



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference:**

**Heard at Manchester Employment Tribunal  
On 15<sup>th</sup>. November 2016**

**EA/2016/0175**

**Before**

**JUDGE DAVID FARRER Q.C.**

**TRIBUNAL MEMBERS**

**PAUL TAYLOR**

**and**

**MICHAEL HAKE**

**Between**

**QUIGLEY AND CARTER LIMITED ("Q & C")**

Appellants

**and**

**THE INFORMATION COMMISSIONER ("THE ICO")**

Respondent

## DECISION AND REASONS

1. This appeal is dismissed but on the terms set out in §47.

### The relevant statutory provisions

2. Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations, 2003 ("PECR") provides as follows
  - (1) *This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.*
  - (2) *Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.*
  - (3) *A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—*
    - (a) *that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;*
    - (b) *the direct marketing is in respect of that person's similar products and services only; and*
    - (c) *the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.*
  - (4) *A subscriber shall not permit his line to be used in contravention of paragraph (2)".*

Section 55A of the Data Protection Act, 1998 ("the DPA"), as amended in relation to PECR communications, by "*The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015*" (S.I. 2015, No.355) provides -

#### ***55A Power of Commissioner to impose monetary penalty***

- (1) *The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that—*

- (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003, and,*  
*(b) subsection (2) or (3) applies.*

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*(3) This subsection applies if the person—*

- (a) knew or ought to have known that there was a risk that the contravention would occur, but*  
*(b) failed to take reasonable steps to prevent the contravention.*

### The background to this appeal

3. Q & C was incorporated in January, 2014 and initially traded as a legal costs firm. That venture failed due to the departure of Mr. Quigley upon whose expertise it relied. Having invested a substantial amount in setting up the company, Mr. Carter (“MC”) switched to data sourcing, specifically to claims relating to packaged banking accounts, a sector of which he had some experience.
4. For that purpose he set up a website, so as to trade as “My Bank Refund” and in December, 2014 obtained a licence from the Ministry of Justice to trade as a claims management company.
5. The business model that he adopted involved engaging a lead generation company to “drive traffic” to the Q & C website, such a company being paid by reference to the impressions or hits on the website resulting from their leads.
6. His evidence at the hearing was that he sought recommendations from “trusted contacts” in the industry as to a well established reliable company to generate such leads. Help Direct UK (“HDU”) was “highly recommended” and he engaged it on a three month trial to supply such leads to the website. He knew that compliance with the requirements of PECR, specifically regulation 22, was essential. He was aware that some, perhaps all the leads were to be generated by third parties which supplied them to HDU. It was therefore essential that the recipients of the texts had consented to such contact on the terms required by regulations 22 and 23. That demanded rigorous checks by Q & C so as to ensure that the traffic to its site was the result of compliant communications from HDU or its suppliers to the recipients of texts.
7. MC issued to HDU a contract headed “Standard Terms and Conditions” together with an “Opted in Data Supply Agreement” which were signed by both parties on 1<sup>st</sup>. January, 2015. The latter purported to relate to Q & C’s obligations under PECR and required HDU to maintain retrievable records of the consents obtained and to grant prompt access to such records whenever Q & C required it. It also included indemnities against liabilities, including fines, incurred as a result of any breach of the agreement by HDU. The content of this agreement will be considered later in this decision. Both agreements were copies of documents used by another

contractor which Q & C chose to adopt with a few name changes. Q & C also served on HDU a Due Diligence Questionnaire, which HDU only partially completed.

8. Q & C terminated the agreement at the end of March, 2015. HDU proved to be a disappointing source of leads and its opt – out software failed to prevent calls to excluded numbers. Its texting had also resulted in fourteen complaints to the ICO and a further 3,488 complaints to the 7726 spam reporting service of GSMA. MC, hence Q & C, were unaware of these complaints until alerted by the ICO on 1<sup>st</sup>. May, 2015, one month after the contract with HDU was terminated. We should add that, in the Tribunal’s opinion, a 7726 [Spam] report amounts to a complaint since it is hard to see what it is saying other than “I did not consent to receiving this text”. MC points out that a substantial number of complaints were repeat complaints following a second unauthorised contact. We consider the point below.
9. The HDU transactions were not the subject of the regulation 22(2) contravention but were material to the ICO’s, hence the Tribunal’s assessment of the gravity of the contravention which followed. MC stated that, when made aware by the ICO in May, 2015, of the complaints referred to above, he requested evidence of the consents from HDU but received nothing. On 27<sup>th</sup>. May, 2015, he informed Ms. Angela Mitchell, the Lead Case Officer charged with this investigation, of his request for the HDU consents and also that he had immediately terminated Q & C’s subsequent contract with C.J. Marketing Limited (“CJM”) to which we now turn.
10. On 1<sup>st</sup>. April, 2015, Q & C entered into an agreement with CJM which was incorporated in documents identical to those referred to in §6. MC stated that a due diligence questionnaire would also have been served on and completed by CJM but, if that is so, it has disappeared. CJM, like HDU was “highly recommended” by “trusted contacts”, according to MC. It seems to have operated in exactly the same way as HDU, generating visits to the Q & C website by texts to individuals with a message about refunds on packaged bank accounts. Q & C’s contravention of regulation 22(2) arises from its conduct in relation to its dealings with CJM.
11. Like HDU, CJM soon provoked complaints to the ICO and GSMA. On 12<sup>th</sup>. June, 2015, Ms. Mitchell emailed MC, drawing his attention to complaints concerning text messages made since 1<sup>st</sup>. April, 2015, hence relating to the marketing activities of CJM. She referred to 72 complaints made to the ICO and 2,795 to the mobile phone networks and requested the consent records for the texts complained of. On 29<sup>th</sup>. June, 2015, MC reported that he had requested the opt – in consent evidence relating to the complaints and that CJM had promised to respond but did not hold the evidence at the time. Thereafter, MC told the Tribunal that he pressed CJM for the consent records but, having terminated their contract obtained from them only a spreadsheet listing fourteen mobile phone numbers linked to a variety of data suppliers, which, MC acknowledged, was useless as evidence of the lawful obtaining of consents by CJM.
12. He made the same point as to the number of recorded complaints as in relation to HDU.

13. On 26<sup>th</sup>. February, 2016, the ICO issued a Notice of Intent to impose a monetary penalty, pursuant to s.55A of the DPA. The Notice specified that Q & C had committed a serious contravention of regulation 22 of PECR (s.55(A)(1)(a)) by instigating the transmission, between 6<sup>th</sup>.April and 9<sup>th</sup>. June, 2015 of 2689 unsolicited communications by means of electronic mail to individual subscribers. It stated that the above figure for complaints probably represented only a proportion of those who received such communications and that the number of communications over a two – month period amounted to a serious contravention. He found that the contraventions were not deliberate but that Q & C knew or ought to have known of the risk of contraventions and had failed to take reasonable steps to prevent them (s.55A(3)). He had decided that a penalty in the sum of £80,000 would be reasonable and proportionate. (The statutory maximum is £500,000 ).
14. MC submitted representations on behalf of Q & C. They foreshadowed almost exactly the Grounds of Appeal from the ICO's decision. They acknowledged a serious contravention of PECR regulation 22 but contested its gravity in relation to the number of communications likely to have been involved and the duration of the contraventions. Q & C did not know that there was a risk of contraventions because it relied on the recommendations of both HDU and CJM and the reassurances embodied in the written agreements and the due diligence undertaken. It believed at the time that it had taken reasonable steps to ensure that the operations of its lead suppliers were compliant with PECR but now admitted that they should have been more “robust”. As to the monetary penalty, the contravention was an isolated incident and Q & C had cooperated fully with the ICO. It had taken steps to prevent any recurrence of the contraventions by changing its business model and deterrence was not a necessary or appropriate factor in the decision on quantum of penalty. The ICO was wrong in his assessment of Q & C's ability to meet the penalty.
15. On 6<sup>th</sup>. June, 2016 the ICO issued a Monetary Penalty Notice in the sum of £80,000. He confirmed his earlier findings and specified the reputational damage to Q & C as a mitigating feature but the possible commercial advantage that it could gain from contravention as aggravating the offence. Q & C appealed to this Tribunal.

#### The Appeal

16. The Tribunal received a written Response from the ICO to the Grounds of Appeal and a Response to that Response from Q & C., which addressed the ICO's Response paragraph by paragraph. The Tribunal read with care all these written submissions before the hearing and does not repeat them extensively here. On the issue of seriousness, Q & C repeated its criticisms of the ICO's calculation of the number of complaints and whether messages to the GSMA service could be characterised as complaints. It did not contract specifically for text messages to be sent. Reliance on warranties to ensure PECR compliance was a “commercial reality”. Q & C was not and could not reasonably have been aware of enforcement action against HDU when it contracted with it.
17. MC submitted a witness statement for the Tribunal hearing, which largely repeated his Grounds of Appeal and Response. Ms. Mitchell provided a short witness

statement setting out the background to the appeal and exhibiting a record of text messages to which brief reference is made below. Both were cross examined on those statements. Further reference to their oral evidence appears below.

18. Q & C's case at the hearing was that

- (i) It admitted serious contraventions of regulation 22 whilst contesting the ICO's assessment of their gravity;
- (ii) It disputed the appropriateness of any monetary penalty;
- (iii) It submitted that, if such a penalty was appropriate, it should be much less than £80,000.

19. Mr. Swan's oral submissions summarised and added to Q & C's written arguments. He acknowledged that it had made mistakes and that its due diligence had been less than was required. However, MC had acted in good faith, had been reassured by the warranties obtained and had been let down by the lead suppliers at every stage of their business dealings. As to both HDU and CJM, the scale of the contraventions would have been much reduced, had Ms. Mitchell alerted Q & C as to the complaints received much earlier than she did. Q & C had plainly enjoyed no commercial advantage from the contraventions, as their financial statements showed. It had fully cooperated with the ICO and had ensured that the contraventions would not be repeated by changing its mode of operation. As to quantum of penalty, the exhibited financial statements for the year ending 31<sup>st</sup> January, 2016 were final accounts and showed that the company could not sustain a penalty of the level imposed.

20. Mr. Hopkins submitted that Q & C had fallen far short of proper due diligence in the choice of lead supplier and the monitoring of its compliance with PECR. He denied any double – counting of complaints, since a second complaint following a second unsolicited text to the same individual made no difference to the estimate of the total traffic in unlawful communications. MC had paid scant regard to the ICO's guidance. Subsequent cooperation was no more than was to be expected. The penalty was proportionate to the contraventions, given the ICO's powers to impose a penalty and the signs from recent financial statements that Q & C's business was picking up.

#### The Tribunal's findings

- 21. This was an appeal in which the oral evidence was very revealing. We found Mr. Carter a most unimpressive witness when dealing with the central issues affecting the gravity of these contraventions.
- 22. Having emphasised repeatedly in written and oral evidence how strongly he had relied on the recommendations of both HDU and CJM by "trusted contacts" (see e.g., witness statement §6 (HDU) and §8 (CJM)), he was quite unable, when asked by the Tribunal, to identify or even describe such contacts or the circumstances in

which the recommendations had been made. This was a fundamental plank in his supposed mitigation. The Tribunal rejects his evidence on this issue.

23. His contractual documents were copies of documents which some other company had used for some other purpose, which were evidently in his office and which he modified by a substitution of names. He took no advice as to their adequacy or appropriateness nor the sufficiency of the warranties as to compliance on which he professed to place such reliance. The Standard Terms and Conditions were plainly unrelated to the type of contract giving rise to this appeal and included (§4) a reference to non – existent Q & C guides to marketing and data protection. The clear impression formed by the Tribunal was that no real thought was given to the need to produce a form of contract designed to ensure that Q & C's business was compliant with PECR. MC's attitude to his contractual relations with his lead suppliers and their likely effect on PECR compliance was, at best, casual.
24. Still more significantly, the Data Questionnaire served on HDU, which clearly contemplated web lead purchases by HDU from unidentified third parties was deficient in a number of significant respects. It gave no answer to the critical question how it would obtain consent to the passing of contact details to Q & C. (§4(4)(i)) nor to the question whether it had a business plan for such referrals (§4(4)(j)). It did not agree to a regular audit of consent records (§5b) but would provide such evidence if there were a complaint. It failed to answer the question whether it agreed to a full audit of HDU and its directors as part of Q & C's due diligence (§(6b)). Most striking is the failure of Q & C to perform any analysis of HDU's answers ( as is provided for by the form) so that no assessment was made as to whether HDU satisfied compliance requirements. Again, the treatment of the Due Diligence Questionnaire gives the impression that MC was not greatly interested in the answers.
25. MC's evidence as to the supposed service and completion of a similar questionnaire by CJM was most unconvincing. The Tribunal does not accept that any such questionnaire came into existence.
26. He stated, when asked about any reference to the ICO's Direct Marketing Guidance, published in 2013 that he did not "store" a copy, had read it at some point but not specifically when making these contractual arrangements. The Tribunal finds that he made no attempt to refer to that guidance or to check whether he was complying with the list of suggested requirements for this type of marketing activity as set out at §§ 164 – 169. Q & C was in reality, buying a marketing list, albeit only some of the leads on that list visited the MyBankRefund website. The guidance provided -

*"164. Organisations buying or renting a marketing list from a list broker or other third party must make rigorous checks to satisfy themselves that the third party obtained the personal data fairly and lawfully, that the individuals understood their details would be passed on for marketing purposes, and that they have the necessary consent. (Our emphasis)*

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*167. Reasonable due diligence might include checking the following:*

*Who compiled the list? When? Has it been amended or updated since then?*

*When was consent obtained?*

*Who obtained it and in what context?*

*What method was used – eg was it opt-in or opt-out?*

*Was the information provided clear and intelligible? How was it provided – eg behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?*

*Did it specifically mention texts, emails or automated calls?*

*Did it list organisations by name, by description, or was the consent for disclosure to any third party?*

*Has the list been screened against the TPS or other relevant preference services? If so, when?*

*Has the individual expressed any other preferences – eg regarding marketing calls or mail?*

*Has the seller received any complaints?*

*Is the seller a member of a professional body or accredited in some way?"*

Of course, not every item on the list might be relevant or reasonably required but Q & C appear to have performed few, if any, of such checks.

27. Q & C made no request for sample evidence of consent records from either HDU or CJM before the intervention of the ICO.

28. As to the probable volume of unsolicited texts, the Tribunal accepts (i) the ICO's evidence as to the number of complaints (including text messages to GSMA) and (ii) the evidence that they represent a very small proportion (whether or not 1%) of the offending messages which were transmitted. If multiple texts were sent to the



same individual, so as to provoke a second or third complaint from the same person, that in no way mitigates the gravity of the contravention, as measured by the volume of texts.

29. The Tribunal is wholly unimpressed by the submission that the ICO could have reduced the scale of the contraventions by intervening earlier. It is perfectly understandable that Ms. Mitchell should properly research the facts before contacting MC and that she had other casework to discharge. Moreover, it is for the data user to ensure that he and those with whom he contracts comply with these important regulations. It is no mitigation for him to say that he would not have breached PECR so seriously, if only the regulator had steered him away from his misconduct sooner.
30. It is probably correct that MC had no knowledge of earlier enforcement action against HDU. He made no serious attempt to discover the truth.
31. It is accepted that there is no clear evidence that Q & C obtained a competitive advantage over compliant businesses by conducting its business in this way, whether in terms of volume of business or reduced costs. However, one of the vices of non – compliance is the obvious possibility that such an advantage may result.
32. We do not regard Q & C as a novice in this market. The exhibited texts dating from December 2012 and January, 2013 between MC and Kevin Ashtiany demonstrate that MC was, by 2015, well acquainted with the lead supply business and the use of texting for this purpose. He must have been well aware of the importance of PECR compliance long before the period with which the Tribunal is concerned.
33. We emphasise that his dealings with HDU are not the subject of sanction but are highly material to any assessment of his attitude to compliance when he contracted with CJM.
34. To summarise, Q & C wholly failed to take any reasonable steps to check that the leads that drove potential customers to its website had been produced by lawful communications. Its due diligence was almost non – existent and it appears to have largely ignored the ICO's guidance then current. It treated contractual warranties as a substitute for due diligence whereas they are simply complementary to it. The Tribunal did not accept important evidence given by MC on matters central to his mitigation which we have identified.
35. We regard all these matters as seriously aggravating features to be set alongside the probable volume of unsolicited communications.
36. The damage to Q & C's reputation and commercial interests resulting from these findings is a matter to be considered in mitigation.
37. The Tribunal attaches little significance to Q & C's cooperation with the ICO following the uncovering of these contraventions. Anything less would have amounted to a serious aggravating feature.

38. There is, in our view, no doubt that this is a case for a significant monetary penalty. The final question is - how much ?

#### The quantum of the penalty

39. Having considered penalties imposed in a few broadly similar cases, the enforcement panel recommended and the ICO decided that a penalty towards the upper end of level C in the range of the ICO's starting points was appropriate and imposed a penalty of £80,000. That reflected contraventions of substantial gravity, having regard to the fact that a monetary penalty can only be imposed for serious contraventions. The ICO had particular regard to the probable volume of unsolicited texts in assessing the offence.
40. Any sanction is likely to have multiple purposes. One, is to mark the community's disapproval of the offending conduct. There is widespread disquiet at the daily invasions of individuals' privacy by unsolicited texts, telephone calls, spam emails and other electronic communications. Another purpose is deterrence. We reject Mr. Swan's submission that deterrence has no place here because MC has changed Q & C's mode of operation. It is quite possible that, in a fast – changing communications market, Q & C may return to buying market lists and the consequent need for compliance with PECR. Moreover, deterrence of others operating in this market is a legitimate consideration, provided it does not result in a disproportionate increase in the level of the penalty imposed on this particular offender. ("Offending" and "offender" are used here as convenient labels and are not intended to imply the commission of a criminal offence. These are civil proceedings with a regulatory penalty imposed for contraventions of a regulatory requirement.) Cutting corners as to obtaining valid consents can plainly confer a competitive advantage on the offender, whether or not it did so here. It must be strongly discouraged.
41. Both these purposes should, in the Tribunal's opinion, be reflected in the amount of the penalty here.
42. Making proper allowances for the absence of previous enforcement measures against either MC or Q & C, we nevertheless assess these contraventions as of above average gravity. We take account, not only of the volume of text traffic involved but of the woeful lack of due diligence and of the feckless attitude to compliance disclosed by the documentation and MC's oral evidence, as described above. We recall that his evidence as to recommendations of HDU and CJM was wholly implausible.
43. This case fully justifies a very substantial penalty. The ICO and, on appeal, this Tribunal, is empowered to impose a penalty of up to £500,000. Any decision must be reached, having regard to the range of penalties that Parliament deemed appropriate.

44. Nevertheless, our decision, like that of the ICO, must take account of Q & C's ability to pay. We received what proved to be its final accounts for year ending 31<sup>st</sup>. January, 2016. They showed a pre – tax loss of about £50,000 and a balance sheet deficiency of about the same amount. This was, for practical purposes, its first full year of trading. MC had lent money to Q & C which was reflected in a director's loan account and we were told that a Mr. Parmar had invested about £250,000 over a period without security. In assessing the appropriate penalty, we do not assume that either MC or Mr. Parmar would choose to meet that penalty from his own resources.
45. At the hearing MC also produced unaudited financial statements covering most of the financial year to date. They suggest a modest improvement in profitability which MC confirmed when stating his confidence in “growing the business”. We conclude that trading will probably improve in the near to medium future.
46. The Tribunal finds that £80,000 is an appropriate penalty, having regard to all the matters referred to in this decision. Nevertheless, an immediate demand for payment of £80,000 would cripple Q & C and probably drive it into liquidation. We do not wish to do that.
47. We conclude that the penalty of £80,000 should stand but be payable over a two – year period.
48. Accordingly, we dismiss this appeal because the ICO's decision was not wrong in law nor do we consider that he erred in the exercise of his discretion as to the quantum of the penalty. He indicated some months ago that he was willing to accept payment on the terms that we now attach to our decision.
49. Either party has permission to make short submissions as to how payment should be made and the effect of any default. Any such submissions must be emailed to the tribunal no later than 4pm. on 5<sup>th</sup>. December, 2016.
50. The Tribunal's decision is unanimous.

Signed David Farrer Q.C.

Judge of the First-tier Tribunal

Date: 22<sup>nd</sup>. November, 2016

Date Promulgated: 28<sup>th</sup> November 2016