B R I T I S H G A S T R A D I N G L I M I T E D

-and-

T H E D A T A P R O T E C T I O N R E G I S T E R

(DA98 3/49/2)

Before the Chairman (J.A.C. Spokes QC); Mr David Perrott and Mr Nigel Watson

APPEAL DECISION

By notice of appeal dated 4 August 1997 (later amended), British Gas Trading Limited appealed against an enforcement notice issued by the Registrar on 3 July 1997, pursuant to Section 10 of the Data Protection Act, 1984.

The main part of the appeal raises a number of issues connected with that part of the first data protection principle, which provides that "personal data shall be processed fairly and lawfully". The enforcement notice also related to an admitted breach of the second and third data protection principles by disclosure of data other than for a registered purpose. The circumstances of the breach of the second and third data protection principles were not directly related to those concerning the first data protection principle.

We heard the appeal on 23rd, 24th, 25th, 26th and 27th and the 2nd, 5th and 6th March 1998.

Mr H Carr and Miss J Reid (Instructed by the Data Protection Legal Officer) appeared for the Registrar, who was called to give evidence. In addition, Mr David Smith (now Manager of the Registrar's private sector compliance group), Mr Phil Jones (an Assistant Registrar) and an expert witness, Professor Dawson, were called for the Registrar. The written statements of 12 domestic tariff gas customers were put in evidence before us by the Registrar. The appellant elected not to cross-examine these customer witnesses, although the content of the statements was not formally agreed. Mr S Burnton QC and Mr D Toledano (instructed by Messrs Herbert Smith) appeared for the appellant. Mr Peter Lehmann (Commercial Director), Mr John Kent (Director of Business Services) Mr Simon Kirk (Managing Director of British Gas Energy Centres Limited) Mr A M Reaney (Relationship Marketing Manager), Miss Clare Spottiswoode (Director General of Gas Supply), Mr Colin Fricker (of the Direct Marketing Association – UK) and an expert witnesses, Professor Shaw, were called for the appellant. Witness statements of all the witnesses (other than Mr Reaney) had been exchanged and provided to us prior to the hearing. Copies of documentation had also been provided to us before the hearing and were supplemented during the hearing. The amount of documentation made it appear unlikely that it would all be directly relevant to the issues before us. Accordingly, we indicated that it would be for the parties in the course of the hearing to draw our attention to that part of the documentation that they wished us to take into account. From the documentation before us, we have therefore, in the main, taken account of that part specifically referred to in the course of submissions, or by the witnesses whose evidence was before us.

The enforcement notice dated 3 July 1997 stated (inter alia) that:

"The Registrar is satisfied that the data user has contravened Principle 1, 2 and 3 of the Data Protection Act 1984 and is contravening Principle 1 thereof".

"The Registrar considers that the data user has contravened and is contravening Principle 1 by unfairly and unlawfully processing personal data relating to individual customers for the supply of gas:-

(i) in order to make unlawful disclosures;
(ii) in order to achieve an unlawful purpose; and
(iii) for purpose, which because of the nature of the property or rights constituted by such data and the nature of the relationship between the data user and its customers and the statutory powers under which the data were obtained, are unlawful, or at the very least, unfair, without the free and informed consent of such customers".

"The Registrar considers that the data user has contravened Principle 2 in that it has held personal data relating to individual customers for the supply of gas for the purpose of debt collecting and tracing and …. has contravened and is contravening Principle 3 in that it has used and disclosed personal data about customers held for …. registered purposes …. for the purpose of debt collecting and tracing …. being both unregistered and involving unlawful disclosures". The enforcement notice contained a statement of reasons as required by Section 10(1) of the Act.

In reaching our decision and the findings of fact and conclusions set out herein we have borne in mind that it is for the Registrar to establish that her decision should be upheld.

The appellant was registered as a data user under the Data Protection Act from 19 August 1996. The registered purposes were subsequently amended. The registered purposes relevant for this appeal included general purpose POO4 (marketing and selling, including direct marketing to individuals) and general purpose PO18 (trading in personal information covering the sale, hire or exchange of personal information whether by the data user disclosing personal information or using it on behalf of a third party). By Section 2(2) of the Act, the data protection principles apply to personal data held by a data user. Thus as a registered user holding such data, BGTL was required to comply (inter alia) with the first data protection principle.

Fundamentally, underlying the appeal relating to the first data protection principle is the question of the extent to which, without infringing the provisions of the Data Protection Act, the appellant, (throughout the hearing described as BGTL), is able to process personal data which includes information arising from an agreement for the supply of gas to an individual at identifiable premises where the relationship for that particular supply began at a time when the supplier, or his predecessor, held the monopoly for the supply of piped gas to such an individual. The appellant disputes the Registrar's contention that the personal data should not be processed so as to enable direct mail promoting services or supplies unrelated to gas supply to be sent to such customers without their prior consent. The appeal is thus concerned with important issues relating to data protection and to utility companies. The parties were unable to reach an agreement to resolve the issues of principle involved despite considerable and commendable efforts so to do prior to the service of the enforcement notice.

In reaching decisions on the question whether BGTL unlawfully or unfairly processed personal data it is necessary to take account of the relevant background concerning household gas supply in recent years. By the Gas Act 1972, the British Gas Corporation was established as a

statutory corporation and to the extent set out in Section 29, it held a monopoly on gas supply. We find that any personal data, as defined by Section 1 of the Data Protection Act, held by the British Gas Corporation was transferred to British Gas plc on 24 August 1986, pursuant to Section 49 of the Gas Act 1986, whereby all the property rights and liabilities of the Gas Corporation were transferred to British Gas plc. British Gas plc was at the time of transfer a company limited by shares wholly owned by the Crown. On 28 July 1986, British Gas plc became an authorised public gas supplier, under the provisions of Section 7 of the Gas Act 1986, and thereby held extensive monopoly rights for the supply of gas. The Gas Act 1986 was subsequently amended by the Gas Act 1995. The 1995 Act was the legislative means of establishing a framework for separating the control of the *transport* of gas through pipelines from the control of the *supply* of gas to customers through the pipelines. The supply was intended in due course to be undertaken by licensed supply companies able to compete with each other for customers. By the "de-merger" of British Gas plc, Transco (B.G. plc) became the company responsible for the transportation of gas and BGTL, a subsidiary of Centrica plc, became a gas supplier. BGTL became a licensed gas supplier on 28 June 1996, by grant under Section 7A of the amended 1986 Gas Act. The licence so granted initially gave BGTL a substantial gas supply monopoly. However, as envisaged in the legislative framework, the extension of competition began to be introduced from April 1996 and was successively extended to further areas during 1997 and 1998. The evidence before us established that by 23 May 1998, it is expected that licensed gas suppliers will be free to compete for customers throughout England, Wales and Scotland. Competition so far has resulted in some one million of some 19 million consumers transferring from one supplier to another. We do not consider it necessary to deal in detail with similar provisions introducing competition in the supply of electricity. However, it is relevant to draw attention to two matters. The competition in the supply of gas to domestic customers will have been fully established before that relating to the supply of electricity is expected to begin later this year. In addition, issues on the application of data protection principles to personal data held by utilities other than BGTL are not yet resolved, not least because the Registrar awaits the outcome of this appeal. Accordingly, we derive little help for the purposes of our decision, from the use which other utilities, in particular electricity suppliers, may have made, or be making, or refraining from making, of personal data held by them. Although facts and issues in the appeal are concerned with monopoly powers and the Utilities we keep well in mind that the appeal comes before us, not because of competition in trade, but to reach decisions concerning the data protection principles.

The assets of British Gas plc were subject to division pursuant to the de-merger. BGTL received the property rights and liabilities referable to gas supply, pursuant to a transfer scheme under Schedule 5 of the Gas Act 1995. Information and personal data relating to customers held by British Gas plc was thereby transferred to BGTL. Paragraph 1(2) of Part II of First Schedule to the Data Protection Act provides that "information shall in any event be treated as obtained fairly if it is obtained from a person who – (a) is authorised by or under any enactment to supply it". Accordingly the information transferred was obtained fairly by BGTL. Any data then held by British Gas plc that had derived from British Gas Corporation would have been included in such transfer to BGTL. The supply of gas by BGTL under its licence granted on 28 June 1996, was governed by standard conditions and a deemed contract. The foregoing licence conditions relating to supply to domestic customers contain no express term relating to personal data arising from information provided by or relating to individual customers. Accordingly, we next examine whether the use made of this information is restricted, other than by express agreement between supplier and customer.

The Registrar founds her conclusion that BGTL has and is unlawfully processing data on the basis that statute and other principles of law apply to render it unlawful for a monopoly

supplier to process the personal data of gas customers whenever a purpose of the processing is to enable direct mail to be sent to gas customers to promote services or supplies, other than those related to or connected with gas supply. The issues of unlawfulness and unfairness are related, but we first set out our conclusions on unlawfulness and then turn to those on unfairness.

The Registrar submits that as the British Gas Corporation was created by the Gas Act 1972, it is accordingly limited to the powers provided by that Act. These it is submitted authorised the corporation as a gas undertaking and would not have permitted the corporation to carry out other activities and would not have permitted the use of customer information for promoting services or supplies unconnected with gas. Thus, it is said that British Gas plc would be under the same restraint in relation to information including personal data which it received from the Gas Corporation. Furthermore, when information including personal data which British Gas plc held, including that inherited from the Gas Corporation, was transferred on de-merger, BGTL would, it is said, be under the same restraint in its use that applied to its predecessors.

First, therefore, we examine the relevant statutory powers of the Gas Corporation. The relevant provisions of the Gas Act 1972, stated by Section 2 "(1) it shall be the duty of the Corporation to develop and maintain an efficient, co-ordinated and economical system of gas supply …. and …. (2) …. the Corporation shall have power to carry on all such activities as it may appear to them to be requisite, advantageous or convenient for them to carry on for or in connection with the discharge of their duty ….". Section 6(1) provided that "…. the Corporation shall have power to do anything, and to enter into any transaction (whether or not involving …. the acquisition of any property or rights or the disposal of any property or rights), which in their opinion is calculated to facilitate the exercise or performance of their functions under any other enactment other than this subsection (including any enactment passed or made after the passing of this Act), or is incidental to or conducive to the exercise or performance of any such function". By Section 48, "functions means duties and powers". No provision in the Act expressly prohibited the use or disclosure of customer information whether by itself or its subsidiaries, but Section 6(1) provided that "nothing in (the) provisions shall be construed as authorising the disregard by the Corporation of any enactment or rule of law". In addition, by Section 7 the Secretary of State had power to "…. direct the Corporation to discontinue any activity either wholly or to a specified extent, not to extend any activity or not to extend it beyond specified limits ….". We conclude that it would have been within the statutory power of the Gas Corporation to use customer information and disclose customer information to third parties, such as subsidiaries, provided in their opinion "it was incidental to or conductive to the exercise or performance of" authorised functions, including any extension of function provided by later enactment. It follows that so far as powers are concerned we conclude it would have been within the power of the Corporation, for example, to use direct mail enclosures with gas bills promoting unrelated goods and services, provided only that the Corporation genuinely was of the opinion that it was incidental to statutory functions. If we had found that the British Gas Corporation had done acts beyond its statutory powers then we would, for the purpose of deciding if there had been a breach of data protection principles, have regarded such acts as unlawful. We emphasise, however, that the existence of such a power does not answer the question of fairness in processing personal data, nor would it have prevented the Secretary of State from directing the Corporation to desist from such direct mailing if, for example, he had concluded it was otherwise undesirable.

British Gas Public Liability Company was incorporated on 1 April 1986. British Gas Trading Limited was incorporated on 6 July 1995. Both companies are, we accept, unlike other corporate bodies to the extent that they are fulfilling public purposes as utilities providing the

public with energy. Copies of the Memorandum and Articles of Association, showing customary corporate wide powers, were before us. We conclude these powers are, unless there are other constraints, sufficient to permit the purposes with which we are concerned in this case. We next consider whether the terms of the Gas Act 1986, impose a restriction upon customer information when held by British Gas plc or BGTL.

Section 42 of the Gas Act 1986, provides that (inter alia and subject to exceptions) "no information with regard to any particular business which – (a) has been obtained under or by virtue of the provisions of this part and (b) relates to the affairs of any individual or to any particular business shall, during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business". By Section 42(5) contravention of the section shall be an offence. The Registrar submits that Section 42 applies to British Gas plc and further that as BGTL is a licence holder under Section 7A of the Act, the Section applies to BGTL also. We accept that Section 42 so applies. The Registrar further submits that Section 42 imposes restriction upon all the customer information and personal data. Customer information and personal data was transferred from the British Gas Corporation to British Gas plc under Section 49 of the 1986 Act, which provided for the besting of the property of the British Gas Corporation in a company which on the transfer date was "a company limited by shares which is wholly owned by the Crown" and was nominated by the Secretary of State. It is accepted by the parties that British Gas plc thereby succeeded to the "property, rights and liabilities of the Corporation, whether or not capable of being transferred or assigned by the corporation". Section 49 is in Part 11 of the Act, whereas Section 42 is in Part 1. Section 42 applies to information obtained "under or by virtue of this part". Accordingly, we conclude that Section 42 does not apply to information transferred to British Gas plc under Section 49. The Registrar further submits that if Section 42 does not apply to customer information obtained by British Gas plc from the British Gas Corporation, it nonetheless applies to information thereafter obtained by British Gas plc and BGTL in the course of carrying out their functions as licensed gas suppliers pursuant to licences granted under Section 7 or 7A of the Gas Act 1986 (as amended) because Section 7 and 7A are in Part 1 of that Act. We consider that Section 42 relates, for example, to information obtained under Section 33 (see Section 33(3)) and under Section 38 of the Gas Act 1986. Section 38 relates to the provision of information, or the production of documents, which could be demanded from individuals or businesses and where failure to comply without reasonable excuse was made an offence. Even if Section 42 applies to the generality of customer information received by British Gas plc or BGTL, it restricts disclosure, not use. Accordingly, while it would prevent disclosure to third parties, it would not restrict use by BGTL. Moreover, the restriction on disclosure in Section 42 applies only to disclosure of "information with regard to any particular business". Accordingly, we conclude that Section 42 does not restrict the use or disclosure of information concerning the generality of domestic gas customers. Section 63 enabled the Secretary of State to give directions to prevent unfair commercial advantage being taken of information furnished during licence negotiations. Section 35, which contains provision for the publication of information or advice, provides in Section 35(2) "…. the Director shall have regard to the need for excluding, so far as is practicable – (a) any matter which relates to the affairs of an individual, where the publication of that matter would or might, in the opinion of the Director, seriously and prejudicially affect the interests of that individual ….", Thus the Gas Act 1986, while providing these particular restrictions, has in contrast no provision that seeks to restrict the more general use or disclosure of information. Thus we do not find any restriction imposed on the use of personal data by virtue, either of limitation of powers in the corporate body supplying gas, or by way of express statutory restrictions in gas legislation, which would render it unlawful, within the meaning of the Data Protection Act, for BGTL either to use the generality of customer information, or disclose such information to wholly owned subsidiaries

in the same group, for the purpose of promoting non-gas related services and supplies by direct mail. We thus turn to consider whether other provisions of general law render such use unlawful.

The Registrar submitted in the course of the hearing that there was an implied term in the arrangement for the supply of gas by BGTL to its domestic customers in the terms set out in a document provided to us as follows: "That BGTL shall not, without the consent of its individual customers, process, use or disclose personal data relating to those individuals and obtained BGTL or its predecessors in business by reason of their position as monopoly gas suppliers, for any purpose other than the supply of gas or gas related products and services". We were referred to the test in B.P. Refinery v Hastings [1978] 52 A.L.J.R. 20 at page 26 "…. for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it: (3) it must be so obvious that "it goes without saying": (4) it must be capable of clear expression: it must not contradict any express term of the contract". In the context of arrangements for the supply of gas provided under a statutory framework by means of a deemed contract and with express tariff terms relating to such supply, and in particular because those arrangements were effective without any implied term, we do not find that there was any implied term of the type urged by the Registrar.

The Registrar submits that the processing of the personal data is unlawful because its use and disclosure amount to a breach of the duty of confidence. We accordingly heard submissions on the scope of the duty of confidence, whether arising pursuant to contract or otherwise. We consider that no question of a breach of confidence can arise when British Gas plc provided personal data to BGTL, since it was provided, as we have observed above, by or under statutory provisions. While there is no general law of privacy, it is clear that there are a number of special relationships under which a duty of confidence may arise. There are many instances where use or disclosure without consent will amount to a breach of a duty of confidence. Relationships with employees, with trade secrets, with doctor and patient, with banker and customer may in law restrict the use that may be made of information, or its disclosure. There are we consider undoubtedly similar restrictions on confidential information that is in the possession of public bodies, including that received from others, held for the purposes of exercising public powers and duties. Examples include information relating to crime, tax, benefits, health and welfare. We were referred to a number of authorities including R v Chief Constable of the North Wales Police ex parte AB [1997] 4 AER 691 (upheld by Court of Appeal 18 March 1998) and Attorney-General v Observer Ltd and others [1990] 1A.C. 109 and to passages from the speeches I the latter decision which included, Lord Keith at page 255 "The law ha long recognised that an obligation of confidence may arise out of particular relationships", Lord Griffiths at page 267 "…. a remedy to protect people from being taken advantage of by those they have trusted with confidential information", Lord Goff at page 281, "…. the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person …. in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others". The duty of confidence may in appropriate situations inhibit use as well as disclosure. The information and personal data, with which we are concerned is that arising from a relationship between supplier and customer, which relationship began when the supplier held a monopoly to supply piped gas to that customer. This includes information and personal data provided to BGTL by British Gas plc. The question for us is does this information and personal data fall into the category of that to which a duty of confidence applies, so that it may not be used or disclosed without consent?

We consider that a duty of confidentiality is unlikely to arise generally from the ordinary relationship of the supplier of goods and services and his customer, although there may be special circumstances in which this might arise with particular customers. The relationship of monopoly utility supplier and customer may be one of considerable power for the supplier, but the circumstance that an individual has a supply of piped gas at his home does not appear to us to fall into the category of information that gives rise to a duty of confidence, unless there are special additional features relating to a particular individual or his address. An obvious example, intended only as an example, would be the unjustified disclosure of the password provided to an elderly or disabled gas care customer. The fact, therefore, that a named individual is a customer for the supply of gas provided by a monopoly supplier at identified domestic premises, consumes particular quantities of gas and has chosen a particular method of payment does not in our view have about it such a character that as a general proposition it can be said to impose on the holder of such information a duty of confidentiality so as to render it unlawful to use the information, or to disclose such information to a company wholly owned within the same group of companies, for purposes of promoting sales of goods or services other than those related to gas. We emphasise that such a finding in our view does not answer the question whether personal data founded on such information can in those circumstances be fairly processed.

As Lord Hoffman observed in R v Brown [1996] 1 A.C. 543, at page 557, "English common law does not know a general right of privacy …. But there have been some legislation to deal with particular aspects of the problem. The Data Protection Act 1984 …. is one such statute". This passage in our view brings us to the heart of this appeal as does the consideration of the "statutory purpose of protecting personal data from improper use" (see Lord Goff at page 550 in R v Brown). Was the processing in all the circumstances unfair? It is here that due weight must be given to the fact that an individual in order to obtain a supply of piped mains gas had no choice but to turn to a supplier who held a monopoly and to provide to that supplier his name and address. Inevitably, also it would enable the supplier to gather information including the chosen method of payment and quarterly consumption figures. Such information, when processed, particularly when combined with personal data from other sources, enables a "profile" of an individual to be built up of use in marketing. The differences between the parties on this aspect is clear. Mr Lehmann, a BGTL and Centrica plc director in his evidence said he thought it unfair that BGTL, should in the competition for gas sales which will soon have fully arrived, be prevented from using this personal data from long-standing customers. Having made our assessment of this part of the evidence we are satisfied that Mr Lehmann would not wish to put BGTL's reputation at risk by processing any personal data in a manner which appeared to him to be unfair. The Registrar is of the opinion that it is unfair to process this personal data for promoting goods or services, of a type that would not have been obvious to the customer when he agreed to take a supply of gas from a monopoly, unless it can be shown that the customer has agreed to such additional processing. The non-obvious purposes at issue include insurance, financial services, electricity and non-gas related goods or services generally. Although the issues of lawfulness and unfairness are necessarily linked, we are satisfied that the Registrar did conclude that the processing was both unfair and unlawful before serving the enforcement notice. Discussions on the disputed issues took place between the parties in an effort to avoid the service of an enforcement notice, but agreement could not be reached. Matters were thus brought to a head by the circulation of a leaflet by BGTL in 1997.

The database used to process the personal data to enable the circulation of the leaflet referred to above was the BGTL tariff gas bill database. The tariff gas bill database (sometimes called the supply database but herein called "the TGB database") contained the records of some 19 million current customers of BGTL and is the system used for billing customers. It is used

throughout the working day, updated regularly and is referred to by BGTL staff to deal with queries from customers. BGTL have other databases, the material one for our purposes is the marketing database. Access to the marketing database is limited to about 20 staff, primarily marketing specialists. It contains information available to BGTL from third parties, including other companies in the Centrica group. It includes information about those who are not, but it is hoped may become, customers. It also contains information relating to customers obtained from the TGB database. The information coming from the TGB database to the marketing database is regularly updated at approximately six weekly intervals. Thus at any one time at least part of the personal data relating to a particular individual will be held on both databases. There is information on the marketing database as to individual names and addresses, whether individuals are BGTL customers or not and whether there is a supply of piped gas available at the premises. The TGB database provides information to the marketing database on whether a customer has opted out from receiving direct mail or whether there is a registration with the Mail Preference Service. The TGB database provides information to the marketing database on the method of payment used by individuals, for example payment by direct debit, or payment by cheque direct to BGTL, or via a bank or Post Office. It provides information on whether money is owed, or if there is a current dispute thereon, and some limited information about recent communications from the customers or a disconnection or warning of disconnection. The purpose of holding information concerning disputes on the marketing database is to prevent direct mail being sent to persons with whom there is a current dispute. The TGB database contains customer gas consumption records for about two to three years (other than that specifically required to be kept longer for tax and VAT purposes). The TGB database provides information on customer gas consumption to the marketing database, but that which is held on the marketing database is limited to the consumption figures for approximately the most recent four quarterly periods. Customers may register with the gas care register, which is a register containing information on the elderly and disabled. The data relating to gas care registration is held on the TGB database and is also provided to and held on the marketing database. By processing personal data held on the marketing database it is possible to "target" particular customers, that is select from among all the customers those who are to receive direct marketing mail based on particular criteria, such as gas consumption or methods of payment. One aspect of such selecting is that it is hoped the direct mail will go to those who are most likely to respond to the particular promotion and thus reduce advertising costs and at the same time reduce any inconvenience customers might otherwise be caused by receiving communications of no interest to them. Another aspect of such selection is that it might disclose personal data directly to third parties who send out the mail themselves or, even indirectly, where the mail is sent out on behalf of advertisers, who will know the basis of selection and each customer who responds will reveal that he falls within the selected criteria. BGTL currently makes clear to customers in "targeted" direct mail, the basis of selection.

Between March and June 1997, BGTL despatched by post, quarterly gas bills to some 19 million customers. In the envelope with the bill was enclosed a copy of the leaflet referred to above. It was a double folded leaflet with a coloured front page entitled "Your Data Protection Rights – the right to choose the information you need". No direct marketing promotions were included in the envelopes. The leaflet stated (inter alia) "we would like to write to you from time to time about our current range of products and services, as well as those we will be developing in the future. Also, we would like to send you information about products and services offered by other reputable organisations. In addition, we would like to pass on information about you to the other companies within our group in order that you may receive information about their products and services directly from those companies". A part of the leaflet stated "If you do not wish to receive information from us about products and services which we think will be of interest to you or do not consent to our passing information

about you to other companies within our group, please complete and return the coupon below to:" A tear-off page contained a freepost address and a freephone telephone number and in addition the address of the Data Protection Registrar. The leaflet was in clear terms, although there was no reference to the leaflet on the gas bill itself. In order to despatch the bills with the leaflets, which would be inserted automatically in envelopes, BGTL processed personal data held on the BGT database. Bills could be inserted automatically in envelopes, but in order to insert a leaflet with a bill differing processing would be necessary, than if merely a bill was to be sent. The Registrar relies on the sending of such a leaflet to establish unfair and unlawful processing, because the processing was intended to relate to promoting services and products unrelated to gas, and BGTL had in mind to promote the sale of electricity when competition in the supply of electricity enabled it to do so. At the date these leaflets were sent we find that BGTL had not sent direct mail promoting these wider products and services. Indeed as Mr Carr put it in his opening speech "the relevance of the leaflet is that it reveals certain of BGTL's intentions in respect, we say, of processing".

The Registrar relied on the sending out of the leaflet to establish that unfair processing had taken place. Section 10(1) of the Data Protection Act 1984 provides that "if the Registrar is satisfied that a registered person has contravened or is contravening any of the data protection principles he may serve him with a notice ("an enforcement notice") ….". The Act does not empower the Registrar to serve an enforcement notice where there has not yet been a contravention. The leaflet stated that it was proposed to send advertising material unless objection were made. Furthermore, the purpose of the leaflet appears to have been to give customers the opportunity to state that they did not wish to receive marketing material. Despite the fact that the Registrar submits that sending the leaflet was insufficient to establish whether those who did not respond were consenting to receive direct marketing, it would we consider be a paradox if a breach of a data protection principle were said to have arisen by the very leaflet that gave individuals the opportunity to have their names suppressed from a marketing list. The specific processing to achieve distribution of this leaflet could not in our view be said to be unfair processing, even if its content indicated that a firm intention had already been formed to send out marketing material promoting non-gas related supplies and services. Mr Carr when confronted with what we saw as the possible difficulty in relying on the leaflet as a breach of the first data protection principle, submitted that the evidence established that other processing had occurred before the service of the enforcement notice which was unfair. This other processing had been carried out to enable that long before the enforcement notice was served in July 1997, personal data had been processed on the TGB database and extracted for the purpose of entering it into the marketing database. It was at a time when an intention had already been formed by BGTL to use the marketing database for the direct marketing of non-gas supply items. We find that there was such processing beginning at the latest by early 1997. When the data was transferred from the supply database to the marketing database it was unlikely to have been in readable form and thus it could be argued that it would not have been "extracting the information constituting the data" (see: Lord Hoffmann R v Brown [1996] 1 AC 543 at page 560). The personal data comprising customer information would undoubtedly, however, have been amended, augmented, or rearranged on the marketing database and thus "processed" by BGTL within the meaning of Section 1(7) of the Act, prior to the service of the enforcement notice. Further, we conclude that there is sufficient evidence that there was also processing on the TGB database, when for example customer consumption figures limited to a shorter period than the two or three years figures held on that database were amended or rearranged to transfer data to the marketing database. The evidence establishes that the data was updated on a six weekly basis and we are satisfied that when this processing occurred BGTL had already the firm and fixed intention and purpose that this processing was to enable its use and disclosure for a wide range of gas and non-gas related direct marketing of supplies and services. The evidence before us, the correspondence

and discussions with the Registrar's department, and the wording of the leaflet issued in March 1997, establish that such an intention and purpose had been formed certainly no later than March 1997 and that the periodic processing to which we have referred thereafter continued to take place. From such intention and purpose, however, we exclude the promotion of the Goldfish credit card. This was not a venture solely controlled by a wholly owned subsidiary of Centrica plc, but was a joint venture between BGTL and a bank. The evidence we heard and the documentary evidence before us established that for the direct marketing of the Goldfish credit card no use was made of personal data obtained from gas supply customers. By not processing data originating from the TGB database, but by using information from electoral rolls and from personal data held on a database controlled by another subsidiary of Centrica plc, significant extra costs and a lower success for the marketing resulted. We accept that the most accurate record of customers will be the TGB database. Changed circumstances such as deaths and household moves are likely to be notified promptly to domestic utility suppliers. However, where through necessity, or choice, a data user processes data based on the newest available list from a particular source, such as an electoral roll, we find nothing in principle that is likely to render the processing unfair, merely because a different list based on a different criterion might in respect of some on the list be more up to date. We do, however, regard additional costs as a material consideration to take into account when hereafter assessing fairness.

The appellant submits that by Section 14(2) of the Act, the Tribunal may review any determination of fact on which the enforcement notice in question was based. Thus, so the argument runs, if we reject the factual basis relied on by the Registrar for the issue of the notice, we should allow the appeal. We reject this argument. Section 14(1) of the Act provides that if the Tribunal considers the notice was not in accordance with the law or the Registrar should have exercised her discretion differently, the Tribunal shall allow the appeal "or substitute such other decision or notice as could have been made or served by the Registrar". We are satisfied that the Registrar could have served an enforcement notice based on the processing of personal data in the circumstances set out above, which occurred well before the service of the enforcement notice.

The appellant submits that as the data was fairly obtained and the use for marketing was a registered use no question of unlawful or unfair processing arises for consideration under the first data protection principle. It is said R v Brown (supra) shows the sequential approach that should be followed, namely obtaining, processing, holding, using and disclosing. While accepting the decision in CCN Systems Limited and CNN Credit v Data Protection Registrar, a 1991 Data Protection Tribunal decision, the appellant seeks to distinguish that decision claiming that processing will only be unfair if carried out in a manner that is unfair. The CCN decision was based on the fact that inappropriate extra data concerning others living at the same address was processed, not upon the use thereafter made of that processing. In the instant appeal, it is said, no appropriate data was processed for the purpose of marketing, which was a registered purpose. The processing carried out by BGTL would be the same processing whatever the content of the marketing leaflets. Thus so the argument runs the Registrar's complaint is based upon the unfair purposes for which the data was to be used and not upon the processing. It is said that processing will only be unfair if carried out in a manner that is unfair and not where the processing is carried out appropriately, but for an unfair purpose. However, the Registrar may only refuse registration on the very limited grounds set out in Section 7(2) of the Data Protection Act. The Registrar could not have refused registration for marketing as such, since processing for marketing gas and gas related products would be fair. We consider that the first data protection principle requires us to look at the processing and decide if it is established that processing was unfair.

We are satisfied that whether the purpose of marketing is registered or not we are required to examine the processing carried out to decide if there was a breach of the first data protection principle. We do not find the decision in R v Brown (supra) inconsistent with that approach. Unfair processing is not a criminal offence under the Act and in any event the operator of the computer in that case was not alleged to have been a knowing party to any wrongdoing. We consider that if, for example, excessive data was held in breach of the fourth data protection principle, or inaccurate data in breach of the fifth data protection principle, this would not absolve the Tribunal from examining whether when particular processing was undertaken using excessive or inaccurate data it was unfair, merely because there had been a breach of some other data protection principle. Furthermore, as the Registrar stated in evidence, in judging "fairness" it is not possible to examine it in a vacuum. "I just do not see how I …. can undertake …. looking at fair and lawful processing without having a view to the intended or actual purpose or use to which the processing will be put". It is, we consider, necessary to look to see what was intended when the processing took place and for what purpose. The fact that processing when undertaken could be used for a registered purpose does not in our view render the processing fair when it is established it was not in fact carried out for a purpose to which a data subject had agreed. For example, if a data user obtained information from a data subject for one agreed purpose and then later deliberately processed the personal data derived from the information for a purpose he knew would not be agreed it would in most circumstances be likely to amount to unfair processing and a breach of the first data protection principle.

The appellant drew attention to other sections of the Data Protection Act, in particular to Section 32 and 33 and submitted that there would be no necessity for these exemptions, if unfair processing was an appropriate consideration in the circumstances set out. These Sections, however, relate to a number of specific exemptions from registration, or subject access, in limited circumstances. Thus we do not find them of assistance in considering fair processing by data users who are registered.

The correctness of serving the notice, therefore, depends on the question whether it is established that the processing was unfair. We now turn to consider this issue. An underlying purpose of the data protection principles is to protect privacy with respect to processing of personal data. We do not overlook the fact that the ability to process personal data, including that for purposes of trade and commerce, has substantial benefits or the general public. Fairness, undefined n the Act, requires us to weigh up the interests of data subjects and data users. In part they may not coincide, but in part they may, for instance, careful selection of those receiving direct mail may be more beneficial for both advertiser and recipient. Even without such "targeting" it may work to the benefit of both that information about new produces and services can thereby be provided.

Many of the background facts were not in dispute and we set out our findings. From time to time the Registrar, pursuant to her powers and duties relating to data protection issues guidance to data users. Copies of such guidance were in evidence. This included guidance to Utilities supplying domestic customers with gas, electricity and water. A guidance note "Data Protection for Direct Marketeers" was issued in 1995. The detailed note included reference to monopoly suppliers and the need to give individuals the opportunity to elect not to have their details used or disclosed for uses beyond the primary purpose for which the information was provided. The note also referred to consent, to confidentiality, fairness and lawfulness. On 1 July 1996 the Registrar's office sent BGTL a copy of "The Requirements Of Fairness And The Use And Disclosure Of Customer Information By Utility Companies". As to the need to provide individuals with a notification of the intention to make particular uses or disclosures of personal data, the note included the following: "However, it is not always possible for utility companies to provide the necessary notification before or at the time they first obtain customer

information …. In other cases the intention of the utility company to hold, use or disclose customer information for a non-obvious purpose will not be settled until some time after information has been provided. In these circumstances, the Registrar considers that the notification to the customer should be accompanied by an opportunity to restrict the holding, use and disclosure of information to the supply purpose and that a positive indication of consent to these secondary activities is necessary. In such circumstances a "mere" opportunity to "opt-out" would not be sufficient to satisfy the requirements of fairness". In a Guidance Note dated March 1997, concentrating on the issue of unlawfulness, the Registrar stated "…. it is the Registrar's view that any uses which would involve the processing of customer data for purposes other than the supply of gas will be outside (the gas supplier's) powers and therefore unlawful. The processing of such data for such purposes would be in contravention of the First Data Protection Principle ….". In addition the Guidance Note specifically referred to Section 42 of the Gas Act 1986 and stated "It is the Registrar's view that any disclosure of customer data contrary to Section 42 which involves the processing of personal data will be in contravention of the First Data Protection Principle".

Copies of the British Codes of Advertising and Sales Promotion were in evidence. The Code included the advice "before any information (collected from consumers) is disclosed to any other company for the first time, consumers should be given the opportunity to object. If after collection, it is decided to use information for a purpose that is significantly different from the one originally intended, consumers must be advised and given thirty days to object". (Code paragraph 53.4).

One of the organisations that issues guidance to its members if the Direct Marketing Association (UK), (herein referred to as "the DMA"). The DMA, founded in 1992, is a trade association for direct marketeers. Members are required to comply with the DMA code of practice. A copy of the current code, providing self-regulation and adjudication, issued in 1997, was in evidence. It contains a similar provision to that in the code of advertising referred to above. As to a change to a significantly different use, a letter from the Data Protection Registrar's office to the DMA dated 5 August 1996, expressed the view that there might be circumstances (for example financial services) where "advising individuals of the new purposes and allowing 30 days for their objections is unlikely to be sufficient to ensure fair and lawful processing". In addition, paragraph 4.14 of the DMA code provides "If advertisers make host mailings (ie enclosing third party material in their mailings) on the basis of selective criteria they must advise their customers of this, otherwise individuals might divulge personal information to third parties without realising they were doing so". DMA members are required to use their databases so as not to send direct mail or telephone individuals, other than customers, who have registered their wish not to have unsolicited approaches with the Mailing Preference Service and Telephone Preference Service. BGTL is a member of the DMA. Mr Colin Fricker, the Direct Marketing Association's director of legal and legislative affairs, drew a distinction between monopoly suppliers (such as public utilities) and others and the need for suppliers to provide an opportunity for customers to "opt-out" from being sent direct mail for a significantly different purpose than that contemplated when they first became customers. He explained the difficulties that would arise for businesses in general if having evolved a new use, not obvious to the customer initially, they had to obtain positive consent. Many customers in his view would simply not respond and such marketing would thereby be impossible. In relation to BGTL his view was that if it was unable to use its own database for direct marketing it would be able to obtain much information from other databases containing considerable detail about households and he could see no unfairness in BGTL's approach to direct marketing. However, Mr Fricker also told us the code is intended to be of general application. "If there are more particular requirements laid down in any other legislation or other codes then we would expect to see other codes to be complied with". The DMA had

accepted in discussion with the Registrar, albeit reluctantly, that monopoly utilities should be treated somewhat differently on the ground that data subjects had no alternative but to do business with the supplier. In reaching our decision, we have taken account of the guidance and codes which we have referred to, but they do not absolve us from reaching our own conclusions in the light of all the evidence.

Approximately 74,000 customers responded to the leaflet by electing to opt-out. Some 61,000 of these did so by returning the tear-off portion of the leaflet and some 13,000 by telephoning. Including the 74,000, together wit customers who had previously elected not to be sent direct mail by BTL (or its predecessors) there are now some 150,000 customers who have opted-out. In processing personal data, that relating to customers who have opted-out is identified and their details suppressed, so that they are not circulated with direct mail, when sent their quarterly bills, nor do they receive other direct mail from BGTL. In addition, BGTL identifies customers on the database who are registered with the Mail Preference Service, as not wishing to receive direct mail. Although the Mail Preference Service is primarily concerned to prevent direct mail from being sent by member organisations to those who are not their customers, BGTL processes the personal data in effect as if a Mail Preference Service registration was an opt-out notified to them by their customers. Accordingly, some 200,000 or more BGTL customers registered with the Mail Preference Service will not receive direct mail from BGTL. BGTL currently offers an opt-out from direct mailing when a new product is offered to customers by direct mail.

The leaflet produced some 100 complaints to the Data Protection Registrar; the highest number of complaints received relating to one item. In addition some 38 complaints were made to BGTL, some of these complainants had also complained to the Registrar. If any additional complaints were made by telephone to BGTL other than are recorded they would have been very few. Miss Spottiswoode knew of no complaints made to the Office of Gas Supply (Ofgas), concerning this issue. In our view the precise number of complaints is not of much assistance to us in reaching a decision. The evidence, including that of the expert witnesses, established that few who are dissatisfied complaint and that data protection issues are not matters of major concern for the vast majority of the general public. Many do not read direct mail and more will not heed its content. The Act does not refer specifically to complaints. Certainly the complaints are very small in relation to the distribution of some 19 million leaflets. Thus there were complaints, significant from the Registrar's standpoint, although we accept that her decisions are based on her own judgment, not that of complainants. The reference to the Data Protection Register in the leaflet and the publicity surrounding its distribution, in part at least we consider added to the number of complaints. We accept the Registrar's evidence that publicity relating to data protection issues unconnected with this appeal has not always led to complaints from the public. We consider that in part the reason public concern with data protection issues is not higher is a measure of the effectiveness of the control and influence exercised by the Registrar over the years to encourage data users to comply with data protection principles. In judging fairness, therefore, we take into account that while there were complaints they were few in number. It is no more than a factor which we take into account. The appellant suggested that the Registrar should have commissioned surveys and opinion polls, but we find that there are annual studies and wide consultation with representatives of data users and consumer groups from which information on public opinions relevant to data protection issues is obtained. Having set out these facts we now continue our consideration of the fairness.

In order to decide whether the processing was unfair, we take into account our above findings on the issue of unlawfulness and we have well I mind that on this issue, as others, it is for the Registrar to establish that the decision now under appeal should be upheld. We consider that

there is a significant distinction to be made between a utility supplying what in effect is an essential for individual domestic customers and the generality of commercial companies. While BGTL and its predecessors held a monopoly in relation to the supply of piped gas to the overwhelming majority of domestic customers, any individual who wanted to have a supply of piped gas had no choice but to provide a name and address and permit the supplier to accumulate additional information, for example their gas consumption and method of payment. It could be argued that nobody was obliged to have piped gas, either from a monopoly or from one or other competing utilities, but that is to ignore the reality that for many both mains electricity and piped gas are necessities. Furthermore, our attention was drawn to the authorities that the utilities, even as limited companies, are under a supervisory system imposed by the State and are to this extent to be looked on as performing public functions, unlike conventional commercial undertakings. (See: Foster v British Gas [1991] 2 A.C. 306 and Griffin v South West Water Services Limited [1995] 1RLR 15). In holding a licence under Section 7A of the Gas Act 1986, as amended, BGTL performs a public service as a gas supplier under the control of the State. We consider that in those circumstances for the supplier to process personal data to disclose to third parties so that the third party could use the information or process the personal data, for marketing purposes, would be unfair processing unless done with the consent of the data subject.

The evidence establishes that Centrica plc has a number of wholly owned subsidiaries. These subsidiaries are in law separate legal entities (see the Court of Appeal decision in Bank of Tokyo Ltd v Karoon [1987] 1 A.C. 45). Nonetheless it is reasonable to take into account that activities now carried on by separate subsidiaries, were previously carried on by one company. The fact is, however, that Centrica plc has chosen or been obliged to have a number of subsidiary companies. We consider that there is a distinction to be made between use by BGTL and disclosure by BGTL to third parties, albeit to co-subsidiaries, all wholly owned by Centrica plc. Furthermore, the fact that disclosure is inhibited will not prevent BGTL processing personal data itself (without disclosure) so as to send out, for example, the advertising material of a third party providing that it is not for marketing or promoting suppliers or services of a type which otherwise renders the processing unfair. BGTL asserts that it does not wish to rent or sell lists of customers to third parties, but the evidence before us indicated that work done by BGTL for another Centrica plc subsidiary would require accounting adjustments, so that gas supply was not providing a cross-subsidy to other activities within the Centrica plc. To the extent that any disclosure of BGTL customer data to another subsidiary required an accounting adjustment this would in effect be a rental of customer information.

We turn now to consider the scope of processing personal data, which BGTL wishes to undertake for itself, or on behalf of third parties. There is no dispute between the appellant and the Registrar that this may be done for purposes relating to gas supply. The issue is, without consent by the customer, may it include marketing or promoting a range of supplies and services extending beyond that relating to gas supply, sales of related goods or servicing. BGTL submit that it is not unfair to send out leaflets to their own customers when they have been given an opportunity to opt-out, such as that contained in the leaflet of March 1997. The Registrar holds the view that any intended use must be clear to the data subject at the time at which the information is collected by the data user, unless it can be shown that there has been subsequent consent and that consent cannot be inferred from a lack of response to a circular offering an opt-out. It can be said that a data subject who receives an unwanted leaflet merely has to ignore it or throw it away. However, this overlooks the fact that his personal data has been processed. It is the act of processing that has to be examined in order to decide if it is proved that the processing is shown to have been unfair.

In relation to long-established customers for the supply of gas, we consider that the supplier could have made use of personal information fairly processing the personal data derived from it for marketing gas related products and services being purposes that reasonable customers would have expected, including the promotion of energy conservation. we conclude that disclosing their personal data to third parties would not be expected, nor for example, processing their personal data to promote items as far removed from gas as banking, mortgages, or health, household or endowment insurance. Professor Shaw, an expert witness called for the appellant, told us "…. if it is similar to stuff they have seen previously, they are not surprised. If it was way way off target, they would be surprised. They would not be particularly surprised to see, say, electricity type mailing and they are well aware, in fact, now that lots of companies are diversifying, be it banks or whatever". BGTL submits that even if information was provided by customers it was not provided for a narrow limited purpose. Customers would at all time have expected their information, provided by the customer or arising from the relationship of supplier and customer, to be used for a wider range than the supply of gas and what they have always done is to use such information for marketing and that is all they wish to do now. We conclude that there is a distinction to be made between what can generally be described as gas-related marketing and wider uses. Thus, we consider that processing, without consent, for wider uses than could reasonably have been expected from a monopoly gas supplier and which are not obvious uses, is unfair. In one sense customer information is constantly being updated, but we consider that where the relationship has begun many years ago the fact that it began as an agreement between monopoly utility and customer remains a fact in the relationship. Expectations as to the scope of goods and services to be marketed by a particular supplier may also change from time to time. These are factors to take into account when examining whether processing was unfair in the light of the facts and circumstances existing at the time when the enforcement notice was served.

We find that at least some gas suppliers showrooms have for a number of years at least stocked a range of goods beyond those directly related to gas. In balancing fairness we take account of the data user as well as the data subject. In doing this we conclude that it would not be unfair for BGTL, not to disclose, but as the data user, to process data on behalf of another subsidiary of Centrica plc to promote such goods as are from time to time stocked for retail sale in shops and showrooms of such subsidiary. Currently this is British Gas Energy Centres Limited. Furthermore, we do not consider that it would be unfair to process such personal data for this limited purpose whether the marketing is part of a communication from BGTL, or a separate (Solus) communication on behalf of the third party. We have looked to see if we should go further in permitting BGTL to process data. We have taken into account that the BGTL monopoly in gas for even the smaller domestic consumers has been reducing and will end in May 1998. There will in due course be competition in the supply of mains electricity to domestic customers. Gas and electricity are both sources of energy and these suppliers compete in the supplying energy for domestic purposes, most notably for heating and cooking. In these circumstances we do not consider that BGTL would be unfairly processing personal data were it to do so for the purpose of offering an electricity supply as a part of a scheme or incentive to a customer to remain as a gas customer. Accordingly we do not find that BGTL unfairly processed personal data to send letters to customers in November 1997. An example of such a letter sent on behalf of Scottish Gas to a direct debit customer was in evidence. It referred to electricity and gas and a purpose of this letter was to retain gas customers and to supply gas.

Our above decisions on what would be fair processing is on the basis that BGTL will continue to offer customers an opportunity to "opt-out" from receiving direct marketing mail, or other promotions, should the customer wish to do so. Further that where any marketing or promotion is undertaken on behalf of a third party based on selected criteria, the data subjects

so circulated are sufficiently informed of the basis of selection. In this way they will be aware of what information arising from the relationship of gas supplier and customer may be disclosed to a third party if they respond to the marketing or promotion. This is commonly called "indirect disclosure". BGTL's current practice is to make customers aware of the basis for selection. We have taken account of the fact that public expectations may change and we accept that the Data Protection Registrar will, as her evidence establishes, take account of such changes as may occur in the future. Increasingly consumers are likely to become aware of the more sophisticated use that direct marketeers can make of personal data.

We have also taken account of the evidence of a meeting in January 1998, between representatives of BGTL and the Registrar. A fundamental difference on the issue of fairness was identified as BGTL's wish to infer consent to the processing of personal data for wider use from a "non-response". There was accordingly a discussion on how consent might be obtained. Mr Kent put forward a figure of 11 million as being the number of BGTL customers from whom, in the course of a year, positive assent to use of personal data for uses beyond those relating to marketing gas related products and services might be obtained. This would have left a balance of some 8 million customers from whom there was no response. Taking into account the expert evidence and Mr Fricker's evidence as to the difficulties of obtaining positive consent, we find, as Mr Kent suggested in evidence, that this was an optimistic figure. We have taken account, therefore, of the difficulty inherent in expecting people to notice, read, understand and respond to requests in leaflets.

We turn now to the question of consent. The special circumstances of the relationship between customer and monopoly supplier will end, but the special circumstances of the relationship between customer and necessary energy utility will remain. If BGTL wish to process personal data beyond the purposes which we have set out, then no unfairness will arise in such processing if the customer has consented to the use of personal data for types of wider and non-obvious purposes of which he has been notified. With new customers we do not consider that, at the time the agreement is made for the supply of gas, there is the difficulty, as BGTL contended, in informing customers of the type of marketing intended to be carried out by processing their personal data and asking then and there if they object. If no objection is then made either orally or in an electronic or other communication from the customer or in a document returned by the customer to confirm the arrangements for the supply of gas (such as either an opt-in box ticked, or an opt-out box left blank), processing of personal data for the purposes made clear, would we consider not be unfair. Any competing gas supplier who currently replaces BGTL has to enter into a written contract with the customer for supply, although in the future this may be possible by telephone. Therefore, we consider BGTL could seek to obtain consent for processing personal data for purposes beyond those we have indicated above by doing so at the time the agreement for supply is entered into, whether by writing, by telephone or by other means.

With existing customers, as with new customers, for the reasons that we have indicated, namely the special position of domestic utilities, particularly where the relationship began in monopoly conditions, we do not consider that it is sufficient merely to send to the customer a leaflet providing them with an opportunity to object to their personal data being processed for purposes beyond those gas related purposes to which we have referred. It would, we consider, be sufficient to prevent processing being unfair if individual customers are informed of the type or types of marketing or promotions BGTL would wish to carry out by processing their personal data, provided that they are given the choice to agree or not and either consent then and there, or do not object to such use. Alternatively thereafter, and before such processing takes place, the customer returns a document to BGTL, or by other means of communication received by BGTL indicates consent to, or by not filling in an opt-out box, or other means,

indicates no objection to processing for such type or types of marketing or promotion. One such returned document could be, for example, a direct debit mandate form; others could be a part of a bill, or purpose designed leaflet.

Accordingly for the reasons set out we have concluded that the Registrar was entitled to reach the conclusion that BGTL had processed personal data unfairly, not on the ground that was identified in the Enforcement notice, but on the other grounds set out above enabling us to substitute a revised form of notice pursuant to Section 14(1) of the Data Protection Act, 1984. We have considered whether in those circumstances the Registrar should have exercised her discretion differently. We find the Registrar considered whether damage or distress had been caused pursuant to Section 10(2) of the Act, before issuing the notice and conclude, as we do, that none was established, either in relation to individuals or corporations. We find that BGTL in relation to the processing of the personal data which resulted in a breach of the first data protection principle intended to act both fairly and lawfully and what was at issue were genuine differences on points of principle. Since July 1997, BGTL has limited the scope of its marketing promotions, although the effect of the enforcement notice is suspended pending appeal. These are among the factors of which we have taken account, but we have concluded that the Registrar correctly exercised her discretion to issue an enforcement notice. Indeed it was the only effective way of resolving the issues in dispute. Accordingly for the reasons set out and in accordance with Section 14(1) of the Act we substitute for the enforcement notice served a notice to reflect our decision. Any enforcement notice must show in clear terms what constraint is placed upon the data user. We set out in a schedule a proposed form for such a substituted enforcement notice, but we do not, as yet, determine that it shall be in those precise terms. This is because, as requested to do so by the parties at the hearing, we propose to give an opportunity to the parties to agree the terms of an amended enforcement order in the light of our decisions as set out above. If the parties are unable to reach agreement expeditiously, or the Tribunal in unwilling to approve terms put before them in writing, the Tribunal will sit again. The Tribunal intends, if such a further hearing is necessary, that it will take place no later than the week commencing 20 April 1998. This would afford the parties an opportunity to make submissions on the form of the amended enforcement notice and for the Tribunal to decide on the final terms of the enforcement notice.

We now turn to set out our decision in relation to the admitted breach of the second and third data protection principles. We were asked by the appellant to consider whether in the particular circumstances in which the breaches occurred we were prepared to substitute an undertaking in place of the enforcement notice. A draft of a proposed form of undertaking to be given to the Registrar by BGTL was before us. By Section 10(8) of the Act, the Registrar may cancel an enforcement notice at any time. Our jurisdiction on an appeal is as provided by Section 14 of the Act. If we uphold the Registrar in law and in the exercise of her discretion the "Tribunal shall dismiss the appeal". In or about May 1997, an employee of BGTL wrote a letter to a District Council Housing Department. The letter stated "I am responsible for the tracing of our customers when they leave a property without providing us with a forwarding address …. I am aware that this is a sensitive area and that absolute discretion will be necessary in any arrangement. However, I am confident that a properly controlled exchange of information …. would be benefit to both our departments. This scheme has been set up in other areas of Britain and has proven to be very successful to both parties". This letter had come to the notice of the Registrar by June 1997, when steps were being taken to serve an enforcement notice in relation to the first data principle issues which are set out above. The Registrar, after consideration, decided to proceed by way of an enforcement notice in respect of the admitted breaches of data protection principles 2 and 3. When the matter was brought to the attention of Mr Kent, a BGTL director, we find he acted promptly to cause instructions to be widely issued within BGTL on 18 June 1997, to ensure that such disclosure ceased. We are

satisfied that any such practice ended forthwith. The writer of the letter is still employed by BGTL, but was not called to give evidence before us. We make no criticism of that since the breach was admitted, nor do we draw an adverse inference from the absence of such a witness. The fact is, however, that on its face the letter showed a serious situation with regard to holding data for an unauthorised purpose. We are satisfied that Mr Kent's immediate concern was to stop the unlawful use. However, he did not make inquiry of the writer of the letter and told us "I am not aware that any other letters went out to their District Councils. They may have done but they have not come to my attention". We thus have the letter, written while BGTL was in discussion with one Registrar over the other data protection issues. We take account of the prompt action by BGTL to stop any further offer to disclose to Local Authorities. It was followed by a meeting between BGTL and the Registrar's staff. By letter date 26 June 1997, BGTL asked the Registrar to reconsider her decision to issue an enforcement notice and offered to provide an undertaking. We consider that the Registrar was entitled to take account of the very fact that no inquiry appeared to have been made by BGTL as to the extent of what was accepted to be a matter of serious concern. In addition, the Registrar was, we consider, entitled to take account of the fact that there had shortly before been a apparent breach of a data protection principle, as set out in paragraph 18 of the "Statement of Reasons", accompanying the enforcement notice. We conclude that the Registrar correct exercised her discretion to proceed by way of enforcement notice, rather than by way of prosecution or an undertaking. We find no error of law in that decision. Accordingly we dismiss the appeal in relation to this part of the appeal.

We stated at the conclusion of the hearing and we record here, that we are indebted to the parties for the manner in which the case was presented to us. It has greatly assisted us to reach our decisions.

No grounds for making an order for costs arise. Accordingly, there will be no order as to costs.

John Spokes
Chairman

24 March 1998

SCHEDULE

ENFORCEMENT NOTICE AMENDEMENTS

Paragraph 1 on pages 1 and 2. Delete that part headed "Principle 1" and substitute the following:

Principle 1

The Registrar considers that the data user has contravened and is contravening Principle 1 by unfairly processing personal data relating to individual customers for the supply of gas for purposes which, because of the nature of the arrangements for the supply of gas and the relationship between the data user and its customers and the statutory rights and duties applying thereto are, without the prior consent of such customers, such as to render the processing unfair.

Paragraph 4 on pages 2 and 3. Delete and substitute the following:

The Registrar hereby gives notice to the data user that in the exercise of her powers under Section 10 of the Data Protection Act 1984 she requires that from 7 August 1997:-

(1) subject to sub-paragraphs (2) and (3) below the data user shall, in connection with marketing or trade promotion, only process personal data which relates to individual customers supplied with piped gas pursuant to licence issued under Section 7A of the Gas Act 1986 (as amended) provided that the processing does not lead to disclosure of the personal data by the data user to a third party and provided it is processed for the following purposes:-

(i) the supply of gas;

(ii) the marketing or promoting by BGTL on its own behalf of the supply, installation, servicing, or repair of gas appliances and gas heating systems and goods which use a gas supply or goods and services incidental to the supply of gas, including energy conservation;

(iii) the marketing or promoting by BGTL, itself or jointly with a third party, of the supply of mains electricity where the marketing or promotion is a part of or directly associated with the marketing or promotion of the supply of piped gas;

(iv) the marketing or promoting by BGTL on behalf of third parties of the supply, installation, servicing, or repair of gas appliances and gas heating systems and goods which use a gas supply or goods and services incidental to the supply of gas, including energy conservation. Such marketing or promotion may be independent of or accompanying a BGTL communication (including BGTL bills and circulars); and

(v) the marketing or promoting by BGTL or by BGTL on behalf of British Gas Energy Centres Limited of such goods or materials as are at the time of the

marketing or promotion available for customers to purchase or to hire at one or more retail premises of British Gas Energy Centres Limited. Such marketing or promotion may be independent of or accompanying a BGTL communication (including BGTL bills and circulars).

(2) Consent. No restriction as aforesaid shall apply to the processing of personal data of customers in the categories set out below:

(i) where individual customers have expressly consented to the type or types of use, disclosure or purposes for which their personal data is processed;

(ii) where individual customers prior to being supplied by BGTL wit piped gas through identified meters are specified addresses and having been informed of the type and types of marketing or promotions intended to be carried out by processing their personal data at or before the time when the agreement for such supply was made and when given the choice to agree to such processing or not, either then and there consented or did not object to such use or alternatively thereafter and before such processing took place had returned a document to BGTL, or by other means of communication received by BGTL had indicated that they consented to, or by not filling in an opt-out box, or other means, had indicated that they did not object to, processing for such type or types of marketing or promotion; and

(iii) where individual customers currently supplied by BGTL with piped gas have thereafter been informed of the type or types of marketing or promotions BGTL would wish to carry out by processing their personal data and the customers when given the choice to agree or not either then and there consented or did not object to such use or alternatively thereafter and before such processing took place had returned a document to BGTL, or by other means of communication received by BGTL had indicated that they consented to, or by not filling in an opt-out box, or other means, had indicated that they did not object to, processing for such type or types of marketing or promotion.

(3) Indirect disclosure. No processing under (1) or (2) above shall be undertaken by reference to selected criteria, whereby individual customers to whom BGTL supplies gas who respond to a third party marketing or promotion would disclose to the third party personal information concerning themselves, other than name and address and the fact that they are a BGTL customer, unless prior to or at the time of receiving the marketing or promotional communication the customers are informed of the type of personal information that might be disclosed by such response.

Penultimate Paragraph on page 3. (misnumbered as paragraph 4 – Re-number as paragraph 5

Final Paragraph on page 3. (misnumbered as paragraph 5). Delete paragraph.