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Case No: HC 06 C00598

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Tuesday, 12<sup>th</sup> December 2006

**Before:**

**MR. JUSTICE LEWISON**

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**Between:**

**MICROSOFT CORPORATION**  
**(a company incorporated under the laws of the**  
**state of Washington in the United States of**  
**America**

**Claimant**

**- and -**

**PAUL MARTIN McDONALD**  
**(also known as GARY A WEBB)**  
**(trading as BIZADS and BIZADS UK)**

**Defendant**

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**MR. MARK VANHEGAN** (instructed by **Messrs. Olswang**) for the **Claimant**  
**THE DEFENDANT** did not appear and was not represented

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**Approved Judgment**

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**MR. JUSTICE LEWISON:**

1. For anyone who uses email SPAM is an unwanted nuisance. More than that, it is a large cost to those involved in providing email services. According to the European Commission in November 2006 the worldwide cost of SPAM in 2005 was estimated at 39 billion euros.
2. Microsoft, the claimant in the present case, actively combats the transmission of SPAM to its subscribers. One of the ways in which it does so, is to set up what it calls "Target Accounts" which are accounts who have no real subscribers behind them but are there as decoys in order to catch "spammers". The details of those accounts are left unprotected by SPAM filters and other types of program.
3. The concern about SPAM led to the promulgation by the European Union of Directive 2002/58/EC of 12<sup>th</sup> July 2002. What is important for present purposes are the terms of recital 40 of the Directive which reads as follows:

"Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automating calling machines, telefaxes, and e-mails including SMS messages. These forms of unsolicited commercial communications may on the one hand be relatively easy and cheap to send and on the other may impose a burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment. For such forms of unsolicited communications for direct marketing, it is justified to require that prior explicit consent of the recipient is obtained before such communications are addressed to them. The single market requires a harmonised approach to ensure simple, Community-wide rules for businesses and users."

4. What is important about that recital for present purposes is that, in my judgment, it shows that part of the policy underlying the Directive was not only the protection of subscribers themselves but also the protection of the electronic communications networks which suffer from the volume of SPAM.
5. In response to that Directive Parliament made the Privacy and Electronic Communications (EC Directive) Regulations 2003. Regulation 22 of those Regulations is headed "Use of electronic mail for direct marketing purposes". It provides as follows:

"(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3) a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of

the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.”

6. Regulation 22(3) then sets out circumstances in which it is permissible to send or instigate the sending of electronic mail for the purposes of direct marketing. Those particular circumstances need not concern me.
7. Regulation 30 is headed “Proceedings for compensation for failure to comply with requirements of the Regulations”. It provides as follows:

“(1) A person who suffers damage by reason of any contravention of any of the requirements of these Regulations by any other person shall be entitled to bring proceedings for compensation from that other person for that damage.

(2) In proceedings brought against a person by virtue of this regulation it shall be a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the relevant requirement.”
8. There are also alternative means of enforcement by the Information Commissioner acting in pursuit of his powers under the Data Protection Act 1998 as extended by the Regulations themselves.
9. The threshold question, as it seems to me, is whether Microsoft Corporation has a cause of action under these Regulations at all. That is to be determined according to the normal principles applicable to deciding whether a private person (whether a natural person or a corporation) has a cause of action for breach of a statutory requirement. The court must first be satisfied that the person who claims the cause of action was within the class of persons for whose protection the relevant statutory requirement was imposed. Second, the court must be satisfied that the terms in which the statutory requirement was imposed enables a claim for relief to be brought.
10. As I have said the domestic regulations were made in order to conform with the provisions of the Directive and part of the policy of the Directive was, in my judgment, to protect the providers of electronic communications’ systems. Consequently, I am satisfied that Microsoft is within the class of persons for whose benefit the statutory requirement was imposed.
11. Regulation 30 explicitly contemplates that a person who suffers damage by reason of a breach of the Regulations is entitled to compensation. Microsoft claims to have suffered such damage – a claim which I will look at in due course. But Microsoft claims not merely compensation in the present case but also an injunction. The Regulation does not specifically entitle a person who suffers from a breach to an injunction. However, the Supreme Court Act 1981 enables the court to grant an injunction in all cases where it is just and convenient. The alternative, if an injunction cannot be granted, is to leave a person who suffers repeated damage, as a result of repeated breaches of the Regulations, to bring a series of actions.

12. That, in my judgment, would be an absurd result and I am therefore satisfied that a person who falls within the terms of Regulation 30 is entitled, in addition to compensation or in lieu of compensation, to claim an injunction restraining breaches of the Regulations.
13. The Regulations apply to prohibit not only the transmission of electronic mail but also the instigation of such transmission. What is the meaning of the word “instigate”? Mr. Vanhegan, who appears on behalf of Microsoft, submits that it has its ordinary dictionary definition which includes urging or inciting somebody to do something. I accept that submission. I do, however, consider that to urge or to incite somebody to do something requires something more than the mere facilitation of the action concerned; it requires, in my judgment, some form of positive encouragement.
14. I turn then to consider the current application for summary judgment against Mr. McDonald. Mr. McDonald has not appeared on the application although he has been notified that it is to be heard. Under the terms of CPR 24.2 the court may give summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim and “there is no other compelling reason why the case or issue should be disposed of at a trial”. It is not, of course, the function of an application for summary judgment to turn into a mini trial. That does not, however, mean that any assertion which the defendant chooses to make must be taken at face value. If an assertion is not credible then the court is entitled to go behind it and to give judgment for the opposing party.
15. The evidence clearly establishes the existence of a business trading as Bizads which operates a website. The website offers for sale lists of email addresses. The email addresses fall into a number of different categories. They include, for example, business opportunity seekers and UK franchise seekers and other categories. The website of Bizads says, amongst other things:

“These email database lists are sent to you in excel database format and txt text file format. They only include the email address and NOT the name of the email owner. All lists are verified by us weekly and we email all the prospects on a regular basis to give them the option to opt-out of the lists. They opt out by using the form HERE.”
16. In relation to business opportunity seekers the website says:

“All the people on these email lists have subscribed to receive business opportunities via email. They have completed an opt-in email form direct from a Bizads website. They are waiting for your opportunity or offer.”
17. In relation to those alleged to be seeking gambling opportunities the website says: “They are waiting for your introductory email.” In relation to MLM networking seekers it says: “They are waiting for your network marketing opportunity or offer”. And in relation to UK home workers it says: “They are waiting for your home working opportunity or offer.”

18. Those statements are, in my judgment, plainly an encouragement to or an incitement of any person who buys a list from Bizads to use the list in order to send emails. The evidence of those who have bought email lists from Bizads is that a very large proportion of complaints have been received from addressees on that list indicating that emails that they received were unsolicited.
19. I consider therefore that Microsoft has established that the lists were used in contravention of Regulation 22 by sending unsolicited electronic mail. I am also satisfied that the words on the Bizads site instigate the sending of that electronic mail in the sense of encouraging it.
20. The defendant, Mr. McDonald, has filed a defence and a purported witness statement in which he asserts – without any supporting documentation – some possible defences to the claim by Microsoft. First he says that it is possible that the owner of the email addresses to whom unsolicited mail has been sent inadvertently consented to that address being used by Bizads. Not only is that assertion no more than speculation it is, in my judgment, incredible. The particular email addresses were target email addresses specifically set up by Microsoft in order to catch spammers and it is, in my judgment, inconceivable that consent would have been given.
21. Second, Mr. McDonald says that the Bizads website may have been subject to a malicious practice of email spoofing. It is not entirely clear what he means by that but it seems probable that what he means is that somebody may have falsely purported to send a message from one of these email accounts. However that, as Mr. Vanhegan points out, is directly contradicted by Bizads own website which states that the lists are verified weekly and that Bizads email all the prospects on a regular basis to give them the option to opt out of the lists. If, therefore, there had been some spoof, then the owners of the real addresses would have been notified if Bizads' assertion were true. Moreover, since some of the addresses were Microsoft target addresses, Microsoft itself ought to have received such notification. It has not.
22. The third possibility that Mr. McDonald canvases is that there may have been misuse of email lists supplied by Bizads or the third parties using opt-in email lists gathered from other people. That is directly contradicted by those who have bought the email lists from Bizads. The contents of one such list are exhibited in the case papers. They plainly show at least one of the Microsoft target addresses having been acquired directly from Bizads.
23. Accordingly, I am satisfied that the evidence plainly establishes beyond any realistic controversy that the Bizads was supplying email addresses of persons who had not consented to receiving unsolicited emails and that it was encouraging those to whom it supplied those emails to use them in order to contact the addressees.
24. The next question I need to address is whether Mr. McDonald is the person who is behind the Bizads business. He says that Bizads is operated by somebody called Mary Ross who, he says, was born in Northern Ireland in November 1965. There is no trace of a Mary Ross having been born in the location given by Mr. McDonald in that or the surrounding years. There is no other documentary evidence of the existence of Mary Ross save for the registration of the Bizads website in her name. The registrant Mary Ross is said in that registration to live at 135 Wimborne Crescent, Milton Keynes, Buckinghamshire. That is the place where Mr. McDonald himself

- lives. The Council Tax bill for Mr. McDonald at that very same address plainly indicates that it was in single occupation, that is to say by Mr. McDonald alone.
25. The Bizads website indicates that the method of payment will be either through Nochex or through PayPal and the registration details for the Nochex accounts are in the name of a Mr. Gary Webb, also apparently with an address at 135 Wimborne Crescent in Milton Keynes. Mr. McDonald has admitted that Gary Webb is simply an alias for him and it is, in my judgment, the overwhelming inference that Mary Ross is simply another alias.
  26. That conclusion is also supported by the history of the Bizads business and its predecessors. It apparently started with the establishment of PMM Direct Marketing in 1985. It will not have escaped notice that PMM are Mr. McDonald's initials although the name of the founder is given as Patrick rather than Paul McDonald on the Bizads website. An email address at [tube89@aol.com](mailto:tube89@aol.com) is also linked to Mr. McDonald and from that email were offered collections of homemade adult videos from a PO Box Number in Milton Keynes to which Mr. McDonald accepts he had access. By 1998 PMM Mailing Specialist Mailing Lists were offering for sale lists of opportunity seekers, home workers and gamblers, all of which feature on the Bizads website and were using phone numbers and PO Box Numbers also linked to Mr. McDonald. All this is before the time at which Mr. McDonald says that Mary Ross appeared on the scene.
  27. In assessing the credibility of Mr. McDonald's assertions I am entitled to, and do, take into account that he has lied previously about the existence of Gary Webb; he has lied about whether he knew a Mary Ross saying initially that he knew nothing about her but subsequently claiming that they had been in a relationship. I take into account also that Mr. McDonald has produced no documentary evidence whatsoever which points to the involvement or even the existence of Mary Ross and that such documentary evidence as there is, with the sole exception of the website registration, tends to suggest that she does not exist.
  28. I also take into account – although I do not place great weight on it in view of the fact that Mr. McDonald is a litigant in person – that neither his defence nor his witness statement is accompanied by a statement of truth or even an assertion in it that Mr. McDonald believes what he says.
  29. In all those circumstances I am satisfied that Mr. McDonald has no real prospect of defending the allegation that he is behind the Bizads business.
  30. Microsoft alleges – and this is not contradicted by Mr. McDonald – that as a result of SPAM it suffers loss. The types of loss it suffers are twofold. One is considerable damage to its goodwill. If subscribers are not effectively protected by Microsoft against SPAM they are less willing to continue as subscribers of MSN or to subscribe to its paying services. In addition, Microsoft itself spends a large amount of money in fighting SPAM and it has had to invest in additional servers in order to cope with the sheer volume of SPAM which is transmitted across the networks.
  31. I am therefore satisfied that Microsoft has suffered a loss as a result of the breach of the Regulations and, consequently, it is entitled to compensation and also to an injunction restraining further breaches of the Regulations.

32. I have considered with Mr. Vanhegan the form of the order which I ought to make and I am prepared to make an order in the terms that he and I have discussed restraining the defendant from transmitting or instigating the transmission of unsolicited commercial emails to hotmail accounts together with the other associated relief contained in that order and an enquiry into compensation.

MR. VANHEGAN: I am very grateful, my Lord. That concludes, I think, today.

MR. JUSTICE LEWISON: I think so. Will you lodge a revised minute?

MR. VANHEGAN: I shall lodge a revised minute.

MR. JUSTICE LEWISON: Thank you very much.

MR. VANHEGAN: I am very grateful.

MR. JUSTICE LEWISON: Thank you.

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