IN THE UPPER TRIBUNAL **Appeal No. GIA/1620/2019**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

On appeal from the First-Tier Tribunal (General Regulatory Chamber)(Information Rights)
First-tier Tribunal case no**:** EA/2018/0138

Between:

Our Vault Limited

Appellant

- v –

Information Commissioner

Respondent

Before: Upper Tribunal Judge K Markus QC
Hearing date: 20th November 2019

Representation:
Appellant: Mr Ian Whitehurst (counsel)
Respondent: Mr Ben Mitchell (counsel) – paper submissions only

NOTICE OF DETERMINATION ON
APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

REASONS

1. This is an application for permission to appeal against a decision of the First-tier Tribunal upholding Enforcement and Monetary Penalty Notices served by the Information Commissioner ('IC'). There was an oral hearing of the application, as requested by the Appellant, Our Vault Ltd ('OVL'). Prior to the hearing the IC provided written submissions but, as she was entitled to do, chose not to attend the hearing. The Appellant was represented at the hearing by Mr Whitehurst who had also provided written submissions prior to the hearing.

2. For the purpose of explaining my decision on the application, a relatively brief factual explanation will suffice. OVL and its sister company, ST&R Ltd, are both owned and controlled by Mr Slater. OVL describes itself as "an insurance agent

and broker" that contacts individuals offering to review their insurance needs before passing their details to ST&R.

3. The basis of the IC's decision was that OVL had seriously contravened regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003. The contraventions found by the Commissioner were set out in the decision notice. In summary OVL was found to have made 55,534 unsolicited direct marketing calls to numbers registered with the Telephone Preference Service ('TPS') where the subscribers had not given their consent to receive the calls. The Commissioner was satisfied that the contravention was serious: there had been multiple breaches of regulation 21 over a 3.5 month period generating a significant number of complaints and, on the evidence, it was reasonable to suppose that the period and extent of the contravention could have been far higher because only a proportion of those who received such calls would have complained. Moreover OVL continued to make repeated calls to subscribers even after they had registered with the TPS or notified OVL that they did not wish to receive calls, the information provided to subscribers was misleading, and OVL had failed to provide evidence of consent. The IC decided that the contravention was negligent. The monetary penalty was £70,000, the IC having identified aggravating features of the case.

4. In the appeal to the First-tier Tribunal, OVL complained that the investigation carried out by the IC had been unfair and in particular that the IC had not given full disclosure of the evidence relied upon until during the course of the First-tier Tribunal proceedings. OVL submitted it had not had a fair opportunity to present its case prior to the IC's decision. An application was made to the First-tier Tribunal that the proceedings should be "stayed as an abuse of the Tribunal's process and/or invites the Tribunal to quash the proceedings in their entirety and for the Respondent to re-institute proceedings afresh against the Appellant and allow the Appellant to address the allegations made by the company in a fair, transparent and proportionate manner."

5. The First-tier Tribunal noted that it did not have a specific power to stay an appeal as an abuse of process but that under rule 5(3) of its procedural rules it had power to stay a case and where "alleged abuse directly affects the fairness of the hearing…the First-tier Tribunal will have power to …make orders designed to eliminate any unfairness attributable to the abuse of process": *Foulson v HMRC* [2013] UKUT 038 (TCC) at [35]. The First-tier Tribunal noted that Mr Slater had conceded in his evidence that he had not been disadvantaged in any way or been unable to present his case. Mr Whitehurst confirmed, at the permission hearing before me, that that was indeed the position. The First-tier Tribunal found that any shortcomings in the provision of disclosure had easily been remedied within the appeal process and refused to stay the proceedings.

6. The First-tier Tribunal confirmed the IC's decision to serve the notices and the amount of the penalty.

7. OVL seeks permission to appeal on two grounds:

Ground 1: The proceedings should have been stayed by the First-tier Tribunal.

Ground 2: In determining the amount of the monetary penalty,

a. the FTT failed to take into account or give sufficient weight to OVL's previously good regulatory compliance, and the amount was disproportionate to the level of culpability and in the light of the conduct of the IC; and/or

b. the First-tier Tribunal erred in taking into account the financial position of ST&R.

Ground 1

8. The IC disputes that there had been inadequate disclosure or other unfairness by her in her decision-making process. However even if there was, Mr Whitehurst has accepted that the position had been corrected during the course of the First-tier Tribunal proceedings and Mr Slater had told the First-tier Tribunal that OVL had not been disadvantaged in those proceedings by any prior unfairness.

9. Mr Whitehurst submits that this was not sufficient to render the proceedings fair as OVL had been "deprived of his right to challenge the basis of the original enforcement notice and monetary penalty notice during the investigative/enforcement stage of the proceedings" and had had to ""use" its right of appeal to ensure that the proceedings were fair".

10. I asked Mr Whitehurst what the point would have been of a stay. He said that it would have given the IC an opportunity to withdraw the notices (or the First-tier Tribunal could have stayed those notices) and the IC could have considered afresh whether to serve notices.

11. I drew Mr Whitehurst's attention to the decision of the Upper Tribunal in *IC v Malnick* [2018] UKUT 72 (AAC); [2018] AACR 29. That decision concerned the functions and powers of the IC and the First-tier Tribunal under the Freedom of Information Act 2000 ('FOIA'). The Upper Tribunal decided that once the IC has issued a decision notice under section 50 FOIA she has entirely discharged her functions and there is no provision for her to amend or supplement her decision or exercise any other function. Moreover, on appeal to the First-tier Tribunal under section 58 of FOIA the First-tier Tribunal: a) stood in the shoes of the IC and exercised a full merits appellate function, and b) had no power to remit a case to be redetermined by the IC.

12. Section 58 of FOIA governs appeals to the First-tier Tribunal under FOIA and is in identical terms to section 49 of the Data Protection Act 1998 ('DPA') which governed the appeal in the present case. The reasoning in *Malnick* applies to the First-tier Tribunal's powers under the DPA as it does to those under FOIA.

13. The DPA establishes a statutory appeal for remedying unlawful decision-making by the IC. The task of the tribunal is to decide whether the notice is "not in accordance with the law". It embraces all errors and the First-tier Tribunal stands

in the IC's shoes (*Malnick* at [90] and [94])). If the First-tier Tribunal decides that the decision was not in accordance with the law, it must allow the appeal.

14. Although I heard no submissions on the point, I acknowledge that the reasoning in *Malnick* of the powers of the First-tier Tribunal on allowing an appeal in a FOIA case (at [103]-[104]) may require some modification in a DPA case. This is because under FOIA the IC is obliged by law to issue a decision notice, but the same cannot be said of enforcement or monetary penalty notices under the DPA. However, that does not matter for present purposes. The unarguable position is that the First-tier Tribunal is required to stand in the shoes of the IC and it would be inconsistent with the wide scope of the tribunal's duties and powers to conclude that, if the tribunal finds that there has been a procedural error by the IC, it must stop the appeal at that point. Section 49 enables the First-tier Tribunal to substitute a notice or decision. This shows that Parliament intended that, where there was a mistake by the IC (whatever the nature of that mistake – law, fact or procedure), the tribunal is to make the decision that the IC could have made.

15. Mr Whitehurst's submission that a person is entitled to a fair decision by the IC and that the First-tier Tribunal should not determine an appeal unless and until that has been achieved would apply equally to any other alleged error by the IC. The argument goes: an appellant is entitled to a lawful decision by the IC before an appeal is determined by the First-tier Tribunal. But if that were correct, there would never be any need for an appeal. With respect to Mr Whitehurst, the position advanced by him makes no sense.

16. Finally, even if the First-tier Tribunal could have stayed the proceedings, Mr Whitehurst was unable to explain what it could possibly achieve. He submitted that it would enable the IC to redetermine the case fairly, but I am satisfied that this would be unachievable. Whatever the First-tier Tribunal's powers are on allowing an appeal under section 49 of DPA, it has no statutory power to require the IC to reconsider a notice on an interlocutory basis and there is no reason why the IC should voluntarily undertake to do so.

17. The more one thinks about it, the more problems with the suggested approach emerge. However, I have said enough. This ground is unarguable.

Ground 2

a) Failure to consider relevant matters.

18. The complaint is that the First-tier Tribunal failed to consider or give sufficient weight to the Appellant's previously good regulatory compliance record or that the monetary penalty was disproportionate to the level of culpability and in the light of the conduct of the IC. This cannot succeed in the light of the First-tier Tribunal's decision at paragraphs 44- 47. The tribunal identified the factors relevant to the amount of a penalty including the culpability of the person or organisation concerned. The tribunal specifically addressed the scale of the contravention at paragraph 47. It had also referred, earlier in its decision, to the fact that the IC

had received a number of complaints about the same matter in November 2015 and that the IC had commenced an investigation which had lapsed due to other pressures on the IC's time. The First-tier Tribunal's decision was taken in the context of there having been numerous complaints over a lengthy period of time. The tribunal had also reminded itself that the contraventions were not deliberate.

19. Even if (and I do not express a view on this) the IC's conduct of an investigation (rather than the ultimate enforcement of penalty notice) could be relevant to the level of penalty in some circumstances, for instance if that conduct caused an appellant some loss, in the circumstances of the present case the allegations about the IC's conduct of the investigation were not arguably relevant to the penalty. But in any event the tribunal rejected the allegations of procedural unfairness in the IC's decision.

b) Taking into account the financial position of ST&R.

20. The tribunal identified the financial position of OVL and that its income came from ST&R. It took into account the turnover and profits of ST&R and the payments which Mr and Mrs Slater, the directors, took from it.

21. It was clearly relevant for the First-tier Tribunal to take into account the profits generated by or the financial value of the activities of OVL which was not itself a profit-making company. The tribunal found at paragraph 46 that OVL's activities contributed to the profits of ST&R, that Mr and Mrs Slater drew substantial sums in salaries and dividends from ST&R and that they provided financial support to OVL for its continued existence. In the light of this, it would have been entirely artificial to consider the financial circumstances of OVL separately from those of ST&R.

22. The submissions regarding "piercing the corporate veil" are misconceived. There was no question here of there being liability under the monetary penalty notice of any person or body other than OVL. In taking account of the overall financial picture, the tribunal was doing no more than reflecting the reality of the situation. It would have been artificial to have done otherwise.

Conclusion

23. I am satisfied that the grounds of appeal have no arguable merit and there is no other reason for giving permission to appeal. Therefore I have refused permission to appeal.

Signed on the original
on 22nd November 2019

Kate Markus QC
Judge of the Upper Tribunal