THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/177/2014

PARTIES

The Information Commissioner (Appellant)

and

Christopher Niebel (Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Information Commissioner.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 14 October 2013, under file reference EA/2012/0260, in relation to the Respondent's appeal against the Appellant's Monetary Penalty Notice dated 26 November 2012, does not involve any error on a point of law.

The First-tier Tribunal's decision accordingly stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

The background to this appeal

1. Unsolicited direct marketing communications, whether by text, phone call or e-mail, are one of the banes of modern life. They represent an intrusion into people's privacy. A member of the public who visits the website of the Information Commissioner's Office is advised that the Commissioner "can issue fines of up to £500,000 for serious breaches of the Data Protection Act and Privacy and Electronic Communications Regulations" (see the page at www.ico.org.uk/enforcement/fines). The Commissioner's website also lists all the monetary penalty notices (MPNs) that have been issued. The majority of these have been issued against public sector organisations for breaches typically involving the loss or disclosure of personal data (see e.g. *Central London Community Healthcare NHS Trust v Information Commissioner* [2013] UKUT 0551 (AAC); [2014] 1 Info LR 51).

2. On 26 November 2012 the Commissioner served a monetary penalty notice on two individuals, Christopher Niebel and Gary McNeish, the joint owners of Tetrus Telecoms. According to the summary on the Commissioner's website, "The company had sent millions of unlawful spam texts to the public over the past three years." This was, I was told, an investigation that had generated the largest number of complaints of any such inquiry handled by the Commissioner. Strictly speaking, Mr Niebel and Mr McNeish were each served with separate MPNs. The present proceedings concern only Mr Niebel; the Commissioner's decision had been to issue him with a MPN for one of the largest penalties so far (£300,000).

3. On 14 October 2013 the First-tier Tribunal (Judge Nicholas Warren, Chamber President, Mrs Susan Cosgrave and Ms Jean Nelson) allowed Mr Niebel's appeal against his MPN. The Commissioner now appeals to the Upper Tribunal, with my permission. On any reckoning, Mr Niebel's conduct represented a considerable public nuisance (in the layperson's broad understanding of that expression, rather than the technical lawyer's meaning). The tribunal's summary of the background to the case pulled no punches:

> "[2] The material before us demonstrates that Mr Niebel and his company, Tetrus, has been engaged in sending unwanted text messages on an industrial scale. There were hundreds of thousands of them sent from hundreds of unregistered SIM cards seeking out potential claims for mis-selling of PPI loans

> or for accidents. There is certainly no evidence from Mr Niebel to show that he made any effort to make sure that the recipients consented or that he retained any record of consents. He did not even bother to register with the ICO under the Data Protection Act (DPA) as a controller of data."

4. Nobody in the proceedings before me took issue with that summary. If anything, the tribunal's account may underplay the scale of Tetrus's operations. The Commissioner's MPN refers to "many millions of unsolicited direct marketing text messages" (at paragraph [7]) and the use of over 16,000 SIM cards (at paragraph [41]).

5. However, Mr Niebel is not charged with being a public nuisance. The case against him is that he acted in serious breach of the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426, as amended; referred to here as "PECR") and as such was liable to pay what is, in effect, a (very substantial) fine by virtue of the MPN issued under the DPA 1998.

6. I held an oral hearing of the Commissioner's appeal to the Upper Tribunal on 13 May 2014. I am indebted to Mr James Cornwell (counsel for the Commissioner) and Mr Robin Hopkins (counsel for Mr Niebel), both of whom appeared below, for their illuminating submissions, both on paper and orally. However, I am dismissing the Commissioner's appeal for the reasons that follow.

The legal framework

7. We have all received unsolicited direct marketing messages by text, e-mail or telephone. As noted above, they are not simply a nuisance. They also represent an intrusion into our privacy. This mischief was recognised by the European Directive 2002/58/EC on privacy and electronic communications ("the 2002 Directive") (see e.g. recitals (2), (3) & (40) and Article 1(1)). The 2002 Directive was implemented in domestic law by PECR. In particular, regulation 22 of PECR prohibits the "transmission of unsolicited communications by means of electronic mail to individual subscribers" for direct marketing purposes, unless the individuals concerned have asked for, or consented to, such communications ("electronic mail" is defined broadly by regulation 2(1) of PECR to include phone texts). Furthermore, regulation 23 prohibits the transmission of such communications which either disguise or conceal the identity of the sender. Regulation 31 of, and Schedule 1 to, PECR modified certain provisions of the DPA for the purposes of the new regime. PECR came into force on 11 December 2003 (regulation 1).

8. The 2002 Directive was significantly amended by Directive 2009/136/EC ("the 2009 Directive"). In particular, Article 2(10) of the 2009 Directive inserted a new Article 15a into the 2002 Directive, entitled "Implementation and enforcement". This required Member States to make provision for penalties for infringements of national provisions adopted under the Directive, "including criminal sanctions where appropriate". In addition, "the penalties provided for must be effective, proportionate and dissuasive". The UK Government sought to give effect to the 2009 Directive by bringing forward amendments to PECR in the form of the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 (SI 2011/1208; "PECR 2011"). In particular, regulation 14(e) of PECR 2011 amended Schedule 1 to PECR so as to make certain modifications to section 55A of the DPA. These amendments were effective as from 26 May 2011.

9. Section 55A itself had been inserted into the DPA by section 144(1) of the Criminal Justice and Immigration Act 2008 (along with the supplemental sections 55B-55E). These amendments were made at the 11th hour of the Bill's Parliamentary

progress (and as such may lend support to the thesis that Parliament may legislate in haste but repent at leisure). Section 55A(1) reads as follows, as modified for the present purposes by PECR (as amended):

> **"55A Power of Commissioner to impose monetary penalty**
> (1) The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that—
> (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003,
> (b) the contravention was of a kind likely to cause substantial damage or substantial distress, and
> (c) subsection (2) or (3) applies."

10. For reasons that will become apparent, this appeal to the Upper Tribunal is concerned solely with the proper interpretation of the second of those three statutory requirements, i.e. was it the case that "the contravention was of a kind likely to cause substantial damage or substantial distress" within section 55A(1)(b)? The threshold of "substantial damage or substantial distress" is a purely domestic construct; a test in those terms does not appear in either the 2002 or 2009 Directives.

The Commissioner's guidance

11. Section 55C of the DPA requires the Commissioner to prepare and issue guidance on how he proposes to exercise his functions under section 55A. That guidance has to be approved by the Secretary of State (section 55C(5)) and laid before Parliament (section 55C(6)). The Commissioner's duty to seek the approval of the Secretary of State has since been replaced by a requirement simply to consult with the minister (section 55C(5) as amended by the Protection of Freedoms Act 2012, section 106(3)), but nothing turns on that for present purposes.

12. What is the status of such official guidance? I did not discern any real disagreement between the parties as to the principles involved; rather the dispute focussed on the application of those principles to the circumstances of the present case. Mr Cornwell did not suggest the guidance had the force of statute law; rather he argued it was highly persuasive, given the requirements of section 55C(5) and (6) and in the absence of binding judicial authority that it was wrong. Mr Hopkins accepted that the guidance was persuasive, but contended that it could not dictate the outcome on the facts of any given case, and the tribunal was entitled to depart from the guidance so long as it explained why. I return to this point in the context of the Commissioner's third ground of appeal below.

13. At this stage I simply note that, as both counsel rightly observed, the Commissioner's guidance is a classic example of 'soft law'. This was the term used by Lord Steyn in *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 AC 148 at paragraph [44] (a usage misattributed to Lord Bingham of Cornhill by the author of *Bennion on Statutory Interpretation* (5th edition, 2008) at p.706). So far as I can tell, Lord Steyn first used the expression 'soft law' in a judicial context as a generic description for "codes, departmental circulars, directives, and statements of practice" in a Privy Council case, *R v Her Majesty's Advocate & Anor* [2002] UKPC D3; [2004] AC 462 (at paragraph [5]). However, Lord Steyn did not coin the term 'soft law' but rather conferred on it judicial respectability; the expression had been part of the currency of legal scholars for many years (especially, but by no means exclusively, in the fields of public international law and European law). Indeed, much of the conceptual work on soft law had been undertaken by Professor Ganz in her path-breaking study *Quasi-Legislation: Recent Developments in Secondary Legislation* (1987), which in turn had built on the foundations laid by the short but

insightful note by the then Robert Megarry entitled "Administrative Quasi-Legislation" (1944) 60 L.Q.R. 125 (highlighting the Inland Revenue's use of extra-statutory concessions).

14. In the present case the relevant guidance or soft law has been published as *Information Commissioner's guidance about the issue of monetary penalties prepared and issued under section 55C (1) of the Data Protection Act 1998* (ICO, January 2012). The Commissioner's guidance on what constitutes "substantial damage or substantial distress" is to be found at pp.14-16 of that document (omitting those passages that relate to breaches of the DPA itself, rather than PECR, and keeping emphasis as in the original):

> "What does the Commissioner mean by the term **substantial**?
>
> The likelihood of damage or distress suffered by individuals will have to be considerable in importance, value, degree, amount or extent. The Commissioner will assess both the likelihood and the extent of the damage or distress objectively. In assessing the likelihood of damage or distress the Commissioner will consider whether the damage or distress is merely perceived or of real substance. The Commissioner does though consider that if damage or distress that is less than considerable in each individual case is suffered by a large number of individuals the totality of the damage or distress can nevertheless be substantial.
>
> ...
>
> **Example – substantial in relation to a serious contravention of the 2003 Regulations**
>
> Distress and anxiety caused to a large number of individuals who receive repeated automated marketing calls based on recorded messages, or marketing text messages without having given their consent, particularly where the identity of the caller or sender is concealed so stopping the messages or complaining is difficult.
>
> What is meant by the term **damage**?
>
> Damage is any financially quantifiable loss such as loss of profit or earnings, or other things.
>
> ...
>
> **Example – damage in relation to a serious contravention of the 2003 Regulations**
>
> The telephone lines of a large number of organisations (including sole traders, doctor's surgeries and the emergency services) are inundated with automated marketing calls based on recorded messages or marketing text messages. Alternative arrangements have to be made so that urgent calls can be received. This results in substantial costs being incurred.
>
> What is meant by the term **distress**?
>
> Distress is any injury to feelings, harm or anxiety suffered by an individual.

...

Example – distress in relation to a serious contravention of the 2003 Regulations

Over a period of several weeks repeated automated marketing calls based on recorded messages are made or marketing text messages are sent to a subscriber who has not agreed to receive them causing anxiety and annoyance to the individual."

The Commissioner's investigation and the decision to levy a monetary penalty

15. The Commissioner's investigations into the operations of Mr Niebel and Mr McNeish through Tetrus Telecoms involved a combination of old-fashioned detective legwork and high-tech forensic analysis of mobile phone usage patterns in conjunction with O2. I need not repeat the details here. There is a helpful summary of that investigative process at paragraphs [6]-[31] of the MPN in question.

16. The essence of the case against Mr Niebel was that he had "sent or instigated the sending of many millions of unsolicited direct marketing text messages" (MPN, paragraph [7]). There were six variants of such communications. Typical such text messages read "CLAIM TODAY you may be entitled to £3500 for the accident you had. To claim free, reply CLAIM to this message. To opt out, text STOP. Thank you" and "URGENT! If you took out a Bank Loan prior to 2007 then you are almost certainly entitled to £2300 in compensation. To claim reply 'YES'" (for further examples, see MPN at paragraph [19]).

17. The MPN concluded that such text messages were in breach of both regulation 22 of PECR (because they were unsolicited) and also regulation 23 (as the sender's identity was disguised or concealed). There is now no challenge to those findings with regard to the particular texts now in issue. The MPN also recorded that "411 of the complaints that were made to the Commissioner about unsolicited texts received between 24 January 2011 and 9 November 2011 can be linked directly to those mobile phone numbers provided by O2" (and as such were associated with Tetrus; MPN, paragraph [16]).

18. The MPN then dealt with the statutory formulation under section 55A(1)(b) as follows:

"Likely to cause substantial damage or substantial distress (S55A(1)(b))
43. The Commissioner is satisfied that the contravention is of a kind likely to cause substantial damage or substantial distress as required by section 55 (1) (b) because of the sheer numbers of individuals who were receiving these texts. Although the distress in each individual case may not always have been substantial, the cumulative amount of distress suffered by the huge numbers of individuals affected means that the level became substantial. In some cases individuals had received a number of texts despite requesting that the practice ceased. When looking at the definition of 'substantial' in terms of the levels of distress, the Commissioner has had regard to section 2, page 14 of the Statutory Guidance referred to in paragraphs 4 and 5 above and this says that the Commissioner considers that 'if damage or distress that is less than considerable in each individual case is suffered by a large number of individuals the totality of the damage or distress can nevertheless be substantial'.

44. The main concerns expressed by the 411 complainants in this case are about receiving multiple texts over a short period of time, receiving texts after

> texting STOP and also having to pay international charge rates to retrieve texts whilst abroad. The underlying theme of the complaints is that the messages are unlawful and cause a nuisance and are an invasion of privacy. The incurring of international charge rates is a form of damage.
>
> 45. It is reasonable to suppose that an individual receiving a message about an accident claim could feel unwarranted concern for the safety of a member of their family. It is also reasonable to suppose that some recipients will actually have suffered accidents and may be disturbed by being reminded of this. Therefore the potential for alarm beyond irritation is a real risk. Some of the 411 received several messages from the same source so suffered more than others who could only show receipt of one or two.
>
> 46. The wording of the messages is indicative of the potential for distress – e.g. quoting an amount of money saying, 'Claim today'. Saying for example, 'you are eligible to claim compensation,' with no regard as to whether they are eligible or not. Words like, 'Almost certainly entitled to £2300,' 'We know how much you are owed', and, 'You have still not claimed compensation for the accident you had'. These are clearly intended to have the maximum impact on an individual and in some cases are likely to be misleading. Distress will be caused by the raising of false expectations."

19. The MPN went on to analyse the evidence under the various other statutory requirements (which are not in dispute now) before considering the aggravating and mitigating features (MPN, paragraphs [59]-[65]), and then deciding that a penalty of £300,000 was "reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty" (MPN, paragraph [69]). In that context, I simply note that the Commissioner had estimated (with remarkable precision) that Mr Niebel had directly or indirectly personally benefited to the tune of £299,883.48 as a result of this spamming activity (MPN, Annex 2).

The trajectory of the appeal before the First-tier Tribunal

20. The way in which the appeal unfolded before the First-tier Tribunal has had a significant impact on the issues to be resolved in this further appeal to the Upper Tribunal. Both parties changed tack in the run-up to the hearing before the tribunal below (this is simply a statement of fact; no criticism is intended of either party).

21. Mr Niebel's original notice of appeal to the tribunal in effect challenged the MPN on most if not all of the counts against him. At that stage it was estimated that a five-day hearing before the tribunal would be required. On 21 February 2013 Judge Warren held a directions hearing. He was plainly troubled by a lack of clarity in the MPN as to the precise contravention relied upon by the Commissioner. He issued a series of directions, one of which was that the Commissioner should "file and serve a clear statement setting out the contravention(s) of the law giving details including dates and nature".

22. On 28 March 2013 the Commissioner duly filed further and better particulars to his response to Mr Niebel's appeal. In that document (at paragraph [6]) the Commissioner accepted (as he had to) that, in establishing a serious contravention of PECR for the purposes of section 55A of the DPA,

> "he can only rely upon complaints relating to contraventions of PECR that occurred on or after 26th May 2011 when the extension of Part V of the DPA to PECR came into force. The Commissioner therefore relies on complaints

> concerning 281 text messages (some complaints relate to more than one in-scope text message)."

23. It now seems that the revised figure for present purposes was 286, but nothing turns on the distinction between the figures of 281 and 286. For completeness the 286 texts were not just those sent on or after 26 May 2011; they were those sent after that date that related to complainants who had agreed to their information being used in appeal proceedings.

24. In the light of these further and better particulars, and other considerations, and with about a fortnight to go to the tribunal hearing, Mr Niebel announced that he would not be filing any evidence himself. Rather, he indicated that he would be contesting the case on a single point only, namely whether the contravention was of a kind likely to cause substantial damage or substantial distress, i.e. the section 55A(1)(b) issue. As a result the tribunal had (largely) uncontested documentary evidence from the Commissioner and heard submissions from Mr Cornwell and Mr Hopkins in the course of a much truncated hearing.

25. The tribunal dealt with the contravention point further at the hearing. Its approach and conclusions were recorded in its decision as follows:

> "[18] We were concerned in case the late change on behalf of the appellant might skew our approach to the issues. Shortly before the hearing the Tribunal sent both parties a note referring to the importance of establishing what the contravention was.
>
> [19] At the start of the hearing we were keen to ensure that the apparent absence of dispute about the facts was not illusory.
>
> [20] Mr Hopkins stated that he was ready to argue, based on a contravention now described as relating to just 286 texts, that Section 55A(1)(b) was not satisfied. Mr Cornwell told us that he asked us to proceed on the same basis so far as the contravention was concerned but in deciding the Section 55A(1)(b) issue, he wanted us to take into account the other evidence about the flood of unwanted text messages emanating from Mr Niebel and Tetrus.
>
> [21] This seemed to us to be problematic. Put shortly, a contravention involving 286 text messages seems to us to be of a very different kind from one involving hundreds of thousands of text messages. It is not possible to import the very much larger number in order to determine the nature of a contravention involving a much smaller one.
>
> [22] Put another way, the scale of the contravention must be included in the description of the contravention which forms the basis on which the Tribunal deliberates when answering the questions asked by the statute. Otherwise it is not possible to tell whether the penalty has been imposed in respect of the smaller number of texts or in respect of the very much larger number of texts.
>
> [23] After allowing time for consideration of this point, we indicated to Mr Cornwell that in asking ourselves whether the contravention was "of a kind likely to cause substantial damage or substantial distress" we would, so far as the question of scale was concerned, rely on the description contained in the account of the contravention. We enquired whether the ICO wished to proceed on the basis that the contravention was actually the sending of hundreds of

> thousands of unwanted text messages. He told us that he had express instructions not to proceed on that basis."

The Commissioner's grounds of appeal to the Upper Tribunal summarised

26. The Commissioner has three grounds of appeal against the First-tier Tribunal's decision. The first is that the tribunal erred in law by taking an unduly restrictive approach to the "kind" of contravention required for the purposes of section 55A(1)(b). The second is that the tribunal erred in law in its interpretation and /or application of the word "substantial" in the context of "substantial damage". The third is that the tribunal erred in law in various respects in its interpretation and application of the expression "substantial distress". In short, the Commissioner's case was that the tribunal, in interpreting and applying the phrase "the contravention was of a kind likely to cause substantial damage or substantial distress" in section 55A(1)(b), had either misinterpreted or misapplied every single material word in that phrase, with the sole exception of "likely".

27. I pause there simply to note that there was agreement between the parties on the proper meaning of "likely" in the context of section 55A(1)(b). The Commissioner's guidance equated "likely" with the civil standard of proof on the balance of probabilities (see e.g. the reference to whether the contravention "was of a kind more likely than not to cause..." at p.18 of the guidance). Both counsel submitted that this approach was incorrect. Instead, they referred me to the decision of Munby J. (as he then was) in *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin), which concerned the meaning of "likely" in the context of section 29 of the DPA. According to Munby J, "likely" meant something more than "a real risk", i.e. a significant risk, "even if the risk falls short of being more probable than not" (at paragraphs [99]-[100]). The tribunal here agreed, noting that whereas the balance of probabilities test "is designed to produce just one outcome whereas, as a matter of common experience, an event can have more than one 'likely outcome'". I also agree with that analysis.

Ground 1: the "kind" of contravention

The First-tier Tribunal's decision

28. The tribunal's analysis of the preliminary issue that arose, namely nailing down the contravention relied upon by the Commissioner, was set out in paragraphs [18]-[23] of its decision (see paragraph 25 above). The tribunal then went on to conclude as follows:

> **"D. The Contravention**
>
> [24] We are therefore concerned with a contravention in which Mr Niebel sent out 286 unwanted text messages. They were in breach of Regulation 22 PECR because they were unsolicited and he did not hold any relevant consent. They were in breach of Regulation 23 PECR because he withheld his own name and address. His actions were deliberate and designed for financial gain. He used unregistered SIM cards which aided his concealment and he had no effective method of screening a number from receiving further texts when the recipient asked for them to stop. The content of the messages varied. The six variants are shown in the "key" to the schedule prepared by ICO investigators. The period of the contravention was from 26 May 2011 to 9 November 2011.
>
> [25] The ICO has provided us with a schedule of the complaints received. Of course, the test we have to apply is not whether actual distress or damage was caused but we accept Mr Cornwell's submission that the actual complaints are relevant material which can assist us in our consideration of

> what was "likely". We must be cautious though because the 286 examples are not a random selection. They are a self selecting sub set of many hundreds of thousands."

The parties' submissions summarised

29. Mr Cornwell, for the Commissioner, began by highlighting the drafting of section 55A(1)(b). Parliament had *not* provided that the Commissioner's power to impose a MPN arose simply where "the contravention was likely to cause substantial damage or substantial distress". Instead, Parliament had expressly inserted additional words, so that section 55A(1)(b) applied where "the contravention was of a kind likely to cause substantial damage or substantial distress" (emphasis added). Those words were not mere surplusage; rather, Parliament's intention was that there should be "some process of abstraction from the particular circumstances of the particular contravention(s)" (skeleton argument, paragraph 41). The distinction between the contravention itself and the "kind" of contravention was also carried through in the secondary legislation (see the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 (SI 2010/31); here the "MPN Regulations 2010"), regulations 3 and 4).

30. The tribunal, Mr Cornwell argued, had interpreted the "kind" of contravention "too narrowly so as to preclude consideration of a salient and indeed essential part of the circumstances of the contraventions, namely that the 286 texts were sent as part of an industrial-scale spamming operation – that factor needed to be taken into account in any proper identification of the relevant kind of contravention and its likely consequences" (skeleton argument, paragraph 43). Thus, he argued, the tribunal had fallen into error by identifying the "kind" of contravention with the contravention itself, so eliding an important distinction made in the legislation. Furthermore, the tribunal's concerns about the need for fairness were adequately met by the NoI and MPN process, as set out in the MPN Regulations 2010, whilst the outcome arrived at failed to give proper effect to the objectives of the 2009 Directive, including in particular the need for an effective and dissuasive system of penalties.

31. Mr Hopkins, for Mr Niebel, accepted Mr Cornwell's opening submission that the use of the expression "of a kind" in section 55A(1)(b) signalled Parliament's intention that there should be a process of abstraction from the particular circumstances of the contravention. However, Mr Hopkins argued, there must be limits to this process of abstraction or generalisation, as otherwise one kind of contravention is transformed into another. His submission was that the scale of the contravention in the present case was 286 text messages, and not hundreds of thousands of such messages, and that scale was an essential part of the "kind" of contravention at issue. Accordingly, and in keeping with the tribunal's conclusion at paragraph [21] of its decision (see paragraph 25 above), "the sending of a single unlawful communication is a different kind of contravention to the sending of millions of unlawful communications. On any common-sense view, those are two different *kinds* of wrongdoing" (skeleton argument, paragraph 17, original emphasis). There was, moreover, no finding by the tribunal that the other messages were sent in contravention of PECR. In short, the Commissioner had sought to make out his case that there was a contravention on the basis of the 286 text messages which were sent after 26 May 2011 and which were referable to the identified complainants. He could not then seek to bring in hundreds of thousands of other texts 'by the back door' by saying they were all "contraventions of a kind".

The Upper Tribunal's analysis

32. I will not pretend that I have found this an easy point to resolve. However, on balance I am persuaded by Mr Hopkins's arguments. The starting point, as in any

exercise in statutory construction, must be to stand back and read section 55A(1)(b) in the context of the provision as a whole. Section 55A empowers the Commissioner to impose a MPN where he is satisfied that three cumulative conditions are met. First, there must have been a "serious contravention" of PECR. Second, the condition specified in section 55A(1)(b), which was the issue on this appeal, must be met. Third, the contravention must have been either deliberate or (to use a reasonable shorthand term) reckless, which was not in issue on the present facts.

33. So what exactly was the "serious contravention" of PCER here that meant the Commissioner could be satisfied under section 55A(1)(a)? The tribunal was quite right to identify the lack of clarity in the MPN as to the details of that "serious contravention". It has to be said that the legislation itself is not entirely helpful. For example, regulation 1(3) of the MPN Regulations 2010 provides that "'contravention' is to be construed in accordance with section 55A". However, section 55A does not in terms define what actually constitutes a "contravention". It simply refers to various characteristics, such as that it must be "serious" and "deliberate". However, as a matter of ordinary English "breach" is a useful synonym. In that context, and as a result of the further and better particulars, 286 texts had been identified as being in breach (or contravention) of regulations 22 and 23 of PCER. In theory, there are at least two possible ways of looking at these offending texts through the prism of section 55A(1)(a).

34. The first is to say that there were 286 separate contraventions. Whilst that is technically correct, it might be difficult to demonstrate that there were necessarily 286 *serious* individual contraventions (leaving aside the difficulty of then showing that each individual communication of a text in itself was of a kind likely to cause substantial damage or substantial distress).

35. The second way of looking at it is to say that there is a composite serious contravention constituted by the sending of the 286 offending text messages. Understandably, this was the way that the Commissioner put his case. In the MPN itself, the seriousness of the contravention was defined in terms of the "multiple breaches of Regulations 22 and 23" (at paragraph 41). Thus also in the further and better particulars we were told that the Commissioner "relies on the cumulative effect of the texts identified in Schedule 1 as contravening PCER, regs. 22 and 23 to establish serious contravention for the purposes of the DPA, s.55A" (at paragraph 15).

36. That being so, and in the circumstances of this case, the "contravention" referred to at the beginning of section 55A(1)(b) must be the cumulative impact of the contraventions constituted by the 286 text messages. The question then was whether that cumulative contravention "was of a kind likely to cause substantial damage or substantial distress". There is no dispute between the parties that the use of the term "likely" means that an objective assessment is required as to the likelihood of (rather than the actuality of) substantial damage or distress, and connotes a significant risk, which need not be "more likely than not". But what then does "of a kind" signify?

37. I accept that the expression "of a kind" is potentially quite broad. However, it seems to me that it has the same sort of meaning as "of a type". It therefore includes such matters as the method of breaching regulations 22 and 23 (e.g. by text, e-mail, automated phone call or "live" cold-calling phone call) and the general content and tenor of the communication (e.g. neutral, overly familiar, offensive, etc). The number or scale of the contravention is also relevant – obviously an aggregated 286 breaches of regulations 22 and 23 are more likely to result in substantial damage or substantial distress than a single one-off contravention. However, in my judgment Mr

Cornwell is seeking to stretch the admitted elasticity of the phrase "of a kind" beyond breaking point when he seeks to bring in hundreds of thousands of other spamming texts. That would be a contravention on a wholly different scale, but on his pleaded case the Commissioner was relying on the 286 identified texts. I do not see this as conflating the separate statutory requirements that there be both a contravention and that the contravention be "of a kind likely (etc)". In broad terms, the "kind of contravention" was one involving multiple breaches of regulations 22 and 23 in the low hundreds, all by unsolicited text messages involving a variety of short direct marketing messages aimed at garnering business for e.g. accident or PPI claims companies.

38. There is one other matter I should mention here, which at first I thought supported Mr Cornwell's construction. Mr Hopkins's submission was that although industrial-scale spamming by Tetrus was not relevant to whether the contravention "was of the kind ..." within section 55A(1)(b), he conceded that it could be factored in by the Commissioner at other stages of the MPN process (e.g. as to the exercise of the discretion to issue a MPN and as to the level of penalty to be levied). Mr Cornwell's response was that this concession was puzzling; how could the other texts be relevant to discretion or quantum but not to the section 55A(1)(b) issue?

39. However, in my view the answer lies in the legislation, which surprisingly does not appear to specify any particular or direct linkage between the contravention itself under section 55A(1) and the size of the penalty. Section 55A is the gateway to the Commissioner's power to impose a MPN. It simply provides that the MPN "must not exceed the prescribed amount" (section 55A(5)). That prescribed maximum is £500,000 (regulation 2 of the MPN Regulations 2010). Beyond that, the MPN Regulations do not fetter the Commissioner's discretion, subject to the procedural requirement that the MPN include "the reasons for the amount of the monetary penalty including any aggravating or mitigating features the Commissioner has taken into account when setting the amount" (regulation 4(e)). So the nature and effect of the particular contravention are plainly relevant factors to be considered in setting the amount of the penalty (see the guidance at p.21). However, wider behavioural issues will also be relevant (see p.22), along with other broader considerations such as "the need to maximise the deterrent effect of the monetary penalty by setting an example to others so as to counter the prevalence of such contraventions" (p.19). It is therefore perfectly proper to consider involvement in industrial-scale spamming as an aggravating factor when determining the amount of the penalty, even where the contravention itself is not framed in such terms. But that assumes, of course, that the section 55A(1) test is made out in all its dimensions.

40. Finally, the difficulty with Mr Cornwell's central submission on this ground of appeal becomes evident if it is tested to its logical limits. Although relying on the aggregate of 286 contraventions, the Commissioner's case was that in deciding whether "the contravention was of a kind" likely to produce the relevant outcome he was entitled to bring into the equation the hundreds of thousands of other text messages which had not been particularised as individual contraventions. But let us assume, for the sake of argument, that many of the complainants got cold feet and did not want their details to be disclosed in the enforcement and appellate process, leaving the Commissioner with only 28 cases instead of 280 or so. Mr Cornwell's argument would allow him to extrapolate from 28 breaches to hundreds of thousands of other unspecified breaches to satisfy the section 55A(1)(b) test (there being no difference in principle here between 28 and 286). That cannot be right.

41. So, Mr Niebel and Tetrus may well have been engaged in industrial-scale spamming, but that was not actually the charge or contravention laid against him.

The point was put well by Mr Hopkins in his skeleton argument for the tribunal below: "In short, this appeal is about the likely consequences of the kind of thing Mr Niebel actually did wrong. It is not about the likely consequences of such messages in general" (at paragraph 33). Thus I see no error of law in the tribunal's conclusion (at paragraph [21]) that:

> "Put shortly, a contravention involving 286 text messages seems to us to be of a very different kind from one involving hundreds of thousands of text messages. It is not possible to import the very much larger number in order to determine the nature of a contravention involving a much smaller one."

Ground 2: the tribunal's approach to "substantial" damage

The First-tier Tribunal's decision

42. The tribunal had this to say as to the meaning of "substantial" (although these comments were made in the context of counsel's submissions on the proper approach to "substantial distress", there is no reason to consider that the word "substantial" carried any different meaning in the context of "substantial damage"):

> "[11] The advocates were also agreed that distress can acquire the label 'substantial' both qualitatively and quantitatively; in other words because of its depth or acuity or because of its widespread nature. It all depends on the facts."

43. The tribunal also concluded as follows:

> "**E. Substantial damage**
> [26] It is likely in our judgement that the contravention was of a kind to lead to people incurring charges for replying 'stop' – though many phone users are on packages and do not exceed their text limits. A person abroad who received a message would have to pay a small charge. The ICO also suggests that damage would be caused because of a text message filling up the memory store on a phone. We regard this as a possible but unlikely outcome. The ICO also refers to loss of 'opportunity costs'. It takes a very short time indeed to give a tut of irritation and delete a spam message such as these and we would regard any loss of opportunity costs as more notional than real.
>
> [27] In our judgement it would be most unlikely for a contravention of the nature and scale described in para 24 above to cause substantial damage and the contravention is therefore not of a kind likely to do so."

The parties' submissions summarised

44. Mr Cornwell argued that the meaning of the word "substantial" can vary according to the statutory context. On the one hand, it may mean more than minor or trivial, i.e. real or of substance. Alternatively, it may mean large, big, weighty or a substantial part. The Commissioner's submission was that in the context of section 55A(1)(b) "substantial" carried the former meaning. He further contended that the tribunal had not made it clear which meaning it had applied and, moreover, if it had correctly adopted the former definition, it had failed to explain why the findings at paragraph [26] of its decision (see paragraph 43 above) did not lead to the conclusion that the contravention was of a kind likely to cause substantial (i.e. real) damage.

45. Mr Hopkins acknowledged that "substantial" was, in his expression a "chameleonic" word, taking its meaning from its context. He argued that this ground of the Commissioner's appeal was essentially a reasons challenge. However, he

said, the tribunal's explanation of "substantial" was perfectly adequate and, in any event, a precise definition was neither necessary nor helpful. Thus the assessment of whether the likely damage was "substantial" was ultimately a question of fact and degree for the tribunal's judgement, which was not susceptible to second-guessing by the Upper Tribunal in an error of law appellate jurisdiction.

The Upper Tribunal's analysis

46. I accept the thrust of Mr Hopkins's starting submission, namely that, absent some binding statutory definitions or jurisprudence, comprehensive definitions of ordinary English words are neither necessary nor helpful. Mr Hopkins referred me to the well-known observations of Lord Reid in *Brutus v Cozens* [1973] AC 854 to the effect that "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law" (at 861C; see also Lord Kilbrandon at 867B-C). Mr Hopkins also reminded me of the comments of Lord Hoffmann in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, who noted that "many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning" (at paragraph 23).

47. I interpose here that Lord Hoffmann's warning echoed the observations of Lord Upjohn in *Customs and Excise Commissioners v Top Ten Promotions Ltd* [1969] 1 WLR 1163 (at 1171):

> "It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look up examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament."

48. That passage in Lord Upjohn's opinion was cited recently by Upper Tribunal Judge Jacobs in *AS v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 587 (AAC) where the issue was the meaning of the terms "repeatedly … within a reasonable timescale" in a test of entitlement to a social security benefit. Judge Jacobs held as follows:

> "19. I am not going to attempt to define what these words mean. That would be wrong. It would be the wrong approach to statutory interpretation and would trespass impermissibly into the role of the First-tier Tribunal. It is not for the Upper Tribunal to give more specific content to the law than the language used in the legislation. The Upper Tribunal will not decide that 'repeatedly' means five times, ten times or any other number. Nor will the Upper Tribunal decide that 'reasonable timescale' means five seconds, five minutes or any other time."

49. Although the context is very different, the same principle holds good here. With that very significant qualification in mind, I accept Mr Cornwell's point that "substantial" can carry two rather different meanings, but the statutory language and context provides the clue. I have derived considerable assistance, despite the very different context, from *Majorstake Ltd v Curtis* [2008] UKHL 10; [2008] 1 AC 787, a decision of the House of Lords on the interpretation of section 47(2)(b)(ii) of the Leasehold Reform, Housing and Urban Development Act 1993. That provision is

concerned with whether a landlord intends to "carry out substantial works of construction on the whole or a substantial part of the premises in which the flat is contained". "Substantial" is used in two slightly different senses here – as an adjective describing the nature of something ("substantial works") and as an adjective defining a part of a defined or known greater whole ("a substantial part of the premises"). Against that background, Lord Scott of Foscote held as follows (at paragraph 18):

> "In the expression 'substantial works' the adjective 'substantial' denotes, in my opinion, works that are not trivial or, as one might say, insubstantial. There is no other yardstick than impression. The issue is one of fact and degree. The same approach should, in my opinion, be taken to the question whether Flats 74 and 77 constitute a 'substantial' part of Block B."

50. Baroness Hale of Richmond, giving what was in effect the leading judgment, held as follows (at paragraph 40):

> "'Substantial, is a word which has a wide range of meanings. Sometimes it can mean 'not little'. Sometimes it can mean 'almost complete', as in 'in substantial agreement'. Often it means 'big' or 'solid', as in a 'substantial house'. Sometimes it means 'weighty' or 'serious', as in a "substantial reason". It will take its meaning from its context. But in an expression such as a 'substantial part' there is clearly an element of comparison with the whole: it is something other than a small or insignificant or insubstantial part. There may be both a qualitative element of size, weight or importance in its own right; and a quantitative element, of size, weight or importance in relation to the whole. The works intended by this landlord are substantial in relation to each of the flats involved, but those flats do not in my view constitute a substantial part of the whole premises."

51. In the present context of section 55A(1)(b), "substantial" is used as a descriptive qualification of "damage" (and indeed of "distress"). The guidance states that "the Commissioner will consider whether the damage or distress is merely perceived or of real substance" (at p.14). The tribunal gave no indication that it dissented from that proposition. Rather, it recorded (at paragraph [11] of its decision) what it understood to be the agreed position as between the advocates that "substantial" could have both a quantitative and qualitative dimension but was ultimately a question of fact and degree. It does not seem to me that the tribunal can reasonably have been expected to deconstruct the term "substantial" any further.

52. Turning to the question of what amounts to "damage", the Commissioner's guidance suggests that "Damage is any financially quantifiable loss such as loss of profit or earnings, or other things" (see above at paragraph 14). Again, the tribunal did not take issue with that guidance. In the course of oral argument, Mr Cornwell invited me to adopt a broader approach, given the preliminary view of Tugendhat J in *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) (discussed further below) that damage within section 13 of the DPA includes non-pecuniary damage (at paragraph [103]), given European developments as to the concept of "moral damage".

53. I decline that invitation. The legislation in issue here refers disjunctively to "substantial damage or substantial distress". Of course, that same phrase also occurs in section 10 of the DPA, but neither counsel referred me to any authorities on that statutory provision which might lend any assistance. It seems to me, given the distinction drawn by the statutory language in section 55A(1)(b), that the Commissioner's guidance is right to differentiate between "damage" and "distress" in

the way that it does. If "damage" was meant to encompass emotional turmoil, then there would have been no need to refer separately to "distress".

54. The tribunal also adopted that same understanding. It is plain from paragraphs [26] and [27] of its decision that it was assessing the extent of what one might call those hard-edged economic losses caused by Mr Niebel's activities, to see if they amounted to a likelihood of "substantial damage". These included the modest costs for those who texted back "stop" (where they had already exceeded their text limit, if relevant) or who replied from abroad, as well as the opportunity costs involved. This was ultimately a classic jury fact-finding question. The tribunal concluded that in the context of the 286 unwanted text messages "it would be most unlikely for a contravention of the nature and scale described in para 24 above to cause substantial damage". That finding is, in my assessment, simply unassailable. The tribunal applied the correct legal test and explained its reasoning adequately albeit concisely. This case was, moreover, a long way from the example of "substantial damage" given in the Commissioner's own guidance (see paragraph 14 above). If the Commissioner was going to make good his case, it was realistically always going to have to be on the basis of a finding that there was a likelihood of "substantial distress" rather than "substantial damage".

Ground 3: the tribunal's approach to "substantial distress"

The First-tier Tribunal's decision

55. The tribunal had this to say as to the meaning of "substantial distress":

> "[12] Finally, Mr Cornwell asked us to adopt a definition of distress produced by the ICO. This describes it as 'any injury to feeling, harm or anxiety suffered by an individual'. We doubt the wisdom, for the purposes of applying the statute, in dividing up the phrase 'substantial distress' into two words. If the ICO definition involves the proposition that it is not possible to have 'any injury to feelings' which falls short of 'distress' then, it seems to us, that the definition is at odds with common experience and with the ordinary use of English."

56. The tribunal later concluded as follows:

> "**F. Substantial distress**
> [28] The ICO suggests that recipients of the accident claim texts might become concerned for the safety of members of their family or be disturbed by being reminded of a previous accident. Having looked at the wording of the texts, we judge this to be highly unlikely. Almost all mobile phone users, in our judgement, will recognise these texts for what they are. We also regard it as highly unlikely that the texts would evoke distress by raising false expectations of compensation.
>
> [29] In our judgement the effect of the contravention is likely to be widespread irritation but not widespread distress. Given the scale of the contravention, there is the possibility of some distress in very unusual circumstances but we cannot construct a logical likelihood of substantial distress as a result of the contravention. We conclude that the contravention is not of a kind likely to cause substantial distress."

The parties' submissions summarised

57. Mr Cornwell submitted that the tribunal erred in law in its approach to the meaning and application of "substantial distress" in five respects. First, the tribunal had failed to explain its interpretation of "substantial". Second, the tribunal had failed to explain its interpretation of "distress". Third, the tribunal had adopted an "unduly

demanding" interpretation of "distress". Fourth, the tribunal had failed to take into account the evidence before it of complainants' distress. Fifth, the tribunal had substituted its own view of the impact of marketing texts for that of the actual recipients.

58. Mr Hopkins took issue with each and every one of these submissions. I need not rehearse his own arguments in detail here as, for the most part at least, I adopt them for the purposes of my own analysis.

The Upper Tribunal's analysis

59. Mr Cornwell's first two points can be taken together. Having dismissed the likelihood of "substantial damage", the question for the tribunal was whether there was, in the alternative, a likelihood of "substantial distress". As noted above, "substantial" here is a qualifying adjective of the noun "distress", so there is considerable force in the tribunal's doubts about dividing the expression "substantial distress" into its component elements and then subjecting each to intense forensic scrutiny. The expression may indeed be "linguistically irreducible" in the terms used by Lord Hoffmann in *Moyna*.

60. That said, the tribunal took issue with the Commissioner's guidance as to the meaning of "distress" and, in my opinion rightly so. According to that guidance, "Distress is *any* injury to feelings, harm or anxiety suffered by an individual" (at paragraph [12], emphasis added). The tribunal's conclusion was that if this "involves the proposition that it is not possible to have 'any injury to feelings' which falls short of 'distress' then, it seems to us, that the definition is at odds with common experience and with the ordinary use of English." This was reinforced by the tribunal drawing a distinction between "irritation" and "distress" (at paragraph [29]); again, as a matter of ordinary English usage, that must be right. Thus the tribunal managed to explain the sense in which they understood "substantial distress" but without falling into the trap of seeking to replace the statutory test with a synonym which might carry different nuances of meaning.

61. Mr Cornwell's third submission under this ground of appeal was that in doing so the tribunal had adopted an "unduly demanding" interpretation of the word "distress". He sought to buttress this submission in four ways.

62. First, Mr Cornwell argued that the Court of Appeal has held that frustration experienced by a data subject by breach of EU data protection regulations is sufficient to constitute distress (see *Halliday v Creation Consumer Finance Ltd* [2013] EWCA Civ 333; [2013] 2 Info LR 85), a case involving a breach of the DPA by a finance company when processing personal data. That was an action under section 13 of the DPA, under which an individual who suffers damage (or distress) by reason of a data controller's contravention of any of the Act's requirements is entitled to compensation from the data controller for that damage (or distress). Mr Cornwell relied on paragraph 35 of Arden LJ's judgment. Her Ladyship, having noted that there was "no contemporary evidence of any manifestation of injury to feelings and distress apart from what one would normally expect from frustration at these prolonged and protracted events", then accepted "as a general principle that, where an important European instrument such as data protection has not been complied with, there ought to be an award, and it is to be expected that the complainant will be frustrated by the non-compliance." It does not seem to me that this even begins to get Mr Cornwell's argument home. Arden LJ's observations were in the context of section 13, which refer to 'damage' or 'distress' *simpliciter*. The test under section 55A (as under section 10) is the appreciably different formulation of "substantial

damage or substantial distress". As Mr Hopkins put it, the addition of the epithet "substantial" raised the bar; the word must be there to do some work.

63. Second, Mr Cornwell noted that the High Court has recently suggested that "damage" within section 13 of the DPA could be read to include "moral damage", connoting the right to compensation for breach of individual rights even where the rights are non-pecuniary (*Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) per Tugendhat J at paragraphs [97] and [106]). This is far too slender a branch on which to hang such a weighty argument. With respect, Tugendhat J decided nothing beyond that there was a serious issue to be tried in that litigation; the observations on section 13 were therefore necessarily tentative. Furthermore, as with *Halliday v Creation Consumer Finance Ltd*, this decision concerned a provision in the DPA which uses a different formulation to section 55A(1)(b). As Mr Hopkins submits, Tugendhat J's reasoning appears to collapse the distinction between 'damage' and 'distress'. There is some support for Mr Hopkins in the Court of Appeal's decision in *Johnson v Medical Defence Union* [2007] EWCA Civ 262; [2011] Info LR 110, where Buxton LJ expressed the view (admittedly obiter) that "there is no compelling reason to think that 'damage' in the Directive has to go beyond its root meaning of pecuniary loss" (at paragraph [74]). Whether or not Tugendhat J's approach is a proper reading under section 13 of the DPA (in which the terms are deployed separately in subsections (1) and (2) respectively, which may not rule out some degree of overlap), in my judgment it cannot apply to section 55A(1)(b), where the expression "substantial damage or substantial distress" is plainly disjunctive.

64. Third, Mr Cornwell submitted that the tribunal's approach was inconsistent with recital (69) to the 2009 Directive, which refers to the need for effective implementation and enforcement powers. Thus the new Article 15a(1) of the 2002 Directive requires that Member States ensure that "the penalties provided for must be effective, proportionate and dissuasive". The tribunal's construction, he argued, undermined the stated legislative goal of protecting the privacy of individuals from aggressive electronic direct marketing techniques. However, as Mr Hopkins submits, this was a "bewitching submission" which took the Commissioner's case no further. We can all agree on the need for a purposive interpretation, but this is an attempt to argue from a broad high-level policy objective to determine the outcome of a particular case. The tribunal's task was to decide if there was a likelihood, on the evidence as it was presented, of "substantial damage or substantial distress".

65. As already noted, the formulation of the threshold in those terms was not mandated by EU law; it was a domestic decision to set the bar at that level. If the result of this case is a question mark over whether the Commissioner's powers are in the terms of the Directive "effective" and "dissuasive" (howsoever those terms are defined), then it seems to me there are at least two possible answers. The first is for the Commissioner to present a more compelling case. Given the considerable resource and effort that was put into this investigation by the Commissioner's staff, I suspect it is questionable whether much more could be achieved on that front. The second, and realistically more profitable course of action, is for the statutory test to be revisited with a view to making it better fit the objectives of the 2002 Directive (as amended). So, for example, a statutory test that was formulated in terms of e.g. annoyance, inconvenience and/or irritation, rather than "substantial damage or substantial distress", might well have resulted in a different outcome.

66. Fourth, and lastly, Mr Cornwell contended that the tribunal had rejected the Commissioner's guidance without having regard to the fact that the guidance had been approved by the Secretary of State and laid before Parliament and indeed cited an example on all fours with the facts of the present complaint. However, 'soft law'

comes in many different shapes and flavours, with differing consistencies; some such extra-statutory forms of soft law may be firm, others may be more wobbly. Given the requirements of section 55C(5) and (6), the Commissioner's guidance is plainly at the 'harder' end of the spectrum of such quasi-legislation. Yet in the final analysis it remains guidance, a useful and persuasive tool to interpreting and understanding the legislation. However, such official guidance always remains the servant to, rather than the master of, the primary legislation enacted by Parliament. As Mr Hopkins points out, the Commissioner had in any event agreed in the course of argument in the present case that the approach taken to the meaning of "likely" in the guidance was misplaced. It was the tribunal's task to apply the statutory test, not the guidance, and the tribunal succinctly explained where and why it differed from the approach taken in the Commissioner's guidance.

67. Mr Cornwell's fourth and fifth points may also conveniently be taken together. These were the submissions that the tribunal had failed to take into account the direct evidence before it of the distress actually experienced by complainants and, moreover, had substituted its own view of the impact of marketing texts for that of the recipients. In doing so, Mr Cornwell took me to both the spreadsheet categorising and summarising the 286 complaints (annexed to the Commissioner's further and better particulars, in response to the tribunal's earlier directions requiring clarification of the contraventions alleged) and a sample of the actual complaints garnered in the course of the Commissioner's investigation. Mr Cornwell argued that the tribunal had failed to engage properly or at all with this body of evidence, contrary to the requirement to conduct a full merits review. Furthermore, in its conclusions at paragraphs [28] and [29], the tribunal had in effect imposed its own value judgement as to the fortitude that recipients should show when receiving unwanted marketing texts. In effect, as Mr Cornwell put it, the tribunal had concluded that the recipients of these texts had failed to show "sufficient British phlegm", so ignoring the proper protection afforded to people's privacy in the measures adopted by the Directives and PECR.

68. Mr Hopkins's answer is that the tribunal plainly did take into account the evidence it received (it referred to the schedule of complaints at paragraph [25]) but expressed caution about the weight to be attached to them. Moreover, the weight to be attached to any particular evidence is quintessentially a question of fact for the fact-finding tribunal (see *DBERR v Information Commissioner and O'Brien* [2009] EWHC 164 (QB), [2011] 1 Info LR 1087 *per* Wynn Williams J at paragraph 32). Furthermore, the complainants' views (or the views of a sub-set of those complainants) could not be decisive; the tribunal's task was to review the facts for itself and make its own assessment of the *likely* consequences of *this* kind of contravention.

69. I am satisfied that the tribunal took into account the complainants' evidence. That evidence had been helpfully digested for them in the form of the Commissioner's schedule to the further and better particulars, as well as being available in its raw form in the multiple lever arch files of individual complaint forms. It is not my role on an appeal limited to error of law to revisit those complaints. Mr Cornwell advised me, and Mr Hopkins did not demur, that oral argument before the tribunal had taken in total about 4 hours. However, I note that the tribunal sat on both 2 and 3 October 2013, indicating that work was done outside the hearing room. I acknowledge that tribunals approach their work diligently. The fact that the tribunal's decision did not refer to specific individual complaints or indeed to every category of complaint does not mean that the tribunal failed to consider the evidence. As Lord Hope intimated in *R (on the application of Jones) v First-tier Tribunal* [2013] UKSC 19, [2013] 2 AC 48, "it is well established, as an aspect of tribunal law and practice,

that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it" (at paragraph 25).

70. Indeed, in a case such as this the tribunal's task would have become unmanageable if it were required to refer to all the evidence and all the parties' submissions in its decision. So, for example, the tribunal's reference to accident claim texts, but not to PPI mis-selling claim texts, in paragraph [28] did not mean that the latter category was overlooked. The tribunal was simply referring to one example (and indeed an example that put the Commissioner's case at its highest). The tribunal's job was to review the evidence, apply the relevant law, make its findings and explain them. The Commissioner himself dealt with the issue of whether there was a likelihood of substantial damage or substantial distress in just four paragraphs in the MPN. The tribunal dealt with the matter equally succinctly, explaining why it had come to the contrary conclusion.

71. It is undoubtedly the case that the tribunal's decision in this case was not as detailed as many that emerge from the information rights jurisdiction. True, the tribunal's decision referred to none of the case law cited by counsel in their submissions, with the sole exception of *R (Lord) v Secretary of State for the Home Department*. True, the tribunal did not expressly mention that PECR gave effect to the 2002 and 2009 Directives. True, the tribunal did not refer to the concept of privacy, other than in the title of the relevant statutory instrument. But that does not mean that either its analysis or its reasoning was inadequate. It is axiomatic that the question of whether a tribunal's reasoning satisfies the test of adequacy has to be judged against the background of all the material before the tribunal and the parties' shared knowledge of the relevant issues.

72. In this respect the schedule to the further and better particulars was undoubtedly a key document. It listed all 286 complaints, identified their key characteristics (e.g. type of message content, whether breach of both regulations 22 and 23, etc) and helpfully included the actual text of any free-form comments made by complainants. These were taken from responses to the last substantive question (Q.12) on the ICO's PECR *Complaint form (marketing messages)* for members of the public, which asks the complainant "Has the receipt of these messages had any practical impact on you? (e.g. prevented urgent messages from being received, incurred costs etc)". Complainants are then asked to tick the relevant box for 'Yes' or 'No' and to provide any details in their own words.

73. The schedule shows that some 225 of the 286 complainants did not make any further comment in answer to Q.12. The content and tone of the 61 complainants (i.e. about 1 in 5) who did add such free-form comments varied considerably. Some simply added a short comment to the effect that the texts "irritated the heck out of me" (complaint 91) or were "invasive & offensive when I am busy" (complaint 237). Others made longer entries indicating real personal upset (e.g. "I have severe bi-polar. This is something I am still coming to terms with & find unwanted text messages to a number I really don't give out very often quite upsetting and disturbing..." (complaint 60). A potential weakness in the complaint form is perhaps that although Q.12 asks complainants about the "practical impact on you", arguably the focus of the examples given (urgent messages missed, costs incurred) is on *damage* rather than *distress* caused. However, the tribunal could only decide the case on the evidence put before it. Taking the schedule as a whole, the tribunal's finding that the effect of the contravention was likely to be widespread irritation rather than widespread (substantial) distress was plainly one that was open to it.

74. It follows that I conclude that the third ground of appeal is also not made out.

Conclusion

75. I therefore conclude that the Information Commissioner's appeal must be dismissed.

Signed on the original
on 11 June 2014

Nicholas Wikeley
Judge of the Upper Tribunal