Neutral Citation Number: [2014] EWHC 4303 (Ch)

IN THE HIGH COURT OF JUSTICE CASE NO HC13A04729

CHANCERY DIVISION

Before Mr. Hollington QC sitting as a Deputy Judge of the High Court of Justice, Chancery Division

Hearing dates: 12-13 November, 4 December 2014

Judgment date: 19 December 2014

BETWEEN:

PHONEPAYPLUS LIMITED

Claimant

-and-

1. WAQAR ASHRAF

2. MAHMOONA HUSSAIN

Defendants

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

JUDGMENT

Regulatory framework

1. This dispute arises out of Section 120 and following of the Communications Act 2003 ("the Act") which concern the regulation of what are called premium rate services, or "PRS" for short.

2. PRS are basically businesses where a member of the public is induced to ring up a telephone number, at a cost significantly in excess of the cost of an ordinary telephone call, so as to access a service which is held out as being valuable. It is an area of commercial life open to abuse of innocent consumers by unscrupulous

entrepreneurs and therefore considered by the European Union and the UK Parliament to require regulation.

3. The present case is concerned with the legality of the imposition of fines upon PRS providers under the code approved under the Act. The regulator under the Act is OFCOM. Sections 120 and 121 of the Act enable OFCOM to approve a code for the purpose of setting "*conditions .. that bind the persons to whom [those conditions] are applied*": s. 120(1) and 121. S. 120(3)(a) then goes on to provide:

> *"(3) The only provision that may be made by conditions under this section is provision requiring the person to whom the condition applies to comply, to the extent required by the condition, with—*
>
> *(a) directions given in accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions; and*
>
> *(b) if there is no such code, the provisions of the order for the time being in force under section 122."*

4. S. 121(5) of the Act provides:

> *"(5) The provision for the enforcement of a code that may be approved under this section includes—*
>
> *(a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 123(2);*
>
> *....."*

S. 123(2) provides:

"The amount of the penalty imposed under section 96 as applied by [s. 123(1)] is to be such amount not exceeding £250,000 as OFCOM determine to be-

(a) appropriate; and

(b) proportionate to the contravention in respect of which it is imposed."

5. The Code, approved by OFCOM, which applied at the material time was the Code of Practice 12th Edition ("the Code"), that was produced by the Claimant ("PPP"). It is common ground that PPP was "*the enforcement authority*" at the material time for the purposes of s. 120, and was therefore "*the person who under the code has the function of enforcing it*": s. 120(3)(a) and (15).

6. The Code, having been approved by OFCOM under s. 121 of the Act, came into force on 1 September 2011. As appears from the evidence of Mr. Omideyi, PPP's senior in-house lawyer, after the Code had been approved by OFCOM but before it came into force, PPP published on its web-site a handbook entitled "Investigations & Sanctions Procedure", which I will refer to as "the Handbook". OFCOM's representative was involved in drafting the Handbook, but it would

appear that it was not formally approved by OFCOM and there is no provision in the Act which enables OFCOM to approve such a handbook.

7. This is consistent with paragraph 1.5 of the Code, which expressly contemplates that PPP will produce guidance to inform providers about how the required rules will be expected to apply to the provision of PRS, and may amend it from time to time on reasonable notice and following appropriate consultation, and which provides that such guidance is "non-binding" and "does not form part of the Code". The Handbook may not have been such guidance, but it reinforces the point that the Handbook had no formal standing or binding effect.

8. As the Handbook's Foreword states, this was the first time that PPP had published such a guide, which was "designed to further clarify what are, necessarily, quite legalistic and detailed rules in Part Four of the Code .., which sets out how we carry out investigations, which procedures we can use and what sanctions we may impose".

9. Because the Handbook is clearly non-binding and forms no part of the Code, it is remarkable that the draftsman of the Code saw no need to make any express reference in the Code to the limitations upon the penalty-imposing powers to be found in s. 123(2) of the Act. The section of the Code where one would have expected those limitations to be incorporated is paragraph 4.8, but paragraph 4.8.2 merely provides:

   "The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in combination in relation to each breach:

   ..

   (d) impose a fine on the relevant party to be paid to [PPP] .."

   For any reference to the statutory maximum penalty of £250,000, one is therefore required to look to the Handbook, which gives the following guidance:

   "Fines may be imposed up to £250,000 per breach. The Tribunal must impose fines that are proportionate, given all the circumstances, and therefore all the guide fine levels are without a lower limit, meaning each range begins at £0. The Tribunal will consider the final assessment of the seriousness rating when making a decision as to a proportionate fine. The bands of case seriousness and the usual levels of fines they may attract are:

   - *Minor: up to £5,000*
   - *Moderate: up to £20,000*

- *Significant: up to £50,000*
- *Serious: up to £100,000*
- *Very serious: up to £250,000 per breach"*

Factual background

10. On 16 July 2012 the 1st Defendant became registered with PPP as what is called a Level 2 Provider, a type of PRS provider. It appears that the service he was offering related to the booking of the driving theory test online. PPP instituted a formal "Track 2" investigation under case reference 17843 into alleged breaches of the Code by the 1st Defendant in April 2013. The 1st Defendant gave responses in writing to the charges – he was asked whether he wanted "to make an informal representation at the adjudication Tribunal", but it appears that he did not take up this opportunity. The Tribunal, charged with adjudicating upon the allegations under the Code, reached a decision dated 16th May 2013, which was communicated to the 1st Defendant on 29th May 2013 and published on 30th May 2013. The Tribunal found five of the breaches proved, which it rated individually as "serious", "very serious", "serious", "serious" and "significant" and collectively as "very serious", imposed a single composite fine of £85,000 and an administrative charge of £8,049.47 in respect of the costs of the investigation and adjudication.
11. On 6 June 2013 the 1st Defendant transferred his home, which was in his name, into that of his wife, the 2nd Defendant. That transfer has now been reversed and the 2nd Defendant plays no further part in these proceedings.
12. The 1st Defendant's agent responded to the Tribunal's decision by email on 14 June 2013, to the effect that he had ceased trading, his business was insolvent, the fine was unfair, he was seeking legal advice and he had left the country. By email dated 6 November 2013 he informed PPP that he wished to appeal. In the meantime, on 10 September 2013 the Tribunal had imposed a further administration charge of £2,700, in respect of the non-payment of the earlier fine and charge. In the event, the 1st Defendant did not pursue any appeal.
13. As a result, PPP commenced this action in order to recover the fine and administrative charges from the 1st Defendant. PPP obtained an injunction relating to the property transfer and the initial court hearings were focussed upon that injunction. The matter came before HH Judge Raeside QC, sitting as a Judge of this Division, at a hearing on 14 January 2014. I was provided with a transcript of that hearing and copies of the parties' skeleton arguments. It was at that hearing that an order was made for the hearing of a preliminary issue as follows:

    "whether the Claimant is the correct party to have pursued the proceedings for the relief sought"

The hearing

14. The hearing before me was for the determination of that preliminary issue, together with PPP's subsequent application for summary judgment. It was bedevilled, and considerably lengthened, by the uncertainty as to the scope of that preliminary issue.
15. As I observed during the course of the hearing before me, the hearing before the learned Judge on 14 January 2014 was unusual to say the least. Mr. Hartman submitted that the correct claimant was OFCOM, not PPP. Further, he submitted to the learned Judge that there should be a preliminary issue as to whether the 1st Defendant was the beneficial owner of the property in question. The learned Judge, given Mr. Hartman's submissions, thought that the issue of the correct claimant should be sorted out first, and so directed that there should be a preliminary issue as to whether PPP or OFCOM was the correct claimant, leaving it to OFCOM to apply to be joined if it wished. In the event, the Claimant did not invite OFCOM to apply to be joined. Mr. Hartman was to my mind indicating to the Court that his client was not worth suing and wanted the proceedings focussed on that issue rather than his defence on the merits, although I accept that he did not make any concession to the effect that his client had no defence. As the learned Judge observed in the course of the hearing, he did not understand Mr. Hartman's submissions as to PPP's lack of standing. In those circumstances, there was bound to be uncertainty as to the scope of the preliminary issue that the Judge directed.
16. The hearing before me started on 12 November 2014. It lasted two days and I reserved judgment. A few days later, on 18 November 2014, I received further written submissions from Mr. Hartman, in which he relied upon proposed amendments to the Act, which had only been published on 12 November 2014 and of which the Defendants were unaware at the time of the hearing before me. Those submissions were supplemented by further written submissions from the Defendants' solicitors on 27 November 2014. The thrust of these submissions was that the proposed amendments demonstrated the strength of the 1st Defendant's submissions before me, in that the proposed amendments sought prospectively to defeat them. In the light of these further submissions, I directed a further hearing on 4 December 2014, at which Mr. Hartman made yet further submissions, to some extent advancing on earlier submissions. I held at that hearing that I would welcome further assistance on the submission made by Mr. Hartman, more a variation on an earlier theme rather than an entirely new point, that the Code was invalid because it did not incorporate any reference to the provisions of s. 123(2) of the Act that the maximum penalty for a breach of the Code was £250,000. This resulted in a yet further round of written submissions.

The proposed amendments to the Act

17. These are of course only proposed amendments to the Act and have not yet been enacted. As I say, however, Mr. Hartman relies upon them rather to show that his construction of the Act is correct and that the proposed amendments are intended to deal with the lacunae that he has rightly identified.
18. The proposed amendment principally relied upon by the 1st Defendant is a new subsection (za) to be inserted before the existing subsection (a) in s. 120(3), so that it would then read as follows:

> "*The only provision that may be made by conditions under this section is a provision requiring the person to whom the condition applies to comply, to the extent required by the condition, with, -*
>
> *(za) the provisions of an approved code;*
>
> *(a) directions given an accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions; and*
>
> (b) *there is no such code, the provision of the Order for the time being in force under section 122."*

So, the 1st Defendant submitted, this showed that, under the Act in its current form, he was not bound by the provisions of the Code, only by a specific direction given by PPP in accordance with the Code (of which many examples were given by Mr. Hartman), and the imposition of a penalty under the Code was not such a direction.

19. The other proposed amendment relied upon by the 1st Defendant is the insertion of a new subsection (aa) after the existing subsection (a) to the following effect:

> *"(aa) provision that applies where there is or has been more than one contravention of the code or directions given in accordance with it by a person and which enables-*
> *(i) a single penalty (which does not exceed that maximum penalty) to be imposed on the person in respect of all of those contraventions, or*
> *(ii) separate penalties (each of which does not exceed that maximum penalty) to be imposed on the person in respect of each of those contraventions,*
> *according to whether the person imposing the penalty determines that a single penalty or separate penalties are appropriate and proportionate to those contraventions;"*

So, the 1st Defendant submitted, this showed that, under the Act in its current form, there was no power under the Code to impose a single composite penalty for a number of contraventions of its provisions.

The 1st Defendant's submissions

20. Before I address the question of the scope of the preliminary issue, I will summarise Mr. Hartman's submissions before me as best I can, firstly at the hearing on 12-13 November. I will not deal with every avenue down which Mr. Hartman's submissions took him. He produced two skeleton arguments, a main one running to 28 pages dated 7 November 2014 and a shorter "Core" one dated 11 November 2014. Miss Deb, Counsel for PPP, submitted that the submissions contained in those documents were wholly without substance and difficult to follow. It was during his oral submissions to me that Mr. Hartman and I were able to agree upon what were the submissions that he ultimately wished to put forward, namely as follows:
    (1) PPP had no standing to bring these proceedings to recover the fine and charges imposed upon the 1st Defendant and, insofar as the Code purported to confer any such standing, it was ultra vires and void. The only person who could lawfully bring such proceedings was OFCOM itself.
    (2) Insofar as the Code purported to confer a power to impose a fine on the service provider, enforceable by PPP, that provision was ultra vires and void since OFCOM's powers under the Act were to impose penalties subject to restrictions as to proportionality and appropriateness, whereas the powers delegated to PPP under the Code were to impose fines without any such restrictions. In other words, it was beyond OFCOM's power under the Act to delegate to PPP powers of sanction which were wider than those which OFCOM had. At the subsequent hearing on 4 December 2014, Mr. Hartman made it clear that this submission extended to the failure of the Code to incorporate the statutory maximum penalty of £250,000.
    (3) The 1st Defendant was not, as a matter of fact, a service provider to whom the Act or the Code applied. The Tribunal was obliged to determine whether the 1st Defendant was such a provider and it failed to do so. These were triable issues of fact.
    (4) The amount of the fine was extortionate and it therefore should not have been imposed. That was a triable issue of fact.

21. Mr. Hartman submitted to me that both submission (1) and submission (2) above fell within the scope of the preliminary issue. I ruled at the hearing before me that only (1) fell with that scope and that (2) did not. It is to my mind

obvious that (2) did not, if only because it is clear that Mr. Hartman had not even formulated it at the time of the hearing on 14 January 2014. And I refused Mr. Hartman's application to extend the preliminary issue so as to include (2): it would have been quite unfair on PPP to have permitted this.

22. I also ruled that submission (2) was not open to the 1st Defendant until it was fairly pleaded in his defence. Accordingly, at 2.30 in the afternoon on the second day of the hearing before me, Mr. Hartman applied to amend the defence so as to add a new paragraph 2, which I am prepared to accept as a fair pleading of the submission. It was this application which caused PPP to produce for the first time, and rely upon, the Handbook. This application was strenuously opposed by Miss Deb. She drew my attention to the lateness of the application, and the contents of her instructing solicitors' letter dated 26th March 2014, in which they had made the point to the 1st Defendant's solicitors that a submission of that nature, which was (being charitable to the 1st Defendant) remotely foreshadowed in earlier correspondence, was not and would need to be distinctly pleaded. Miss Deb also drew my attention to the principles I should apply to such an application which were to be found in the Court of Appeal judgment in Swain-Mason v. Mills & Reeve [2011] EWCA Civ 14. I had already made it clear that I was only going to allow the 1st Defendant to rely upon this submission in answer to PPP's application for summary judgment, and Miss Deb was willing and able to deal with it on that basis subject to being allowed to draw my attention to the contents of the Handbook. Miss Deb was not able to point to any prejudice that her client would suffer if I allowed the amendment, except for the fact that, if this amendment were allowed and the summary judgment application failed as a result, further costs would be incurred and the 1st Defendant had made it perfectly clear that his main defence was that he was not worth suing. But I also need to take into account the fact that this defence was I think foreshadowed in Mr. Hartman's skeleton argument for a hearing in April 2014, at which HH Judge Raeside was supposed to determine the preliminary issue, but ran out of time to do so.
23. Miss Deb further submitted that I should only allow this amendment if I came to the view that the newly pleaded defence was strong.
24. In my judgment, given that this is an application for summary judgment and the points raised are ones of law, I should grant permission to amend the defence as sought by the 1st Defendant. I also take into account the fact that these are proceedings for the recovery of quasi-criminal penalties. But the merits of the submissions are, I accept, crucial and I will come back to them.

The preliminary issue

25. So I turn first to the preliminary issue and submission (1) above. Mr. Hartman, Counsel for the 1st Defendant, relied in particular upon the provisions of s.

120(3) and s. 123, which referred back to ss. 94-96, and in particular s. 95(6). Mr. Hartman had to accept that Mr Justice Walker in ICTIS v. Andronikou [2007] EWHC 2307 (Admin) had decided that the enforcement authority, then ICTIS, had power to enforce directions given by it under the Code. He submitted that the present case was distinguishable, because PPP was not seeking to enforce directions under the Code but a fine imposed under the Code, and, having regard to the provisions of s. 120(3), only OFCOM had the power to do that and it had no power to delegate to the enforcement authority the power to do that.

26. In further support of that submission, the proposed amendment to the Act so as to add the new subparagraph (za) to section 120(3) is relied upon.
27. PPP's case was that its demand that the 1st Defendant pay to it the fine and administrative charges, was, within the meaning of s. 120(3)(a) of the Act, a *"direction[] given in accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions"*, and that there were no grounds for impugning that direction.
28. The 1st Defendant's case in this respect has a superficial attraction but in my view it ignores the many other provisions of the Act which make it clear that OFCOM may delegate to PPP as the enforcement authority all powers of enforcement of the provisions of the Code approved by OFCOM, including the recovery of fines and administrative charges imposed by the adjudication Tribunal. Paragraph 4.8.2 of the Code, as presaged by s. 121(1), (2)(a), (4) and (5)(a) of the Act, provides that any fine that may be imposed by the Tribunal is *"to be paid to [PPP]"*. In my view, the words in section 120(3)(a) of the Act, namely *"directions given in accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions"*, are quite wide enough, read in the whole statutory and regulatory context, to comprehend the enforcement of the provisions of the Code, although I can see that the proposed amendment, by the insertion of the new subsection (za) before the existing subsection (a) in s. 120(3), would be a considerable improvement to the Act from the point of view of the use of plain English.
29. I would add that Mr. Hartman further submitted that ICTIS v. Andronikou [2007] EWHC 2307 (Admin) was wrongly decided. I propose to follow it.
30. So, I reject this submission.
31. It follows that I find in favour of PPP on the preliminary issue.

The Claimant's application for summary judgment

32. I turn therefore to PPP's application for summary judgment. I will deal first with all of Mr. Hartman's submissions other than submission (2). Of course, I apply for this purpose the provisions of CPR Rule 24.2.
33. As to submission (3), there is the uncontradicted evidence adduced by PPP that the 1st Defendant was registered with PPP as the relevant service provider and

never denied that he was the material service provider during the proceedings before the Tribunal. The provisions of paragraph 3.4 of the Code deal with the need for and consequences of registration. The 1st Defendant has in the current action filed evidence to the effect that in reality the service provider was his next door neighbour, a Mr. Hussain. But, be that as it may, that does not begin to provide a defence to the claim, although no doubt it would give rise to a claim by the 1st Defendant against Mr. Hussain. I reject Mr. Hartman's submission that PPP and the adjudication Tribunal were under a duty to investigate and make a specific determination as to the 1st Defendant's status as the material service provider: there is no basis for such an obligation, which is in any event manifestly unreal, given the undisputed evidence that the 1st Defendant was registered as the relevant service provider. It is absurd to suggest that a registered service provider such as the 1st Defendant can rely upon the falsity of the details which have been submitted on his behalf by way of registration.

34. As to submission (4), it is not for the court to inquire into the amount of the fine imposed: that is a matter for the adjudication Tribunal, whose decision could be reviewed and/or appealed but was not. In any event, on the basis of the information before the Tribunal, Mr. Hartman did not begin to formulate a case that the Tribunal had manifestly erred. No triable issue is raised in my judgment.
35. That, therefore, leaves submission (2) as the only remaining defence to PPP's summary judgment application.
36. By way of further and related submission, in the light of the proposed amendment to section 121(f) of the Act, it was submitted that the tribunal had no power to impose a single composite fine for several contraventions of the Code. This was a new defence but in all the circumstances I do not think I should ignore it. I will deal with it separately later.
37. Mr. Hartman's submission was that s. 121(5)(a) provides that a Code may include "provision for the payment to a person specified in the code of a penalty not exceeding the maximum penalty for the time being specified in section 123(2)". S. 123(2) provides:

    "The amount of the penalty imposed under section 96 as applied by [s. 123(1)] is to be such amount not exceeding £250,000 as OFCOM determine to be-

    (a) appropriate; and

    (b) proportionate to the contravention in respect of which it is imposed."

    In contrast, the Code provides that the Tribunal may "impose a fine", not a "penalty", by way of sanction "depending upon the seriousness with which it regards the breach(es) upheld": para. 4.8.2.
38. So, Mr. Hartman submits, the Code is ultra vires because the Code does not restrict the Tribunal's sanction power in the manner required by s. 123(2), which are restrictions upon OFCOM's sanction power. He relies upon the well-known Spath Holme case [2000] 3 WLR 141 (HL): OFCOM cannot delegate a wider power that the power it has, and the court will scrutinise carefully and construe strictly subordinate legislation such as the Code so as to satisfy itself

that it does not exceed the powers conferred by the primary legislation, here the Act.

39. In my judgment, there is a short and straightforward answer to this submission, namely that it is implicit in the Code that the provisions in it for imposing sanctions upon PRS providers for breach of the Code are subject to the limitations set out in s. 123(2) of the Act: see Bunney v. Burns Anderson plc. [2008] Bus. L.R. 22, particularly at paras. 68-69 of the judgment of Lewison J.. That it goes without saying that these limitations applied as if expressly incorporated in the Code is supported by the fact that the Handbook plainly assumes that the provisions of s. 123(2) apply notwithstanding the fact that the Code does not expressly say so. And in my judgment such an implication is supported by the legal maxim that it is better for a thing such as the Code to have effect than to be made void: see R v. Institute of Chartered Accountants in England and Wales ex parte Nawaz 25 April 1997, unreported (CA). Further, if the right question is to ask whether, if the Code had been instead drafted so as to reflect word for word the contents of s. 123(2), rather than as it was actually drafted, there was a realistic possibility that any service provider, against whom a finding of infringement had been made, would have received a lesser monetary sanction, the answer to that question would be in the negative for the following reasons:
    (i) There is no substantial difference between a sanction being "proportionate to the contravention" (Act), as opposed to "depending upon the seriousness with which it regards the breach(es) upheld" (Code).
    (ii) It went without saying that the sanction had to be "appropriate" (Act) – a sanction would hardly be imposed if it were inappropriate.
    (iii) There is no substantial difference in meaning in this context between a "fine" (Code) and a "penalty" (Act).
40. Does it make any difference that, in the light of the proposed amendment to section 121(f) of the Act, there was no provision in the Act which gave the tribunal the power to impose a single composite fine for several contraventions of the Code, as it did here? In my judgment, the answer is plainly no. It would be ridiculous, and indeed positively unfair to the 1st Defendant as an infringer, to my mind if the Tribunal were unable to look at the matter in the round, as any criminal court would and as the Tribunal did in this case.

41. I would note that Miss Deb raised further points as to why submission (2) was bad. She also referred me to Avon County Council v. Buscott [1988] 1 QB 656, in support of the submission that the 1st Defendant could only raise submission (2) in an application for judicial review against OFCOM, not in these proceedings to which OFCOM was not a party. In the event, I have not needed to deal with these submissions.

42. And so in my judgment there is no substance in any of the above defences, there is no point of law which is unsuitable for determination at a hearing such as this, and the 1st Defendant has no real prospect of successfully defending the claim.
43. I find that PPP is entitled to summary judgment on its application and is *prima facie* entitled to its costs. If the parties are unable to agree upon a minute of order, including as to costs, I will determine any such dispute on written submissions to be sent to me not later than 4 pm on the day before before the formal handing down of judgment, at which I will not expect any attendance by the parties.