Neutral Citation Number: [2015] EWHC 1605 (Admin)

Case No: CO/4140/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2015

Before :

MR JUSTICE EDIS

- -

Between :

THE QUEEN (on the application of STEPHEN JOHN DUFF)	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
(1) THE MASTER, FELLOWS AND SCHOLARS OF THE COLLEGE OF THE HOLY AND UNDIVIDED TRINITY WITHIN THE TOWN AND UNIVERSITY OF CAMBRIDGE OF KING HENRY VIII'S FOUNDATION	
(2) RANSOMES PARK LIMITED	
(3) THE FM GROUP (UK) LIMITED	
(4) EQUITY ESTATES PROJECTS LIMITED	**Interested Parties**

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Nicholas Yeo (instructed by **Gotelee Solicitors**) for the **Claimant**
Tom Cross (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 6th May 2015

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Approved Judgment

Mr. Justice Edis :

Introduction

1. This claim concerns the exercise by the Secretary of State for Transport of a power conferred on him by Regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002/2742, which is in the terms set out below. Regulation 27(1)(e) created a power to disclose information which may lead to the identification of the registered keeper of a registered motor vehicle on the register maintained by the Driver and Vehicle Licensing Agency (DVLA) under the provisions of the Vehicle Excise and Registration Act 1994. The Regulation lists a number of persons to whom such disclosures may be made and Regulation 27(1)(e) allows disclosures to other persons, not identified above, to whom the data may be disclosed. The claimant seeks judicial review of the exercise of this power in his case in the way set out in the decision letter at paragraph 3 below.

> **"27.— Disclosure of registration and licensing particulars**
> (1) The Secretary of State may make any particulars contained in the register available for use—
>
> (a)
>
> (i) by a local authority for any purpose connected with the investigation of an offence,
>
> (ii) by a local authority in Scotland, for any purpose connected with the investigation of a decriminalised parking contravention, or
>
> (iii) by a local authority in England and Wales, for any purpose connected with its activities as an enforcement authority within the meaning of Part 6 of the Traffic Management Act 2004 ;
>
> (aa) by the Department for Regional Development for any purpose connected with—
>
> (i) the investigation of a contravention to which Schedule 1 to the Traffic Management (Northern Ireland) Order 2005 (contraventions subject to penalty charges) applies; or
>
> (ii) the exercise of the Department's powers under Article 18(1)(b) or 21(1)(b) of that Order (immobilisation or removal of vehicles);
>
> (b) by a chief officer of police;
> (c) by a member of the Police Service of Northern Ireland;
> (d) by an officer of Customs and Excise;
> (da) on or after 30th April 2010 or the date of coming into force of section 144A of the 1988 Act (whichever is later), by the Motor Insurers' Bureau (being the company of that name incorporated on 14th June 1946 under the Companies Act 1929) for any purpose connected with the exercise of any of the functions of the Secretary of State relating to the enforcement of an offence under section 144A of the 1988 Act; or
> (e) by any person who can show to the satisfaction of the Secretary of State that he has reasonable cause for wanting the particulars to be made available to him.
>
> (2) Particulars may be provided to such a person as is mentioned in paragraph (1)(e) on payment of such fee, if any, of such amount as appears to the Secretary of State reasonable in the circumstances of the case."

2. The claimant is a Certificated Bailiff and runs a business called "ProServe" which made a large number of requests for the disclosure of particulars from the register prior to 4th June 2014, which were granted. By letter of that date (the decision letter) the Secretary of State (through the DVLA) indicated that from 2nd July 2014 requests from ProServe and its clients would be refused unless ProServe complied with a condition that it should become a member of an Accredited Trade Association (ATA). This condition arose because the Secretary of State decided to apply a policy to require car park management companies to join an ATA to the claimant. I shall call this policy "the policy". This decision followed substantial correspondence and it is not alleged that there was a failure to consult before it was taken. The Interested Parties are clients of the claimant's business.

3. The decision letter first apologises for a misunderstanding and then sets the decision out as follows:-

> "Your letter makes submissions about the nature of ProServe's business and of its clients. As before, I would not want to comment on anything that may still be discussed in a court. However, we would have to disagree that ProServe's activities are markedly different to those carried out by operators whom we require to obtain membership of an Accredited Trade Association (ATA) in order to request data.
>
> "Although you have made the point that your primary purpose is to take action to ensure that your clients are protected against unlawful interference with their land, the nature of this interference is parking-related trespass, which is regarded as a relevant obligation in Schedule 4 of the Protection of Freedoms Act. The measure adopted by ProServe to enforce this where the use of the DVLA data is involved is the same as those of traditional parking operators, i.e. the imposition and pursuit of charges.
>
> "The introduction of the ATA model and its subsequent extension to all parking companies came about in order to put in place parameters for operators without formal regulation or governance. You have set out your position with regard to matters such as signage, ticketing, charge levels and appeals, but these are matters which successive ministers have regarded as being for an ATA to monitor and ensure compliance with, so as to provide the necessary assurances to the DVLA that our data is being used appropriately. I should also point out that the minister's requirement is that motorists are offered an independent appeals service if the appeal is rejected by the company that issued the charge.
>
> "I understand the points you have made about the services that you provide to your clients. However, the Agency is required to ensure that its disclosure of vehicle keeper data under the reasonable cause provisions is fair and lawful, and membership

> of an appropriate ATA for this type of operation is a key factor in informing the disclosure of data under these provisions.
>
> "I have noted your conclusion that you believe membership of an ATA to be inappropriate. I note also your intention to consider legal action, and to advise your clients to seek the data direct. From DVLA's perspective, the position is not affected, and the requirement on you will also apply to your clients. Therefore unless you confirm that ProServe will make arrangements to obtain membership of an appropriate ATA by 2 July 2014, we will not provide further data for these purposes until ATA membership is obtained and confirmed."

4. I do not read the above letter as meaning that all clients of ProServe must be registered with an ATA in order to be allowed disclosure of data from the register. It means that the DVLA will not allow ProServe to avoid the application of its policy by making requests for disclosure in other names. The advice which ProServe said it had given to its clients was advice to request the data themselves so that they could pass it to ProServe for its use. The letter simply said that data would not be provided for the use of ProServe by any route unless ProServe was a member of an ATA.

5. Sections 54-56 of the Protection of Freedoms Act 2012 (POFA) and Schedule 4 to that Act prohibit wheel clamping and allow the recovery of parking charges from registered keepers in certain circumstances. The writer of the decision letter is correct to say that payment of damages for trespass where a vehicle has been left on land and there is no contract is a "relevant obligation" to pay what are described as "parking charges" in Schedule 4. The Schedule defines a parking charge as follows:-

> *"parking charge"*—
>
> (a) in the case of a relevant obligation arising under the terms of a relevant contract, means a sum in the nature of a fee or charge, and
>
> (b) in the case of a relevant obligation arising as a result of a trespass or other tort, means a sum in the nature of damages,
>
> however the sum in question is described;"

Relevant obligation is defined as follows:-

> *"relevant obligation"* means—
>
> (a) an obligation arising under the terms of a relevant contract; or
>
> (b) an obligation arising, in any circumstances where there is no relevant contract, as a result of a trespass or other tort committed by parking the vehicle on the relevant land;"

6. The claimant formerly operated by using wheel clamps until this was prohibited, and in reality is seeking now to continue to provide a service which will discourage illegal parking on private land by other means. The purpose of the reference to the 2012 Act in the decision letter appears to be to make the point that, however the activity of ProServe is defined in law, it engages the provisions of the relevant legislation in the same way as other parking management methods and thus to support the decision to deal with ProServe in the same way as them.

The Challenge to the Decision in These Proceedings.

7. The claimant relies on 4 grounds and has permission from the Deputy High Court Judge to argue them all. It appears from the remarks of the Judge when granting permission at an oral hearing that he regarded some as more arguable than others, but he gave a general grant of permission. I must therefore consider them all. They are as follows:-

   i) **Irrationality**. It is said that it is irrational to require the claimant or the clients of ProServe to join an appropriate ATA because there isn't one.

   ii) **The unlawful pre-conditions ground**. ATAs have terms of membership and codes of practice by which their members conduct is regulated by the ATA. That is why the Secretary of State considers membership desirable. It offers a measure of self-regulation by the industry without imposing a regulatory burden on the state. The claimant says, by this ground, that in requiring him to join an ATA the Secretary of State has imposed an unlawful and rigid pre-condition which in effect incorporates the entirety of the terms of membership and codes of practice "as further unlawful and rigid pre-conditions to the exercise of discretion".

   iii) **The abdication of power ground**. It is said that the requirement amounts to a surrender of the power given under the Regulations to the ATA, when the Regulations require the Secretary of State to exercise his own judgment.

   iv) **The DPA ground**. It is said that the Secretary of State misunderstood relevant provisions of the Data Protection Act 1998 and took these misconceptions into account when making the decision. It is said that this Act does not apply since "the vast majority of ProServe's applications concern commercial vehicles" in which no personal data is involved at all, and that disclosure of data is necessary for the purposes of exercising legal rights and is therefore exempt from the non-disclosure provisions.

The Evidence of the Claimant.

8. The claimant's witness statement explains that his business provides services to a number of clients which include service of documents, investigations, debt collection work, commercial rent recovery, forfeiture and land bailiff services. He provides estate management and land bailiff services to clients including the Interested Parties in this case. He says that none of his clients are to his knowledge commercial car park operators. He says, of the services which he provides to them:-

> "ProServe does not offer parking management services. We offer our clients services to deal with trespassers. The character of the trespass our clients are most often concerned with is unauthorised or disruptive parking on private land. We do not operate or manage authorised parking schemes or car parks for our clients. Our goal is the very opposite, to stop parking, stopping and waiting which amounts to trespass."

9. The nature of the work done by the claimant can be described by reference to some of the Interested Parties. Trinity College Cambridge owns the Port of Felixstowe and the Trinity Distribution Park Felixstowe. This is a very large operation which involves about 30,000 vehicles a day passing through the site, mostly commercial vehicles. The roadways on the site have to be kept clear of obstructions and experience has shown that unless effective action is taken the roads become blocked by stationary vehicles and gridlock ensues. There is a traffic management protocol which restricts stopping on the roadways, but this is not always observed by drivers and requires enforcement. ProServe provides that enforcement. The FM Group (UK) Limited is a tenant of Trinity College and runs a fuel station and shop in Felixstowe. This is a very busy site and about 10,000 vehicles a day pass through. The services offered include vehicle washing and a café which are run by sub-tenants. Obviously, these businesses require visiting vehicles to stop on the site in order to use them but it is necessary to ensure that the site does not become obstructed. Ransomes Park Limited owns the roads and communal parts of Ransomes Europark, Ipswich. Approximately 40,000 vehicles per day pass through the site, mostly commercial vehicles. The roads have to be kept clear of obstructions by discouraging drivers of these vehicles from parking, stopping or waiting on the estate roads. The vehicles which visit these sites may stop in order that their drivers can sleep, or for other reasons. Sometimes, the claimant's business has to deal also with travellers who seek to set up camp on site. It is clear from the statement of Mr. Duff and also from statements submitted by the Interested Parties that the problem of vehicles being parked on these sites is a substantial one which is capable of causing substantial loss.

10. The enforcement process involves the use of warning signs prominently displayed at the entrance points to the site. A copy of a sign in use when the proceedings were issued appears at page 175 of Mr. Duff's exhibit, I shall refer to it as "the Sign". It says "WARNING PRIVATE PROPERTY: NO TRESPASSING. NO PARKING. NO STOPPING. NO WAITING." It is a muddled document which has been the subject of litigation and which has now been amended. Mr. Duff complains that if he were required to join an ATA he would have to change all his signs. He says that this would cost him money and this would be unfair. However, he does not suggest that changing the document at his page 175 caused him any particular hardship. It said this:-

> "If you park, stop, wait or leave a vehicle or any item on this land without authority of the landowner it will result in either you committing trespass, or entering into a contract with the landowner.
>
> ….
>
> "By parking, stopping waiting or trespassing you the owner/driver or registered keeper are exposing the owner of this property to a pre-agreed contractual loss under the terms of an agreement with ProServe Enforcement Solutions. This loss will be recoverable from you by the owner of this property as damages for breach of contract between yourself and the owner of this property or in trespass. The relevant contractually agreed sums are listed below….."

11. The Sign then sets out a list of recoverable sums for trespass and/or breach of contract which cover both cars and commercial vehicles and which are all said to be "subject to VAT". It explains that details of the Registered Keeper of offending vehicles will be requested via the DVLA to assist in the "prosecution" of vehicles that have trespassed on the property or who have not paid the charges. It is to give effect to this threat that ProServe was in the habit of making requests for information from the DVLA which would be provided under Regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002/2742. Where these details are provided, the preferred approach of ProServe is to threaten and if necessary issue claims in the County Court on the small claims track. The claims are contested only infrequently, but in *Ransomes Park Limited v Anderson* Judge Moloney, Q.C. heard one of them, sitting in the Norwich County Court on appeal from the District Judge on 24th October 2014. The District Judge had dismissed the claim. On appeal, Judge Moloney said that this was not a case about car parks in the ordinary sense of the word. It was about "double yellow lines", or parking in places which might cause obstruction to traffic, rather than overstaying in a permitted parking space. He explained the contractual situation, which was that ProServe was entitled invoice the client for the sum shown on the Notice. The client then sought to recover that amount as its loss from the wrongly parked vehicle, having incurred the liability under its agreement with ProServe. Under that agreement, ProServe could decide for itself how much the liability would be, and the client would have to pay, but would hope to recover it from the trespasser. Judge Moloney rejected the claim based on a supposed contract between the landowner and the trespasser. The Sign was too muddled to justify a finding that it contained an offer which the driver had accepted by his conduct. I shall not repeat the reasoning which is very persuasive (and which may be apparent from reading the parts of the Sign quoted above). However, he upheld the claim in trespass. The Sign made it quite clear to the driver that he was not allowed to stop where he did. The claim was, in reality, for a "flat fee" such as is seen in contractual parking cases[1], but this was a claim in tort for damages for trespass. There was no evidence to justify the figure which was claimed other than by reference to the Sign. The Judge assessed damages in the sum of £97.50 doing the best he could on the limited evidence before him to apply the appropriate measure of damages. He rejected the claim based on what had been alleged to be a contractual measure of damage which was £187.50. He said that his assessment was not a precedent and that better evidence of the actual loss sustained by the owner should be supplied in other cases.

12. I have described the events in the Norwich County Court because they are relevant to the issue in this way. One objective achieved by the Secretary of State in requiring operators such as ProServe to join an ATA is that they will then be subject to a code of conduct and there will be a right of appeal to an independent body if a trespasser is dissatisfied with the way in which the operator deals with the case. The appeal will be dealt with on the papers and will not involve the service of claim forms, contested trials before a District Judge and a possible appeal to a Circuit Judge, which is what happened to Mr. Anderson. He disputed liability to pay £187.50 and was held liable to pay £97.50 after he succeeded in proving that ProServe (acting on behalf of the landowner) was not entitled in law to decide what to charge him and then sue for that

[1] On 23rd April 2015 the Court of Appeal upheld a decision by Judge Moloney QC to award such a fee in such a case. The Fee was £85, and the case was argued by Leading Counsel for both sides in the Court of Appeal: see *ParkingEye Limited v. Beavis* [2015 EWCA Civ 402.

sum without proving that the owner had suffered loss to that extent. The Judge noted that the sum claimed included an element of profit for ProServe, which he held was appropriate, because ProServe was entitled to make a profit out of these "parking charges", as defined by Schedule 4 to POFA. One question to be decided in this case is whether the Secretary of State acted rationally in imposing a condition on access to the data on the register which would reduce the scope for the use of this somewhat disproportionate enforcement procedure. Most people would have paid the £187.50 and thus have paid £90 too much. Is it irrational for a minister to seek to introduce an element of regulation into this context?

13. The claimant's evidence explains in some detail how important it is for all his clients to have effective control to avoid stationary vehicles causing trouble for their businesses and other activities on their land. The Interested Parties confirm that in their evidence. This is not in dispute, and I shall not set it out in detail. The Secretary of State does not suggest that the claimant's clients do not have a legal right to use their land as they choose and to dictate to their visitors where, if anywhere, they may stop their vehicles on that land. In the case of these large commercial estates, there is also a public interest in the smooth functioning of economically important businesses. The Secretary of State is not seeking to undermine those businesses in any way.

14. The claimant sets out the detail of his career as a certificated bailiff and suggests that the control exercised over him by the County Court when renewing that status is a sufficient guarantee of his conduct so that it reduces the need for him to regulated by membership of an ATA. He points out that there is no allegation of misconduct against him in this case and that it is accepted that he has used the data which he has requested in appropriate ways. Finally, in his second witness statement the claimant describes how the application of the policy to him represents an "existential threat" to his business. I do not doubt the honesty of this evidence, but its weight in the present issue is limited. First, the financial information which he provides is insufficient to persuade me that membership of an ATA trul presents a threat to the continued viability of the business. If landowners want to deal with trespass by vehicles by using a commercial company to obtain data which has been collected essentially in the public interest, it will have to pay a charge for that service which reflects all the cost incurred by that company in obtaining that information. This will include the cost of regulatory compliance. The sums recovered from trespassers, whether through the court system or otherwise, will be calculated to compensate for the loss caused by the trespass which will include the cost incurred by the landowner in employing a contractor to deal with the trespass. There is no obligation on the Secretary of State to adopt a policy which ensures that one particular business model is profitable. If, genuinely, ProServe cannot continue to operate while complying with an otherwise lawful policy then that is not a reason for declaring the policy unlawful. Although there is a hint of a complaint that the status quo was changed after ProServe had relied upon statements which it understood meant that it would not be subject to the policy, the four grounds I have set out at paragraph 7 above do not involve reliance on this concept. The Secretary of State is entitled to have a policy and to change the policy where he considers it necessary to do so. This is not a claim based on a failure to consult or a legitimate expectation.

The Accredited Trade Associations and the policy

15. The Secretary of State relies upon the evidence of Robert Toft, who is Head of Data Sharing Policy at the DVLA. He explains the history of the relevant policy and the reasons why the Secretary of State, through the DVLA, has decided to apply it to the claimant. Since 2009 the Secretary of State has implemented the policy which is that the power under Regulation 27(1)(e) of the 2002 Regulations will not be exercised where the company requesting data is not a member of an ATA. This was done in order to help to ensure that motorists were treated fairly where the DVLA releases data which enables them to be pursued. The history of this is well known, and included consideration of the use of wheel clamps which was, at that time, lawful. There was public concern about the abuse of clamping to raise revenue which was disproportionate to any loss suffered by the aggrieved landowner. Often, but not always, this concern arose from the treatment of vehicles which had chosen to park in a car park, but had overstayed the time for which they were permitted to park. The Secretary of State naturally did not wish to assist behaviour which in some instances was perceived to amount to a form of extortion. The policy initially followed a consultation in 2006 and applied to companies who sought "approved conditional access" to the Register. This means that they had access by submitting requests for data online in bulk via secure electronic links subject to the terms of a contract with DVLA and retrospective auditing. They acquired this status by serving a six month probationary period during which their use of the data was monitored.

16. As appears from paragraph 27(1)(e) of the Regulation, data may be released to persons "who can show to the satisfaction of the Secretary of State that [they have] reasonable cause for wanting the particulars to be made available to [them]." The other categories to which data may be released, such as the police, are public bodies of one form or another who have a legitimate interest in accessing information collected and held on behalf of the public so that it can be released to them. The extra category in sub-paragraph (e) allows the Secretary to State to decide whether the applicant has a "reasonable cause" for wanting the information. This, says Mr. Toft, is usually understood to relate to circumstances where the use of the vehicle has given rise to an alleged liability. This might include private individuals who claim to have suffered damage as a result of the use of a vehicle in an accident, insurance companies who seek to establish the identity of a tortfeasor, or petrol stations who have suffered loss as a result of fuel having been stolen from them. The majority of such requests are made by parking management companies who seek information in order to take enforcement action including the issuing of a parking charge notice or proceedings for trespass or breach of contract.

17. The policy was designed to promote fairness to the motorist by ensuring that the applicant for data operated to appropriate standards within a code of practice and that, therefore, the data would be properly requested and used. The Minister explained the policy to Parliament as follows:-

> "…part of the process for accrediting trade associations will include ensuring that there is a clear and enforced code of conduct (for example relating to conduct, parking charge signage, charge levels, appeals procedure, approved ticket wording and appropriate pursuit of penalties, that is approach

> by letter only and county court action only to permit a house call."

18. In February 2007 the DVLA approved the accreditation of the British Parking Association ("the BPA") which was an industry membership body established in 1968. The BPA launched its Approved Operator Scheme. A second ATA for the private parking sector was accredited in July 2014, the Independent Parking Committee Limited ("the IPC"). At the time of the decision letter in this case there was only one ATA, namely the BPA, and the Secretary of State was therefore making the release of data conditional on membership of the BPA. There are five other ATAs but these are specific to different trades, for example fuel retailers.

19. In 2009 the policy was extended to all companies requesting data for parking related reasons under Regulation 27(1)(e) whether the request was made electronically or online. This change followed another public consultation and was intended to ensure that all parking management companies operated to the same recognised standards.

"Giving people information from our vehicle record"

20. In March 2013 the DVLA published "*Giving people information from our vehicle record*". This document is relied upon by the claimant and it is necessary to set out certain parts of it. Mr. Toft points out that it is not intended to be exhaustive and to cover every possible person who could seek to ask the DVLA for information. He says that it is descriptive of the types of organisation which seek data. He says further, that an applicant cannot dictate the application of the policy to his case by choosing to describe himself in one way rather than another. In the end it is a matter for the Secretary of State to decide, having regard to the policy and its aims, how to categorise any particular applicant. The introduction to this document says:

> "Below is a list of the people or organisations who ask us for information. The type of information we are able to give will vary depending on who is asking for it and why they need it."

21. This is followed by a series of pages dealing with different categories of enquirer each of which contains a table which shows what information DVLA will supply and what the enquirer is required to do in order to secure it. It is only necessary to refer to two of these pages. Category number 7 is "Housing and Estate management companies" which are required to use form V888/2 which is titled "Request by a company for information about a vehicle." The Table ("Table 1") is as follows:-

DVLA		**Enquirer**	
The information we will give	*Why we give this information*	*Information we want from you*	*Evidence we need you to give us*
The name and address of a registered keeper on a specific date	To indentify the current keeper of a vehicle parked or abandoned on private land	The vehicle registration number, the make of the vehicle and the model of the vehicle	A copy of agreements with Landowner or confirmation that enquirer owns property.

			Data protection registration number
		The date and location of the incident	Companies House number (if registered there)
			Proof of your address if it is different to the one given to Companies House or registered with Data protection. A copy of a letterhead or invoice

22. Category number 13 is called "Private car park enforcement companies" who are required to use form V888/3 which is called "request for information for those who issue a parking charge notice" and has a table ("Table 2") as follows:-

DVLA		**Enquirer**	
The information we will give	*Why we give this information*	*Information we want from you*	*Evidence we need you to give us*
The name and address of a registered keeper on a specific date	To indentify the current keeper of a vehicle parked on private land or breaking conditions on that land	The vehicle registration number, the make of the vehicle and the model of the vehicle	Copy of agreement between the landowner and the car parking company
		Date of the incident and where it happened	Data protection registration number
		If issuing a charge an explanation why this could not be made when the incident happened	Companies House number (if registered there)
		Confirm if a ticketing or an APR system is in place	Proof of your address if it is different to the one given to Companies House or registered with Data protection. A copy of a letterhead or invoice
		ATA membership number	Letterhead with ATA membership or other evidence of ATA membership

23. The claimant points out that until the decision letter, he applied using form V888/2, for Estate Management companies, and data was supplied to him as such. He complains that the application of the policy to him therefore represents a change of position by the Secretary of State which does not reflect the actual nature of his business. He says that he is an estate management company and should be treated as such. The important difference between the two categories is that the Table 2 requires membership of an ATA whereas Table 1 does not. It is to be recalled that the power to supply data only arises if the Secretary of State considers that the enquirer has a reasonable cause for wanting it. Therefore a very important part of the table is the second column where the DVLA explain why they are prepared to supply information to persons in the category described in the Table. In my judgment, Table 2 is more appropriate to the claimant's business than Table 1 which identifies a need to supply information to those dealing with vehicles which are abandoned on private land. The claimant does not often deal with abandoned vehicles. Mr. Toft explains that Table 1 really applies to companies which manage housing estates and on behalf of residents or landowners and which periodically deal with abandoned vehicles or unauthorised parking by non-residents. This is usually on a non-commercial basis with the organisations seeking vehicle details in order to approach the registered keeper to resolve issues consensually if possible. In this evidence, in my judgment, Mr. Toft is explaining what the DVLA means by this category. These Tables are not statutory definitions, but an attempt to describe the types of applicant and what is expected of each type. The criticism that Mr. Toft's understanding is not derived from the document but from his own knowledge of the kind of applicant Table 1 is attempting to describe is therefore beside the point. The principal issue here, it is to be recalled, is rationality.

The impact of the Protection of Freedoms Act 2012 (POFA)

24. POFA made vehicle clamping a criminal offence and introduced a new route by which landowners could use DVLA data to recover charges from registered keepers of vehicles. In anticipation of its coming into force on 1st October 2012 ProServe wrote to the DVLA on 11th July 2012 saying this:-

> "We are bailiffs and we do not have locations where people are invited to park, they are a matter of tort or trespass, we will not be joining the BPA and we are currently not members of any other Trade Association, we are in the process of joining the Association of British Investigators…..Our intention following receipt of the information is to write to the keeper and inform them that we are intending to issue proceedings with our clients for trespass, but we will offer them an out of Court settlement prior to proceedings."

25. Mr Toft says that this reference to out of court settlement suggested to him a method similar to the levying of parking charges by companies covered by Table 2. They commonly allow a substantial reduction for charges paid within a short period of time, and the ATAs both stipulate that they should do so. He said in an internal email at the time that he was concerned that unless ProServe became members of an ATA there was a risk of uncontrolled parking enforcement and the displacement of rogue clamping with rogue ticketing. Since that would be supported by use of data supplied by the DVLA, this was a risk which required attention. After some difficulties and

complaints from "motorists" which are not material to the decision I have to take, the DVLA reviewed the position of ProServe in 2013 and wished to decide whether to extend the policy to that business. After correspondence with ProServe which resulted in further information becoming available, the DVLA decided on 8th April 2014 that ProServe's operations should be considered to fall within the scope of the policy and that it should therefore be required to obtain membership of an appropriate ATA in order to request vehicle keeper data. In addition to the substantial scale of the requests for data, certain features of its business meant that it properly fell within the policy, and the differences between it and a parking management company operating a car park did not justify applying a different policy to it. The common features were

i) The nature of the operations. Enforcing against trespass was a central part of ProServe's operations and not an occasional feature of a different kind of business.

ii) The use of Signage. I have set out a part of a sign used by ProServe above. It tried, but was later held to have failed, to create a contract under which a fixed sum could be recovered in the event of breach, and claimed damages for trespass in the same sum in the alternative. This is very similar to what parking management companies do. There had been complaints about the signage which used small print for important terms of the notice.

iii) Charge levels. These were fixed in just the same way as parking management companies fix charges.

iv) Charge notices. These were issued by ProServe in the much the same way as by Parking Management companies.

v) Absence of an independent appeals service. There was no free access to an independent appeals service where a dispute arose about a charge notice. There was an internal appeal process, but the only way of obtaining independent scrutiny of a particular claim by ProServe was to defend court proceedings.

26. Having identified these similarities between ProServe and parking management companies, the Secretary of State, through the DVLA, decided that both types of operation should be treated in the same way. This required that ProServe should join an ATA.

27. This decision was followed by correspondence and the issue of these proceedings. It is not necessary to rehearse every complaint made by ProServe, because the issues have been helpfully distilled and are set out at paragraph 7 above.

The submissions of ProServe

28. Mr. Yeo submits that ProServe's business model is unique and it is not a private car park enforcement company, because it does not operate any car parks. It works on behalf of landowners and their agents and the Secretary of State acknowledges that different considerations should apply to such organisations. This is shown by Table 1 above. He took me through the BPA Code of Practice to show that it was not a suitable body to require ProServe to join. He reminded me that the risk of

inappropriate behaviour by ProServe was much reduced by the status of Mr. Duff as a certificated bailiff. He also submits that the DVLA erred in saying that it would refuse applications made directly by ProServe's clients unless they joined an ATA. He says it would be absurd to expect the Fellows of Trinity College Cambridge to join a trade association for car park operators when the one thing they do not want their land to be is a car park. He points also to the failure of the DVLA to identify the objectives of the policy so that ProServe could meet them by other means.

29. Mr. Yeo submitted orally that the first three issues, irrationality, unlawful pre-conditions and abdication of power resolve into different ways of arguing the same point. This must follow from his acceptance that there is no challenge to the lawfulness of the policy itself, only of its application to ProServe. The second and third ground of challenge would apply equally, on one view, to all those affected by the policy including car park operating companies. Since it has operated since 2006 and was extended in 2009 it would be surprising if it were unlawful in its conception. These grounds of challenge are advanced as different ways of illustrating the unlawfulness of requiring ProServe to join an ATA.

30. In reality therefore this case, on the first three grounds, depends on whether it was rational to require ProServe to join an ATA, and to require its clients to use a contractor which was a member of an ATA or to join one themselves if they wished to use the register to acquire substantial quantities of data for the purpose of preventing by deterrence trespass to their land. This requires consideration of the terms of the ATA's Code of Practice and the ways in which they are said to be inappropriate for the business model of ProServe. I shall limit my consideration to the BPA since it was the association which existed at the time of the decision letter. There is now a little more choice for a contractor than there was at that time, but in their essence the organisations are similar.

i) Terminology. It is said that the ATA Code clearly contemplates regulating members who police car parks where vehicles are invited to enter and remain usually on terms as to payment of a fee, and often on terms as to payment of a penalty charge for overstaying, or parking outside defined parking spaces and the like.

ii) Consumers. The policy (and the ATA Code which it generated) was conceived to protect the interests of consumers ("motorists"). The trespassers whom ProServe is employed to deal with are not consumers who receive a service. Therefore, it is irrational to accord them the same protection against unfair treatment as those who are. A policy which was developed to be fair to consumers is obviously, it is said, not applicable to an operation which does not deal with consumers but with predominantly commercial vehicles which deliberately flout the terms of the licence by which they entered land.

iii) Fixed Charges. The ATA exercises control over fixed charges which its members hope to levy. It requires charges specified in notices to be reasonable and says this, at paragraph 19.5 of its Code:-

> "19.5 If the parking charge that the driver is being asked to pay is for a breach of contract or an act of trespass, this charge must be proportionate and commercially justifiable. We would

> not expect this amount to be more than £100. If the charge is more than this, operators must be able to justify the amount in advance."

iv) Signage and Notices. The ATA has rules about the form of these documents. Compliance would require ProServe to replace its existing signs which, as I have said above, it has done recently in order to address problems which have become apparent in the County Court. The sign which the ATA requires is intended for use in the case of vehicles which parked in places where no parking is permitted (which is the situation with which ProServe deals). The BPA Code of Practice at Appendix B says that the large blue "P" on its proposed sign can be left out if public parking is not invited and the operator is managing trespass.

v) The Appeal Process. As I have said, this is an important part of the Secretary of State's reasoning in adopting the policy and applying it to ProServe. Paragraph 22 of the Code sets out the procedure required for dealing with "complaints, challenges and appeals." There is a two stage process in which the operator is first required to address the issue internally and to inform the motorist of the right to appeal to an independent appeal panel which is established and run by the ATA. This is called "Parking on Private Land Appeals" (POPLA) and the operator is required to comply with its procedures. The jurisdiction of the courts is excluded if POPLA finds against the operator (because the operator is obliged by the Code to accept the outcome), but the operator may use the court system to recover any debt which POPLA finds is owed to it. ProServe objects to this because it ousts the jurisdiction of the court to adjudicate in actions for damages for trespass to land. The amount it is entitled to recover should be fixed by the court and not an ATA.

vi) Uniforms. The ATA Code requires operators to behave "professionally" which includes a requirement that front line operational staff wear a uniform and carry a photo-identity card that is visible and available for inspection by drivers. This is said to "give the wrong impression" because it suggests that ProServe was providing a service, and also to involve unnecessary expense.

The Data Protection Act 1998: Ground 4

31. Mr. Yeo supports his case on the fourth issue by reference to letters written as part of the pre-action (but post-decision) correspondence by the DVLA. These suggest that a concern about compliance with the Data Protection Act 1998 was a substantial part of the motivation of the Secretary of State in extending the policy to ProServe. This is said to have been an error because ProServe's activity only rarely involves any personal data at all. Most of the vehicles are commercial vehicles and the identity of the company which is their registered keeper is not personal data within the 1998 Act. Further, it is said that the Act is rendered irrelevant in this context because of section 35 of the Act which provides

> "(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—
>
> (a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

(b) for the purpose of obtaining legal advice,

or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."

32. This issue really turns on a question of fact and it is convenient to deal with it now before returning to the more substantial issue concerning the rationality of the requirement to join an ATA. The Secretary of State submits that whatever impression may be given by letters written after the event, its concerns in applying the policy to the claimant were as set out above and not a fear that it would be a breach of the Data Protection Act to disclose data to the claimant unless he joined an ATA. Mr. Toft has explained in his statement that considerations concerning the proper use of data were an important factor in formulating the policy requiring membership of an ATA. The Code of the ATA contains provisions which provide additional reassurance for the security and proper treatment of personal data. However, the decision to extend the policy to the claimant was not taken because of any concern that he posed any particular risk of the abuse of data. It was taken, instead, because the nature of ProServe's operations was such that the policy ought to be extended to it. The reference in correspondence to the Data Protection Act does not mean that an irrelevant consideration was taken into account, because the Act requires that personal data be disclosed fairly and lawfully. There are some privately owned vehicles which require enforcement action by ProServe, including commercial vehicles operated by sole traders, so the Act is not an irrelevance.

33. Mr. Cross, who appears for the Secretary of State, submits in any event that no relief could sensibly granted even if this ground were valid. This is because if the decision survives the irrationality challenge, it is likely to be remade in the same way even if it is quashed and remitted on this ground. There is a degree of *realpolitik* in this submission and I do not think it necessary to decide whether it is well-founded. I reject this fourth ground of challenge because I am not prepared to infer from the choice of language in post-decision correspondence that Mr. Toft is not telling the truth when he says that the decision (which was taken by the acceptance of his recommendation) was not based on a concern that disclosure to the claimant would breach the Data Protection Act unless the claimant were a member of an ATA. It is not surprising that pre-action correspondence in a case such as this is permeated with the language of the 1998 Act, but this does not mean that the particular decision with which I am concerned was taken because of a misconceived fear that the Act might be breached by disclosure to the claimant. The claimant has therefore failed to make out his factual case and it is not necessary to consider this ground further.

The requirement to join the ATA: discussion and decision

34. The claimant submits that the Codes of Practice currently in use by the ATAs are not be suitable in every respect to the regulation of an operator which seeks to prevent all parking on the relevant land, rather than to operate a car park on the land. To the extent that this may be right, it does not follow that the requirement to join the ATA was irrational. The Codes were devised to regulate the car park operators because their activity was the reason why membership of an ATA became a precondition to accessing the register electronically as from 2006 and by any means as from 2009. The accreditation of the ATA by the Secretary of State is conditional upon it being able to regulate all those businesses which are required to become members of it. In so far as the claimant's business model may require slightly different rules in the

Code of Practice, the ATA will therefore be required to adopt them. This does not mean that the claimant is entitled to re-write the Code as he wishes: its purpose remains the regulation of his business so that it does not misuse its access to the register in any way. The BPA and IPC have both confirmed that membership applications from companies which seek to prevent trespass and it follows that if this requires any changes to the Codes of Practice then they must make them. So, for example, it may be necessary to consider who, in a business of this kind, should be described as "front line operational staff" who should wear uniforms. If the claimant or his staff issue documents which have the same effect as parking charge notices this may involve their coming into contact with drivers of vehicles. The requirement that uniforms are worn appears to be designed to ensure that confusion does not arise as to the identity and status of a person issuing a written demand for money. There seems no reason in principle why this requirement should not extend to members of staff of the claimant who come into contact with trespassing drivers. This is particularly so where members of staff may find themselves using barriers to prevent vehicles from leaving the site. That, however, is a matter for the ATA to consider when it decides what, if any, amendments to its Code should be made to ensure that the claimant's business is properly regulated. I am not persuaded by the submission that the uniform requirement is irrational because it may give the wrong impression because a uniform suggests that a service is being provided. The member of staff issuing documents is providing a service to the landowner, just as the local authority traffic wardens were doing (apparently without much success) before the clients employed the claimant. The cost of providing a uniform is modest and, as I have indicated, would ultimately be part of the costs passed to the customer and, perhaps, recovered from trespassers.

35. My observations at paragraph 34 above are designed to deal with the alleged incompatibility of particular parts of the Codes of Practice with the claimant's business model. In my judgment, the overall structure of the Codes is suitable for providing a degree of regulation for the claimant. The differences between the claimant's business model and that of a parking management company are far less substantial than the similarities. He is not, in any real sense, an estate management business. This may be illustrated by the fact that in the case of the Trinity College land at Felixstowe his contract is with an estate management company retained by the College to manage its estate. That company, as part of its many functions might have to deal with parked or abandoned vehicles and does so by retaining a specialist business which seeks to recover charges from trespassers. That specialist business makes a profit from those charges. Where Mr. Toft points out that estate management companies running, for example, housing estates do not deal with trespassing vehicles on a commercial basis, he means that they do not seek to generate a substantial income stream from the trespassers. The distinction is really a matter of degree. The claimant has made over 1,800 applications for disclosure since 2012, which puts him into a different category from that of an estate management company which occasionally has to deal with an abandoned car. Therefore, Mr. Toft's explanation of the classification of the claimant in Table 2 above and not Table 1 is entirely rational. Once the claimant is properly put into Table 2, then the Secretary of State is entitled to conclude that he is engaged in an activity which has given rise to public concern and which requires a raising and maintenance of standards across the industry.

36. The imposition on the claimant of a condition which applies to everyone else involved in substantially similar activity is not a punishment imposed for wrong-doing.

Therefore the fact that he has not misused data in the past is irrelevant. Similarly, the fact that he is a person whose behaviour is already subject to some control as a bailiff is irrelevant. The County Court in considering the renewal of his certification as a bailiff will not know about, or take into account, matters such as the fairness of the signs he uses in his ProServe business. These things are regulated by an appropriate trade association, not by the County Court. The signs which he uses have been found to be defective by Judges in the County Court and, although they have now been changed, did create a misleading impression in that the readers were intended to believe that they had somehow entered into a contract to pay particular sums as a result of having parked on the private land equivalent of a "double yellow line". This is an indication in the particular case of the claimant that regulation by an ATA would be desirable. However, in this respect the particular conduct of the claimant is not the critical question. The policy holds, after at least two public consultations, that this industry requires a degree of self-regulation. The rule that a lawyer must belong to an appropriate professional body does not involve a finding that the lawyer has behaved badly and requires regulation, nor can the lawyer argue that he should not be required to comply because he can devise other ways of giving effect to the policy behind the rule. Once the Secretary of State has found, as he did, that the claimant, despite his argument to the contrary, is involved in the same industry as other people already subject to the policy it is entirely rational to apply it to him. As I have indicated in my judgment that classification of the claimant's business is not irrational.

37. The principal concerns which the claimant raises about the effect of joining an ATA (apart from the requirement to pay for membership) appear to relate to the fixing of the level of charges and the appeal procedure. As far as the charge level is concerned it is simply not true to say that the BPA Code imposes a limit of £100. I have set out the provision above. The claimant is required to justify his charges to the ATA and no doubt would seek to do so in a rather more persuasive way than he achieved before His Honour Judge Moloney Q.C. in his litigation against Mr. Anderson (where he recovered less than £100). The ATA will consider his representations and decide what level of charging is proportionate to the loss caused by the trespass. If there is a dispute about that in any particular case, it will be decided in the first instance by POPLA and to the extent that the claimant's charges are upheld, the claimant can then sue for the charge.

38. The existence of an independent and free appeal body is a matter which the Secretary of State is entitled, in my judgment, to regard as a real benefit to the public interest conferred by the policy. The submission of Mr. Yeo was that there is a clear "legislative steer" requiring disclosure to any person who had reasonable cause to want it, which is usually understood to relate to a person wishing to enforce a liability. Since it is common ground that the claimant is such a person disclosure should be made to him. He submits that the policy which requires membership of an ATA runs contrary to that "steer". There are two answers to this, in my judgment

    i) The legislation creates a discretion: disclosure may be made to a person whom the Secretary of State considers has a reasonable cause for wanting it. He is entitled to have a policy which governs the exercise of that discretion.

    ii) In any event, a person who wanted disclosure to enforce a genuine liability by improper means would have a cause for wanting it, but not a reasonable cause.

> The function of the policy is to prevent malpractice and thus to ensure that disclosure is made to those whose cause is reasonable in this sense.

39. Therefore I find that the policy does not offend against the terms of Regulation 27(1)(e), and its application to the claimant is not irrational.

The unlawful pre-condition ground

40. This ground is, as I have said, partly covered within ground 1. In addition, Mr. Yeo argues that the requirement of membership of an ATA is unlawful because it excludes the jurisdiction of the courts to award damages for trespass. Damages for trespass are at large and for the court to assess, he submits. That submission would be more attractive if the claimant was not in the business of posting signs which claim fixed sums for trespass. The Sign which he used to use before it fell foul of the County Court said this (in the small print section, as Judge Moloney pointed out)

> "Recoverable sums for trespass and/or breach of contract, are as follows: Removal car £300. Removal commercial £600. Charge notice car £150 per hour. Charge notice commercial £250 per hour. Control by barrier and restriction charge £100 per hour per person."

41. In fact, membership of an ATA does not entirely oust the jurisdiction of the court. The member of the ATA is restricted from recovering more than POPLA has upheld. If the charge is upheld by the ATA and POPLA, but is not paid, it will be claimed by the claimant as damages for trespass. No doubt the County Court would be influenced in its assessment of quantum by the fact that the charges had been approved in advance by the ATA and upheld after the event by POPLA, but it would still have to make a finding about the proportionality of the charge claimed to the loss suffered. The ATA requirement is that the charges should be justifiable commercially, which may come to something very similar. There is no doubt that the ATA is in a better position to know what level of charges may be justified commercially than is a County Court judge sitting in the small claims court with no evidence on the topic except what the claimant says.

42. At one stage the claimant suggested that membership of an ATA would prevent him using barriers. In fact this is a misreading of the Code of Practice of the BPA. The use of barriers is regulated by the POFA which creates criminal offences. The BPA restriction goes no further than that.

Abdication of power

43. The short point in answer to this ground is that the Secretary of State has not abdicated his power under Regulation 27(1)(e). He has indicated that he will exercise it where applicants are able to satisfy the requirements in Table 2 above.

Conclusion

44. I agree with the Deputy High Court Judge who refused permission on the papers, prior to its grant at an oral hearing. She observed that this claim for judicial review is really a merits challenge to the decision rather than a true public law claim. The

claimant does not agree that he should be subject to a requirement that he should join an ATA if he wishes to be able to access large amounts of data from the register in order that he can profit by recovering sums of money from the keepers or drivers of vehicles which have trespassed on his clients' land. He is no doubt entitled to that view. However, the Secretary of State took a different view and his decision is plainly not irrational and there is no other arguable basis for quashing it.

Costs

45. After circulating this judgment in draft in the usual way I received a written submission on behalf of the claimant that the Secretary of State's costs should be limited to 75% of the costs because the Pre-Action Protocol letter did not make the true basis of the decision sufficiently clear. It allowed a belief to be rationally formed that a misconceived approach to the Data Protection Act had played a significant part in the decision in this case. In deal with this at paragraphs 31-33 above.

46. The problem with this argument is that the Secretary of State's position on this issue became clear in the Acknowledgement of Service and was the basis on which the Deputy High Court Judge who refused permission on the papers refused it on ground 4. The Deputy High Court Judge who granted permission did so generally, but did not identify any arguable issue on ground 4. It was therefore open to the claimant to abandon this argument at that stage, but he did not do so. Further, my impression is that it was a relatively short point which would not justify a very substantial discount on a costs order. Finally, there appears to me to be some hazard in founding a judicial review claim on a construction of the pre-action protocol correspondence when the basis of the decision was clearly set out in the decision letter. For these reasons it appears to me that the claimant should pay the costs of the Secretary of State without deduction.