FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

EA/2018/0138

BETWEEN:

OUR VAULT LTD

APPELLANT:

and

THE INFORMATION COMMISSIONER

RESPONDENT

DECISION

Tribunal:

Brian Kennedy QC

Andrew Whetnall

Malcolm Clarke

Location: Manchester IAC/AIT.

Dates of Hearing: 5 November 2018, and 28 & 29 March 2019.

For the Appellant: James Slater of Counsel.

For the Respondent: Ben Mitchell of Counsel.

Decision: Appeal Refused.

Introduction:

[1] This decision relates to an appeal brought under section 48 of the Data Protection Act 1998 ("DPA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in final Monetary Penalty and Enforcement Notices dated 18 June 2018, which are a matter of public record.

[2] The Tribunal Judge Brian Kennedy QC and lay members Mr Andrew Whetnall and Dr Malcolm Clarke sat to consider this case on 5 November 2018, and 28th and 29th March 2019. At hearing the Appellant was represented by Mr Whitehurst BL, the Commissioner by Mr Mitchell BL.

Factual Background to this Appeal:

[3] Full details of the background to this appeal and the Commissioner's decision are set out in the final Monetary Penalty Notice. This appeal concerns whether the Commissioner was correct to issue a penalty for serious contraventions of the Privacy and Electronic Communications Regulations 2003/2011 (PECR). Our Vault, the Appellant company describes itself as *"an insurance agent and broker"* that contacts individuals offering to review their insurance needs before passing their details to a sister company, ST&R Ltd, for the sale of insurance products. Both companies are owned and controlled by James Slater, and it was accepted that the Appellant Company was a business involved in sales. The Tribunal was told that there have been changes in company structure and nomenclature since the Penalty notice was issued, but these are not relevant to the present appeal. The Appellant told the Commissioner that it holds a list of 3.5 million numbers and has made 30 million calls in four years.

Chronology:

Nov 2015	42 Complaints received by ICO and 137 complaints received by Telephone Preference Service ("TPS") from individuals that they had received unsolicited calls from the Appellant company
1 Feb 2016	Commissioner writes to company detailing complaints and requesting an explanation Response from Appellant claiming calls made for "lifestyle survey" and individuals who consent are transferred to an FCA-authorised sister company
9 March 2016	ICO requests evidence of consent and explanation for repeat calls made to those on Do Not Call ('DNC') list. Investigation lapses owing to other pressures on the Commissioner's time.
1 April 2016 - 26 April 2017	Commissioner receives further 77 complaints about Appellant Company re repeat calls after denial of consent
22 May 2017	ICO requests explanation and notes on-going concerns re compliance

	Appellant provides spread sheet of calls but these in fact demonstrated both non-compliance with DNC requests and that calls were made to TPS registered numbers.
26 April 2018	Commissioner's Notice of Intent to impose £70,000 penalty
2 May 2018	Representations confirming no TPS licence but states that a 'dialler company' is engaged to manage that element
18 June 2018	Final Enforcement Notice and Monetary Penalty Notice upholding decision and amount
4 July 2018	Notice of Appeal

Relevant Legislation:

Privacy and Electronic Communications Regulations 2003

Regulation 21 Unsolicited calls for direct marketing purposes

(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.

NB at the time of the alleged contraventions, the Data** Protection **Act 1998 was the applicable legislation. It has been superseded by the Data Protection Act 2018 and the Data Protection (Charges and Information) Regulations 2018 , which came into force on 25 May 2018.

Data Protection Act 1998

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

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

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

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

Section 17 - Prohibition on processing without registration.

(1) Subject to the following provisions of this section, personal data must not be processed unless an entry in respect of the data controller is included in the register maintained by the Commissioner under section 19 (or is treated by notification regulations made by virtue of section 19(3) as being so included).

(2) Except where the processing is assessable processing for the purposes of section 22, subsection (1) does not apply in relation to personal data consisting of information which falls neither within paragraph (a) of the definition of “data” in section 1(1) nor within paragraph (b) of that definition.

Section 48 - Rights of appeal.

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

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

Section 49 – Determination of Appeals

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

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

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

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

Section 55A - Power of Commissioner to impose monetary penalty

(1) The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that—

(a) there has been a serious contravention of section 4(4) by the data controller,

(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and

(c) subsection (2) or (3) applies.

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

(3)This subsection applies if the data controller—

(a) knew or ought to have known —

(i) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but

(b) failed to take reasonable steps to prevent the contravention.

(3A) The Commissioner may not be satisfied as mentioned in subsection (1) by virtue of any matter which comes to the Commissioner's attention as a result of anything done in pursuance of—

(a) an assessment notice;

(b) an assessment under section 51(7).

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

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

(6) The monetary penalty must be paid to the Commissioner within the period specified in the notice.
(7) The notice must contain such information as may be prescribed.
(8) Any sum received by the Commissioner by virtue of this section must be paid into the Consolidated Fund.

Commissioner's Penalty Notice:

[4] The Commissioner explained that the Appellant used a number of call identification lines (CLIs) over time, these being the telephone number presented when an individual receives a call from Our Vault. Those addressed in the Monetary Penalty Notice at Para 27 were misdated as relating to 2016 in respect of one CLI, and as corrected should read (with corrections underlined) as:

a. CLI 0333 ****131: 146,699 calls between 1 March 201**7** – 7 April 201**7** of which 54,923 (35.7%) were TPS registered; CLI 01257 ****12: 3,078 calls between 7 April 2016 -16 June 2016 –of which 611 (20%) were TPS registered.
b. CLI 01257 448612: 3,078 calls between 7 April 2016 -16 June 2016 –of which 611 (20%) were TPS registered.
(The necessity for the correction of the dates is discussed later in this judgment in the section headed "*Permission to amend*".)

[5] The Appellant made representations on various points on this analysis. It argued that the total numbers listed are call attempts and not the total of unique numbers dialled, as they include repeat calls, calls which did not result in contacts, and some to numbers registered on TPS after the Appellant company had called them (perhaps to bar unwanted calls from other businesses). If adjusted for duplicate calls to the same number the totals of unique numbers called would be 32,010 calls to TPS numbers out of a total of 86,582 numbers called from the CIL 0333 number (TPS 37% of total), and 611 TPS calls out of total of 1710 for the 01275 number TPS 32% of total. This stands in opposition to the quoted figure of 20% if this calculation is based on the total number of calls made.

[6] The ICO's observation is that the call attempts are relevant as regulation 21 refers to "the making of unsolicited calls" and so relates to each attempt not each call connection. The calls resulted in 179 complaints to TPS and to the Commissioner, and a finding that the Appellant had breached Regulation 21 PECR. The high volume of calls, the percentage of calls to TPS subscribers (average of over 37% over both CILs, whether the calculation

excludes repeat calls to the same numbers or not), the concession by the Appellant that it had made 30 million calls in four years without screening against the TPS register once numbers were uploaded to the dialler, and the lack of any effective contractual safeguards to avoid TPS calls, led the Commissioner to conclude that the contravention was serious. This was compounded by the fact that some complaints reported repeat calls to TPS subscribers even after they had informed the Appellant that they did not wish to receive calls. The described nature of the first call as being a 'lifestyle survey' was misleading as it could be seen from scripts and the Appellant's own description that the purpose was to generate leads to the insurance business by identifying insurance needs, including the policies held, what was being paid and renewal dates. The Appellant provided no evidence of the consent of TPS subscribers to the first survey calls. The Appellant's case rested on assurances that consent was obtained for further calls during the first survey call and for each subsequent call, and those who became insurance customers consented to contacts and the holding of records by Our Vault. Customers who clearly withheld their consent were placed on a do not call list and removed from the diallers..

[7] It was accepted that the Appellant Company did not deliberately contravene the regulations, but because it relied so heavily on direct marketing, it should have known that that such actions would risk contravention of the law. The Commissioner published detailed guidance for companies operating under PECR and the matter was widely publicised in the media. The fact that the Appellant stated that the data was TPS screened by the supplier before being uploaded led the Commissioner to conclude that the Appellant knew of its obligations. The Commissioner was in correspondence with the Appellant from early 2016, and yet found that the Appellant continued to make unsolicited direct marketing calls to TPS subscribers in 2017. It was found that there were insufficient safeguards in the Appellant's business, and the company had failed to take reasonable steps to prevent the contravention. A penalty of £70,000 was deemed to be reasonable.

Grounds of Appeal:

[8] The Appellant initially advanced the following grounds of appeal against the Monetary Penalty Notice:

i. The Appellant had provided sufficient evidence of consent to calls;
ii. The decision was procedurally unfair as a result of the following failings by the Commissioner:
    a) failures to consider adequately the Appellant's representations;

b) failure to provide sufficient details of the alleged complaints or 'raw data' of calls;
c) failure to consider adequately the Appellant's engagement with investigating officers; and
d) failure to make it explicit to the Appellant that it was under investigation.

iii. The level of penalty is disproportionate given the short period of time of the breaches, the level of engagement with the Commissioner, the good history of the company and the separation between the Appellant and the alleged 'sister company'. The Appellant criticised the Commissioner for attempting to "pierce the corporate veil by the back door" by taking the relationship between the two companies into account in any fashion.

[9] At a later date the Appellant sought to rely on a fourth ground of appeal, namely that the Appellant was not in control of the telephone number from which the majority of calls were made between March and June 2016. There was also a late application to appeal the Enforcement Notice.

[10] The Appellant also applied to have the matter stayed as an abuse of process, or to have the Commissioner's decision quashed and for the investigation to resume. This application was made on the basis that the Commissioner failed to disclose the raw data and details of complaints to the Appellant. When disclosure was made, the Appellant took issue with the amount of calls that the Commissioner claimed were in contravention of PECR.

Commissioner's Response:

[11] As a preliminary matter, the Commissioner noted that some of the dates of contravention in the Notice were incorrect (in that they mistakenly referred to 2016 only), but argued that the errors were so minor that they did not interfere with the parties' proper understanding of the contraventions and therefore caused no prejudice. They provided evidence that in communications the parties never focussed exclusively on 2016 but rather referred to 2016 and 2017.

[12] Regarding the first ground, the Commissioner stated that the Appellant repeatedly promised to provide evidence of consent but failed to do so. The Appellant needed to provide evidence of consent to the first call it made to each of the numbers from which the Commissioner had received complaints. This 'original consent' is important because it is

unlawful under Regulation 21(1)(b) of the 2003 Regulations to call TPS-registered numbers without this consent, and in support of this the Commissioner cited *Optical Express (Westfield) Ltd v IC* (EA/2015/0014).

[13] The Commissioner denied that she had failed to consider the Appellant's representations. Rather than ignoring the fact that the Appellant had relied on a 'dialler company', the Commissioner noted that in the representations the Appellant accepted that they had a role in removing TPS subscribers from their call list without the input of the dialler company. Just because there was nothing in the representations that dissuaded the Commissioner from her preliminary views on the breaches or provided any evidence of consent does not mean that the representations were ignored.

[14] The argument that the Appellant was denied details about the complaints or 'raw data' was described as "*factually incorrect and logically inconsistent*". The Commissioner noted that the correspondence showed that the Appellant received or generated sufficient information to attempt and fail to prove consent to each of the calls, including two spreadsheets, which purported to show the said consent. It is also untrue to say that the Appellant was not informed that it was under investigation; the Commissioner detailed four occasions in 2016 and 2017 in which the Appellant was told of the investigation and the potential for fines.

[15] In respect of the third ground being the quantum of penalty, the Commissioner detailed at length the particular features of the contravention and the specific aggravating features in the Appellant's case, noting that while the contravention alleged lasted one year, it is clear that the Appellant's business model was "*negligent"* and resulted in "*large-scale breaches"* of PECR. The previous investigation was not discontinued as a result of the Appellant's clarification, but rather lapsed because of more pressing business.

[16] The Commissioner also pointed out the objective in imposing the penalty, as both a general and specific encouragement towards compliance. The amount of penalty is commensurate to the seriousness of the case and is consistent with the guidance published by the Commissioner in December 2015[1] and in keeping with previous penalties imposed in other cases. It is not disproportionate to the Appellant's turnover and gross profit for the most

1 *Information Commissioner's guidance about the issue of monetary penalties prepared and issued under section 55C (1) of the Data Protection Act 1998:* Presented to Parliament pursuant to Section 55(C)(6) of the Data Protection Act 1998 as amended by Section 144 of the Criminal Justice and Immigration Act 2008, December 2015

recent year of accounts when the accounts of both Our Vault and ST & R are taken together. It is appropriate to consider the Appellant company in conjunction with the associated sister company ST&R Ltd, with whom it shares common ownership, direct management and a significant degree of linkage of business. This is not 'piercing the corporate veil', but according to the Commissioner it is following the guidance in *LAD Media Ltd v IC [2017] UKFTT 2017_0022* in taking into account the financial circumstances of the Appellant. ST&R commercial revenues are the source of the injections of cash needed to keep Our Vault viable. In some years these are shown in the accounts as commissions receivable of the order of £4m. More recently the accounts note that the company is not financially viable, but the Director contributes the necessary financial support. It is not a telling argument that the Appellant objects to the fine as greater than the profit made by Our Vault in any year of operation. The commercial nature of Our Vault as a generator of insurance leads is clear, and the sales it helps to generate are of the order of £4m. The Appellant has not attempted to conceal this information. It is drawn from the series of accounts for both companies submitted at pages 53 to 84 of the supplementary hearing bundle.

[17] The fourth ground concerned the Appellant's control of the telephone numbers in question. The Commissioner accepted that, in regard to the incorrect drafting of the Notices, the Appellant did not have control of the number 0333 at the time initially (wrongly) alleged, but reiterated that both parties understood the notices to relate to the correct dates. The Commissioner noted that it was the Appellant that gave the Commissioner the call identification lines it had used to make calls to customers, and later sent spread sheets detailing its call records for the line beginning '0333'. The dialler records for the two lines revealed a large percentage of calls made to TPS subscribers.

[18] As for the dispute concerning the precise numbers of offending calls, the Commissioner pointed out that the 'duplicates' in the raw data referred to by the Appellant are not an error, but rather show multiple calls to the same TPS-registered numbers, each constituting a separate breach of PECR. Whether or not the calls connected is irrelevant, as it is the act of calling the number in itself, which is the breach. There are no flaws in the substantive portions of the Commissioners findings, she argued, save for the "minor" corrections required regarding dates of non-compliance.

Tribunal Hearing – March 2019:

[19] The Tribunal received witness statements and evidence from Ms Hodkinson from the Commissioner's Office and from Mr Slater, CEO of Our Vault Ltd. Ms Hodkinson explained

the steps taken in the investigation and the information provided to the Appellant at each stage. She explained that the Appellant provided "*a very detailed data chart but nothing to indicate clear consent"*. She also provided to the Tribunal a transcript of one of the call recordings; she stated that the call was what was referred to in the Commissioner's Direct Marketing Guidance as "*sugging"* i.e. selling under the guise of research. She also explained that the discrepancy in dates between the Notices and the substance of the communications and investigation was owing to "*a human error, which was a simple case of typing the wrong year"*.

[20] Mr Slater, on behalf of the Appellant, provided evidence that throughout the two investigations by the Commissioner in 2016 and 2017 *"there was never any mention or discussion surrounding a large volume of calls made to TPS registered customers"*. He denied receiving any evidence from the Commissioner regarding these breaches, and took exception to the assertion by the Commissioner that his company had not engaged substantively with the investigation. He claimed that, rather than declining to provide the requested evidence of consent, his business was never asked to provide the consent as the Commissioner came into possession of the information after his company was told that the investigation was complete. At hearing, the only evidence of consent he was able to provide was the consent of customers agreeable to having their details passed to ST&R Ltd but did not provide the original consent to being contacted. Mr Slater accepted in cross-examination that he was unable to provide evidence of consent to all calls made to TPS numbers. He also accepted that the two companies are closely linked, in that he owns and controls both of them, and the income of the Appellant Company is entirely drawn from ST&R Ltd.

[21] Mr Slater also noted that between 2016 and 2017 the volume of complaints had halved, and claimed that the imposition of the penalties had resulted in negative publicity that had damaged his business and had a negative impact on his personal and financial relationships. Mr Slater claimed that the Commissioner informed his company in September 2017 that her investigation was complete, but nevertheless decided to continue her investigation and acquired the details of the 0333 number from the data provider and dialler unbeknownst to the Appellant.

Abuse of Process:

[22] The Appellant raised the point that the Commissioner had obtained the dialler records for the number 0333 but had not fully disclosed the data to the Appellant. It claimed that analysis of the data would show that the Appellant did not own, control or use the number

0333 before the beginning of March 2017. The Appellant also took issue with the fact that the Commissioner had requested that the hearing be adjourned to consider the matters, claiming that all material should be in the Commissioner's possession. The Appellant therefore applied to have the case stayed as an abuse of process for "material non-disclosure" which had denied the Appellant the *"opportunity to engage in a constructive process".*

[23] The First Tier Tribunal (FTT) has not been given a specific power by Parliament to stay an appeal as an 'abuse of process'. Rule 5(3)(j) provides a general power to stay a case, and the extent of the FTT's powers were discussed at length in *Foulson v HMRC* [2013] UKUT 038 (TCC) but summarised at paragraph 35:

> *"I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter, which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against a public authority"*

[24] This appeal does not fall into the second category, i.e. the conduct of the public authority is so malicious or tainted by such egregious misbehaviour that the appeal cannot be allowed to continue. Instead, this is a situation wherein the Appellant is claiming that some aspect of the Commissioner's conduct or the evidence has rendered the hearing before the FTT unfair; so unfair that it cannot be remedied. This submission was, in our view, profoundly diminished by Mr Slater's concession in oral evidence that, at the hearing, that he was not disadvantaged in any way or unable to present his case. The Tribunal therefore disagree with the submissions made on behalf of the Appellants in seeking to establish a stay for Abuse of Process. We are cognisant of the high threshold required to justify such a stay.

The Tribunal has extensive case management powers, and is obliged to take all matters relevant to the determination of the case, including the conduct of the parties. The Tribunal has followed the authority of *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 as approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, to the effect that the Tribunal is obliged to pay careful attention to the reasons given by the Commissioner for arriving at the decision under appeal, as it is the Commissioner to whom Parliament has designated the responsibility for making decisions about the Data Protection Act. We find on the facts before us it has been established that any shortcomings in the provision of disclosure in this instance were easily remedied within the process.

Tribunal Findings:

[25] Turning then to the substantive issues in this appeal, it appeared to us that there were four questions in regards to the Penalty Notice to be decided in order:

i. Should the Tribunal permit the amendments to the Penalty Notice as requested by the Commissioner.
ii. If yes, then do the activities of the Appellant fall under the relevant legislation.
iii. If yes, then was there evidence of consent to the calls in issue being made.
iv. If no, then is the level of penalty proportionate.

Permission to amend

[26] The Tribunal has a power under Rule 5 (3)(c) of the 2009 Rules to permit any party to amend a document. The Appellant amended its grounds of appeal to include a new ground. The question is whether permitting the Commissioner to change the dates on the Penalty notices would be so prejudicial to the Appellant that it would render the entire process unfair.

[27] The Commissioner argued that both parties were working under the same understanding that the contraventions occurred in 2016 and 2017. She noted that the error did not come to light until the first hearing in November 2018, and the Appellant's contemporaneous documents did not make any complaint about the dates in the notices; In the Appellant's correspondence with the Commissioner in July 2017, it sent to her a spread sheet detailing the call record for the number 0333 that relates to the correct dates of the contravention. This, Mr Mitchell stated, was evidence that both parties were working on a common understanding of the timescale of the contravention during the investigation.

[28] From the conduct alleged by the Commissioner, it is clear that the dates on the Penalty Notices were wrong. What must be considered is what prejudice correcting this error at this

stage would do to the Appellant. We can see nothing in the Appellant's arguments that would show that the manner in which it mounted its defence fundamentally changed as a result of the request to amend the dates. The Appellant claimed that it had the necessary consent for all calls made to TPS subscribers at all times, and had provided evidence of that to the Commissioner. The spreadsheets that the Appellant had provided as the purported evidence covered the dates that the Commissioner now states were the correct dates, rather than the mistyped dates in the Notices.

[29] As such, we were satisfied that the Appellant was not so prejudiced by the proposed amendments that we should refuse the application. Accordingly the Notices are amended as per the Commissioner's request and as outlined at paragraph 4 of this judgment.

Direct Marketing

[30] The Appellant initially denied that it was involved in any sales, but simply conducted lifestyle surveys and then passed data of consenting customers on to the sister company ST&R Ltd. However, in his evidence at hearing in March 2019, Mr Slater, in his evidence to this Tribunal, accepted that the company was inherently involved in the business of sales. It generates all its income, save for some periods in which leads were sold to other companies, from the sister company whose business is the sale of insurance products to those potential customers identified by the Appellant company.

[31] The Commissioner's Guidance on Direct Marketing is instructive and indicative. Paragraphs 39 and 40 of the Guidance state as follows:

> *[39] However, an organisation cannot avoid the direct marketing rules by labelling its message as a survey or market research if it is actually trying to sell goods or services, or to collect data to help it (or others) to contact people for marketing purposes at a later date. This is sometimes referred to as 'sugging' (selling under the guise of research). If the call or message includes any promotional material, or collects data to use in future marketing exercises, the call or message will be for direct marketing purposes*
>
> *[40] "If an organisation claims it is simply conducting a survey when its real purpose (or one of its purposes) is to sell goods or services, generate leads, or collect data for marketing purposes, it will be breaching the DPA when it processes the data. It might also be in breach of PECR if it has called a number registered with the TPS, sent a text or email without consent, or instigated someone else to do so. "*

[32] There is an undeniably close link between the Appellant company and ST&R Ltd. The Appellant criticised the Commissioner for an attempt to 'pierce the corporate veil' even when Mr Slater accepted that he owned and controlled both entities. Nevertheless, the description that he gave of the relationship between the businesses persuades the Tribunal that the Appellant company passed the information that it gleaned from the calls to ST&R Ltd for the purpose of selling insurance, and the call transcript shows that it offered a "25% discount" on products. We are satisfied that the Appellant is effectively and substantively engaged in direct marketing.

Consent

[33] In this instance, the Appellant had two arguments: firstly, that not all of the calls identified by the Commissioner as being made to TPS subscribers were unsolicited, as some of those subscribers were existing ST&R Ltd customers; secondly, it argued that it had provided sufficient evidence of consent, but because there is no 'industry standard' form of consent the Commissioner should not penalise the Appellant for the manner in which it obtains and records consent.

[34] In regards to the first point, we were presented with tables showing how far calls to TPS numbers were calls to existing customers. The overall percentage as checked in our oral evidence appeared to be about 5% (4469 showing "Yes" out of a table with 86583 lines.) It is settled law that the onus is on the person engaged in direct marketing to provide evidence of consent to such communications. The Commissioner referred the Tribunal to *Optical Express (Westfield) Ltd v ICO* EA/2015/0014, and that principle is iterated at paragraphs 44 and 45 of that judgment:

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

[35] The fact that there is no 'industry standard' for the recording of consent does not relieve direct marketing businesses of their obligation to prove consent to each and every

call made to TPS subscribers. As long as the consent is recorded in a clear way, showing how and when consent was given and satisfying the Commissioner that such consent was free and informed, then that will satisfy the legal requirements. The Commissioner gave clear and repeated signals as to the nature of evidence of consent that could satisfy the requirements. Clearly consent cannot be gained within the first or survey call. The Commissioner had therefore asked for evidence in respect of each number on the schedule of complaints that specific and informed consent had been given to receive the initial call. Requests for such evidence had been made and repeated in the Commission's letters of 1 February 2016, (HB 234), of 9 March 2016 (HB234) and 22 May 2017 (HB 252.) Evidence could be satisfied through a screen shot of where you gain consent, a tick box used to gain consent through a website, or if consent was obtained by telephone the date and time.

[36] None of the material provided by the Appellant constituted such evidence specific to each TPS number called, or even in the form of a generic script or check box or other form of indicating and recording consent relating to the initial compilation of lists of what were said to be "consented" numbers. The Appellant responded promptly to these requests by providing various material including time and date if checks it made to individuals who had been TPS registered at the time of the first call, but no evidence of consent other than that taken within the call. It was claimed that it always gains consent when calling, but could not show any evidence as to the means or substance of consent attached to what were said to be "consented lists" that certain third parties had from time to time provided to it to build up its data base.

[37] The most straightforward way of weeding and updating such lists would have been to register directly with the TPS service in order to screen or rescreen these lists. Mr Slater said he had spoken to providers and put them on warning that contracts would be ended if they failed to provide the required evidence. However, the regulator places the onus on the instigator of calls, and the due diligence arrangements had clearly failed where samples showed 37% of calls being made to TPS numbers. Mr Slater, in evidence, protested that the number of complaints received was equivalent to 0.0004% of all calls made, and this showed that due diligence was being applied and arrangements were working well. It is known to this Tribuinal from other cases that the public does not take the trouble to complain at all often. Although they register their TPS preference in large numbers, they may not have high expectations that this constitutes an effective protection as will be evidenced by calls received, intercepted by call blockers or registered on answering machines. A sense of fatalism may develop. But this does not mean that the

limited effectiveness of measures is accepted, or that their failure does no harm or effective countermeasures including sanctions are not desired.

[38] The Tribunal had the opportunity to examine spread sheets itemising calls to TPS lines, showing the percentage within all call volumes for the sample CILs and to ask questions about them. These spread sheets contained more than 100,000 lines of data. The panel cannot apply the same degree or experience of scrutiny to such data as a professional regulator.

[39] We also took the following from the Appellant's claims that diligent care was taken to avoid contravention of the PESC regulations, that the overall level of complaints was very low in relation to the volume of calls made and had been improving (although the difference between the proportion of calls to TPS numbers in the second chronological series, those from 01257, numbers rose from 20% to 35% when repeat calls were excluded, as Mr Slater argued was appropriate), and that it had been handicapped at various stages of the ICO's investigation and proceedings by failure to supply promptly material obtained from dialling companies that merited comment or response:

[40] We have concluded the essence of the offence before us is the number of calls to TPS lines. It is the initial and any subsequent calls without informed and specific consent that count, and the ICO offered opportunities for the Appellant to show that there had been informed and specific consent before these calls were made on more than one occasion. Consent means, in the words of Regulation 21(4), that the subscriber has given notice to the caller that (he) "does not for the time being object to such calls being made on that line by that caller". Such calls may then be made lawfully notwithstanding the fact of TPS registration. Despite the clear opportunities to provide evidence of such consent during the course of the ICO investigation, in the interval between our hearings on 5 November 2018 and 28 and 29 March and at those hearings, the Appellant failed to produce either general or specific evidence of such consent given before the initial call to a TPS number.

[41] The material provided concerning care and due diligence related largely to those who had become customers of Our Vault or Star, including where Our Vault stored relevant documents and contracts for its sister company. Although the process of securing consent before a customer relationship was established appeared vague and fell well short of a positive opt-in, a matter of recipients of calls failing to dissent when the caller said that

there would be future reminders and contacts as opposed to giving express consent, these relationships with existing customers are not the heart of the case. Where documents were produced governing the obligations of the providers of numbers or of dialling companies they did not clearly show the terms on which those on the lists provided had agreed to be contacted, some left the obligation to weed the lists of new TPS registrations with the Appellant, and the Appellant had never registered to take updates from the TPS service. With calls to TPS numbers at 35% or above depending on whether repeat calls were included on the whole sample for the 033 CIL, there can be little doubt that such calls were not effectively screened or prevented by the supplied lists, and were made on an industrial scale as an integral part of the Appellant's business model.

[42] The Appellant's focus on the number of complaints in relation to the volumes of calls made and delayed opportunity to comment on specific complaints is not to the point (although there was through our process ample time to remedy any initial limits on opportunities to provide relevant evidence). Complaints are the signal (or litmus test) to the ICO that calls contrary to TPS registration are being made, and its procedures begin by selecting calling companies where the volumes of complaints to the TPS and ICO are significant. But the volume of complaints cannot be expected to be commensurate with the number of calls made and is not a real indicator of the scale of nuisance and distress generated. The receipt of unwanted calls or even the presence of unexplained calls from unknown numbers on an answering machine can cause aggravation and distress, the expense of installing call blocking equipment, and because of the scale of financial fraud initiated by cold callers there may be anxiety as recipients of calls feel threatened or worry about distinguishing between criminals and legal business. The Tribunal are familiar with many complaints of distress and inconvenience caused in these circumstances.

[43] In all the circumstances, and on the evidence before us, the Appellant has failed to satisfy (either the Commissioner or) this Tribunal that it had secured prior consent to all or indeed any of the first calls made to TPS subscribers, and would have had very great difficultly demonstrating consent to each because of the wholesale way in which call lists are generally put together. Accordingly we find no error in the Commissioners' Decision in that regard, and uphold the Commissioner's decision to impose both a Penalty Notice and the Enforcement Notice.

Proportionality of the penalty

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

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

> *There is no binding guidance from the higher courts or tribunal to assist with the scale of the monetary penalty, or how to approach the assessment. The following factors appear to us to be relevant although will differ from case to case:*
>
> v. *The circumstances of the contravention;*
>
> vi. *The seriousness of that contravention, as assessed by*
>
> a. *the harm, either caused or likely to be caused, as a result;*
>
> b. *whether the contravention was deliberate or negligent;*
>
> c. *he culpability of the person or organisation concerned, including an assessment of any steps taken to avoid the contravention.*
>
> vii. *Whether the recipient of the MPN is an individual or an organisation, including its size and sector;*
>
> viii. *The financial circumstances of the recipient of the MPN, including the impact of any monetary penalty;*
>
> ix. *Any steps taken to avoid further contravention(s);*
>
> x. *Any redress offered to those affected.*
>
> *We also consider that the amount of the penalty should be of a level to deter further contraventions, whether by the recipient of the MPN or others.*

[46] The accounts provided to the Tribunal show that the Appellant company is not a profit-making company, and is dependent on the financial support of Mr Slater for its continued existence; that is to say, ST&R Ltd provide all the income of the Appellant company. ST&R Ltd.'s accounts were also provided, and they show that in the year ending July 2018, ST&R Ltd paid nearly £200,000 in salaries and dividends to Mr and Mrs Slater as directors, but also had advanced a further £723,449 to them. The outstanding balance of credits and advances was £573,740. ST&R Ltd had a turnover of over £4m, and made a profit of £233,432.

[47] We are not convinced by the Appellant's claims that the amount of the penalty was disproportionate either to the scale of the contravention or the size of the business. It is known from the data presented in this and other cases that that the public does not lodge formal complaints very often, even though they register their TPS preference in large numbers, indicating an explicit wish that they should not be 'cold called'. The relatively low number of formal complaints cannot be taken to mean that calls on TPS numbers do not cause harm or that recipients of such calls are not distressed or angered by them, or that effective counter measures, including significant sanctions are not justified. As to the size and profitability of the business, businesses cannot prevent themselves being held to account for contraventions of PECR and DPA simply by hiving off the physical acts of direct marketing into another company under their effective direct control, as appears to be the case on the evidence before us in this case, and with no other source of income. The penalty amount of £70,000 on the evidence before us was carefully considered and arrived at by the Respondent. Her reasoning remains sound. In all the circumstances of this appeal it is in our view reasonable and justified in the circumstances.

[48] For the reasons given above we find that the appeal should be dismissed in its entirety, and the requirement set out in the Enforcement Notice shall come into force/continue in force as from the expiration of the date of and subject to the Decision of any appeal of this decision.

Brian Kennedy QC

Date: 3 June 2019

Promulgation date: 4 June 2019