

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 20/2010

BETWEEN

YUNG MEI CHUN JESSIE

Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 17 September 2013

Date of Handing down Written Decision with Reasons: 20 November 2013

DECISION

1. This appeal arises from a complaint under the Personal Data (Privacy) Ordinance, Cap.486 ("the Privacy Ordinance").
2. S.4 of the Privacy Ordinance provides that a data user shall not do an act that contravenes a data protection principle unless required or permitted by the Ordinance. Data protection principle 3 ("DPP3") provides that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of the collection, or for a directly related

purpose. This, however, must be read with the exemptions provided for in Part VIII of the Privacy Ordinance, the ones relevant here being s.58(2) together with s.58(1)(d) and the new s.60B, which we will examine in detail below.

The Facts

3. Mr. Chan Sing Chuen ("Mr. Chan") was the plaintiff and the Appellant was the defendant in a District Court civil action DCCJ 15756/2000 ("the Action"). In 2002, Mr. Chan obtained judgment in the Action against the Appellant for payment of a certain sum with interests and costs ("the Judgment"). Her application for leave to appeal against the Judgment was refused in the District Court, and finally in the Court of Appeal in June 2005.

4. In 2007, Mr. Chan instructed his solicitors to send two letters to the Appellant to demand for payment of the judgment debt with interests and costs:

- (1) A letter dated 25th July 2007 ("Letter B") was addressed and sent to 3 separate addresses, two of which were business addresses ("Address 2" and Address 3") and one was a residential address ("Address 4"). Address 4 was the address given by the Appellant in the Action. Addresses 2 and 3 were former working addresses of the Appellant.
- (2) A letter dated 17th August 2007 ("Letter A") was addressed and sent to the Appellant c/o her then employer, Merrill Lynch (Asia Pacific) Ltd. ("Address 1").

5. After the letters, the Appellant complained to the Privacy Commissioner for Personal Data ("the Commissioner") against both Mr. Chan and his solicitor for, inter alia, sending the letters to Addresses 1, 2 and 3 without her consent. The Commissioner decided not to continue an investigation into that complaint, pursuant to which the Appellant appealed to the Administrative Appeals Board ("AAB") by Administrative Appeal No. 18/2008 ("AAB18/2008"). It was heard on 28 September 2010, pending decision.

6. Before the hearing of AAB18/2008, Mr. Chan wrote to the AAB by letter dated 21 December 2009 ("the 2009 Letter") in which he stated, inter alia, the followings:-

"Sources of getting the addresses to enforce the judgment debt against Ms. Yung were available to the general public to search for individuals who qualified oneself as Certified Public Accountants and Licensed

Representatives, and were published in Government Gazette and SFC's website.

Letter A sending to Ms. Yung's ex-employer and Letter B sending to 2 of Ms. Yung CPA addresses were because Ms. Yung failed to respond when being served to her last correspondence address used in DCCJ 15756 of 2000. This was the normal course of action demanding the judgment debt if the party did not respond. My solicitor has also taken reasonably practicable steps and marked clearly on the envelop that the letter as "PRIVATE AND CONFIDENTIAL".

7. On 13th January 2010, the Appellant complained to the Commissioner ("the Complaint") alleging that by the 2009 letter, Mr. Chan had confirmed that he had used her working address, namely Address 1, as provided by the Securities and Futures Commission ("SFC") in its website. By sending legal documents to Address 1, Mr. Chan had used the information for a purpose which did not meet the specific purpose as set out by the SFC in its website.

8. After receiving the Complaint, the Commissioner made enquiries with Mr. Chan and obtained from him further information. In his letter of 12 April 2010 ("the 2010 Letter"), Mr. Chan stated the followings:-

"3. To enforce judgement debt against the Complainant back in July 2007, I tried to locate addresses of the Complainant through various means, including the use of search engine "Google". When preparing this response, I walked through the search at "Google" again step-by-step and confirmed what exactly can be found, after more than two and half years. I then realized that I had mixed up with the existence of published address of a CPA in Government Gazette web-site with what was included in the Excel spreadsheet (that could be directed on the same pop-up page) I mentioned to your office in the conversation on 15 March 2010. Details of the search results were described as below.

Using advance search in 'Google' for Yung Mei Yung Jessie [sic.], a list of items would pop up, *Exhibit 1*. The last item showed an address of the Complainant in the Government Gazette website. This was one of the 3 addresses that my former solicitor sent the demand letter to the Complainant on 25 July 2007.

Item 2 of the list was an Excel spreadsheet showing list of persons who qualified oneself as 'Licensed Representative', *Exhibit 2*. As shown in the address bar on the web page, it appeared that it came from an URL at http://www.hksfc.org.hk/sfc/doc/TC/intermediaries/trading/licensed/3_var

iation_of_ra_chi_jun_2007.xls. This made me feel that the said spreadsheet was coming from SFC.

However, as shown in *Exhibit 2*, there was no business address in the Excel spreadsheet. It also explained why I did not include office address of Merrill Lynch (Asia Pacific) in the demand letter sent on 25 July 2007.

2. My solicitor then informed me that the Complainant failed to respond to the demand letter sent to her at the 3 addresses. I was so desperate that I then tried to explore other means to locate the Complainant. Knowing the Complainant had been previously working for Goldman Sachs, an international investment bank, I tried cold calling other international investment bank. It was then found out that the Complainant was working in Merrill Lynch (Asia Pacific) and the "Letter A" was sent on 17 August 2007."

9. The Commissioner decided that a full investigation was unnecessary under s.39(2)(d) of the Privacy Ordinance and informed the Appellant of his Decision by letter of 18 June 2010. Dissatisfied with the Commissioner's Decision, the Appellant appeals to this Board.

The Commissioner's Decision

10. The Commissioner's Decision was based on 2 grounds:

- (1) There was insufficient evidence to show that Mr. Chan obtained the information from the SFC's website.
- (2) Relying on the authorities of Lily Tse Lai Yin & Others v The Incorporated Owners of Albert House & Others [2001] HKCFI 976, Suffiad J. and M v M [1997] HKFamC1, Saunders J, Mr. Chan's use of Address 1, being for the purpose of enforcing the Judgment, fell within the exemption of s.58(2).

11. At the hearing of this appeal, the Commissioner further relies on the exemption under s.60B of the Privacy Ordinance.

Our Decision

12. Insufficient Evidence: We agree that there is insufficient evidence to prove that Mr. Chan obtained Address 1 from the SFC's website. We rely on the followings:-

- (1) Contrary to the Appellant's allegation, we find nothing in the 2009 Letter to constitute an unequivocal statement that Mr. Chan obtained Address 1 from the SFC's website.
- (2) The demand letters, Letters B and A, were sent in July and August of 2007 respectively whereas the 2009 Letter was sent in December 2009. Given the lapse of almost 2½ years, one has to make allowances for mistakes in recollection.
- (3) The step-by-step explanation set out in the 2010 Letter, supported by Exhibits 1 and 2, was not implausible.
- (4) Rather, it lends credence to Mr. Chan's explanation as to why Letter A was sent separately after Letter B – namely that he did not get Address 1 on the internet together with the other addresses but obtained it subsequently by cold-calling the various international investment banks.

13. In trying to ascertain whether one can find the business address of a licensed representative on the SFC's website, Ms. Chan representing the Commissioner personally did a search of the same shortly before the hearing and provided us with copies of her search results. But websites are changed and modified constantly. We note that while the web address of the SFC was "hksfc.org.hk" in Exhibit 2 of the 2009 Letter, it was "sfc.hk" in Ms. Chan's search. In the circumstances, while we appreciate Ms. Chan's effort, we do not feel it appropriate for us to rely on these search results.

14. S.58 exemption: We accept that even if Mr. Chan obtained Address 1 from the SFC's website as alleged, his use of Address 1 was exempted from DPP3 by virtue of s.58(1)(d) and 58(2) of the Privacy Ordinance.

15. S.58(2) stipulates that personal data are exempt from the provisions of DPP3:

"in any case in which (a) the use of the data is for any other purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection".

16. Among the purposes stipulated in sub-section (1) is s.58(1)(d):

"the prevention, preclusion or remedying (including punishment) of

unlawful or seriously improper conduct, or dishonesty or malpractice, by person”

17. Lily Tse Lai Yin & Others was an action for damages for personal injuries or under the Fatal Accidents Ordinance in respect of an accident in 1994 when the canopy of a building collapsed onto the pavement causing injuries and deaths to several passers-by. Discovery was sought against the Urban Services Department, the Buildings Department and the Police for various files and witness statements. This was resisted on the ground that such disclosure in the absence of consent would contravene the Privacy Ordinance.

18. It was held by Suffiad J that “unlawful or seriously improper conduct” in s.58(1)(d) extended beyond criminal conduct to include civil wrong. The word “unlawful” describes something which is contrary to some law or enactment or is done without lawful justification or excuse. Since tort is a civil wrong, the bringing of a civil claim for damages in tort amounted to the remedying of unlawful or seriously improper conduct within s.58(1)(d). That being the case, the use of data in respect of such a civil claim was exempted from DPP3 by s.58(2).

19. In the present appeal we are not dealing with a claim for damages for tort. Nonetheless, the failure to pay a judgment debt in accordance with a judgment of the court is no less a civil wrong and a “seriously improper conduct” within s.58(1)(d). We fail to see why a plaintiff who has obtained a judgment should be worse off than a plaintiff seeking judgment.

20. In M v M, following a decree nisi for divorce, the husband was ordered to make periodical payments for the maintenance of the child of the family. From July 1996 the husband had failed to make any payment and the wife could not locate him because he had moved to another unit in the housing estate.

21. Deputy Judge Saunders granted the wife's application to order the Director of Housing to supply her with the husband's current address. While taking the view that the husband's breach of the maintenance order was not “unlawful”, he held that it was “seriously improper conduct”. A failure to pay maintenance may result in the issue of a judgment summons whereby the person ordered to pay is required to attend the court to explain why he has not paid. If his explanation is not satisfactory he may be committed to prison. A contempt of court is “seriously improper conduct” as those words are naturally used and misunderstood. The learned judge concluded, at paragraph 21 of his judgment, that where a person is in breach of a court order and another person, being entitled to the benefit of that order, wishes to enforce the order, then, by virtue of s.58(2), a

data user is exempt from the provisions of DPP3 and may supply the information upon appropriate request.

22. Similar provisions leading to the committal of a judgment debtor can be found in the Rules of the District Court for the enforcement of judgments given in the District Court. The rationale of Deputy Judge Saunders's conclusion apply with equal force in the present appeal.

23. Pursuant to the two decisions, which are binding on us, we hold that Mr. Chan's use of Address 1 to locate the Appellant and to enforce the Judgment against her was for the purpose of the prevention, preclusion or remedying of a seriously improper conduct within s.58(1)(d) of the Privacy Ordinance and was thus exempted from DPP3 by s.58(2).

24. S.60B exemption: Following the extensive amendments to the Privacy Ordinance in 2012, s.60B provides a further exemption to DPP3: personal data is exempt

“if the use of the data is, (b) required in connection with any legal proceedings in Hong Kong; or (c) required for establishing, exercising or defending legal rights in Hong Kong.”

25. Ms. Chan for the Commissioner submits that s.60B(b) and (c) are applicable because Address 1 was required in connection with legal proceedings in Hong Kong, namely the Action; and it was required by Mr. Chan for exercising and defending his legal rights, namely the enforcement of the Judgment. We agree with and accept her submission.

26. On the question whether s.60B can apply retrospectively given that it did not come into effect until 1 October 2012, Ms. Chan relies on Administrative Appeal No.16 of 2012. In that decision, the AAB took the view that on a proper construction of the Privacy Ordinance, and considering its legislative purpose, section 4 and DPP3 of the Ordinance should not receive a strict and narrow interpretation as to prevent collected data to be used in a court or tribunal to ensure a fair proceedings therein, when Article 10 of the Bills of Right Ordinance guarantees such right to a fair trial. Alternatively, citing Lord Mustill in L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486, at 525F, and employing the principle of fairness, the AAB there opined that s.60B should have retrospective effect.

27. In the absence of full legal arguments, we do not wish to decide on the retrospective effect of s.60B as a general rule. But in the context of the present appeal, we are of the firm view that the exemption is pertinent.

28. We refer to the judgment of Suffiad J in Lily Tse Lai Yin & Others, in paragraph 19 of which he commented that it was never the intention of the legislature that the Privacy Ordinance should impede the administration of justice by restricting or eliminating the power of the High Court to order discovery under s.42 of the High Court Ordinance and it would be a very sad day for the administration of justice in Hong Kong if that consequence came about, whether intended or not. Likewise it would be a sad day for the administration of justice if a plaintiff should be prevented from using relevant data to locate a defendant and to enforce a judgment against her merely because those data were not originally collected for that purpose. It is not in the interests of the general public to limit the use of data in such an event and we do not think it was ever the intention of the Privacy Ordinance to do so. The incorporation of s.60B gives effect to the true purport and intent of the Privacy Ordinance and spells out what has been its effect all along.

29. It is important to bear in mind that the Commissioner's duty to investigate or continue an investigation is not absolute. S.39(2)(d) of the Privacy Ordinance provides that the Commissioner may refuse to carry out or continue an investigation if he is of the opinion that, having regard to all the circumstances of the case any investigation or further investigation is for any other reason unnecessary. By section B paragraph (g) of the Complaint Handling Policy issued by the Commissioner, an investigation may be considered unnecessary if given other practical circumstances, the investigation cannot reasonably be expected to bring about a more satisfactory result.

30. The primary role of the Commissioner is not to prosecute or punish a contravention, but to put a stop to it and to prevent any recurrence. The presence of s.60B means that as from 1 October 2012, if not before, the use of data for the enforcement of judgment is clearly exempt from DPP3. There is no contravention to stop or recurrence to prevent. Any investigation will be unnecessary. The Privacy Commissioner is entitled to take into account the current state of the law and decide that to carry out or continue an investigation into such an employment of data done prior to s.60B is equally unnecessary. In so doing, the Commissioner is not seeking to retrospectively alter any vested rights or interests or create any inequity; but is acting in accordance with the true purport and intent of the Privacy Ordinance.

Grounds of Appeal

31. We refer to paragraph 10 above and reject Grounds 1 and 2 of the Grounds of Appeal.

32. Ground 3 of the Grounds of Appeal alleges a breach of s.64(9) of the Privacy

Ordinance. For the same reasons above, we reject this ground. We do not accept that Mr. Chan has knowingly made a false statement or knowingly misled the Commissioner or any other person in the performance of his functions.

33. The Appellant in her written submission to this Board alleged that Ms. Sandra Liu representing the Commissioner at the hearing of AAB18/2008 confirmed that Mr. Chan had made two different versions on how he obtained Address 1. This allegation is categorically refuted by the Commissioner before us. We find nothing to support the Appellant's allegation and reject it.

34. The Appellant in her written submission further alleged that Mr. Chan had made another false statement to the Commissioner, namely that Letter B was not marked "Private & Confidential" as claimed. We note that this was an allegation raised and considered in AAB18/2008. It is not relevant for our present consideration. We do not feel it appropriate or necessary for us to make any finding on this allegation.

35. Ground 5 of the Grounds of Appeal alleged that the Appellant and her husband had an agreement with Mr. Chan that they did not have to settle the Judgment. But the Appellant had made the very same allegation before in District Court action DCCJ 4126 of 2007 and the allegation was duly rejected by H.H. Judge Lok in his judgment on 11 June 2009. Her application for leave to set aside that judgement was dismissed in the District Court, and by the Court of Appeal in HCMP 1178 of 2009. This Board is of course bound by these judgments. We see no ground to revisit the allegation and we categorically reject Ground 5 of the Grounds of Appeal.

36. We refer to paragraph 21 above and reject Ground 6.

Conclusion

37. We find that there is insufficient evidence to prove that Mr. Chan obtained Address 1 from the SFC's website.

38. In any event, Mr. Chan's use of Address 1 to locate the Appellant and to enforce the Judgment against her was for the purpose of the prevention, preclusion or remedying of a seriously improper conduct within s.58(1)(d) of the Privacy Ordinance and was thus exempted from DPP3 by s.58(2).

39. It follows that there is no evidence of any contravention of the Privacy Ordinance.

40. Further, the Privacy Commissioner is entitled to take into account s.60B(b) and (c) of the Privacy Ordinance and decide that given the current state of the law, to carry out or continue an investigation is unnecessary.

41. In summary, we find that further investigation is unnecessary and the Commissioner was right in his decision to refuse to continue the investigation under s.39(2)(d) of the Privacy Ordinance. We hereby confirm the Commissioner's Decision and dismiss the appeal.

(signed)

(Ms Cissy Lam King-sze)

Deputy Chairman

Administrative Appeals Board