Neutral Citation Number: [2015] EWCA Civ 76

Case No: A2/2013/3300

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER DISTRICT
His Honour Judge Hodge QC
3376OF2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE RYDER
and
LORD JUSTICE BRIGGS

- -

Between :

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS	**Appellant**
- and -	
PLT ANTI-MARKETING LIMITED	**Respondent**

- -
- -

SIMON POPPLEWELL and ADAM DEACOCK
(instructed by **LEATHES PRIOR**) for the **APPELLANT**
JESSICA SIMOR QC and DAVID MOHYUDDIN
(instructed by **HOWES PERCIVAL LLP**) for the **RESPONDENT**

Hearing date : Tuesday 13th January 2015

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APPROVED JUDGMENT

Lord Justice Briggs:

Introduction

1. This is an appeal from the Order of HHJ Hodge QC sitting as a judge of the Chancery Division in the Manchester District Registry, made on 29th October 2013, whereby he dismissed the interim application of the appellant company PLT Anti-Marketing Limited ("PLT") for a variation of undertakings previously given by PLT pending the final hearing of a petition by the respondent Secretary of State for Business, Innovation and Skills for the winding up of PLT in the public interest.

2. Prior to the presentation of the petition, PLT's business consisted of the provision to members of the public of a service, the ostensible purpose of which was to eliminate or (more likely) reduce the exposure of its customers to unwanted marketing, both by unsolicited telephone calls, generally known as 'cold-calling' and by post, generally known as 'junk mail'. Perhaps ironically, the main method whereby PLT recruited its customers was by cold-calling, whereby its telephone sales team invited customers there and then to commit contractually to paying a £4 monthly subscription for the service, pursuant to prepared texts or scripts. A main element in the service offered was that PLT would procure the registration of its customer with two services, the Telephone Preference Service ("TPS") and the Mail Preference Service ("MPS"). I shall have to say more about those services in due course but, in outline, the effect of registration is to notify traders that the registered person does not wish to receive cold calls (in respect of the TPS) or junk mail (in respect of the MPS), and to impose consequences upon traders which ignore that preference. The key feature of both of those services, for present purposes, is that they are provided to the general public free of charge, and a main reason for the presentation of the petition was that, in the Secretary of State's view, a business which seeks to charge customers for obtaining for the customer that which the customer could obtain free of charge is a form of scam which ought, if possible, to be prevented in the public interest.

3. The grounds for winding up in the public interest were set out in paragraphs 31 to 42 of the Petition under five headings, the second of which was:

> "Breach of Consumer Protection Regulations and Breach of Undertakings Provided to NTS (*Norwich Trading Standards*)."

Under the first part of that heading the Petition alleges breaches (by commission) of Regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008 ("the Regulations") and breach (by omission) of Regulation 6 of the Regulations. The breach of Regulation 6 is spelt out in a single, concise paragraph of the Petition in the following terms:

> " (35) PLT trades in breach of Regulation 6 of the [*Regulations*] by failing to inform members of the public prior to entering into a contract with those individuals and requiring payment that those individuals can obtain a service similar to the service offered by the Company free of charge through registration with the TPS and MPS."

4. The Secretary of State applied at the outset of the proceedings for the appointment of a provisional liquidator. This was refused by Judge Hodge on the Secretary of State's without notice application and successfully opposed, but on terms, by PLT when the matter came back before the judge after an adjournment for evidence, on 13th May 2013. The most important term which the judge required, in lieu of appointing a provisional liquidator, was that PLT would not sell its services to new customers before the final hearing of the Petition, without informing customers that the services of TPS and MPS were available free of charge. In an extempore judgment given on that day, he concluded, without deciding anything finally, that the Secretary of State had a well-arguable case for a winding-up order in the public interest, including a case based on the alleged breach of Regulation 6. PLT duly gave that undertaking (and others) by counsel.

5. Faced with a potentially significant period (pending the final hearing of the Petition) when it would be unable to recruit new customers in the manner which it wished to do, PLT decided to change its marketing policy in various ways designed to address the allegations in the Petition. In evidence deployed on a renewed application to the judge, PLT produced a proposed new marketing script, a new form of confirmation of customer order, and an amended website. Its proposed new marketing policy (reflected in its script) included making it clear that part of its service consisted of registering customer details with the TPS and the MPS, but it declined to commit its marketing team to explain to prospective customers that the TPS and MPS services were provided by those entities free of charge to customers. This refusal became the main sticking point between the parties on PLT's application to vary its undertakings, and counsel for PLT invited the judge to treat the question whether continued trading (including recruiting new customers) without disclosing that the TPS and MPS services were available to the public free of charge would be a breach of Regulation 6 as a preliminary issue. This was opposed by counsel for the Secretary of State on the grounds that the issue was hypothetical rather than preliminary but, in view of its obvious importance to the parties (and their evident readiness to argue it in full), the judge acceded to PLT's invitation, and did determine that question as a preliminary, rather than merely interim, issue so that his decision on it would be binding at trial.

6. The judge took this course without identifying the precise factual basis upon which he was proceeding, whether it depended upon taking the facts alleged in the Petition as true or as assumed facts, or explaining the consequences for the binding nature of his determination if the facts alleged in the Petition turned out to be different in any material respect from the facts found at trial. He took this course, as far as I can ascertain, because both parties appeared to take it for granted that the issue could be finally decided, one way or the other, as a matter of principle, regardless of the detailed context of the trading in which the proposed new script was to be deployed.

7. For reasons which I shall explain in due course, the judge determined that for PLT to continue to trade and seek new customers without disclosing that the TPS and MPS services were provided to the public free of charge would involve a breach of Regulation 6. The result was that the application to vary the undertakings failed *in limine*, and the judge did not have to decide whether, had he reached the opposite conclusion on the preliminary issue, he would have permitted any, and if so what, variation in the undertakings.

8. The main (and in one sense quite short) issue on this appeal is whether the judge's determination of the preliminary issue was right or wrong. But PLT submits that, if it was wrong, this court should, without further ado, permit the variation in undertakings sought unsuccessfully on the application before the judge. After hearing Mr. Popplewell and Mr. Deacock for PLT, we made it clear that we would not, if PLT was otherwise successful, be minded to take that course. Since (as explained above) it had been unnecessary for the judge to embark upon that task, we considered that even if PLT succeeded in relation to the preliminary issue, it would be necessary for the question whether that success justified variation in the undertakings pending the final hearing of the Petition to be determined at first instance, there being no prior determination of issues relevant to that question suitable for an appellate review.

9. For similar reasons we made it clear that we would not be minded, even if PLT succeeded in relation to the preliminary issue, to address, for the first time, a new case under Regulation 5 advanced for the first time by the Secretary of State in a Respondent's Notice. Again, there has thus far been no consideration of that case (let alone an opportunity for PLT to respond to it with evidence) at first instance. Accordingly, the only issue which we considered it appropriate to decide on this appeal is whether the judge was right in his determination of the preliminary issue which I have described.

The TPS and the MPS

10. The TPS is a service provided by Ofcom, pursuant to Regulation 26 of the Electronic Communications (EC Directive) Regulations 2003 ("the Electronic Communications Regulations") which were made by way of implementation within the UK of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communication sector ("the Electronic Communications Directive"). Both in its original and amended form, the Electronic Communications Directive required member states to provide, in summary, an opt-in or opt-out service to the public, free of charge, designed to ensure that unsolicited direct marketing communications in electronic form could not be made to members of the public who do not wish to receive them. By Regulation 26, the UK decided to adopt an opt-out system, whereby members of the public can register their names and telephone numbers with the TPS if they do not wish to receive unwanted electronic direct marketing. By Regulation 21, the effect of registration was a prohibition upon unsolicited direct electronic marketing to subscribers on the register beginning 28 days after registration.

11. Evidence in these proceedings (including a Which report) demonstrates that registration under the TPS is not, on its own, an invariably successful method whereby a member of the public may obtain complete protection from unsolicited direct electronic marketing. In short, whether by accident or design, cold-calling continues to be made to telephone subscribers on the register. Accordingly, TPS offers, again free of charge, a complaints service whereby a registered person may complain to TPS of continued cold-calling, and TPS will take up that complaint with the trader concerned. The free availability of that complaints service follows automatically upon registration.

12. MPS is a broadly similar service, in relation to unsolicited marketing by post. It is not statutorily based. Rather it is offered, again free of charge, by the Direct Marketing Association in co-operation with the Post Office. Like the TPS, it also offers a free complaints service, of a similar kind, but the consequence of sending junk mail to registered addresses consists merely of breach of one or more voluntary codes of practice rather than conduct rendered unlawful by statute. It may therefore be said to lack some of the teeth of the TPS, but otherwise to be essentially similar in concept and operation.

PLT's proposed service

13. The service which PLT seeks liberty to provide to new customers pending the final hearing of the Petition may be summarised as follows:

    i) Customers are immediately registered (with their telephone numbers and addresses as appropriate) with both the TPS and the MPS.

    ii) In addition, they receive PLT's own complaints service which, according to PLT's evidence on its application for variation (which has yet to be tested), differs in significant respects from that provided by either the TPS or the MPS, and in a manner alleged to be beneficial to customers.

    iii) For the combination of (i) and (ii) above, PLT makes a standard charge to subscribers of £4 per month, or £39.99 per year.

14. It will be readily apparent that the services provided directly to the public by TPS and MPS free of charge are, in one respect, precisely the same as that which a direct customer of PLT receives, and in another respect alternative to PLT's service. Either way, the customer obtains registration of his or her name, address and relevant telephone numbers on the registers maintained by TPS and MPS, together with those entities' free complaints services. But the PLT customer obtains, in addition, a wholly separate complaints service from that provided either by TPS or MPS, which may be either better or worse than the complaints services provided by TPS and MPS, in terms of efficiency, speed and ultimate effectiveness in deterring rogue traders.

15. It is (in particular in advance of a trial of the Petition) impossible to quantify in relative terms either the value to the hypothetical customer or the cost to PLT of the two parts of its proffered service, namely registration and complaint handling. Plainly, registration of customers' details involves some deployment of staff time and equipment by PLT, even if the registration service provided by TPS and MPS is free. This is a one-off expense for PLT. By contrast, its provision of a complaints handling team must involve some recurring cost, although the evidence currently suggests that the team is very small, and there is little or nothing in the evidence to provide a reliable indication of the extent to which it is valued by PLT's customers, on a continuing basis.

16. It can however be said from the evidence as a whole, as the judge did say, that the registration service is an important part of that which PLT provides to its customers. It is in fact the only means whereby PLT seeks, in advance, to fend off unwanted

direct marketing to its customers. The complaints service is, by contrast, a means whereby, after the event, PLT seeks to deal with direct marketing which the registration process has failed to deter.

The Regulations

17. The Regulations seek to implement within the UK the maximum harmonisation provisions of the Council Directive 2005/29 known as the Unfair Commercial Practices Directive ("the UCPD"). The Regulations are therefore to be interpreted, as far as possible, so as to further the purposes and provisions of the UCPD. Article 1 of UCPD contains the following concise summary of its purpose:

> "The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests."

The twin purposes of consumer protection and uniformity across member states are emphasised by recitals (1), (5) and (11) in relation to consumer protection and (3) to (6), (11) and (12) in relation to uniformity.

18. Article 5.1 prohibits unfair commercial practices. Article 5.4 provides (in particular) that:

> "Commercial practices shall be unfair which:
>
> (a) are misleading as set out in Articles 6 and 7
>
> ..."

Article 6 deals with misleading actions and is not directly material to this appeal. Article 7 deals with misleading omissions. Paragraph 1 provides as follows:

> "1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise."

The phrase "material information" in Article 7.1 is not separately defined, but Article 7.4 contains a list of five types of information which are to be regarded as material, in the case of an invitation to purchase. They may be summarised as (a) the main characteristics of the product, (b) the address and identity of the trader, (c) the price and any associated charges, (d) arrangements for payment, delivery, performance and complaint-handling and (e) any rights of withdrawal or cancellation.

19. The relevant provisions of the Regulations closely follow their counterparts in the UCPD. Thus, Regulation 3(1) prohibits unfair commercial practices. Regulation 3(4)(a) and (b) provide respectively that misleading actions and omissions are unfair commercial practices. Regulation 5 deals with misleading actions and Regulation 6 with misleading omissions.

20. Regulation 6 provides so far as is relevant as follows:

> "(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2) –
>
> (a) The commercial practice omits material information
>
> …
>
> and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.
>
> (2) The matters referred to in paragraph (1) are –
>
> (a) All the features and circumstances of the commercial practice.
>
> …
>
> (3) In paragraph (1) "material information" means –
>
> (b) The information which the average consumer needs, according to the context, to take an informed transactional decision;
>
> ..."

21. Regulation 6(4) broadly replicates Article 7(4) of the UCPD by specifying, in relation to an invitation to purchase, the same list of types of information which are to be treated as material under Regulation 6(3).

22. In Regulation 2, headed Interpretation, the phrase "transactional decision" is defined as meaning:

> "Any decision taken by a consumer, whether it is to act or to refrain from acting, concerning –
>
> (a) Whether, how and on what terms to purchase, make payment in whole or in part, retain or dispose of a product; or
>
> (b) Whether, how and on what terms to exercise a contractual right in relation to a product."

This broadly replicates the definition of the same phrase in Article 2(k) of the UCPD.

23. Regulation 2(2)-(6) contains a detailed definition of the phrase "average consumer". This is a widely used phrase in EU legislation, not specifically defined in the UCPD. For present purposes, I need only quote Regulation 2(2):

> "In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers, account shall be taken of the material characteristics of such an average consumer, including his being reasonably well-informed, reasonably observant and circumspect."

24. The UCPD does however, at Recital (18), contain the following guidance about the reason for the use of that phrase:

> "It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice,… The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case."

25. There is special provision, both in Recital (18) to the UCPD, and in Regulation 2(3)-(5), for the identification of the average consumer in particular targeted groups, or vulnerable groups. Despite the endeavours of counsel to address us on those aspects, they do not seem to me to have any bearing on the present appeal, not least since the Petition makes no allegation that PLT's practices were targeted in that way, or that identifiable groups of consumers were particularly vulnerable to the practices complained about.

26. At the heart of the present appeal lies the question what, as a matter of interpretation of the Regulations in the light of the UCPD is, or is not, "material information" in the context of an alleged misleading omission contrary to Regulation 6. Mr. Popplewell pointed out that, whereas Regulation 6(3) contains a specific and (subject only to Regulation 6(4)) exclusive definition of "material information", the corresponding Article 7 of the UCPD does not do so in terms. In my judgment that is a distinction without a difference since, unaided by the Regulations, I would have interpreted Article 7.1 as defining "material information" by reference to information that the average consumer needs, according to the context, to take an informed transactional decision, subject again only to Article 7.4.

27. We were shown no European jurisprudence about the meaning of "material information" but both Mr. Popplewell and Miss Simor QC for the Respondent agreed

that we could properly follow and apply an attempt of mine to shed light on the meaning of that phrase in paragraph 74 of *OFT v Purely Creative & ors* [2011] EWHC 106 (Ch). I have included paragraph 73 in the citation which follows, to enable paragraph 74 to be read in context:

> "The final question of interpretation, which arises only in relation to Regulation 6, relates to the provision in paragraph (3)(a) that "material information" means *inter alia*:
>
> > "The information that the average consumer needs, according to the context, to take an informed transactional decision;"
>
> The starting point under English common law in relation to pre-contractual negotiations is *caveat emptor*. That may be qualified both by statute and even by the common law in relation to particular types of transaction, such as the obligation to disclose latent defects when negotiating a sale of land, and the obligation of utmost good faith on an applicant for insurance. Again, these English law concepts must be put on one side, not least because in systems of civil law widely used in Europe there exist general obligations of good faith in contractual relationships which have no parallel in the common law.
>
> A literal reading of Regulation 6(3)(a) and its equivalent in Article 7.1 of the UCPD might suggest that something approaching an utmost good faith obligation is imposed in relation not merely to the consumer's decision whether to contract, but also to every transactional decision, such as, in the present case, a decision whether to respond to a promotion by post, text message or premium rate telephone call. Although qualified by the causation requirement to which I have referred, I regard that analysis as imposing an excessively high hurdle, and counsel did not suggest otherwise. It cannot have been the intention of the framers of the UCPD to require that level of disclosure, and to do so would indeed cause barriers to the free movement of goods and services beyond that necessary to achieve a high degree of consumer protection. In my judgment the key to understanding this paragraph is the concept of "need". The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision."

28. Counsel were also broadly agreed that the Regulations did not impose any general requirement upon a trader to inform a consumer about the availability, nature, qualities and price of alternative goods or services, alternative that is to those which the trader was inviting the consumer to acquire, even if it might be said that such information was needed to enable the average consumer to make an informed

transactional decision. Thus in paragraph 14 of their skeleton argument, Miss Simor and Mr. Mohyuddin said that:

> "It is not misleading *per se* for traders not to provide comparative pricing because in most cases consumers will not need that information in order to take an informed transactional decision."

In her oral submissions, Miss Simor said that it was no part of the Secretary of State's case that a trader who charges for a service must inform the consumer of a free competing service. But she was at pains to say, both in writing and orally, that everything depended upon context, as indeed Regulation 6 and Article 7 make very clear.

29. Mr. Popplewell went considerably further down this road. He submitted that Regulation 6 (and Article 7) were only about what he labelled "inward-facing" information. That is, information about the trader and its product, and not information about other traders and other products, which he labelled "outward-facing" information. He placed particular reliance upon the undoubted fact that all the types of information specified in Regulation 6.4 (and Article 7.4) were, and were only, types of inward-facing information, suggesting that those framing the UCPD and the Regulations simply did not have outward-facing information in mind at all when dealing with misleading omissions, so that an appeal to a particular context could not produce any different outcome.

30. In my judgment the resolution of this issue depends on a closer analysis than that which I conducted in the *Purely Creative* case of the mechanism by which the question whether information is material (in the context of misleading omissions) is to be determined by reference to the average consumer's need for it. It may readily be said that, in relation to a transactional decision whether to purchase goods or services, the average consumer may need to have information about the availability, quality and prices of alternative products, even if some consumers might be content with the price proposed, without wishing to shop around. But the average consumer is defined as being reasonably well-informed, reasonably observant and circumspect and, as I said in the *Purely Creative* case, at paragraph 62, the requirement to make those assumptions reflects the common sense proposition that the UCPD exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer.

31. In my judgment, the critical question, particularly in the context of information about alternative products, is whether the average consumer can be said to need to obtain that information from the trader in question, rather than obtain it (for example) by shopping around, and finding out for himself whether something better, or cheaper, is on offer. Generally, inward-facing information is likely to be available only from the trader in question, because it is information about that trader, or its goods or services. By contrast, information about alternative or competing products may generally be supposed to be available in the marketplace, to the extent that a particular consumer wishes to obtain it before deciding whether to make a purchase from the trader in question. In short, shopping around for information about alternative products (whether goods or services) is characteristic of the reasonably well-informed, observant and circumspect consumer.

32. Nonetheless, I agree with Miss Simor that an expectation that the average consumer will make his or her own enquiries about alternative competing products can be no more than a general assumption or starting point, and therefore one which may yield to particular aspects of the context in which the alleged omission arises. Both Article 7.1 and Regulation 6.1 go out of their way to emphasise the importance of context, both in express terms, and in requiring all the features and circumstances of the commercial practice to be taken into account.

33. Counsel were also broadly agreed that neither the Regulations nor the UCPD in general required a trader to disclose to a consumer its mark-up or the cost which it would incur in obtaining all or part of the product offered to the consumer from a third party, such as a wholesaler, manufacturer or (in relation to services) sub-contractor. I agree that this must be so, but the reason for it is perhaps less easily attributable to any particular part of the language of the Regulations or the UCPD. That information may truly be said to be inward- rather than outward-facing, and commonly a matter of commercial confidentiality, so that the average consumer could not be expected to obtain it from any other source. In my judgment the reason why this concession is generally correct is because, viewed objectively, the consumer does not need to know how much profit the trader is seeking to make from selling to him. The consumer can form his own view about whether the price demanded is worth paying for the product on offer, having regard to anything comparable available elsewhere on the market. The average consumer may also need to consider his or her own ability to pay for and service the product, but again, this is not information which the consumer needs to obtain from the trader in question.

34. The foregoing observations are, I think, as far as one can usefully go in addressing the issue on this appeal as a matter of construction of the Regulations, in the light of the UCPD. I turn therefore to an analysis of the question how Regulation 6 is properly to be applied to the particular facts of the present case.

Analysis

35. There is in my view a serious difficulty at the threshold of this analysis. It is that legislation which is heavily dependent for its effect upon particular context was applied by the judge by way of preliminary issue, at a stage when substantial parts of the "features and circumstances of the commercial practice" in question were a matter of dispute between the parties, which could only satisfactorily be resolved at the final hearing of the Petition. This appeal has been argued upon the implicit assumption that the only available conclusions were that non-disclosure that TPS's and MPS's services were free either was or was not a breach of Regulation 6. But in my judgment an alternative available answer was that this question could only be resolved at trial, when all the features and circumstances of the commercial practice were definitively known.

36. The judge's conclusion that the fact that TPS and MPS offered their services for free was material information under Regulation 6 was based upon a very simple analysis, encapsulated in the following extracts from paragraphs 41 and 42 of his judgment:

> "I have no difficulty in arriving at the conclusion that the fact that consumers can obtain a similar service to that provided by the company for free elsewhere is indeed material information for the purposes of the Regulation. … Applying the test formulated by Mr. Justice Briggs in *The Office of Fair Trading v Purely Creative*, namely, the concept of need, in my judgment the omitted information is not merely information that would assist or be relevant to the consumer. Rather, it is information, the provision of which is *necessary* to enable the average consumer to take an informed transaction decision. It seems to me clear that it is material to a prospective consumer who receives the call utilising the proposed telephone script to know that he is to be charged for a service that is available for free. He is told that the company will register his details with the [TPS and MPS]. It seems to me material that he should know that he can register himself with those services for free.
>
> The crucial feature in the present case is that an important part of the very service the company is offering is available free of charge from the very persons, namely the MPS and TPS, who the company will be approaching to provide that service. This is not a case where the company has to trawl the market to investigate products being produced by its competitors. … It knows, and is charging, upon the basis that such registration is free. I agree that there is, in general, no obligation on a supplier to identify its particular mark-up however, in my judgment, it is an obligation on a supplier of a service to say that the service for which it is proposing to charge can be obtained for free from an alternative supplier."

37. I respectfully disagree with that analysis. In my view it contains the following errors. The first is the assumption that information is material information on the basis of need regardless whether that information could be obtained by a reasonably well-informed, observant and circumspect (and therefore average) consumer otherwise than from PLT.

38. The second error is that it treats as decisive (or "crucial" as the judge put it) the fact that, because PLT is obtaining registration with TPS and MPS as part of its business plan, it knows that it is available for free, and does not have to "trawl the market" to find that out. That would be true of any case where the allegedly material information consisted of the price at which the trader obtains part of the product offered from a wholesaler, manufacturer or sub-contractor. The judge appeared to have been alert to that difficulty, in his observation that there is in general no obligation on a supplier to identify its particular mark-up. But this led to the judge's erection, as a general principle, of the proposition that a supplier of a service for which it is proposing to charge will always be obliged to inform the consumer (if it be the case) that the same service is available free from an alternative supplier.

39. This is, in my view, clearly erroneous. Indeed, Miss Simor expressly disclaimed any such principle in her oral submissions, as I have set them out above. The proposition

must in my judgment be *a fortiori* erroneous if it is only part of the service which the trader is offering that can be obtained free from an alternative supplier.

40. Taking those three points in turn, I have already explained why I have found it necessary to look more closely at the "needs" test which I formulated in the *Purely Creative* case, and upon which the judge understandably relied. A critical question in the present case is whether the average consumer, being offered a service which includes (but is not limited to) registration of his name and contact details with TPS and MPS, may be supposed to be able to find out that this part of PLT's service can be obtained direct from those entities, and at no charge (apart from his own time and trouble). The judge's assumption that this is information which the average consumer needs to have, begs the question whether he needs to obtain it from PLT.

41. Miss Simor relied very heavily in her submissions upon what the judge described as the "crucial" feature of the case, but for a slightly different reason than the judge himself. She said that this was not, in substance, a case about information as to alternative services, but about information about the very service actually being provided by PLT. It was, therefore, (using Mr Popplewell's nomenclature) inward-facing information about an important part of PLT's offering to customers.

42. Mr Popplewell protested that this was a radical departure from the way in which the alleged breach of Regulation 6 had been pleaded in the Petition, where the allegation (which I have quoted above) was precisely that the omission related to the free availability of a "similar" (and therefore alternative) service rather than the very service being offered by PLT. To that objection Miss Simor responded that, whereas the Petition had been addressed to the service apparently offered by PLT prior to the presentation of the Petition, the preliminary issue raised by the variation application concerned a proposed new or different service. In any event, she submitted that, as noted by the judge at paragraph 40, the Secretary of State's submission at the hearing clearly was that which the judge regarded as crucial. No objection to that submission was taken on the basis that it had not been pleaded.

43. I am not disposed to rule against the judge's analysis (vigorously supported by Miss Simor on appeal) on pleading grounds. The question is really one of analysis. PLT was not itself offering a registration service, in the sense that it was providing the relevant public registers, or using TPS or MPS as its sub-contractors for that purpose. On the contrary, PLT was offering to do on behalf of its customers what the customers could have done for themselves, namely apply for and obtain registration on TPS's and MPS's registers. That was not a service provided, free or otherwise, by TPS or MPS. They simply offered access to a place on their respective registers, free of charge, to all customers who took the time and trouble to apply. The real alternative to the registration application service being offered by PLT was not one which TPS, MPS or even any other intermediary was known to be providing free of charge. The real alternative was for the customer to do it himself, at no cost other than his own time and effort in filling in and sending (electronically or otherwise) the relevant forms. The real omission was, therefore, not a failure to inform consumers that the very service being offered was available free, but only that no part of PLT's cost of discharging that part of its service would include a registration fee payable to TPS or MPS. That is properly to be characterised as an aspect of the internal cost to PLT of providing part of the service which it proffers to its prospective customers,

and not something which, as the judge acknowledged and the Secretary of State accepts on this appeal, is generally disclosable as material information to consumers.

44. It does not however follow from my disagreement with the judge's analysis (and with Miss Simor's valiant attempt to support it) that the only correct conclusion is that the fact that TPS and MPS provide their services free is not material information within the meaning of Regulation 6, so that PLT could trade as proposed in its evidence in support of its variation application without breach of Regulation 6. In my view the answer to that question depends on all the features and circumstances of its commercial practice, viewed as a whole (see Regulation 6(2)(a)). Some of the relevant circumstances, such as the fact that a prospective customer's agreement is generally sought by a cold call, appear to be common ground but the circumstances as a whole have yet to be either agreed or, where disputed, established at trial. It is in my view perfectly possible (so that there is an arguable case) that when PLT's commercial practice, viewed as a whole, has been subjected to the intense forensic analysis only achievable at trial, it may be shown that the fact that prospective customers can obtain registration with TPS and MPS free, together with a complaints service by each entity, will be material information within the meaning of Regulation 6. For present purposes, I need, and can, go no further than to say that in my judgment the preliminary issue should not have been finally and bindingly determined against PLT, on the basis that the information about the free availability of TPS and MPS's services was material information within the meaning of Regulation 6. But nor should it be determined that the information was not material information, in advance of a trial. It is a contextual question for which the necessary contextual facts have yet to be established.

45. I have thus far said nothing about PLT's second ground of appeal which was that, even if the information was material in the relevant sense, nonetheless the average consumer would have made no different transactional decision if provided with it, because he or she would be likely already to know that information anyway.

46. The judge roundly rejected that proposition, at paragraph 43 of his judgment. He said:

> "As Mr Popplewell submits, this is a matter for the court to determine having regard to the court's own faculty of judgment. In arriving at that judgment, I can not ignore the fact that, as Mr Mohyuddin submits, and as I accept, the company's reluctance to tell customers that the two Preference Services can be obtained for free can only be explained on the basis that the company fears that to do so would have a detrimental effect on its business. I have to ask myself: why does the company not want to have to notify customers that they can register with TPS and MPS themselves for free? The only answer that I can supply, and that is consistent with the answer given by Mr Mohyuddin, is that the company is concerned that if the information were to be provided, an appreciable number of customers would decline the service that is being offered by the company."

47. On this appeal Mr Popplewell criticises the judge's analysis on the basis that, rather than apply his own faculty of judgment, he simply relied upon a single piece of evidence, namely PLT's own reluctance to provide this information when cold-calling prospective customers, and treated it as conclusive in relation to what should have been a multi-factorial balancing exercise, having regard to all the evidence.

48. Again, it seems to me that, although the judge's simple analysis is at first sight very persuasive, he was hampered by conducting this part of his analysis of the preliminary issue in advance of trial. The causation question which Regulation 6(1) (and Article 7.1) requires to be answered is to be addressed in its full factual context, taking into account all the features and circumstances of the commercial practice in question.

49. My conclusion that the Secretary of State has an arguable case at trial for the proposition that the information that TPS and MPS provide their services free of charge is material information, because the average consumer needs to have it from PLT (rather than from some other source) when making the transactional decision whether to contract for PLT's service, makes it impossible to conclude at this interim stage that the average consumer may safely be treated as already knowing the information withheld. It follows that this second ground of appeal offers no alternative route to a conclusion at this interim stage that PLT's proposed method of trading cannot involve a breach of Regulation 6.

50. When it became apparent to us, unfortunately after the conclusion of the hearing, that the preliminary issue might admit, in addition to a yes or no answer, the answer that it could not properly be determined before trial, we warned the parties of that possibility and sought their written submissions about it. They have been duly provided. For PLT it is submitted that this is an outcome for which no-one contended before the judge (although the Secretary of State submitted that the issue was inappropriate because purely hypothetical). Nor was it contended for by either party on appeal, or by way of cross appeal. Therefore it should not be entertained now, and certainly not without a further oral hearing. For the Secretary of State it was submitted that this court could take that intermediate course, but should nonetheless make clear, even if *obiter*, its views on the questions argued, because of their importance in the public interest.

51. As for PLT's request for a further oral hearing, I am satisfied that the point has been fully ventilated in the exchange of written submissions which we have received, so that a further oral hearing is neither required nor justified.

52. I do not consider that this court should in effect be forced into treating a question as admitting only a yes or no answer, merely because of the binary way in which an appeal has been argued, if it considers after anxious thought that it is not equipped finally to decide the question on the material available. This problem not infrequently arises, even after a trial at first instance, where a different legal analysis by an appellate court forces a re-trial, because the appellate court lacks the further findings of fact upon which to apply its analysis of the law. Of course the appellate court will think hard before directing a re-trial because of the serious cost and delay to which the parties are thereby subjected.

53. Here by contrast there has been no trial, and a trial of the Petition has still to take place, even though now much delayed by this appeal. It is in my view both artificial

and wrong to treat this preliminary issue as admitting of only a yes or no answer, all the more so because of the prominence given to context, both in Regulation 6 and in Article 7. It is, for the reasons already given, simply not a question which, asked in the abstract, admits of only one answer. To do so would be to mislead the public into thinking that non-disclosure of the fact that a comparable service, or part of the service offered, may be obtained free will always be lawful, or always unlawful, regardless of the context in which that non-disclosure occurs.

Relief

54. I need say little by way of explanation for our conclusion, already communicated during the hearing of this appeal, that it would in any event be inappropriate for this court to address the question whether the undertakings should be varied as sought by PLT. Nonetheless my conclusion that a negative answer to the issue as to breach of Regulation 6 can not properly be arrived at prior to trial, by way of preliminary issue, means that the judge's original conclusion that it was a triable issue, in paragraph 37 of his extempore judgment on 13 May 2013, remains undisturbed as a result of PLT's variation application as re-determined by this appeal. It was in part because the judge considered that there was an arguable case of breach of Regulation 6 that he required the undertakings now sought to be varied. In the circumstances, it seems to me that to require the variation question now to be referred for further consideration at first instance would be an arid exercise.

Conclusion

55. For those reasons, I would allow the appeal to the extent of setting aside the judge's determination of the preliminary issue, upon the basis that it is an issue which should be determined only at the final hearing of the Petition. But I would not disturb the judge's order refusing to vary PLT's undertakings.

Lord Justice Ryder

56. I agree.

Lord Justice Richards

57. I also agree.