IAC-AH-CJ-V1

The First-tier Tribunal
(General Regulatory Chamber)
Claims Management Services

Tribunal Reference: CMS/2015/0001

Heard at Field House
On 6 October 2016

Before

JUDGE PETER LANE
MARK WHITE

Between

AURANGZEB IQBAL

Appellant

and

THE CLAIMS MANAGEMENT SERVICES REGULATOR

Respondent

Representation:

For the Appellant: In person
For the Respondent: Brendan McGurk, Counsel, instructed by the Government Legal Department

DECISION AND REASONS

A. Introduction

1. The Compensation Act 2006 empowers the Secretary of State to designate a person as the Regulator of persons authorised to provide regulated claims management services. Pursuant to section 5(9) of that Act, the Secretary of State is, for the time

being, exercising the functions of that Regulator. At all relevant times, the appellant was a person authorised to provide such services, although he subsequently relinquished his authorised status.

2. The appellant ran two telephone call centres, located respectively in Bradford and Derby. The appellant's business involved calling, on behalf of solicitors, persons who may have suffered industrial hearing loss. The solicitors were interested in providing legal services for those who may have suffered such loss in the course of their employment.

3. As a result of amendments which came into force in 2014, the respondent is empowered by regulation 48 of the Compensation (Claims Management Services) Regulations 2006 to require an authorised person to pay a penalty, if satisfied that the person has failed to comply with a condition of authorisation. Regulation 49 provides for determining the amount of a penalty. By virtue of regulation 49(4), the factors to which the respondent must have regard, in determining the amount of the penalty, are the nature and seriousness of the acts or omissions giving rise to the decision to require payment of a penalty and the relevant turnover of the business of the authorised person.

4. It is common ground that, in the present case, the relevant turnover of the appellant at the requisite time was £2.46 million.

5. In the Annex to this decision, we set out relevant legislation, Rules, Codes of Conduct and Guidance. The respondent submits that, in essence, the position that emerges from these sometimes overlapping or interconnecting provisions is essentially as follows.

6. A person, such as the appellant, who operates a call-centre business, must, as a condition of authorisation, ensure that calls are not made to members of the public who have registered with the Telephone Preference Service. The TPS is a register, kept by OFCOM pursuant to the Privacy and Electronic Communications (EC Directive) Regulations 2003, of numbers allocated to subscribers, in respect of particular lines, who have notified OFCOM that they do not for the time being wish to receive unsolicited calls for direct marketing purposes on the lines in question.

7. In order to avoid breaching the PECR Regulations, an authorised person must, in practice, be aware of the state of the TPS register. A breach does not, however, occur if someone on the TPS register has been so for less than 28 days, preceding the date on which the call is made (regulation 21(3)).

8. An authorised person can purchase a licence to have access to the TPS register or use the services of third parties, who have such access and who are paid to inform the authorised person of the state of the register.

9. The facility exists for the TPS register to be screened in "real time", which means that even those who have joined the register less than 28 days earlier will not be called.

10. Regulation 21(4) provides for what is known as a "opt in":–

> "(4) Where a subscriber who has caused a number allocated to a line of his to be used 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."

11. The respondent lays emphasis upon the words "that caller" in regulation 21(4). An opt-in is effective only if the person in question has signified a willingness to be called by a particular person or business.

12. In the case of an authorised person, such as the appellant, who is introducing business to a solicitor, there is a further restriction. The requirements of authorisation contained in Client Specific Rule 8 of the Conduct of Authorised Persons Rules 2014 in effect prohibit the authorised person from acting in a way that puts the solicitor in breach of the Rules governing solicitors' conduct. The Solicitors Regulation Authority Code of Conduct 2011 prohibits solicitors from making "unsolicited approaches in person or by telephone to members of the public in order to publicise your firm" (see paragraphs 1 and 2 of the Annex).

13. The upshot of all this is that an authorised person will be in breach of the conditions of authorisation if the person:–

    (a) calls a person who has been on the TPS register for more than 28 days and who has not opted-in to be called by the authorised person on the line dialled; and

    (b) calls a person (whether on the TPS register or not) who has not solicited an approach to be made to that person by the solicitors for whom the authorised person is, in effect, treated as working.

B. The respondent's decision and its background

14. As a result of complaints from the public and data received from OFCOM, the respondent audited the appellant's business on 30 September 2014. Following that audit, the respondent wrote to the appellant on 7 November 2014. The respondent pointed out relevant requirements of the Conduct of Authorised Persons Rules, the Direct Marketing Association's Direct Marketing Code of Practice and the PECR Regulations. Having reviewed the appellant's opt-ins, supplied following the audit, the respondent took the view that it was evident the appellant did not have overriding consent to make unsolicited telemarketing calls to numbers registered against the TPS. "Overriding consent" can take the form of an opt-in of the kind described in paragraph 13(a) above.

15. The respondent's letter noted that the appellant "does not currently screen its data against the TPS prior to calling". The respondent therefore said:

> "I recommend that you screen data against the TPS in-house at least 28 days prior to calling. If this is not feasible, you must ensure that you have rigorous systems in place to monitor your data supplies and to ensure that your business has overriding consent to make telemarketing calls to TPS registrants."

16. The letter noted the appellant's statement that he purchased business data from Marketing Lists Limited for use in his outbound telemarketing campaign. The respondent stated in the letter that the appellant "must ensure that your business carries out thorough due diligence when purchasing data to ensure that your business has the necessary consent to make telemarketing calls to the data subjects". Relevant guidance material was supplied. Reference was also made to General Rule 2(e) of the Conduct of Authorised Persons Rules 2014, which requires an authorised person to operate a procedure that verifies the source of data purchased and to retain evidence to demonstrate that this procedure had been followed. The letter ended by setting out the action required, as well as giving a warning about the future conduct of the appellant's business.

17. On 29 November 2014, Messrs Scott Robert, consultants acting for the appellant, wrote to the respondent in reply to the letter of 7 November. Scott Robert accepted on the appellant's behalf that "due diligence has not been substantially documented". Scott Robert apologised for "the error in providing the list of telephone numbers which it makes use of which was due to an internal administrative error in preparing the information requested". It seems that telephone numbers in respect of only one of the call centres were provided. Scott Robert now enclosed a full list of the numbers used by the appellant. The letter also said:–

> "Our client also confirms that it has now adopted appropriate measures with regard to screening against the TPS register namely that data where it does not have express consent to contact the individual concerned is screened prior to any dialling activity."

18. An opt-in document, supplied by Marketing Lists, contained the following form of words, which the respondent assumed was indicative of what the appellant was using:–

> "Yes I grant permission for you and carefully selected 3rd parties to use the information supplied for marketing activities such as market research or contacting me by post, telephone, email, fax or other means regarding further products, services and special offers."

19. On 12 February 2015, the respondent wrote again to the appellant. The respondent stated that, despite the earlier warning:–

> "We have continued to receive complaints from consumers who have received telephone calls from your business despite being registered with the TPS. We [are] also in receipt of information from the Office of Communications (OFCOM) which suggests the same."

20. The letter stated that due to the seriousness of the matter a formal investigation had been commenced. The appellant was required to provide evidence of turnover figures in relation to regulated claims management activity over the past twelve months. These figures were expressly said to be for use in connection with any financial penalty that might be imposed.

21. On 14 April 2015, Scott Robert wrote to the respondent. At paragraph 8 Scott Robert said:–

> "8. Our client now has its own TPS licence in place. This TPS licence is used to check all numbers against the register. When any number is found to be listed on the register this is not put onto the call rotation and will not be called by our client."

22. The letter also confirmed previously supplied turnover figures in the sum of £2,466,250.00.

23. On 23 April 2015, Mr Williams of the respondent queried the statement that the appellant had its own licence, since Mr Williams had been unable to find a record of the appellant's registration on the TPS website.

24. Scott Robert emailed the respondent on 24 April 2015 to say that:–

> "In respect of point 8 of our response, the wording used was incorrect. Our client does not hold its own TPS licence but uses a facility named Blue Telecom run by the firm Swansea IT Limited … This firm provides our client with live TPS screening facility against registered CLI numbers."

25. So far as the previous such suppliers, Marketing Lists Limited, were concerned, Scott Robert said that the appellant "did not have a contract with this firm as the date of purchase was done on an invoice basis". The appellant did not have any documentary evidence as to the ceasing of the relationship between the appellant and Marketing Lists Limited, "as this was done verbally". The email also said that no contract existed "as the data purchase was done on an invoice basis".

26. On 18 May 2015, the respondent wrote to the appellant to say that the respondent was minded to impose a financial penalty and a variation of the appellant's authorisation. The variation issue is not one that concerns this appeal. So far as the financial penalty was concerned, the respondent noted the differing statements from Scott Robert as to whether the appellant had its own TPS licence. In any event, whatever arrangements the appellant had put in place were not working, so far as the respondent was concerned. There had been 234 complaints during March 2015.

Between November 2014 and March 2015, OFCOM had provided details of 1,107 complaints from TPS-registered consumers.

27. On each occasion, according to the respondent, the appellant had responded that the TPS complainer had been contacted by the appellant "in relation to market research".

28. 693 of the complaints were received during January, February and March 2015, following the implementation of the Regulations permitting the respondent to impose financial penalties. The letter went on to cite General Rule 5, Client Specific Rule 4 and Client Specific Rule 8 in support of the respondent's contention that there was no evidence to show that the TPS-registered complainers had opted-in in a manner that enabled the appellant to call them. This was so, both of the PECR Regulations and of the Solicitors Regulation Authority Code of Conduct.

29. The letter went on to explain the way in which the respondent's enforcement policy had been applied. The nature of the breach was assessed at level 3 and the seriousness at level 4. The penalty band was 8 to 10% of turnover, giving a proposed penalty of £245,000.

30. The appellant was invited to make written representations. Short Richardson & Forth LLP, Solicitors, did so on behalf of the appellant on 29 May 2015. In their letter, Short Richardson said that the appellant had been trading for little more than a year and was on a "steep learning curve". He had employed the professional services of Scott Robert "to ensure that full compliance is met at all times". The appellant employed 60 young people from areas of high unemployment. This was a reduction from the previous year, in which 200 employees had been working for the appellant. The reduction was said to be "reflective of the decline of the market".

31. It was said that Mr Clancy of the Information Commissioner's Office had had a meeting in April 2015 with the appellant and had commented that there had been a significant reduction in the number of complaints to the TPS. The appellant had made "significant improvements to his business and indeed learned from earlier mistakes". Marketing Lists Limited had been relied upon in the past but the appellant had since engaged Verso Group and UK Datahouse "to provide all of the data to him".

32. At the audit in September 2014, the appellant was said by Short Richardson to have accepted "that he was not screening his data against the TPS register, as he was placing reliance upon Marketing Lists Limited". The appellant was unable to provide evidence of this, as the relationship with Marketing Lists Limited had ended. The letter stated that the appellant's assertion at an earlier point that TPS complaints were, in fact, "in respect of market research" arose from the appellant being "advised to provide this explanation by Marketing Lists Limited, which he accepts was certainly not the best advice".

33. The letter referred to the "misunderstanding" as to whether the appellant had his own TPS licence. "He again confirms that he does not, but does place reliance upon Blue Telecoms to undertake proper live screening".

34. The imposition of the penalty would, it was claimed, cause "the closure of the business and the substantial loss of employment". The appellant denied that his breaches were intentional, negligent or reckless.

35. On 4 August 2015, the respondent issued its decision letter. The respondent considered the amount of the penalty to be reasonable, based on the turnover declared. Although there had been a reduction in the volume of complaints, the figures in question showed, according to the respondent, that this was "directly related to the volume of telemarketing calls made by your business". The number of complaints continued to be unacceptably high, with 371 generated between 1 April and 31 May 2015, in addition to the 693 generated between 1 January and 31 March 2015. By failing to address the complaints, the appellant was adjudged to have been negligent and reckless. Any remedial action had been ineffective and insufficient. False information had been supplied by the appellant on several occasions. The respondent did, however, accept that a small proportion of the complaints to the TPS might not be as a result of the appellant's telemarketing calls. The fact the appellant himself could not tell was itself regarded by the respondent as problematic. Nevertheless, the respondent decided to reduce the level of financial penalty by £25,000. The appellant was, accordingly, required by the decision to pay a financial penalty of £220,000.

C. The Appeal

36. The appellant appealed against the penalty decision to the First-tier Tribunal. The hearing took place on 6 October 2016. The appellant appeared in person, assisted by a friend. The appellant, who it emerged had been trained as a lawyer, presented his case ably. The respondent was represented by Mr McGurk of Counsel.

37. The Tribunal heard evidence from the appellant and from Greg Williams of the respondent. Vicki McAusland of the respondent had also produced a witness statement, but was not called upon to give oral evidence.

38. The documentary evidence and other materials were contained in a paginated bundle, running from page 1–1 to page 4–209, with a substantial number of pages being inserted after the initial numbering had occurred. The appellant made two written statements, one in the bundle and one served the day before the hearing, together with other materials.

39. We have had regard to all that written material in reaching our unanimous decision. We have also, of course, had regard to the oral evidence and submissions of the parties.

40. The appellant told us that he considered someone must be using his trading names, as he had continued to receive TPS complaints even after he had ceased trading and surrendered his licence in February 2016. The appellant's second statement made reference to complaints he had made in respect of the length of time that it took the respondent to authorise him. Reference also was made to dealings the appellant had with the Legal Aid Board.

41. Under cross-examination, the appellant confirmed that he had been a solicitor who, in 1998, had been suspended from practice for a breach of the Solicitors' Accounts Rules. A condition was imposed whereby the appellant was not permitted to work without supervision. In 2002, the appellant was working with a firm which suffered intervention. Charges were brought against the appellant and other partners concerning a failure to keep proper records and the withdrawal of money without authorisation. The appellant was struck off the roll of solicitors in 2004. A request to be restored to the roll was refused in July 2012.

42. The appellant maintained that he had been treated "appallingly" by the respondent in respect of the process leading to his authorisation.

43. The appellant considered that the 2014 audit by the respondent had gone very well. He had relied upon Scott Robert for advice.

44. The appellant was asked who his compliance manager was during the relevant time. The appellant was unable to say at first, before eventually indicating that he had taken responsibility for regulatory matters. He believed he had read relevant bulletins from the MOJ. The appellant believed that he had read the marketing and advertising guidance note (4–183), as in force when he began his business. He had not read the PECR Regulations. The appellant did, however, understand the need for overriding consent, in the form of an opt-in for those who had chosen to be on the TPS register. The appellant accepted that he could not just take the word of a third party on this matter.

45. He did not remember whether he had read the part of the guidance which told authorised persons that they could not make sales, marketing or customer service calls under the guise of research or a survey. This was deemed to be "sugging" (sic) and against the DMA Direct Marketing Code of Practice.

46. So far as the requirements for an effective opt-in were concerned, the appellant's attention was drawn to page 4–189 where we find the following:–

> "Solicitors must not make unsolicited approaches in person or by **telephone** to members of the public in order to publicise their firm. Additionally they are unable to accept referrals which have been obtained as a result of an unsolicited approach. Therefore you will be unable to refer a claim to a solicitor if it is as a result of an unsolicited approach by telephone.

> An 'opt in' to receiving unsolicited marketing is insufficient to comply with this rule; you will be required to obtain expressed consent for you to contact the consumer if the claim is to be passed to a solicitor. This rule will still apply if the claim is passed onto a claims management business before being referred to a solicitor or if the claim could eventually be referred to a solicitor."

47. The appellant said that he understood all this. When asked if he realised he could not rely on Marketing Lists Limited, the appellant said that life was not black and white and sometimes one had to make a business decision. He had done so in relying on Marketing Lists Limited.

48. Turning to the audit, the appellant said that he understood the respondent was interested in both the Bradford and Derby call centres. He had told the Information Commissioner that the TPS alleged breaches were, in fact, marketing research calls because Marketing Lists Limited had told him to say that they were market research. He did, however, accept that the calls were not, in fact, market research.

49. The appellant maintained that he had not been asked for relevant call centre telephone numbers in respect of Bradford but would have provided them if asked.

50. The appellant said that the business was expanding rapidly at the time and one could not always get it right. He had relied on Marketing Lists Limited and also on Scott Robert. The appellant felt that Asian call centre claims management companies were being targeted and he was being made a scapegoat. He very much wished, in retrospect, that he had got his own TPS licence. He disputed that the respondent had advised him to get such a licence.

51. The appellant accepted that the guidance stated that an authorised person could not take the word of third-party providers. The appellant said that he believed he had read all the relevant bulletins issued by the respondent.

52. So far as opt-ins and the interaction with the SRA Rules were concerned. The appellant said that there would not be any call centres at all if the respondent's interpretation of the relevant requirements was right. Scott Robert had told the appellant that this was a "grey area".

53. The appellant said that only 0.008% of his calls had caused problems.

54. As for the sample opt-in supplied by Marketing Lists Limited (4–24ZZ), the appellant accepted that this did not refer to any specific hearing clinic (such as that run by the solicitors with whom the appellant was involved in the industrial hearing loss claims business). The appellant, nevertheless, said that he had been told that this was an adequate opt-in.

55. The specimen "data provider audit" form at 4–24LL was a "blank" form and the appellant did not say that he had been shown such a form, as completed by

Marketing Lists Limited, Verso, UK Data or Blue Telecom, all of whom he said had been engaged by him at various times to supply data.

56. The appellant accepted he had no evidence to show that any of the TPS complainants were people who had registered less than 28 days before being called by the appellant. Solicitors would, according to the appellant, ask from time to time about compliance and he would check with Marketing Lists Limited. The appellant agreed with Mr McGurk that if, as Scott Robert had stated in their letter of 12 January 2015, all numbers were "screened before being dialled and the system is updated on a weekly basis", then the appellant could never fall foul of the PECR Regulations. The appellant said that Marketing Lists Limited had told him that they were doing this. He regularly met with them and was told that everything was compliant.

57. The appellant said he understood that Verso operated an "oral" opt-in, whereby a person would give consent when telephoned. Mr McGurk asked how, logically, this could operate as an effective opt-in, given that the person would already have been called, in breach of the Regulations. The appellant said that the respondent needed to pursue others in this regard, just as they were pursuing him.

58. The appellant was asked about the bar graphs at 4.59A. Mr McGurk explained that these showed the reduction in complaints concerning the appellant was commensurate with the reduction in calls being made by him. There was, as a result, no evidence of improvement in the appellant's processes. The appellant said that the number of violations was minute.

59. The appellant said that the letter from Scott Robert, in which it was asserted that the appellant was in possession of his own TPS licence, was incorrect and that Scott Robert had not run their letter past him before it had been sent. The appellant accepted that the error remained uncorrected until after the respondent had checked the TPS website in April 2015, and had been unable to find a record of the appellant's registration.

60. The appellant said that the publicity given by the respondent to the penalty investigations regarding his business had had a harmful effect on the business. It was, however, pointed out to the appellant that the letter of 29 May 2015 ascribed the reduction in business to a "decline of the market". The appellant said that his last potential client had pulled out in June 2015. It was put to him that publication did not occur until August 2015, at which point the appellant said that the pulling out of the last potential client would have been in August.

61. The appellant was asked about his reliance upon the views of Mr Clancy of the Information Commissioner's Office. Attention was drawn to the note of the meeting between Mr Clancy and the appellant at 4–57/58. This had taken place in April 2015 at the appellant's premises in Bradford. It was pointed out to the appellant that it was stated in that note that the appellant "was the most prolific offender in the TPS top 20" and that "complaints relating to hearing claims accounted for around 20% of

all valid complaints to the TPS". The appellant said that the note had not been prepared by him.

62. The appellant accepted that in December 2015, the Information Commissioner had served an enforcement notice on the appellant regarding breaches of the PECR Regulations. The enforcement notice referred (4–75C) to the Commissioner having received "numerous complaints via the TPS and from individuals directly who are subscribers to specific telephone lines. The individuals allege that they have received unsolicited marketing calls on those lines, from various individuals acting on behalf of [the appellant]". It was stated that many of the individuals "allege that they have continued to receive such calls despite complaints to the Commissioner and/or the TPS".

63. The appellant said that sometimes the staff had forgotten to record the callers asking to be put on a "do not call" list.

64. The appellant concluded his evidence by saying that he was "here to face the music – the buck stops with me".

65. Mr Williams was asked by the appellant about the circumstances surrounding the appellant's authorisation by the respondent. Mr Williams said that he was unaware of the appellant's complaint in this regard until he read the appellant's second statement, the day before the hearing. In the time available, Mr Williams had been able to establish that the complaint was dealt with by a different staff member than the employee about whom the complaint had been made.

66. Mr Williams said that although, according to the turnover figure, the appellant could have received a penalty of 20% of turnover, the actual figure imposed was in the region of 8 to 10%. The Regulations permitted the respondent to base its penalties on turnover rather than net profit. That was the will of Parliament.

67. Mr Williams denied that the respondent was using the appellant as a scapegoat. He also confirmed that other businesses had received financial penalties and been named in the respondent's website.

D. Discussion

68. We have set out at paragraphs 6 to 13 above the way in which the respondent says the relevant regulatory requirements work, as regards an authorised person in the position of the appellant. We are satisfied that the respondent's understanding is correct. The appellant appeared, at points, to accept important elements of it. To the extent that he did not, the appellant has not been able to advance any coherent reasons why the respondent may be wrong. It is not sufficient to contend that call centres of the kind with which we are concerned would not be able to operate, if the respondent is correct. The requirements are, to be sure, particularly challenging in

the case of those marketing on behalf of solicitors; but that is, in our view, a deliberate consequence of the decision to treat authorised persons as, in effect, an extension of the solicitors themselves, for the purposes of the relevant provisions of the SRA Code of Practice. Client Specific Rule 8 of the Conduct of Authorised Persons Rules 2014 could not be clearer:–

> "8. Where a business is introduced to a solicitor, the business must not act in a way that puts the solicitor in breach of the Rules governing solicitors' conduct."

69. The SRA Code of Conduct says to a solicitor that "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business".

70. So far as concerns opt-ins under the PECR Regulations, regulation 21(4) makes it abundantly clear that the opt-in comprises notification that a person "does not, for the time being, object to such calls being made on <u>that line</u> by <u>that caller</u>" (our emphases), with the result that "such calls may be made by <u>that caller</u> on <u>that line</u>, notwithstanding that the number allocated to that line is listed in the said register" (our emphases).

71. The appellant has been completely unable to demonstrate that the referrals made to solicitors were compliant with the regulatory regime. On the contrary, the evidence before us points overwhelmingly to the fact that such referrals would unquestionably have been in breach. The only specimen opt-in which the appellant has seen fit to put before us manifestly fails to be effective in this regard. It does not begin to make the appellant's actions in telephoning a person a solicited approach to publicise a particular firm of solicitors. It would have been only much later in the process that a potential client would know about the involvement of solicitors, by which time the breach would have already occurred.

72. The same is true of PECR opt-ins. Looking at the specimen Marketing Lists opt-in at 4-24ZZ (and that is all we have), and leaving aside the question of who is meant by the word "you", it is plain that the phrase "carefully selected third parties" is insufficient to meet the requirement in regulation 21(4).

73. The appellant's evidence concerning so-called verbal opt-ins was, likewise, unsatisfactory. The whole point of the TPS would be undermined if call centres were able to view opt-ins in this way. In any case, the concept of a verbal opt-in runs completely contrary to the plain words of regulation 21(4) and the provisions in regulation 26, regarding what is the TPS register.

74. Although the appellant candidly ended his evidence by accepting that the "buck stops with" him, much of his evidence involved an attempt to deflect criticism onto others. Despite the allegedly heavy reliance placed by the appellant upon the efficiency and probity of Marketing Lists Limited, no written agreement is said ever to have existed between the appellant and that company. We find that astonishing.

The materials emanating from Marketing Lists Limited are, as a result, exiguous. It is clear from what we do have that any reasonable authorised person would have undertaken rigorous procedures in order to ensure themselves that data was being properly screened. Despite the fact that the appellant claimed to have had many discussions with the company, there is no evidence to show the appellant acted in such a manner.

75. It is clear from the evidence set out above that the appellant's response to the concerns articulated by the respondent was both belated and wholly inadequate. The appellant continued with Marketing Lists Limited for longer than was responsible. They did not leave the scene until February 2015. Relying on them after November 2014 was, in all the circumstances, unreasonable.

76. We have not seen any written agreements between the appellant and Verso or UK Data. Likewise, we have not been furnished with any relevant TPS licences regarding these bodies. As for Blue Telecoms, in which the appellant clearly laid great store, it only had a 28-day licence in the spring of 2015 and there is no indication that that licence was renewed.

77. We agree with the respondent that the data shows that the decline in the number of complaints is broadly in line with the decline in the number of calls made by the appellant's call centres. Accordingly, to ascribe the decline in complaints to any measures taken by the appellant is simply not possible. The number of complaints, as set out in the respondent's correspondence, continued to be troubling.

78. It is also noteworthy that the solicitors then acting for the appellant, in their letter of 29 May 2015, ascribed the reduction in calls made as "reflective of the decline of the market", rather than the result of any greater regulatory awareness on the part of the appellant.

79. Overall, we have concluded that the respondent was correct to categorise the appellant's behaviour as reckless. Even though the appellant may have been new to claims management work and this particular regulatory regime, he had previous experience of other regulatory regimes and the consequences that can flow, where requirements are flouted. The appellant has been legally qualified and is (as was apparent at the hearing) highly intelligent.

80. The truth of the matter is, we find, that the appellant was set upon expanding his business – and exploiting the financial rewards that it could bring – as rapidly as possible and chose to take a cavalier approach to the responsibilities which his status as an authorised person entailed.

81. We make these findings in the full knowledge of the fact that Scott Robert were employed as consultants by the appellant, following the audit by the respondent. Scott Robert were not called by the appellant to give evidence. We therefore do not have their explanation as to how they came to say to the respondent, in terms, that

the appellant now held his own TPS licence. Even on the appellant's own evidence, however, the matter is problematic. The appellant said that he did not check the contents of the letter in question, before it went out. Furthermore, the appellant was content to leave the respondent with untrue information until Mr Williams queried the matter at the end of April 2015.

82. In the circumstances, we do not find that the appellant's attempts to put blame on Scott Robert have been shown to be justified. The fact of the matter remains that the appellant bore responsibility for ensuring that he met the relevant requirements imposed on him as an authorised person. It was his choice not to undertake his own TPS screening, despite the specific suggestion in the respondent's letter of 7 November 2014 (4–22) and the audit report (4–9). It was also the appellant's choice to engage UK Data and Blue Telecom, without being able to demonstrate that he had required them to take any particular steps to ensure compliance.

83. The appellant's statement that the TPS complaints related to calls that were merely market research is, we find, false. The appellant appeared to accept in oral evidence that this was so (paragraph 48 above). The fact that he blithely accepted the alleged advice of Marketing Lists Limited to categorise the calls as such is, we consider, a further instance of what can at best be described as recklessness.

84. We agree with the respondent that the appellant can draw no material assistance from the fact that the number of complaints amounted to only a small fraction (0.008%) of the total number of calls made. The number of complaints needs to be looked at in its own terms. Each represents a person who has gone to the trouble of making a complaint, having been called by the appellant in breach of the PECR Regulations. It is far more likely than not that a substantially greater number of persons did not complain. The logic of the appellant's stance is that, the larger the number of calls made by the authorised person's business, the larger the number of complaints that the regulatory regime (and, ultimately, the public) must, in effect, tolerate. We are not satisfied that there is anything in the legislation, rules, codes or guidance that supports such a position.

85. We accordingly conclude that the appellant was in breach of the relevant requirements; that he acted recklessly in that regard; and that he gave (or was responsible for giving) misleading information to the respondent.

86. As we have seen, the appellant very belatedly sought to introduce allegations that he had been treated discourteously by the respondent's officials, during what he claimed was an unduly protracted application process, leading to his becoming an authorised person. We are entirely unpersuaded that these allegations have been substantiated; but in any event, the appellant has not shown there to be any material connection between the process that led to his authorisation and the matters with which this appeal is concerned. We also find that the appellant has not shown there to be any substance in his contention that, as an Asian, he was subjected to a greater degree of interest on the part of the respondent than is the case with non-Asian

authorised persons. We accept Mr Williams' evidence that the respondent has taken regulatory action against non-Asians.

87. We required submissions from the parties on what the effect, if any, might be on the appellant's liability to pay a penalty of his no longer being an authorised person (he relinquished that status in February 2016). The respondent's position is that the scheme of the legislation is such that the appellant became liable to pay the penalty, at a point when he was an authorised person. Significantly, in the respondent's view, section 13 of the 2006 Act (appeals and references to the Tribunal) speaks of a penalty being imposed on "a person", who may appeal against it. Parliament's intentions would, in the respondent's view, be subverted if the legislation were read so as to enable persons to avoid punishment for acts and omissions committed whilst they were authorised persons, by merely ceasing to be authorised.

88. The appellant's submissions did not take issue with any of this. Instead, the appellant used the opportunity to reiterate his belief that the penalty was disproportionate to the number of calls involved. He also said the respondent "could not even be bothered to acknowledge and convey their regrets on the passing of my brother at the age of 60 or extend my time to file a response. My father died at the age of 64 and I am 55 but am carrying far more stress than them".

89. We agree with the respondent's position, for the reasons set out in paragraph 87 above. It would be a surprising result if the position were otherwise and the statute thus envisages an appeal being brought against the imposition of a penalty on a person, as opposed merely to an authorised person.

90. We accordingly turn to the ascertainment of the size of the penalty to be imposed.

91. Regulation 49 of the Compensation (Claims Management Services) Regulations 2006 is quite clear as to the way in which the respondent must determine the amount of any penalty. Regulation 49(1) provides that it is to be determined "in accordance with this regulation and regulation 50".

92. Regulation 49(2) provides that the amount of the penalty must be:–

> "(a) for an authorised person whose business has a relevant turnover of less than £500,000, no more than £100,000;
>
> (b) for an authorised person whose business has a relevant turnover of £500,000 or more, no more than 20 per cent of that turnover."

93. Regulation 49(4) says that the respondent, in determining the amount of the penalty, must have regard to:–

> "(a) the nature and seriousness of the acts or omissions giving rise to the Regulator's decision to exercise the power to require the authorised person to pay a penalty; and

(b) the relevant turnover of the business of the authorised person."

94. Regulation 50 provides the meaning of "relevant turnover". Turnover is to be determined for the period of twelve months prior to the date on which the respondent gives notice under regulation 51(1) (that is to say, notice of a proposed penalty). Regulation 51(2) requires the Regulator to "take into account any written submissions" made in response to the notice in determining (inter alia) "the amount of the penalty".

95. Section 5(4)(b) of the Compensation Act 2006 requires the Regulator to "have regard to any guidance given to him by the Secretary of State". In December 2014, the Ministry of Justice issued "claims management regulation – financial penalties scheme guidance". Since the Secretary of State is, at present, the Regulator, this guidance must, accordingly, be taken into account by the respondent, pursuant to the 2006 Act.

96. The guidance explains how to score, on a level of 1 to 3, the nature of the breach or breaches, as between basic, escalated and severe. The respondent's letter of 18 May 2015 stated that the score for "nature" was assessed to be 3 (severe). The guidance states that breaches that fall into this category "are generally likely to be deemed as intentional, reckless and negligent. It is likely that the authorised person would have ignored previous compliance, advice or warnings and that there may have been no cooperation with the investigation from the authorised person". The guidance goes on to refer to the authorised person having shown "no clear intention to put in place measures that would remedy the situation and the breaches identified. The example behaviours are said not to be exhaustive.

97. The Tribunal fully agrees with the respondent that the appropriate score under "nature" should be 3. We have held that the behaviour of the appellant at the relevant times falls to be categorised as reckless. It is plain, for the reasons we have given, that the appellant failed to put in place appropriate measures, despite compliance advice and warnings.

98. The respondent scored the level of seriousness as 4 (medium). The guidance states that breaches falling into this category are likely to have affected "a number of consumers or other organisations" and there is likely to be potential for even further, more widespread detriment if action is not taken.

99. Judged on its own, the number of persons concerned was, in real terms, significant. Hundreds of people a month were being driven to complain. The overwhelming likelihood is that a far greater number was subjected to calls, notwithstanding their presence on the TPS register. The evidence also plainly shows that any referrals made by the appellant to solicitors are more likely than not to have placed those solicitors in breach of the SRA's Code of Conduct. The size of the relevant turnover

(some £2.4 million) is, we find, indicative of the number of persons likely to have been involved in such unsolicited approaches.

100. Accordingly, irrespective of the issue of potential for further breaches, the respondent was justified to impose a score of 4 for seriousness.

101. At 4–121 on the page headed "final score calculation", we find the following:–

> "Once a final score is reached, an assessment of the business' means will also need to be conducted. A business' means will play a pivotal role in the consideration of the appropriateness of a penalty and, in conjunction with a final score derived from the initial nature and seriousness of assessment, will provide an indication of an appropriate penalty range."

102. The guidance then refers to the two-tier approach, by reference to the size of relevant turnover, as provided in regulation 49(2).

103. It seems to the Tribunal that the reference to a business' "means" under "final score calculation" is, in fact, intended to refer to the amount of relevant turnover. There is, we find, no scope in the legislation for any wider consideration of an authorised person's ability to pay, as a factor in determining the level of penalty. On the contrary, regulation 49(4) is explicit in specifying only the nature and seriousness of the acts or omissions and the relevant turnover as matters to which the Regulator must have regard. It is in this light, therefore, that one must read regulation 51(2)(b), whereby the Regulator must "take into account any written submission made by the authorised person … in determining the amount of the penalty".

104. In any event, we are not satisfied that the appellant has given any satisfactory evidence regarding his ability to pay the penalty. In oral evidence, he claimed to be in financial difficulties. Only one day before the hearing did the appellant supply an accountant's report, unsigned, but dated 13 October 2014, which purported to show a net profit for the period 1 June 2013 to 31 May 2014 of £8,540. We place no weight on this document. Besides not being signed, it is stated to be a report made "solely to" the appellant. No responsibility was assumed by the accountant "to anyone other than [the appellant] for our work and for this report". Furthermore it said "we have not verified the accuracy or completeness of the accounting records or information and explanations you have given to us and we do not, therefore, express any opinion on the financial information".

105. In all the circumstances, we conclude that the penalty of £220,000 was correctly arrived at, applying the relevant legislation and guidance, and there is no reason for it to be changed. We have had regard to what the appellant said about further complaints being made even after he had ceased business. We are not, however, prepared to accept without more the contention that persons unknown are using the appellant's trading names and, moreover, may have done so during the relevant period. We consider that the respondent's decision to reduce the originally proposed penalty by £25,000 represents an appropriate and proportionate response to such

evidence as there is regarding certain complaints possibly not being as a result of the appellant's telemarketing activities. Like the respondent, we consider that any uncertainty in this regard is, in fact, a further example of the appellant's problematic business activities.

E. Decision

106. This appeal is dismissed.

Signed

Judge Peter Lane
4 November 2016

Paragraphs 6, 12 and 16 amended pursuant to rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009
14 November 2016

ANNEX

Legislation, rules, code of conduct and guidance

1. The relevant legislation is as follows:

"**Compensation Act 2006**

4 Provision of regulated claims management services

(1) A person may not provide regulated claims management services unless –

(a) he is an authorised person,
(b) he is an exempt person,
(c) the requirement for authorisation has been waived in relation to him in accordance with regulations under section 9, or
(d) he is an individual acting otherwise than in the course of a business.

(2) In this Part –

(a) 'authorised person' means a person authorised by the Regulator under section 5(1)(a),
(b) 'claims management services' means advice or other services in relation to the making of a claim,
(c) 'claim' means a claim for compensation, restitution, repayment or any other remedy or relief in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made –

(i) by way of legal proceedings,
(ii) in accordance with a scheme of regulation (whether voluntary or compulsory), or
(iii) in pursuance of a voluntary undertaking,

(d) 'exempt person' has the meaning given by section 6(5), and
(e) services are regulated if they are –

(i) of a kind prescribed by order of the Secretary of State, or
(ii) provided in cases or circumstances of a kind prescribed by order of the Secretary of State.

(3) For the purposes of this section –

(a) a reference to the provision of services includes, in particular, a reference to –

(i) the provision of financial services or assistance,
(ii) the provision of services by way of or in relation to legal representation,
(iii) referring or introducing one person to another, and
(iv) making inquiries, and

(b) a person does not provide claims management services by reason only of giving, or preparing to give, evidence (whether or not expert evidence).

(4) For the purposes of subsection (1)(d) an individual acts in the course of a business if, in particular –

(a) he acts in the course of an employment, or
(b) he otherwise receives or hopes to receive money or money's worth as a result of his action.

(5) The Secretary of State may by order provide that a claim for a specified benefit shall be treated as a claim for the purposes of this Part.

(6) The Secretary of State may specify a benefit under subsection (5) only if it appears to him to be a United Kingdom social security benefit designed to provide compensation for industrial injury.

5 The Regulator

(1) The Secretary of State may by order designate a person ('the Regulator') –

(a) to authorise persons to provide regulated claims management services,
(b) to regulate the conduct of authorised persons, and
(c) to exercise such other functions as are conferred on the Regulator by or under this Part.

(2) The Secretary of State may designate a person only if satisfied that the person –

(a) is competent to perform the functions of the Regulator,
(b) will make arrangements to avoid any conflict of interest between the person's functions as Regulator and any other functions, and
(c) will promote the interests of persons using regulated claims management services (including, in particular, by –

(i) setting and monitoring standards of competence and professional conduct for persons providing regulated claims management services,
(ii) promoting good practice by persons providing regulated claims management services, in particular in relation to the provision of information about charges and other matters to persons using or considering using the services,
(iii) promoting practices likely to facilitate competition between different providers of regulated claims management services, and
(iv) ensuring that arrangements are made for the protection of persons using regulated claims management services (including

arrangements for the handling of complaints about the conduct of authorised persons)).

(3) **[…]**

(4) The Regulator shall –

(a) comply with any directions given to him by the Secretary of State;
(b) have regard to any guidance given to him by the Secretary of State;
(c) **[…]**
(d) try to meet any targets set for him by the Secretary of State;
(e) provide the Secretary of State with any report or information requested (but this paragraph does not require or permit disclosure of information in contravention of any other enactment).

(5) **[…]**

(6) The Secretary of State may pay grants to the Regulator (which may be on terms or conditions, including terms and conditions as to repayment with or without interest).

(7) A reference in this Part to the Regulator includes a reference to a person acting on behalf of the Regulator or with his authority.

(8) The Secretary of State may by order revoke a person's designation under subsection (1).

(9) While no person is designated under subsection (1) the Secretary of State shall exercise functions of the Regulator.

(10) The Secretary of State may by order transfer (whether for a period of time specified in the order or otherwise) a function of the Regulator to the Secretary of State.

13 Appeals and references to Tribunal

(1) A person may appeal to the [First-tier Tribunal ('the Tribunal')] if the Regulator –

(a) refuses the person's application for authorisation,
(b) grants the person authorisation on terms or subject to conditions,
(c) imposes conditions on the person's authorisation,
(d) suspends the person's authorisation, **[…]**
(e) cancels the person's authorisation **[**, or**]**
[(f) imposes a penalty on the person.**]**

(1A) A person who is appealing to the Tribunal against a decision to impose a penalty may appeal against –

(a) the imposition of the penalty,
(b) the amount of the penalty, or

(c) any date by which the penalty, or any part of it, is required to be paid.

(2) The Regulator may refer to the Tribunal (with or without findings of fact or recommendations) –

(a) a complaint about the professional conduct of an authorised person, or
(b) the question whether an authorised person has complied with a rule of professional conduct.

(3) On a reference or appeal under this section the Tribunal –

(a) may take any decision on an application for authorisation that the Regulator could have taken;
(b) may impose or remove conditions on a person's authorisation;
(c) may suspend a person's authorisation;
(d) may cancel a person's authorisation;
(da) may require a person to pay a penalty (which may be of a different amount from that of any penalty imposed by the Regulator);
(db) may vary any date by which a penalty, or any part of a penalty, is required to be paid;
(e) may remit a matter to the Regulator;
(f) may not award costs.

(3A) In the case of appeals under subsection (1), Tribunal Procedure Rules –

(a) shall include provision for the suspension of decisions of the Regulator while an appeal could be brought or is pending;
(b) shall include provision about the making of interim orders;
(c) shall enable the Tribunal to suspend or further suspend (wholly or partly) the effect of a decision of the Regulator;
(d) shall permit the Regulator to apply for the termination of the suspension of a decision made by the Regulator.

(4) **[…]**

Financial Services (Banking Reform) Act 2013

139 Power to impose penalties on persons providing claims management services

(1) The Schedule to the Compensation Act 2006 (claims management regulations) is amended as follows.

(2) In paragraph 8 (rules about conduct of authorised persons), in sub-paragraph (2)(b), after sub-paragraph (i) insert -

'(ia) provision enabling the Regulator to require an authorised person to pay a penalty;'.

(3) In paragraph 9 (codes of practice about conduct of authorised persons), in sub-paragraph (2)(b), after sub-paragraph (i) insert –

'(ia) enable the Regulator to require an authorised person to pay a penalty;'.

(4) In paragraph 10 (complaints about conduct of authorised persons), after sub-paragraph (2) insert –

'(3) Regulations under sub-paragraph (1) may enable the Regulator to require an authorised person to pay a penalty.'

(5) In paragraph 11 (requirement to have indemnity insurance), in sub-paragraph (2)(b), after 'Regulator' insert 'to require the payment of a penalty by an authorised person or '.

(6) In paragraph 14 (enforcement), in sub-paragraph (4), for the words from 'impose' to 'authorisation' substitute 'require an authorised person to pay a penalty, or to impose conditions on, suspend or cancel a person's authorisation, '.

(7) After paragraph 15 insert -

'**16 Penalties: supplementary provision**

(1) This paragraph applies in any case where regulations include provision enabling the Regulator to require an authorised person to pay a penalty.

(2) The regulations –

(a) shall include provision about how the Regulator is to determine the amount of a penalty, and
(b) may, in particular, include provision specifying a minimum or maximum amount.

(3) The regulations –

(a) shall provide for income from penalties imposed by the Regulator to be paid into the Consolidated Fund, but
(b) may provide that such income is to be paid into the Consolidated Fund after the deduction of costs incurred by the Regulator in collecting, or enforcing the payment of, such penalties.

(4) The regulations may also include, in particular –

(a) provision for a penalty imposed by the Regulator to be enforced as a debt;

(b) provision specifying conditions that must be met before any action to enforce a penalty may be taken.'

Compensation (Claims Management Services) Regulations 2008

49. - Determining the amount of a penalty

(1) The Regulator must determine the amount of any penalty that an authorised person is required to pay under regulation 48 in accordance with this regulation and regulation 50.

(2) The amount of the penalty must be –

(a) for an authorised person whose business has a relevant turnover of less than £500,000, no more than £100,000;
(b) for an authorised person whose business has a relevant turnover of £500,000 or more, no more than 20 per cent of that turnover.

(3) The amount of the penalty may be the same as or greater or less than the proposed amount set out in the notice under regulation 51(1)(b).

(4) When determining the amount of the penalty that an authorised person is required to pay under regulation 48(1), (2) or (4) the Regulator must have regard to –

(a) the nature and seriousness of the acts or omissions giving rise to the Regulator's decision to exercise the power to require the authorised person to pay a penalty; and
(b) the relevant turnover of the business of the authorised person.

50. - Relevant turnover

(1) In this Part 'relevant turnover' means the figure determined by the Regulator in accordance with this regulation.

(2) The Regulator must determine such figure as the Regulator considers appropriate for the turnover of the business of the authorised person.

(3) The turnover to be determined is the turnover of the authorised person's business from regulated claims management services.

(4) The turnover to be determined is for the period of 12 months prior to the date on which the Regulator gives the notice under regulation 51(1).

(5) When determining the relevant turnover of an authorised person under this regulation the Regulator must have regard to –

(a) any figure for the annual turnover or the expected annual turnover used by the Regulator for the purposes of calculating the authorised person's most recent fee for authorisation;

(b) any more up to date information on turnover.

(6) When determining the relevant turnover of an authorised person under this regulation the Regulator may estimate amounts.

51. - Notice of proposed penalty and written submissions

(1) Before requiring an authorised person to pay a penalty, the Regulator must give written notice to the authorised person –

(a) stating that the Regulator proposes to require the authorised person to pay a penalty;
(b) setting out the proposed amount of the penalty;
(c) setting out the proposed date by which the penalty would be required to be paid or the proposed date by which each part of the penalty would be required to be paid;
(d) setting out the figure used by the Regulator for the relevant turnover and the basis on which the Regulator determined that figure;
(e) setting out the reasons for the Regulator's decision, and a summary of the evidence on which the Regulator relies;
(f) inviting the authorised person to make a written submission in relation to the matters in the notice; and
(g) specifying a reasonable period within which the authorised person must do so.

(2) The Regulator must take into account any written submission made by the authorised person within the period allowed under paragraph (1)(g) or any further period allowed by the Regulator –

(a) in determining whether to require an authorised person to pay a penalty;
(b) in determining the amount of the penalty; and
(c) in determining the date by which the penalty is required to be paid or the date by which each part of the penalty is required to be paid.**"**

2. A condition of the appellant's authorisation by the respondent was that the appellant must comply with the Conduct of Authorised Persons Rules 2014. The following Rules are relevant:-

"**General Rule 2(e)** – a business shall conduct itself responsibly overall including, but not limited to, acting with professional diligence and carrying out the following:- Take all reasonable steps in relation to any arrangement with third parties to confirm that any referrals, leads or data have been obtained in accordance with the legislation and the Rules.

General Rule 5 – a business shall observe all laws and regulations relevant to its business. This includes:

Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003:

'**Unsolicited calls for direct marketing purposes**

21. - (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 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 –

(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.'

Client Specific Rule 4 – cold calling in person is prohibited. Any marketing by telephone, email, fax or text shall be in accordance with the Direct Marketing Association's Code and any related guidance issued by the Direct Marketing Association.

Client Specific Rule 8 - where business is introduced to a solicitor, the business must not act in a way that puts the solicitor in breach of the Rules governing solicitors' conduct.

Rule 3.1 of the Direct Marketing Association's Code of Practice also requires members to comply with all relevant legislation, including the PECR Regulations 2013."

3. **SRA Code of Conduct 2011**

> "**O(8.3)** you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business"; (original emphases).

4. Guidance has been issued in respect of the imposition of a financial penalty by the respondent:

> "**Claims Management Regulation: Financial Penalties Scheme Guidance (December 2014)**
>
> From 29 December 2014, the imposition of a financial penalty becomes an additional available enforcement sanction for use against non-compliant authorised persons under the following circumstances:
>
> • As a consequence of a failure to comply with the Conduct of Authorised Persons Rules
>
> …
>
> In practice under the CMR Unit's revised Enforcement Policy, a financial penalty is likely to be considered where:
>
> - Breaches have continued despite previous compliance advice or warnings
>
> - Detriment caused to consumers or third parties in general can be clearly monetised
>
> - Any financial gain or loss avoided by the business can be monetised
>
> - The business has sufficient financial means to pay a penalty
>
> - No previous formal enforcement action has been imposed
>
> - Action to vary, suspend or cancel the authorisation of a business would be disproportionate under the circumstances.
>
> This list is non-exhaustive but sets out some relevant indicators that are likely to be considered when deciding whether to initiate the penalty calculation process or move to consider the other formal enforcement sanctions.
>
> …
>
> *Calculation of a penalty*
>
> Where a financial penalty is deemed necessary an appropriate penalty amount will be considered. Overall, specific penalty amounts will not be attributed to specific individual breaches of the Rules but rather the overall nature and seriousness of a breach or collection of breaches.

…

Nature Consideration Categories

The nature of a breach or collection of breaches will initially be assessed and will be set out under 3 general levels, each carrying a score.

Basic – Score: 1

The nature of breaches that fall under this category will be the least serious, are likely to be relatively minor and may also relate to more basic administrative failings. Breaches are not likely to be linked to any significant systemic failures, a business is likely to have cooperated fully with the investigation and may have taken significant steps to remedy the issues raised.

Escalated – Score: 2

The nature of breaches that fall under this category are likely to be more serious with a number of factors causing increased concern. It is likely that the authorised person would not have taken on board any previous compliance advice or warnings. There may have been less cooperation with the investigation from the authorised person generally.

Severe – Score: 3

The nature of breaches that fall under this category will be the most concerning with a number of factors causing significant regulatory issues. Breaches that fall into this category are generally likely to be deemed as intentional, reckless and negligent. It is likely that the authorised person would have ignored previous compliance advice or warnings and there may have been no cooperation with the investigation from the authorised person.

…

The example behaviours mentioned in each category listed are not exhaustive but provide an idea of the relevant factors that could contribute to the overall assessment of the nature of a breach or group of breaches.

Seriousness Consideration Categories

The second element of consideration consists of an assessment of the overall seriousness of a breach or collection of breaches. The level of seriousness is effectively based on the overall impact of the breaches identified and how far the non-compliance has affected other parties.

Low – Score: 2

Breaches that fall into this category will be the least serious and are unlikely to have any wide impact on consumers or other organisations. A business placed in this category is likely to be in a position where a clear breach of the Rules has been

identified but are likely to be administrative or technical breaches which do not have a wide impact.

Medium – Score: 4

Breaches that fall into this category are likely to have affected a number of consumers or other organisations. The detriment caused may have affected a group of consumers or limited numbers of other organisations however there is likely to be potential for even further, more widespread detriment if action is not taken.

High – Score: 6

Breaches that fall into this category are likely to have already affected large numbers of consumers or other organisations over a considerable period of time. The detriment caused is likely to be widespread and consumers or defendant businesses may have incurred significant costs as a result of the business' practices.

Final Score Calculation

The scores attributed from both the Nature and Seriousness categories are then added together to give a final score. As a result of the different factors being considered as part of the assessment, it will be possible for a breach or collection of breaches to be placed at different levels of each step.

Once a final score is reached, an assessment of the business' means will also need to be conducted. A business' means will play a pivotal role in the consideration of the appropriateness of a penalty and, in conjunction with the final score derived from the initial nature and seriousness assessment, will provide an indication of an appropriate penalty range.

Businesses' turning over less than £500k per annum can be subject to a penalty of no more than £100k. Businesses with a turnover of £500k or more per annum will be subject to penalties based on a percentage of their turnover which ultimately can not exceed more than 20% of their turnover.

Annex A provides some examples of the types of considerations that may affect an assessment of the nature and seriousness of a breach or group of breaches.

Annex B provides details of the relevant penalty bands in which a non-complaint, authorised person may be placed.

Annex A: Nature & Seriousness Scoring Table

Nature	Score
…	
Escalated • Minimal/Some cooperation from authorised person with regulatory investigation • Breach as intentional, negligent or reckless but minor in nature • Breaches continued after notification of non-compliance • Breach may have formed a pattern of misconduct or resulted from	2

systemic failures	
…	

Annex B: Penalty Band Table

Band	Nature/ Seriousness Rating	Score	Penalty Range (Fixed) - Turnover less than £500,000 in previous 12 months	Penalty Range (%) - Turnover £500,000 or more in previous 12 months
A	…			
B	Escalated / Low	4	£3,000 - £12,500	0.6% - 2.5%
	Basic / Med	5	£12,500 - £25,000	2.5% - 5%
	Severe / Low			
C	…			
D	…			
E	…			

…"