IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-627
CIV-2011-404-628
CIV-2011-404-3944
CIV-2011-404-3947
[2014] NZHC 139

BETWEEN	CHIEF EXECUTIVE OF THE DEPARTMENT OF INTERNAL AFFAIRS Plaintiff
AND	IMAGE MARKETING GROUP LIMITED First Defendant
AND	BRENDAN PAUL BATTLES Second Defendant (excluding CIV-2011-404-3947)

Hearing: 10 February 2014

Appearances: J B Hamlin for Plaintiff
T J Herbert for Defendants

Judgment: 12 February 2014

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 12 February 2014 at 4.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Meredith Connell, Crown Solicitor, Auckland

Counsel: T J Herbert, Auckland

Introduction

[1] The Plaintiff ("Department") applies for an order for payment of a pecuniary penalty pursuant to s 45 of the Unsolicited Electronic Messages Act 2007 ("Act").

[2] The Department's proceedings arise from breaches of the Act committed between the end of February 2009 and December 2010. The breaches led to complaints to the Department and, in turn, to these proceedings.

[3] Mr Battles, the Second Defendant in three of the proceedings, is the sole director of the First Defendant. The parties have agreed that the Department should discontinue its proceedings against Mr Battles. Given that, references below to "the Defendant" are references to the First Defendant.

[4] The Department and the Defendant have now resolved the proceedings on terms which include, amongst other things, the Defendant acknowledging various breaches of the Act and paying a pecuniary penalty. The parties have agreed on a penalty of $120,000, subject to the Court's approval.

[5] I accept the Department's submission that the Court's task in assessing a penalty agreed by the parties is that taken in *Commerce Commission v Alstom Holdings SA*.[1] For the reasons that Rodney Hansen J gave, the Court should approve the penalty if it is within the proper range.

[6] I also accept the submission of Counsel for the Department that the proper range is to be assessed by adopting an approach consistent with the "*Taueki*" methodology, that is by establishing a starting point or penalty, with that starting point to be adjusted as necessary to reflect any aggravating and/or mitigating factors relating to the defendant.[2] Wylie J adopted this approach in another case under the Act, *Chief Executive of the Department of Internal Affairs v Mansfield*,[3] and I do likewise.

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[1] *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC).
[2] *R v Taueki* [2005] 3 NZLR 372.
[3] *Chief Executive of the Department of Internal Affairs v Mansfield* [2013] NZHC 2064 at [64].

Unsolicited Electronic Messages Act 2007

[7] I adopt the following summary of the purpose and framework of the Act which appears in *Mansfield*:

> [4] Unsolicited electronic messages have become an increasing problem in recent years. The then Minister for Information Technology, the Honourable David Cunliffe, in introducing the Act, noted as follows:
>
> > In just a few years, unsolicited commercial email, generally known as spam, has gone from being a minor nuisance to becoming a significant social and economic issue. It is also a drain on the business and personal productivity of New Zealanders. Spam impedes the effective use of email and other communication technologies for personal and business communications. It threatens the growth and acceptance of legitimate e-commerce. Spam technology is also increasingly being used as the delivery mechanism for computer viruses, phishing, and identity theft.
>
> The negative effects of spam are significant and far reaching. A Departmental deponent, a Mr Anthony Grasso, records research indicating that it is estimated that around 120 billion spam email messages are sent every day. Such messages clog up the internet, disrupt email delivery, reduce business productivity, raise internet access fees, irritate recipients, and erode people's confidence in using email and other forms of electronic communications.
>
> [5] The Act was introduced in an endeavour to combat the difficulties caused by spam. It came into force on 5 September 2007. Inter alia, it prohibits the sending of unsolicited commercial electronic messages that have a New Zealand link. Further, commercial messages must contain accurate information about the sender and they must have a functional "unsubscribe" facility. ...
>
> [6] ...
>
> [7] The key prohibitions contained in the Act are backed up by a series of comprehensive definitions, for example, of the words "electronic message", "commercial electronic message", "unsolicited commercial electronic message", and "civil liability event".
>
> [8] ...
>
> [9] The Court can order a person to pay a pecuniary penalty if it is satisfied that the person has committed a civil liability event. If the perpetrator is an individual, the pecuniary penalty must not exceed $200,000. If the perpetrator is an organisation, the maximum penalty is $500,000. The Court can also order the payment of compensation and/or damages.
>
> (Footnotes omitted)

Background

[8] The parties have filed a statement of agreed facts. From this it is apparent that the Defendant breached the Act on four separate occasions, the last such breach being a course of conduct that continued over a period of nine months in 2010. The details are as follows.

February/March 2009

[9] Between the end of February 2009 and the end of March 2009, the Defendant sent or caused to be sent no fewer than 44,824 text messages ("text messages") to mobile telephones connected to networks operated in New Zealand by Telecom New Zealand Limited and Vodafone New Zealand Limited. The 2009 text messages sought to promote the sale of a product known as an "Antenna Booster". The Department received nine complaints in respect of the text messages.

[10] The Defendant has acknowledged that, at least in respect of the text messages sent to those who complained, it breached ss 9, 10 and 11 of the Act.

[11] Section 9 of the Act provides:

> **9 Unsolicited commercial electronic messages must not be sent**
>
> (1) A person must not send, or cause to be sent, an unsolicited commercial electronic message that has a New Zealand link.

[12] It is common ground that the text messages were "commercial electronic messages that [had] a New Zealand link". It is also now common ground that the text messages, at least in respect of those recipients who complained, were "unsolicited" in that the recipient had not "consented to receiving" them, as that phrase is defined in s 4(1) of the Act.

[13] This is not the sole breach of s 9 that the Defendant has now acknowledged. From the statement of agreed facts it appears that the Defendant (wrongly) believed that all recipients had consented to the receipt of the messages, so that they were not "unsolicited". This may be why counsel for the Defendant described the breaches as

"technical" in his submissions. I accept the breach may not have been deliberate. I do not, however, consider it "technical".

[14] Other important features of the text messages were that they did not include accurate sender information and did not include an "unsubscribe" facility, those two omissions constituting breaches of ss 10 and 11 of the Act. Those breaches were committed in respect of every text message, not only those which were "unsolicited".

September 2009

[15] On or about 9 September 2009, the Defendant sold a database containing approximately 50,000 email addresses to a third party, Mr Dean Letfus. Mr Letfus paid $1,000 to the Defendant for the purchase of the database.

[16] On 15 and 16 September 2009 Mr Letfus sent messages to the email addresses in the database, marketing and promoting goods and services. Mr Letfus subsequently received approximately 400 complaints from recipients of his email.

[17] Mr Letfus's conduct was in breach of s 9 and placed the Defendant in breach of s 15 of the Act, which provides:

> **15 Third party breaches of Act**
>
> A person must not—
>
> (a) ...
>
> (b) ...
>
> (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a breach of any of sections 9 to 11 and 13; or
>
> (d) ...

14 and 15 December 2009

[18] Between 14 and 15 December 2009, the Defendant sent or caused to be sent email messages ("2009 messages") to computers connected to the internet and located in New Zealand.

[19] The Defendant operated an account with Ezymsg Pty Limited ("Ezymsg"), an Australian web-based marketing and database management service. Between 14 and 15 December 2009, Mr Battles logged into the Defendant's Ezymsg account and sent the 2009 messages. The Department received 43 complaints in respect of the 2009 messages. Enquiries of Ezymsg indicate that 519,545 such messages were sent.

[20] The Defendant acknowledges that the sending of the 2009 messages, at least to those who complained, constituted a breach of s 9 of the Act.

16 March 2010 and 9 December 2010

[21] Between 16 March 2010 and 9 December 2010 the Defendant sent, or caused to be sent, further email messages to computers connected to the internet and located in New Zealand ("2010 messages"). These messages were sent as part of 21 email advertising campaigns conducted by the Defendant. The Department received 69 complaints in respect of the 2010 messages. The precise number of recipients of the 2010 messages is unknown.

[22] The Defendant acknowledges that it breached s 9 of the Act by sending or causing the 2010 messages to be sent, at least in respect of those who complained.

Profit

[23] Aside from the $1,000 paid by Mr Letfus, there is little information available as to the extent to which the Defendant profited from its conduct. The agreed statement of facts is to the effect that profit was "modest but material" or "limited". Counsel for the Department acknowledged, however, that the Department did not know what profit was made.

Discussion

[24] A breach any of ss 9, 10, 11 or 15 constitutes a "civil liability event" for the purposes of the Act.[4] The Court may order a person to pay a pecuniary penalty in

[4] Unsolicited Electronic Messages Act 2007, s 18.

accordance with s 45 of the Act if it is satisfied that a person has committed a civil liability event.

[25] Section 45 provides:

> **45 Pecuniary penalties for civil liability event**
>
> (1) On the application of the enforcement department, the Court may order a person (the "perpetrator") to pay a pecuniary penalty to the Crown, or any other person specified by the Court, if the Court is satisfied that the perpetrator has committed a civil liability event.
>
> (2) Subject to the limits in subsections (3) and (4), the pecuniary penalty that the Court orders the perpetrator to pay must be an amount which the Court considers appropriate taking into account all relevant circumstances, including—
>
> (a) the number of commercial electronic messages sent:
>
> (b) the number of electronic addresses to which a commercial electronic message was sent:
>
> (c) whether or not the perpetrator has committed prior civil liability events.
>
> (3) If the perpetrator is an individual, the Court may order the perpetrator to pay a pecuniary penalty not exceeding $200,000 in respect of the civil liability events that are the subject of the enforcement department's application.
>
> (4) If the perpetrator is an organisation, the Court may order the perpetrator to pay a pecuniary penalty not exceeding $500,000 in respect of the civil liability events that are the subject of the enforcement department's application.

[26] In determining the amount of the pecuniary penalty to be imposed, s 45(2) of the Act requires the Court to take into account all relevant circumstances, including in particular those matters referred to in s 45(2)(a), (b) and (c). On a "*Taueki*" approach, ss 45(2)(a) and 45(2)(b) would be material to the starting point and s 45(2)(c) to the end sentence.

[27] The Defendant has not committed a prior civil liability event. Although it is an organisation for the purposes of s 45(4) of the Act, its sole employees are Mr Battles and a sales representative.

[28] Of particular relevance in sentencing will be the need to deter a defendant, and anyone else, from breaching the Act. The effects of "spam" on the efficiency of the internet, an essential means of communication, must be borne in mind. As s 45 states, the number of commercial electronic messages sent and the number of addresses affected is highly material and goes to the gravity of the offending. The extent to which a defendant's breach was deliberate, parity of treatment and principles of totality will also be material.

[29] Counsel referred me to a list of general principles considered pertinent to the assessment of penalties under trade practices legislation, as appears in *Australian Communications and Media Authority v Mobilegate Ltd and Others (No 4)*.[5] I agree that some or all of those matters may be relevant in any given case.

Starting point

[30] Counsel advised me that the parties had agreed a starting point of $30,000 to $50,000 in respect of the text messages, $100,000 to $140,000 in respect of the email breaches, and in each case had taken the mid-point of the identified ranges, giving a starting point for all the offending of $160,000.

Other authorities

[31] I have considered two other cases in which the Court imposed a pecuniary penalty. These are *Chief Executive Department of Internal Affairs v Atkinson* and *Chief Executive of the Department of Internal Affairs v Mansfield*.[6]

Mansfield

[32] In *Mansfield*, the Department likewise sought the imposition of a civil pecuniary penalty pursuant to s 45 of the Act. Mr Mansfield took no steps in the

[5] *Australian Communications and Media Authority v Mobilegate Ltd and Others (No 4)* [2009] FCA 1225, (2009) 180 FCR 467.
[6] *Chief Executive Department of Internal Affairs v Atkinson* HC Christchurch CIV-2008-409-2391, 19 December 2008; *Chief Executive Department of Internal Affairs v Atkinson* HC Christchurch CIV-2008-409-2391, 27 October 2009; and *Chief Executive of the Department of Internal Affairs v Mansfield*, above n 2.

proceedings and the case proceeded by way of a formal proof hearing. The Department sought a pecuniary penalty of $100,000.

[33] The events giving rise to the proceedings occurred between early April 2010 and late September 2010. During this time the Department received 53 complaints from recipients of emails promoting "Business Seminars NZ". It appeared these emails were sent as part of separate email marketing campaigns. Wylie J determined that Mr Mansfield had breached s 9 of the Act.[7]

[34] In fixing the starting point, Wylie J took into account that hundreds of thousands of messages had been sent, that some recipients had received more than one message, that Mr Mansfield had profited and that he had acted deliberately or recklessly. The Judge allowed a reduction of $5,000 on account of early co-operation, giving an end penalty of $95,000.

Atkinson

[35] The Department's proceedings in *Atkinson* were brought against Shane and Lance Atkinson and Roland Smits. The proceedings concerned the sending of more than 2 million unsolicited electronic messages to computers located in New Zealand, between September 2007 and December 2007.

[36] Lance Atkinson had agreed with a third party to market products on the internet. In the period to which I have referred he received payments in the order of $1.6 million, an unspecified amount of which he paid to others he had recruited to assist him.

[37] The emails were sent in breach of ss 9, 10 and 11 of the Act. All defendants were knowingly concerned in those breaches and therefore breached s 15 of the Act.

[38] In respect of Lance and Shane Atkinson, French J considered that a starting point "at the top of the available range" was warranted. The top of the available range for an individual is $200,000. French J also accepted, however, that each defendant was entitled to a substantial discount because the conduct was not illegal

[7] *Chief Executive of the Department of Internal Affairs v Mansfield*, above n 2 at [59].

when it commenced, for an undertaking as to future compliance and for their co-operation. French J confirmed the proposed penalties of $100,000 for each of the Atkinson defendants and $50,000 in respect of Mr Smits, who was less culpable.

[39] I consider that the starting point, $160,000, that the parties have agreed in this case to be within the proper range although at the lower end of that range. This is because of the need for deterrence, the number of breaches, the period of time over which they were committed and the number of messages sent. Although there is no evidence as to how many 2010 messages were sent and to how many electronic addresses, I infer both numbers were substantial, there being 21 separate campaigns. In addition to those matters, as an organisation, the Defendant is subject to a higher maximum penalty.

Matters relating to the Defendant

[40] I accept the Department's submission that there are no aggravating features that require an increase to the starting point.

[41] I also agree that the starting point should be reduced to reflect the Defendant's co-operation and acknowledgement of liability. The acknowledgement of liability avoids the very substantial costs the taxpayer would incur if a trial were required, that trial being estimated to take seven days.

[42] The parties submitted that a 25 per cent reduction was appropriate. I agree that discount is within the proper range and that the end penalty of $120,000 is within the proper range.

[43] I add that Counsel for the Department advised me from the Bar that, despite requests, the Defendant had not supplied information as to how many messages were sent in 2010 and to how many addresses. There is no evidence of any such request. In a future case, however, evidence of a refusal to supply such information might affect the extent of any discount to be given on account of a defendant's co-operation.

Result

[44] Pursuant to s 45(1) of the Act I order the First Defendant to pay a pecuniary penalty of $120,000 to the Crown in respect of the civil liability events referred to in this judgment.

[45] There are no submissions before me as to costs. From that I assume that no orders as to costs are sought but counsel may make submissions if they wish.

.....

M Peters J