cookies. The types of cookies that might be disproportionate in relation to the purpose of the website may vary depending on the context.

- Users should also be offered a real choice regarding tracking cookies. Tracking cookies are generally used to follow individual behaviour across websites, create profiles based on that behaviour and take decisions affecting people individually. When tracking cookies are being used to single out people in this way, they are likely to be personal data.

Why this Matters

The Opinion on first reading appears to be consistent with the approach taken in the United Kingdom and other European countries in that it recognizes some form of active behaviour as a mechanism for consent and not just tick boxes. On further review, however, some of the comments could call into question the validity of some consent mechanisms currently used.

One obvious concern relates to statements on websites that by continuing to use it the website users are consenting. The Opinion questions whether merely staying on the entry page ‘without further active behaviour’ can really amount to consent. Many websites will include a cookies statement, which disappears after a short time. The Opinion states that information should not disappear until the user has expressed consent.

Many websites do not list every cookie, but instead describe the categories of cookies (often following the ICC categories). In such cases, the retention period would not be specified, while the Opinion states that this should be included. In practice, it is questionable whether website operators will change their current approaches based on this Opinion, particularly as there has been very little enforcement action and the ICO has indicated in earlier reports that it does not see this as a high priority.

Sue Gold, partner, Osborne Clarke

Flogas Britain v Calor Gas

Anna Williams

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Who: Flogas Britain Ltd v Calor Gas Ltd

Where: The High Court, United Kingdom

When: 16 October 2013

Law stated as at: 29 October 2013

What happened

Over a number of years, Flogas had compiled and maintained a database with information relating to its liquid propane gas (LPG) customers, including their name, address, contract date and relevant pricing information.

Copy of database used for marketing

An ex-employee of Flogas, Mr Hughes, received from another ex-Flogas employee a copy of the information from the database regarding Flogas customers who received delivery of LPG to a storage tank on their premises. Mr Hughes then supplied this information to competitor Calor when he joined their employment.

Mr Hughes had saved a copy of a spreadsheet containing this information onto his personal computer. He saved a form of this file and also provided some information on a memory stick to Calor's Head of Marketing who then used the information to send a series of mailshots to a significant number of Flogas's customers. These emails invited the Flogas customers to switch to Calor for their LPG needs and offered £100 of free LPG to those who did indeed switch. Flogas discovered this unlawful use of its database when it received a surge of telephone calls from customers requiring it to meet the Calor offer.

The two claims the High Court were asked to consider were:

Different views on level of damage**Breach of confidence**

Calor admitted that it used customer details obtained from Flogas's database; thus, where the breach of confidence claim was concerned, the only issue for the court to decide was quantum. Having discovered the misuse of the information, Calor took various mitigation measures, including cancelling a further round of mailshots due to be sent to Flogas customers and dismissing the employees involved in the use of the data. The case became sticky when both parties gave their expert evidence on the point of quantum of damages. The experts used different methodologies with very different figures resulting: Flogas valued the claim at between £6.5 m and 8.1 m, whereas Calor valued the matter at only £125,823–224,255.

Mailshots breached rights**Infringement of database rights**

The court had to decide both liability and quantum where database rights infringement was alleged. Flogas claimed the mailshots sent by Calor to Flogas's customers breached Flogas's rights in the database under Regulation 13 of the Database Regulations and additional damages for database right infringement were also sought.

Database protection in the United Kingdom

By way of a quick summary, database right subsists in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database as required by the Database Regulations (Regulation 13, Copyright and Rights in Database Regulations 1997).

A database right is infringed when, without due authorization, a person extracts or re-utilizes the whole (or a substantial part) of the contents of the database. As with the assessment of a 'substantial part' where an infringement of copyright is concerned, this is a qualitative test, but it can also be assessed quantitatively and an extraction from a database for infringement purposes means any permanent or temporary transfer of all or

a substantial part of the contents of the database to another medium (by any means).

As with copyright cases, the court has at its disposal the ability to award additional damages for breach of database right if having regard to all the circumstances in the case it believes the infringement to be particularly flagrant or there has been some benefit accruing to the defendant as a result of the infringement (in particular a pecuniary advantage in excess of the damages the defendant would otherwise have to pay).

The high court’s ruling

Quantum based on defendant’s assessment

In summary, the court agreed with the defendant’s expert on the assessment of quantum of damages under three of the heads of claim regarding loss of profits owing to the defendant’s mailshots to customers identified using the claimant’s database, but awarded the sums claimed by the claimant for damages under the two remaining heads regarding costs of management time and professional costs.

Regarding liability for infringement of the claimant’s database rights, the court found that the database rights had been infringed by Mr Hughes and the Calor Head of Marketing and that Calor Gas Ltd was vicariously liable for their acts. However, the court refused to award the claimant additional damages for database rights infringement.

As part of the judgement delivered, the court made the following statements relating to the assessment of damages for breach of confidence and database rights:

Quantum of damages for breach of confidence

Issue is loss to business

In terms of general principles, Proudman J said that she followed Dowson & Mason Ltd v Potter [1986] 1 WLR 1419, in which the court regarded the loss of profits not the value of the confidential information as the important factor. She also followed Force India Formula One Team v 1 Malaysia Racing Team [2012] EWHC 616 Ch, whereby monetary relief could be awarded to a claimant who had suffered financial loss as a result of a defendant’s breach of an equitable obligation of confidence.

Proudman J said that it was the loss to the claimant’s business that should be at issue and it would therefore be unjust to restrict the claimant to an assessment of the value of the confidential information only.

Where relevant heads of loss were concerned:

Heads of loss	Type of loss	Proudman J decision
1	Loss of contribution from Flogas domestic customers on the Flogas database who moved to Calor and to other	The judge preferred the evidence of Calor’s expert witness and assessed damages at £142,052 in relation to loss of customers to Calor, subject to adjustment for discounting at a different rate and for a different

(Continued)

Heads of loss	Type of loss	Proudman J decision
	suppliers owing to the mailshots	period. She did not award any sum for damages relating to loss of customers to other suppliers.
2	Loss arising from the reduction in prices given to retain customers who were woken up to opportunities for price negotiation owing to the mailshots	Proudman J. again preferred the evidence of Calor's expert witness and assessed damages under this head at £69,159, subject again to adjustment to take account of the revised discount rate
3	Loss of customers who would otherwise have been won by Flogas but for the market disruption caused by the mailshots	The judge preferred Calor's expert evidence, finding that there was little or no evidence that it were the mailshots that caused Flogas not to win new customers
4	Cost of management time spent dealing with the disruption arising from the mail shots	Applying the principles set out in <i>Aerospace Publishing v Thames Water</i> [2007] EWCA Civ 3, Proudman J. awarded the damages of £21,126.87 claimed by Flogas as she agreed that they had suffered a significant disruption. Even in the absence of conclusive contemporaneous notes of meetings and time records, it was held that Flogas had to spend time and effort to devise strategies as to how to deal with the fact that its database had been misused. It was held that for this head of loss, a step needed to be taken back to look at the situation in the round and Flogas had to deal with a certain amount of disruption caused by the misuse of the database by Calor
5	Professional costs of actions required following the misuse of the Flogas database	Flogas had engaged Inta Forensics to assist with the recovery of the information from the Flogas Database from Calor's computer system. The judge allowed these costs of £45,599.63, since the claim was intricately linked to the misuse of the Flogas database. It was held by the court that it was not possible for

(Continued)

Heads of loss	Type of loss	Proudman J decision
6	Interest	Flogas to avoid these costs as they were necessitated by Calor's actions This was agreed upon by the experts as LIBOR plus 2 per cent compounded annually

Extraction of database

Liability for breach of database right

Calor did not dispute that the Flogas database constituted a database for the purposes of section 3 A(1) of the Copyright Designs and Patents Act 1988, and where database rights were concerned, Proudman J. considered Flogas's investment into the database meant that it was also capable of being a 'database' under regulation 13 of the Database Regulations.

Proudman J. found that extraction of the Flogas database for the purpose of Article 7(2) of the Database Directive occurred through Mr Hughes' copying of the data after the beginning of his employment with Calor and the supply by the Calor Head of Marketing of the information to Calor's marketing and advertising agency. These acts were the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form, within the definition in the Database Directive.

Significant investment by Flogas in database

Proudman J. said that she had to decide whether the extraction of a substantial part had taken place in the light of the guidance BHB v William Hill Case C-203/02 and the Dataco case. She concluded that the meaning of 'substantial part' for the purpose of an extraction from the Flogas database had been fulfilled.

The investment that Flogas had made in the Flogas database was undoubtedly one that had been great and the information was collected over time and required significant effort in creating and maintaining it. Considering this significant investment, the extractions she had found to have taken place amounted to a 'substantial part' in the qualitative sense.

Calor Gas vicariously liable

Proudman J. found that Calor was vicariously liable for the acts of Mr Hughes and its Head of Marketing in infringing Flogas's database right, applying the principles in Weddall v Barchester Healthcare Ltd [2012] EWCA Civ 25. Among other things, the database extractions had a close connection with their employment, in that they related to business intelligence that was closely linked to the conduct of the business. The wrongful conduct could fairly and properly be regarded as affected by Mr Hughes and the Head of Marketing while acting in the ordinary course of Calor's business or the employee's employment, because the copying and handling of this data was in principle something that would come within the realm of the ordinary course of their employment. It would therefore not be unjust to impose vicarious liability on Calor for it.

Damages not recoverable twice

Quantum of damages for breach of database rights

Regarding ordinary damages, Proudman J. held the infringement of Flogas's database that arose right on exactly the same facts as the liability for breach of confidence. As Flogas was already being compensated for the loss it had suffered in that respect, it was held that Flogas could not recover such damages twice under the head of database rights infringement also.

No deceit involved

Additional damages

On the issues of whether Flogas could claim additional damages for infringement of its database rights pursuant to Regulation 23 of the Database Regulations and Section 97(2) of the Copyright Designs and Patents Act 1988, Flogas had argued Calor's conduct had been 'flagrant' justifying additional damages, but the court disagreed and held that such additional damages should not be awarded.

Under Section 97(2) of the Copyright Designs and Patents Act 1988, the court has to have regard for all the circumstances of the case when assessing the need for additional damages and Proudman J. felt the *Harrison v Harrison* tests regarding flagrancy had not been fulfilled. The evidence had not demonstrated scandalous and deceitful conduct on the part of Calor in line with those seen in previous precedents and additional damages were therefore not required to uphold the justice of this case. While the extractions that took place had been enough to establish the infringement of the database right, there was not the additional element of reprehensible conduct necessary to justify the imposition of additional damages.

While she accepted Flogas's submission that flagrancy was not a necessary finding in order to award additional damages, Proudman J. said that she struggled to find other grounds that could justify an award of additional damages. She also pointed out that awards of additional damages were few and far between and that the sums in question had been small. The benefit that Calor had obtained through the infringement of the database right, even when interpreted widely (not just in financial terms) did not, in Proudman J.'s view, exceed the damages for loss suffered.

Awards of additional damages are rare

Why this matters

This case is a useful reminder of the principles to be applied when assessing damages for breach of confidence through an act of misuse of a customer database. Proudman J.'s decision in this case reminds businesses and lawyers of the issues to be considered when assessing whether database rights have been infringed and when additional damages may be claimed for such an infringement.

The case is also a reminder that awards of additional damages in intellectual property cases are few and far between and, while the actions of a competitor may certainly be unattractive and not in the proper spirit of fair competition, it does not mean that additional damages will be a recourse readily available to the injured party.

Anna Williams, associate director UK, Osborne Clarke