# *Kennard,* Reading County Court (15th April 2015)

## Introduction

The judge started by welcoming the claimant and defendant, and explaining the rules of procedure for the hearing. She also explained that appeals from the small claims track were very rare, and that, generally, she would not be minded to grant permission for an appeal on a small claims track decision, although a party wanting an appeal could petition the High Court directly.

From the perspective of the public gallery at least (two chairs at the side of the room), the proceedings seemed relatively informal, with the judge keen to ensure that each side had an opportunity to make its case.

## Inadvertent inclusion of "without prejudice" material

Either the claimant or the defendant had included in his submissions to the court material which was marked as "without prejudice". The judge ruled that, in her opinion, an offer made without prejudice to settle in a case such as this indicated solely that the defendant did not wish to be troubled with defending a case, rather than any admission of liability, and so would treat the WP documents she had seen on that basis.

## Was the claimant an "individual subscriber"?

The judge's first question related to the requirement within Regulation 22 that the recipient of the unsolicited email must be an "individual subscriber"; if the recipient is not an "individual subscriber", the message falls outside Regulation 22.

The claimant explained to the court the relationship between himself and his email service provider, and referenced evidence adduced by the defendant — a copy of an invoice — as proof that he was an individual subscriber, simply buying services from a third party. At no point, the claimant stressed, had he been

employed by, or a director of, the service provider's company, nor even a shareholder.

Unfortunately, this was not addressed any further, and the judge moved to the issue of damages without ruling on this point.

## Had the claimant "suffered damage"?

The judge read aloud the first words of Regulation 30 — "A person who suffers damage…" and stated that she could not see that the claimant had suffered any damage, and that the claimant had not put forward any case on this point.

The claimant argued that receipt of the message had used the resources of his computer and, as such, had suffered at least nominal damage, but the judge was unpersuaded, stating that such damage, if any, was *de minimis*: in other words, too small to be a matter for the court.

The claimant argued that, by virtue of receiving the message, he had suffered distress. The judge took a firm line on the issue of distress, stating that the law only recognises claims for distress in very limited circumstances: where accompanied by damage, where the claim is one of psychiatric harm, or for certain contracts (the judge did not elaborate on this, but this was likely a reference to contracts with enjoyment as a key part of their purpose, such as the classic 'ruined holiday' case). The claimant proposed that other cases had found that distress was recoverable, but the judge was not persuaded.

The claimant finally argued that, by virtue of the message arriving, his attention was diverted from his work. The judge held that he was not obliged to check an email as soon as it was received and, in any case, even if the claimant did want to deal with it then, clicking "unsubscribe" (or, the judge's words, "get lost") was an interruption of just seconds, after which the claimant could return to his work.

Having dismissed each of the claimant's points of damage, the judge dismissed the case, on the basis of no damage.

## Expenses

Having dismissed the case, the judge turned to the matter of expenses. The defendant explained that he had incurred a cost in attending the hearing — around 80 miles in each direction — and would like to recover the costs for doing so, at the HMRC rate of 45p per mile.

In addition, he sought to recover the expenses incurred in corresponding with the court (and perhaps also the costs of corresponding with the claimant). He produced an itemised list of his costs of recorded delivery, and the judge was happy to accept those too.

All in all, the claimant was ordered to pay the defendant expenses in the sum of just under £100.

## Comment

This was an interesting case to watch, if only from the perspective of seeing how the judge dealt with a claim under the Privacy and Electronic Communications Regulations, which I suspect is not an everyday occurrence. It was clear that the judge had prepared for the case in terms of being familiar with the regulations, and she seemed relatively familiar with the broader subject, as she declared at the end that she was herself no fan of spam.

Although the judge accepted the claimant's submission that the recitals to the directive from which the regulations emanate clearly indicate that the harm of spam is in the ease of sending and the burden of deleting, and the "intrusion of privacy" that this causes, and that the purpose of the Regulations would be undermined by a finding that only financial loss was recoverable, she felt that the Regulations were worded in such a way that it was only open to look for "damage": as the claimant could produce no evidence of "damage", the case had to be dismissed.

In terms of trying to avoid such a pitfall in the future, I wonder whether a case might have a greater chance of success if:

- a would-be claimant records what he/she were doing at the time an unsolicited email is received, and the steps taken to get rid of it. For example, the time taken in adding the sender's email address to a spam filter,

and the time taken in returning to full productivity after an interruption. Although, here, the claimant had advanced that his concentration has been disturbed, the judge felt that this was just a few seconds rather than anything else; this might be a tricky hurdle to overcome;

- documenting any costs directly connected with receiving the email: for example, on a metered connection (e.g. where data is PAYG or with a bundled amount in a contract), downloading an email uses some of that allowance. Avoiding a finding that these costs were *de minimis* might be difficult, unless, perhaps, the email was received when roaming, or in some other situation in which data costs could be more. The judge did comment that, had the email caused the computer to crash, there would have been "damage", but I am not sure how one might put a figure on this, unless one lost unsaved work which needed to be repeated or the like;

- advancing a claim based on inconvenience and nuisance may avoid what seemed to be a trigger word of "distress" whilst still remaining true to the principles of the directive; and

- producing a list of cases which found in favour of a claimant under Regulation 30 for a breach of Regulation 22, and asking that the judge take these into account. Ideally, the case would be one which has precedent value, and so binds the court, rather than other County Court decisions, although even these might be useful. Perhaps the closest example would be the recent Court of Appeal decision in *Vidal-Hall*, although this case dealt with the data protection, and not ePrivacy, framework.

In addition, I would bring with me an itemised list of all the costs I had incurred in bringing the case, including recorded delivery and so, in the event that these help me recover some or all of my costs.