EA/2018/0287

D M DESIGN BEDROOMS LTD

Appellant:

and

THE INFORMATION COMMISSIONER

Respondent:

DECISION

Appeal Hearing: Edinburgh -15 May 2019.

Before: Tribunal: Brian Kennedy QC, Anne Chafer & Paul Taylor.

Appearances:

Mr Paul Motion of BTO Solicitors LLP represented the Appellant

The Commissioner was represented by Ms Jen Coyne of Counsel.

Result: The Appeal is refused.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 48 of the Data Protection Act 1998, the statute in force at the relevant time ("DPA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in final Monetary Penalty Notice ("MPN") and Enforcement Notice ("EN") dated 23 November 2018.

Factual Background to this Appeal:

[2] This appeal concerns whether the Commissioner was correct to issue a penalty of £160,000 for serious contraventions of the Privacy and Electronic

Communications Regulations 2003/2011 (PECR). The Appellant Company manufactures furniture, and engages in direct marketing in order to promote its business. It purchased telephone numbers from TDP Direct Marketing Ltd ("TDP") and ran its calling activity through another company ("DXI"). Between 1st April and 30th November 2017 ("the period of contravention"), the Commissioner and the Direct Marketing Association ("DMA") received 99 complaints that subscribers to the TPS system had received unsolicited marketing calls from the Appellant Company.

[3] <u>RELEVANT LEGISLATION:</u>

Privacy and Electronic Communications Regulations 2003

Regulation 21 Unsolicited calls for direct marketing purposes

(A1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making calls (whether solicited or unsolicited) for direct marketing purposes except where that person—

(a) does not prevent presentation of the identity of the calling line on the called line; or

(b) presents the identity of a line on which he can be contacted.

(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 -

(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 a subscriber in respect of the called line is one listed in the register kept under regulation 26.

(2) A subscriber shall not permit his line to be used in contravention of paragraphs (A1) or (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—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.

(6) Paragraph (1) does not apply to a case falling within regulation 21A or 21B.

Data Protection Act 1998

The period of contravention was prior to the introduction of the Data Protection Act 2018.

Section 11 - Right to prevent processing for purposes of direct marketing.

(1) An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing for the purposes of direct marketing personal data in respect of which he is the data subject.

(2) If the court is satisfied, on the application of any person who has given a notice under subsection (1), that the data controller has failed to comply with the notice, the court may order him to take such steps for complying with the notice as the court thinks fit.

...

(3) In this section "direct marketing" means the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.

Section 48 - Rights of appeal.

(1) A person on whom an enforcement notice, an assessment notice, an information notice or a special information notice has been served may appeal to the Tribunal against the notice.

(2) A person on whom an enforcement notice has been served may appeal to the Tribunal against the refusal of an application under section 41(2) for cancellation or variation of the notice.

Section 49 – Determination of Appeals

(1) If on an appeal under section 48(1) the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.

Section 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.

(2)This subsection applies if the contravention was deliberate.

(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.

(4) A monetary penalty notice is a notice requiring the person to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.

(5) The amount determined by the Commissioner must not exceed the prescribed amount.

(6) The monetary penalty must be paid to the Commissioner within the period specified in the notice.

(7) The notice must contain such information as may be prescribed.

(8) Any sum received by the Commissioner by virtue of this section must be paid into the Consolidated Fund.

COMMISSIONER'S MONETARY PENALTY NOTICE:

[4] The Commissioner set out that she first contacted the Appellant in regard to the complaints on 27 October 2017. The Appellant assured her that it screened numbers against the TPS register, which it claimed that it downloaded every month. However, TPS informed the Commissioner that the last time the Appellant had downloaded the register was March 2017. The Appellant used DXI to make calls through 189 separate

call lines (CLIs). After some confusion with figures supplied by the various parties, the Commissioner was satisfied on balance that in the time frame from April to November 2017 the Appellant company was responsible for making 1,661,607 calls to numbers that had been registered with TPS for not less than 28 days.

[5] The decision to issue the Monetary Penalty and the Enforcement Notices was informed by the following factors:

i. the incorrect assertion by the Appellant that it downloaded the register every month;

ii. the failure of the Appellant company to conduct appropriate due diligence on DXI in regard to the data purchased;

iii. the apparent ability of the company to service any fine imposed without a significant long term effect on the business;

iv. five further complaints received by the Commissioner that further calls were being made by the Appellant in contravention of *PECR* after the investigation process had begun.

[6] The Enforcement Notice accepted that it was unlikely that actual damage had been caused, but required the Appellant to refrain from contacting or instigating unsolicited contact for the purposes of direct marketing with those numbers that were registered with TPS or had previously refused consent to the Appellant for such calls.

GROUNDS OF APPEAL:

[7] The Appellant advanced the following grounds of appeal against the Notices:

i. ***Procedural unfairness*** – the Commissioner delayed informing the Appellant that she was disputing information provided by the Appellant resulting in the loss of evidence, and failure by the Commissioner to disclose information;

ii. ***Irrationality*** – the Commissioner had not adequately explained her methodology, and the Appellant claimed that the alleged volume of calls *"could not physically have been made during the period in question"*

iii. ***Insufficiency of evidence*** - the evidence being relied on by the Commissioner is flawed. The Commissioner has produced no evidence that would prove her assertion that 1,661,607 TPS registered numbers were called between the 1st

April 2017 – 30th November 2017. No evidence of the methodology used by DXI and the DMA to produce this figure has been provided.

iv. ***Breach of the Appellant's Convention Rights*** – the Commissioner breached the Appellant's Article 6 rights in publicising the intention to issue a Penalty Notice prior to the expiration of the appeal period; the Commissioner failed to advise DM of its rights under Article 6 ECHR thus evidence presented to the Tribunal should not be considered.

v. ***ICO not behaving as a fair and impartial tribunal*** – the Commissioner failed to act as a fair and impartial Tribunal for the determination of the breach;

vi. ***Wrong standard of proof applied by ICO*** – the Monetary Penalty Proceedings are criminal for the purposes of the Convention rights;

vii. ***ICO's early repayment discount scheme is a fetter on the right of appeal*** – the immediate loss of the ICO's 20% early payment discount if an appeal against an MPN is taken to the First-tier Tribunal is an unfair disincentive against risking an appeal;

viii. ***Disproportionate fine*** – the Commissioner failed adequately to consider the impact of the previous fine upon the Appellant's business and upon the Director personally. The level of penalty is disproportionate given the short period of time of the breaches, the level of engagement with the Commissioner and the good history of the company.

CASE MANAGEMENT ISSUES:

[8] Prior to the Commissioner submitting her response, the Tribunal found it necessary to issue directions on the procedure and scope of the appeal. In a Case Management Direction of the 21st December 2018 (p.171-173) the Tribunal's Registrar clarified the issues, which the panel must decide. It was reiterated that the appeal is a hearing *de novo*, and that the relevance to be attached to allegations of procedural unfairness would only be when assessing the weight to be placed on the Commissioner's decision. The claim that the right to appeal is fettered, and any purported challenge to the *system* of enforcement and penalty notices under the ECHR is not a matter over which the Tribunal can rule.

[9] These directions (along with a further, short direction, issued by the Registrar on 28th December 2018) were appealed to the Chamber President, Judge McKenna by

email dated 10th January 2019. Judge McKenna responded on 11th January 2019 upholding the Registrar's initial directions. She stated that if DM wished to pursue their procedural grounds they must do so in the appropriate venue; the First Tier Tribunal has no supervisory jurisdiction, per: *HMRC v Abdul Noor* [2013] UKUT 071 (TCC).

COMMISSIONER'S RESPONSE:

[10] The Commissioner confirmed her reliance on the figure of 1,661,607 calls, and remarked that the Appellant had not provided evidence to prove anything contrary. She stated that the Appellant was unable to prove that it took adequate steps to screen its calls against the TPS list, describing its attempts at due diligence as "*very poor*" especially in light of the previous penalty notice issued in 2013. The Commissioner and the DMA had received 99 complaints in total (79 to the DMA and 20 to the Commissioner) in relation to unsolicited marketing calls from the Appellant company. Details of these complaints were sent to the Appellant on the 27th October 2017. One complaint was subsequently discounted, as there was doubt as to whether the call had been made by the Appellant.

[11] The spreadsheets included commentary from the complainant; examples of these are as follows:

ix. *"Despite your fines they are still continuing to cold call and pressure sell."*

x. *I told them I was registered with TPS and had previously asked them not to call me. She argued and said she had a right to call me."*

xi. *"The caller referred to my wife as… which was her maiden name, we have been married 11 years… obviously name taken from old mailing list from years ago."*

[12] Ten of the complainants recorded that they were told by the Appellant's call centre that the call was following on from a survey they had completed or a competition they had entered. All of these complainants recorded that they have not taken part in either of these, some referring to the claims as a "blatant lie", amongst other descriptions.

[13] The number of complaints was a concern to the Commissioner, as was the fact that many individual complaints reported "*threatening or rude behaviour"* by the Appellant Company. The Commissioner conceded that there was one complaint which should not be considered owing to the apparent confusion on the part of the complainant as to the identity of the caller, but that still left 98 complaints. The sheer amount of relevant calls made, led the Commissioner to conclude that the breach was deliberate and with the intention of financial gain, but even if the Tribunal were not satisfied that it was deliberate, she argued it was open to the Tribunal to find the Appellant was at least negligent in the manner in which it conducted its business.

[14] The amount of the fine was considered against the Appellant's profit as represented to the Commissioner, and she considered the penalty to be proportionate in the circumstances whilst also acting as a deterrent. She emphasised the need for the enforcement notice, in order to compel the Appellant Company to improve its operations.

[15] As for the grounds of appeal, the Commissioner noted that the Appellant had failed to provide any evidence or detail as to which categories of evidence the Commissioner failed to disclose. It also failed to specify what evidence has been lost or compromised; the Commissioner commented when a company is aware that it is potentially subject to enforcement action, the prudent course of action would be to preserve evidence. It is not the fault of the Commissioner that the Appellant was imprudent. She remarked that the Appellant was legally represented throughout the process from the Commissioner's first engagement, and if it failed to provide any evidence it now claims would have exculpated it, that is not something that can be laid at the Commissioner's door.

APPELLANT'S REPLY:

[16] The Appellant took issue with the Commissioner's assertion that it had failed to conduct sufficient due diligence. It provided the contract it had with TDP for the purchase of data, and clarified that the data in question was not merely telephone numbers but also included names, ages, addresses and demographic information.

All data supplied by TDP was uploaded to the Appellant's dialling system, and it was claimed that the system "*automatically checks*" the TPS register daily. It also provided materials from TDP in which TDP repeatedly claims compliance with the Commissioner's requirements and 'licensing' as a direct marketer. The Appellant now claims to have been "*duped"* by TDP but insisted that its reliance on TDP was reasonable in the circumstances.

[17] The Appellant also supplied representations and material to support its contention that a number of complaints refer to the company in error. Of the 98 complaints referred to by the Commissioner, 16 were from numbers that had provided consent to TDP, 9 were described as "Head Office Opt-In", 2 were from numbers not recognised by the Appellant company, and the remainder were from "cleansed data purchases". The Appellant argued that it was for the Commissioner to prove that the Appellant did not filter the data. The Appellant also claimed that in that period it suspected that a batch of data purchased from TDP had not been screened adequately and had to be abandoned *"at considerable cost and inconvenience to the Appellant"*.

[18] In regard to the volume of calls made, the Appellant strenuously denied having made over 3 million calls in the time period in question, stating that it simply did not have the capacity for its workforce to make such calls. It said that it purchased between 500,000-600,000 unique phone numbers from various sources in that timescale. Initially the Appellant said that it employed between 15 and 20 people to make the calls, but then asserted that following the 2013 penalty notice it had reduced its call centre staff from 100 to 29. It robustly denied any rude or threatening behaviour, stating that it "*undertakes strict call monitoring regimes"* and had no record of such behaviour. It did concede however "*due to the lapse in time, these records cannot be supplied"*. It also asserted its contention that the appropriate standard of proof in this determination is the criminal standard.

TRIBUNAL HEARING:

[19] Both parties provided comprehensive skeleton arguments in advance of the hearing. The Appellant called two witnesses who were Mr. Jody Duffy (the marketing Data Manager) and Mr Ben Taylor (the Operation Director) and the

Commissioner called Mr Jamie Snaddon, (General Counsel for Europe for the 8x8 Group).

[20] There was considerable oral evidence given at the hearing, inter-alia on the following issues; The Commissioner highlighted that the contract, provided by the Appellant to support its claims of appropriate due diligence, contained a term that the ***Appellant*** must comply with PECR, but notably did not contain any guarantee that the data supplied by TDP did not include any signatories to TPS. None of the other materials provided from TDP contained a guarantee that the information purchased would be compliant with PECR in relation to TPS. As the Appellant did not purchase the TPS list directly after March 2017, it was unable to screen its call data against the most up to date register. Furthermore, the DXI checker that the Appellant was using at all material times did not automatically remove any TPS-listed data. As for the dispute about the amount of calls made, the Commissioner explained that she was relying on the data provided to it by DXI. The software provided to the Appellant by DXI allowed the Appellant to conduct *"predictive and progressive dialling"* which greatly speeds up the calling process. The figure of 1,661,607 calls in the time period is therefore entirely plausible.

[21] The Appellant reiterated its assertions that, as the penalty is imposed for alleged contraventions of the law and intended to be both punitive and deterrent, the appropriate standard of proof for the Tribunal to consider is the criminal standard. It cited case law in relation to penalties imposed for defaults in VAT compliance, including; *Georgiou v UK* (40042/98) [2001] STC80 and *King v Walden* [2001] WL 513115.

[22] With this in mind, the Appellant asserted that there was insufficient evidence to show that it was responsible for making the calls that gave rise to the complaints. The Appellant stated that the reallocation of CLI's to other customers by DXI raises a doubt that another client could have made some of the calls. *(The Tribunal however noted that Mr Jamie Snaddon, from DXI explained that once a customer no longer requires use of a CLI and it becomes inactive, it is reallocated to a new customer but only with the permission of the existing customer*).

[23] The Appellant also reiterated that the penalty was overly punitive and could potentially lead to the dissolution of the company. The Appellant described itself as a family business of some 34 years standing, and outlined how it had undergone massive reputational damage since the 2013 penalty with turnover dropping over 50%. This, it claimed, led to them taking greater care to ensure compliance. It completely refuted the suggestion that it had acted in deliberate contravention with PECR, and stated that publication of the MPN by the Commissioner has resulted in two lenders pulling out of supporting the company.

[24] The Commissioner refuted the idea that the numbers were called by a different client of DXI, on the basis that it would be a remarkable coincidence that DXI would have reallocated the numbers to a different company engaged in precisely the same business as the Appellant. Furthermore, in the course of the hearing, Mr Jody Duffy, the Marketing Data Manager for the Appellant company, gave evidence that the company was reliant on the advice given to it by TDP, and conceded that the company had failed to make adequate changes or provide guidance to staff on how to check if numbers are TPS registered. The Tribunal have given weight to this evidence.

TRIBUNAL FINDINGS:

[25] In light of Judge McKenna's directions (as described earlier) the Tribunal has not considered grounds i), iv), v), vi and vii) as these are ruled to be beyond our jurisdiction,

Ground ii) – Irrationality:

[26] In the Appellant's 'Paper Apart – No.5 Grounds of Appeal' at p.11, paragraph 12 it is stated:

"The ICO's action in imposing the MPN and EN without explaining what weight if any she had attached to the Appellant's concerns enumerated above was irrational."

[27] As the Appellant has noted at p.11, paragraph 10, the Commissioner included the following statement in her MPN at paragraph 45 (see p.358):

"In reaching her final view, the Commissioner has taken into account the representations made by D M Designs on this matter".

[28] In our view it is sufficiently clear from this and from the Commissioner's phrase "*Taking into account all of the above…*" at paragraph 49 (see p.358) that the Appellant's representations were taken into proper consideration. It is also clear from paragraphs 26 to 44 of the MPN why the Commissioner has deemed it necessary to impose a penalty. Here she sets out the detail of the contravention, the seriousness of the contravention and whether, in her opinion, it was deliberate or negligent. In other words, these are the Commissioner's settled conclusions having considered evidence and representations during the course of her investigation. The fact that the detail of each representation and those in later correspondence are not addressed one by one does not erode from the fact that the Commissioner has clearly set out why she considers the imposition of a penalty is necessary and proportionate. It follows that the weight allocated to the Appellant's concerns is clear, particularly where the Commissioner does not vary from her notice of intent.

Also, at p.11, paragraph 13*:*

"The ICO relied on a witness from the DMA in making her findings. Her methodology was challenged by the Appellant and the ICO was asked to explain the methodology. She failed to do so. That was a breach of natural justice and also irrational since the Appellant was left unable to challenge the witness's methodology and conclusions whereas a fair and impartial tribunal has a duty to allow a witness's evidence to be tested."

[29] We do not accept this ground for the following reasons;

Firstly, the Commissioner's email to the Appellant dated 23rd July 2018 (p.290 – 308), with attachments, is a clear attempt to explain the methodologies adopted in her investigation, including those of the DMA and 8x8/DXI. Indeed the appendices shed light on several aspects of methodology; for example, at p.295 we see an email exchange between 8x8 and the Commissioner's Office which sets out what the Commissioner is seeking in terms of evidence and the methodology by which 8x8 are able to provide this (i.e. "…*SQL queries run at CDR level*…"). Although it is regrettable that the Appellant did not have sight of the Third Party Information Notice sent to 8x8 on 29th November 2017 (see p.300), (though it does now), what it

sought is clearly identifiable from the correspondence in the 'Attachments 2 to 5' (see pages 295 – 308).

Secondly, as noted by the Commissioner in her closing submissions of the 6th June 2019, at paragraph 35:

"…Mr Taylor accepted in oral evidence… that DM does in fact retain the metadata about calls. It has not destroyed it all as originally asserted. It has only destroyed voice recordings of calls… DM has the metadata which would set out what calls it made, to what numbers and when."

Also at paragraph 36:

"DM is able to set out what it… says is the correct data on calls. If the Commissioner is wrong in her final figures (the basis for which has been fully explained in evidence in the bundle… and by Mr Snaddon) then DM is in a position to challenge it. Yet it does not do so. The inference the Tribunal should draw is that DM cannot successfully do so.

[30] We were surprised that the Appellant made no effort to produce its own figures in light of the above concession. The period of contravention was clearly set out, so it seems that the Appellant could have done its own checks and provided the result. We note Mr Taylor's evidence that the system "*freezes*" when trying to get details of calls made in 2017 (see p.404, paragraph 10). However, when questioned about this, Mr Snaddon at the oral hearing stated that he had asked the "Tech Team" about the alleged problems and no issues had been raised with them in this regard. This seems odd to us; we would have expected urgent requests to 8x8 for assistance in view of the penalty with which the appellant was faced and the crucial part that their call detail records would play in rebutting the Commissioner's evidence.

[31] Further, we note that the Appellant has referred to the Optical Express (Westfield) Limited (EA/2015/0014) ("OE") case in relation to the Appellant's claim that the Commissioner ought to have provided call data to evidence the number of calls in contravention of Reg.21 PECR (Closing Submissions for the Appellant, paragraphs 4.1 – 4.3).

The panel in the present appeal is made up of the same members that considered the OE appeal; consequently we have an insight into the particulars of the case. In OE, the appeal concerned a large volume of complaints against unsolicited SMS marketing in contravention of Reg, 22 PECR. The spreadsheets provided by the Commissioner, to which the Appellant refers, contained outline details of the complaints made to both Groupe Speciale Mobile Association ("GSMA") and the Commissioner (see paragraph 8 of the OE ruling).

OE had in fact raised a substantially similar ground to the Appellant in the extant case; i.e. that the Commissioner should have provided evidence that the 4,609 complaints received about allegedly unsolicited communications from OE, were actually unsolicited.

At paragraph 37(f) of the OE decision the Tribunal found as follows:

> *"…it would be impossible to provide detailed evidence in respect of each and every one within the Notice. Furthermore, as the Commissioner himself stated, to do so would reveal the personal data of the complainants in a public notice, in breach of the DPA. OE had been furnished with two spreadsheets containing details of the complaints he had considered; it should therefore have been clear to which complaints he was referring in the Notice. In the circumstances therefore it was entirely appropriate for the Commissioner to only include outline details."*

[32] In the current case, the Commissioner clearly identified the period of contravention and the number of calls said to have been involved, along with details of 99 complaints. We are satisfied that this was sufficient for the Appellant to mount a defence in reliance on its own call data, evidence proving consent and submissions.

Ground iii) – Insufficiency of evidence:

Number of calls placed

[33] In the Appellant's Response to the Commissioner's Response, (p.86 – 165), at paragraph 16(j) (p.93) it is stated:

"(j) In relation to the "number" of "calls placed", the Appellant challenges the Respondent to prove the "number" of calls. During this period the Appellant was operating on a pay-as-you-go basis with DXI. As a result, the Appellant was charged for the minutes used, not for the number of calls made. Appendix 18 is a copy of the Appellant's data usage bill for the period in question, which details the minutes."

[34] Appendix 18 can be seen at pages 148 – 157 (of the Open Bundle). These are the statements of top-ups referred to by DM above in support of their argument that the total number of calls made figure is wrong.

[35] The Tribunal has added together the top-ups listed as "success" under the column headed "Response Status" where the transaction took place in April 2017; we find that this amounts to £5,758. We have then compared this with the table provided by Jamie Snaddon in support of his witness statement for DXI at "JS1" (see page 386). Here, we find that the same figure is given for the total amount of top-ups made in April 2017, i.e. £5,758.

[36] The Tribunal conducted the same exercise in relation to May 2017, adding together the successful top-up transactions provided by DM at page 151, which total £6,718. This agrees with Jamie Snaddon's (DXI) evidence in JS1 (see page 386), which shows the same total top-up figure for May 2017.

[37] The witness statement of Jamie Snaddon for DXI (p 377 – 393) at Exhibit JS1 (p.386) also shows DXI's evidence in respect of the number of outbound calls made by DM by month between April and November 2017 (the period of contravention). In April 2017 this shows that the number of outgoing calls was 317,163; for May 2017 it shows 386,683.

[38] Also in exhibit JS1, (p.393), a table is provided which shows (in the final column headed "No Registered") the number of calls made by DM to TPS registered numbers. This uses historical data provided by the DMA (who manage the TPS register) and reflects the TPS register as it was at the date of the calls, rather than at the time of checking in 2017.

[39] For April 2017 the table shows that DM made 171,215 calls to TPS registered numbers. This fits comfortably within the total number of calls made by DM during April 2017 (i.e. 317,163) meaning that 54% of all calls made by DM during that month were to TPS registered numbers. The figures for May 2017 are 386,683 calls made (p.386) of which 166,253 calls were to TPS registered numbers (p.393) equalling 43% of all calls made which, on any reckoning, is a considerable proportion which we regard as serious.

[40] It is noted from Jamie Snaddon's witness statement at para.29 (see page 383) that: *"We have no record of the Appellant raising any complaints or queries as to the cost of calls…".* In Jody Duffy's evidence, when asked whether DM had queried the cost of calls he replied that there had been no queries, though he noted that this would not be within his role. However, he did state that he would be able to verify the call volume and would expect to be asked to do so as part of his role as DM's Marketing Data Manager, a post he had been in since its creation in November 2017. Prior to that he dealt with DM's IT and was responsible for TPS screening.

[41] It is clear from the above that despite their argument to the contrary, DM's own evidence demonstrates that they did (or at the very least, could have) made the number of calls alleged by the Commissioner.

[42] We are also satisfied that DXI took reasonable steps to verify their call data. Paragraphs 24 and 25 of Jamie Snaddon's witness statement (see page 382) set out the steps they took to do so. Amongst these were checks to establish whether other customers had used the CLIs allocated to DM during the period of contravention. However, if this had been the case, DM's own evidence as to the amount of top-ups paid would not agree with DXI's figures, which in turn relate to the number of minutes used and charged for. In any event, Mr Snaddon stated that whilst CLIs are re-assigned when no longer required by a customer, this would not take place until the customer agreed to release each CLI. He also stated that to

ensure the records provided to the Commissioner were correct, (quote) *"a sanity check*" had been carried out against the call detail records (p.385, para.24).

CONSENT:

[43] The Appellant asserts in its closing submissions (see paras.4.4 – 4.6) that it has refuted the TPS complaints tabled by the Commissioner, referring in particular to Appendix 14 & 15 of its response to the Commissioner (p.140 & 141-145).

However, the Commissioner notes in her closing submissions at paragraphs 9 – 11: *"DM does not in this case adduce any evidence of the specific, unambiguous consent given by any call recipients to DM for DM to contact them for the purpose of direct marketing*." We agree with the Commissioner; the fact that DM have shown at Appendix 14 the source of the data and by extension what they say to be proof of consent, is insufficient. For example, the "Completion Form" used in connection with existing customers (see p.202) provides no way of opting out from future marketing communications; consequently it cannot be said to provide unambiguous consent. It must also be noted that DM made no effort to provide copies of forms in relation to those 9 existing customers falling within the list of 99 (subsequently reduced to 98) complainants.

[44] It is settled law that the onus is on the person engaged in direct marketing to provide evidence of consent to such communications. That principle is iterated at paragraphs 44 and 45 of *Optical Express(Westfield) Ltd v ICO* EA/2015/0014:

> *[44] In this instance as Optical Express (Westfield) Ltd Limited is the sender of the marketing messages in question it is incumbent upon them to be able to provide evidence to the Commissioner that in doing so they were in compliance with the requirements of PECR. In any event the Commissioner would have no means of identifying where the Appellant had not obtained the details of the subscribers nor where their consent was recorded.*
>
> *[45] For the sake of clarity, the Tribunal finds that the onus or burden of proof that the texts were not unsolicited and/or made with consent is and was at all times with OE. The Commissioner does not have to prove consent.*

[45] The Appellant's claim that some of the complainants had consented to contact through a TDP survey is not supported by evidence to back this up. For example, it

was open to the Appellant to produce the wording of the survey in question, highlighting the script said to have been used to elicit consent. From this the Tribunal may have been able to make a judgement as to whether this was sufficient (e.g. whether it named DM as the sender of marketing amongst other things).

[46] In relation to those complainants whose details were said to have been obtained through cleansed data purchases, the Tribunal has little sympathy with this argument. Firstly, it was made clear in Optical Express (at paragraph 85) what is meant by consent for the purposes of PECR:

"85] Consequently, when a data subject gives consent they must be informed about the processing to take place, including who by and what for. In no other way can consent be said to be "informed" . If there was any doubt about this it is clarified by Article 10 which says that in order to ensure that the processing is fair you must tell the data subject (a) who is going to process the data, (b) what it will be processed for and (c) anything else at all to ensure fairness, such as, to whom the data might be passed and any applicable rights which the data subject has in relation to the processing (e.g. the right to object to direct marketing under Article 14(b))"

Following on from this, even so called "opted-in" data would not be properly consented unless the Appellant was named as the sender of the marketing. We have been provided with no evidence to suggest that this was the case.

Secondly, the legal duty to ensure that calls are not made to TPS registered numbers rests with the Appellant by virtue of Regulation 21 PECR. There is no latitude for claims that assurances were provided by a supplier of data, it is the marketer's responsibility to ensure compliance. The Appellant should and would have been well aware of this through its previous dealings with the Commissioner. Indeed it is clear that the Appellant had no doubt about this from a statement on p.269 (part of representations in the letter from BTO Solicitors dated 19th July 2018):

"Although our client is aware that it has the responsibility to ensure that the marketing phone calls it makes comply with the law…"

[47] In any event, it cannot even be said here that TDP had given adequate assurances in view of Clause 11(iv) of their terms and conditions (see p.105):

"The company does not warrant that the Data/Electronic Data is accurate or complete…"

[48] When asked about this at the hearing, Mr Duffy explained that it referred to a margin of error in the data, giving the example that if 100,000 records had been leased, 10% may have been inaccurate. Putting it another way, there was a risk that 10% of leased records might not actually be "opted-in" to receive marketing calls. It seems to us that this poses the considerable risk of non-compliance with consequential action. The Appellant should therefore have made enquiries of TDP at the commencement of their business relationship rather than at the end of the period of contravention.

Ground viii) – Disproportionate fine:

[49] The maximum amount that the Commissioner can impose as a monetary penalty is limited by the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 to £500,000. She has issued extensive Guidance on why and how she comes to issue a penalty for the amount decided. We are not convinced that there was any procedural unfairness in the Commissioner's decision to issue the notice; the notice shows that the Commissioner considered the Appellant's representations and explanations, and the fact that she came to a different conclusion than the Appellant does not mean that the Appellant was ignored. Indeed, the Commissioner accepted that the contraventions were serious and deliberate.

[50] The FTT explored the relevant factors for consideration of the amount of a penalty in *LAD Media Ltd v ICO* EA/2017/0022 at para.47:

There is no binding guidance from the higher courts or tribunal to assist with the scale of the monetary penalty, or how to approach the assessment. The following factors appear to us to be relevant although will differ from case to case:

xii. *The circumstances of the contravention;*

xiii. *The seriousness of that contravention, as assessed by*

a) *the harm, either caused or likely to be caused, as a result;*

b) *whether the contravention was deliberate or negligent;*

c) *he culpability of the person or organisation concerned, including an assessment of any steps taken to avoid the contravention.*

xiv. *Whether the recipient of the MPN is an individual or an organisation, including its size and sector;*

xv. *The financial circumstances of the recipient of the MPN, including the impact of any monetary penalty;*

xvi. *Any steps taken to avoid further contravention(s);*

xvii. *Any redress offered to those affected.*

We also consider that the amount of the penalty should be of a level to deter further contraventions, whether by the recipient of the MPN or others.

[51] Further factors for consideration in regard to the size of the penalty were identified in Holmes Financial Solutions v ICO [2018] UKFTT 2018_0030 (GRC), and they included the length of time of the unlawful conduct, the number of connected calls and the culpability of individual directors. In that case, the Tribunal noted especially:

"They had no due diligence arrangements in place and they unreasonably relied on informal, verbal advice and assurances provided by their business partners without making any checks...they simply "turned a blind eye" to all of this".

[52] It is our view on the evidence at the hearing of this appeal, that the contravention is a serious one due to the number of calls recorded and the contravention was deliberate. On the evidence before us it is our view that the Appellant knew or ought to have known that a contravention was likely, and failed to take steps to prevent the breaches. The facts in support of the argument that the Appellant ought to have known stem from an historical perspective with a previous breach prior to 2017 when they were made fully aware of the regulatory regime and the specific requirements of Regulation 21. It was clear from the evidence of Mr Duffy that TDP never provided any sufficient assurance that the data provided to DM was compliant with the TPS register. If the contravention by the Appellant was not deliberate in the strictest sense, it was certainly reckless; they ought to have known, and to rely blindly on such assurance, as TDP seemed to provide, was

patently negligent in the circumstances. We also refer to internal para.10 -13 above, which illustrates the types of complaints made about the Appellant's practices. We have taken this into account in our deliberation as to the level of the penalty.

The level of the Penalty:

[53] We accept the penalty at £160,000 is within the bottom third of the applicable scale and we further accept and adopt the Respondents careful assessment of the application of the criteria identified in Holmes Financial Solutions and LAD Media at Paragraphs 28 – 37 of her skeleton argument as being appropriate on the facts of this case. We further were not convinced of the veracity of the evidence of Mr Duffy about how seriously he maintained the Appellant took their responsibilities. In evidence it became clear that there are no policy documents, manuals, training records, or new model contracts/terms used with data suppliers. Mr Duffy's assertion that the appellant had reformed after previous breaches and contravention was in our view hollow and unconvincing in the circumstances.

The Enforcement Notice:

[54] The EN, served on the same date as the MPN (i.e. 23rd November 2018) ordered that the Appellant:

Neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where the called line is that of:

(a) A subscriber who has previously notified D M Design that such calls should not be made on that line; and/or
(b) A subscriber who has registered their number with the TPS at least 28 days previously and who has not notified D M Design that they do not object to such calls being made.

[55] The appellant has breached Regulation 21 PECR 2003. The level of breach (1,661,607 calls) was significant and in our view serious. The appellant has previously been subject to enforcement action and on the evidence before us has failed to

remedy its working practices, either adequately or at all. In these circumstances we hold that the Enforcement Notice is fully justified.

[56] In view of our findings in relation to the appeal against the MPN and in light of the Commissioner's statement at paragraph 20 of the EN:

> "…*following the established contravention which forms the basis of this Enforcement Notice, further complaints appear to have been logged in respect of unsolicited calls allegedly made by D M Design*."

We see no reason to reach a different conclusion in relation to the EN served on the Appellant on the 23rd November 2018.

Conclusion:

[57] We have reached our unanimous conclusions on the basis of the evidence before us and for the reasons set out above. We take particular account in our findings that the breach was serious by virtue of the number of calls made and the period over which they were made; also that at the very least, the Appellant acted recklessly, if not deliberately when they breached the Regulations. We therefore dismiss the appeal and uphold the MPN of £160,000. We also uphold the EN in relation to the Appellant using a public electronic communications service for the purpose of making unsolicited marketing calls to numbers allocated the TPS register for 28 days or more.

Brian Kennedy QC **8 July 2019.**

Date Promulgated: 9 July 2019