ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 17/2000

BETWEEN:

LI TAK-CHEUNG Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA Respondent

Before : The Administrative Appeals Board
Date of Hearing: 24 November 2000
Date of Decision: 5 January 2001

DECISION

This appeal raises an interesting and important issue concerning the effect of an individual's bankruptcy on his credit data (more particularly, his account default data) collected by a data user (in this case, a credit reference agency) acting under the Code of Practice on Consumer Credit Data issued by the Privacy Commissioner for Personal Data.

Personal Data (Privacy) Ordinance

The Personal Data (Privacy) Ordinance, chapter 486 of the Laws of Hong Kong, was enacted to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith.

Data Protection Principles

Schedule I to the Ordinance sets out six (6) Data Protection Principles which are to be observed, unless an act or practice that contravenes the Data Protection Principle(s) is required or permitted under the Ordinance (s.4).

Data Protection Principle 2

The relevant principle, for the purposes of this appeal, is Principle 2 - the accuracy and duration of retention of personal data.

Broadly speaking, Data Principle 2 provides that all practicable steps should be taken to ensure that personal data, including an individual's account default data, is :-

(1) accurate, and

(2) that the data is kept no longer than is necessary for the purpose for which the data are to be used.

Regarding Data Protection Principle 2(2), s. 26 of the Ordinance provides, amongst other things, that a data user shall erase personal data held by him, where the data are no longer required for the purpose for which the data were used, unless it is in the public interest for the data not to be erased.

Code of Practice

Under s.12 of the Ordinance, the Privacy Commissioner for Personal Data may issue a code of practice as, in his opinion, is suitable for the purpose of providing practical guidance in respect of the requirements imposed on data users.

In 1998, the Commissioner issued the Code of Practice on Consumer Credit Data ("the Code") which took effect on 27 November 1998.

Practice - accuracy of personal data

In the Code, the relevant clause which seeks to give effect to Data Protection Principle 2(1), termed the Personal Data Accuracy Principle, is Clause 3.3:-

3.3 A credit provider should only provide consumer credit data to a credit reference agency or to a debt collection agency after checking the data for accuracy. If the amount in default is subsequently repaid or written off in full or in part, or if any scheme of arrangement is entered into with the individual, or if the credit provider discovers any inaccuracy in the data which have been provided to and which the credit provider reasonably believes are being retained by the credit reference agency or the debt collection agency, the credit provider should notify the credit reference agency or debt collection agency promptly of such fact.

Practice - limitation of retention of personal data

The relevant clause which seeks to give effect to Data Protection Principle 2(2), termed the Personal Data Retention Limitation Principle, is Clause 2.2:-

2.2 A credit reference agency should delete from its records any account default data under clause 2.1.2.1 relating to an individual no later than 5 years from date of final settlement of the amount in default, except that where it has received notification from the credit provider:

- that the amount in default has been settled in full within 90 days from the date the default occurred, such data should be deleted upon the receipt of such report;

- that the amount in default has been settled in full before the sending of a written notice to the individual by the credit provider pursuant to clause 3.5 or within 30 days from the date of the sending of such notice, such data should be deleted upon the receipt of such report; or

- that the amount in default has been finally settled pursuant to a scheme of arrangement agreed with the individual, such data should be deleted upon the receipt of such report or on or before the expiry of 5 years from the date of the agreement, if such expiry is later.

For present purposes, it would be noted that under clause 2.2, account default data should be deleted no later than:-

- date of final settlement of the amount in default + 5 years;
- where the amount in default has been finally settled pursuant to a scheme of arrangement, the date of final settlement, or the date of agreement of a scheme of arrangement + 5 years if that is later than the date of final settlement.

It would be noted that there is no express reference to *whether*, and if so, *when* account default data should be deleted when the individual goes bankrupt. This is the situation with the present appeal.

Appellant's circumstances - bankruptcy

Prior to October 1995, the Appellant was indebted to, amongst others, Inchroy Credit Company.

In 1995, a petition for his bankruptcy was filed by another creditor. On 18 October 1995, a receiving order was made and on 7 December 1995, a bankruptcy order was made against him.

The effect of a bankruptcy order is that no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debts (s.12(1) Bankruptcy Ordinance).

Inchroy proved in the Appellant's bankruptcy. On 31 May 1996, Inchroy wrote-off the Appellant's debt.

On 8 December 1999, the Appellant was discharged from bankruptcy under the "automatic discharge" provisions of the Bankruptcy (Amendment) Ordinance 1996 (76 of 1996).

The effect of a discharge is that, amongst other things, it releases the bankrupt from all the bankruptcy debts (s.32(2) Bankruptcy Ordinance).

The Appellant's Complaint

The Appellant's complaint which is the subject-matter of this appeal focusses on the effect of his bankruptcy and discharge on the account default data collected on him by a credit reference agency, Credit Information Services Ltd. ("CIS").

Prior to his complaint, the individual credit check provided by CIS listed, amongst other things, the Inchroy debt and the date of write-off, but it did not indicate the Appellant's bankruptcy or discharge. The Appellant argued that by reason of Inchroy's write-off, alternatively, by

reason of the bankruptcy order or the discharge, the account default data should have been deleted.

CIS did not concur with this view, and this led to the Appellant's complaint to the Commissioner.

Scheme for Complaint, Decision and Appeal

Section 4 of the Ordinance provides that a data user shall not do an act, or engage in a practice, that contravenes a Data Protection Principle unless the act, or practice, is required or permitted under the Ordinance.

Where an individual, who is the subject of certain data, considers that the data user has done an act or engaged in a practice which contravenes the Ordinance, he may lodge a complaint to the Commissioner.

The Commissioner may then carry out an investigation, or refuse to carry out an investigation if one of the reasons set out in s.39(1) or s.39(2) applies.

Where the Commissioner refuses to carry out an investigation, the complainant may appeal to this Appeals Board against that refusal.

The Commissioner refused to carry out an investigation in relation to the Appellant's complaint. Under s.39(3), where the Commissioner refuses to carry out an investigation, he shall, amongst other

things, by notice in writing inform the complainant of (a) the refusal and (b) the reasons for the refusal.

On 4 May 2000, the Commissioner notified the Appellant in writing that there was no prima facie evidence that CIS's act or practice could have contravened the provisions of the Ordinance and that he refused to carry out an investigation. It is from this decision that the Appellant has lodged this appeal.

Neither the Appellant nor the Commissioner called any evidence but reference was made to the Individual Credit Check provided by CIS. Although the Appellant also objected to the accuracy of a figure of $13,998.00 set out in the credit check as the amount of his debt to Inchroy, it transpired in the course of the appeal that this figure only appeared in the credit check after the complaint was lodged, and did not form part of the complaint or the Commissioner's decision. Hence, it cannot be the subject of the present appeal.

The Appellant was not legally represented, and the grounds covered in his Notice of Appeal and in his oral submissions were wide-ranging. Each ground is discussed in turn below.

Scope of public consultation on the Code

The Appellant criticised the scope of public consultation on the provisions of the Code. He said he was unable to find much in the way of materials showing there had been public consultation.

This argument can be dealt with briefly. The jurisdiction of the Appeals Board is over the Commissioner's decision on the specific case before it, not on the adequacy or otherwise of the scope of public consultation undertaken by the Commissioner before he issued the Code. Under s.12 of the Ordinance, the Commissioner may issue a code of practice as, in his opinion, is suitable for the purpose of providing practical guidance. No scope or period of public consultation is prescribed.

Commercial nature of bankruptcy

As a preliminary point, the Appellant also argued that his bankruptcy debts were incurred for business purposes, so that they should not be contained in an individual, or personal, credit check.

This argument can also be dealt with briefly. A bankruptcy affects the property and person of an individual, whether the debts were incurred for business or personal reasons. All those debts, and any bankruptcy arising therefrom, would therefore be relevant to an individual credit check.

Final settlement = write-off? bankruptcy? discharge?

The Appellant submitted that the account default data should have been deleted as Inchroy had written-off the debt in May 1996, and there could not be any other "date of final settlement" as his bankruptcy and discharge released him from the obligation to repay his debts.

Write-off

The Appellant referred the Appeals Board to clause 3.3 of the Code which requires the credit provider (Inchroy) to inform the credit reference agency (CIS) of any subsequent repayment, *write-off* and scheme of arrangement. Consequently, he argued, the write-off should be regarded as the final settlement, similar to repayment or a scheme of arrangement.

There is some attraction in this argument, but it is not necessary for the Appeals Board to decide it in the context of the present facts. That is because the writing-off of the debt occurred only *after* the Appellant's bankruptcy, in which Inchroy lodged a proof of debt which was admitted by the trustee in bankruptcy.

A creditor who proves for his debt in a bankruptcy and whose debt is admitted by the trustee in bankruptcy has, by acquiring a right to share proportionally in the trustee in bankruptcy's distribution of the bankrupt's estate, lost his right to enforce his claim against the bankrupt.

Accordingly, it would not have mattered to Inchroy and the Appellant whether, or when, Inchroy wrote-off the debt. The financial relationship between them as creditor and debtor was, as a result of the bankruptcy, governed by the bankruptcy rules, and not by the write-off.

Put another way, the operative act affecting the account default was the bankruptcy, not the write-off. Accordingly, the Appeals Board is of the opinion that, in the circumstances of this case at least, the write-off did not effect a final settlement and could not be equated to it.

In any event, even if (contrary to our opinion above) the write-off did effect, or could be equated to, a final settlement, the Commissioner could not have investigated CIS at the time of the Appellant's complaint. This is because even in the case of a final settlement by repayment, CIS could, under clause 2.2 of the Code, have retained the account default data up to 5 years after repayment. As the write-off occurred in May 1996, the 5-year period does not expire until May 2001, and CIS could not therefore be said to be in contravention when retaining the account default data in 2000.

As to the issue whether the Commissioner was right in prescribing in the Code, for the retention of account default data, a period of 5 years after final settlement, that is not within the ambit of the present appeal. There is clearly a *purpose* to be served in retaining account default data *after* final settlement, because a potential creditor would have an interest in knowing a potential debtor's credit history, even after repayment of a previous debt of which the potential debtor had been in default. As to whether the *period* of retention prescribed in the Code is too long for that purpose, that is not within the scope of this appeal, because it has not been suggested that the Commissioner has acted outside the Ordinance in prescribing that period.

Bankruptcy Order

We have dealt above with the question whether the write-off should be treated as final settlement. As a matter of completeness, we would also consider the question whether (a) the bankruptcy order or (b)

its discharge can be equated to final settlement for the purpose of default data retention limitation.

It may be argued that the bankruptcy order should be so equated because it is similar to a scheme of arrangement. Clause 2.2 of the Code provides that where the amount in default has been finally settled pursuant to a scheme of arrangement, data should be deleted upon receipt of a report that the amount in default has been finally settled, or on the date of agreement of a scheme of arrangement + 5 years if that is later than the date of final settlement.

However, a bankruptcy order is not the same as a scheme of arrangement. In the case of a scheme of arrangement, there is a contractual variation of the debts due and owing. A bankruptcy order, on the other hand, has the effect of only barring the creditors' *remedies* against the property or person of the bankrupt (s.12(1) Bankruptcy Ordinance).

Discharge of bankruptcy

If one has to consider the date of "final settlement" in the context of a bankruptcy, it would appear to be more closely related to the date of discharge from bankruptcy. This is because it is only at discharge that the bankrupt is released from the bankruptcy debts (s.32(2) Bankruptcy Ordinance), thus effecting the permanent discharge of the debtor's financial obligations that is characteristic of a final settlement.

We note that CIS has, along these lines, undertaken to delete the default data at the expiry of 5 years from the date of discharge from bankruptcy.

In any event in this case, whether the write-off, the bankruptcy order or the discharge is to be equated to final settlement, the default data could still be retained at the time of the complaint in 2000.

Lacuna in the Code

The present case shows quite clearly however that there is a lacuna in the Code in that there are no express provisions dealing with treatment of account default data in the event of a bankruptcy and discharge. This is a matter which should be addressed by the Commissioner as soon as possible.

Section 39(3) notice of reasons for refusal

There is one final matter that the Appeals Board has to mention. In the course of the appeal, the Appellant stated on more than one occasion that he was constrained to bring the appeal since he had not had a proper explanation proffered to him in the Commissioner's notice of refusal to investigate.

The Appeals Board agrees with the Appellant that the reasons for the refusal had not, in the present case, been articulated as fully as they should have been. Section 39(1) and s.39(2) set out a total of 9 grounds on which the Commissioner could refuse to investigate a complaint. The notice of refusal did not refer to any of these grounds. Hence the

Appellant had no means of knowing the ground on which the Commissioner had refused to investigate his complaint.

Further, it is inadequate simply to say that there was no prima facie evidence of CIS' contravention of the provisions of the Ordinance. An analysis, however brief, should have been provided to enable the complainant to understand why the Commissioner took the view that the account default data could be maintained without contravention.

Whilst the Appeals Board understands the Commissioner's difficulties when faced with a complaint that is not formulated by legally qualified advisers, it is his statutory duty under s.37(4) to provide appropriate assistance to an individual who wishes to make a complaint and requires assistance to formulate the complaint. If a complainant is assisted to develop a properly formulated complaint, that would in turn facilitate an analysis of the issues involved, and articulation of the reasons for a refusal, if appropriate.

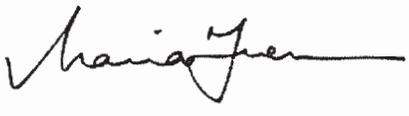
Order

In the light of our decision that there was no obligation on the part of CIS to delete the account default data immediately after receipt of Inchroy's report of write-off, the Commissioner was correct in refusing to carry out an investigation into the complaint, and the appeal must be dismissed.

As far as costs are concerned, s.22(1) of the Administrative Appeals Board Ordinance provides that the Board shall only make an award as to costs under s.21(1)(k) against an appellant if it is satisfied that

he has conducted his case in a frivolous or vexatious manner. The Board does not consider that the Appellant has conducted his case in a frivolous or vexatious manner. He has presented his case in a proper and logical way, even though this area of the law is by no means easy or straightforward.

Accordingly, there will be no order as to costs. This order as to costs is provisional until the expiry of 14 days when it takes effect unless any applications are made within that period to vary it.



Madam Justice Yuen

Deputy Chairman
Administrative Appeals Board

The Appellant Mr LI Tak-cheung, in person

Mr Eric Pun, Legal Director for the Privacy Commissioner for Personal Data