response to the third or fourth letters.

484. That leaves the question of loss and damage. In fact, as will be seen, it does not seem that proof of loss and damage by any third party is an essential ingredient in the defence of illegality raised on behalf of Somerfield. But, insofar as it is material, it seems to me that the likelihood is that at least some of the recipients would have suffered loss and damage which could have been recovered by action. It seems to me that it is highly unlikely that none of those who received the third or, for that matter, the fourth letter, would have had a defence if proceedings had, in fact, been taken against them. In fairness, however, the reminder notice which preceded the third letter did refer to that possibility.

485. Leaving aside any question as to whether all or part of the amount claimed could be regarded as a penalty, it is quite clear that there were at least some motorists who alleged that the charge notice had been wrongly issued against them as, for example, because they had entered the car park at a particular time and had left it many hours later, but had, in the meantime left and returned without contravening the prohibition on returning within a specified time. More importantly, perhaps, the notices were, of course, addressed to the registered keeper of the vehicle, who might very well not have been the person responsible for leaving it at the car park in question. There may not have been very many cases of this kind. But it does not seem to me that it matters. The letters made no distinction between those who might have been liable and those who might not. I think it is very likely that at least some of those in the latter category would have paid up in order to avoid the risk of legal proceedings.

486. I conclude, therefore, that all the ingredients of the tort of deceit are made out in relation to the letter which constituted the third document in the series. The fourth letter differs somewhat in its tone and content; and it incorporates dire warnings about the consequences of any judgment being entered against the recipient. But, unlike the previous letter, it does not expressly state that proceedings would be issued or that ParkingEye or CCS were authorised to initiate such proceedings. Indeed, as I observed at an earlier stage, its wording seems to pre-suppose that there had been some communication from the recipient of the previous documentation; but there is no evidence to suggest that it was only in those circumstances that this final letter would be sent out. But, if this fourth letter had stood on its own, I would not have concluded that it incorporated any of the misrepresentations relied on by Somerfield in its Defence.

487. The case on deceit, therefore, in my judgment, turns on the wording of the third letter; and I have concluded that all the elements of the tort appear to be made out in relation to that letter. No legal argument was advanced as to why, in those circumstances, the tort was not committed when the letters were sent out in this form. Considerable emphasis was placed on the fact that Somerfield had itself approved the form and content of the documents in question; and I have concluded that this must be correct. But all that

would follow from that conclusion is that ParkingEye and Somerfield would have been joint tortfeasors; it would not mean that the tort had not been committed.

488. In particular, it was not suggested that it would be a defence to an action of deceit that the person making the misrepresentation honestly believed that he was entitled to any payments which he sought to recover by means of the misrepresentation. Nor was it suggested that it might be a defence if the payments in question were in fact due. If these points had been raised and pursued, I would have had little difficulty in rejecting the first, having regard to the principle set out at paragraph 18-18 of the 19th edition of Clerk & Lindsell. The answer to the second might be less straightforward. But it would not seem to arise on the facts of the present case as I have sought to analyse them. So I do not propose to deal with it further save to say that even if a claim in deceit in those circumstances might be met by a cross-claim for the amount due, damages for other loss, including distress, might also be recoverable.

489. So, I conclude that Somerfield has established that the tort of deceit was committed when the third letter was sent out, or at least when it was acted upon. I confess to some degree of unease about that conclusion. I make no finding of dishonesty, since that is not an ingredient in the tort. Furthermore, in view of my conclusions on the nature of the contractual relationship with the motorist, many, if not most of the recipients of the letters are likely to have been under a legal obligation to pay the charges in question. Indeed, though there was no specific evidence to that effect, ParkingEye no doubt believed that all or most of the recipients were liable to make the payments in question.

490. I accept, furthermore, that there can be nothing wrong in principle in threatening legal proceedings in order to recover monies which are or may be due. I also think that some degree of latitude must be given to anyone threatening legal proceedings in such circumstances. I would not have wished it to be thought that a solicitor, for example, writing a letter before action, would normally be at risk of committing the tort of deceit, depending upon the precise instructions which he might have received from his client and the precise terms of his letter.

491. But the facts of this case are of a different kind. There was a clear and deliberate misrepresentation of ParkingEye's authority and intentions designed to induce payment from the recipients, whether or not they were, in fact, liable. In those circumstances, as I said at an earlier stage, I can see no answer to Somerfield's case on this issue, whether as a matter of fact or of law; indeed no obvious legal defence was advanced on behalf of ParkingEye and there was no substance in the factual matters relied on for that purpose.

492. I should add that I am not unduly impressed by the suggestion that statements of this kind were driven by commercial imperatives. It was suggested that, unless "strong" notices and letters were sent out, very few

people would pay up. It might well be the case, I suppose, as was, I think, suggested in cross-examination, that not many would pay if the notices and letters made it clear that no further action would be taken in the event of non-payment. But that is not, in reality, an appropriate contrast. Leaving aside, for one moment, what are said to be the other objectionable features of the initial notice and reminder, it is clear from the figures annexed to ParkingEye's expert's report that the very large majority of those who paid did so in response to one or other of the first two notices. The additional payments recovered in response to the two later letters represented a very small proportion of the total. But, of course, as will be seen, a considerable number of motorists simply failed or refused to make any payment whatever.

The Administration of Justice Act 1970

493. Somerfield also contends that the sequence of notices and letters constitutes the offence of the unlawful harassment of debtors under section 40 of the Administration of Justice Act 1970 (as amended). In its material parts, section 40 reads as follows:

> "(1) A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he -
>
> (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation;
>
> (b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure pay it;
>
> (c) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or
>
> (d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not.
>
> (2) A person may be guilty of an offence by virtue of sub-section (1)(a) above if he concerts with others in the taking of such action as is described in that paragraph, notwithstanding that his own course of conduct does not by itself amount to harassment.
>
> (3) Sub-section (1)(a) above does not apply to anything done by a person which is reasonable (and otherwise permissible in law) for the purpose
>
> (a) of securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them from future loss; or
>
> (b) of the enforcement of any liability by legal process
>
> (3A) Sub-section (1) above does not apply to anything done by a person to another in circumstances where what is done is a commercial practice within the meaning of the Consumer

Protection from Unfair Trading Regulations 2008 and the other is a consumer in relation to that practice.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine of not more than level 5 on the standard scale."

494. I need not concern myself with sub-section 3A, which was inserted by virtue of the Regulations referred to in the sub-section and which took effect only from 26th May 2008. But, if it were to be held that ParkingEye's conduct, on its face, constituted an offence under section 40(1) it is contended on its behalf that section 40(3) applies so as to prevent the commission of any such offence.

495. Somerfield's case under these provisions is set out at paragraphs 61, 62 and 63 of its Amended Defence. By paragraph 62, it is alleged that by sending the notices and letters, ParkingEye, in concert with CCS "harassed the recipients of Parking Fines with demands for payment which, in respect of the frequency and/or the manner of making such demands were calculated to subject the recipient of the Parking Fines and/or members of his household to alarm and distress." It then summarised the substance and frequency of the notices and letters and set out certain passages from them. That is an allegation of a breach of section 40(1)(a) of the Act. At paragraph 63, it was further alleged that, by acting in this way, ParkingEye "falsely represented *(itself)* to be authorised in some official capacity to enforce payment". In particular, it referred to the use of the word "fine", which was said to be suggestive of a criminal offence. That appears to be an allegation of a breach of section 40(1)(c) of the Act, notwithstanding the reference to a "criminal offence" which might suggest reliance on section 40(1)(b).

496. I was referred to only one authority specifically on the provisions of section 40 of the 1970 Act, namely the decision of the Divisional Court in **Norweb Plc -v- Dixon** [1995] 1 WLR 636, in which an appeal was allowed against a conviction by Norweb of an offence of harassment. But the decision turned on a narrow and what might perhaps be regarded as a somewhat technical point. The supplies of electricity to Norweb's customers and the customer's obligation to make payments were governed by statute, rather than by contract. But the act required demands for payment which were claimed to be due under a contract. Since no such contract existed and none was relied upon as the basis of the demand, there could be no offence.

497. But the court also considered a separate issue, namely the meaning to be attributed to the word "calculated" in section 40(1) of the Act. In a passage which is probably to be regarded as obiter, it was held that the justices were wrong to construe this term as equivalent to the word "intended". It was held that the true construction of the expression "calculated to subject…" was that it meant "likely to subject…" rather than "intended to subject…" It therefore covered the conduct of those who

engaged in conduct which was likely to have the consequences set out in section 40(1), even if they did not intend those consequences.

498. The only other authority to which I was referred arose out of the similar provisions of section 1 of the Protection from Harassment Act 1997. The provision itself is to be found at section 1(1) of the Act, which is in these terms:

> "1(1) A person must not pursue a course of conduct
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other.
>
> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to a harassment of the other".

499. By section 3, a civil remedy is provided for a breach of section 1; and by section 7(2) it is provided that references to harassing a person include "alarming the person or causing the person distress."

500. In the case of **Ferguson -v- British Gas Trading Limited** [2009] 3 All ER 304, the Court of Appeal refused to strike out a claim where the claimant had brought proceedings under the 1997 Act in reliance upon a lengthy series of steps taken by the defendant in pursuit of an alleged debt. The full particulars are set out in an Annex to the judgment of the Court of Appeal which runs to 25 paragraphs. It was accepted that, for a cause of action to arise, there must be a course of conduct, involving at least two acts, and that the conduct must cross the boundary "between unattractive and even unreasonable conduct and conduct which is oppressive and unacceptable". This is derived from earlier authority, albeit in a somewhat different context, which is cited at paragraph 15 of the judgment of Jacob LJ.

501. But it was also recognised, in the same paragraph, that much would depend upon the context; and that the conduct must be of a sufficient gravity to justify the application of criminal sanctions. I also note that, at paragraph 20, the Lord Justice expressed the opinion that it could not be a defence merely that the person subjected to the course of conduct knew that the claims and threats were unjustified. In the circumstances, he considered that it was strongly arguable that the conduct in question was sufficiently grave to cross the boundary, so that the matter would have to go to trial. Though the decision in that case arose out of different statutory provisions, it seems to me that the boundary between conduct which falls within section 40(1) and that which falls outside it must be the same in substance as under the 1997 Act.

502. Now, Mr Chaisty made a passing observation to the effect that no offence could be committed under the Act unless there was in fact a debt. He pointed out that it was Somerfield's own case that there was or may not

have been any contract with any of the motorists in question. The point was not pursued with any vigour; and for my part, I think there is nothing in it. The Act simply requires demands for payment "with the object of coercing another person to pay money claimed from the other as a debt due under a contract." Whilst it may well have been the legislative intention to catch conduct designed to collect debts which were lawfully due, it does not seem to me that it applies only to such cases. Provided that it is "claimed…as a debt due under a contract", the offence is made out provided, of course, that the other necessary ingredients are also established.

503. In my judgment, **Norweb Plc -v- Dixon** supports the view that I have taken. It will be recalled that this was a case where the mutual obligations of the parties arose by statute; and there is no indication that the supplier in fact claimed the money "as a debt due under a contract". What Dyson J said at pages 644-5 of his judgment in that case was this:

> In my view, the offence does not require proof of the existence and terms of a contract which has in fact been concluded between the consumer and supplier, any more than it requires proof that the debt is in fact due. What is required is proof that the supplier has made demands for payment of a debt which he claims to be due under the contract which he claims to exist. It cannot have been intended that it should be an offence to claim a non-existent debt under a contract which in fact exists, but not an offence to claim a debt under a fictitious contract."

504. I turn therefore to the question as to whether a contravention of section 40(1) has, on the face of it, been made out. I note, at the outset, that no more than four notices or letters would have been sent out in any individual instance. So this is not a case in which the recipient would have been bombarded with a lengthy series of demands over a substantial period. But it is right to say that only a comparatively short period elapsed between each successive notice or letter.

505. The first two notices were comparatively restrained. They did, however, seem to me to create a somewhat "official" impression from the use of the chequered border (which I understand is commonly used in the case of fines issued by or on behalf of public authorities) and the use of the word "penalty" on more than one occasion. But the heading, in each case, employs only the expression "parking charge" in large capital letters; and the same expression is used elsewhere in each document. Furthermore, the wording on the back of the notice refers to a "debt" "debt counsellors" and the possibility of legal proceedings in the County Court or Sheriff's Court; and, despite the allegation set out at paragraph 65 of the Amended Defence, the word "fine" nowhere appears. So I am not persuaded that there was any false representation that criminal proceedings might lie for any failure to pay the debt in question insofar as that is, in fact, alleged.

506. Nor am I persuaded that either of these documents embodies any false representation that ParkingEye was authorised in some official capacity to

claim or enforce a payment or that the notices themselves were falsely represented by ParkingEye to have or purport to have some official character. Accordingly, I do not consider that they fall within paragraphs (b), (c) or (d) of section 40(1) of the 1970 Act. Furthermore, I do not consider that, in themselves, these first two documents in the series fall within section 40(1)(a) as they do not seem to me to cross the boundary referred to in **Ferguson -v- British Gas Trading Limited**. But, of course, they provided the launch pad for the third and fourth letters, to which I must now turn.

507. These two letters from CCS are very different in their tone from the first two notices. I have already commented on the content of the third letter with its threat of immediate legal proceedings as to which costs were said to be no object. It also threatens that, in the event of legal proceedings, if the claim was ignored, a bailiff would attend to remove the recipients' goods. It also is suggested that payment should be made in order to avoid "all the hassle and cost", which, it was said, would become "substantial". For good measure, it informs the recipient that ParkingEye's objective was to deter "the dishonest", namely people who were not "genuine customers". There is no indication whatever that there was any way in which the recipient could challenge his liability to pay, though there was a brief reference to such possibility in the earlier reminder notice. But there is nothing in the wording or appearance of the letter which suggests that any criminal proceedings might lie for any failure to pay or that CCS was acting in any "official" capacity.

508. The fourth letter, as I have already noted, seems to assume that there had been some sort of communication from the recipient of the earlier notice, though there was no indication that it would only be issued in such cases. It refers in the first paragraph to the fact that the issue of civil proceedings, followed by judgment and its enforcement could only bring problems for the recipient. Quite apart from costs, this could, at least potentially, involve the removal and sale of personal possessions. It then went on to enlarge upon the implications of a judgment. These would include increased cost of credit, high interest rates and at least the possibility that the recipient might not be able to obtain credit at all. This might result in problems over electricity, gas and water supplies, for which pre-payment might be required in the future.

509. This fourth letter does not, in fact, specifically threaten to take any steps which might affect the recipient's credit rating, except as a consequence of any judgment. But I rather doubt if it would be read in this somewhat legalistic way by many of its recipients. So there would be a further tightening of the screw at this final stage.

510. It seems to me that the essential foundation of Somerfield's case on the harassment issue is to be found in the third and fourth letters and that the central question is whether these letters, taken individually or together, amounted to demands for payment which, "in respect of their frequency or the manner or occasion of making any such demand, or of any threat of

publicity by which any demand is accompanied" were calculated to subject the recipient or members of his family or household to "alarm, distress or humiliation".

511. But an offence is only committed under section 40(1) if the person responsible "harasses" another with demands of this kind. Unlike the position under the Protection of Harassment Act 1997, the 1970 Act does not provide any express guidance as to the meaning of this expression. Thus it does not specifically state that it requires a "course of conduct". But it seems to me that, in ordinary English usage, the word harassment connotes a course of conduct rather than isolated acts. Furthermore, an offence is committed only if the demands are made with the object of "coercing" another person to pay a debt. That seems to me to be quite a strong expression.

512. The demands must also be such as are likely to subject the recipient to alarm, distress or humiliation, applying the gloss applied to the word "calculated" by the Court of Appeal in **Norweb Plc -v- Dixon**. I make two further observations about this test. Firstly, it cannot mean "likely" in the sense of requiring proof on the balance of probabilities. Secondly, in order to make out the offence, it is not essential, in my judgment, that it be established that any recipient was in fact subjected to alarm, distress or humiliation as a result of the demands in question, though the absence of any evidence to that effect may help to cast light on the question whether they were, in fact, likely to have that effect.

513. Finally, of course, I must bear in mind that, as was said in **Ferguson -v- British Gas Trading Ltd**, the demands in question must cross the line between conduct which is unattractive and even unreasonable and that which is oppressive and unacceptable; and they must be of such gravity as to justify the sanction of the criminal law.

514. I confess that I have not found this an easy question to resolve. The third and fourth letters are undoubtedly aggressive and unpleasant in tone; and I think it is likely that some recipients would be alarmed or even distressed by contents, even though there is precious little evidence of any cases in which this, in fact occurred. But in the end I am not persuaded that the offence is made out.

515. First of all, I think it is important to bear in mind that the first two notices, were fairly innocuous, so that I am really concerned only with the two letters sent out in the name of CCS. Whilst two letters could be regarded as constituting a course of conduct, particularly having regard to the two earlier notices, it seems to me that two demands would not normally be regarded as falling within the core meaning of the concept of harassment. Secondly, I think I should disregard, at this stage of the analysis the fact that, as I have found, the third letter contained clear misrepresentations of ParkingEye's intention and authority to commence legal proceedings. That may well be a highly material consideration for the purposes of determining whether a defence under section 40(3) would be available to

ParkingEye if there would otherwise have been a breach of section 40(1). But in applying section 40(1), it seems to me that I must simply look at the wording of the letters and their likely effect on the recipient and not the question whether everything said in them is, in fact, true. If the true position had been that ParkingEye was authorised to take proceedings and intended to do so if the charge was not paid, I think it would be difficult to brand the contents of the letters as harassment.

516. But in any event, I have ultimately to determine whether the manner in which demands for payment were made in the form of these letters, and the threats which they contained, crossed the boundary delineated by the Court of Appeal in **Ferguson -v- British Gas Trading Ltd** and were of such gravity as to justify the sanctions of the criminal law. For my part, I am not persuaded that this test is satisfied. I conclude, therefore that no offence has been made out under section 40(1) of the Administration of Justice Act 1970.

517. If I were wrong in that conclusion, I would, of course, have to go on to consider the effect of section 40(3) of the Act. I did not in fact receive any detailed submissions whatever as to the scope and application of this sub-section. It is obviously intended to permit conduct which might otherwise contravene the provisions of section 40(1) in cases where the debt in question was or was believed to be due, provided that the steps taken to secure payment or enforce liability were reasonable and otherwise lawful. Save as is provided by this sub-section, however, it is important to bear in mind that it is no defence under section 40 that the debt in question was or was believed to be lawfully due.

518. But I do not consider that the provisions of section 40(3) prevent the application of section 40(1) in this case. The sub-section applies only to acts which might otherwise contravene section 40(1) which were reasonable, and otherwise permissible in law, and which were done for either of the two specified purposes set out at paragraphs (a) and (b) of the sub-section. The first of these purposes is that of securing the discharge of an obligation due or believed to be due to the person in question or to the persons for whom he acts or protecting himself or them from future loss. It may very well be the case that, in the majority of instances, the debt sought to be recovered was lawfully due to ParkingEye or, at least that it was believed to be due and owing. It was not specifically put to Mr McKerney that ParkingEye had no such belief. But I cannot see how it could possibly be contended that this could be so in each and every case, particularly in view of the fact that the letters were sent out to the registered keeper.

519. So I do not think that, in each case in which they were sent out, the purpose of the letters can be said to fall within the first part of paragraph (a) of section 40(3). It is true that this paragraph refers to another purpose, namely protecting the person in question or the persons for whom he acts from future loss. In one sense, of course, a major objective of the whole enterprise was to protect Somerfield's commercial interests by reducing

any abuse of its car parking facilities. But I do not readily see how the manner in which the demands were made in these letters (as opposed to the imposition and collection of the charges) could be said to have been designed to achieve that purpose.

520. The other relevant purpose is to be found at paragraph (b) of section 40(3) of the Act. This refers to anything done for the purpose of the "enforcement of any liability by legal process". Obviously, these letters contain clear threats to commence legal proceedings with all the dire consequences which may follow. I am prepared to assume that the words of section 40(3)(b) are to be construed as extending to threats to commence legal proceedings. But if, as I have held to be the case, ParkingEye had no intention or authority to do so, I cannot see how this can properly be said to have been the "purpose" of the letters.

521. But, even if either of these purposes had been made out, the demands made by ParkingEye would have to be both reasonable and otherwise permissible in law. Given the misrepresentations involved in the third letter, I do not see how I can possibly conclude that either of these requirements has been fulfilled. Furthermore, the indiscriminate use of the letters, without regard to the possibility that the recipient might not be liable or might not have the means to pay in full or at once, and without any reference to any procedure which might be invoked in those circumstances would, in itself, in my judgment, properly be regarded as unreasonable. So I conclude that section 40(3) would not prevent the demands made in these letters from contravening section 40(1) of the Administration of Justice Act 1970 if they would otherwise have contravened those provisions.

The Contractual Consequences

522. I must now go on to consider the implications of these findings for ParkingEye's claim for damages under the Agreement. The general rule is not, I think, in doubt. No action may be brought to enforce a contract to perform an illegal act. Indeed, such a contract may itself be an unlawful conspiracy. Furthermore, a particular type of contract may be prohibited by statute, though it is not suggested that this principle has any application to the facts of the present case. Yet further, for some purposes, it may be necessary to distinguish between cases in which the illegal feature was known and intended by one or other or both parties at the time when the contract was made and those where one party subsequently chooses to perform the contract in a legally objectionable manner. The general rule applies in the former case but not necessarily in the latter. If both parties to the contract were complicit in the illegality, neither of them can enforce their contractual rights under the contract. But this principle does not debar an innocent party from pursuing his remedies through the courts.

523. Once again, comparatively little in the way of authority was cited to me; and there was only a limited examination of the principles involved. Mr Fealy relied upon various passages in Chitty on Contracts, 30th edition

(2008) and upon two or three reported cases. I start with certain passages from Chitty. At paragraph 16-007 the following summary was given:

> "**How illegality may affect a contract**. Illegality may affect contracts in a number of ways but it is traditional to distinguish between: (1) illegality as to formation; and (2) illegality as to performance. Broadly speaking the first refers to the situation where the contract itself is illegal at the time it is formed, whereas the latter involves a contract which on its face is legal but which is performed in a manner which is illegal. In this latter situation it is possible for either both or only one of the parties to intend illegal performance. Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract or provide any other remedies arising out of the contract."

524. After some further discussion of these principles, the paragraph concludes with the following passage:

> "The Law Commission has stated that:
>
> > "Generally, it seems that the commission of a legal wrong, or acting otherwise contrary to public policy, in the course of performing a contract does not, at common law, affect enforcement….."
>
> Illegality will only preclude the enforcement of a contract where it has been:
>
> > "…entered into for the purpose of doing [an]….unlawful or immoral act or the contract itself (as opposed to the mode of….performance) is prohibited by law""

525. Further commentary on the distinction between illegality as to formation and as to performance are to be found at paragraphs 16-008 and 16-009. The former, reads as follows:

> "**Illegality as to formation** Contracts may be illegal when entered into because they cannot be performed in accordance with their terms without the commission of an illegal act. Thus the contract may involve a breach of the criminal law, statutory or otherwise, or alternatively it may be a statutory requirement that the parties to the transaction possess a licence and where they do not the contract will be illegal as formed

526. The latter paragraph deals with illegality as to performance in the following words:

> "**Illegality as to performance** The illegality may arise because both or one of the parties may intend to perform the contract in an illegal manner. The court will deny its assistance where both or one of the parties intended to perform a contract in an illegal manner or to effect some illegal purpose. In this situation it is customary to distinguish between the situation where the legally objectionable features were known to both parties and the situation where they are known only to one."

527. It is worth citing the following paragraph of the work, paragraph 16-010, in full. It is in these terms:

> "**Both parties aware of legally objectionable features**. Neither party can sue upon a contract if:
>
> (a) both knew that its performance necessarily involved the commission of an act which, to their knowledge, is legally objectionable, that it is illegal or otherwise against public policy; or
>
> (b) both knew that the contract is intended to be performed in a manner which, to their knowledge is legally objectionable in that sense; or
>
> (c) the purpose of the contract is legally objectionable and that purpose is shared by both parties; or
>
> (d) both participate in performing the contract in a manner which they knew to be legally objectionable.
>
> *Ashmore, Benson, Pease & Co Ltd -v- A.E Dawson Ltd* provides a good example of a contract which was illegal as to performance so as to bar either party from maintaining an action with respect to it. The defendants agreed to transport two boilers belonging to the plaintiffs and did so by carrying the boilers on lorries which could not lawfully carry the loads in question. The goods were damaged in the course of transit but the claim of the owner for damages was rejected; the owner of the goods not only knew that the goods were being transported in an illegal manner but had actually "participated" in the illegality in the sense of assisting the defendant carrier to perform to contract in an illegal manner. However, that a party commits some illegality in the course of performance does not result in his being unable to enforce the contract.
>
> > "The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of … performance) is prohibited by law."
>
> Thus in *St John Shipping Corp -v- Joseph Rank Ltd* the carrier was able to enforce its claim for freight even though it had illegally overloaded its vessel. However, the plaintiff company would not have been entitled to recover freight had it intended from the beginning to perform the contract in an illegal manner."

528. I need not cite the following paragraph, which deals with cases in which the contract does not necessarily involve the commission of any legally objectionable act but where one party has a legally objectionable intention or purpose which is unknown to the other party. In such a case, the innocent party is not precluded from suing on the contract. But I should briefly refer to paragraph 16-012 which deals with the relevance of the parties' ignorance of the law. It starts with a quotation from the judgment of Blackburn J. in **Waugh -v- Morris** (1873) L.R. 8 Q.B. 202, 208 which sets out the following proposition:

"Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not."

529. The passage in Chitty then continues as follows:

"Thus, in *Miller -v- Karlinski*, an employee, whose mode of payment amounted to a fraud on the Revenue, was held unable to recover arrears of salary, whether or not the parties knew that what they were doing was illegal. Equally, where a statute makes the contract itself illegal, the parties' ignorance to the law does not make it the less so. Even where the contract is capable of lawful performance, if the express purpose for which it was made was to do something unlawful, failure by the parties, through ignorance of the law, to appreciate that the purpose was unlawful is irrelevant. But where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced on the ground that there was never a "fixed intention" to do that which was later discovered to be lawful and that while the parties "contemplated" such unlawful act, they did not "intend" to do it. In other words, knowledge of the law is of evidential significance with respect to the parties' intended mode of performance. It is important in this situation that at least the parties seeking to enforce the contract can carry it out in a legal manner. Where the parties do not intend to enter into an illegal transaction but make a mistake as to the characterisation of the contract, for example, treating a contract of service as a contract for services for tax purposes so that it is illegal, the contract has been held to be enforceable."

530. But I was not specifically referred to this passage in the course of argument; and none of the cases mentioned in the body of the paragraph itself or in the footnotes were cited to me.

531. The last two paragraphs from Chitty relied upon by Mr Fealy are to be found at 16-017 and 16-018. The first of these deals with fraud and states in general terms that a contract is illegal where its object is the perpetration of a fraud. The relevant footnote adds the further proposition that: "deliberate deceit, even in the absence of moral turpitude, is sufficient." The case cited in support of this latter proposition is **Brown Jenkinson & Co Ltd -v- Percy Dalton (London) Ltd** [1957] 2 QB 621. But once again, this case was not cited to me during the course of the trial. Furthermore, the final sentence at paragraph 16-017 adds a further qualification in these terms: "However, where the contract in question is remote from the illegality, the court will enforce the contract." But no specific reliance was placed upon this qualification to the general rule; nor was I referred to the case cited in the footnote to this passage. Finally, at paragraph 16-18, the following proposition appears:

> "If a contract has as its object the deliberate commission of a tort, it would seem that the contract is illegal, even though no criminality or fraud is involved."

532. Mr Fealy also cited a passage from the speech of Lord Goff of Chieveley in **Tinsley -v- Milligan** [1994] 1 A.C. 340, 354-355. That case concerned a dispute over a property which had been purchased by two single women as a dwellinghouse and which was vested in the sole name of the plaintiff, but on the understanding that they were to be the joint beneficial owners of the property. The purpose of this arrangement was to facilitate a series of persistent but comparatively minor frauds by both parties on the Department of Social Security. After a dispute arose, the plaintiff brought possession proceedings against the defendant; and the defendant counterclaimed for a declaration that the property was held in equal shares and for an order for sale. The question which was ultimately considered by the House of Lords was whether the Defendant could enforce her rights in view of the illegal nature of the agreement between the parties.

533. The majority of the House held that the defendant was entitled to succeed on her counterclaim, notwithstanding the illegal arrangement. Lord Browne-Wilkinson, with whom Lord Jauncey and Lord Lowry agreed, referred to various modern authorities, the effect of which he summarised as follows at page 370:

> "From these authorities the following propositions emerge: (1) property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract; (2) a plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right; (3) it is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the plaintiff has acquired legal title under the illegal contract that is enough."

534. He then went on to hold that the same principles applied in equity as at common law.

535. So **Tinsley -v- Milligan** was a very different sort of case from the one with which I am concerned in this action. Furthermore, it must be borne in mind that Lord Goff was in the minority in according a wider scope to the underlying principle of public policy. That principle is formulated in the passage from the speech of Lord Goff cited by Mr Fealy by reference to the judgment of Lord Mansfield CJ in **Holman -v- Johnson** (1775) 1 Cowp. 341, 343, in the context of the law of contract. Leaving aside the Latin maxims which have traditionally been invoked, the principle is that:

> "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act."

536. The only other observation which I make about the decision in **Tinsley -v- Milligan** is that every member of the House agreed that the "more flexible" approach that had been adopted in the Court of Appeal did not

represent the law. That heretical approach was summarised in the following passage in the judgment of Nicholls LJ in the court below which was quoted by Lord Goff at page 353:

> "The underlying principle is the so-called public conscience test. The court must weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment."

537. Mr Fealy also referred me to the case of **Standard Chartered Bank -v- Pakistan National Shipping Corp (No. 2)** [2000] 1 Lloyd's Rep 218 and, in particular, paragraphs 3, 26 and 27. The particular purpose for which he cited these passages was to establish that, for the purposes of the tort of deceit, "dishonesty", as that word was used in the criminal law, was not a necessary ingredient. As it happens, however, Evans LJ, at paragraph 44, whilst accepting that, at least in contract cases, the "public conscience" test was not material in the light of **Tinsley -v- Milligan**, nonetheless referred to the "pragmatic approach" described by Bingham LJ (as he then was) in **Saunders -v- Edwards** [1987] 1 WLR 116 at 1134. The passage in question reads as follows:

> "Where the plaintiff's action in truth arises directly *ex turpi causa*, he is likely to fail….Where the plaintiff has suffered a genuine wrong, to which allegedly unlawful conduct was incidental, he is likely to succeed….."

538. The case of **Saunders -v- Edwards** itself was one of those in which the sort of approach deprecated by the House of Lords in **Tinsley -v- Milligan** had been adopted. It involved the sale of a property with an apportionment of the value between the property itself and certain chattels which was false and intended to avoid stamp duty. But it is important to note that the claim was based upon an entirely separate allegation of deceit against the vendor and that Kerr LJ, who gave the leading judgment, specifically declined to consider what the position might have been if the proceedings had been brought to enforce the contract itself. In the event, the Court of Appeal upheld the claim in tort, subject to a reduction in the amount for damages and interest.

539. A further case cited by Mr Fealy was **Birkett -v- Acorn Business Machines** [1999] 2 All ER (Comm) 429. That involved an agreement for the supply of a photocopier which was dressed up as one relating to a different type of equipment in order to obtain the necessary finance. The principal point for which the case was reported was a procedural one which is irrelevant for present purposes. But it was cited to me by Mr Fealy for a somewhat different purpose. One of the arguments raised on appeal was whether the third party which provided the finance was, in fact, deceived. It appears that the judge at first instance had held that it had; and it seems that the Court of Appeal was divided on the point. But that was held to be immaterial. The point was dealt with by Colman J. at page 434 of his judgment. What he said was this:

> "In my judgment, whether Mercury was or was not deceived is irrelevant. The fact is that, so far as Mr Birkett was concerned, the

agreement was indisputably one under which Mercury was *to be* deceived. It was therefore an agreement with at least one illegal object and that object rendered it contrary to public policy that it should be enforced. In these circumstances the judge was under a duty to decline to enforce it."

540. Sedley LJ also addressed the same point at page 436. For his part, he did not consider that the evidence was sufficient to establish that the third party had in fact been deceived. But he also held that this was immaterial, since the illegality inhered in the very formation of the contract and not merely in its performance. The relevant passage is in these terms:

"If therefore the question were, as the judge took it to be, one of illegality of performance, I would hold the evidence to be insufficient to meet the peculiarly high standard demanded by authority and principle. But the first question was not this; it was whether the contract itself was tainted by illegality. On the material before the judge it undoubtedly was. The claimant had agreed, at the defendant's instigation, to lie about the make of photocopier in order to obtain finance. It follows that the contract between these two parties was founded on an intended fraud on a third party, and this, I agree, was enough to render it unenforceable."

541. Mr Fealy also referred me to the decision of the Court of Appeal in **Taylor -v- Bhail** [1996] CLC 377. That was a case in which the plaintiff, who was a building contractor, entered into a contract with the defendant, who was the headmaster of a school, to carry out building works and repairs necessitated by storm damage, the cost of which was to be defrayed by the school's insurers. It was agreed between the parties to the contract that the plaintiff should inflate his estimate by the sum of £1,000 and that this should be paid to the defendant out of the monies provided by the insurers. Some of the work was then carried out and the plaintiff sued for monies allegedly due and damages. The judge at first instance gave judgment for the plaintiff; but the Court of Appeal overruled his decision on the grounds that the contract or contracts between the parties amounted to an agreement to defraud the insurers.

542. It is apparent that, at first instance, the Judge carried out a balancing act of the kind referred to in **Saunders -v- Edwards** [1987] 1 WLR 1116 and by the Court of Appeal in **Tinsley -v- Milligan** [1992] 2 All ER 391. But it seems that his judgment was delivered prior to the decision of the House of Lords on appeal from the latter case, in which the House disapproved of such an approach. In those circumstances, the substantial point taken on the appeal in support of the judgment below was that the contract was severable and that the corrupt payment of £1,000 to the Defendant by means of the deception intended to be practised upon the insurers could be regarded as separate from the contract to carry out building works at a proper price which was not, in itself, in any way unlawful.

543. The Court of Appeal dismissed this argument in a fairly peremptory manner. The leading judgment was given by Sir Stephen Browne P. He put it in this way at pages 380 to 381:

> "The important feature of the case is that the contract was, in substance, an agreement between the appellant and the respondent to defraud a third party, the insurance company. This, in my judgment, is not capable of severance. Mr Harris has invited our attention to a number of authorities, all of which are very different on their facts. In my judgment they do not assist in this particular instance. I say that because it is quite clear, in my judgment, that this was one indivisible contract. The plaintiff could not plead his case or present his claim in court without embracing the whole of what took place between himself and the appellant. Indeed, he did so in his evidence-in-chief. The estimate which was delivered to the insurance company included, with the connivance of both parties, the additional £1,000, which constituted in effect an endeavour to defraud the insurance company for the enrichment of the defendant. From the plaintiff's standpoint, as shown by his own evidence, it provided the inducement to the defendant to give the contract for the work to him."

544. Russell LJ agreed. He also held that there was one indivisible contract. Having cited a passage from the evidence in which the Defendant described the agreement between the parties, he emphasised that he could not read into this dialogue between the parties two contracts, one relating solely to the work done and the other to the unlawful payment of £1,000. He added the comment that: "the one was in no sense collateral to the other." He went on to consider whether the court could sever the lawful part from the unlawful part of the agreement, despite the fact that there was but one contract. But he concluded that the two parts of the agreement were "inextricably intertwined" so that there was no room for severance and the whole of the contract was tainted by fraud.

545. Millett LJ also agreed. He identified the question as being whether the building contract could be identified and enforced separately from "the fraudulent arrangements of which it formed an integral part". He summarised counsel's submission on the point as being to the effect that the conspiracy was ancillary and subsidiary to the building contract, for which provided at best only partial consideration; and that its illegality did not affect the Plaintiff's right to enforce the building contract at the true and not the inflated price.

546. He addressed this argument on page 382 of his judgment in these words:

> "In many contexts it may be important to analyse a transaction in order to determine whether it consisted of a single contract or two contracts. But illegality is a question of substance, not form. Whether the arrangements between the plaintiff and the defendant comprised a single contract or two separate contracts is, in my judgment, immaterial; they constituted a single, indivisible arrangement tainted by fraud, neither component of which was ancillary or subsidiary to the

other, and neither of which is severable so as to leave the other enforceable.

It is important to bear in mind that the law refuses to enforce not only contracts which are in themselves illegal, but also contracts which are *ex facie* legal but which, to the knowledge of the parties, have an illegal purpose or are intended to be performed in an illegal manner. In *Pearce -v- Brooks* (1866) LR 1 Exch 213 the plaintiffs agreed to supply the defendant with a brougham on hire-purchase. The defendant was a prostitute. The jury found that the plaintiffs knew that she intended to use the brougham in the course of plying her trade. The plaintiffs were unable to recover the cost of the hire. This is a well-known example of a contract which is legal on the face of it but was unenforceable because it was intended for an illegal or immoral purpose."

547. He then referred to the case of **Miller -v- Karlinski** (1945) 62 TLR 85 in which an employee was not permitted to recover arrears of salary and expenses from his employer because the terms of his employment provided for him to make inflated claims for expenses as a form of disguised remuneration in order to perpetrate a fraud upon the Revenue.

548. He concluded his analysis of this issue at page 383 in these words:

"In all such cases there is an underlying, lawful contract - to supply a brougham on hire, to engage a workman at a wage, or to build a wall - and in all of them that underlying contract has been rendered unenforceable by the illegal manner in which it was intended to be performed or by the illegal use to which it was intended to be put."

549. I should mention that both Russell LJ and Millett LJ specifically rejected the argument that, notwithstanding the illegality, the Plaintiff could recover for the work legitimately carried out on a quantum meruit basis.

550. Mr Fealy produced one further authority on the issue of illegality. Namely **Hewison -v- Meridian Shipping Services PTE Limited** [2003] ICR 766. The claimant, who suffered from epilepsy, was employed by the defendants as a merchant seaman. His epilepsy would, in fact, have prevented him from being so employed. But he falsely represented on a number of occasions that he did not suffer from the condition. He sustained an injury in the course of his employment and brought proceedings against the defendants to recover damages for his injuries and for his consequent loss of earnings. It was held by the Court of Appeal, upholding the first instance decision of Morland J, that the same principle of public policy underlying the court's approach to the enforcement of illegal contracts applied so as to prevent any claim for damages in respect of that part of his loss attributable to his continuing falsely to assert that he did not suffer from the condition in question. So he was not entitled to recover any damages under that head.

551. Now, Mr Chaisty QC, on behalf of ParkingEye did not subject any of these authorities to any detailed analysis; nor did he cite any further authorities

in support of his argument. But he pointed out that there was no allegation in the Amended Defence of any unlawful conspiracy; but only an averment at paragraph 60 that, at all material times, ParkingEye intended to perform and did perform the Agreement in an unlawful manner. Indeed, Mr Chaisty had very little to say about the potential impact of any illegality on ParkingEye's claim. He did, however, put forward the essentially factual argument that ParkingEye, through Mr McKerney, did not intend to perform the Agreement in an illegal manner, or at least that there was no sufficient evidence to that effect. He also emphasised the fact that, as I have found, the form and contents of the letters were approved by Mr Ogden on behalf of Somerfield; and he submitted that it was obvious that, if Somerfield had raised objections to the form and content of any of these documents, ParkingEye would have made any changes which would be necessary in order to comply with its requirements.

552. I think that this last submission is probably correct. It is Somerfield's case that serious concerns about these documents began to arise in February 2006 and that, once the matter had been investigated, it would have insisted on changes being made. In those circumstances, I think it is likely that, if the Agreement had not been terminated, the third and fourth letters would have been modified so as to eliminate any legally objectionable features.

553. Now, I am far from confident that the legal landscape was fully surveyed in the course of submissions so as to identify all relevant features. But it seems to me to be quite plain that the Agreement itself did not amount to an unlawful conspiracy; indeed, as Mr Chaisty pointed out, no such allegation was made in the Defence. The terms of the Agreement itself, whether express or implied, did not involve any undertaking on either side to carry out any unlawful act. Nor, as it seems to me, can it properly be said that it had some unlawful purpose, albeit one which was not or did not need to be expressed. The Agreement required four notices or letters to be sent out, but it did not prescribe their form or contents. On the face of it, therefore, it could be carried into effect in an entirely lawful manner.

554. The thrust of Somerfield's case, therefore, is that, as a matter of fact, ParkingEye chose to perform the Agreement in an illegal manner when demands for payment were sent out in the form of the third and fourth letters. Furthermore, it is submitted that it must have intended to perform it in this way at the time when the Agreement was made. But the mere fact that a contract is performed in a manner which involves committing some form of offence does not, in itself, necessarily mean that the contract is illegal and unenforceable at the behest of the guilty party. I refer to the commentary in Chitty on Contracts which I have already cited. So, if the case had simply been that, on one, or perhaps a few occasions, a debt collector instructed on behalf of ParkingEye had deceived or unlawfully harassed a debtor, that would not, in itself, have rendered the contract illegal in the sense of preventing ParkingEye from suing upon it.

555. But, it is suggested that it makes all the difference that ParkingEye intended, at the time when the Agreement was made, that unlawful means should be used to extract payment from defaulting motorists. That is supported by the proposition set out at paragraph 16-010 of Chitty and by certain passages in the authorities cited, such as the observations of Millett LJ in **Taylor -v- Bhail** [1996] CLC 377 at 382. But, for my part, I do not think that this principle is applicable to the facts of the present case.

556. In the first instance, I am not satisfied that it would be right to conclude that ParkingEye had a firm and settled intention to act in an unlawful manner at the time when the Agreement was executed. As I have already pointed out, the form and content of the various notices was not prescribed. Nor, indeed, was there any provision on the face of the contract conferring any right of veto on Somerfield in relation to their form and content. It was open to ParkingEye at any time, no doubt in consultation with Somerfield, to decide what form the third and fourth letters should take. As I have previously observed, I have little doubt that if Somerfield had, at any time, required changes to these letters, ParkingEye would have complied with its wishes. It should be recalled that, in the very e-mail by which Mr McKerney sent to Mr Ogden copies of the draft letters, he referred to the need for a "flexible and adaptable approach".

557. Furthermore, insofar as it is material, I rather doubt if either Mr McKerney or Mr Ogden fully appreciated the potential legal implications of the draft letters, though Mr McKerney must obviously have been aware, at least by the time Agreement was executed, that some of the statements in the third letter were untrue. If someone had pointed out the potentially objectionable aspects of these letters, I am quite sure that they would have been changed.

558. Yet further, as I have previously indicated, I do not consider that it could properly be said that the use of unlawful means to collect any of the fines was one of the "purposes" of the Agreement. It simply provided the opportunity or occasion for what, in the event, as I have found, amounted to the tort of deceit. In my judgment any illegality is simply too remote to render the Agreement unenforceable. The position would have been no different if I had found that the demands made in the letters constituted an offence under section 40 of the Administration of Justice Act 1970.

559. The mere fact that Mr Ogden approved the draft letters submitted to him by Mr McKerney on 28th April 2005 does not, in my judgment, affect this analysis one way or the other. If the contract was illegal because of the use or intended use of those letters, it would remain unenforceable at the behest of ParkingEye whether or not Somerfield was a party to the illegality. But the mere fact that these drafts were approved by Mr Ogden on behalf of Somerfield does not necessarily mean that, subject to any question of illegality, there was a binding contract between the parties under which ParkingEye undertook to use letters in that form for the purposes of collecting the parking charges. It is not obvious to me that

there would be any consideration to support such an undertaking. So I do not see that the approval of the drafts, in itself, leads to the conclusion that ParkingEye had entered into a binding commitment to perform its obligations in such a way to render the entire Agreement illegal and unenforceable.

560. Even if there had been a firm agreement between the parties to the effect that letters in this form should be used for the purposes of collection, it seems to me that this would have been entirely separate from the Agreement itself. It is quite different from the situation which was considered by the Court of Appeal in **Taylor -v- Bhail** [1996] CLC 377 in which the corrupt payment and the necessary intention to deceive the insurers was an essential part of the contract upon which the plaintiff sued. Both Sir Stephen Browne P and Russell LJ appear to have accepted that, in principle, where there were two separate contracts, one of which involved illegality and the other did not, the illegal contract might be severed from the other. But, of course, on the facts of the case, there was one indivisible agreement which was tainted by the illegality. Millett LJ also appeared to accept that, in some circumstances, it might be necessary to determine whether there was one agreement or two. But he emphasised that, in relation to illegality, the question was one of substance and not of form. As a matter of fact, he held that what was agreed in that case constituted a single, indivisible arrangement, neither component of which was ancillary or subsidiary to the other so that one could not be severed from the other.

561. That is very far from the present case. If there was a firm agreement to use these letters, it seems to me that it was truly collateral to the principal Agreement. It was entered into on a different occasion and concerned, at most, only one aspect of the way in which the principal Agreement was to be carried into effect. For my part, I consider that it could properly be regarded as an entirely separate contract, so that any illegality is not to be treated as tainting the principal Agreement itself and rendering that Agreement illegal and unenforceable.

562. I conclude, therefore, that the strict rule which, in many cases will preclude a party from enforcing a contract on the grounds of illegality does not apply in the circumstances of the present case. It follows, in my judgment, that ParkingEye can pursue its claim for damages notwithstanding the fact that it used unlawful means in seeking to collect at least some of the parking charges envisaged by the Agreement.

563. But that is not quite the end of the matter. The principle that the court will not assist a party who has to rely upon his own wrongdoing is of a somewhat wider application than the strict contractual rule which I have had to consider in this section of my judgment. I refer, in particular, to the last of the cases cited by Mr Fealy, namely **Hewison -v- Meridian Shipping Services PTE Limited** [2003] ICR 766. It seems to me, therefore, that the court should not permit ParkingEye to recover damages in respect of any part of its alleged loss which depends on the assumption that, but for Somerfield's breach of contract, ParkingEye would have

collected monies from motorists which it would not have received without the use of third or fourth letters.

564. But I have already held that, if the contract had not been terminated in early March 2006, it is likely that Somerfield would have required modifications to the third and fourth letters which would have removed the legally objectionable features. It seems to me, therefore, that there can be no objection in principle to allowing ParkingEye to pursue a claim for continuing loss even in relation to monies which it would have received only after the third and fourth letters had been sent out. I am fairly confident, however, that rather less would have been collected at this stage, if the letters had been modified in this way, than was in fact the case prior to termination. But no arguments were put forward as to how the historic figure might be discounted in order to reflect any such change in procedure; and I do not propose to make any assumptions in the absence of further arguments.

565. In the circumstances, it is not necessary for me to consider ParkingEye's alternative claim for a restitutionary remedy. But if I had held that the Agreement was unenforceable for illegality of the kind alleged, I would have rejected any such claim.

PART VII
DAMAGES

566. I now turn to consider the various issues arising in connection with the causation and quantification of ParkingEye's loss. I have already made a number of findings which are potentially relevant to these issues. For convenience, I propose to summarise them at this point. They are as follows:

(1) On or about 17th January 2006, it was agreed between Mr McKerney and Mr McDonald that Somerfield should be entitled to cancel charges where they might cause damage to its business and reputation but would pay compensation to ParkingEye for each such cancellation at the rate of 65% of £37.50, being the amount of the charge which would otherwise have been paid, discounted for early payment. This works out at a figure of £24.38 in each case.

(2) Though the Agreement contemplated that ParkingEye's system would be installed at 25 Preliminary Stores, only 19 were, in the event, selected and two of those subsequently proved unsuitable. But this was not attributable to any breach by Somerfield of any of the express or implied terms of the Agreement; and any damages for future loss should not be assessed on the assumption that it would have been obliged to make any further sites available at which the system could be installed or that it would, in fact, have done so.

(3) Somerfield did not have an unrestricted power to issue parking permits but was entitled to do so only for members of staff and individuals visiting the store for legitimate purposes otherwise than as customers. The number of permits issued at many of the stores exceeded the number that could reasonably have been expected to have been issued for these purposes; and ParkingEye's estimate that no

more than 25 permits could properly have been issued at any time at any individual store is fair and reasonable. Accordingly, damages are to be assessed on the footing that no more than 25 permits would have been issued at each store.

(4) Somerfield could not and would not have exercised its contractual powers under clause 2.8 to alter the Exemptions set out in Schedule 4 to the Agreement so as to allow its customers free all day parking. Damages should, therefore, be assessed on the basis of the Exemptions set out in Schedule 4.

(5) Likewise, Somerfield could not and would not have increased the free parking time limits so as to allow, in effect, unlimited parking for its customers at each of the car parks in question. Subject to one further qualification, therefore, damages fall to be assessed on the basis of the time limits which were in force at the time when the Agreement was terminated. The qualification is that it is likely that, if the contract had not been terminated, agreement would have been reached for some modest extensions of the time limits at certain stores as requested by Mr Halsall in the document attached to the e-mail which he sent to Mr McKerney on 15th February 2006 after the meeting between the two men earlier that day. That must be taken into account in the assessment of any future loss. But it does not necessarily follow that the outcome of any further discussions about these time limits would have resulted in the acceptance by Mr McKerney of these proposals without some modification.

(6) Somerfield did not exercise any rights of termination under the contract, would not have been entitled to exercise any such rights and would not in fact have done so if the contract had not been terminated at the beginning of March 2006. Damages are, therefore, to be assessed on the footing that the system would have remained in place at each of the 17 stores at which it had been successfully installed throughout the remaining period of the contract.

(7) In principle, ParkingEye cannot claim damages for any loss of revenue which it would have received as a result of sending out the third and fourth letters to motorists, in view of the illegality involved. But if the Agreement had not been terminated in early March 2006, it is likely that these letters would have been modified so as to remove their legally objectionable features. These modifications would probably have meant that they would have brought in somewhat less revenue and this will have to be taken into account in the assessment of its future loss.

The Expert Evidence

567. Each side adduced expert evidence on the issue of damages. The Claimant's expert was Mr Robert Parry, head of Forensic Accounting for the Tenon Group which I am told is the ninth largest accountancy practice in the United Kingdom. His report was dated 14th April 2008 and was served in advance of any report from Somerfield's expert. The expert instructed by Somerfield was Mr Roger Anthony Stamford Isaacs of Milsted Langdon LLP who co-ordinates that firm's forensic accountancy activities. He prepared a report dated 16th July 2009 which was essentially

responsive to the earlier report of Mr Parry. Subsequent discussions were held between the two experts and a joint statement was prepared and finally signed on 29th September 2009.

568. Significant criticism was directed at both experts both in the course of cross-examination and in the counsel's final submissions. Mr Parry had advanced two alternative calculations of ParkingEye's loss, one in the sum of £470,975 and the other in the sum of £1,546,885. But he accepted, in the course of his discussions with Mr Isaacs, that the latter figure was unsustainable because he had failed to take an important consideration into account. I will explain the nature of the error later in this judgment. But it resulted in the really rather dramatic reduction in the latter estimate from £1,546,885 to £750,485. That was a figure which was adopted by Mr Chaisty QC at the opening of the trial.

569. Furthermore, in cross-examination, he conceded that there was an obvious error in the figures which he had adopted for the purposes of calculating the loss of profit at the Calne store. In a nutshell, he had concluded that a loss would have been incurred as a result of the issue of an excessive number of parking permits at that store, even though it appeared from the information which he himself had recorded that only 20 such permits had been issued, which did not exceed the limit of 25 permits per store.

570. The impact of the first of these two errors on Mr Parry's calculations is very striking. It increases his total estimate of ParkingEye's loss by nearly £800,000. Once pointed out, it is a very obvious error, as Mr Parry himself readily accepted. So it is really rather worrying, given its significance, that it was not picked up by Mr Parry himself prior to his discussions with Mr Isaacs. On the positive side, once it was pointed out by Mr Isaacs, he immediately acknowledged the problem and revised his calculation accordingly.

571. The problem over the parking permits at Calne was something which was raised for the first time only in the course of cross-examination. So Mr Parry had no opportunity to consider the point in advance. It is perhaps unsurprising, in those circumstances, that he was unable to explain how it had come about. Be that as it may, it remained unexplained and no application was made on behalf of ParkingEye to adduce any further evidence on the point.

572. These are matters which raise some concerns about Mr Parry's approach. In the circumstances, Mr Fealy invited me to treat his assumptions and conclusions with considerable circumspection. But I am not willing to approach Mr Parry's evidence on the footing that his calculations may be vitiated by some general and unspecified errors. His evidence has been tested by the usual adversarial procedures; and these have highlighted two particular problems with his initial report. No other obvious errors were established on his part, though various other criticisms were made of his assumptions, methods and conclusions. But I will deal with the other matters on their merits.

573. As for Mr Isaacs, Mr Chaisty made a number of criticisms which, he submitted, rendered his evidence of little value in determining how to assess the damages claimed by ParkingEye. In the first instance, he pointed out that Mr Isaacs had not attempted to provide any figure or range of figures of his own in relation to the loss sustained, though he calculated that, on certain assumptions, no loss whatever might have been suffered. It was not suggested to Mr Isaacs that this was in any way a breach of his duty as an expert; and Mr Isaacs himself made it clear in his report that he was not attempting to carry out an assessment but simply to provide "financial background" to assist the court in assessing any such damages. I refer to paragraph 1.4.5 of his report. He elaborated upon this somewhat in cross-examination, pointing out that his report was a response to the report prepared by Mr Parry on behalf of ParkingEye, that he had not been instructed to give an opinion of his own as to the actual loss, if any, sustained and that there were, in any event too many variables to enable him to provide, so to speak, a "ready reckoner".

574. For my part, I think that such a general criticism of Mr Isaacs is unwarranted. This is not a case in which, as was once fairly normal, there had been full disclosure of all potentially relevant documents followed by a mutual exchange of experts' reports. In accordance with the procedural directions given in the case, ParkingEye was required, in effect, to put forward its case on damages in the form of Mr Parry's report. This set out the assumptions on which it was based, the methodology he had adopted, the calculations he had carried out and the conclusions he had reached. Somerfield was then entitled to respond to ParkingEye's case by way of its own expert's report. It seems to me that it was perfectly legitimate for Somerfield and its expert to limit themselves to a critical appraisal of Mr Parry's report without attempting to put forward any alternative analysis which, of course, might have required further documentary disclosure.

575. Nonetheless, section 5 of Mr Isaacs' report was headed "My Own Calculations". As a matter of general impression, one might easily assume that Mr Isaacs was putting forward a positive case that, in all probability, ParkingEye would have suffered no loss whatever as a result of the premature termination of the Agreement. On the face of it, that would be a surprising conclusion which might, in itself, raise real doubts about the methodology adopted by Mr Isaacs in this part of his report.

576. In fairness to Mr Isaacs, however, a more careful reading shows that he was carrying out what he described in cross-examination as a "sensitivity analysis" with a view to showing the "tipping point" at which the project would have gone from profit to loss, depending upon the particular assumptions used for the purposes of the forecast. He pointed out that Mr Parry had assumed that 0.42 charges per space per week would have been generated through the remainder of the contractual period. But if this were reduced to a charging rate of 0.1 per space per week, this would mean that the system would have operated at a loss.

577. In itself, that does not seem to be a proposition which merits criticism. But Mr Isaacs went rather further. At the outset of this section of his report, he sought to draw a comparison between the charging rates achieved by ParkingEye and those which he calculated on the basis of information provided to Somerfield by Town & City Car Parking Limited and by another anonymous car park management company which operated an ANPR system. The former, he suggested, indicated a charging rate of only .037 charges per space per week, less than one-tenth of ParkingEye's figure, as calculated by Mr Parry. He went on to suggest that this supported what he understood to be Somerfield's case that ParkingEye had set the free parking time limits at too low a level and was, therefore, levying more charges than it ought to have done.

578. In cross-examination, however, in my judgment, this exercise was shown to be flawed. The material initially provided by Town & City Parking Limited, as set out at Appendix V of his report was in the form of a table setting out the number of charges raised at a considerable number of sites and the number paid, cancelled or written off. The total number of charges was 4,048 which, it was accepted, amounted to an average of 44 for each store. But there is nothing in this material which gives any indication of the period over which these charges were generated, so it does not seem possible to extract from these figures any charge rate per space per week.

579. But Mr Parry also obtained some further information from Town & City Parking Limited which is set out at Appendix VI of his report and which appears to give the total number of charges generated each month at a number of the stores which it managed. Since it also gives the number of parking spaces for each store, it is obviously possible in principle to work out the charging rate per space per week both for each individual store and as an overall figure. This is the basis of the comparative figure of .037, which he contrasts with Mr Parry's average of 0.42. The information is confined to a period of five months commencing in January. According to Mr Isaacs, these were the first five months of 2009, though the document does not say so on its face.

580. But, there are some very peculiar features about these figures, as Mr Isaacs was compelled to accept in cross-examination. Thus, the Newquay site appears to have generated only one charge during the five month period, though it had no less than 177 spaces. But even more oddly, during the unspecified period referred to in the earlier data set out at Appendix V, no less than 351 charges were recorded at this site, albeit over an unidentified period. Another odd feature of the figures set out in Appendix VI can be demonstrated by reference to the site at Alcester. The charging rate per space per week was 0.005 and there was a total of 84 spaces. This would mean, on average, that only one charge would be levied every 2½ weeks. On the face of it that seems quite remarkably low and constitutes an unconvincing comparison by which to assess Mr Parry's rate of 0.46.

581. But Mr Isaacs did not investigate any of these matters and appears to have adopted the figures which he had been given uncritically. Furthermore, he

does not seem to have given any real weight to the fundamental distinction between the system operated by Town & City Parking Limited and ParkingEye's system. The former was an entirely manual system; whereas, of course, ParkingEye's was fully automated. Mr Isaacs accepted that the automated system was likely to be significantly more efficient than the manual one. But he had made no enquiries about the manner in which Town & City Parking Limited operated its manual system so as to enable him to form any view as to worth of the comparison. In fairness, however, he made a fairly general comment about the distinction between the two systems at paragraph 5.5 of his report, commenting that the manual system might not be as efficient as ParkingEye's system. For that reason, he added that its charging rate per space per week might be "slightly less" than ParkingEye's. In cross-examination, he accepted that it would have been better not to have used the word "slightly".

582. The information supplied by the anonymous ANPR car park operator was set out in Appendix IV to Mr Isaacs' report. It was even less detailed and specific than that supplied by Town & City Parking Limited. It simply provided figures for 76 sites, giving the total number of tickets issued and the number subsequently paid. It provides no further details, even as to the period over which these charges were levied. But, in the absence of such further details, it is difficult to see how any meaningful comparison could be drawn between the charge rate per space per week achieved by this provider and those achieved by Town & City Parking Limited and by ParkingEye itself. But Mr Isaacs did not investigate these matters further. In fairness, however, the only figure derived from this information upon which he specifically relied was that relating to the payment ratio, which is a matter which I will have to deal with separately later in this judgment.

583. This was a very unsatisfactory section of Mr Isaacs' evidence. It appeared to support a case advanced on behalf of Somerfield relating to time limits; and it suggested that ParkingEye's claim appeared to be based on figures which were wholly out of line with the results achieved by other service providers. But, on closer examination, the exercise seems to have been based on comparative material of little if any value which he had not investigated further. But he made no reference to this in his report. In my judgment, once he had decided to pursue this line of inquiry, he should have made clear its limitations.

584. In the light of these unsatisfactory aspects of this part of his evidence, Mr Chaisty invited me, in effect, to disregard Mr Isaacs' evidence in its entirety. It is a factor which I bear in mind in assessing the quality of the other opinions which he expressed, where those are subject to serious challenge or dispute. But, as in the case of Mr Parry, it seems to me that I should consider his evidence about other matters on its merits; and that is what I propose to do.

Mr Parry's Approach

585. As I have said, ParkingEye's case on damages is set out in Mr Parry's report, as subsequently qualified in the joint statement of the experts and his oral evidence. No alternative approach to damages was advanced by Somerfield; and Mr Isaacs' evidence was, in effect, simply a critique of Mr Parry's approach. Accordingly, I propose to summarise Mr Parry's methodology and conclusions and then deal individually with the various attacks upon it.

586. For the purposes of his report, Mr Parry had been provided with various types of material, including schedules of offences generated at the sites operated by ParkingEye for Somerfield and for other clients, as well as details of the payments made and cancellations. This material, it would seem, had been provided by Mr McKerney and Mr Waterson and had been extracted from the records of ParkingEye and of Waterson Consulting Limited (which was responsible for the installation and removal of the system). Both Mr McKerney and Mr Waterson gave evidence on behalf of ParkingEye; but there was no challenge to the accuracy of the information which had been gathered and passed on to Mr Parry. It is true that, in his own report, Mr Isaacs did not specifically admit the accuracy of the data in question. But, so far as I am aware, there was no request on the part of Somerfield for an opportunity to investigate the validity and accuracy of the figures in question.

587. Nonetheless, in the course of his cross-examination of Mr Parry, Mr Fealy seemed at one stage to be suggesting that the figures in question might not be reliable and accurate. But he made no positive challenge to them in their entirety, though he indicated that he might wish to make submissions on the burden of proof in due course. In the event, he did not do so, though he raised questions as to the accuracy of certain figures relating, in particular, to the number of charges which might have been generated if parking permits had been limited to a maximum of 25 per store. In all the circumstances, I see no reason not to accept the accuracy of the underlying data relied upon by Mr Parry for the purposes of his analysis, save where some specific challenge is made to the figures in question.

Basis 1

588. Mr Parry summarised his calculations at Appendix 15 of his report in two columns headed "Actual" and "Claimed Basis". Mr Isaacs, for his part, adopted a somewhat more neutral and convenient terminology describing them as "Basis 1" and "Basis 2" respectively. I will follow his example and deal first with Basis 1.

589. In essence Mr Parry's approach to the assessment of ParkingEye's loss under Basis 1 was simple and unremarkable. He took the actual figures achieved by ParkingEye prior to termination at each of the stores at which the system had become fully operational and projected them forward over the full period of the Agreement. It will be recalled that only 19 stores had ever been selected and agreed as suitable candidates for the installation of the system and that two of these proved, in the event, to be unsuitable.

Furthermore, it seems that three of the remaining 17 never became fully operational. Accordingly, historic data was available only for 14 stores; and the figures are summarised at Appendix 5 of Mr Parry's report.

590. In Appendix 5, Mr Parry distinguishes between charges "loaded" and those where a charge notice was actually issued. Charges were "loaded" when the system detected a vehicle which had remained on the car park in excess of the prescribed time limit. But in only 91% of cases was a charge notice actually issued. There were a number of reasons for this, most obviously where the identity of the registered keeper could not be ascertained. At these 14 sites, a total of 6,520 charges were "loaded" but only 5,928 of these resulted in the issue of a charge notice.

591. Mr Parry's Appendix 5 then sets out the total number of cases in which a second, third or fourth notice or letter was issued. The relevant figures were 2,593, 1,024 and 299 respectively. He then records the number paid at the discounted rate of £37.50, at the full rate of £75 and at the enhanced rate of £135. A very large majority, 2,867 in all, were paid at the discounted rate; only 100 were paid at the rate of £75 and only 27 at the enhanced rate of £135. Expressed as percentages of the number of charges actually paid, only 3% were paid at the full rate and 1% at the enhanced rate. The total number of cases in which payment had in fact been made was 2,994, representing 46% of all charges loaded and 51% of those cases in which a charge notice had been issued.

592. Mr Parry then set out various figures recording the number which had remained unpaid for various specified reasons including 784 which were said to have been cancelled on grounds of negative publicity.

593. The summary set out in Appendix 5 allowed Mr Parry to calculate the historic payment ratio, that is to say the percentage of cases in which payment was actually made after a charge notice had been loaded or issued. The figure which he obtained was 51%. But Mr Parry also needed to determine the average number of charges loaded per space per week at the 14 sites in question. The relevant figures were set out in the first part of Appendix 4 and carried down to a more detailed analysis which he set out in Appendix 7. The latter set out the details in tabular form, giving the number of available spaces at each car park (including the five at which the system had not become fully operational), the number of weeks over which charges had been loaded and the actual number of charges loaded during the period of operation, distinguishing between those loaded in the first four weeks and those loaded subsequently. He then calculated the average number of charges loaded per space per week at each car those over the first four weeks of operation and thereafter.

594. Though there was considerable variation between individual sites, the average number of charges per space per week during the first four weeks was 0.61; and the average number thereafter was 0.42. The importance of this figure is that it represented Mr Parry's attempt to take into account what was called the "drop off" ratio. It was recognised by both him and

Mr Isaacs that it was likely that more charges would be raised in the first few weeks of operation and that the number would then tail off somewhat as motorists became more familiar with the system and took steps to avoid having to pay any charges. Mr Parry's calculation, on the basis of these figures, was that the drop-off ratio was 69% when one compared the number of charges loaded in the first four weeks with what happened thereafter.

595. I make one further observation about the figures in Appendix 4 and Appendix 7. They diverge very slightly from those set out in Appendix 5, the total number of charges loaded being recorded as 6,512, rather than 6,520. I do not know the reasons for this slight divergence but, so far as I am aware, no point was taken upon it.

596. The next step in Mr Parry's analysis was to use these figures for the purposes of projecting the loss of revenue forward throughout the entire period of the Agreement. The details were set out in Appendix 9 which used the historic data as the basis of a separate projection for each individual car park. He did so, of course, by applying the appropriate charge per space per week to the number of available spaces multiplied by the number of weeks which the Agreement still had to run. In this way, he sought to calculate the number of charges which would have been loaded if the Agreement had continued to operate throughout its full term; and this figure could then be used to calculate the resulting loss of income. Insofar as the exercise was limited to the 14 sites which had become fully operational, that seems entirely straightforward. In the case of each of these car parks, he simply used the average charge per space per week for that particular site as the basis of his projection.

597. But Mr Parry also sought to apply the same approach to the stores which had not become fully operational; and he included within this category the two stores which had subsequently proved unsuitable as well as a further six unidentified sites intended to bring the total number up to the full complement of 25 Preliminary Stores. In order to do so, he simply multiplied the average figures for the number of charges per space per week (based on the historic data for the sites which had become fully operational) by the average number of car parking spaces at those stores. The starting date for this projection was 9th January 2006, which he adopted on the footing that it was the latest date at which any of the selected stores had actually gone live. The net result of the computation set out at Appendix 9 is that the total charges shortfall extrapolated over the remaining period of the Agreement was 42,433.

598. This figure represents the projected number of charges which would have been loaded if the Agreement had continued for its full term in respect of 25 stores. But, since the historic data showed that it was only in 91% of the cases in which a charge had been loaded that a charge notice was actually issued, Mr Parry applied that percentage in order to ascertain the number of charges loaded which would probably have resulted in the issue of a charge notice. This produced a figure of 38,614. But he noted at

paragraph 43 of his report that this might be conservative and that it was at least arguable that a higher percentage figure should have been adopted.

599. The next step, of course, was to determine what proportion of these would have resulted in payment. This was calculated by the application of the payment ratio which, on the basis of the historic data, he had calculated at 51%. This meant that payment would probably have been received in respect of 19,693 charges.

600. Mr Parry then set about calculating the amount of revenue which would have resulted from these payments. He did not attempt to break it down between payments at the three different rates. Instead, he took a composite rate based upon the weighted average of the payments actually received. His figure, which is set out at Appendix 5, is £39.60. This which reflects the fact that the overwhelming preponderance of payments received was at the discounted rate of £37.50. By multiplying this weighted average of £39.60 by 19,693, representing the likely number of payments, Mr Parry arrived at a total loss of revenue of £779,800. This was the base figure which he used for his computation of ParkingEye's loss on Basis 1, which is summarised at Appendix 15 to his report.

601. Mr Parry then added three further items to this base figure in order to calculate ParkingEye's total loss. The first of these was the sum of £19,110 in respect of negative publicity charges payable by Somerfield where charges had been cancelled on those grounds. The total number of such charges, as set out in his Appendix 5, was 784, in respect of each of which Somerfield had agreed to pay ParkingEye the sum of £24.38, that is to say 65% of £37.50.

602. The second of these three additional items was the sum of £2,390 which he described as "late permit administration charges". This arose by way of the application of clause 9.5 of the Agreement under which, it will be recalled, Somerfield was entitled to cancel up to 25 offences each year in respect of vehicles which should have been recorded as permit holders. Any cancellation on these grounds in excess of 25 each year gave rise to a charge of £10 in each case. It is not clear to me how Mr Parry arrived at his base figure of 239. I am prepared to accept that it was based upon figures provided by ParkingEye upon which he was entitled to rely. Furthermore, it does not appear to form the basis of any continuing loss after the date of termination.

603. The last of these three additional items is the sum of £4,375 representing costs which ParkingEye incurred and which it was assumed would not have been incurred but for early termination. The details were set out at paragraphs 72, 73 and 74 of Mr Parry's report. The sum of £1,700 was attributable to the early termination of various supply contracts, brief details of which had been provided by ParkingEye's accountants and were set out in Appendix 12. The balance of £2,675 represented wasted expenditure incurred by CCS which had been charged to ParkingEye's account.

604. Arithmetically, these various items add up to the grand total of £805,675. But Mr Parry properly recognised that the early termination of the Agreement meant that costs were saved by ParkingEye and that these would have to be deducted from the total revenue figure in order to determine the likely net loss of profits arising from the early termination of the Agreement. The largest single item related to the processing costs which would have been payable to CCS. The basis of this calculation was set out at paragraphs 64, 65, 66 and 67 of Mr Parry's report. As appears from those paragraphs, Mr Parry adopted an average or composite figure of £7.30 for each charge paid. Adopting this figure, Mr Parry calculated that ParkingEye would have been charged a total of £144,000 by CCS for collecting the charges which would probably have been paid during the remainder of the Agreement.

605. There was no challenge to the arithmetical accuracy of this calculation. But, as Mr Parry also made clear in these paragraphs in his report, ParkingEye had actually paid CCS at a slightly higher rate prior to the termination of the Agreement. These payments represented an average of £9.36 per charge paid. Mr Parry noted that this figure had been challenged by ParkingEye as being above the level of the charge rates agreed with CCS and that it was expecting a refund. His figure of £7.30, therefore, was based upon his understanding of what had been agreed with CCS rather than what had been invoiced and paid. However, no refund has apparently been obtained from CCS and no further evidence was provided to justify the lower figure. Accordingly, it was ultimately conceded that the total amount of the costs saving to be deducted under this head must be calculated at the higher rate of £9.36 per charge paid.

606. The remaining operating costs which Mr Parry considered would be saved as a result of the early termination of the Agreement are set out under a number of headings in Appendix 15 to his report. There are five items in all, comprising the net savings on monitoring and line rental and other site costs, as well as the average weekly cost of maintenance and repair carried out by Waterson Consulting Limited. Further details are set out at paragraphs 68, 69 and 71 of Mr Parry's report. He does not, however, include any provision for savings on staff overheads. As he explained at paragraph 70, he did not think it was appropriate to assume that any additional staff costs had been incurred for the purposes of the Agreement or saved when it was terminated.

607. The total amount saved by reference to these five items was £190,700. To this must, of course, be added the processing costs which Mr Parry had calculated at the rate of £7.30 per charge paid. Adopting this figure, therefore, his calculation showed that total savings of £334,700 were to be set against the projected loss of revenue and withdrawal costs of £805,675, giving a figure for the likely net loss of profits of £470,975.

608. In principle, it seems to me that Basis 1 represents a perfectly orthodox approach to the calculation of future loss of this kind. But various

modifications would have to be made to the calculation in the light of the concession made by ParkingEye as to the costs saved in respect of the charges payable to CCS and to take account of the findings which I have already made.

609. Firstly, the claim would have to be limited to the 17 sites at which the system was successfully installed. That would seem to be a comparatively straightforward exercise. Secondly, account would have to be taken of my finding that ParkingEye is not entitled to claim damages in respect of any charges which would have been paid only as a result of the use of the third and fourth letters in the form in which they had been used prior to termination. That is a matter upon which I will, if necessary, hear submissions. But it seems at first blush that only a modest discount would be appropriate. The proportion of payments received after the issue of the third and fourth letters appears to have been only a very small percentage of the total. Furthermore, as I have found, if the Agreement had not been terminated, it is highly likely that the letters would have been modified so as to remove the legally objectionable features, though it is likely that this would have led to a slight reduction in the amounts paid in response.

610. Thirdly, there would also have to be taken into account my finding that there would probably have been some increase in the free parking time limits at certain stores, though not necessarily to the full extent proposed by Mr Halsall in his e-mail of 15th February 2006. Once again, if necessary, I will hear submissions on the point.

611. I will, of course, also have to determine whether any further modifications will have to be made to Mr Parry's Basis 1 calculation in the light of further challenges made on behalf of Somerfield which I will have to consider in due course.

Negative Publicity

612. But there is a further element in ParkingEye's claim which has to be taken into account in conjunction with Mr Parry's calculation of post-termination loss on Basis 1. It will be recalled that, at trial, Mr Chaisty QC sought permission to pursue a claim in respect of an additional head of damages and that I have decided that such permission ought to be granted. It arises out of the agreement by which Somerfield agreed to pay ParkingEye a sum equivalent to 65% of £37.50 on each occasion when it cancelled the charge on the grounds of negative publicity. In respect of the period prior to termination, of course, such a claim has already been included in Mr Parry's Basis 1 calculation in the total sum of £19,110.

613. But, for some reason, Mr Parry did not follow through the logic of his general approach and include within his projection of future revenue on Basis 1 any element attributable to such negative publicity payments. This only became apparent during the course of his cross-examination by Mr Fealy. At a very late stage, Mr Isaacs and Mr Parry were able to discuss this head of claim and signed a further joint statement dated 24th June 2010 in which they set out an agreed computation of the likely loss of revenue

under this head based upon the rate at which negative publicity charges has been incurred prior to termination. This produced a projected figure of 5,020 such charges, resulting in a claim for £122,363, on the footing that, in each case, Somerfield would have paid ParkingEye 65% of the discounted charge of £37.50.

614. In this supplemental joint statement, the experts took into account any potential savings in respect of costs payable to CCS. They considered three possibilities. One of these was that no such charges would have been incurred at all; and the other two provided for savings at the alternative rates of £7.30 or £9.36 to which I have already referred. At the lower of these two rates, the net loss of income was £85,717; and at the higher rate it was £75,376.

615. It was not made clear to me in the course of final submissions whether the full amount or one or other of the two net figures was relied upon by Mr Chaisty. But, in the absence of any argument or good reason to the contrary, it seems to me that I should take the lowest of these three figures as representing ParkingEye's claim under this head. Indeed, though he did not elaborate upon it, this appears to have been the basis upon which, in the course of closing submissions, Mr Chaisty indicated that the total amount claimed under Basis 1 was £546,351 which is, of course, the sum of Mr Parry's original figure of £470,975 and the lowest of the three sums claimed in respect of negative publicity charges.

616. Once again, the additional head of claim in respect of negative publicity charges seems to me to have been calculated in a perfectly orthodox manner. It represents simply a projection of the historic figures over the full life of the Agreement. So, at first blush, subject to the qualifications which I have already mentioned, the calculation of ParkingEye's loss, as set out in Mr Parry's Basis 1 and the supplemental joint statement of 24th July 2010, seems to be entirely sound in principle. Indeed, Mr Isaacs did not seek to criticise the general approach adopted by Mr Parry.

Basis 2

617. I now go on to consider Mr Parry's computation under what has been referred to as Basis 2. The original version of this computation was set out, in summary form, in Appendix 15 to Mr Parry's report, alongside his similar summary of his Basis 1 calculations. It was this original version of the Basis 2 calculation which led to the quite remarkable conclusion that ParkingEye had suffered a loss of no less than £1,546,885, which was the amount adopted in ParkingEye's Amended Particulars of Claim, which simply referred to Mr Parry's report for full particulars as to how the sum was calculated.

618. I describe that figure as "quite remarkable" in view of the overall financial performance of ParkingEye as shown by its audited and unaudited accounts for the periods ending 31st August 2005, 2006, 2007 and 2008. After initially operating at a loss, it moved into profit for the year ended 31st August 2006, showing a gross profit for the period of £800,652.

During the following year, the gross profit increased to £1,183,550; and during the year ending 31st August 2008, it increased yet again to £1,900,565. ParkingEye appears, therefore, to have been a very profitable company. But the loss of profits originally claimed under Basis 2 in respect of this single Agreement with Somerfield was considerably more than the total gross profits made from its entire operations in the year ending on 31st August 2007. One might have thought that this would in itself have led to some concerns as to the reliability of the exercise.

619. The reason why this figure was so much greater than that claimed under Basis 1 was principally to be found in the way in which Mr Parry sought to calculate the impact of ParkingEye's case that no more than 25 free parking permits should have been issued for each site. Albeit on the basis of some very exiguous evidence, I have reached the conclusion that this contention has, in fact, been made out.

620. As appears from paragraphs 47, 48, 49 and 50 of his report and Appendixes 4 and 10, Mr Parry first attempted to determine the number of charges which would have been generated prior to termination if the maximum number of permits issued at any site had been limited to 25. The data upon which he based this calculation had apparently been provided by Mr Waterson. The figures set out at Appendix 4 seem to show during the period of actual operation, a further 7,949 charges would have been loaded if the limit had not been exceeded.

621. Mr Parry went on to calculate the total number of charges which would have been loaded over the entire life of the contract if no more than 25 parking permits had been issued at each store. The details of his computation are set out in Appendix 10. This shows that the total would have been 100,597, from which there would have to be deducted 6,512, representing the number of charges actually loaded prior to termination, so as to give a net figure of 94,085.

622. So far as I can tell, the calculations set out in Appendix 10 do not, in fact, incorporate or depend upon the number of excess charges for the period prior to termination derived from the data set out in Appendix 4. What he appears to have done is to calculate the number of charges per space per week which would have been loaded at each site during the first four weeks of operation, if there had been a limit of 25 permits in each case, and to apply a drop-off ratio of 65% for the remainder of the contractual period. That contrasts with the drop-off ratios adopted for the purposes of Basis 1 which were based on the historic data for each site. In relation to the sites which had not been selected or which never became operational, he used the average figures derived in relation to the other sites. This gave him an estimate of the total number of charges which would have been during the entire life of the Agreement, from which he had to deduct the number which had in fact been loaded prior to termination.

623. Having arrived at a figure for the number of additional charges which would have been loaded, Mr Parry then sought to ascertain the number that

would have resulted in a charge notice being issued by applying the same percentage as under Basis 1, namely 91%. The resulting figure was 85,617.

624. Mr Parry's next step was to try to determine the number of such charges which would have resulted in payment. Unlike his use of the historic figure of 51% in his calculation under Basis 1, he adopted a higher conversion rate of 62% for the purposes of his Basis 2 calculation. This gave him a figure of 53,083 additional payments. He then calculated the gross and net loss in precisely the same way as he had done in his calculation under Basis 1, adopting the same weighted average payment of £39.60. The only other difference between the two calculations was, of course, that there would have been significantly greater savings in processing costs, even calculated at the rate of £7.30 per charge.

625. In summary, therefore, the major difference between the two calculations is that, under Basis 2, Mr Parry sought to determine the total number of fines which would have been loaded, both before and after the date of termination, if there had been a limit of 25 free parking permits at each site. But he also used a higher payment ratio of 62%, compared with the historic figure of 51%. Furthermore, he applied his average drop-off rate of 65% to all of the sites after the first four weeks, whereas, for the purposes of Basis 1, he had taken the historic drop-off rates after the first four weeks at each store.

Basis 2A

626. But, as Mr Isaacs pointed out in his own report, Mr Parry's calculations under Basis 2 assumed that, in each case where a motorist who had an "invalid" permit parked his vehicle on one of the car parks in question, a parking charge would in fact have been loaded and issued. His observations on the point are set out in some detail at section 4 of his report. At paragraph 4.1.12, he suggested that there was no reason to think that any of the individuals concerned, or more than a comparatively small number, would have incurred a charge if no parking permit had been issued to him.

627. When this point was canvassed with Mr Parry during the course of the discussions between the experts, he appears immediately to have accepted the force of the argument and produced a revised version of Appendix 15 which was annexed to the joint statement of the experts. In this revised version, he added a further column in which he set out an alternative calculation. It is this alternative approach which I will refer to as Basis 2A. In this calculation, he entirely excluded any claim based upon the issue of excessive numbers of parking permits, insofar as that related to the future. But he sought to preserve such a claim insofar as it related to what had actually happened prior to termination.

628. In order to do this, he simply added the additional 7,949 charges referred to at Appendix 4 to the 42,433 charges derived from his Appendix 9 which he had employed for the purposes of his Basis 1 calculation. This resulted

in a total of 50,382 additional charges loaded, from which he derived a figure of 45,848 cases in which charge notices would have been issued by applying the usual factor of 91%. Adopting the same payment ratio of 62% as he had used in his original calculation under Basis 2, rather than the 51% figure used for the purposes of Basis 1, Mr Parry then calculated that 28,426 of these would have resulted in payment which, at the usual composite average rate would have resulted in total revenue of £1,125,700, as compared with the original Basis 2 assessment of £2,102,100. The computation then followed the same model as the others, deducting the assumed net savings, in order arrive at a bottom-line figure of £750,485, representing the net loss of profit.

Somerfield's Critique

629. But I must nonetheless consider the various challenges to these calculations which were mounted on behalf of Somerfield. Most of these have already been dealt with, insofar as they depend upon the various contractual issues which I have attempted to resolve earlier in this judgment. But there remains one broad challenge mounted by Mr Fealy to the entirety of the claim together with several specific challenges directed at particular aspects of Mr Parry's approach.

630. Mr Fealy's fundamental attack on ParkingEye's case was based on the proposition that ParkingEye had advanced a claim which was grossly exaggerated and had not pleaded any alternative case. I refer to paragraphs 2 and 3 of his closing written submissions. He referred me to the observations of Stuart-Smith LJ in **Senate Electrical Wholesalers -v- Alcatel Submarine Networks Limited** [1999] 2 Lloyd's Rep 423 at paragraph 53 on page 435. At paragraph 50 of his judgment, the Lord Justice referred to the general procedural requirement that a party must plead the damage claimed and set out the method by which he arrives at the amount of the claim; and that any alternative method of calculation intended to be relied on should also be pleaded. Paragraph 53 of his judgment, upon which Mr Fealy primarily relies is in these terms:

> "It not infrequently happens, especially in personal injury cases in relation to the assessment of future loss of earnings, that the plaintiff's case is greatly exaggerated, being based on unrealistic prospects of promotion and success which the Judge rejects. In such cases, provided that the Judge is satisfied that there will be continuing loss of earnings, he may well have to do his best on such material as is available to find a proper and reasonable basis of assessment of the question. The plaintiff cannot complain if, through opening his mouth too wide, he fails to prosecute a more modest claim and the Judge does not deal with the matter as sympathetically as he might otherwise have done."

631. It is Mr Fealy's submission that ParkingEye has "opened its mouth too wide" in the present case and that no quarter should be given to it insofar as it is unable to make out its claim in full. That proposition appears to be directed principally at ParkingEye's alternative case founded on Mr Parry's Basis 2 computation and the very substantial downward revision

which Mr Parry was obliged to make as a result of his discussions with Mr Isaacs which is now embodied in his calculation on Basis 2A. But I think that there was also a more general point founded upon the procedural requirements referred to by Stuart-Smith LJ at paragraph 50 of the judgment cited, namely that the court should not allow a claimant to pursue an unpleaded alternative case if his case as pleaded is shown to be unsustainable in any material respects.

632. Insofar as Mr Fealy sought to attack Mr Parry's Basis 1 calculation in its entirety on these grounds, I have no hesitation in rejecting it. ParkingEye's case under Basis 1 was set out with great clarity in Mr Parry's report and was concisely summarised at Appendix 15 to that report. Mr Isaacs appeared to have no difficulty whatever in understanding the case advanced by Mr Parry, save for one or two limited matters upon which he sought clarification during the course of the discussions which led to the original joint statement.

633. It is true that ParkingEye's case was not pleaded in anything other than the most general terms. Opinions may differ as to whether the case management directions given during the course of these proceedings should have required a more detailed pleading. But it seems to me that it was plainly envisaged and understood that the details of its claim for damages would be set out in its accountancy expert's report which was to be served before Somerfield's expert evidence so as to give both its legal advisers and its accountancy expert a full opportunity to meet it.

634. What remains of Mr Fealy's submissions on this point is that some of the elements in the case under Basis 1, as formulated in Mr Parry's report, had not been made out in full, so that the calculation may need certain amendments or modifications. That is not particularly surprising in a case such as the present where virtually every point appears to have been put in issue. Indeed, one of the reasons which Mr Isaacs himself gave for not attempting to put forward his own counter-assessment was that there were simply too many variables. At least in relation to Basis 1, all that will be required is for the court to consider the effect of the changes to these variables which reflect my findings on various specific issues. It is not as if some true alternative case was being put together during the course of the trial. Provided that there is sufficient evidence to enable the court to make any necessary adjustments, there can be no question, in my judgment, of rejecting the claim as a whole, simply because some ingredients have not been established to their full extent or because a successful attack has been made on certain aspects of the claim.

635. So even though I have held that the claim based upon Mr Parry's Basis 1 calculation cannot be upheld in full, I can see no possible justification for dismissing it in its entirety. It is true that the additional head of claim for a continuing loss in respect of negative publicity payments was advanced only at a very late stage in the proceedings. But it was clearly formulated; and the experts appear to have had no difficulty in agreeing the appropriate calculation based upon historic figures. Furthermore, for reasons which I

have already set out, I consider that it has sufficient merit to justify its inclusion as an additional head of damages. Accordingly, Mr Fealy's general attack fails in its entirety in relation to Basis 1.

636. But I am more sympathetic to Mr Fealy's general submissions that little latitude should be allowed in relation to ParkingEye's claim under Basis 2, as now presented in its modified form under Basis 2A. If I were to conclude that the assumptions made for the purposes of that calculation were unsound in relation to the impact of a limit of 25 on the number of parking permits which could be issued at each store, I would be disinclined to allow any further alternative calculations of damages to be put forward on that footing.

Parking Permits

637. I now turn to the more specific challenges to Mr Parry's approach. I start with the question of parking permits. ParkingEye's case that damages are to be assessed on the basis that there was a limit of 25 on the number of parking permits which could be issued by each store formed the fundamental premise of Mr Parry's Basis 2 calculation. But as I have already explained he readily accepted that this was flawed because of its failure to take into account the fact that motorists would probably have behaved differently if they did not have such a permit. So Basis 2 was effectively abandoned by ParkingEye and replaced by the alternative calculation under Basis 2A.

638. Basis 2A represents a radical downward revision of the original calculation under Basis 2. But it was nonetheless the subject of vigorous challenge by Mr Fealy on various grounds. The most substantial was that, by continuing to assert a loss attributable to the issue of an excessive number of permits, Basis 2A fell essentially into the same error as had infected the original Basis 2 calculation and had led to its substantial downward revision. Mr Chaisty QC sought to maintain this revised version by submitting that it reflected the actual historic position. A substantial number of individuals to whom "invalid" parking permits had been issued had, as a matter of fact, overstayed and would, therefore, have incurred a charge but for the protection apparently afforded by the parking permit. If the parking permit had not been issued, therefore, a charge would undoubtedly have been loaded on each such occasion.

639. Mr Fealy's response to this argument was that, if there was a breach of contract on Somerfield's part by issuing an excessive number of permits, the correct legal approach to be adopted in determining what loss if any had been suffered by ParkingEye in consequence of such breach would have been to ask what would have happened if there had been no such breach. He submitted that it was highly unlikely that an individual who had been issued with an "invalid" parking permit would have behaved in the same way if no such parking permit had, in fact, been issued. That, of course, was precisely the reason why Mr Parry had abandoned any claim for future loss under Basis 2 in its original form.

640. Furthermore, Mr Fealy pointed to the extraordinary implications of the assumptions upon which Basis 2A was founded. He relied upon the observations of Mr Isaacs in section 4 of his report. Mr Isaacs pointed out that it appeared from the figures referred to in Mr Parry's report that a total of 1,474 permits had been issued, which was 1,032 more than would have been issued had there been a limit of 25 permits per store. But, as he also pointed out at paragraph 4.1.10 of his report, it is implicit in Mr Parry's Appendix 4 that by issuing these additional permits, ParkingEye was deprived of the benefit of 7,949 charges. So, if the individuals to whom these permits had been issued had not received a permit, it was apparently to be assumed that they would have been fined, on average, 7.7 times during the period when the Agreement remained in force.

641. For my part, I can see no answer to these arguments. Mr Fealy's legal submissions on the point seem to me to be entirely well-founded. It also seems utterly improbable that there would not have been a substantial change of behaviour on the part of those who had been given "invalid" permits if no such permit had been issued at all. That seems to have been conceded by Mr Parry by his abandonment of the more extensive claim originally formulated under Basis 2. Furthermore, Mr Isaacs' observations about the assumptions involved seem to me to amount to a powerful critique of the entire approach. In the light of these observations, at paragraph 4.1.11 of his report, Mr Isaacs added that, in his view, the approach "flies in the face of common sense". I agree.

642. That finding wholly undermines the main pillar of Mr Parry's revised calculation under Basis 2A. It may be that an alternative case could have been formulated on the footing that at least some of the spaces which would otherwise have been occupied by "invalid" permit holders might have been occupied by other motorists, some of whom would have incurred charges. But no such alternative case was formulated; and it is difficult to see how any such case could have been pursued without further evidence.

Payment Ratio

643. The next specific issue was to do with the payment ratio, though it appeared, in the end, to have evaporated in the entirety in relation to Basis 1, since Mr Isaacs accepted in cross-examination that the figure adopted by Mr Parry for the purposes of this calculation was appropriate. But it is nonetheless necessary, I think, to say something about it primarily because of its potential relevance to Mr Parry's calculation under Basis 2 and Basis 2A, but also because it may be indirectly connected with the additional claim under Basis 1 for the continuing loss of Negative Publicity payments.

644. It will be recalled that Mr Parry extracted from the historic data a payment ratio of 51% and that this was the percentage which he applied for the purposes of his calculation of future loss under Basis 1. But he actually argued that this might be too low; and for the purposes of his Basis 2 calculation he adopted a higher percentage of 62%. He used the same

figure in his revised calculation under Basis 2A. Mr Isaacs, on the other hand, commented that a figure of 51% appeared "relatively high" in the light of the information supplied by Town & City Parking Limited and by the anonymous ANPR provider which seemed to show payment ratios of 46.6% and 49.7% respectively. But it became apparent in cross-examination that he did not, in fact, challenge the 51% figure adopted by Mr Parry for the purposes of his Basis 1 calculation.

645. But it is quite important to bear in mind that Mr Parry's 51% figure takes into account the fact that one of the reasons for non-payment was the fact that some of the charges were cancelled by Somerfield, whether for reasons of negative publicity or on other grounds. These matters were touched upon at paragraph 34, 35 and 36 of his report. Indeed, I note that he appeared to suggest that the agreement to reimburse ParkingEye at the rate of 65% of the discounted amount of the charge in each such case was intended to reflect the sort of payment ratio which could have been expected if the charge had not been cancelled.

646. This point was explored in a little more detail in cross-examination. Mr Parry agreed that one of the reasons why he thought that the payment ratio of 51% was somewhat lower that might otherwise have been expected was because of the cancellation of the charges by Somerfield. It was then put to him by counsel that the number of charges cancelled on the grounds of negative publicity amounted to 13% of the total number issued during the currency of the Agreement. Mr Parry agreed with this figure and with counsel's further suggestion that if all these charges had in fact been paid, rather than cancelled, it would have resulted in a payment ratio of about 63%. That was, he thought, one of the reasons why the payment ratio achieved by ParkingEye under the Agreement with Somerfield was lower than the figure of about 62% found elsewhere. So all this seems to have been common ground. Indeed the experts adopted the same 13% figure for the purposes of their supplemental joint statement of 24th June 2010. But the essential point for present purposes is that, were it not for the arrangements for the cancellation of charges on the grounds of negative publicity, the payment ratio would probably have been significantly higher than 51%.

647. Be that as it may, the ratio of 62% adopted by Mr Parry for the purposes of both Basis 2 and Basis 2A was primarily based on statistics relating to a number of other stores and businesses where ParkingEye operated a similar car park management system. The information was summarised in a table set out in Appendix 6 to his report and was discussed at paragraph 32 to 36 of the report. Disregarding one rather anomalous result, the average payment ratio was said to be 62%.

648. Mr Isaacs challenged this analysis on two grounds. Firstly, he could not see any satisfactory reasons why the historic results at Somerfield's stores was, in fact, considerably lower than 62%. That, of course, neglects the impact of cancellations. Secondly, he relied upon the payment ratios apparently achieved by Town & City Parking Ltd and by the anonymous

ANPR service provider, which suggested figures of 46.6% and 49.7% respectively. But, for reasons which I have already given, I do not consider these are satisfactory comparisons.

649. Whilst Mr Parry's own comparative material were hardly full and detailed, his approach gains substantial support from the impact upon his historic figure of the high rate of cancellations. So, if cancellations are taken out of account, I would accept Mr Parry's figure of 62% in preference to the figures proposed by Mr Isaacs. But this is relevant only to the computation under Basis 2A, since Basis 2 has been abandoned and the 51% payment ratio adopted for the purposes of his Basis 1 calculation is clearly appropriate in view of the separate additional head of claim in respect of cancellations on the grounds of negative publicity.

Drop-Off Ratio

650. The next specific issue raised on behalf of Somerfield related to the drop-off ratio. In his Basis 1 calculations, Mr Parry used the actual average number of charges loaded per space per week after the first four weeks to calculate the drop-off ratio for each individual car park where the historic data for that purpose was available. For the other sites, he took the average of these individual ratios which came out at about 69%. On the face of it, that approach seems sound. But the point is largely academic, at least in relation to the additional stores, since I have held that no claim can be pursued in relation to those stores.

651. But in his Basis 2 calculation, Mr Parry adopted a drop-off ratio of 65%. This figure was derived from average figures supplied by ParkingEye across all their sites. The details are set out at Appendix 8 to his report. This is also academic, in view of the abandonment of the claim under Basis 2; and the drop-off ratio does not feature explicitly in Mr Parry's revised Basis 2A calculation, though it may indirectly affect the calculation insofar as he used a similar ratio for the purposes of Basis 1 and adopted the resulting figure for the purposes of Basis 2A. The point of the exercise, of course, was to attempt to take into account the fact that after the system had been in operation at any particular site for a few weeks, it was likely that regular users of the car park would have come to appreciate the efficiency of the system and would have altered their behaviour accordingly.

652. Mr Isaacs, for his part, agreed that an exercise of this kind was appropriate. But he expressed the opinion that the first four weeks of operation was too short a period to obtain a satisfactory measure of the likely change of behaviour on the part of the motorists. He dealt with this quite briefly at paragraphs 4.3.4, 4.3.5 and 4.3.6 of his report and concluded that an appropriate drop-off ratio would have been 5%.

653. Mr Isaacs based his opinion upon an analysis of the results achieved at one site only, namely Blackpool. His justification for doing so was, on the face of it, a fair one, namely that it was the site which had been in operation for the longest period. He set out the number of charges per

week in graphical form at paragraph 4.3.4 of his report and suggested that this showed that the charging rate did not level off until about the 17th week. He then compared the rate for the first 16 weeks with that achieved over the next 16 weeks and found that the latter was only 5% of the former.

654. But I am satisfied that the figures from Blackpool did not constitute an adequate basis for drawing such a general conclusion. It was accepted that it was an unusual site which was likely to have experienced a substantial seasonal variation. In fact, this is a point which Mr Parry himself had made about certain sites, such as Torquay, at paragraph 38 of his report. Furthermore, it became apparent in cross-examination, though it was not investigated in detail, that taking different periods for the purposes of making such a comparison might produce different results. But these would not necessarily have been any more favourable to Somerfield if they had been adopted by ParkingEye.

655. It seems to me that Mr Parry's approach is much more soundly based than that adopted by Mr Isaacs. It might be said that to take an initial four week period as the basis of comparison is somewhat arbitrary. But I think that would be unfair. In the end, these are matters of judgment. It seems to me to be very likely that regular users would learn to change their behaviour fairly rapidly after the introduction of the new system; and a period of four weeks seems to me to be entirely fair and reasonable. I would therefore accept Mr Parry's approach to the calculation of the drop-off ratio.

Net Savings

656. I turn next to the net savings which Mr Parry accepted had to be set off against the projected gross returns in order to determine ParkingEye's loss of profits. Mr Fealy rather tentatively suggested to him in cross-examination that there was a lack of documentary evidence to support some of this expenditure. But Mr Parry provided details of the information on which he relied; and it seems to me that it is far too late to mount a challenge to the accuracy of the underlying information in cross-examination. In any event, insofar as it was suggested that, in the absence of supporting documentation, Mr Parry should not have made any allowance for the expenditure in question, that would have had the obvious effect of increasing the net profit figure.

657. But, in the course of his cross-examination of Mr Parry and in his closing submissions, Mr Fealy raised two further points in relation to Mr Parry's analysis of the net expenditure which would have been saved by ParkingEye as a result of the early termination of the Agreement. For cross-examination purposes, he prepared a short document headed "Calculation of the Actual Net Cost of the Contract". This calculation was based on a summary of the total income received by ParkingEye from the operation of the system prior to the termination of the Agreement against which was set off total expenditure incurred by ParkingEye with credit also being given for the residual value of the equipment. I note that the total expenditure does not include any items for which supporting invoices

were not provided. This reduced the total expenditure figure by nearly £16,000. The total net loss, as calculated in this way, is said to have been £100,178.

658. Now, a copy of this document had apparently been provided to Mr Parry prior to cross-examination; and he was asked whether he agreed with it. But he was unwilling to do so, suggesting that the net loss on this basis would have been about £45,000. He suggested that this was because of the failure to include the items which were unsupported by invoices. But Mr Parry also disagreed with the inclusion or exclusion of certain other items of expenditure.

659. Mr Fealy also briefly referred to this document in the course of his closing submissions. For my part, I entirely fail to see the point of the calculation. It attempts to compute ParkingEye's net loss as at the date of termination solely by reference to its income and expenditure position immediately after termination. But, whether the correct figure is £100,000 or £45,000, it seems to me to be entirely immaterial to the expectation loss sustained by ParkingEye by way of the net loss of profits flowing from the premature termination of the Agreement. Mr Fealy did not seek to put forward any alternative basis upon which ParkingEye's loss should be calculated; and, if he had sought to do so, I think it is highly unlikely that I would have permitted such a course, having regard to the approach adopted by Somerfield in its instructions to Mr Isaacs and its reliance upon his report.

660. But Mr Fealy raised a further point, almost incidentally, in the course of his final submissions. For the purposes of those submissions, he produced several schedules which offered alternative calculations of ParkingEye's loss, adopting the same approach as had been taken by Mr Parry for the purposes of his Basis 1 calculation but varying some of the assumptions. These schedules were not the subject of any detailed commentary in his accompanying written submissions; nor were they explored in any detail in his oral submissions. They include a reworking of Mr Parry's Appendixes 9 and 14 and a summary similar in form to his Basis 1 calculation as set out in Appendix 15. These reworked calculations exclude - correctly as I have found - any claim in respect of the six stores which were never selected and the two which were selected but were subsequently found to be unsuitable. But they also recalculate the costs saved. One of these, of course, was the CCS processing costs which are brought into account at what was ultimately accepted as the correct rate, namely £9.36 rather than £7.30, though I do not know whether Mr Fealy's figure is, in fact, correct.

661. In addition, however, the details of the other net savings of costs, as set out in Mr Parry's Appendix 14 were reviewed and recalculated. I was not taken through the details of this recalculation. But, insofar as it is sought to challenge any individual item in Mr Parry's calculation on this basis, I would reject it. There is, however, one important qualification to this general observation. It correctly excludes any saving of expenditure at the eight stores which were included within Mr Parry's calculation but which

were never selected or proved unsuitable. Since I have found that these are to be excluded from the loss of profits claim under Basis 1, it follows that any expenditure saved must also be excluded.

Calne

662. The next point raised by Mr Fealy which might have a bearing on Mr Parry's calculations was the rather odd error relating to the loss of revenue from the issue of parking permits at Calne. This is not, in fact, directly relevant to Mr Parry's Basis 1 calculation, since that computation does not take into account any loss of revenue resulting from the issue of an excessive number of parking permits. On the other hand, it would appear to be material to Mr Parry's Basis 2 calculation, since that was primarily intended to take into account the impact on ParkingEye's claim of a limit on the number of parking permits which could be issued by each store. More importantly, however, it would also seem to be directly relevant to his Basis 2A calculation, since that adopts the figure for excess permits issued prior to termination which is to be found in Appendix 4. But that is precisely where the error is to be found. So, if I were to accept that damages should be assessed in accordance with Mr Parry's Basis 2A, I would exclude from it any additional charges attributable to any excess permits said to have been issued at Calne.

663. But, as I indicated earlier in this judgment, Mr Fealy also sought to rely upon this apparent error to raise more general doubts about the reliability of the data used by Mr Parry and the soundness of his approach. But for reasons which I have already given, I do not think that it suffices to undermine any other aspects of Mr Parry's expert evidence.

The Negative Publicity Claim

664. That leaves only the question of negative publicity. The main point of substance raised by Mr Fealy can, I think, be simply stated: it could not and should not be assumed that Somerfield would have continued to cancel charges on the grounds of negative publicity at the same rate as before if the Agreement had run its full course. In fact, the agreed calculation, as set out in the supplemental joint statement of the experts is based on the assumption that the number of such cancellations would have formed the same percentage of the total number of charges during the remainder of the contract as they had prior to termination, namely 13%.

665. But Mr Fealy's point is a fair one which has to be addressed. One way of dealing with it would be to apply a percentage discount to this additional head of claim. I doubt if any such discount would have been a substantial one, given the very obvious concern felt by some of the stores about the impact the system was having upon their trade. On the other hand, I bear in mind that this was not a matter which was specifically canvassed with Somerfield's witnesses because of the very late stage at which the likelihood of a continuing, rather than an historic loss, was first appreciated.

666. But it seems to me that the decisive answer to Mr Fealy's objection is to be found in the relationship which I have already discussed between the payment ratio and cancellations on the grounds of negative publicity. As was plainly accepted on behalf of Somerfield, if there had been no agreement about cancellations on the grounds of negative publicity, the payment ratio is likely to have increased from the historic level of 51% to about 64%. So, if there had been no agreement by which Somerfield was entitled to cancel these charges on payment of 65% of the discounted charge rate, it would seem to follow that ParkingEye would have received payment in about 64% of all cases in which a charge notice had been issued, including those which would otherwise have been cancelled on grounds of negative publicity.

667. If an overall payment ratio of 64% had been adopted under Basis 1, it would have substantially increased the amount of the claim. But, even though such a percentage ratio was not adopted for these purposes, it seems to me that if, to take an extreme example, Somerfield had simply stopped cancelling charges on the grounds of negative publicity, ParkingEye would probably have received payment in about 64% of cases where the charge would otherwise have been cancelled. The same would seem to apply if the number of cancellations was simply reduced. So any reduction in the number of cancellations on the grounds of negative publicity would reduce the amount payable directly to ParkingEye by Somerfield at the rate of 65% of the discounted charge in each case; but it would increase the revenue which ParkingEye could expect to receive from the motorists whose charges might otherwise have been cancelled, the amount of which would have to be calculated by applying a payment ratio of about 64% to the total number of cases involved.

668. So whilst ParkingEye's claim for damages in respect of the future loss of negative publicity payments directly from Somerfield would be reduced, there would be a corresponding increase in its claim for damages for the future loss of revenue from motorists. Furthermore, it is likely that at least some of the payments received in such cases would be at the higher rate of £75 rather than the discounted rate of £37.50. So it seems to me that it can make no significant difference to ParkingEye's loss even if it were to be assumed that there would have been a substantial reduction in the number of charges cancelled on the grounds of negative publicity.

669. In those circumstances, I do not consider that it would be appropriate to make any discount to the amount claimed under this head to reflect any decrease in the number of charges which would have been cancelled on these grounds if the Agreement had run its full course. But if I were wrong, given the apparent strength of feeling in certain quarters within Somerfield, I would have discounted the total figure under this head of claim by no more than 25%.

Discussion

670. The outcome of this analysis can be simply stated. In principle, Mr Parry's Basis 1 calculation seems to me to be a perfectly orthodox and

reasonable method of determining the likely loss of profits sustained by ParkingEye as a result of the premature determination of the Agreement. I reject any general attack on the assumptions and methodology involved. But I accept some of the specific challenges raised by Somerfield, the consequences of which will have to be worked out at a later stage.

671. In addition, it seems to me that ParkingEye is entitled to include a claim for the loss which it sustained in respect of cancellations on the grounds of negative publicity, both before and after termination. Details of the pre-termination loss are included in Mr Parry's Basis 1 calculation; and post-termination losses were the subject of the experts' supplemental joint statement dated 24th June 2010.

672. Since Basis 2 is no longer relied upon. I need say nothing more about it. But the alternative computation under Basis 2A suffers from the same deficiencies and cannot in my judgment, stand

673. I should perhaps add that I was not invited to consider whether a payment ratio of 62% should be adopted for the purposes of Mr Parry's Basis 1 computation, rather than the historic rate of 51%. But, for reasons which I have already given, the claim in respect of negative publicity charges in addition to those claimed under Basis 1 is, in effect, an alternative to reformulating the Basis 1 claim itself on the footing of a higher payment ratio. I conclude, therefore, that a claim under basis 2A also fails and must be rejected.

PART VIII
CONCLUSIONS

674. I conclude, therefore, that ParkingEye succeeds in its claim for damages and that the quantum of those damages is to be determined broadly in accordance with Mr Parry's Basis 1 calculation, together with a further sum in respect of charges cancelled by Somerfield on the grounds of negative publicity. But the final calculation requires certain modifications to Basis 1 in accordance with my findings on various specific issues as set out in the body of this judgment. I will hear counsel in due course as to the effect of those modifications.