

**IN THE COLCHESTER COUNTY COURT**

**BETWEEN**

**NIGEL ROBERTS**

**Claimant**

**- and -**

**MEDIA LOGISTICS (UK) LIMITED**

**Defendant**

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ON DAMAGES  
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1. On the 19<sup>th</sup> October 2005 it was ordered that the Defendant pay the Claimant an amount to be decided by the Court and costs. This statement for the Court is confined to the issue of damages.
2. The Claimant notes that the Defendant appears to claim to be well-informed about Data Protection legislation. The Claimant also notes that although the Defendant has admitted his action sending unsolicited marketing by email, and admits that he holds and processes personal data on the Claimant, he refuses, and continues to refuse, to provide details of how he came to acquire, and process the Claimant's Personal Data; he also refuses to disclose any records of consent of the Data Subject(s) to such processing (*Letter from Media Logistics to Nigel Roberts, 15<sup>th</sup> August 2005* at numbered paragraphs 1-2).
3. **Nominal Damages**
  - i) Every breach of a (statutory or common law) duty gives a rise claim to nominal damages (*Ashby v White (1703) 1 Sm LC (13<sup>th</sup> Edn) 253*) Accordingly the Claimant submits that, inter alia, the Court should award nominal damages.
  - ii) The Claimant submits that the amount of nominal damages that the Court should award should be not less than £50 for the following reasons.
    - a) £50 is the quantum of nominal damages awarded to the Claimants in *Douglas v Hello! [2003] EWHC 2629 (HC) [12]* for breaches of the Data Protection Act. In that case Lindsay J regarded £50 as appropriate

where there is a potential for double recovery (In *Douglas v Hello!* there was a simultaneous claim under another cause of action which was also likely to provide redress). The current case may be distinguished from *Douglas v Hello* as there is no possibility of a double recovery and there is one cause of action. The Claimant submits, therefore, that the Court should consider awarding of nominal damages in an amount that is greater than that awarded in the *Douglas* case.

- b) £50 is also the amount the Defendant offered to pay to charity in response to the Claimant's original complaint (Letter from Media Logistics to Nigel Roberts, 15<sup>th</sup> August 2005 at numbered paragraph 4). The Claimant refused the Defendant's offer as there is no right of a wrongdoer a right to impose such conditions (i.e. that any damages must be paid to charity); nonetheless this offer indicates that the Defendant himself appears to accept that the size of payment which might be appropriate for his breach of duty should be at least this amount.
- iii) The Claimant therefore submits the Court should award nominal damages in an amount to be decided by the Court and that amount should be at least £50.

#### 4. Actual Damages

- i) The Claimant submits that the starting point in consideration of actual damages is that the general principle is to put the Claimant in the position he was before the breach of duty.
- ii) The Claimant received and continues to receive several hundred unsolicited 'spam' email messages per day; these are generally advertisements for products and services of varying legality. This barrage of 'spam' means the Claimant has had to employ various technical measures to remove unwanted email.
- iii) The annual cost of 'anti-spam' measures used by the Claimant (necessitated by spam he is receiving as a result of all the unlawful trading of his Personal Data) is as follows:

SPAMCOP.NET "Filtered Email" service @USD \$20.00	£11.50
"Norton Anti-Virus" email virus filtering @USD 40.00	£23.00
Flame Computing 'grey-listing' anti-spam management service @USD 100.00 per month	£790.00

- iv) As the Claimant is a busy Chartered Engineer he employs the services of an administrative assistant. One of her duties is to review his email and delete spam. Approximately half an hour of the time of his assistant is spent on this task each day.
- v) Most of the 'spam' the Claimant receives is from companies and organisations in far-flung countries well beyond the reach of English Law. In consideration of his actual losses in this case, the Claimant is not claiming that the whole of his losses from spam (i.e the costs having to implement the anti-spam measures detailed above) are caused solely by the Defendant's breach of duty. The Claimant recognises that the actual losses that from each of the 'spam' emails he has received from the Defendant are (relatively) small.
- vi) However, the Claimant submits that as extensive unlawful trading in his personal data, including his email address, is taking place by spammers (and in which trade of personal information the Defendant is participating) that this trade in his Personal Data is the sole cause of the total expense and inconvenience to which he has been put and is continuing to be put.
- vii) But for the practice of unlawful trading in email addresses he would not suffer any of the losses and expenses as detailed above. The Claimant further submits that such losses are reasonably foreseeable.
- viii) The Claimant submits therefore that the Defendants actions have made a material contribution to the actual losses he is suffering.

- ix) It is the purpose of the legislation to prevent this particular mischief -- i.e. losses such as those suffered by the Claimant from 'spam email' (*Privacy and Electronic Communication (EC Directive) Regulations 2003* implementing *Council Directive 2002/58/EC*).
- x) Spam email, by virtue of its cumulative effect, causes significant actual losses both to individuals and businesses. In May 2004, the BBC reported that spam was costing British businesses £3.2bn per year. (*BBC News, 25 May 2004*). It is generally recognised that the problem has not diminished since that date.
- xi) The Claimant has been put to inconvenience and expense in order to attempt to prevent the flood of unsolicited emails that is caused by the unlawful trading of his Personal Data. Despite his best efforts, this has been only partially successful.
- xii) The unsolicited email which he is receiving interferes with the proper functioning of his personal and business email, requires additional disk storage, delays the receipt of legitimate email and takes up considerable amounts of the Claimant's time (and that of his assistant) in examining the contents in order to determine whether the mail is from a legitimate source or not.
- xiii) Furthermore, in considering his actual losses, the Claimant has been subject to nuisance caused by the actions of the Defendant.

- xiv) Additionally or alternatively, therefore, the Claimant submits the Court should award actual damages not exceeding £300.

5. **Rookes v Barnard [1964] AC 1129 (HL)**

- i) It is the general rule that damages are compensatory and should not be awarded as punishment.
- ii) However, the Claimant submits that an award of damages may take into account policy considerations. For example, to show by way of example to others that a particular course of wrongful conduct is not to be tolerated.
- iii) The circumstances in which exemplary damages might be awarded were set out by Devlin LJ in *Rookes v Barnard*. These circumstances include, inter alia, conduct (by a defendant) that is calculated to make a profit for himself which may well exceed the compensation payable to a Claimant. Where this is the case an award of exemplary damages may be made in appropriate cases even though such an award might be inconsistent with the general principle that damages are intended to be compensatory.
- iv) It might be suggested that as the statutory duty was only created in 2003, a breach of that duty, self-evidently, cannot be a tort to which exemplary damages might have been awarded pre-1964, and therefore that exemplary damages should not be awarded in this case.

- v) However should this point be raised by the Defendant the Claimant would submit that the nature of the tort sued upon is not the determining consideration, and that the question of whether exemplary damages are appropriate should be determined simply by whether the factual situation is covered by Lord Devlin's test, as above (per Lord Mackay, *obiter* in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 at 45) In any event, the Claimant submits that Defendant's liability also arises from the common law.
- vi) It is submitted by the Claimant that the Defendant was well aware of Data Protection Legislation making his conduct wrongful, yet he chose to pursue his course of action nonetheless, sending bulk unsolicited email without the informed consent of the recipient, judging that his profit would outweigh any damages which might be awarded to anyone who might seek redress, and that therefore the current case should be considered to fall within the second of the *Rookes v Barnard* categories.
- vii) The Defendant's continued refusal to identify the wrongdoer who unlawfully provided the Claimant's Personal Data to him is a further illustration of his attitude in this regard towards the Law and towards the Claimant's rights.
- viii) The Claimant therefore submits that *Rookes v Barnard* should apply to the Court's consideration of damages in the current case and that the Court should, if it thinks just and equitable, award an amount additional to nominal and/or actual damages under this heading.



- ix) The Claimant further submits that the amount of exemplary damages the Court should award should be moderate rather than excessive, but in any event should be appropriate (*Design Progression v Thurloe Ltd* [2004] EWHC 324).

## 6. Human Rights Act 1998

- i) The Defendant is not a public authority. Nothing in the Claimant's Claim involved issues under the *Human Rights Act 1998*. (See p2. of the Claimant's Claim Form). However, the Claimant submits that in reaching its decision on the amount of damages the Defendant should pay to the Claimant, the Court, itself a public authority, ought to take the Claimant's Convention Rights into account (*Douglas v Hello!*), and in particular the positive obligation to protect the Claimant's Conventional rights under Art 8(1).
- ii) It is submitted that the term 'correspondence' in Art 8(1) must be given an wide meaning, and that it includes email correspondence. The Claimant therefore submits that right to respect for the Claimant's private life, and for his (email) correspondence includes protecting him from unlawful trading in his personal data and from 'spam' and this should be taken into account in determining the amount of damages.