



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

EA/2014/0014

B E T W E E N :-

OPTICAL EXPRESS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Tribunal

**Brian Kennedy QC
Paul Taylor
Anne Chafer**

Hearing: 3 June 2015 (Glasgow) & 14 July 2015 (London)

Location: Fox Court, London.

Decision: Appeal Refused.

Appearances:

Appellant: Robert McKenzie of Counsel.

Respondent: Robin Hopkins of Counsel.

|

Subject Matter: Enforcement Notice under Section 40(1) of the Data Protection Act 1998 (“the DPA”), an Appeal thereto under Section 48(1) DPA and the engagement of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

Result: Appeal Refused.

Introduction:

1] This is an appeal against an Enforcement Notice issued by the Information Commissioner (“the Commissioner”) on 19 December 2014 under Section 40(1) of the Data Protection Act 1998 (“the DPA”).

Background:

2] The background to the Enforcement Notice (“the Notice”) issued by the Commissioner is that in November 2012, the Commissioner identified that a high volume of complaints were being received about the Appellant, Optical Express Limited, (hereinafter referred to as “OE”) sending unsolicited marketing texts relating to laser eye surgery. As this appeared to be a breach of the Privacy and Electronic Communications Regulations 2003 (the Regulations), the Commissioner undertook a lengthy and extensive investigation and contact was made with the Appellant in November 2012.

3] A meeting was held in April 2013 at which the Commissioner’s Office made clear that they believed that OE did not have the appropriate level of consent to send the texts, which were the subject of the complaints. OE argues that if their suppliers agree in their contracts that they will only supply ‘consented data’ that should be sufficient proof of consent and that the number of complaints is a small amount compared to the millions of text messages they have sent and further, these complainants have forgotten that they opted-in to receiving marketing text messages.

4] A telephone conference was held in May 2013 during which neither party accepted the views of the other party. The Commissioner advised that new guidance on direct marketing would be published and that OE’s compliance with the Regulations would continue to be monitored.

5] The Commissioner published this new guidance ‘Direct Marketing’ on 10 September 2013. This clarified the issue of consent and, in relation to electronic marketing, it made clear that if information is supplied by third parties it cannot be relied upon to satisfy the requirements of Regulation 22 (3), the soft opt in.

6] In April 2014, the Commissioner researched the complaints made regarding OE sending unsolicited marketing texts (“The Texts”) from the date the Direct Marketing guidance was published, 10 September 2013 and 1 April 2014.

7] The complaints came from three sources: -

Groupe Speciale Mobile Association (GSMA) which provides a spam reporting service as part of their Spam Management and Prevention Service. Their web site defines SMS spam as any unwanted text message received on a mobile device. This allows a person to easily report spam to their operator and to a global collection, aggregation and reporting service by forwarding any unwanted text message to the number 7726. The Commissioners online spam reporting tool. Complaints made to the mobile phone networks.

The total number of complaints in this period was: -

GSMA 7726 number	- 7165
Commissioner online	- 341
Mobile phone networks	-

8] On 17 April 2014, the Commissioner sent OE two spreadsheets, DJC1¹ which contained the 7165 GSMA complaints and the other DJC2² which contained the 341 complaints received by the Commissioner. The Commissioner reiterated his view that OE could not rely on the third party consent unless the subscriber had been informed at the time the data had been collected that it would be passed on to the Appellant or any other company providing laser eye surgery and asked the Appellant to provide an explanation of how they believed that they complied with the Regulations along with evidence of the actual consent or prior interaction with the subscriber upon which the Appellant relied.

9] By July 2014, the Commissioner had received a response from the Appellant in relation to 4609 of the 7165 complaints made using the GSMA 7726 spam reporting line. As the Commissioner's view was that in relation to these 4609 responses OE had not provided any direct evidence of consent, copies of forms, voice recordings or any fair processing notices in which the OE is named or specifically described as the recipient of any of this collected data, it was decided to proceed with issuing a preliminary enforcement notice relying upon these 4609 complaints.

10] The Commissioner's analysis of these 4609 responses indicated that:-

225 texts were sent to existing customers

In 29 cases the Appellant had no record of the text being sent by them.

In 49 cases the "consents" were collected prior to 2010 with the earliest being data collected via a travel survey in Malaga in 2001.

¹ OB page 415 para 22

² OC page 415 para 23

11] The Commissioner's view was that with the exception of the 225 cases referred to above, the information supplied by OE did not evidence in any way that the subscriber had consented to OE contacting them by text to promote its services and that it merely alluded to the fact that the subscriber's data had been collected by a third party and subsequently supplied to and used by OE.

12] The Commissioner noted that 6 separate data suppliers had contributed to the database used by OE and these 16 data suppliers had obtained the information from 120 sources.

13] The Commissioner sent OE a preliminary enforcement notice on 30 October 2014 to which the Appellant replied on 1 December 2014.

14] In the interim, the Commissioner continued to make enquiries in relation to the marketing messages complained of. On the 17 December 2014 he served Information Notices on four telecommunications providers; Vodafone Limited, Telefonica UK Limited, Hutchison 3G UK Limited and EE Limited.

15] According to David Clancy's witness statement, this was in order to try and identify a selection from the forty-nine subscribers said by OE to have consented to the receipt of such marketing communications. Three subscribers were successfully contacted and each one provided a witness statement. In each case the subscriber confirmed that at some point they had completed a Thomas Cook travel survey form, often during a return flight from holiday. However they stated that they did not consent to OE contacting them with marketing text messages.

16] Having considered OE's response and the witness statements he had obtained from three subscribers, the Commissioner concluded that the Texts had been sent in contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("the Regulations"). He found that those messages were unsolicited and that they had been sent without the requisite consent having been given by the recipients and he issued an enforcement notice on 19 December 2014.

17] The Notice required OE to cease such contraventions and specifically, the Commissioner required the Appellant to stop sending unsolicited marketing text messages without recipients' consent, except in circumstances where Regulation 22(3) of the Regulations applied.

18] The Appellant wishes to continue sending marketing text messages of this type, or at least to be entitled to continue this practice and appeals under Section 48 (1) DPA against the Enforcement Notice.

Relevant Law:

19] The Regulations implement EU Directive 2002/58/EC. A fundamental purpose of that Directive is to protect the privacy of users of electronic communications services such as mobile phone networks. The Regulations should be construed so as to give proper effect to that Directive.

Article 1 Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communications sector and to ensure the free movement of such data and of electronic communication equipment and services in the community.

Article 1(2) the provisions of this Directive particularise and complement Directive 95/46/EC for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

The focus of the Directive is primarily the protection of the rights and freedoms of individuals rather than the invasive use of electronic communications for the purposes of marketing.

20] Article 13 of Directive 2002/58/EC is entitled “unsolicited communications”. It says this (emphasis added):

a). The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent. □

b). Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use. □

c). Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation. □

d). In any event, the practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, shall be prohibited. □

e). Paragraphs 1 and 3 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

21] Article 13 is implemented in the UK through Regulation 22 of the Regulations. Regulation 22 states:

(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender. □

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—□

(a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;

(b) the direct marketing is in respect of that person's similar products and services only; and□

(c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication. □

(4) A subscriber shall not permit his line to be used in contravention of paragraph (2).

22] The Commissioner's power to issue an enforcement notice is set out in Section 40 DPA (as incorporated, with modifications, by regulation 31 and Schedule 1 of the Regulations). The relevant provisions are as follows:

(1) If the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (in this Part referred to as "the relevant requirements"), the Commissioner may serve him with a notice (in this Act referred to as "an enforcement notice") requiring him, for complying with the requirement or requirements in

question, to do either or both of the following— □

(a) to take within such time as may be specified in the notice, or to refrain from taking after such time as may be so specified, such steps as are so specified, or □

(b) to refrain from processing any personal data, or any personal data of a description specified in the notice, or to refrain from processing them for a purpose so specified or in a manner so specified, after such time as may be so specified.

(2) In deciding whether to serve an enforcement notice, the Commissioner shall consider whether the contravention has caused or is likely to cause any person damage.

...

23] An enforcement notice must contain—□ (a) a statement of the relevant requirement or requirements, which the Commissioner is satisfied, have been or are being contravened and his reasons for reaching that conclusion, and □ (b) particulars of the rights of appeal conferred by section 48.

12. Section 48(1) DPA provides for an appeal to the Tribunal against an enforcement notice.

(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.

Grounds of Appeal

Breach of statutory duty to give reasons

24] OE state that the Commissioner was under a statutory duty, by virtue of s.40(6) DPA, to give reasons for his decision to issue an Enforcement Notice ("the Notice").³

25] OE say this was particularly relevant given the lack of agreement between the two parties in relation to the interpretation of Regulation 22(2) PECR. OE claim that at the very least the Commissioner ought to have set out his reasoning as to why he considered r.22(2) to have been breached.⁴

26] OE refer us to a planning permission case involving *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR 1953. This says that: "*The reason for a decision must be intelligible and must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved.*"⁵

27] To summarise their argument, they say even if the reasons for the issue of the Notice were self-evident, it cannot be said that they were proper, intelligible and adequate reasons which satisfy the duty under s.40(6) DPA. OE further argue that the contentious issues which formed the subject of the dispute between the two parties were not addressed in a way that enabled them to know how the Commissioner had reached his conclusion⁶

28] The amended wording of s.40(6) is as follows:⁷

An enforcement notice must contain-

(a) a statement of the relevant requirement or requirements which the Commissioner is satisfied have been or are being contravened and his reasons for reaching that conclusion, and

³ OE "Note of Argument", para.19

⁴ Ibid. note 1

⁵ Op. cit. note 1; para.20

⁶ Op. cit. note 1; para.24

⁷ By virtue of Schedule 1, para.1(d), The Privacy and Electronic Communications (EC Directive) Regulations 2003, 2003 No. 2426

(b) particulars of the right of appeal conferred by section 48

29] In relation to (a), the Commissioner made clear that he was satisfied OE had contravened Regulation 22(2) PECR and stated how it had been breached (i.e. by sending direct marketing texts without prior consent).⁸

30] The Commissioner then adequately set out the rights of appeal.⁹

31] In light of this, we find, it is abundantly clear from the Notice what it was that OE were alleged to have done wrong. Following the South Bucks case, the reason for the decision was intelligible from paras.8 and 9 of the Notice and it was adequately described in para.8. The reader can understand why the matter was decided as it was, again from paras.8 and 9, but also from the contextual information provided in paras.2 to 7. The conclusion is amply set out in para.9 and it is obvious that he has resolved the issue on the basis of the evidence described in para.8."¹⁰

32] In relation to the argument that the Commissioner had not set out how he had reached his conclusion, bearing in mind the disputed interpretation of Regulation 22(2), again, we find this is clear. The Commissioner says that unsolicited direct marketing communications were sent by OE.¹¹ This led to him being satisfied that OE had contravened Regulation 22(2) by sending such communications without prior consent.¹² The dispute between the two parties, discussed before the Notice was issued, is whether or not prior consent is required before direct marketing by text and in this instance, whether such communications were unsolicited. Para.9 does therefore clearly identify this.

Breach of common law duty to give reasons

⁸ Open bundle, p.160, para.9

⁹ Loc. cit. note 6; paras.11-12

¹⁰ Op. cit. note 1; pages 159-160

¹¹ Loc. cit. note 6, para.8

¹² Ibid. note 6

33] OE draw particularly on the case of *R. v Civil Service Appeal Board Ex. p. Cunningham* [1991] 4 All E.R. 310; *R. (on the application of Viggers) v Pensions Appeal Tribunal* [2006] EWHC 1066). This argument focuses on the Commissioner being subject to the rules of fairness and natural justice. OE argue that these rules require the Commissioner to give reasons for his decisions in order that those subject to them know the issues which he took account of, how he reached his decision and that in doing so he acted lawfully.¹³

34] Referring to *Miller Mead v Minister of Housing and Local Government* [1963] 2 QB 196 (per Upjohn, LJ at 232), OE say that the Commissioner should have given reasons which enabled them to identify what it is that they are required to do, or to desist from doing, in order not to breach Regulation 22(2).¹⁴

35] OE condense the above precedent (and others) into the following requirements, which they say the Commissioner should have included in his Notice:

- (a) a statement of the data protection principle or principles which the Respondent is satisfied have been contravened by the Appellant, his reasons for reaching that conclusion and particulars of the rights to appeal;
- (b) clear measures of sufficient particularity which the Appellant requires to take and/or things which the Appellant requires not to do in order to comply with the relevant legal requirements; and
- (c) evidence that the 4,609 alleged complaints received by the Respondent from complainants alleging to have received unsolicited communications from the Appellant have in fact received unsolicited

¹³ Op. cit. note 1; para.26

¹⁴ Ibid. note 10

communications from the Appellant without first giving their consent to such receipt.¹⁵

36] The final point of note is that OE argues that they are entitled to have the reasons for the issue of the Notice included in the Notice itself rather than to have to draw inferences from previous exchanges with the Commissioner.

37] Taking each of OE's requirements in turn:

(d) It appears that OE have taken the original wording of s.40(6) DPA, rather than the version amended by, (and for the purposes only) of the Regulations. The amendment is set out under Schedule 1, para.1(d)) and the resultant wording as above. In short, the amendments are:

"...for the words "data protection principle or principles" there shall be substituted the words "relevant requirement or requirements."

Consequently the Commissioner identified, at para.9 of the Notice, that OE breached Regulation 22(2), i.e. "*the requirement*". His reasons are set out in both paras.8 and 9, which read as follows:

"8. Between 10 September 2013 and 1 April 2014, the Commissioner received 4,609 complaints from individuals either directly, or via the 7726 spam text reporting service, who allege that they have received unsolicited marketing text messages. The Commissioner is satisfied that these communications were sent or instigated by Optical Express (Westfield) Limited, marketing the company and its services.

¹⁵ Op. cit. note 1; para.29

9. *In the circumstances, the Commissioner is satisfied that Optical Express (Westfield) Limited has contravened Regulation 22(2) of the Regulations by sending such communications to individual subscribers for direct marketing purposes without their prior consent.*"

It is therefore, we find, abundantly clear that the Commissioner issued the Notice because the 4,609 complaints related to "...*unsolicited marketing text messages... sent or instigated by Optical Express (Westfield) Limited, marketing the company and its services.*"

As noted earlier, the rights of appeal were correctly set out at paras.11 and 12 and also in Annex1.

- (e) So far as clear measures which he required OE to take, this is set out between paras.10 and 11, as follows (specific requirements have been underlined):

"In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the Act, he requires that Optical Express (Westfield) Limited shall within 35 days of the date of this Notice:

- (1) *Except in the circumstances referred to in paragraph (3) of Regulation 22 of the Regulations, neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified Optical Express (Westfield) Limited that he consents for the time being to such communications being sent by, or at the instigation of Optical Express (Westfield) Limited.*"

It is obvious from this what the Commissioner says OE should stop doing. (Electronic mail is defined by Directive 2002/58/EC at Article 2(h) to mean "... any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipients terminal equipment until it is collected by the recipient."

- (f) Next OE says that the Commissioner should have provided evidence that the 4,609 complaints he received about allegedly unsolicited communications from OE, were actually unsolicited. The Tribunal finds that there were actually 7165 complaints from made to the 7726 service in the period in question (10 September 2013 to 1 April 2014) as well as a further 341 made directly to the Commissioner which were provided to OE in two spreadsheets on 17 April 2014. However, it would be impossible to provide detailed evidence in respect of each and every one within the Notice. Furthermore, as the Commissioner himself stated, to do so would reveal the personal data of the complainants in a public notice, in breach of the DPA. OE had been furnished with two spreadsheets containing details of the complaints he had considered;¹⁶ it should therefore have been clear to which complaints he was referring in the Notice. In the circumstances therefore it was entirely appropriate for the Commissioner to only include outline details.

Direction

38] OE assert that the Commissioner should have precisely directed them as to what they were required to do in order to comply with the Regulations applicable to the transmitting of direct marketing communications.¹⁷ They argue that repetition of the requirements of Regulation 22(2) does not constitute a proper basis for direction in an Enforcement Notice.¹⁸

¹⁶ Op. cit. note 6; p.74

¹⁷ Op. cit. note1; para.33

¹⁸ Loc. cit. note 15; para.34

39] It is clear in the context of paras.8 and 9 of the Notice what OE were said to have done wrong. The paraphrasing of Regulation 22(2) serves to highlight the difference between this and the proper requirements for sending marketing text messages. There can be no doubt therefore as to what OE were required to do in order to comply. Furthermore, the Commissioner, as the appropriate regulator, had engaged with OE and exhaustively stated to them the correct interpretation of Regulation 22(2). This was through the meeting between the parties on the 30th April 2013,¹⁹ during the telephone conference of the 30th May 2013,²⁰ and in the letter dated 17 April 2014.²¹ Finally, the Commissioner has published guidance on his website, to which OE have referred in the course of these proceedings. OE cannot rely on their own interpretation of Regulation 22(2) to make an argument that the Commissioner has not directed them as to what they should do in order to comply.

40] We note that in the Respondent's Note of Argument at para. 29 he suggests that it should be the Information Commissioner who provides evidence that the 4609 complaints he received about allegedly unsolicited communications from OE, were actually unsolicited.

41] And in the Respondent's Supplementary Closing Submissions on behalf of the Appellant para 35 '*The evidence burden is on the Respondent to satisfy the Tribunal on the balance of probabilities that each of the communications relied on were unsolicited by the recipients*'.

42] However we note OE have themselves required their data providers to include the following term in their contracts ' (see pg 10 OB) "*Any complaint reaching Optical Express that arises from 'Names' insisting they have given no such permission will be passed back to (name of data supplier) whose sole responsibility it will be to provide full and satisfactory resolution in the eyes of*

¹⁹ Op. cit. note 6; p.58-61

²⁰ Loc. cit. note 17; p.70-71

²¹ Loc. cit. note 17, p.72-74

both the individual 'Names' concerned and the Information Commissioners Office."

43] The Tribunal does not agree on two counts; firstly, the figure of 4609 relates to the number of marketing messages which OE had investigated and provided a response in respect of to the Information Commissioner

44] In this instance as Optical Express 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 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.

47] The Tribunal was provided with electronic copies of three spreadsheets by the Commissioner: DJC1 – the list of 7165 complaints made via the GSMA 7726 spam reporting line, DJC2 – the list of complaints made direct to the Commissioner, DJC3²² – which contains the list of 4609 complaints. At the oral hearing, the Commissioner demonstrated on a laptop these two spreadsheets, which they had been unable to provide in a satisfactory hardcopy form. The spreadsheets illustrated number and type of complaints. The Tribunal enquired about a) the availability of hard copies and b) an extract of those records containing a more detailed narrative within the complaints. The Commissioner undertook to provide those to the Tribunal and the Appellant. The Tribunal indicated that they would be open to any further submissions from either party arising from this disclosure.

²² OB page 416 para 24.

48] This was provided to both Parties and the Tribunal. The Parties have made no further submissions directly relating to the two spreadsheets provided as a result.

49] The Tribunal investigated in depth the two spreadsheets in question and make the following observations.

50] DJC1 extract containing the 186 entries with additional comments from the GSMA spam reporting line.

158 complainants have used terms such as 'unwanted', 'not asked for', 'unsolicited', 'spam', 'would like them to stop', 'texted telling them to remove from their database', 'message not requested', 'even though I have blocked the number', 'junk marketing texts' and 'please stop this persistent spammer'

DJC2 extract containing the 198 entries with additional comments from the Commissioner's on line spam report.

27 complainants mentioned that they were already registered with the Telephone Preference Service, 64 said they had no previous relationship with Optical Express or that they did not know how Optical Express had got their number, 32 use the term 'spam', 6 said the text had been received after they had told Optical Express that they did not want to receive marketing texts from them. Specific entries stated that 'it is extremely annoying', 'this organisation... are a persistent pest', 'I am really upset and angry', 'disrupt my time off – I am contractually obligated to respond to text messages within 5 minutes', 'registered with TPS – great anger and additional unwanted and unwarranted stress and hypertension', 'intrusion on my privacy', 'causes me to panic', 'sent at 03.23 am... woke me and my wife, ... caused panic ... then great anger, ... not much sleep for the rest of the night', 'woken up due to the time received', 'it is an intrusion and unsolicited', 'knew

daughter's name as well... blatant invasion of her privacy', 'phoned mum at work because I was so worried, ... so distressed'.

51] These comments confirmed the Tribunal's opinion that the individuals who take action after receiving a text from Optical Express and report it to either the GSMA 7726 number or the Commissioner's online spam reporting service are clearly indicating that they view these Optical Express marketing texts as unsolicited. As the Tribunal were unable to directly link all of these entries to those which were, the Tribunal specifically notes three complainants made to the 7726 service and also included in the 4609 responses received by the Commissioner from Optical Express and therefore included in the complaints on which the Enforcement Notice was based:

52] A complaint referred to the 7726 spam reporting service relating to an unsolicited marketing text on the 14 March 2014 at 08:03:15 from a complainant who we shall identify from initials DW where inter alia the complainant stated "I have just heard on the BBC that if I receive unwanted texts I forward them to you to take action. Thank you." This was in response to a text which states "OPTICAL EXPRESS: Do you want to WIN FREE laser eye surgery in February? Reply EYES at standard text cost to enter our free prize draw. Opt out: reply STOP."

53] Two complaints were referred to the 7726 spam reporting service (relating to an unsolicited marketing text) from one complainant who we shall identify from initials JC. On 16 September 2013 at 14:35:28 the complainant stated "I received the below text at 12:17 on 16/09/13. I would be most grateful if you could do something to prevent any more SPAM messages coming to my number please. I have also included the number it came from. Many thanks JC 07860030840" (This is one of the numbers used to send Optical Express texts). This was in response to a text which states "OPTICAL EXPRESS: Are you the September winner of FREE laser eye surgery? To enter reply EYES at standard text cost. Competition entry FREE. Opt out: Reply STOP". And a second complaint on 28 October 2013 at 20:53:41. "I received the below text at 18:13 on 28/10/13. I would be most grateful if you could do something to

prevent any more SPAM messages coming to my number please. I have also included the number it came from. Many thanks, JC 07860030840". This was in response to a text which stated "OPTICAL EXPRESS: Last chance to win FREE laser eye surgery in October! Reply EYES to enter at standard text cost. Competition entry FREE. To opt out reply STOP".

54] One anonymous complainant entered only "Sent to my mobile" with a mobile number on 11 November 2013 at 12:23:11. This was in response to a text which states "OPTICAL EXPRESS: Win FREE laser eye surgery in November! Reply with EYES at the standard cost of a text. Competition entry FREE. To opt out reply STOP".

55] By searching the names on DJC1, the Tribunal found the complainants' mobile phone numbers which enabled the Tribunal to link their complaint with a correlating entry on DJC3. The information on DJC3 is as follows:

For DW. The mobile phone number is the same, Trading Floor, then a series of reference numbers.

For JC. The mobile number is the same, IPT, then a reference number

For anonymous. The mobile phone number is the same, Trading Floor, then a series of reference numbers.

56] The Tribunal are therefore satisfied that there are at least three complainants who made complaints to the 7726 reporting line which make it clear that the marketing texts from Optical Express are unsolicited and which are included in the 4609 responses from Optical Express (upon which the Enforcement Notice is based) and where there is no opt in information entered in the spreadsheet. We make the following findings from what has been provided to us.

The legal effect of the Notice

57] Following on from the above, OE claim that as the Commissioner failed to set out reasons for issuing the Notice and gave no valid directions, contrary to the requirements of s.40(6) DPA, the Notice is null and void.²³

58] The Tribunal having concluded that the Commissioner did give valid reasons and direction (see above), we are of the view that need not address this point.

The communications were not unsolicited and therefore Regulation 22(2) was not engaged

59] OE contend that a communication is not unsolicited if the recipient has invited its receipt; also, that a communication is not unsolicited if it is consented to. They further argue that in order for there to be a breach of Regulation 22(2) it must be established that a transmitted communication was unsolicited and that it was not consented to.²⁴

60] Reference is made to a consultation document, prepared by the Department of Trade and Industry ("DTI") for the Implementation of the PECR Directive. Although we have not been provided with a copy, it is apparently stated that the chief purpose of the Regulations is to safeguard that contact details are fairly collected and subscribers are clearly informed of, and given a chance to object to, use of their data for direct marketing by that same business. According to OE, this suggests that Regulation 22 was designed to create a level playing field between marketers' legitimate interests and recipients' rights to privacy and should be interpreted accordingly.²⁵

61] In light of this OE assert that all communications sent by them are exclusively on the basis that the recipient has opted in to receipt of such

²³ Op. cit. note 1; para.36

²⁴ Op. cit. note 1; para.37

²⁵ Loc. cit. note 21; para.39

communications by voluntarily expressing a willingness to receive such communications.²⁶

Observations

62] So far as OE's assertion that a communication is not unsolicited if the recipient has invited its receipt; for the purposes of Regulation 22(2) there is only one valid way in which to actually invite receipt and that is to give consent to the sender. There are only two sides to the coin; marketing which is consented to and unsolicited marketing. Under this Regulation there is no "solicited marketing" because this is the same thing as marketing, which has been consented to. Regulation 22(3) however, does address this. It makes clear that the only possible version of "solicited marketing" is where a person already has some sort of relationship with the sender. The wording of Regulations 22(2) & (3) mean that a person cannot be said to have solicited marketing where the sender is unknown.

63] The DTI consultation referred to in fact illustrates this point. The safeguarding that contact details are fairly collected and subscribers are clearly informed of, and given a chance to object to, use of their data for direct marketing reflects precisely those requirements which the DPA sets out at Part 2 of Schedule 1, paras.1 and 2 (often referred to as "*the fair obtaining code*"). If the point at which the recipient ticks a box to opt-in (in other words, consents) does not give details of the actual sender's name and contact details, how can he or she be said to be fairly informed? An opt-in issued by a company intending to sell-on the personal data it collects in this way is, in effect, only valid so far as marketing which itself sends and no other party. This also reflects the fact that Regulation 22(2) is explicit when it says that "*...the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent...*".

²⁶ Loc. cit. note 21; para.43

64] This situation was amply described by Peter Carey in his book *"Data Protection: A practical guide to UK and EU law"*.²⁷ At p.204 he identifies that:

"...the 2003 Regulations state that the consent must have been given to the sender of the emails - this will have an inevitably detrimental effect on the "list rental" business as, in the case of list rental, the sender of the emails will not be the person to whom consent has been given, even where such consent exists."

The respondent's failure to produce evidence that the communications were unsolicited

65] OE refer again to their argument that the Commissioner provided no evidence to demonstrate that the marketing texts were unsolicited.²⁸

66] They point to the three witness statements provided by the Commissioner in support of his case.²⁹ Each of these relate to a Thomas Cook survey form, generally undertaken during return flights. OE state that this form has a tick-box option to indicate that the person completing it is happy to receive marketing communications from third parties, such as themselves. Thomas Cook then license this data to OE, from which marketing texts are directed to persons within the data-set.³⁰

67] OE refer to the witness statement of Nikhil Manglani, in support of their case. In particular they point to his suggestion that it is not uncommon that a recipient, who has previously opted-in to receive communications, forgets that he agreed to do so or changes his mind without informing the third party or company from whom his data was collected.³¹

²⁷ Carey, P., *"Data Protection: A practical guide to UK and EU law"*, Oxford University Press 2004

²⁸ Op. cit. note 1; para.45

²⁹ Op. cit. note 6; p.420-422, 423-425 and 426-427

³⁰ Op. cit. note 1; para.46

³¹ Loc. cit. note 27; para.48

68] Finally, OE argue that even if the Commissioner's three witnesses are held not to have opted in, this tiny number of persons would not justify the issue of an Enforcement Notice. It would not be reasonable to have done so.

69] We find it is the case that the marketing texts were unsolicited (see above).

70] The mechanism described by OE, whereby personal data is "harvested" from a Thomas Cook survey and licensed to them is exactly that envisaged by Carey, P, when he refers to "*...the case of list rental, [where] the sender of the emails will not be the person to whom consent has been given.*" It is for this reason that the marketing texts are unsolicited, because the recipient did not solicit them directly from OE.

71] So far as Mr Manglani's suggestion that a recipient may often forget that he has opted-in to such communications, it was open to OE to check against their records whether this was actually the case. In any event, the fact remains that in my opinion such opt-ins do not satisfy the strict requirements of regulation 22(2) for reasons which I have explained earlier.

72] In response to OE's assertion that even if the witnesses are held not to have opted in, this tiny number of persons would not justify the issue of an Enforcement Notice; these demonstrate that one of the processes by which OE obtain their source for text marketing is non-compliant with Regulation 22(2). It would therefore, in our view, be entirely appropriate to issue a Notice on the strength of this alone. However, the Commissioner relies on the 4,609 complaints as his evidence, not just his three witnesses.

73] Following on from this, the Commissioner relied on reports made to the 7726 spam reporting service as part of his evidence.³² It was clarified after the

³² Op. cit. note 6; p.416, para.24

hearing that this service only exists for the reporting of unsolicited marketing text messages.³³ It was, we accept, entirely appropriate therefore for the Commissioner to assume that the relevant complaints were made in respect of unsolicited text marketing received from OE. In light of this and the fact that the Commissioner had provided a list of these complaints to OE prior to issuing the Notice, it was for them to refute that the marketing actually was unsolicited.

(N.B. – The Tribunal notes: SPAM Oxford English Dictionary definition of SPAM – irrelevant, or unsolicited messages,

7726 service set up by Groupe Speciale Mobile Association (GSMA) in 1982. They run a Spam Management and Prevention Service providing a spam reporting service, which allows a person to easily report spam to their operator and to a global collection, aggregating and reporting service. GSMA website – SMS spam is defined as any unwanted text message received on a mobile device.)

The Respondent has misinterpreted the meaning of consent and therefore he ought to have exercised his discretion differently

74] OE submit that they have the relevant consent necessary to carry out direct marketing by text message.³⁴

75] They argue that the meaning of consent must be construed with reference to the objective of the Directive, which is to protect the privacy of the data subject from new risks through publicly available communication networks (Recitals 5 and 6). They refer to Recital 17, which states:

“... Consent may be given by any appropriate method enabling a freely given specific and informed indication of the user's wishes, including by ticking a box when visiting an Internet website.”

³³ Email from Mark Thorogood to GRC dated 5th June 2015 at 13:40

³⁴ Op. cit. note1; para.50

In OE's argument, the words “*specific... indication*” makes clear the need for a separate declaration of consent by the data subject, which relates only to consent to marketing by electronic mail. Consequently they say, this should not be afforded the construction put forward by the Commissioner which narrows its scope as to refer not only to marketing by electronic means but also to the organisation sending it. OE argue that their interpretation is supported by the German Federal Supreme Court in case VIII ZR 348/06 [2009] E.C.C. 27³⁵

76] OE further object to the Commissioner's interpretation that consent, within the meaning of Regulation 22(2), requires that the recipient knows the identity of the prospective sender of the marketing communication and that consequently, generic indications of the broad type of sender is insufficient.³⁶

77] OE then assert that the Commissioner's interpretation is contrary to his own guidance, which at paragraph 57 states: “*neither the DPA nor PECR say that consent for marketing must be explicit. Implied consent can also be valid consent in some situations – in other words, if it is reasonable from the context to conclude that the person consents, even if they have not said so in as many words.*” OE argue that the term ‘*sender*’, within the meaning of Regulation 22, does not mean “prospective sender” and this is acknowledged by the Respondent’s own guidance where he asserts that, indirect consent might be valid in some circumstances if it is clear and specific enough to the effect that the customer must have anticipated that their details would be passed to the organisation in question. OE submit that the term “*sender*” should be construed, applying the same interpretation, endorsed by Lord Steyn in *Shanning*, within the economic and social context in which the term is to take effect, namely direct marketing. As such, ‘*sender*’ is said by OE to mean a marketer or a third party in respect of which the recipient has consented to have his/her contact details passed for marketing purposes.³⁷

³⁵ Op. cit. note 1; para.53

³⁶ Loc. cit. note 32; para.54

³⁷ Op. cit. note 1; para.55

78] According to OE, neither the Directive nor the Regulations prescribe any means, form, context, method, terms, context of the consent; nor do they explicitly or implicitly require that consent to marketers be identified by name, type, section or business classification. In their opinion, what has to be considered is "*what has the subscriber consent to?*" If the subscriber gives consent to all forms of marketing communications in all market sectors from any marketer then nothing further is required.³⁸

79] In respect of interpretation, OE refer to Jacobs J in *AS v Secretary of State for Work and Pensions* (ESA) [2013] UKUT 587 (AAC), where he held that: "*I am not going to attempt to define what these words mean. That would be wrong. It would be the wrong approach to statutory interpretation and would trespass impermissibly into the role of the First-tier Tribunal. It is not for the Upper Tribunal to give more specific content to the law than the language used in the legislation...*".³⁹

80] Drawing on the above, OE aver that the meaning of 'sender' within Regulation 22 must be read to include direct marketers in all market sectors or, where the consent specifies sectors. They argue that the Commissioner's interpretation is misconceived and inconsistent with both a literal and purposive interpretation of Regulation 22. Furthermore that in issuing the notice, the Commissioner failed to reasonably exercise his discretion.⁴⁰

81] Finally on this point, OE say that the terms of the Notice, at page 3, are contrary to law because there are no assertions that the Appellant is the transmitter or the instigator of the unsolicited communications. The Notice confuses the role of transmitter and sender. The Notice ought to have been directed to the transmitter of the communications. It is the sender and not the transmitter that requires to have consent to the sending of unsolicited

³⁸ Op. cit. note 1; para.56

³⁹ Loc. cit. note 35; para.57

⁴⁰ Loc. cit. note 35; para.59

communications. Paragraph 9 of the Notice does not disclose any conduct, which would give rise to a contravention of Regulation 22(2).⁴¹

Observations

82] It is clear from Article 2(f), Directive 2002/58/EC (the “PECR Directive”) that consent means:

(f) "consent" by a user or subscriber corresponds to the data subject's consent in Directive 95/46/EC;"

83] Article 2(h) of Directive 95/46/EC says:

"(h) 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."

This must be read alongside Article 7, which provides conditions for the processing of personal data. The first one is relevant here and it says:

"Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or..."

84] Article 10 must also be observed and this requires that:

"Information in cases of collection of data from the data subject

⁴¹ Loc. cit. note 35; para.60

Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

- (a) the identity of the controller and of his representative, if any;*
- (b) the purposes of the processing for which the data are intended;*
- (c) any further information such as
 - the recipients or categories of recipients of the data,*
 - whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,*
 - the existence of the right of access to and the right to rectify the data concerning him**

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject."

85] Consequently, when a data subject gives consent they must be informed about the processing to take place, including who by and what for. In no other way can consent be said to be “informed”. If there was any doubt about this it is clarified by Article 10 which says that in order to ensure that the processing is fair you must tell the data subject (a) who is going to process the data, (b) what it will be processed for and (c) anything else at all to ensure fairness, such as, to whom the data might be passed and any applicable rights which the data subject has in relation to the processing (e.g. the right to object to direct marketing under Article 14(b)).

86] Applying this to OE; when consent was obtained by Thomas Cook or whomever, it was not stipulated (or at least it has not been shown to have been stipulated) that the personal data would be processed by OE. Neither was the marketing of specific types of product stipulated. In my opinion it should say something about the products to be marketed if they are different from the business of, for example, Thomas Cook. This falls under the “*to guarantee fair processing*” category. If the data subject doesn’t know what

other products might be marketed then how can he exercise his right to object to some of them whilst being happy to receive others?

87] In the view of this Tribunal it would be perverse for the definition of “consent” to be sourced from 95/46/EC without the accompanying effects of other relevant Articles.

88] Consequently, by failing to obtain proper, fully informed and specific consent in accordance with Articles 2, 7 and 10 of Directive 95/46/EC, OE fall foul of Regulation 22(2).

89] Finally, so far as OE's argument that the terms of the Notice are contrary to law because there are no assertions that the Appellant is the transmitter or the instigator of the unsolicited communications; para.8 of the Notice asserts that OE sent or instigated the unsolicited marketing text messages. To argue that "sent" does not equate to "transmitted" is without merit as both words have the same meaning in relation to electronic communications.

The Respondent's failure to correctly exercise its discretion on the facts of the case.

90] The Appellant submits that, if, when considering whether to issue an Enforcement Notice, the Commissioner makes a finding that there was no damage or no likelihood of damage, he ought not to issue the Notice. In any event, they argue, if he did it was incumbent on him to provide reasons why he deemed such a course of action necessary. OE quote section 40(2) DPA, which provides:

"In deciding whether to serve an enforcement notice, the Commissioner shall consider whether the contravention has caused or is likely to cause any person damage..."

They argue that the purpose of this section is to qualify the Commissioner's discretion by defining the consideration, which he is

required to observe before issuing an Enforcement Notice; the intensity of review, which he is required to apply to the relevant facts, and the reasons why he exercised his discretion in a particular manner. They go on to say that:

(1) the Respondent's discretion is not unfettered and has to be applied in a manner that promotes the policy aims and objects of the Act in conjunction with the ones of the Regulations;

(2) there will be cases, as here, where the impact of an alleged breach is so small that it would only have a de minimis effect and which could not justify the issuance of an enforcement notice; and

(3) where statute provides a right of appeal from a decision or act made by a public body, reasons are required for the exercise of a discretion so as to enable the affected person to exercise effectively its appeal right.⁴²

91] They further argue that it was incumbent on the Commissioner to provide sufficiently full and clear reasons to indicate not only how and why discretion was exercised to issue the Notice, but in particular, given the finding that there was no damage or likelihood of damage, why the issuance of the Notice was considered necessary, as per *R. (on the application of Green) v Criminal Injuries Compensation Appeals Panel* 2008 EWHC 3501 (Admin).⁴³

92] OE assert that consequently, in failing to provide such reasons, the Commissioner acted arbitrarily and unlawfully and misdirected himself in the issuance of the Enforcement Notice.⁴⁴

93] It is clear to us, from the Notice, that the Commissioner fulfilled the requirements of section 40(2). At para.10 he set out that he had considered

⁴² Op. cit. note 1; para.61

⁴³ Op. cit. note 1; para.62

⁴⁴ Loc. cit. note 40; para.63

whether any contravention had caused or was likely to cause any person damage. He gave his decision that; in this case, it was unlikely that actual damage had been caused.

94] This section requires nothing more than that the Commissioner must consider, when deciding whether to serve an Enforcement Notice, whether the contravention has caused or is likely to cause any person damage. It is not determinative as to whether or not the Commissioner should actually go on to issue an Enforcement Notice, as claimed by OE. Neither does it set out conditions on which basis the Commissioner should or should not do so. It simply means that he must take any damage into account.

95] Neither is the alleged breach small; it involves a minimum of 4,609 complaints about unsolicited text marketing. It also relates to a practice which OE assert is within the law but which the Commissioner has ruled is not and therein lies his reason for issuing the Notice. In the absence of an Enforcement Notice and the concomitant right of appeal, how else can the matter be resolved? The Commissioner was therefore correct to exercise his discretion in the manner he did in order to bring the dispute to a head and to have the law tested through the appellant Tribunals.

The Respondent's failure to take account of the suppression option as a relevant consideration when exercising his discretion to issue the Notice

96] The final ground relates to OE's stated compliance with Regulation 22(3). This, they argue, has a bearing on the Commissioner's exercise of his discretion to issue the Notice. They say that it is trite law, when exercising a discretionary power that a decision-maker may take into account a range of considerations, some of which may not be expressly specified in the enabling statute. These are those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if, in his

judgment and discretion, he thinks it right to do so (*R v Somerset CC Ex p. Fewings* [1995] WLR at 1049 per Simon Brown LJ).⁴⁵

97] According to OE, the cumulative purpose served by Regulations 22(2) and 22(3) is to protect recipients from having transmitted to them unsolicited communications to which they have not consented and to provide an effective means by which recipients of such communications may require that they cease. It is argued that this approach is consistent with the terms of section 11 DPA, which permits an individual at any time by written notice to require that a data controller cease from processing that individual's personal data for the purposes of direct marketing. The Commissioner, in the exercise of his discretion, ought to have had due regard to the fact that all the communications offered the option to suppress such communications. The evidence, which the Commissioner relies on, disclosed that none of the complainants made use of the suppression option. The Commissioner, having failed to give any or sufficient weight to the effective provision of such an option and the failure of any of the complainants, on whose evidence he relies, to make use of such option demonstrates that he has exercised his discretion unreasonably and has erred in law.⁴⁶

98] It seems clear that OE are referring to Regulation 22(3), as opposed to Regulation 23 as stated in their Note of Argument.

99] Regulation 22(3) states that:

"3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

(a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;

⁴⁵ Op. cit. note 1; para.64

⁴⁶ Loc. cit. note 42; para.65

(b) the direct marketing is in respect of that person's similar products and services only; and

(c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication."

100] It is therefore clear that in order to be able to rely on these provisions, the sender must have an existing relationship with the recipient. In no other way can marketing texts be sent without consent.

101] Consequently OE's claims that because they provided a mechanism through which the recipient could opt out of future messages, the Commissioner ought not to have used his discretion to issue the Notice, are not valid. The fact is that the direct marketing texts should not have been sent in the first place because they were unsolicited and in breach of Regulation 22(2). The opt-out mechanism is neither here nor there as that only applies in cases where the sender has an existing relationship with the sender, as per Regulation 22(3).

Conclusion

102] In view of our observations and reasons above we find that the appeal should be dismissed.

Brian Kennedy QC

31 August 2015.