**IN THE FIRST-TIER TRIBUNAL** **Case No.** EA/2012/00111
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's**
**Monetary Penalty Notice dated 27 April 2012**

**Appellant:** **Central London Community Healthcare NHS Trust**

**Respondent:** **Information Commissioner**

**Heard at**
**Field House London on 3-5 December 2012**

**Date of decision:** **15 January 2013**

**Before**
John Angel
(Judge)
and
Rosalind Tatam and Paul Taylor

**Attendances:**

For the Appellant: Mr Timothy Pitt-Payne QC
For the Respondent: Miss Anya Proops

**Subject matter: S.49 DPA extent of Tribunal's jurisdiction; S.55A - C DPA power of Commissioner to impose monetary penalty; s.41A and s.51(7) DPA assessment notices.**

## DECISION OF THE FIRST-TIER TRIBUNAL

**The appeal is dismissed and the Information Commissioner's Monetary Penalty Notice date 27 April 2012 is upheld.**

## REASONS FOR DECISION

Introduction

1. This is the first Monetary Penalty Notice ("MPN") to be appealed to the First-tier Tribunal ("FTT"). Under the Data Protection Act 1998 as amended ("DPA") the Information Commissioner ("IC") has power to impose a monetary penalty on a data controller where there has been a serious contravention of one or more of the Data Protection Principles ("DPPs").

2. In this case the IC served an MPN dated 27 April 2012 on the Central London Community Healthcare NHS Trust ("the Trust") requiring the Trust to pay a penalty of £90,000.

3. The IC has an office which helps him undertake his duties which is known as the Information Commissioner's Office ("ICO"). In this case both terms are used but unless stated otherwise they are used interchangeably.

The factual background

4. The parties agree the following factual background relating to the data breach in issue in this case:

    a. The Trust is responsible for managing vast quantities of sensitive patient data;

    b. The Trust had in place an arrangement by which it faxed, each weekday evening, highly sensitive patient data relating to patients in its palliative care unit ("the Unit") to St John's Hospice ("the Hospice"). The data in question was contained in inpatient lists, to assist doctors providing out of hours care for these individuals;

    c. The Trust used a fax protocol (or task sheet for the administrator) for sending the lists which had been agreed with the Hospice ("the protocol"). The protocol required the Unit to telephone the Hospice to check that the relevant fax had been received;

    d. The person responsible for faxing the lists to the Hospice ("the administrator") had not been given adequate training in respect of the faxing process and had not been specifically trained to obtain management approval to vary the fax protocol in accordance with changing operational needs;

e. In March 2011, the administrator became aware that the list needed to be sent to an additional fax number at the Hospice ("the additional fax number"). The administrator did not update the protocol with the additional fax number and did not obtain approval from her manager in respect of the new arrangements;

f. Thereafter the administrator (or her stand-in) faxed the inpatient lists on some 45 separate occasions to a fax number which was not in fact the number for, nor that which had been provided by, the Hospice;

g. The administrator did telephone the Hospice to confirm that the first fax had been received but did not check that the second fax had been received under the additional fax number;

h. The error only came to light when, on 6 June 2011, a member of the public rang the administrator to inform her that he had been receiving the inpatient lists since 28 March 2011 but had shredded them. The Trust has been unable to trace the member of the public following this call and, accordingly, has no way of confirming precisely what had happened to the data;

i. The lists which were wrongly sent to the member of the public contained data relating to 59 individuals, all of whom were regarded as 'vulnerable adults' due to their age and ill health. The data in issue included not only the patients' names but their medical diagnoses; medical treatment; information about the patients' domestic situations (including third party/family information) and resuscitation instructions. This information amounted to acutely private information and sensitive personal data (under section 2 DPA).

## The Legal Framework

**DPPs**

5. The basis on which the IC imposed a monetary penalty was that the Trust had breached the seventh DPP.

6. The Trust is and was at all material times a data controller, within the meaning of section 1(1) DPA.

7. Subject to various exemptions (not relevant to this case), it is the duty of a data controller to comply with the DPPs in relation to all personal data with respect to which he is the data controller: section 4(4) DPA.

8. The DPPs are set out in Schedule 1 to the DPA. The seventh principle provides:

*Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.*

9. Schedule 1, Part II, paragraphs 9-12 make further provision for steps that a data controller must take to comply with this principle, in particular:

*9. Having regard to the state of technological development and the cost of implementing any measures, the measures must ensure a level of security appropriate to – (a) the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage as are mentioned in the seventh principle, and (b) the nature of the data to be protected.*
*10. The data controller must take reasonable steps to ensure the reliability of any employees of his who have access to the personal data.*

**MPN**

10. The ICO's power to impose a monetary penalty is conferred by section 55A DPA.

11. This provision was not part of the DPA as originally enacted. It was inserted by section 144(1) of the Criminal Justice and Immigration Act 2008. The power to issue an MPN came into force on 6 April 2010.

12. Section 55A provides as follows:

*(1) The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that—*
*(a) there has been a serious contravention of section 4(4) by the data controller,*
*(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and*
*(c) subsection (2) or (3) applies.*

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

*(3) This subsection applies if the data controller—*
*(a) knew or ought to have known—*
*(i) that there was a risk that the contravention would occur, and*
*(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but*
*(b) failed to take reasonable steps to prevent the contravention.*

*(3A) The Commissioner may not be satisfied as mentioned in subsection (1) by virtue of any matter which comes to the Commissioner's attention as a result of anything done in pursuance of—*
*(a) an assessment notice;*
*(b) an assessment under section 51(7).*

*(4) A monetary penalty notice is a notice requiring the data controller to*

*pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.*

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

*(6) The monetary penalty must be paid to the Commissioner within the period specified in the notice.*

*(7) The notice must contain such information as may be prescribed.*

*(8) Any sum received by the Commissioner by virtue of this section must be paid into the Consolidated Fund.*

*(9) In this section—*
*"data controller" does not include the Crown Estate Commissioners or a person who is a data controller by virtue of section 63(3);*

*"prescribed" means prescribed by regulations made by the Secretary of State.*

13. Section 55A(3A) was not part of section 55A as originally enacted. It was inserted by section 175 of, and paragraph 13 of Schedule 20(5) to, the Coroners and Justice Act 2009. This provision also came into force on 6 April 2010.

14. Section 55A(1) imposes three preconditions for the service of an MPN:

    a. First, there must be a *serious* contravention of section 4(4) by the data controller.
    b. Secondly, the contravention must be of a kind likely to cause *substantial damage* or *substantial distress*.
    c. Thirdly, the contravention must either be *deliberate* or because the data controller *knew or ought to have known* that there was a serious risk that a contravention would occur and would be of a kind likely to cause substantial damage or distress, but failed to take reasonable steps to prevent it happening.

15. Unless these three preconditions are met the IC has no power to serve an MPN. If the preconditions are met then the IC has a power, but not a duty, to serve an MPN. Hence it is for the IC in the exercise of his discretion to decide whether to serve an MPN, to take some other form of regulatory action or to take no action.

16. If the IC decides to serve an MPN he has a discretion as to the amount of any monetary penalty: section 55A(5). But the penalty must not exceed the prescribed amount (i.e. prescribed in regulations: see section 55A(9)). The prescribed amount is £500,000 under regulation 2 of the *Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010* (SI 2010/31).

17. Even if the three preconditions are met the IC, under section 55(3A), cannot serve an MPN where the serious contravention of section 4(4) has come to his attention as a result of anything done in pursuance of:

    a. an assessment notice under section 41A ("compulsory assessment"); or
    b. an assessment under section 51(7) ("consensual assessment").

18. The relevant provision for consideration in this case is section 51(7) which provides that:

    *The Commissioner may, with the consent of the data controller, assess any processing of personal data for the following of good practice and shall inform the data controller of the results of the assessment.*

**Statutory guidance**

19. Under section 55C(1) the IC must prepare and issue guidance on how he proposes to exercise his functions under sections 55A and 55B which must only be issued after approval by the Secretary of State and, in effect, Parliament: sections 55C(5) and (6).

20. Statutory guidance that we are concerned with in this case was issued by the IC on 30 January 2012 ("the MPN guidance"). It stated that:

    *The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with the Act. The possibility of a monetary penalty notice should act as encouragement towards compliance, or at least as a deterrent against non-compliance, on the part of all data controllers or persons.*

21. The MPN guidance covers the IC's power to impose a monetary penalty, the circumstances in which the IC would consider it appropriate to issue an MPN and how the IC will determine the amount of a monetary penalty together with the factors he will take into account when making such a decision. It also covers the processes involved in issuing an MPN.

**Scope of FTT jurisdiction**

22. DPA section 55B(5) provides:

    *A person on whom a monetary penalty notice is served may appeal to the Tribunal against—*

        *(a) the issue of the monetary penalty notice;*
        *(b) the amount of the penalty specified in the notice.*

23. Article 7 of the Data Protection (Monetary Penalties) Order 2010 provides that:

    *Section 49 and Schedule 6* [i.e. of the DPA] *have effect in relation to appeals under section 55B(5) as they have effect in relation to appeals under section 48(1).*

24. Under section 49 DPA (so far as material):

> *(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.*

25. We conclude, from these provisions on the scope of the FTT's jurisdiction, that firstly there is a right of appeal both against the issue of an MPN and against its amount: section 55B(5) DPA. The data controller can argue that there should not have been an MPN at all, or that the penalty should have been lower or, as in this case, the data controller can argue both in the alternative.

26. Secondly in relation to each of these two matters (the issue of an MPN, and its amount) there are essentially two bases of appeal: that the MPN was not in accordance with the law; and that, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.

27. Thirdly the Tribunal may make its own findings of fact, and substitute them for those reached by the IC: section 49(2) DPA.

28. Fourthly, the Tribunal can consider appeals in relation to the exercise of the IC's discretion: both its discretion as to whether an MPN is appropriate (assuming that section 55A(1) is satisfied), and its discretion as to the amount of the MPN.

29. Are there any limits, however, to the Tribunal's jurisdiction? It is common ground between the parties that it includes the established public law grounds for challenging the exercise of a discretion (e.g. illegality, irrationality or procedural impropriety). If the exercise of a discretion is unlawful in public law terms then the case falls within section 49(1)(a). If the Tribunal considers that the discretion ought to have been exercised differently then the case falls within section 49(1)(b).

30. The IC considers that there is a limit to our jurisdiction. The IC contends that the exercise of his discretion can only be challenged if it is perverse or otherwise unlawful on public law principles.

31. Miss Proops on behalf of the IC argues that the Tribunal should approach the exercise of its functions under section 49, in such a way that it should be disinclined to disturb the conclusions reached by the IC under section 55A, save where it is clear that the IC either: (a) did not have all the material evidence before him as and when he reached his decision to issue an MPN or

(b) the notice is itself flawed on an application of public law principles (e.g. the decision to impose a penalty was *Wednesbury* unreasonable, was based on irrelevant considerations or ignored relevant considerations).

32. Miss Proops' reasons why the Tribunal should adopt this narrow, essentially supervisory approach to the discharge of its functions under section 49, may be summarised as follows:

a. The IC is a statutory regulator. As the DPA itself makes clear, Parliament has endowed the IC with broad powers of statutory oversight and enforcement in respect of the obligations imposed under the DPA.

b. In his role as regulator, the IC has a unique and unparalleled level of insight, expertise and understanding when it comes to the standards and policy principles which are to be applied under the DPA. This is why the IC was charged, under the legislation, with crafting the statutory guidance applicable to the MPN regime.

c. Set against this background, in his role as regulator, the IC is well placed to make the necessary qualitative assessments in order to determine: (a) whether the requirements of section 55A have been met and, further, (b) the level of penalty which should be applied in individual cases.

d. In this respect, the regime applicable under the DPA is very different from the regime applicable under the Freedom of Information Act 2000 ("FOIA"). In the context of the FOIA regime the IC will often have no greater expertise on the particular subject matter of the appeal than the Tribunal. Moreover, under FOIA, the question of whether information is exempt from disclosure does not turn on any subjective assessment by the IC but rather on whether the information, judged objectively, is exempt.

e. For the Tribunal to adopt an essentially public law, supervisory approach to the discharge of its functions under section 49 ensures that due deference is shown to the IC's authority, expertise and experience as statutory regulator, whilst at the same time affording appropriate protection to the appellant.

f. There is no public policy justification for allowing an appellant to have 'two bites of the cherry' when it comes to regulatory enforcement, particularly where, as in this case, the facts relating to the contravention are essentially agreed. Put another way, if the IC's decision is reasonable in a public law sense and otherwise compliant with public law principles, then in the absence of material new evidence, what public policy justification is there for disturbing the IC's decision?

g. To allow a wider approach to the discharge of the Tribunal's functions under section 49 would merely invite costly litigation without serving any meaningful public interest. Parliament cannot have intended such a result when enacting section 49 DPA.

33. The Trust disputes the proposition that the Tribunal must discharge its appellate functions by reference to public law principles. It does so on the ground that, had Parliament intended to confine the Tribunal's jurisdiction in this way, Parliament would not have enacted section 49(1)(b).

34. Miss Proops explains the reason for the inclusion of section 49(1)(b) in section 49 is that there may be cases where new evidence is available which casts a different light over the case. In these circumstances, the Tribunal must be at liberty to depart from the IC's conclusion to impose a penalty, even though that conclusion was itself sound on an application of public law principles (i.e. it was per se in accordance with the law).

35. Mr Pitt-Payne on behalf of the Trust argues that the IC's approach assumes that the Tribunal's role is identical to that played by the Administrative Court in a judicial review claim. This he argues is not only inconsistent with the terms of section 49(1): it is also inconsistent with the fact that the legislature has chosen to provide an appeal route to a specialist Tribunal against MPNs, rather than leaving the IC's exercise of its powers under section 55A to be controlled by the judicial review jurisdiction of the Administrative Court.

36. We have considered these arguments and agree with the Trust that if Miss Proops is right, then section 49(1)(b) would be wholly redundant: cases of public law illegality would fall within section 49(1)(a). We are not prepared to accept the narrow view of our jurisdiction suggested by the IC. If Parliament had intended such an approach then, in our view, the Tribunal's powers under section 49(2) would have been limited to consideration of section 49(1)(a) only and there would have been no need to provide for section 49(1)(b). We note that this provision is worded similarly to section 58(1) and (2) of FOIA. In fact it would appear the provisions under FOIA were lifted from the DPA. Under FOIA, as referred to above, the IC also has discretionary powers and we are not aware of any case where the Tribunal (or higher court) has decided that there is a limit to the Tribunal's jurisdiction.

37. If we take the view that appeals under section 49 DPA must be approached essentially as a 'de novo' hearing, akin to the approach adopted in the FOIA context, Miss Proops suggests that we should ensure that, when considering the evidence we afford considerable weight to the IC's views, particularly given his knowledge, experience and expertise as the relevant regulator under the DPA. We have some sympathy with this suggestion although the Tribunal panel does have specialist knowledge of the area and we are aware the ICO often benefits from reasons given in decisions of the FTT.

38. In relation to section 49(1) we find, as the FTT has also found in relation to section 58(1) of FOIA, that the Tribunal has power to allow the appeal *and/or* substitute such other notice or decision as could have been served. Such other

notice would normally be a substituted MPN but it could also be, for example, an enforcement notice.

39. Where the Tribunal is asked to consider the amount of a penalty then we take the view that we can increase as well as decrease the amount, as well as accept the IC's figure. But if we were inclined to increase the penalty where the IC does not ask for a higher figure, then as a matter of procedural fairness, we would expect to give the data controller the opportunity to be heard or make written representations before making a final decision.

The investigation by the IC

40. The Trust initially notified the IC that a breach had occurred by telephone on 22 July 2011. That telephone call was followed up by a letter dated 25 July 2012 from James Allison the Trust's Information Governance Facilitator. The letter set out in some detail the circumstances leading to the breach, how the Trust handled it and the volume of personal data lost. The salient facts are as follows:

    a. On or around 28 March 2011 the Hospice asked an administrator at the Unit to send inpatient lists to an additional fax number due to the leave of absence of one of the out of hours doctors;

    b. The second fax number was not added to the fax protocol "Administrator Responsibility for Doctor's Rota and Out of Hours on-call communication";

    c. The inpatient lists were then sent to the agreed fax number at the Hospice as well as to the additional fax number;

    d. The administrator only checked receipt at the agreed fax number, not the additional fax number;

    e. On 6 June 2011 the administrator received a telephone call from an unknown individual to inform the Unit that he had been receiving the inpatient lists since 28 March 2011 and that he had "shredded" the lists but would give no further details including who he was or their contact details;

    f. By then there had been 45 individual fax transmissions to the unknown individual using the additional fax number;

    g. The Trust stopped sending this patient information by fax, and then took action to investigate the incident including trying to locate the unknown recipient and rectifying the breach of the protocol;

h. The Trust then notified the IC, some 50 days later:

i. At this time the Trust was still considering how best to approach the patients and/or their families. (The Trust notified the remaining data subjects or their personal representatives of the breach by letter sent on 24 October 2011. By then only 15 of the 59 patients involved were still alive.)

41. Andrew Powell was allocated the case electronically via the ICO CMEH case management system which gave no indication as to the case's importance. It was his first MPN case having moved from his position as a case officer in the Customer Contact department to a case officer in the Enforcement department's civil investigation team.

42. Following receipt of the 25 July letter and other correspondence Mr Powell, spoke to Mr Allison on 3 October 2011. They both gave credible and helpful evidence before the Tribunal.

43. Mr Powell accepts that he may have indicated during this phone conversation that based on the letter the breach did not seem particularly serious but, he says, this was on the understanding from Mr Allison that the breach was as a result of a human error. Mr Allison says in cross-examination that Mr Powell said "I don't think this will receive a monetary penalty notice" and this was later repeated during a subsequent conversation on 26 October 2011. Mr Powell cannot recall this later assurance. Neither witness took a contemporaneous note of either conversation. This is the only real evidence in this case which is in dispute.

44. We note that in Mr Powell's letter of 3 October following the first conversation that he documents "the fact the reported breach has occurred as a result of human error." Also it is clear from other evidence in this case, including the MPN guidance, that Mr Powell did not have authority to decide whether an MPN should be issued. The role of a case officer is to investigate a breach and indicate what enforcement options if any were open to the IC to take, not to decide on the enforcement and the amount of any penalty. In any case his investigation had only just started on 3 October and it was only later into his investigation that he appreciated that institutional factors had also played a part in the breach. He does not recall giving any further assurances during the conversation on 26 October. This conversation was a follow up to the Trust's letter of response dated 25 October to the IC's letter of 3 October requesting further information as part of the investigation. In the letter of 25 October there is no reference to any indications allegedly given by Mr Powell; the letter states "we have not yet formed a view on what action, if any, we will take". In fact there was not any until well after the commencement of these proceedings, not even in the Trust's grounds of appeal.

45. In evidence Mr Allison informed us that before notifying the breach to the IC he was aware of the IC's powers including the MPN guidance. He now accepts that it is not a "human error case". The Trust was, in effect, required to report serious breaches to the IC under *the Checklist for Reporting, Managing and Investigating Information Governance Serious Untoward Incidents* published by the DoH and NHS in January 2009.

46. We have considered all the evidence and find on a balance of probabilities that the IC, through his case officer Mr Powell, did not give any serious indication or assurance that there would be no fine or MPN in this case which in any way excluded the IC from deciding to issue an MPN. Although Mr Powell may have given the impression from his initial consideration that this was not a serious breach this was not something that the Trust could rely on bearing in mind the early stage of the investigation. It was made clear during a telephone conversation between Mr Powell and Mr Allison on 15 November that the breach was being treated more seriously during the process of the ICO's investigation and following the receipt of further information from the Trust. By this time Mr Allison (who indicated during cross-examination that he knew before his first telephone call to the ICO that an MPN was 'on the cards') was under no illusion that the case was being considered for enforcement action.

47. We now know from the evidence in this case, that Mr Powell, as the case officer, only has responsibility for investigating a breach and recommending regulatory action. He is not himself the decision maker when it comes to the imposition of a penalty under section 55A. The decision to impose a penalty is taken by a Deputy Commissioner, in consultation with an internal working party comprising various senior managers within the ICO and one of the ICO's enforcement lawyers.[1] On 3 October 2011, the ICO wrote to the Trust identifying the full range of enforcement powers available to the IC under the DPA, including the power to issue an MPN. The ICO went on to confirm that it was still investigating the matter and had not yet formed a view on what action, if any, would be taken. Thereafter, the Trust provided the ICO with further information about the contravention, including copies of the lists in question and relevant policy documents.

48. Mr Powell completed a Regulatory Action Case Summary ("RACS") which recommended "it is suggested that regulatory action be considered and whether the circumstances of this incident are substantial enough to warrant a CMP". [Civil Monetary Penalty, given within an MPN.]

49. The RACS was used as a basis for discussion by the Enforcement Team and a Regulatory Action Recommendation Report ("RARR") was produced by the Team which included Mr Powell. The RARR included details of the incident

[1] See the Regulatory Recommendation Action Report and the Standard Operating Procedure for MPNs which describes the process applied by the ICO in the context of the MPN regime.

leading to the breach, the answers to questions as to whether the threshold for an MPN had been met. In answer to the question "did the Trust know or should have known that there was a risk that a contravention would occur", the RARR notes that:

> *It has been the ICO's position that the use of fax machines used to transfer information represents a significant risk. This message has regularly been communicated to the NHS by Strategic Liaison, further to the NHS being assessed as a high risk sector which routinely processes highly sensitive personal data.*

50. The RARR recognised that the Trust had taken immediate action to contain the risk and longer term actions to implement technological and organisational changes in the wake of the breach. It also recognised what it describes as aggravating and mitigating factors. The case officer recommended one or more of three possible appropriate actions – MPN, Enforcement Notice and an Undertaking.

51. The RARR was discussed by an Enforcement Team working party on 5 January 2011. Six officers were present including the Head of Department, Group and Team Managers, a DPA solicitor, someone with a liaison role with the NHS and Mr Powell. They concluded that there was "a serious breach of the DPA, that disclosure of the data was of a kind likely to have caused substantial distress and that the Trust knew or ought to have known that an information security risk was present". In deciding to refer the breach to "the Deputy Commissioner as a recommended CMP", the working party implicitly agreed that the IC's discretion be exercised in favour of issuing an MPN.

52. A second working party meeting was convened on 17 January 2012 where it was determined that a monetary penalty of £90,000 should be recommended to the Deputy Commissioner. This figure was arrived at by taking into account the seriousness of the contravention, aggravating and mitigating circumstances and the financial impact on the Trust. In evidence it was explained to us that the methodology for arriving at this figure was based on a "framework for determining the appropriate amount of a monetary penalty" which is dated 31 January 2011 but was being used internally and had not been published. This recognised three bands of penalty as follows:

    1. Serious = £40,000 to £100,000

    2. Very serious = more than £100,000 but less than £250,000

    3. Most serious = more than £250,000 up to the maximum of £500,000.

53. The breach in this case was determined as "serious" and the working party took the midway point of the band, namely £70,000, and then applied the

aggravating features to see whether it should be higher and then the mitigating features to this figure to see whether it should be lowered. We were informed that this approach was similar to that used by other regulators such as the FSA.

54. Before submitting these recommendations to be formally considered at an Enforcement team meeting with the Deputy Commissioner present the ICO issued a Notice of Intent on 8 February 2012 ("NoI"). The NoI confirmed that the Commissioner was minded to impose a penalty of £90,000 providing a summary of the findings in the RARR and providing the Trust with the opportunity before 12 March 2012 to make any representations as to why the IC should not serve an MPN. In cross-examination Mr Powell informed us that the reports were passed to the Deputy Commissioner after the second meeting of the Enforcement team so he was aware of the position. We note that the NoI would appear to indicate that he had been involved and that at times during this case it is evident that the respective roles of the ICO and IC are not always clear. We do not consider this is significant as the responsibility of the IC to enforce the DPA cannot be carried on by himself alone. Like other regulators he needs an Office and Deputies to support him carry out his responsibilities. In any case the Deputy Commissioner was kept informed and we can infer from this that he would not have agreed that the NoI be issued without his approval.

55. The Chief Executive of the Trust provided representations in response to the NoI on 8 March 2012 ("the March representations"). In the March representations, the Trust conceded that the breach was of an order that it engaged the IC's powers under section 55A. It also explicitly accepted that a financial penalty was warranted. However, it drew the IC's attention to what were largely the mitigating features and invited the IC to consider a lower penalty figure. The Chief Executive expressed the Trust's position as follows:

> *Given the severity of the breach in such a sensitive service and the fact that we should have done more to secure a better understanding of our operative to seek management approval for a variation, we will not appeal the Commissioner's assignment of a financial penalty. However, we would request that, if these representations are accepted, he gives consideration to significantly reducing the penalty from the level of £90,000 indicated.*

56. These representations were considered at a meeting of the Enforcement Team on 24 April 2012 but this time with the Deputy Commissioner present (but not Mr Powell). It was decided to issue an MPN for £90,000, although there were some amendments to the notice to reflect some points made by the Trust.

57. This process is largely set out in a draft document entitled "Standard operating procedure Monetary Penalty Notices" dated [xx] July 2011 which again had not been published at the time.

The Monetary Penalty Notice

58. The MPN was issued on 27 April 2012. In summary, the IC concluded that: (1) the Trust had contravened the seventh data protection principle; (2) the contravention was serious in all the circumstances; (3) the contravention was of a kind likely to cause substantial distress and, further, (4) that the Trust ought to have known both that there was a risk that the contravention would occur and that it would be of a kind likely to cause substantial distress. In light of these findings and having regard to the particular facts of the case, the IC determined that a monetary penalty was warranted.

59. When determining the amount of the penalty, the IC took into account a range of features which he considered to be aggravating (p. 6 of the notice). He also took into account a number of mitigating factors (pp. 6-7 of the notice). Those mitigating factors included, but were not limited to, the facts that: the contravention had been voluntarily reported to the Commissioner's office; substantial remedial action had been taken by the Trust; and, further, that the Trust fully co-operated with the ICO during the course of the investigation. The IC went on to determine that a penalty of £90,000 should be imposed and that it should be paid by Tuesday 29 May 2012 at the latest.

60. The IC confirmed in the notice that, under the early payment scheme, he would discount the MPN by 20% (to £72,000) if he received full payment by Monday 28 May 2012. The Trust offered to pay the discounted figure on the basis that if an appeal resulted in no penalty or a lesser penalty then the overpayment would be refunded. This was not acceptable to the IC and the discounted penalty was not paid.

The Trust's grounds of appeal

61. The Trust contends that:

    a. the MPN dated 27 April 2012 was not in accordance with the law; and/or

    b. to the extent that the said MPN involved an exercise of discretion by the IC, it ought to have exercised that discretion differently.

    The Tribunal is asked to allow the appeal and quash the Notice. Alternatively, the Tribunal is asked to vary the Notice so as to substitute a lower monetary penalty.

62. The Trust's case was developed under nine headings, summarised below, although one of the grounds of appeal was withdrawn during the hearing.

*Decision to impose a monetary penalty*

a. The investigation that the ICO carried out, following the Trust's voluntary report, constituted an "assessment" within the meaning of section 51(7) DPA. Unlawfully, and in breach of section 55A(3A) DPA, in determining that it was satisfied that an MPN might be imposed, the IC relied on matters that came to his attention as a result of that section 51(7) assessment. Hence the decision to impose a penalty was not in accordance with the law.

b. The IC failed to take proper account of its own policy on imposing monetary penalties where a data controller voluntarily reports an incident, as set out in the guidance paper *Notification of Data Security Breaches to the Information Commissioner's Office* ("NDSB"). Hence the decision to impose a penalty was not in accordance with the law, and/or the IC ought to have exercised his discretion differently.

c. The IC exercised his discretion wrongly in deciding that a monetary penalty was appropriate in this case: he failed to take any or any sufficient account of the overriding policy objective to encourage co-operative working between the ICO and data controllers, and failed to give sufficient credit for the Trust's transparency and co-operative stance. Indeed, more fundamentally, the evidence simply does not explain on what basis the IC exercised his discretion to impose a monetary penalty in this case. Hence the decision to impose a penalty was not in accordance with the law, and/or the IC ought to have exercised his discretion differently.

d. Further, the IC failed to take proper account of the mitigating features identified in the MPN, including that the Trust was a "first-time offender" as far as data security breaches were concerned. Hence the MPN was not in accordance with the law, and/or the IC ought to have exercised his discretion differently.

e. Further, the IC imposed a penalty, despite an indication by his case officer early in the course of the investigation that Mr Powell did not consider the case would be worthy of a fine. There was no change in circumstances to justify the change of position. Hence the decision to impose a penalty was not in accordance with the law, and/or the IC ought to have exercised his discretion differently.

f. Further, the IC's change of position gives rise to an inference that the IC must have taken account of irrelevant considerations in deciding to impose a monetary penalty: hence the decision to impose a penalty was not in accordance with the law, and/or the IC ought to have exercised his discretion differently. During the hearing the Trust withdrew this ground of appeal.

*Decision as to the amount of the penalty*

g. The IC failed at any stage to explain the principles by reference to which he proposed to calculate the amount of the penalty, thereby depriving the Trust of any opportunity to make meaningful representations on that issue. Hence the decision as to the amount of the penalty was not in accordance with the law, and/or the ICO ought to have exercised his discretion differently.

h. In setting the amount of the penalty, the ICO gave insufficient credit to the Trust for the various mitigating features in the case. Hence the decision as to the amount of the penalty was not in accordance with the law, and/or the ICO ought to have exercised his discretion differently.

i. The Trust offered to pay £72,000 (i.e. the penalty discounted by 20%) by 28 May 2012, on the footing that such payment would be without prejudice to the right to appeal, and that the payment would be refunded by the ICO if the appeal succeeded. ICO refused to accept that offer, effectively putting the Trust to a choice between taking the benefit of the discount for prompt payment or exercising its right to appeal. In this further respect, the decision as to the amount of the penalty was not in accordance with the law, and/or the ICO ought to have exercised his discretion differently.

The case before the Tribunal

63. We deal with each of these grounds in turn. However before doing so we draw attention to the fact that the Trust has conceded that the requirements for an MPN are present in this case; namely there was a serious contravention of the seventh DPP, the contravention was of a kind likely to cause substantial damage or distress and that the Trust ought to have known that there was a risk that the contravention would occur and would be of a kind likely to cause substantial damage or distress but failed to take reasonable steps to prevent it.

**Whether the IC's investigation was a consensual assessment?**

64. In brief Mr Pitt-Payne contends that the ICO conducted an assessment, within the meaning of section 51(7) DPA; but, contrary to section 55A(3A), it took into account the matters that it discovered on that assessment, when deciding to impose an MPN. For that reason, the MPN of 27 April 2012 was not in accordance with the law, and should be quashed.

65. The Trust seems to be arguing that, where the IC investigates a contravention of the DPA which has been voluntarily reported by the data controller, that investigation must invariably be deemed to be an 'assessment' for the purposes of section 51(7) DPA and the IC is accordingly excluded from issuing an MPN under section 55A(3A).

66. Miss Proops describes this ground of appeal as directed at the question of whether the IC has *vires* to impose an MPN under section 55A and that it is misconceived.

67. Because of the importance of the issue we set out the Trust's arguments, as put forward by Mr Pitt-Payne, in some detail.

68. The DPA does not oblige data controllers to notify data security incidents (or other DPA breaches) to the ICO. This contrasts with the recent Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, which applies to the providers of public electronic communications. There is, however, a non-statutory scheme for breach notification. That scheme was

introduced before the IC obtained a power to impose monetary penalties for data breaches; hence, at this point, it was not intended that breach notification could potentially lead to a monetary penalty.

69. The background, Mr Pitt-Payne says, was that in November 2007 the Chancellor of the Exchequer explained to Parliament that HMRC had lost two data disks containing a copy of the Child Benefit database. The resultant scandal led to the grant of an immediate "spot check" power to the ICO, to enable it to check data handling in Government. The Cabinet Office launched a "Data Handling Review".

70. The Government supported the notification of data security incidents to the ICO. The Data Handling Review Interim Report, published in December 2007, said that "as part of good practice, Departments should routinely notify the Information Commissioner of any significant instances of potential data loss and this process will continue as the work progresses."[2] The Data Handling Review Final Report, published in June 2008, confirmed this position[3].

71. As part of the Data Handling Review, in December 2007 the NHS Chief Executive wrote to his counterparts across the NHS reminding them of the importance of good data governance[4]. Subsequently, DoH (revised) Guidance[5], about the handing of "Serious Untoward Incidents", advised NHS bodies that the ICO should be informed of all "Category 3-5 incidents"[6]. This was followed by further DoH guidance issued on 20th May 2008.

72. Mr Pitt-Payne says this historical analysis raises an important question, namely, what did the Government consider that it was signing-up to when it took the position that Departments and Agencies should notify incidents to the ICO? The answer, he says, is in the first version of the NDSB that was published in March 2008. At page 3 the ICO explained that "it should be noted that the Information Commissioner does not have the power to impose a fine or other penalty as punishment for a breach. Our powers only extend to imposing obligations as to future conduct." So at this point notifications would not lead to fines, only the imposing of obligations as to future conduct (which would be Enforcement Notices or non-statutory undertakings).

73. However, in the years that followed, Mr Pitt-Payne says the ICO changed its position, in response to the changing legislative framework, with the result that by the time that the Trust came to notify its incident in this case – the NDSB said that a notification "could lead to…..where there is evidence of a serious, deliberate or reckless breach of the DPA, the serving of a monetary penalty notice requiring the organisation to pay a monetary penalty of an amount determined by the Commissioner up to the value of £500,000."[7] However, Mr Pitt-Payne argues the use of the non-statutory breach notification regime by the

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[2] See para 14 of the Interim Report.
[3] See para 2.42 of the Final Report.
[4] See letter from David Nicholson dated 4th December 2007 to all Chief Executives of NHS Trusts, Gateway reference.
[5] 29 February 2008 Gateway reference 9571.
[6] Category 3 for serious breach of confidentiality. 4 for serious breach with either particular sensitivity or up to 1000 people affected and 5 for serious breach with potential for ID theft or over 1000 people affected.
[7] Version 4 of the *Notification of Data Security Breaches to the Information Commissioner's Office* dated 8 July 2010.

ICO as a vehicle for fining is not what was intended by the ICO or the Government when that regime was introduced. Hence, when it comes to deciding how to categorise the processes followed by the ICO that begin with a voluntary notification, the fairest option, Mr Pitt-Payne argues, is to treat those processes as assessments within the meaning of section 51(7). This means that they fall within the scope of section 55A(3A), and cannot be used as a basis for imposing monetary penalties.

74. Mr Pitt-Payne points out the DPA talks about three kinds of assessment. He says they share a common, unifying purpose, which is to enable the ICO to assess a controller's compliance with the law. Where they differ in substance is that one can be used in a coercive manner (section 41A), one can be used in a consensual manner (section 51(7)), and one can even be used without a direct engagement with the controller (section 42 request for assessment by data subject). Thus, Mr Pitt-Payne says, they provide the ICO with a wide range of options, with further back-up provided by the power to serve an Information Notice.

75. The consensual element, he argues, is satisfied in a case such as the present, because: (a) the Act does not place a statutory duty on controllers to notify, so where they do so this is a voluntary act; (b) the ICO invites notification in the NDSB, explaining that "the nature of the breach or loss can then be considered together with whether the data controller is properly meeting his responsibilities under the DPA" and "the nature and seriousness of the breach and the adequacy of any remedial action will be assessed", so the controller notifies knowing they will be assessed; and (c) the controller co-operates fully with the ICO's investigations after notifying, thereby participating in the assessment.

76. Miss Proops takes issue with the Trust's contentions. She argues that section 51(7) applies to assessments which are conducted with the consent of the data controller *'for the following of good practice'*. In essence, the purpose of any assessment conducted under section 51(7) is to enable the IC to assess a data controller's data processing arrangements with a view to his educating and advising the data controller as to how to achieve good practice. Thus, section 51(7) is directed at educating and advising data controllers, on the basis of a consensual engagement, with a view to avoiding future breaches of the DPA.[8] The aim of the statutory bar provided for under section 55A(3A) is to prevent the IC from using information he obtains via the educational/advisory process provided for under section 51(7) to impose an MPN on a data controller.

77. The public policy justification for this statutory bar, she says, is that if data controllers felt that information provided in the course of a good practice audit ("GPA") could potentially be used against them to justify the imposition of an

[8] See further the ICO's guide 'Auditing Data Protection: a guide to ICO data protection audits' ("the Audit Guide"), particularly the executive summary at pages 3-4.

MPN, this would strongly deter them from consenting to such audits; thus stymieing the objectives of the legislation.[9]

78. Miss Proops contends that where the IC is notified of a serious contravention under the DPA and he conducts an investigation into that contravention with a view to exploring whether regulatory action is warranted, the investigation is not conducted with a view to the IC performing an educational/advisory function; it is not an investigation *'for the following of good practice'* within the scope of section 51(7). Instead, it is an investigation which is designed to enable the IC to make an assessment as to: (a) whether the case calls for regulatory action and (b) if it does, the nature of any action which should be undertaken.

79. Moreover she considers there is no meaningful cross-over between the IC's investigatory/regulatory functions where he is notified of a serious breach and the IC's educational/advisory functions under section 51(7) where a data controller has consented to submit to a good practice audit (although similar investigatory steps would be taken in both situations).

80. Miss Proops also considers that the Trust's case that section 55A(3A) applies in any case where the data controller has notified the IC of a contravention of the DPA effectively amounts to the Trust seeking to write a limitation into section 55A(3A) which is not there. Had the legislators intended to exclude the IC's power to issue an MPN in all cases where the contravention had been voluntarily reported, Miss Proops says, it would have been expected that such an exclusion would be expressly indicated in the legislation. In any event it cannot be presumed that the legislators intended MPNs to be inapplicable in cases where the particular contravention was voluntarily reported. The primary purpose of the statutory penalty regime embodied in section 55A is not to ensure that contraventions are voluntarily reported when they occur but rather to penalise data controllers in circumstances where they deliberately or negligently/recklessly commit serious contraventions of the legislation, thereby promoting compliance with the Act (by that public authority and others).

81. Miss Proops explains that the reason why an exception is "carved-out" in respect of section 51(7) is not so as to ensure that serious data breaches are reported but rather with a view to encouraging data controllers to consent to good practice audits and thus reducing the chances that data controllers will breach the Act in future.

82. She says that the logical conclusion of the Trust's case is that even in the case of the most serious, deliberate and damaging contravention, a data controller

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[9] See further §§23-25 of the Ministry of Justice consultation paper: The Information Commissioner's Inspection Powers and Funding Arrangements under the DPA (published on 16 July 2008); the outcome section in the 'Summary of Responses' to the consultation paper and also the Audit Guide, response to the question 'what about enforcement action' .

could effectively guarantee that it would not be subject to a penalty merely by ensuring that the contravention was reported to the IC. Such a conclusion, she maintains, is absurd and simply cannot be reconciled either with the statutory scheme embodied in the DPA or with the legislative intent which must be presumed to underpin section 55A. It is a result, she says, which would substantially and untenably diminish public trust in the effectiveness of the DPA regulatory regime.

83. It is no answer to these points, she says, to say that the data controller would still potentially be subject to all other regulatory remedies open to the IC. The other remedies lack the powerful regulatory 'bite' of the remedy afforded under section 55A. The mere fact that the IC may, in circumstances where a contravention has been reported to him, investigate the factual circumstances of that breach prior to deciding what form of enforcement action to take does not and cannot mean that the IC has, as a result, conducted an 'assessment' for the purposes of section 51(7). The fact that the IC investigates a reported breach is a proper and typically a necessary precursor to the issuing of a NoI. It is not a process which can be treated as effectively excluding the issuing of such a notice.

84. Miss Proops considers there is otherwise nothing in the legislative history of section 55A(3A) which suggests that the Trust's arguments as to the scope and effect of this provision should be accepted. Section 55A(3A) was introduced merely in order to ensure that the MPN regime provided for under s. 55A(1) could not be used so as to undermine the GPA regime. The Trust's attempt to expand the scope of section 55A(3A) so that it applies in any case where a contravention is voluntarily reported does not remotely protect the GPA regime. Instead, it simply deprives the MPN regime of much of its force. In any event, it is wholly arbitrary to suggest that the bar provided for under section 55A(3A) is engaged where the IC conducts an investigation following a voluntary reporting but is not engaged where the IC conducts an investigation after he learns of the contravention by some other means. There is nothing in the statutory language to suggest that such a dividing line can be drawn. It follows that, if, under section 55A(3A), the IC cannot take into account any information he obtains following an investigation commenced after a contravention is voluntarily reported then equally he cannot take into account any information he obtains following an investigation commenced in circumstances where the IC learnt of the contravention from another source. On this analysis, Miss Proops contends, the IC would, in effect, never be able to issue an MPN as he would never be able to investigate a contravention without engaging the statutory bar under section 55A(3A).

85. Before dealing with the above contentions of the Trust and IC, there was much argument between the parties as to what is an assessment. Basically the Trust argues that the IC has not explained how the processes beginning with a voluntary notification should be categorised if they do not fall within section 51(7). Mr Pitt-Payne says the IC is a "creature of statute" and all of his actions need to be founded upon a specific section of the Act. The Trust submits that there is no more appropriate section than section 51(7) for these processes. He argues that the IC has re-coupled assessments and fines, contrary to the

legislative intent, thereby using the voluntary notification process in a manner not contemplated when that process was introduced.

86. We find this argument difficult to accept. Sections 41A, 51(7) and 55A provide the IC with three different powers. They each require, in our view, investigations to be undertaken and assessments to be made in relation to the carrying out of each power. The ICO has provided specific guidance or code of practice for each one separately. *Auditing Data Protection* dated May 2011 addresses section 51(7) consensual assessments. *Assessment Notices* dated April 2010 addresses section 41A coercive or compulsory assessments. The MPN guidance addresses section 55A. We accept that at the time of the investigation they could have more clearly explained how they related to each other and that the terminology used could have been more consistent, particularly in relation to the various notification guidance (although we understand this has now been done). However we cannot accept that Parliament intended anything other than that there are three different powers which each require either expressly or impliedly their own investigation and a form of assessment and that the only overlap relates to the "carve-out" provisions in section 55A(3A). In the case of the section 55A powers the MPN guidance (statutory guidance) clearly explains that "as a starting point the Commissioner will satisfy himself, by means of an investigation …. He will then consider whether, in the circumstances, it would be appropriate to issue" an MPN. This latter stage is clearly, in our view, a form of assessment.

87. We return to the main contentions. We have carefully considered all these and prefer the contentions made by Miss Proops. The Tribunal asked Mr Pitt-Payne whether and how he could envisage section 55A applying where there was voluntary notification. His only suggestion was that in order to invoke the section the IC would have to serve an Information Notice under section 43 as part of his investigation thereby providing an element of compulsion to the process which would then no longer be voluntary or consensual. Only then could section 55A be used unless notification had been by a third party or discovered on the basis of the ICO's own investigation from say something they had read in the newspapers. We find this explanation to be so contrived that it could not possibly have been what Parliament intended. If it had so intended then surely it would have spelled it out in the legislation. Also we note that the Trust was, in effect, compelled to notify such a breach as in this case under DoH and NHS guidance and that it may not be accurate to describe it as a purely "voluntary" or "consensual" notification.

88. Also we have taken into account the following matters in coming to our conclusion:

    a. When considering Parliament's intention in relation to introducing MPNs it appears to us that the overriding policy objective is to penalise wrongdoers and provide a deterrent culture rather than to just identify serious contraventions;

    b. The purpose of the section 51(7) "carve-out" is not to incentivise data controllers to notify beaches but rather to encourage them to seek to be educated and advised by the ICO to ensure future compliance.

c. There is nothing in the MPN guidance that appears to us to support the Trust's case. Even if we are wrong and some of the other guidance is confusing the Trust cannot rely on such guidance to construe the statutory legislation.

d. There can be no serious dispute that the IC has power to investigate contraventions in his enforcement capacity and not just in his guise as an educator. Any other conclusion could result in serious violence to the legislation. Having regard to the statutory scheme even if not expressly provided for the IC enjoys an implied power to investigate all potential contraventions of the DPA in an enforcement capacity and the only limit on that implied power is as to the "carve-out" in section 55A(3A). In coming to this conclusion we have considered *Bennion on Statutory Interpretation* and particularly note what he says at page 487:

> *The legislator is presumed to intend that the literal meaning of the express words of an enactment is to be treated as elaborated by taking into account all implications which, in accordance with the recognised guides to legislative intention, it is proper to treat the legislator as having intended. Accordingly, in determining which of the opposing constructions of an enactment to apply in the factual situation of the instant case, the court seeks to identify the one that embodies the elaborations intended by the legislator.*

89. Mr Pitt-Payne also argues that ministerial statements made in the Parliamentary debates on section 55A(3A) support his contentions on section 51(7). In order for the Tribunal to be able to take these into account the Trust must establish that the requirements identified by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 (at 640C) have been met on the facts of this case.

90. We do not consider the primary legislation is ambiguous or obscure and accordingly there is no need to make reference to the statements of the Minister. We could understand an argument that the IC's policy documents might be ambiguous or obscure but such documents were not the basis of the decision in *Pepper.* Therefore we do not consider it permissible to rely on statements made in Parliament in order to limit the scope of the IC's powers under section 55A(1).[10] Even if we are wrong such statements as have been made by Ministers do not seem to us to support the Trust's case.

91. We therefore find that a voluntary notification of a serious breach of the DPPs does not preclude the IC from investigating the breach with a view to issuing an MPN as well as taking other enforcement action.

92. Moreover in relation to this ground of appeal we find that the IC's decision was in accordance with the law, and/or properly involved the exercise of his discretion.

[10] See (*R v Secretary of State for the Environment ex parte Spath Holme Ltd* [2001] 2 AC 349, per Lord Bingham at 392C-D; Lord Hope at 407E-H, 408C-D, and Lord Hutton at 413G. and Lord Nicholls at 398C and 399D).

## ICO's disregard for its own policy

93. The Trust's second ground of appeal is that the MPN is contrary to the ICO's own NDSB. For this reason, the Notice was unlawful in public law terms. Alternatively, the ICO ought to have exercised its discretion differently, by not serving an MPN but instead dealing with the data security breach in some other way.

94. Mr Pitt-Payne says that both the original version of the Notification Policy, and the version in force when the Trust voluntarily notified the data security breach, state that "the Commissioner will not normally take regulatory action unless a data controller declines to take any recommended action, he has other reasons to doubt future compliance or there is a need to provide reassurance to the public"[11].

95. He argues that this language places an important limitation on the circumstances when regulatory action will be pursued. While the Trust accepts that policies should not act to fetter discretions[12], they cannot, he says, just be simply discarded, ignored or by-passed without good reasons, which reasons should be explained[13]. Mr Pitt-Payne considers that what the ICO ought to have done therefore was, first, to consider the three circumstances set out in its NDSB. It should have asked itself: whether the data controller, the Trust, had declined to take any recommended action; whether the ICO had any other reasons to doubt the Trust's future compliance; or whether there was a need to provide reassurance to the public by taking regulatory action against the Trust. On a proper approach the ICO, Mr Pitt-Payne contends, would have answered each question in the negative. The ICO ought then to have gone on to consider whether, nevertheless, it ought to take regulatory action in this case: and if yes, whether it should do so by way of enforcement notice, MPN, or in some other way.

96. Mr Pitt-Payne argues that there is no evidence whatsoever that the ICO adopted this approach. Neither the MPN, the RACS, the RARR, nor the ICO's witness statement, provide any evidence to suggest that the ICO appreciated the effect of its NDSB during its deliberations in this case. Having regard to the evidence as a whole, Mr Pitt-Payne contends, the best inference to draw is that the ICO simply overlooked the language of its NDSB.

97. The ICO responds that while it should have regard to the NDSB, its effects are "non-binding". In the context of the use of the word "assess", the ICO also argues that the policy is merely a policy. It is non-statutory and, hence, non-binding. It cannot operate to fetter the powers afforded to the IC under primary legislation. Specifically in response to the Trust's contentions, the ICO argues

[11] See Version 4 dated 8 July 2010 which had effect when the Trust notified.

[12] See *R (Alconbury Developments Ltd) v. Secretary of State for the Environment* [2001] UKHL 23).

[13] For example, in the case of *Gransden v. Secretary of State for the Environment* (1987) 54 P & CR 86, it was held that "if it is going to depart from the policy, it must give clear reasons for … doing so in order that the recipient of its decision will know why the decision is being made as an exception to the policy and the grounds upon which it is taken." The decision of the Supreme Court in *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 is to similar effect: the Courts expect public bodies to honour their published policies, though they may depart from them if a good reason can be shown.

that the language is outdated and that it does not reflect the position adopted by the IC following the introduction of the MPN.

98. Mr Pitt-Payne says the effect of this argument is to brush away the language of the NDSB, as if it does not matter and the ICO does this because it is convenient to do so, yet, where it suits to, the ICO gives credence to the NDSB, particularly treating non-compliance with it as an aggravating feature when it comes to quantum of the financial penalty. In other words, the ICO is trying to have its cake and eat it.

99. Moreover Mr Pitt-Payne considers that the language of the policy does matter and that it is obviously important. The fact that the language under scrutiny has been excised from the current version of the NDSB, which was published after this appeal was commenced[14], underlines its importance and that this excision would not have been necessary if the language was unimportant.

100. Mr Pitt-Payne also submits that it is wrong for the ICO to argue that the language was "outdated". Version 4 contains a hyperlink at the foot of page 4 to the ICO Monetary Penalty Guidance, so contrary to the ICO's submission that it would have been obvious to the Trust that the language was outdated, the structure of Version 4 clearly showed that the language took account of the Monetary Penalty regime.

101. To summarise, Mr Pitt-Payne concludes that ICO departed from its policy without considering the reasonableness of doing so, and without even directing its mind to the existence and significance of the NDSB. He argues the ICO's decision was unlawful in public law terms and therefore it was not in accordance with the law and hence the Notice should be quashed. Alternatively, he argues, the ICO ought to have exercised its discretion differently: it should have had regard to its own policy, and if it had done so it would have chosen not to impose an MPN. On this alternative basis, the Notice should be quashed.

102. We have difficulty with the Trust's submissions. Firstly we do not consider the ICO has departed from its policy. The statutory policy (MPN guidance) is the starting point. Here it states that "the Commissioner is committed to acting consistently, proportionately and in accordance with public law. Essentially, the Commissioner will use this power as a sanction against a person who deliberately or negligently disregards the law". The NDSB is not a statutory policy and therefore if there is any tension between the two the statutory guidance should be followed. However we do not consider that such tension is present in this case. In its early versions the policy makes clear that regulatory action may be taken "where there is a need to provide reassurance to the public. Such a need is most likely to arise where the circumstances of the breach are already in the public domain". When the Trust informed the patients and their representatives of the data breach in October 2011 it, in effect, went public. As the Trust was unable to contact the recipient of the faxes, it cannot confirm that all sheets containing patient information have been shredded, so the (remote) possibility exists that personal data will yet come to light in the wrong hands. In its latest version (September 2012) the paragraph to which Mr Pitt-Payne refers has been removed from the policy. In any case the particular

[14] September 2012.

paragraph comes under the heading “Will a reported breach be made public?” which is a different context to “what will the Information Commissioner’s Office do when a breach is reported” which is the previous section (which lays out the policy which would appear to have been followed in this case). Incidentally during this period the statutory guidance has remained the same. Taking all this into account we do not find that the IC’s decision was unlawful in public law terms.

103. As to the discretion exercised by the IC, even if the Trust is correct that the ICO should have made clearer that its objective in this case was to reassure the public, the Trust itself acknowledged the seriousness of the breach. Mr Pitt-Payne does not submit that the statutory guidance was not followed. If there is any tension with the early versions of the NDSB, the MPN guidance should be preferred. Therefore, in our view, the IC exercised his discretion properly. Even if the MPN was flawed, the Trust’s own Chief Executive in his letter of 8 March 2012 accepted that the IC had reached the right decision and we do not consider in the circumstances of this case that the exercise of the IC’s discretion should be interfered with.

104. Therefore in relation to this ground we find that the IC’s decision was in accordance with the law, and/or properly involved the exercise of his discretion.

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**Wrong exercise of discretion in deciding to impose a penalty**

105. It is conceded by the Trust that all the conditions in section 55A(1) are made out. If they are made out the IC has the option: (i) to serve an MPN; (ii) to take some other regulatory action (e.g. to serve an enforcement notice); or (iii) to take no action. The ICO has a discretion to choose between these three options, and in some cases both to serve an MPN and take some other regulatory action.

106. We have already explained above that the IC’s discretion is not unfettered and is open to scrutiny by this Tribunal. Also as set out above, there are two bases for such scrutiny of a decision to serve an MPN. First, the Tribunal should consider whether the Notice was not in accordance with the law; and this would include whether the decision to serve the Notice was unlawful in public law terms. Secondly, the Tribunal should consider whether the IC’s discretion ought to have been exercised differently. This provision enables the Tribunal to substitute its own view for that of the IC, if it concludes that the IC’s exercise of its discretion was wrong.

107. Hence it is important for the Tribunal to understand on what basis the IC has exercised his discretion in this case so as to serve an MPN. The Tribunal can only make that assessment on the basis of the evidence before it.

108. Mr Pitt-Payne argues that the IC has not called any witness evidence to explain how and why he exercised his discretion.

109. This is not entirely accurate. Although Mr Powell’s written witness evidence for the IC deals only with one limited factual matter in response to a claim by Mr

Allison, Mr Powell did elaborate further in cross-examination and answering questions of the Tribunal at the hearing and he was involved with the investigation and subsequent Enforcement Team meetings. Among other things he explained that an MPN is not issued in every case in which the conditions are met.

110. Mr Pitt-Payne argues that the only documents that the ICO has disclosed in relation to its decision making process in this case, are the RACS and RARR. In the course of correspondence about disclosure, Mr Pitt-Payne says that the ICO made it very clear that these are the only documents in its possession that explain its decision-making process and therefore the Trust understands that these two documents represent the entirety of the ICO's case file in this matter. Mr Pitt-Payne says that in seeking to understand how the ICO exercised its discretion, there is nowhere for the Tribunal to go apart from these two documents (Summary and Report), the NoI and the terms of the Notice itself.

111. In public law terms, Mr Pitt-Payne says, the exercise of discretion was unlawful because the IC gave no or no sufficient weight to relevant considerations, and therefore reached a conclusion that was perverse in law. Further, on the basis of the material before the Tribunal, there is simply no explanation as to how the IC – having found that the preconditions in DPA section 55A(1) were met – then went on to exercise his discretion in favour of serving an MPN rather than responding to the data security breach in some other way.

112. In relation to relevant considerations, the Trust makes three points.

a. First, in deciding to impose a penalty the IC failed to take proper account of the overriding policy objective to encourage cooperative working between his office and data controllers and failed to give sufficient credit for the Appellant's transparency and its co-operative stance.

b. Secondly, the effect of his policy to impose high profile fines on data controllers who voluntarily report incidents and cooperate with his investigations is to discourage other controllers from being open and transparent.

c. Thirdly, the ICO's approach to cases of this nature creates an unfair and unsustainable distinction between those data controllers who, when suspected of being in breach of the DPA, are required to submit to assessment notices or are requested to undergo consensual audits and those, like the Trust in this case, who voluntarily submit themselves to regulatory scrutiny.

113. Mr Pitt-Payne says, there is no evidence that the IC has considered these matters or directed his mind to the existence of a discretion as to whether to serve an MPN or respond in some other way. Nor, he says, is there any evidence as to the basis on which the IC exercised that discretion and that the evidence indicates that the IC moved straight from the proposition, "Section 55A(1) is satisfied" to the further proposition, "Therefore, we should serve an MPN": Mr Pitt-Payne says this was a wholly erroneous approach.

114. Looking at the evidence before the Tribunal, the RACS was largely produced by Mr Powell who explained that he investigated the incident and received advice from his supervisor. The RARR contains a history of the incident and indentifies the factors as to the seriousness of the breach. It concludes with a suggestion that regulatory action be considered and whether the circumstances of this incident are substantial enough to warrant an MPN. It does not seem to purport to record any decision to issue an MPN until the final meeting on 24 April 2012. From the Standard Operating Procedure Monetary Penalty Notices we can see that the RACS would then have been considered by a Group Manager who would decide whether to convene an Enforcement Team group to "consider whether the matter is suitable for regulatory action involving a monetary penalty notice".

115. This was so decided as we see from the RARR where three meetings were subsequently held to consider the incident and what action to take. The report provides the background to the breach based on the RACS and undertakes an exercise as to whether the threshold for taking regulatory action was met. This was done by asking a number of questions and answering these from the evidence obtained during the investigation to determine the seriousness of the breach. The next step was to measure what the Trust had done to contain the breach and prevent reoccurrence. This lead to an analysis of what aggravating and mitigating factors should be taken into account. It is clear to us that the RARR takes into account relevant considerations based on the MPN guidance and gives weight to them. Part VI of the RARR, prior to recording the meetings, is the case officer's recommendations for action where he has ticked as possibly appropriate actions the boxes for a Civil Monetary Penalty Notice, Enforcement Notice and an Undertaking. He did not tick the boxes for an Information Notice, Audit-consensual (presumably section 51(7)), Audit-compulsory (presumably section 41A) and Negotiation/informal resolution.

116. The Team, comprising of six officers including the Head of Department, Group and Team Managers, a DPA solicitor, someone with a liaison role with the NHS and Mr Powell met on 5 January 2011. They asked themselves the necessary questions to establish whether the conditions for an MPN were satisfied and concluded that the breach would be "referred to the Deputy Commissioner as a recommended CMP".

117. Mr Pitt-Payne argues, however, that it does not address the question whether, given that these conditions/factors are present, the IC should exercise his discretion to serve an MPN.

118. It seems to us from Mr Powell's evidence and the RARR that the Team was considering at least three possible regulatory actions that could be taken but concluded that they would recommend the MPN route.

119. On 17 January 2012 they met again to consider what would be an appropriate penalty amount and decided to recommend to the Deputy Commissioner the sum of £90,000. As explained in paragraph 52 above, we know from the January 2011 Framework how they approached deciding the amount of the penalty.

120. On reviewing the two documents, (the RARR and RACS), we find that the ICO was largely following the MPN guidance (statutory guidance which includes the underlying objective) and its own internal procedures. However, at this stage no decision had been made by the IC. The ICO then issued a NoI to the Trust explaining the statutory framework, the IC's powers, the background to the incident, the grounds on which the IC proposed to serve an MPN and the amount of the penalty and gave the Trust the opportunity to make representations as to why the IC should not serve an MPN. We note that the NoI appears to indicate that this is a matter which the IC had already considered and come to a provisional conclusion about. We now know that the Deputy Commissioner had not yet considered the matter formally at a meeting with the Team/working group, and that ICO Enforcement Team were at this stage only making a recommendation to him. In this respect the NoI is misleading but not to the extent, in our view, to make the notice unlawful. Section 55B(3) makes it clear that the notice must inform the Trust of the IC's proposals, which it did. In this respect there is perhaps a difficulty in understanding the difference, if any, between the responsibilities of the ICO and the IC. The fact there is an internal process by which an ICO team undertake the investigation and assessment and issue the NoI before involving the IC formally (in the form of one of his Deputies) is, in our view, a matter of additional scrutiny and process rather than substance.

121. After receiving the Trust's representations the Enforcement Team met again but this time with the Deputy Commissioner (and not Mr Powell). In other words the composition of the group was at a more senior level. This group or panel, having taken into account the recommendations or proposals and Trust's representations, decided to issue an MPN for £90,000. This in our view records the IC's decision. In exercising his discretion he seems to us to have had all the necessary information before him to take a decision including the various regulatory options available.

122. We return to the Trust's contention that in public law terms the exercise of the IC's discretion was unlawful because the IC gave no or no sufficient weight to relevant considerations, and therefore reached a conclusion that was perverse in law and the three points he raises in paragraph 111 above. We find the basis of the process to exercise the discretion and the decision itself in all the circumstances of this case to be entirely reasonable and cannot accept that the IC reached a conclusion which was perverse in law. We consider the three points raised by the Trust to be largely misconceived or unfair to suggest in relation to how the IC exercised his discretion in practice in this case. There was no evidence provided to any of the three meetings (by the Trust or anyone else) that a MPN was inappropriate in this case. The Trust's view of the IC's 'overriding policy objective' is misconceived. The argument that voluntary reporting by authorities will be discouraged is misplaced in that authorities who do not report voluntarily are likely to face higher monetary penalties.

123. We do accept however that the process could have been more comprehensible and we note that the internal documents have now been published and made clearer.

124. Therefore in relation to this ground we find that the IC's decision was in accordance with the law and/or properly involved the exercise of his discretion.

**Failure to take proper account of mitigating features in deciding to impose a penalty**

125. The Trust contends that in deciding whether to serve an MPN or to take some other form of regulatory action, the ICO ought necessarily to have taken into account any mitigating factors that might render it appropriate to take a different (less onerous) form of regulatory action. In this case Mr Pitt-Payne says, there were obvious mitigating features (albeit largely factors relating to after the breach occurred). The Trust had voluntarily reported the data security incident to the Commissioner, and voluntarily co-operated throughout the Commissioner's investigation. Further, the Trust voluntarily reported the incident to the affected data subjects; no complaints were received from the affected data subjects; the personal data involved were not further disseminated; the Trust had not suffered similar incidents in the past, i.e. it was a "first time offender" in data security terms; and the Trust voluntarily undertook substantial remedial action.

126. We do not consider this contention is correct. In order to decide whether it is appropriate to impose an MPN the IC must ensure under section 55A that there is a serious contravention, the contravention was of a kind likely to cause substantial damage or distress, that the Trust ought to have known that there was a risk this would occur and be of a kind likely to cause substantial damage or distress but failed to take reasonable steps to prevent the contravention. From the evidence it is clear to us that this is what the ICO did. According to the MPN guidance the IC "will take full account of the facts and circumstances of the contravention and any representations made to him". Again from the RACS and RARR this is what he has done.

127. When it comes to the amount of the penalty then according to the MPN guidance the IC will take into account the sort of mitigating factors the Trust mentions above and we deal with this later.

128. Therefore we consider the Trust's argument as applied to this ground of appeal is misconceived. Even if we are wrong we consider the IC has recognised many of the factors raised and has had regard to them. The fact that there was a voluntary notification cannot be given much weight when the Trust was under, in effect, an obligation to report (both to the ICO and to the NHS regionally). In any case it was reported over a month after the breach was discovered. Co-operation was the least that could be expected for such a serious breach. By the time the Trust informed the patients over three quarters were dead. There is still no absolute guarantee the sensitive information has been destroyed. The Trust's mitigating features are therefore features to which we find the IC could not give much weight. In any case they are almost all post facto events and nothing about the wrongdoing.

129. Therefore in relation to this ground of appeal we find that the IC's decision was in accordance with the law, or properly involved the exercise of his discretion.

**ICO's change of position**

130. We can deal with this ground very briefly following our above finding that Mr Powell did not commit the IC to any position – see paragraphs 41 to 46 above. We do not find the IC changed his position. He did not make a final decision to impose a MPN until the meeting of 24 April 2012.

131. However the Trust puts it another way. The Trust does not suggest that the ICO was simply bound by the indication given by its case officer, and unable to depart from that indication. Rather, the point is that if the ICO was to depart from that indication, then: (i) it ought to have addressed its mind to the question, asking itself on what basis it was proposing to take a different approach; and (ii) it ought to have explained its proposed change of approach to the Trust, giving its reasons, and giving the Trust an opportunity to respond.

132. We find, even if an indication was given, this was at the beginning of the investigation and was based on an initial notification of the extent and seriousness of the breach and on the evidence cannot be considered as a change of position. Therefore for the Trust to be suggesting that the IC should have taken the approach in the preceding paragraph, as if it was departing from its position, is unjustified in the circumstances of this case.

133. We conclude in relation to this ground of appeal that the IC's decision was in accordance with the law, or properly involved the exercise of his discretion.

**Failure to explain principles as to amount of penalty**

134. The Trust contend that the IC erred in law and/or exercised his discretion wrongly in setting the amount of the penalty, in that he failed at any stage to explain the principles by reference to which he proposed to calculate the amount of the penalty, thereby depriving the Trust of any opportunity to make meaningful representations as to the appropriate amount.

135. Mr Pitt-Payne explains that the ICO served the NoI so as to give the Trust an opportunity to make representations. It was obliged to do this before issuing the Notice: see DPA section 55B(1)-(4). The NoI stated that the amount of the proposed penalty was £90,000, but gave no explanation whatsoever, he says, as to how that figure had been reached. The Trust was therefore deprived of the opportunity to make meaningful representations as to the amount of the penalty. Hence the Notice did not fulfil the statutory objectives of section 55B(1)-(4), in giving the data controller a fair opportunity to comment (including as to quantum) before any MPN was issued. For this reason, Mr Pitt-Payne contends, the Notice was not in accordance with the law; alternatively, the ICO ought to have exercised its discretion differently in serving the Notice.

136. Although the ICO does not spell out its methodology in the NoI, it does explain its reasoning in the NoI which appears to be consistent with the principles set out in the MPN guidance. We now have the benefit of seeing the methodology which is referred to earlier in the reasons for this decision and can see how the actual figure was calculated.

137. The contravention is categorised as “serious” and thus at the lower end of the scale. In relation to the contravention the NoI explains the aggravating and mitigating features which are the approach recognised in the MPN guidance to assist in assessing the amount of the penalty. Mr Allison made it clear in evidence that he was aware of the use of MPN, and from this we assume the likely size of penalties given for breaches by other authorities. So we have difficulty in understanding the point being made by Mr Pitt-Payne. From the Trust’s Chief Executive’s response of 8 March 2012 it seems to us that he appreciates the principles being applied and attempts to make an improved case for the amount of the penalty to be lowered.

138. We find it interesting that the contravention is only categorised as “serious” and not “very serious” as it seems to us on the facts of this case the IC could have taken a more penal approach to the amount in question. In addition to the mistakes made by the first administrator (described in para 4e. to g. above), the Trust had failed to assess if this transmission of data was strictly necessary (after the breach, alternative methods were used when necessary), had failed to display the fax safe haven protocol (4.4d of the “Code of Conduct for employees in respect of Confidential Information”) beside the fax machine, had failed to ensure staff training was adequate and up to date, had failed to ensure that the ‘stand-in’ administrator followed exactly the same protocol as the usual administrator (which she did not, as shown by the statements from the two individuals), and had failed to install technological or manual mechanisms to enable it to trace destinations of faxes. As part of the National Health Service, the Trust is also bound by the Caldicott Principles, and it breached at least two of these in this case.

139. We refer back to the submission of Miss Proops that the particular expertise of the ICO is such that we should be cautious about interfering in its assessment. We are satisfied that the ICO has reached a figure within a range of reasonable figures it could have considered. We are helped in this by the fact that in the MPN dated 27 April 2012 the IC, after taking into account the Chief Executive’s representations of 8 March 2012, reconsidered the amount of the penalty and “whether it is a reasonable and proportionate means of achieving the objective which the Commissioner seeks to achieve by this imposition”. The underlying objective is clearly stated in the NoI on page 7. As he says in the Notice he came to a reasonable and proportionate view based on the particular facts of this case.

140. We find that the IC did not err in law and/or exercised his discretion correctly in setting the amount of the penalty. On consideration of all the evidence we find that he did explain the principles by reference to which he proposed to calculate the amount of the penalty and that the Trust was given the opportunity to challenge these which it did.

**Failure to take proper account of mitigation in setting amount of penalty**

141. Mr Pitt-Payne contends that, in setting the amount of the penalty the IC gave insufficient credit to the Trust for the fact that it had: (i) voluntarily reported the data security incident to the Commissioner; (ii) voluntarily co-operated throughout the Commissioner’s investigation; and (iii) voluntarily reported the

incident to the data subjects. The ICO also failed to give sufficient credit for the other mitigating features referred to in the Notice.

142. We have considered all the evidence and it is clear that the ICO did take all factors/features into account. In any case we have already provided our view of the above factors earlier in these reasons for our decision and explained how we do not give much weight to them.

143. Mr Pitt-Payne contends that the aggravating features reveal several fundamental misunderstandings by the ICO. The serious nature of the contravention and the likelihood of causing substantial distress are treated as aggravating features which were used to establish the preconditions of the ICO's jurisdiction to issue an MPN in the first place. He says they cannot possibly be treated as aggravating the contravention (i.e. making it potentially worse than others where MPNs were imposed); if it were not for these features then the question of an MPN would not even arise.

144. This is not what we consider the IC did. The MPN is clear. It first explains how he determined that the elements necessary for an MPN were present and then considered the aggravating and mitigating features "taken into account in determining the amount of a monetary penalty". These take into account the behavioural issues referred to by Mr Pitt-Payne.

145. Finally under this ground Mr Pitt-Payne refers us to the heading "impact on the data controller" in the MPN. He says it states that the controller had sufficient financial resources to pay a monetary penalty up to the maximum without causing undue financial hardship and that liability to pay the penalty would fall on the public purse. The same error, as he calls it, can be seen in the meeting on 17 January 2012 where the ICO noted that "the financial status of the data controller is not considered, as it is a public authority and judged to have sufficient funds to pay without hardship". Mr Pitt-Payne contends that the ICO failed to take into account that any penalty would be paid from the Trust's budget and would therefore, necessarily, have a potential impact on services. He suggests to us a more appropriate penalty would be £40,000 which is the lowest level of the "serious" band category in the 31 January 2011 Framework document.

146. The MPN guidance recognises that a feature which should be taken into account in determining the amount of the penalty is the ability of the data controller to pay the amount. The IC clearly does take this into account as he refers to it in the NoI. It could be argued, however, that this is an insufficient approach to assessing financial impact. But the Trust was given the opportunity to challenge the approach. The Chief Executive in the Trust's representations following the NoI does not do this or make the case that a penalty of £90,000 will reduce service availability or other hardship. So the IC cannot be criticised for not considering the matter further or appearing to give it increased weight for which no evidence is provided. We note that no evidence was provided to the Tribunal of the effect on service delivery of a penalty of this size. We also note that the penalty is likely to be only a small percentage of turnover.

147. We would observe that the terms "mitigating" and "aggravating" features are used in the 2010 Monetary Penalties Regulations in regulations 3 (c) and 4 (e).

148. Therefore we cannot accept Mr Pitt-Payne's assertion that the ICO failed to give sufficient weight to the mitigating features identified by the Trust. Moreover we cannot find that in its approach to mitigation the ICO acted in a manner that was not in accordance with the law; nor alternatively it ought to have exercised its discretion differently.

149. The Tribunal having considered all the arguments and evidence finds that, the IC exercised his discretion properly in levying a financial penalty of £90,000.

**Early payment discount**

150. The monetary penalty notice stated that the penalty would be reduced by 20% to £72,000 if the ICO received full payment by Monday 28 May 2012. The Trust offered to pay £72,000 within the time specified, on the footing that payment would be without prejudice to its right to appeal, and that the payment would be refunded by the ICO if the appeal succeeded. The ICO refused to accept payment on that basis, and took the position that the Trust had a choice between taking the benefit of the discount, and exercising its right to appeal. This, the Trust says, was an error of law and/or a wrong exercise of discretion: effectively, the ICO sought to subject the Trust to a financial penalty for exercising its right to appeal.

151. Mr Pitt-Payne invites us, if we disregard the Trust's arguments as to appropriateness of the amount of the penalty, to reduce the amount of the penalty to £72,000 so that the effect would be to restore the benefit of the discount for early payment, because the Trust has been wrongly deprived of that benefit.

152. The MPN guidance provides for an early payment discounted on the following basis:

> *If the Commissioner receives full payment of the monetary penalty within 28 days of the monetary penalty notice being served, the Commissioner will reduce the monetary penalty by 20%.*

153. The purpose of the scheme would appear to us to encourage early payment and also to ensure there is an early resolution to the matter. There is no provision for a without prejudice payment.

154. The failure of the IC to accept the without prejudice offer outside the basis of the MPN guidance does not seem to us to amount to an error of law and/or wrong exercise of discretion. At most the MPN guidance is a quasi judicial obligation on the IC to provide a discount on specific terms. He did so in this case. The Trust chose not to accept the terms and it is its loss when an appeal fails.

155. We note that such a discount for early payment is offered under other regimes like parking and minor road traffic offences. We are not aware that an offender can reserve his position if he decides to appeal.

156. For these reasons we are not prepared to restore the discount.

Conclusion

157. We find, for the reasons given above, that the IC was entitled to serve an MPN in this case and that he exercised his discretion properly as to the amount of the penalty. We dismiss the appeal and uphold the MPN.

158. Our decision is unanimous.

Signed

John Angel
Tribunal Judge

Date: 15 January 2013

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