IAC-AH-VP/KRL-V1

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Claims Management Services

Tribunal Reference:
CMS/2016/002

Heard at Field House
On 23 and 24 January 2017
Further Submissions 21 February and 1 March 2017

Before

JUDGE PETER LANE
PETER FREEMAN

Between

UKMS MONEY SOLUTIONS LIMITED

Appellant

and

THE CLAIMS MANAGEMENT REGULATOR

Respondent

Representation:

For the Appellant: Ranjit Dhanda, Representative
For the Respondent: Ewan West, Counsel, instructed by the Government Legal Department

DECISION AND REASONS

A. Introduction

1. The Compensation Act 2016 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 authorised to provide Claims Management Services.

2. From 6 July 2016, the respondent made a decision pursuant to Regulation 52 of the Compensation (Claims Management Services) Regulations 2006, requiring the appellant to pay a financial penalty of £50,000. The letter also requested the appellant to sign and return an attached written undertaking schedule. The decision required the appellant to pay the penalty in three instalments: the first instalment of £20,000 by 3 August 2016; the second instalment of £15,000 by 5 September 2016; and the third instalment of £15,000 by 3 October 2016. The financial penalty was imposed because the respondent considered the appellant had failed to comply with the conditions of its authorisation.

3. The appellant appealed against that decision. The essence of the appellant's grounds, as developed, is as follows. The appellant contends that it is being punished twice for the same transgression, since the Information Commissioner had imposed a penalty on the appellant in respect of the same unsolicited SMS text messages, which had led the respondent to impose its penalty on the appellant. The respondent should, in any event, have had regard to the combined effect of the two penalties, when setting its own level of penalty. The respondent had also made an error in setting the level of penalty and the original view of Mr Greg Williams, one of the respondent's officers, should prevail. Finally, the respondent had applied the incorrect turnover period and the issue should be remitted to the respondent in order for this to be corrected.

B. Background

4. On 14 August 2014, the respondent conducted an audit of the appellant's business. As a result, it was established that the appellant was contacting consumers by SMS using both the appellant's own client database and data provided by DBS Data Marketing Limited ("DBS"). The appellant was advised in an audit report sent on 29 October 2014 that in order to comply with rules 2(d) and (e) of the 2014 Conduct of Authorised Persons Rules it had to take all reasonable steps in relation to any third parties to confirm that any referrals, leads or data had been obtained in accordance with the requirements of the relevant legislation and Rules. The appellant was advised that reliance on assurances from third parties would not constitute sufficient due diligence. It was further advised that it should record the checks it had

undertaken of any data supplied that it intended to use, or had used. Thus, although DBS had apparently advised the appellant that its "opt ins" were sufficient for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR"), the appellant was told it should not rely on those assurances but carry out its own assessment.

5. On 24 November 2014, the appellant informed the respondent that its due diligence did, in its view, comply with rule 2(3) but that it would ensure in future that this process was documented.

6. On 26 January 2015, the respondent issued a letter of warning to the appellant, indicating that the opt-ins it had obtained were, in fact, insufficient for the purposes of regulation 22(2) of PECR. That meant not only that the appellant had committed a breach of General Rule 5 of the 2014 Rules but also that it had breached Rule 1.1 of the Direct Marketing Association's Code and, thus, had breached Rule 4 of the 2014 Rules. The appellant was told that in order to remedy the breach, the appellant needed to provide documentary evidence to demonstrate how the transmission of an SMS text would not constitute a breach of the 2014 Rules.

7. On 19 August 2015, the respondent was informed by the Information Commissioner that a number of complaints had been received concerning the appellant's sending of SMS messages. The respondent accordingly requested information from the appellant regarding the transmission of such messages between 1 February and 31 August 2015.

8. In responses of September and October 2015, the appellant replied that between February and March 2015, no messages had been sent; between April and June 2015 600,000 messages each month, on average, had been sent; in July 2015 the appellant sent 250,000 messages; in August 2015 it sent 175,000 messages; and the total number of SMS messages sent was, accordingly, 2,222,000.

9. The appellant said that between April and June 2015, an SMS message was used, which it accepted required the recipient to opt-in. The appellant said it became aware of problems after being notified of 35 complaints made to the Information Commissioner and after 1,200 SMS messages had been sent to a spam recording mechanism. The appellant did not explain why it was unaware that this message content was being used, until it had been alerted about the matter by the Information Commissioner.

10. Following notification from the Information Commission on 27 August 2015 that the opt-in was insufficient, the appellant had ceased generating business through SMS marketing.

11. The respondent considered that two of four opt-in statements used by DBS on behalf of the appellant were insufficient for the purposes of the PECR. There was no

documentary evidence to indicate that the appellant had itself carried out checks on this data.

12. 600,000 records had been purchased by the appellant from a company trading as "Buffalo". The appellant's own due diligence questionnaire indicated that Buffalo was unable to declare the source of all its data because of non-disclosure agreements. A check had been undertaken by the appellant only after receiving a prompt from the respondent. So far as concerned data provided by DBS which originated from Callcredit Information Group Limited, the appellant was unable to provide any opt-in.

13. On 27 October 2015, the respondent conducted a further audit of the appellant, during which the appellant stated that it had purchased data from Elite Marketing Data Limited for the purposes of a calling campaign that was currently being undertaken.

C. The Information Commissioner's penalty

14. On 16 October 2015, the Information Commissioner issued the appellant with a Notice of Intent, indicating that it was minded to impose a penalty for contravention of the PECR (Regulation 51 of the Compensation (Claims Management Services) Regulations 2008). On 17 November 2015, the Information Commissioner issued a Monetary Penalty Notice to the appellant in the sum of £80,000, under section 55A of the Data Protection Act 1998, in consequence of a breach of PECR. The notice stated that between 6 April and 10 June 2015 the appellants had used Public Communications Service for the purposes of transmitting 1,320,000 unsolicited communications by means of electronic mail to individual subscribers. The appellant did not appeal against the issue of this notice by the Information Commissioner.

D. Respondent's request for evidence regarding due diligence

15. On 9 December 2015 the respondent sent a letter to the appellant requesting confirmation and evidence of its due diligence procedures in place prior to the audit conducted on 27 October 2015. The response was received on 21 December 2015. The appellant said that, in respect of DBS, a meeting had been held in December 2013 to purchase data but there was no due diligence questionnaire or evidence of any checks having been carried out on the data itself. In respect of Buffalo, a conversation had taken place prior to the date of purchase but, again, there was nothing to indicate that any checks had been undertaken on the data or that it could be used for SMS marketing. No due diligence questionnaire was provided. In respect of Elite, an undated due diligence questionnaire stated that opt ins were compliant with PECR but no detail was provided as to how that might be. There was no evidence that the appellant had checked the accuracy of what Elite had said in this regard.

E. the respondent's "minded to" letter

16. On 23 March 2016, the respondent issued the appellant a "minded to" letter, indicating its intention to issue a penalty in respect of the breach of General Rules 2(d) and (e) and client specific rule 1(c) concerning, respectively, the failure to conduct and document due diligence on leads accepted from third parties and also the use of misleading statements in the SMS marketing. The "minded to" letter indicated that, in accordance with the respondent's financial penalties guidance, the "nature score" was assessed as 2, as was the "seriousness score" leading to an overall score of 4. In accordance with the guidance, this led to a penalty band of 0.6% to 2.5% of the appellant's turnover. The respondent proposed that the penalty should be £50,000.

17. On 12 April 2016, the appellant sent an email to the respondent, pointing out that under the guidance, the penalty band of 0.6% to 2.5% would, in fact, produce a penalty of £25,063.67. The appellant asked for the penalty to be corrected.

18. On 13 April 2016, the respondent informed the appellant that the seriousness score and thus the penalty band in the "minded to" letter were incorrect as a result of "an administrative error". The seriousness score should have been 4, rather than 2, leading to a penalty band of 5 to 8% of turnover. The penalty was, accordingly, in accordance with the guidance, as it represented 5% of turnover.

F. The hearing

(i) Request to see respondent's 'decision bank'

19. At the hearing on 23 January 2017, the Tribunal dealt with a procedural issue, concerning the appellant's request to see material contained within the "decision bank" of the respondent. This contains information relating to the internal workings of the respondent, including communications with third parties who are being investigated or in respect of whom penalties are being considered. The appellant's case was that it should see this material, in the light of the grounds it had raised regarding the relationship between the functions of the respondent and the Information Commissioner, and as regards the administrative error admitted by the respondent.

20. The appellant objected to the disclosure of this information. Mr West submitted that, if the proceedings were in court, information of this kind could be released only pursuant to a confidentiality undertaking being entered into by a party's lawyers. Since Mr Dhanda was not a lawyer, such a course was not possible.

21. The Tribunal ruled as follows. Having heard Mr West and Mr Rapport, respectively counsel and solicitor for the respondent, the Tribunal was satisfied that, had there been anything in the decision bank of material that was helpful to the appellant, the

respondent could and would have informed the Tribunal. It had not done so. There was nothing to suggest that the respondent and those advising it were in breach of their professional duties in this regard. For the material nevertheless to be released in these circumstances would, we found, be likely to have an adverse effect upon the carrying out of the respondent's statutory functions. The respondent was entitled to pursue its investigations and inquiries with third parties on the basis that its interactions with them would be kept confidential. Since all formal decisions of the respondent are publically available, together with the reasons for those decisions, there was no substance to the appellant's contention that it could not properly determine how it had been dealt with, compared with others. Furthermore and in any event, the reasons advanced by the appellant for wishing to see the material were essentially speculative, amounting to no more than a fishing expedition.

(ii) Evidence

Kate Moore

22. Kate Moore gave evidence. She is the respondent's Regulation and Policy Manager. She assists the Head of Regulation in making decisions to take enforcement action once a recommendation has been received from the operational team. The respondent grants authorisation to claims management companies providing regulated claims management services, subject to their competency and suitability. It also investigates such companies for alleged breaches of the conditions of their authorisation. Since 29 December 2014, the respondent can also require claims management companies to pay a financial penalty, where the breach occurred after that date.

23. Claims management companies are required to comply with the conditions of their authorisation, as detailed in regulation 12(5) of the 2006 Regulations. This means that the companies are also required to comply with various Rules incorporated by reference to the company's authorisation. These include the Conduct of Authorised Persons Rules 2014, the Complaints Handling Rules 2014 and the Client and Care Rules 2006. Within the 2014 Rules there are provisions regarding the general conduct of the company (for example, to conduct itself with honesty and integrity: General Rule 1) and Client Specific Rules governing the company's interaction with clients and potential clients.

24. The 2014 Rules impose requirements whereby claims management companies must ensure they take all reasonable steps to confirm that referrals, leads or dates have been obtained in accordance with the Rules (General Rule 2(e)) and that they maintain appropriate records and audit trails (General Rule 2(d)) in order to demonstrate compliance with the Rules. Documents, in written, printed or electronic form, must be kept, which are sufficient to enable the respondent to monitor compliance with the requirements of the Regulations. Client Specific Rule 1(c)

requires that a claims management company shall ensure that all information given to the client is clear, transparent, fair and not misleading.

25. The respondent's financial penalty scheme guidance has been created to assist claims management companies to understand the type of consideration that would be taken into account by the respondent when considering whether a penalty is appropriate and, if so, what the level should be. The guidance is, according to Ms Moore, not intended to be exhaustive but seeks to identify some of the criteria that will be considered. The assessment of the nature and seriousness of the breach takes into consideration the actions of the claims management company and the impact that the breach has had on industry, consumers and/or third parties. Some of the main considerations include (i) the cooperation of the claims management company during the investigation; (ii) the type of rule breached; (iii) whether the breach was reckless, intentional or negligent; (iv) whether the non-compliance continued after any advice in relation to that form of conduct was given; and (v) the detriment or loss to customers, the industry or third parties. The volume of the activities considered as well as the gains made by the company from the breach.

26. Where the claims management companies remedied the breach or taken steps to ensure that the breach cannot occur again and this is taken into account once the penalty level has been determined in respect of the breach itself. By the same token, if there are any additional aggravating factors, such as a failure to supply information or attempting to mislead the respondent, then this will also be taken into account.

27. Ms Moore describes the process taken in respect of the decision which is the subject of these proceedings. The process involved a number of stages, starting with an investigation into the suspected breach of the conditions of authorisation. The investigation was carried out by the respondent's direct marketing team within the operational team. On completion of the investigation, they produced a recommendation to the Head of Regulation, detailing the activity that had brought the appellant to their attention, the breaches of the rules that had occurred, the advice provided to the appellant, the recommended action to impose a financial penalty of £20,000 and the justification for why alternative action was not proposed.

28. After receiving the report on 22 February 2016, Ms Moore reviewed the contents of the draft letter, in order to provide advice to the Head of Regulation and to identify any flaws or risks in a proposed recommendation. Her review of the report was in line with the respondent's processes and, also in accordance with those processes, no amendments were made to the report itself. However, Ms Moore rearranged some of the contents in the draft letter to be sent to the appellant in order for it to be consistent with the respondent's standard approach in drafting "minded to" letters. The main focus of the rearrangement was to place the information that related to the investigation first and the advice provided to the appellant near the end of the letter. Certain deletions were made, including the reference to advice provided to the appellant by the Information Commissioner.

29. As part of the respondent's normal process, a financial penalty consistency panel was then arranged. The purpose of the panel is to ensure that the proposed approach is consistent with previous decisions made by the respondent. The panel met on 9 March 2016 and decided that the amount of the penalty should be £50,000. As a result of their considerations of the financial penalty guidance, the panel was of the opinion that the seriousness category should be changed from low to medium, as the breaches could not be considered as technical and administrative, because of the misleading content in the text messages sent to potential clients. The panel decided, however, that the penalty should be at the low end of the penalty band and therefore fixed this at 5% of turnover which, rounding down, gave the sum of £50,000. The penalty was, on this basis, under 5%.

30. On 15 March 2016, the report, chronology, draft undertakings, amended "minded to" letter and the notes of the financial penalty consistency panel were sent to the Head of Regulation for a decision. Ms Moore identified that there were different recommendations emanating from the panel, compared with those of the investigating officer. She provided details and requested the Head of Regulation to review the information.

31. The Head of Regulation made his decision on 17 March 2016, in which he confirmed that he was of the view that the recommendation was proportionate and was satisfied with the approach. On 17 March 2016 and again on 22 March 2016, Ms Moore requested clarification from the Head of Regulation in respect of the amount of the penalty which he had approved. On 22nd March 2016, he confirmed that he was content that the amount of the financial penalty should be £50,000, in line with the recommendation of the consistency panel.

32. Unfortunately, when Ms Moore sent the "minded to" letter on 23 March 2016 to the appellant, she did not amend the seriousness score and penalty band references, as they had been in the draft. The upshot was that the letter that was sent informed the appellant that the financial penalty was £50,000 but the information in the letter showed that the seriousness score was 2 and that the penalty band should therefore be 0.6 to 2.5% of turnover. Ms Moore said that the letter should have stated that the seriousness score was 4 and that the penalty band was, therefore 5 to 8% of turnover.

33. Under cross-examination, Ms Moore reiterated much of what is in her statement. She was pressed on why it was that Mr Greg Williams had not given evidence and whether his view, which was contrary to that of the consistency panel, should not be followed. Ms Moore said that it was important for the respondent to achieve a degree of consistency in its decision-making. Were there no attempt by the respondent to achieve consistency, claims management companies would not know where they stood or would stand, in the event of breaches of their conditions of authorisation.

34. As for the relationship between the respondent and the Information Commissioner, Ms Moore said that the respondent did not take into consideration the number of text

messages sent without authorisation. The respondent had looked at the content of the messages, concluding that they were misleading.

35. The fact that the Information Commissioner was involved and was imposing a penalty under the Data Protection Act 1998 would, however, be relevant to the respondent, insofar as concerned the continuing viability of the claims management company. A full view needed to be taken in order to ensure that the respondent's decision-making was proportionate.

36. Ms Moore denied that the Head of Regulation had, in fact, approved the recommendation of Greg Williams in the operational team. The former had been clear that the penalty should be £50,000.

37. Ms Moore referred to the notes of the consistency panel (3-57/58). She explained by reference to this document how the panel had reached its scores and why it had disagreed with the earlier view of Mr Williams.

38. Asked whether text messages cause less inconvenience than unsolicited telephone calls, Ms Moore replied that it depended upon the context of the messages. There could be misleading statements of either kind.

39. In re-examination, Ms Moore agreed that the respondent's code was a statutory one, having regard to the terms of the primary legislation. At 3-64, the email from Greg Williams of 22 February 2016 could be seen to have reached the Head of Regulation.

40. Ms Moore confirmed that the Information Commissioner had based his penalty on the fact of the SMS messages being unsolicited. By contrast, the respondent had based its decision on the content of the messages. In response to a point made by Mr Dhanda, to the effect that not all of the 2.222 million messages would have had misleading content, Ms Moore said that the respondent had used that figure as indicating the potentiality for misleading messages to have been sent on a widespread basis. This was how the scoring system took the seriousness level from the top of band B to band C.

Jennifer Greatorex

41. Ms Jennifer Greatorex gave evidence. She is a Senior Claims Management Officer working with the respondent's direct marketing team. She described the audit undertaken by the respondent of the appellant and confirmed the conclusions, described earlier, that the appellant had not used due diligence in connection with the data supplied by the companies with which the appellant had had agreements.

42. Ms Greatorex addressed the issue of the misleading messages sent by the appellant:-

"12. On 15 October 2015, the Appellant identified that the three types of SMS messages that stated '*EVER had loans or credit cards? There is a HIGH chance you're STILL due a PPI refund! UKMS can check for you No Win No Fee. Text CHECK to claim or "stop" to opt out', 'records indicate you STILL haven't claimed ALL the PPI refunds you could be entitled to text "CLAIM" and UKMS will send you a claim pack to opt out text "stop" and "last chance" to check no win no fee to see if the bank owes you money! UKMS will not text you again regarding your PPI refund. Text "CHECK" to claim or "STOP" to opt out'* were originally sent in early 2014 and had not been removed from the SMS sender.

13. Of the messages reported to the ICO or the spam reporting tool 7726, none of them contain the phrase that the Appellant claimed it had been using 'Had a loan or credit card in the last 25 years? Are you due a PPI REFUND? UKMS can check for you – NO Upfront Fees!' It is therefore unclear exactly how many of the 2,200,000 messages displayed the correct content".

43. Ms Greatorex was pressed by Mr Dhanda as to whether the Information Commissioner and the respondent had conducted a joint investigation. She denied this had happened. She also denied that the respondent was being punished twice for the "same mistake".

44. Ms Greatorex was asked about paragraph 42 of her statement, in which she stated that the respondent relied upon the financial penalty guidance, which proposed that the medium category involved there being a likely "potential for even further, more widespread detriment if action is not taken". The appellant, said Mr Dhanda, had offered to enter into an undertaking that would avoid further breaches but this had not been recognised.

G. Discussion

45. In reaching our unanimous decision in this case, we have considered all the evidence and submissions, both oral and written. The fact that we do not refer to a specific matter or item is not to be taken as indicating that we have not considered it.

(i) Non bis in idem/ ECHR Article 4, Protocol 7

46. The first issue is whether the imposition of the penalty by the respondent is unlawful as being contrary to the *non bis in idem* principle and/or Article 4, Protocol 7 of the European Convention for the Protection Human Rights and Fundamental Freedoms.

47. We find that there is no substance in this submission of the appellant. The Information Commissioner imposed his penalty for a contravention of regulation 2 of PECR, pursuant to section 55A of the Data Protection Act 1998. The penalty imposed by the respondent was levied under the 2006 Rules in respect of breaches of the 2014 Rules. The two legislative powers are wholly distinct.

48. The fact that Parliament chose to enact these discrete penalty provisions is indicative that the legislature did not consider that, in doing so, it was acting contrary to common law or the ECHR. In any event, the substance of the respective actions of the two Regulators is distinct. It is plain from the materials relating to the Information Commissioner's decision-making that his penalty was based on the **sending** of **unsolicited** SMS messages. The mere fact that the messages were unsolicited constituted the breach. The number of messages sent, over 2.2 million, indicated its seriousness.

49. By contrast, the respondent's decision to impose a penalty lay, in part, upon the appellant's failures regarding due diligence. The other part related to the misleading nature of the messages sent. Paragraph 12 of Ms Greatorex's statement contains the wording of the misleading messages. Phrases such as "there is a high chance you're still due a PPI refund", "records indicate you still haven't claimed all the PPI refunds you could be entitled to" and "last chance to check no win no fee to see if the bank owes you money" are all plainly misleading.

(ii) Scale of the problem

50. The appellant sought to make much of the fact that the respondent could not establish that all of the millions of messages sent contained misleading content. That is true but it misses the point. Given the wholly inadequate systems operated by the appellant at the relevant times, there was plainly a real likelihood, at least, of these misleading messages being sent in very great numbers. That emerges from paragraph 13 of Ms Greatorex's statement, where she notes that of the messages reported to the Information Commissioner or the spam reporting tool, none contained the non-misleading wording which the appellant claimed it had been using. The appellant has been unable to show, even in the roughest terms, how many of the messages sent were unlikely to have been misleading.

(iii) Relevance of the Information Commissioner's penalty

51. The only way in which the penalty imposed by the Information Commissioner could be relevant to the level of penalty set by the respondent is if the level of the respondent's penalty, coming hard on the Information Commissioner's penalty, would threaten the continued existence of the claims management company. If it would, then that would be a relevant consideration, just as would any other financial demand on the company.

52. The evidence shows plainly that the respondent had this firmly in mind. At 3-47 of the bundle, we find an email from Amy Brewin, a Senior Claims Management Officer of the respondent, to Vicki McAusland, also of the respondent (but based in London, rather than Burton-on-Trent). In this email, specific consideration was given to combined effect on the appellant of the two penalties. This led to a second meeting

of the consistency panel, when it was decided that the appellant would be permitted to pay the £50,000 penalty in three instalments.

53. It is clear from the turnover figures (including those dealt with at paragraphs 69 and 70 below) and the large sum of £466,695 paid as "consulting fees" to the director of the appellant, that a further penalty of £50,000 would not be reasonably likely to result in the appellant going out of business for that reason. The company could cope. In any event, the director's remuneration was such that he could be expected to assist the company in paying the penalty, in order to ensure future such fees.

(iv) Seriousness category

54. We turn to the difference of opinion between Mr Williams and the consistency panel, concerning the scores to be given in respect of the "seriousness category". As we have explained, it was the panel's decision to move this from band B (score 2) to band C (score 4) which resulted in the turnover band rising from 0.6 to 2.5% to 5 to 8%, leading to the imposition of the £50,000 penalty, which is based on a little less than 5% of turnover.

55. We are entirely persuaded that the incorrect references in the "minded to" letter sent by Ms Moore to the appellant were the result of administrative oversight on her part. The appellant has not begun to show otherwise.

56. Although the Tribunal has wide powers under section 13 of the 2006 Act, as to what it may do on an appeal against a decision of the respondent, it is important to bear in mind that the respondent is entrusted by Parliament with regulating the activities of claims management companies and that its decisions must, as a consequence, carry due weight (R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court [2011] EWCA Civ 31).

57. We do not consider that the decision of the consistency panel not to accept the views of Mr Williams means either that Mr Williams was right, and the panel wrong, or that the matter is so finely balanced as to entitle the Tribunal to place no or only very limited weight to the eventual decision of the respondent, via its Head of Regulation.

58. This is what the panel had to say:-

> "**Seriousness category recommended – low:**
>
> Panel express that this doesn't feel like it fits with previous action that we've taken.
>
> Panel felt that due diligence breaches were more than just administrative or technical in nature. The due diligence breaches, insufficient opt in and misleading statements in SMSs affected a wide range of people (as it resulted in a number of complaints to the ICO) which is the opposite of the low category wording stating 'breaches which do not have a wide impact'.

> The panel felt that failure to supply and lack of documentation is not technical but a clear breach.
>
> The wording of the medium category talks about likely, may and potential, all of these words could relate to there being no due diligence in this case".

59. In our view, not only was the consistency panel entitled to take that view; we expressly endorse it. The appellant, we find, undertook nothing that could remotely be described as due diligence. The appellant took no proper action to investigate what was being done on its behalf by the various data suppliers, on whom it relied

60. That lack of diligence led, we find, directly to the breaches comprising the sending of misleading SMS messages. As we have already noted, the appellant has no idea how many of the 2.222 million messages contained such misleading statements. This state of affairs is a direct result of the appellant's failure to perform due diligence.

61. For those reasons, the breaches in question were not, we find, administrative or technical.

62. The potential number of those sent misleading messages is of significance in setting the level of penalty. Ms Moore was, perhaps, not entirely pellucid in this aspect of her evidence. The essential point, we find, is that the Information Commissioner was concerned about the number of persons who had been sent unsolicited messages by SMS. The respondent was concerned about the "wide range of people" likely to have been sent messages whose content was misleading. In both cases, the likely number of messages impacted on the degree of seriousness of the breach in question.

(v) Past behaviour/relevance of draft undertaking

63. It is plain from the terms of the decision and of the consistency panel's report that the level of penalty was determined by reference to what the appellant had done in the past. The appellant, however, contends that regard should have been had, in fixing the penalty, to its willingness to enter into an undertaking. As far as we are aware, however, the appellant has not entered into a formal undertaking that would prevent it from using SMS messages as a means of communication in its claims management business in the future. In any event, the key focus of the penalty should, in our view, relate to past breaches.

64. We also observe that the unsigned undertaking schedule, at 1-37 of the bundle, includes a provision whereby the appellant would have agreed to comply with the requirements of General Rule 2 of the 2014 Rules, when completing due diligence on data purchased, and maintain appropriate records and audit trails to show that this has been completed. Such an undertaking, even if entered into, would amount to no more than a promise by the appellant to comply, in future, with its legal obligations. The point of such an undertaking is unclear.

65. Finally on this issue, it is relevant to note that the respondent's evidence was to the effect that the appellant's past behaviour had been to cease problematic activities, whilst the same were being investigated, only to resume them thereafter. This further undermines any significance being given to the appellant's willingness to enter into an undertaking.

(vi) The correct turnover figure

66. The final substantive matter concerns the issue of turnover. It was accepted by the respondent that the turnover figure of £1,002,547, in respect of which the £50,000 penalty had been calculated, represented the wrong turnover period. The proper reading of the legislation is, in fact, to require the penalty to be ascertained by reference to turnover in the twelve months preceding the sending of the "minded to" letter by the respondent.

67. At the hearing, there was discussion as to what should be done in the circumstances. The respondent's submission was that the appellant's efforts to produce material relating to the correct turnover period had been unsatisfactory and that the Tribunal should, in effect, take its own view. The appellant, for its part, submitted that, since the turnover figure used was plainly one related to the wrong period, the matter should be remitted to the respondent.

68. Neither proposed course of action struck us as likely to further the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. The Tribunal accordingly made the following directions:-

> "(1) Not later than 21 February 2017 the appellant shall respond in writing to the respondent's questions (1) and (2) [as set out on 24 January 2017];
>
> (2) Not later than 7 March 2017 the respondent shall inform the appellant and the Tribunal in writing of its calculation of relevant turnover, with concise reasons.
>
> (3) Not later than 21 March 2017 the appellant shall inform the respondent and the Tribunal whether it agrees that calculation and if not, shall give concise reasons for any disagreement.
>
> (4) Not later than 28 March, the respondent shall inform the Tribunal (and copy to the appellant) its final position on turnover, with reasons and, if different from the appellant, shall give the Tribunal any additional reasons of the appellant for its view of turnover, which were not mentioned above".

69. In the event, to the credit of the parties, matters proceeded more expeditiously than had been anticipated. Both sides are agreed that the relevant turnover figure is £1,042,577.70. This was confirmed by the respondent in an email to the Tribunal of 1 March 2017.

70. As can be seen, that turnover figure is some £40,000 higher than the one that formed the basis of the respondent's decision of 6 July 2016. In all the circumstances, however, and bearing in mind the additional work that the appellant has had to undertake in producing the new turnover figures, we consider that the penalty of £50,000 should remain.

71. We are firmly of the view that no lower penalty is appropriate. As we have stated, we agree with the scoring mechanism adopted by the consistency panel and the Head of Regulation. The respondent has, in short, applied its guidance properly and there is no special feature in this case requiring that guidance to be set aside or modified.

(vii) Payment by instalments

72. The only remaining issue is, therefore, whether any change is required to the instalment payments provisions of the decision. Plainly there is, since the dates referred to in the letter (as set out above) have passed. We accordingly order that the appeal decision should be varied as follows:-

> "Number of payments: 3.
>
> The date by which the first instalment of £20,000 is required to be paid: **30 June 2017**.
>
> The date by which the second instalment of £15,000 is required to be paid: **31 July 2017**.
>
> Date by which the third instalment of £15,000 is required to be paid: **29 September 2017**."

73. The appeal is allowed to the above extent.

Judge Peter Lane
16 June 2017