IN THE FIRST TIER TRIBUNAL **Appeal No: EA/2014/0112**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Monetary Penalty Notice dated 1 April 2014

Before

Andrew Bartlett QC (Judge)

Rosalind Tatam

Alison Lowton

Heard at Field House, London EC4

Dates of hearing 9-10 December 2014

Date of decision 15 December 2014

APPELLANT: **AMBER UPVC FABRICATIONS LIMITED**

RESPONDENT: **INFORMATION COMMISSIONER**

Representation:

For the appellant Ben Williams

For the respondent James Cornwell

Subject matter:

Privacy and Electronic Communications Regulations 2003 – unsolicited calls for direct marketing

Cases:

Marleasing SA v La Comercial Internacional de Alimentacion SA C-106/89, [1992] 1 CMLR 305;

Campbell v MGN Ltd [2002] EWCA Civ 1373;

Durant v Financial Services Authority [2003] EWCA Civ 1746;

R (Lord) v Sec of State for the Home Department [2003] EWHC 2073 (Admin);

FII Group Test Claimants v Revenue and Customs Comrs [2012] UKSC 19;

Scottish Borders Council v IC EA/2012/0212, 21 August 2013;

Niebel v IC EA/2012/0260, 14 October 2013

Central London Community Healthcare NHS Trust v IC [2013] UKUT 0551 (AAC);

Vidal-Hall v Google Inc [2014] EWHC 13 (QB);

IC v Niebel [2014] UKUT 0255 (AAC).

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

Introduction

1. A telephone call made for direct marketing purposes is against the law when it is made to the number of a telephone subscriber who has registered with the Telephone Preference Service ('TPS') as not wishing to receive such calls on that number, unless the subscriber has notified the caller that he does not, for the time being, object to such calls being made on that line by that caller. The relevant law is regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, as amended ('PECR' or 'the regulations').

2. The appellant sells UPVC windows and related products to the domestic market. The present appeal is against a Monetary Penalty Notice dated 1 April 2014 by which the Information Commissioner imposed on the appellant a penalty of £50,000 for making unsolicited calls for the purposes of direct marketing contrary to regulation 21.

Legal framework

3. A fundamental purpose of Directive 2002/58/EC was to protect the privacy of electronic communications users.[1] The PECR were made for the purpose of giving effect to Directive 2002/58/EC. The PECR were amended for the purpose of giving effect to Directive 2009/136/EC, which amended and strengthened the 2002 provisions.

4. According to recital (69) to the 2009 Directive, the need to ensure an adequate level of protection of privacy calls for effective implementation and enforcement powers in order to provide adequate incentives for compliance. Hence the new Article 15a(1) of the 2002 Directive (inserted by the 2009 Directive) requires Member States to lay down rules for penalties that are "effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified".

5. PECR Regulation 21 provides:

> (1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-
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> (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
>
> (b) the number allocated to the subscriber in respect of the called line is one listed in a register kept under regulation 26.
>
> (2) A subscriber shall not permit his line to be used in contravention of paragraph (1).
>
> (3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.
>
> (4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.
>
> (5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his–
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> (a) the subscriber shall be free to withdraw that notification at any time, and
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> (b) where such notification is withdrawn, the caller shall not make such calls on that line.

6. The register kept under regulation 26 is maintained by the Telephone Preference Service.

[1] See Recitals (2) and (3) and Article 1(1).

7. Section 11(3) of the Data Protection Act defines direct marketing as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of the PECR: see regulation 2(2).

8. The Commissioner's power to issue a Monetary Penalty Notice derives from s55A of the Data Protection Act, as adopted and adapted by the PECR 2011, in the following terms[2]:

> (1) The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that-
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> > (a) there has been a serious contravention of the requirements of the [PECR] by the person,
> >
> > (b) the contravention was of a kind likely to cause substantial damage or substantial distress, and
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> > (c) subsection (2) or (3) applies.
>
> (2) This subsection applies if the contravention was deliberate.
>
> (3) This subsection applies if the person-
>
> > (a) knew or ought to have known- (i) that there was a risk that the contravention would occur, and (ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but
> >
> > (b) failed to take reasonable steps to prevent the contravention.

9. The prescribed maximum penalty is £500,000.[3] The Commissioner has issued Guidance pursuant to s55C.[4] The Guidance has been approved by the Secretary of State and laid before Parliament.

10. There is a right of appeal to the Tribunal against a Monetary Penalty Notice.[5] The nature of the appeal is a full merits review: *Central London Community Healthcare NHS Trust v IC* [2013] UKUT 0551 (AAC), [50]. The applicable standard of proof is the balance of probabilities: *Scottish Borders Council v IC* EA/2012/0212, 21 August 2013, [20].

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[2] See reg 31 of and Schedule 1 paragraph 8A to the 2003 Regulations, as amended and inserted by the 2011 Regulations.

[3] Data Protection (Monetary Penalties) (Maximum Penalties and Notices) Regulations 2010, reg 2.

[4] Information Commissioner's guidance about the issue of monetary penalties prepared and issued under section 55C(1) of the Data Protection Act 1998, published 2012. This is the second edition of the guidance.

[5] The right of appeal is provided by article 7 of the Data Protection (Monetary Penalties) Order 2010, which applies the appeal provisions of s49 of the Data Protection Act.

11. The relevant provisions were considered in some detail in *Niebel v IC* [2014] UKUT 0255 (AAC). Mr Williams for the appellant submits that the following points of principle can be distilled from the Upper Tribunal's decision:

> "a. 'The contravention', depending on the circumstances of a particular case, may be taken to be the cumulative impact of the total number of individual contraventions relied on by the ICO (as, e.g., in *Niebel*, 286 specific text messages) (§ 36).
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> b. The next step is to ask whether that 'cumulative contravention' was "of a kind likely to cause substantial damage or substantial distress" (§ 36).
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> c. 'Of a kind' includes such matters as the method of breaching the regulations (e.g. by text, "live" cold-calling, etc.), the general content and tenor of the communication, and the number or scale of the contravention(s). The tribunal should only consider the identified individual contraventions in assessing whether the 'cumulative contravention' was of the relevant 'kind' (§§ 37, 40).
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> d. 'Likely' means something which is more than 'a real risk', i.e. 'a significant risk' (per *R (Lord) v SofS for the Home Department* [2003] EWHC 2073 (Admin) (§ 27) but thus need not mean "more likely than not" (§ 36).
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> e. 'Substantial' is an ordinary English word which the Upper Tribunal should not seek to define or replace with synonyms (§§ 46-48); it can have a range of meanings which are context-sensitive (§§ 49-50); it can have both a quantitative and qualitative dimension, but is ultimately a question of fact and degree (§ 51). Notably the Commissioner's own guidance refers to the distinction between distress (or damage) which is "merely perceived" rather than "of real substance" and neither the FTT nor the Upper Tribunal in *Niebel* thought that was over-stating the sense in the context of s55A.
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> f. 'Damage' and 'distress' are distinct (§ 53); the former being confined in this context to economic loss and the latter to emotional effect (ibid).
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> g. 'Substantial distress' is a compound phrase, which to some extent is "linguistically irreducible" (§ 59); however, 'distress' does not encompass "any injury to feelings", as the Commissioner's guidance suggests, and is distinct from mere irritation (§ 60). The formulation of the threshold in those terms was a domestic decision, not mandated by EU law (§ 65) and it is a matter for parliament not the tribunal system to decide whether to lower the threshold to include, e.g., mere annoyance or irritation.
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> h. The FTT should consider evidence of the actual impact of the contravention(s) on complainants but is entitled to be cautious about what weight to attach to it; the

tribunal's task is to "review the facts for itself and make its own assessment of the likely consequences of this kind of contravention" (§68, emphasis original)."[6]

12. We broadly accept Mr Williams' summary, subject to some qualifications.

13. First we note that in *Niebel* at [64]-[65] the Upper Tribunal referred to the inconsistency with the Directives which was introduced by the domestic threshold requirement of proof of the likelihood of substantial damage or substantial distress. The Upper Tribunal suggested that it may be incumbent on the Commissioner to present a more compelling case, or that the statutory test should be "revisited with a view to making it better fit the objectives of the 2002 Directive (as amended)". There is a third approach to the inconsistency, which is that, since PECR are intended to implement the 2002 and 2009 Directive, it is the Tribunal's duty to interpret the regulations, so far as possible, in a manner that is consistent with the Directives (the *Marleasing* principle).[7] In *Niebel* the Upper Tribunal, while agreeing on the need for a purposive interpretation (see [64]), did not enter into any detailed discussion of how this might be implemented or how far the inconsistency could be reduced by adopting this approach.

14. As regards point 'c', the proposition that the tribunal should only consider the identified individual contraventions in assessing whether the 'cumulative contravention' was of the relevant 'kind' was specific to the circumstances of *Niebel*, where the charge or contravention actually laid against Mr Niebel and Tetrus was not that they had been engaged in industrial-scale spamming, involving hundreds of thousands of messages, but was confined to 286 messages. In other circumstances the Commissioner might present a case based both on a sample of identified individual contraventions and on a wider course of conduct involving contraventions, the latter being demonstrated by evidence but without identification of individual calls.

15. As regards point 'd', we note that in *Niebel* it was agreed between the parties that the Upper Tribunal should proceed on the basis of the meaning of "likely" which was held by Munby J (as he then was) to apply to s29(1) of the Data Protection Act in *R(Lord) v Home Secretary* [2003] EWHC 2073 (Admin) at [99]-[100], namely, it connotes a degree of probability where there is a "very significant and weighty chance" of substantial damage or substantial distress being caused, ie, "the degree of risk must be such that there may very well be" such damage or distress, "even if the risk falls short of being more probable than not". The Upper Tribunal

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[6] Paragraph 10 of the Skeleton Argument on behalf of the appellant.

[7] This is a basic principle of law by which the Tribunal is bound: *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89, [1992] 1 CMLR 305; *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [96] (not affected by the reversal on appeal at [2004] UKHL 22); *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [3]; *FII Group Test Claimants v Revenue and Customs Comrs* [2012] UKSC 19, [176] "*Marleasing*, at any rate as it has been applied in England, is authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom".

was therefore not required to make a decision on the appropriate meaning of "likely" in the present statutory context. It seems to us that the considerations identified by Munby J as dictating his choice of meaning (see *Lord* at [99]) are absent from the present context. It is at least arguable that the most appropriate meaning for the present context is the meaning identified by Munby J at [96] and [97] as "more than fanciful", ie, "a real, a substantial rather than merely speculative, possibility, a possibility that cannot sensibly be ignored". It could be said that the choice of this latter meaning is dictated by the obligation on the Tribunal to interpret the regulations, so far as possible, in a way consistent with the Directives which they are intended to implement.

16. As regards point 'e', we see that in *Niebel* Mr Cornwell identified two rather different meanings of the word "substantial", one meaning being 'more than trivial, ie, real or of substance', and the other 'large, big, weighty or a substantial part'; and the Upper Tribunal accepted that he was correct to distinguish these two possible meanings: see *Niebel* at [44] and [49]. We are unsure whether paragraphs [49]-[51] are intended to exhibit a choice of one meaning rather than the other for the purposes of the particular statutory context. What the Upper Tribunal had to decide was whether there was an error of law in the decision of the First-tier Tribunal. The First-tier Tribunal had proceeded on the basis of agreement between the parties that distress "could acquire the label 'substantial' both qualitatively and quantitatively, in other words, because of its depth or acuity or because of its widespread nature".[8] We read paragraphs [49]-[51] of the Upper Tribunal decision as holding principally that proceeding in this way did not involve an error of law. In so far as there was a choice between the two meanings, we concur with Mr Cornwell's submission that the Upper Tribunal chose the first meaning, because in paragraph [51] it endorsed the Commissioner's Guidance to the effect that the distress needed to be "of real substance". This fits with the citation in paragraph [49] in which the meaning "not trivial" is given. However, if the Upper Tribunal's decision should not be read as having made a choice of meaning, so that it is open to us to choose between the two meanings, we do so by applying the *Marleasing* principle; we have no hesitation in choosing Mr Cornwell's first meaning, since this is less inconsistent with the United Kingdom's obligation to implement the Directives than the second.[9]

17. As regards point 'f', the Commissioner's Guidance states that "damage" is "any financially quantifiable loss such as loss of profit or earnings, or other things". We are unsure whether this is intended to mean that the only relevant kind of "damage" is economic loss. If it is intended to mean that, then we respectfully disagree. In *Niebel* the Upper Tribunal made reference to this guidance at paragraph [52]. What the Upper Tribunal decided at paragraph [53] was that "damage" was distinct from the emotional turmoil which would qualify as

[8] *Niebel v IC* EA/2012/0260, 14 October 2013, at [11].

[9] We acknowledge our considerable debt to the oral submissions of Mr Cornwell and Mr Williams in assisting our understanding of paragraphs [44]-[51] of *Niebel*. We would add that we are unsure what the Commissioner's Guidance means by distress that is "merely perceived".

"distress". We are bound by that holding and in any event respectfully agree with it, but we would add that we see no reason to exclude from the statutory meaning of "damage" any other form of damage recognised by law. For example, depending on the facts, personal injury could be relevant, as also could interference with the comfortable and convenient enjoyment of property.[10]

18. As regards point 'g', the phrase "distress does not encompass any injury to feelings" is ambiguous. What the Upper Tribunal rejected was the proposition that any injury to feelings, however small, automatically qualified as "distress". The term "distress" must be given its ordinary meaning; it connotes something more than mere irritation.

19. Mr Williams included in his point 'g' a submission that the formulation of the threshold in terms of substantial damage or distress was a domestic decision, not mandated by EU law, and it is a matter for Parliament not the tribunal system to decide whether to lower the threshold. We accept this submission as far as it goes, as faithfully reflecting paragraphs [64]-[65] of the Upper Tribunal's decision, but we do not consider that this excuses us from applying the *Marleasing* principle in so far as we have to make a choice between the two possible meanings of "substantial", as discussed in paragraph 16 above.

20. The Commissioner's Guidance states that, "if damage or distress that is less than considerable in each individual case is suffered by a large number of individuals the totality of the damage or distress can nevertheless be substantial". Mr Williams expressly accepted that this was a correct statement of the law.[11]

21. We approach our task in this case on the basis of the above exposition of the law, except as follows:

    a. We assume for the purposes of this appeal that the relevant degree of likelihood is the degree required by the citations from paragraphs [99]-[100] of *Lord*. We do this because the Commissioner did not argue for the less stringent meaning found in paragraphs [96]-[97] of *Lord*. It would be unfair to the appellant for us to proceed on a basis which the appellant did not have a fair opportunity of dealing with.

    b. While Mr Cornwell was disposed to agree, as a matter of law, with the wider meaning of "damage" which we have referred to in paragraph 17 above, the Commissioner's case against the appellant was put squarely on the basis of the

[10] We do not understand paragraph [63] of *Niebel* as deciding to the contrary. The discussion was concerned only with the relatively novel concept of 'moral damage' provisionally recognised by Tugendhat J in *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB), and did not touch on more familiar forms of damage long recognised at common law.

[11] This was on the basis that the cumulation of insubstantial distress in a large number of cases could satisfy the "quantitative dimension" of substantial distress referred to in *Niebel* at [51]. However, Mr Williams rightly reminded us that substantial distress could not be constituted by the cumulation of something that in each instance fell short of distress.

likelihood of substantial distress, rather than the likelihood of substantial damage. We therefore confine our consideration to the question of distress and do not consider any question of damage.

The appeal to the Tribunal and the questions for the Tribunal's decision

22. The appellant's contentions on appeal are, in outline:

    a. The contravention was not serious.

    b. Section 55A(1)(b) was not satisfied, because the contravention was not of a kind likely to cause substantial distress.

    c. The appellant's engagement with the Commissioner renders the imposition of the penalty inappropriate; alternatively its size is disproportionate.

    d. Because the appellant has made improvements to its systems, the penalty is inappropriate and/or disproportionate.[12]

Evidence and findings

23. We received written and oral evidence from Mr Eddie Taylor (the finance director, but not a company director, of the appellant), Mr Mark Carter (an accountant employed by the appellant), Mr David Clancy (a manager in the Commissioner's Enforcement department's PECR team), and Mr Arthur Cummings (an assistant manager of the Telephone Preference Service run by the Direct Marketing Association (UK) Ltd). This evidence was accompanied by two large volumes of documentation.

24. Some of the material facts were not in dispute at the hearing. The appellant operates across the Midlands from a central office at Coleshill and branches at Cotteridge, Coventry, Derby, Erdington, Leicester and Wolverhampton. It relies heavily on telephone calls to market its products and services. It made nearly four million telephone calls in the period of complaint (May 2011 to April 2013), of which Mr Taylor surmised between 80% and 90% were marketing calls. The Commissioner relied on 524 unsolicited calls made in contravention of the regulations. The appellant admitted that it made 360 of the calls. Some consumers complained of being called two or more times.

25. We found the evidence of Mr Taylor and Mr Carter to be rather unsatisfactory in a number of different ways. They took refuge in broad assertions about the appellant's approach to compliance with the regulations, without being able to demonstrate that they were genuinely familiar with the relevant facts. They were able to speak only in general terms about the changes to the appellant's telephone systems that had been made from time to time, and appeared unfamiliar with the detail. They had no convincing explanations for the numerous occasions when the appellant had failed to respond to complaints and

[12] This outline is adapted from the appellant's skeleton argument, paragraph 11.

correspondence from TPS or from the Commissioner. The general picture which we got was of a company which did as little as possible as late as possible to comply with the regulations, and only took reluctant and belated action in response to clear threats of legal enforcement.

26. We comment in particular on the following features:

    a. There was an incontrovertible history of failure to respond to complaints and correspondence which were definitely received by the appellant. The suggestion by the appellant that it did not respond to the Commissioner's letters of 28 July 2012 and 6 December 2012 because it had not received them found no support in the evidence. Other letters sent to the same addresses had been received and similarly ignored.

    b. When the appellant did respond to the Commissioner's correspondence, such responses were at best only partial, and failed fully to answer the Commissioner's queries or to give full details of remedial actions.

    c. The appellant criticised the Commissioner for sometimes being confused about which company (whether the appellant, or a related company with a slightly different name[13]) was making unsolicited calls. This was a very unattractive criticism, given that the appellant did not comply with the requirements of the Companies (Trading Disclosures) Regulations 2008/495 concerning the publication of details of company registered name and number, address of registered office, etc, on all business correspondence and documentation. Some of the correspondence was positively misleading. The appellant's letter of 11 April 2013, written by Mr Carter, was even signed by him in the name of the Company Secretary of the wrong company.[14]

    d. The appellant's claim that large numbers of emails from TPS had not been responded to because, unknown to the appellant, they had gone into the appellant's spam box, appeared to us to be a lame and improbable excuse. The emails were addressed to Mr Carter at his individual email address, and it was clear that other emails so addressed were regularly received from TPS. From the excuse itself it was clear that the appellant had never even thought about putting TPS onto its email

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[13] The appellant sold UPVC windows and the like under the trading name "Amber Windows". The related company (with a common director and at the same address) was Amber UPVC Windows Ltd, which sold similar products on a business to business basis.

[14] By way of further detail: the representations letter of 4 November 2013 contained no information as to the registered name, address or number; Mr Taylor's letter of 15 September 2014 was headed 'Amber UPVC Windows', which is the name of the business to business company, minus the word "Limited", but gave the company number of the appellant.

'white list', so as to be sure of receiving every email from TPS; this would have been a priority for a properly run company engaged in telephone marketing.

e. Mr Taylor and Mr Carter both claimed that calls could only be made to TPS registered numbers from one telephone line in each office (generally the branch manager's telephone or possibly another dedicated handset). This claim could not be squared with the call details. For example, such calls were made from at least five different numbers at the Leicester office. They were unable to explain this. The schedules showed calls made to TPS registered subscribers from lines that were supposedly barred from doing so. At the material time the appellant had no system for verifying that staff based in its branches were not wrongly calling TPS registered numbers.

f. Mr Taylor stated that the appellant's practice was to treat 'lead cards' and other requests for information as evidence of consent to receive marketing calls. The form of lead card in use was quite hopeless for that purpose. It was confusingly worded, and was filled in by the canvasser, not by the consumer. It did not properly identify the legal entity to which consent was supposedly given. Although the expression of interest by the consumer may have related only to a particular product at a particular time, the lead was treated as a general consent. Customers remained on the contact list for calls even if they changed their mind and cancelled the appointment noted on the lead card, unless they specifically asked to be taken off the list.

g. While the practice may have been to treat lead cards as evidence of consent, it seems to us that the appellant did not in fact believe that it had appropriate evidence of consent. In relation to 513 complaints notified to the appellant by TPS, relating to the period of complaint, there was only one occasion when the appellant's response to TPS was that it had the consent of the subscriber.

h. According to Mr Taylor the appellant's provider Telephone Europe Ltd made a positive identification of 360 complained-of calls as having been made by the appellant. The appellant's letter of 15 September 2014 stated that (only) seven of the 360 were calls to existing customers. In evidence Mr Taylor said at one point there were two instances where the call had been from the service department. At points in his oral evidence he claimed that many of the 360 calls were not marketing calls, but there was no reliable evidence to show that this was correct. The complaints by members of the public were specifically on the basis that the calls were marketing calls; in our view the probability is that the members of the public were correct in nearly every case.

i. The appellant contended that the identification of 360 calls by Telephone Europe meant that the balance of the 524 relied on by the Commissioner had not been made by the appellant. This was an illogical jump, and there was no evidence from Telephone Europe to back it up. This contention is inconsistent with the

identification of "Amber Windows" by nearly all of the complainants, and with other evidence of identification. We reject it.

j. Mr Taylor took the view that complaints were not genuine or did not indicate distress where they were made more than 24 hours after the call in question. It had not occurred to him that, if a complaint was made a month later, that might indicate that the member of the public remained upset even after that length of time.

k. Mr Taylor admitted that even now the appellant had no written procedure for how telesales staff should act when told by the person taking the call that the number was TPS registered. He gave no evidence of any training or instructions given to sales staff, supervisors or managers regarding the requirements of the regulations or how to comply with them.

l. The appellant featured in the TPS top twenty most complained about companies in February, March, June, November and December 2012 and February, March, April and May 2013. A properly run telemarketing company would keep a very close watch on its standing with the TPS. Yet Mr Taylor complained in his letter of 15 September 2014 that the Commissioner's letter of 14 October 2013[15] had not pointed out to him that Amber was appearing in the top twenty list. In our view this is illustrative of his lack of proper attention to the basics of telemarketing compliance.

m. Mr Taylor sought to blame the Commissioner for not responding constructively to his closing remark in his letter of 4 November 2013 about welcoming dialogue as to further actions he could take and what other companies were doing. In our view this was unreasonable, when seen in the context of the appellant's failure to deal properly with the earlier correspondence and its failure to take on board the detailed information provided by the Commissioner about its legal obligations.

n. The measures taken recently by the appellant to improve its telephone system were undocumented. Invoices were produced, but these gave no details of the functionality of the new equipment or systems. When this was explored with Mr Taylor, he stated that there was no written specification of the appellant's requirements against which the performance of the new equipment or new systems could be judged.

o. In sum, it was obvious to the appellant from October 2009 onwards that it was the subject of frequent complaint to TPS and/or the Commissioner from TPS registered consumers, but in our view the appellant did not at any time up to the issue of the Monetary Penalty Notice treat the issue of its compliance with the law with appropriate seriousness. Its responses, such as they were, were always too little, too late.

[15] mis-dated 18 March 2013

27. The Commissioner contended that there was evidence that the appellant made calls to consecutive numbers, and that this showed that the appellant was not using numbers obtained from marketing leads or bought-in lists but simply dialling sequential numbers. Mr Taylor and Mr Carter denied this allegation and explained why such a practice would be inherently unlikely to occur. Having considered the details of the evidence, we were not satisfied that this allegation was substantiated on the balance of probabilities.

Was the contravention serious?

28. We have no hesitation in finding that the contravention was serious. In our view the evidence establishes that the appellant made hundreds of calls that were in breach of regulation 21. The breaches were on a large scale and over a substantial period. As we have indicated above, we consider that all or nearly all of the 524 calls identified by the Commissioner were contravening calls. Even if we are wrong about some of them, the broad picture does not alter.

Was the contravention of a kind likely to cause substantial distress?

29. Mr Williams argued that the contravention was not of a kind likely to cause substantial distress. We accept his legal submission that aggregation of instances of mere irritation or annoyance could not qualify as substantial distress. His principal points on the facts were:

    a. A brief sales call, consisting of introductory remarks and sales patter, asking if the recipient was interested in the appellant's products (the normal pattern in this case), was not of a nature likely to cause substantial distress.

    b. Unlike unsolicited text messages, such calls do not cost anything to receive and are not anonymous. They do not need to be deleted but can be terminated simply by replacing the receiver.

    c. If such calls might cause irritation or annoyance, that was not the same as causing distress.

    d. The rudimentary details provided by complainants to the TPS did not establish distress was actually caused.

    e. The fuller details provided by complainants to the Commissioner should be treated with caution, particularly in view of the fact that those complainants were a self-selecting sample whose reaction was stronger than that of the generality of recipients. Moreover, the oft-repeated record "The call caused me substantial damage or distress" simply reflected a tick box choice, not the complainant's own description.

30. In regard to the first three of Mr Williams' points:

a. We take into account the usual nature of the calls, as described in the evidence. There were some examples of bad behaviour by sales staff during calls, but we will assume in the appellant's favour that these were untypical and rare.

b. We do not accept the argument that live sales calls are either less intrusive than, or no more intrusive than, text messages. A text message can certainly be annoying but it involves no direct human interaction; it can be ignored if the subscriber chooses to do so. A live telephone call is an insistent intrusion which demands attention. Where the subscriber is registered with TPS, the call defeats the subscriber's expectation that an incoming call will not be an unsolicited marketing call.

c. We accept that in many instances the calls would cause nothing more than irritation or annoyance, and that this is not the same as causing distress.

31. We postpone discussion of his fourth and fifth points until we have considered the inherent probabilities. It seems to us that, when hundreds of people who are registered with TPS receive unsolicited marketing calls, there is a very significant and weighty chance of substantial distress being caused, ie, the degree of risk is such that there may very well be substantial distress, in two ways:

    a. First, among the hundreds of people there may very well be one or more who are more sensitive than the average person, and accordingly suffer substantial distress as a result of such a call. This might be (for example) because they are suffering from physical or mental ill-health, or because they have recently been bereaved, or because they work from home and are close to a deadline for sending out a piece of work, or because of a recent bad experience with the same or another telesales company, or because the call comes at a time when they are awaiting a telephone call on a matter of great importance, or because they are elderly and vulnerable. There are many other possible reasons. The significant and weighty chance of causing substantial distress to one person is sufficient for the threshold test to be satisfied.

    b. Secondly, among the hundreds of people affected there will be some whose sensitivity is significantly greater than average, so that they will suffer not merely irritation but some distress from the call, albeit falling short of a substantial kind. Given the numbers involved, the aggregation of the distress suffered by these people will easily pass the threshold of substantiality.

32. We have considered the details provided by complainants to the TPS and to the Commissioner. We are conscious that we are required to decide not whether substantial distress was actually caused but whether the contravention was of a kind likely to cause substantial distress. Most of the details relate to calls during the complaint period. Where they relate to calls outside the complaint period, they seem to us to be no less and no more pertinent for the purpose of testing our view of what was likely, since there is nothing to suggest that the nature of the calls altered.

33. While it is true that the details provided by TPS are fairly rudimentary, they do not in our view undermine the assessment which we have given above, of how substantial distress is likely to be caused.

34. In so far as those who complained to the Commissioner were a self-selecting sample whose reaction was stronger than that of the generality of recipients, this does not seem to us to be a feature that materially helps the appellant's case. A person who suffered substantial distress might or might not complain to the Commissioner. Someone who was unwell or under severe pressure of work might be very unlikely to expend the time and effort to complain. If one person among that sample complained of substantial distress, that would constitute a potential illustration of the likelihood which we have mentioned above.[16]

35. The details of the complaints made to the Commissioner seem to us to confirm our views of inherent likelihood which we have expressed above. The option "The call caused me substantial damage or distress" was repeatedly selected by complainants, and this is not something that we should simply ignore. Two more detailed examples will suffice to illustrate:

    a. From within the complaint period one complainant, who selected the 'substantial damage or distress' option, wrote: "This call made me very angry. I have asked on many occasions that they should not call me again, but still they call. Asking me if I remember the previous call is adding insult to injury! I have called Amber Windows head office and complained again. I was told I would be removed from their lists, but they said that last time. I have no faith in thier [*sic*] promises to stop calling." We infer that this complainant suffered substantial distress.

    b. From after the complaint period another complainant, who selected the 'substantial damage or distress' option, wrote: "These calls are very distressing. It was late at night and I told them that we didn't want them to call as we are on the TPS. But ... I have received numerous calls ... ...". We infer that this complainant suffered substantial distress.

<u>Guilty mind?</u>

36. The grounds of appeal were somewhat diffuse. They did not raise a clear challenge to the fulfilment of the requirement that the contravention be either (1) deliberate or (2) such that the appellant knew or ought to have known that there was a risk that the contravention would occur, and that it would be of a kind likely to cause substantial damage or distress, and that the appellant failed to take reasonable steps to prevent it. The appellant's skeleton argument for the hearing did not identify this as a live challenge.[17] It was, however, raised by

[16] We acknowledge, of course, that, the actual occurrence of something that is very unlikely does not establish that it should have been regarded as likely. But in our view that situation is not this case.

[17] Similarly, the Commissioner did not see it as a live issue, as is evident from paragraph 39 of the Commissioner's skeleton argument.

Mr Williams in his closing submissions. We understood this to be a change in his arguments in the light of the difficulties which the appellant faced, on the evidence, on proof of consent. In other words, he shifted from arguing that there was consent to arguing that the appellant believed that there was consent, and hence did not have the guilty mind required by s55A(2)-(3).

37. Mr Cornwell submitted in response:

    a. There was no satisfactory evidence that any of the complainants actually consented, so there was no proper basis for a belief (if indeed any such belief existed) that the calls were being made to subscribers who had consented. In the absence of a proper basis, the appellant could not avoid a finding that, at the least, it ought to have known the risk.

    b. Amber was being bombarded with complaints from the TPS and from the Commissioner. From the volume and nature of the complaints it knew something must be amiss, yet it failed to take prompt and effective remedial action. It must therefore be the case that the contravention was either deliberate or satisfied the second limb of the definition.

38. We do not consider that the appellant was entitled to change its case at the very late stage of closing submissions, but in any event we accept both parts of Mr Cornwell's submission. We have also found that the appellant did not actually believe that it had consent: see paragraph 26g above. We therefore reject Mr Williams' submission.

Did the appellant's engagement with the Commissioner render the imposition of the penalty inappropriate or its size disproportionate?

39. The appellant's engagement with the Commissioner was poor over a long period, as we have described above. In view of our factual findings, the appellant's contention that its engagement with the Commissioner rendered the imposition of the penalty inappropriate or its size disproportionate is in our view wholly without merit.

Is the penalty inappropriate and/or disproportionate because the appellant has made improvements to its systems?

40. In April 2013 the Commissioner published a "Framework used to guide ICO staff in determining the appropriate amount of a monetary penalty". Under this five-step framework, the first step is consideration of the seriousness of the contravention. The Commissioner considered that the present case fell into the "serious" category, for which the band is £40,000 to £100,000. An initial assessment of £90,000 was reduced to £50,000 having regard to the financial condition of the appellant at the time of the Monetary Penalty Notice.

41. Since the objective of a Monetary Penalty Notice is to promote compliance with the regulations by punishing illegal behaviour and deterring other contraventions, the

Commissioner would be entitled to impose a penalty even if the appellant had fully solved its compliance issues at the date of issue of the Notice.[18]

42. In the present case the evidence about improvements was unsatisfactory in the respects we have indicated above. Even after service of the Notice, contraventions continued. It seems that even today the appellant has no formal procedure for how telesales staff should act when told by the person taking the call that the number is TPS registered. We were presented with no evidence of any training or instructions given to the appellant's telesales staff, supervisors or managers regarding the requirements of the regulations or how to comply with them.

43. In our view the penalty was appropriate (or, indeed, lenient) in the circumstances, and the appellant has no legitimate complaint concerning its size.

Conclusion

44. For the reasons set out above, and having regard to our findings, we hold that the Monetary Penalty Notice is in accordance with the law, and the appellant has not persuaded us that the Commissioner ought to have exercised his discretion differently, either by deciding not to issue the Notice or by setting a lower penalty. The appeal must therefore be dismissed.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge

[18] See further Article 15a(1), quoted in paragraph 4 above.