ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NOS. 50/2009, 18/2010 & 25/2010

BETWEEN

YUNG MEI CHUN, JESSIE Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram: Administrative Appeals Board

Date of Hearing: 4 July 2013

Date of Handing down Written Decision with Reasons: 5 September 2013

DECISION

Note: references in this Decision to "AB 50/2009" and "AB 25/2010" are references to the Appeal Bundles in AAB No. 50/2009 and AAB No. 25/2010 respectively and references to "the Ordinance" are references to the Personal Data (Privacy) Ordinance, Cap. 486.

THE APPEALS

1. These three appeals are brought by Miss Yung Mei Chun, Jessie ("the Appellant") against decisions of the Privacy Commissioner for Personal Data ("the Commissioner"). They came to be heard before this Board on 4 July 2013. Pursuant to the order of the Chairman of the Administrative Appeals Board ("AAB") that the three appeals shall be heard "by the same Board on the same day, one after the other" and that "as to the order for hearing the appeals, it shall be decided by the Board hearing the appeals" (see AB 50/2009, 519 and AB 25/2010, 156), the Board proceeded to hear the appeals one after another and in this order: (1) AAB No. 18/2010, (2) No. 50/2009 and then (3) No. 25/2010. In all three appeals, the Respondent is the Commissioner and the person bound by the decisions appealed against is Merrill Lynch (Asia Pacific) Limited ("ML").

2. At the hearing, the Appellant appeared in person. The Commissioner was represented by legal counsel, Ms. Cindy Chan, assisted by Ms. Brenda Kwok and Ms. Amy Chan from the Commissioner's office. ML was absent. However, as it had previously indicated that it did not wish to attend the hearing, the Board proceeded to hear the appeals in its absence.

3. At the outset, the Appellant indicated to the Board that she would withdraw her appeal in AAB No. 18/2010 and would no longer pursue it. She would, however, proceed with AAB Nos. 50/2009 and 25/2010. The following is the Decision of the Board on these two appeals.

AAB No. 50/2009

The Facts

4. We shall first deal with AAB No. 50/2009. This appeal is concerned with ML's refusal to comply with a data correction request (DCR) made by the Appellant. The Appellant was a former employee of ML. In compliance with a data access request made by the Appellant on 24th September 2007, ML sent a bundle of documents to the Appellant on 2 November 2007 (AB 50/2009, 172).

5. On 30th December 2007, the Appellant made a data correction request to ML pursuant to section 22(1) of the Ordinance, in which the Appellant alleged that there was incorrect/inaccurate personal data contained in two documents, namely (1) a termination letter dated 24th September 2007; and (2) "a Credit Check Report prepared by First Advantage" (AB 50/2009, 173). The DCR in respect of the termination letter is the subject of another appeal, AAB No. 33/2008, and hence does not concern us in the present appeal. This appeal only relates to the DCR in respect of the "Credit Check Report prepared by First Advantage".

6. Amongst the documents supplied to the Appellant by ML, there was a report ("the said report") which listed the Appellant as being a party to 4 cases in the Small Claims Tribunal, namely Case No. S62322, SCTC062322/2003 ("Action 1"), Case No. S9653, SCTC009653/2004 ("Action 2"), Case No. S57766, SCTC057766/2002 ("Action 3") and Case No. S53895 ("Action 4"). In Actions 1 and 2, the plaintiff was listed as a "Jessie Yung Certified Public Accountant" and because she was the plaintiff (i.e. the person instituting the said

actions), her ID card and contact phone number was supplied to the Small Claims Tribunal. In Action 3, the defendant was a "Yung Mei Chun" and because this person was not the one instituting the actions, neither her ID card nor contact phone number was given to the Tribunal. Action 4 lists "Yung Mei Chun" as the plaintiff, but, for some reason, it only has a case number, but no action number. No information, therefore, could be gathered in respect of this action.

7. In her DCR, the Appellant claimed that she was not a party to the 4 cases which, she said, was contained in a "Credit Check Report prepared by First Advantage". In fact, this was a mistake. The said report was not the Credit Check Report prepared by First Advantage. It was in fact a report obtained on ML's behalf by its solicitors, Messrs. Deacons ("Deacons"), via an internet company called e.CreditManagement.com Limited ("e.Credit"). Due to this mistake on the part of the Appellant and the misunderstanding which followed as result, the initial response by ML to the Appellant's DCR was therefore to the effect that it did not have the original report prepared by First Advantage, nor any control over its contents and hence was in no position to accede to the Appellant's request to correct the data contained therein (AB 50/2009, 180, 186).

8. This misunderstanding between ML and the Appellant persisted until August/September 2008 when ML, in correspondence with the Appellant, confirmed that the said report formed part of her personal information and record held by it and directed her to the source of the data, i.e. e.Credit (and not First Advantage) (AB 50/2009, 301-315). We note, however, that this matter seems to have been raised by ML with the Commissioner at a slightly earlier time, i.e.

in June 2008 in Deacons' letter to the Commissioner dated 13 June 2008 (AAB 50/2009, 322, at 323-4). However, this is of little consequence. Suffice it to say that, by September 2008, both parties knew what the subject matter of the DCR was.

9. In any event, ML was at all material times unwilling to accede to the Appellant's DCR. This much is apparent from its letters to the Commissioner dated 13 June 2008 (before the clarification of the misunderstanding with the Appellant) (AB 50/2009, at 324) and 25 September 2008 (after clarification of the said misunderstanding) (AB 50/2009, at 267-8). In the letter dated 25 September 2008 (at AB 50/2009, 267), Deacons stated ML's position as follows: "Our clients did not make any amendment to the Complainant's personal data kept by our clients after receiving the data correction request because they were not satisfied that the requested correction was accurate (especially in the light of the matters mentioned in (c) above and (g) below) nor were they provided with such information to enable them to ascertain that the Court Cases were not related to the Complainant. Having said the above, our clients did attach to the [said report] a copy of (1) the Complainant's data correction request; (2) our replies to her data correction request; (3) the log book stating the reasons for refusing to comply with her request; (4) a copy of our letter to e.CreditManagement.com Limited; and (5) the correspondence between our client with your Office in respect of this case…".

10. The reference to "(c) above" (AB 50/2009, 267) is to the fact that ML had instructed Deacons to conduct an internet search on members of the Hong Kong Institute of Certified Public Accountants (CPA) and discovered that only

one CPA had the exact name of "Jessie Yung Mei Chun" and there was no other CPA called "Jessie Yung". Given that the Appellant was indeed a CPA and the plaintiffs in Actions 1 and 2 were described as "Jessie Yung, Certified Public Accountant", ML took the view that the Appellant was a party to these two cases.

11. The reference to "(g) below" (AB 50/2009, 268) was ML's submission to the following effect: "For the matters mentioned in (c) above, we respectfully submit that Ms. Yung had not been honest in her letter dated 30th December 2007 [i.e. her DCR] when she said that she was not a party to Case No. S62322 and Case No. S9653 [Actions 1 and 2]. Because of this reason, our clients also seriously doubt the truthfulness of her assertion about the other two cases, especially in light of the fact that she had **only** chosen the cases from the Small Claims Tribunal, which are not matters of open public record and thus it is difficult to verify whether she is a party".

12. Subsequently, and upon the suggestion of the Commissioner, ML also added a written note, namely "Yung Mei Chun claimed that she was/is not a party in this action" next to the record of the 4 cases in question in the said report. Deacons informed the Appellant of this and provided her with a copy of the revised version of the said report under cover of a letter dated 20th August 2009 (AB 50/2009, 413-432).

13. Meanwhile, upon ML's refusal to accede to her DCR, the Appellant made a complaint to the Commissioner on 24 February 2008 (AB 50/2009). The Commissioner decided to investigate the matter pursuant to section 38(a) of

the Ordinance and duly informed ML by a letter dated 9 September 2008 (AB 50/2009, 255).

14. Upon investigation, the Commissioner found that ML was *not* in contravention of the requirements of the Ordinance in relation to the Appellant's DCR (see Result of Investigation dated 2nd December 2009, AB 50/2009, 440-449). It is against the Commissioner's finding that the Appellant has now appealed.

The Statutory Provisions

15. Section 24(3) (b)-(d) of the Ordinance provide as follows: A data user may refuse to comply with section 23(1) in relation to a data correction request if-

(b) the data user is not satisfied that the personal data to which the request relates is inaccurate;

(c) the data user is not supplied with such information as the data user may reasonably require to ascertain in what way the personal data to which the request relates is inaccurate;

(d) the data user is not satisfied that the correction which is the subject of the request is accurate.

16. Section 25(1) of the Ordinance provides that a data user who pursuant to section 24 refuses to comply with section 23(1) in relation to a data correction request shall, as soon as practicable but, in any case, not later than 40 days after

receiving the request, by notice in writing inform the requestor of the refusal and the reasons for the refusal.

17. Section 25(2) of the Ordinance stipulates that where the personal data to which a data correction request relates is an expression of opinion and the data user concerned is not satisfied that the opinion is inaccurate, then the data user shall

(i) make a note, whether annexed to that data or elsewhere-

(A) of the matters in respect of which the opinion is considered by the requestor to be inaccurate; and

(B) in such a way that that data cannot be used by a person (including the data user and a third party) without the note being drawn to the attention of, and being available for inspection by, that person; and

(ii) attach a copy of the note to the notice referred to in subsection (1) which relates to that request.

18. Section 25(3) of the Ordinance then provides that "expression of opinion" includes an assertion of fact which is unverifiable or in all the circumstances of the case not practicable to verify.

The Issues

19. The issues before the Board are therefore these:

(1) Is the question of whether or not the Appellant was/is a party to the 4 cases in question, (i) one of fact or (ii) an "expression of opinion" within the meaning of section 25 (2) & (3) of the Ordinance?

(2) If it is one of fact, may ML lawfully refuse to accede to the Appellant's DCR to correct the record in the said report in accordance with the provisions of section 24(3) (b)-(d) of the Ordinance?

(3) If it is an expression of opinion, has ML satisfied the provisions of section 25(2) of the Ordinance?

Our Decision On The Issues

20. The Commissioner made enquiries with the Small Claims Tribunal (see AB 50/2009, 393-6) and received the relevant Claim Forms in Actions 1, 2 and 3. The ID card number and contact phone number of the claimant/plaintiff (namely "Jessie Yung Certified Public Accountant") in Actions 1 and 2 were also provided (see AB 50/2009, 401-412). As regards Action 3, the Commissioner was informed that the defendant was "Yung Mei Chun" and no ID card number was provided. No material or information relating to Action 4 could be located because it had only a case number and no action number. Without an action number, the Tribunal could not even ascertain the year in which the action was instituted.

21. Upon checking his own records, the Commissioner discovered that the ID card and phone numbers of the claimant/plaintiff in Actions 1 and 2 provided by the Small Claims Tribunal exactly matched those of the Appellant. The

Commissioner wrote to the Appellant on 25 August 2009, asking her to confirm whether she was the claimant/plaintiff in Actions 1 and 2 and, if so, why she stated the opposite in her DCR dated 30 December 2007 (AB 50/2009, 433-4). The Appellant replied by a letter dated 13 September 2009 (AB 50/2009, 435) but did not answer the Commissioner's questions and failed to provide any concrete reply.

22. The Commissioner took the view that, in the circumstances, the Appellant had supplied false information in her DCR and might possibly have infringed section 64(2) & (9) of the Ordinance. A report was made to the police who investigated the matter. To cut a long story short, no prosecution was brought and the case was officially closed.

23. It is the Appellant's submission that this fact is an indication that she was correct in alleging in her DCR that the record in the said report regarding Actions 1 and 2 was wrong and required correction. She further submitted that "Jessie Yung Certified Public Accountant" was a sole proprietorship business, which was totally different from her as an individual person. We respectfully disagree with both these submissions for the reasons which appear hereinbelow.

24. First of all, the result of the criminal investigation and the decision of the police and/or the Department of Justice not to prosecute the Appellant are, in our view, irrelevant to our consideration of this appeal. We bear in mind two points: (1) The issues involved in the criminal investigation and in this appeal are different. The law enforcement authorities investigating/considering a criminal matter are undertaking a task which involves, inter alia, assessing the prospects

of a successful criminal prosecution. In so doing they would be concerned with the Appellant's *mens rea* in making the assertion(s) in her DCR that she was not a party to Actions 1 and 2. If she had made untrue assertions in her DCR, but in the honest belief that they were true, then that would be very relevant to the decision as to whether a criminal prosecution should be launched against her. The Board, on the other hand, is concerned with whether or not the data in question is inaccurate data which required correction and, in turn, whether or not ML was lawfully justified in refusing to correct it. (2) In any event, this Board is not bound, nor should it be influenced by, the result of the criminal investigation, especially when we have no way of knowing precisely how and why the decision was arrived at.

25. Secondly, it is quite clear that Jessie Yung Mei Chun trading as a sole proprietor business in the name of "Jessie Yung Certified Public Accountant" is the one and the same person and the same legal entity as the person known as Jessie Yung Mei Chun, namely the Appellant. We would have thought, as a person who was once a Director of Investments/Private Wealth Manager, Global Private Client Group of ML, the Appellant would be expected to be aware of this. However, as she is not legally trained, and giving her the very fullest benefit of the doubt, we shall assume that she did not. Be that as it may, the fact remains that there is cogent evidence, as the Commissioner so found (and we agree), that the Appellant was indeed the claimant/plaintiff in Actions 1 and 2. As such, the data to this effect in the said report was accurate and required no correction.

26. The position as regards Actions 3 and 4 stands on a different footing. Here it is common ground that it was not possible to verify one way or the other

whether the "Yung Mei Chun" who was named as a party in these two actions was or was not the Appellant. We have seen that, according to section 25(3) of the Ordinance, opinion includes "an assertion of fact which is unverifiable or in all the circumstances of the case not practicable to verify". We have also seen despite the best efforts of the Commissioner (which we think are commendable) in investigating this matter, it was not possible to verify the accuracy or otherwise of the data as regards Actions 3 and 4. In our view, the data sought to be corrected as regards Actions 3 and 4 does in fact fall within the definition of "expression of opinion" in section 25(3).

27. The question then becomes whether the steps taken by ML are sufficient to satisfy section 25(2) of the Ordinance. These steps are those described in paragraphs 9 and 12 above. We have seen that there was initially some confusion and misunderstanding between the parties over which document(s) the data whose correction was sought was contained in. As soon as this confusion/misunderstanding was cleared up, however, ML promptly took the remedial steps which are described above. The Commissioner found (paragraph 15 of the Result of Investigation, AB 50/2009, 449) that these subsequent actions taken by ML have satisfied the requirements of section 25(2) of the Ordinance. We respectfully agree.

28. The Appellant, however, submitted that the question of whether she is or is not a party to the actions *must* be a *fact* and not "opinion". She argued that it is quite contrary to common sense and the ordinary meaning of the phrase "expression of opinion" to classify it as such. She argued that, once she

asserted that she was not a party to the actions and, in the absence of proof to the contrary, ML was under a duty to correct the record in the said report.

29. Let us assume, for the sake of argument, that the Appellant is correct and that the question is, indeed, one of fact. What then is the position?

30. According to section 24(3) of the Ordinance, the data user may refuse to comply with a DCR when he is not satisfied either that the personal data to which the request relates is inaccurate or that the correction which is the subject of the request is accurate. The issue then becomes whether it is, in the circumstances of the case, reasonable for the data user to be "not satisfied". As we have seen, ML's submission is that, having regard to the fact that it had strong reasons, referred to in its letter dated 25 September 2008 (AB 50/2009, 267 & 268), for believing that the Appellant had not been honest in stating her position with regard to Actions 1 and 2, it was perfectly justified in doubting her as regards Actions 3 and 4. Section 24(3)(c) entitles ML to be supplied with such information as it may reasonably require to ascertain in what way the personal data to which the request relates is inaccurate. No information was supplied to ML by the Appellant other than a bare assertion that the said data was inaccurate.

31. In these circumstances, we find that it was reasonable for ML to have been "not satisfied" that the requested correction was accurate. Accordingly, we find (as the Commissioner has found) that, even upon the basis that the data sought to be corrected was one of fact (as opposed to "opinion"), ML was *not* in breach of the requirements of the Ordinance in refusing to comply with the Appellant's DCR.

Summary of Our Decision

32. We therefore conclude as follows:

(1) The data in the said report sought to be corrected as regards Actions 1 and 2 is fact. The evidence shows that the said data is accurate and requires no correction. The Commissioner was therefore correct in concluding that ML had not breached the requirements of the Ordinance in refusing to correct it.

(2) The data in the said report sought to be corrected as regards Actions 3 and 4, on the other hand, is opinion. In this regard, subsequent actions taken by ML having satisfied section 25(2) of the Ordinance, the Commissioner was also correct in concluding that it had not breached the requirements of the Ordinance in refusing to correct the said data.

(3) Even if we are wrong is concluding that the data as regards Actions 3 and 4 was not opinion but fact, nevertheless, ML was, in the circumstances, justified in refusing to correct it by reason of section 24(3)(b), (c) and/or (d) of the Ordinance.

33. It follows from the above that this appeal fails and should be dismissed.

AAB No. 25/2010

The Facts

34. We shall now proceed to deal with AAB No. 25/2010. This appeal is, if we may call it such, a "sequel" to AAB No. 50/2009. It stems from the fact that, in AAB No. 50/2009, there was a finding by the Commissioner that ML had been unable to verify whether the Appellant was a party to Actions 3 and 4. Relying on this finding, the Appellant made a fresh complaint to the Commissioner that ML was in breach of Data Protection Principle 2 in the First Schedule of the Ordinance (DPP2) in failing to take all practicable steps to ensure that her personal data was accurate (AB, 25/2010, 61). We shall, for convenience, refer to this as the Appellant's first point of complaint. She also stated in her complaint that 'Regarding the two other cases, S62322 (SCTC62322/2003) and S9653 (SCTC9653/2004) [Actions 1 and 2], the name of the party was "Jessie Yung Certified Public Accountant" which was and still is a sole proprietor business. That is to say, the party is not "Jessie Yung" or "Yung Mei Chun". Again, Merrill does not keep accurate personal data'. We shall refer to this as the Appellant's second point of complaint.

35. The Commissioner refused to carry out an investigation (AB, 25/2010, 3) and it is against this refusal that the present appeal is brought. This time round the Commissioner did not deal with the merits of the complaint at all because he took the view that the Appellant's complaint was frivolous, vexatious and not bona fide in that it was made for the purpose of subjecting the opponent parties to inconvenience, harassment and expenses (see AB 25/2010, 50-51). In support of his view, the Commissioner pointed out that, between the period

2008-2010, the Appellant has made no less than 12 complaints against ML and other parties arising out of the same chain of events, most of which were found by the Commissioner to be unsubstantiated (AB 25/2010, 40-45). Most of the Commissioner's decisions have been appealed against and became the subject matter of some 13 appeal cases before this Board (see the summary at AB 25/2010, 40-46). A new and updated summary was provided to us at the hearing which we have, with the consent of the parties, directed to be inserted into the appeal bundle. We note that most of these appeals have been dismissed by the Board. However, according to the Appellant, some of these decisions of the Board are currently the subject of applications for judicial review by the High Court.

DPP2 and The Commissioner's Policy

36. DPP2(1) (a) in Schedule 1 of the Ordinance provides as follows: "All practicable steps shall be taken to ensure that-(a) personal data is accurate having regard to the purpose (including any directly related purpose) for which the personal data is or is to be used".

37. In addition to taking the view that the Appellant was acting frivolously and vexatiously, the Commissioner was also of the opinion that there was no prima facie breach of any requirement of the Ordinance, thus making it unnecessary for an investigation to be conducted. The Commissioner seeks to rely on section 39(2) (c) and (d) of the Ordinance and Part (B) of his Complaint Handling Policy, a copy of which was sent to the Appellant under cover of a letter dated 22 October 2010 (AB, 25/2010, 88). Section 39(2) contains the following provisions:

The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances-

.....

(c) the complaint is frivolous or vexatious or is not made in good faith; or

(d) any investigation or further investigation is for any other reason unnecessary.

38. Part (B) of the Commissioner's Complaint Handling Policy contains the following provisions:-

Section 39(1) and (2) of the Ordinance contain various grounds on which the Commissioner may exercise his discretion to refuse to carry out or continue an investigation. In applying some of those grounds, the Commissioner's policy is as follows:-

.....

(b) the complaint may be considered to be vexatious, if the complainant has habitually and persistently made to the Commissioner other complaints against the same or different parties, unless there is seen to be reasonable grounds for making all or most of those complaints.

39. The Commissioner also submitted that the Appellant's complaint shares the same issue as that which is the subject matter of AAB No. 50/2009, namely

whether or not the Appellant was a party to the same 4 cases in the Small Claims Tribunal (Actions 1 to 4). Such issue having already been thoroughly investigated and concluded by him, the Commissioner expressed the view that he should not waste limited resources to investigate a matter which is the same as, or substantially similar to, one which was previously investigated and concluded. He further submitted that investigating a matter which is the subject matter of pending appeals might even interfere with the relevant appeal process (AB, 25/2010, 50-51).

Is The Appeal Frivolous and/or Vexatious?

40. We have carefully considered the Commissioner's submissions which were very ably put forward by Ms. Chan on his behalf. However, we think the Board should not make a finding that the Appellant had acted frivolously or vexatiously lightly. In our view, one cannot make such a finding from the number of the appeals against the Commissioner's decisions, especially in view of the fact that it was the Commissioner who decided to allocate different case numbers to some of the Appellant's complaints, which resulted in a number of such complaints, which were made to the Commissioner at the same time, to be investigated/considered separately and which in turn resulted in separate appeals being listed before the Board. Nor can we look at the success rate of the Appellant's various appeals in order to make such a finding, especially in view of the fact that the decisions in some of these appeals are still pending and a number of the Board's decisions against the Appellant may now be subject to judicial review.

41. The fact that the present appeal stems from that in AAB No. 50/2009 does not necessarily mean that it is frivolous and/or vexatious. On the contrary, it is perfectly logical and understandable for the Appellant to think that, in the light of the Commissioner's finding that ML had not been able to verify two of the entries in the said report, ML had thereby failed to ensure the accuracy of the data it kept. The fact that the Commissioner has thoroughly investigated the case from the point of view of whether ML was entitled to refuse to accede to the Appellant's DCR does not, in our view, preclude a further and fresh investigation into whether ML had failed to take all practicable steps to ensure the accuracy of the data which it kept. With respect, we also fail to see how such investigation may "interfere" with the appeal process.

42. We are therefore of view that the merits of the Appellant's complaint ought to be looked into and we shall proceed to do so. We shall first consider the Appellant's first point of complaint. The issue here is quite simple: Did ML take all practicable steps to ensure the data it kept was accurate having regard to the purpose (including any directly related purpose) for which the personal data is or is to be used.

Is ML In Breach of DPP2?

43. What was the purpose for which the data was or was to be used? The factual background leading to these appeals is set out in paragraphs 8 & 9 of the Commissioner's statement pursuant to section 11(2) (a) and (b) of the AAB Ordinance (see AB 25/2010, 37, at 39-40). We do not think it is necessary for us to repeat this here and/or to set it out in its entirety. Suffice it to say that ML had terminated the Appellant's employment for the reason of "material

non-disclosure" of the various sets of litigation she was involved in. The Appellant was of the view that her dismissal was wrong/unlawful and had instituted proceedings against ML in various venues, including the Labour Tribunal, the SFC and this Board. In addition, we are now told that proceedings have been commenced in the High Court where some of the decisions of the Board may well be challenged by judicial review. The purpose of collection of the data regarding the various sets of litigation involving the Appellant was obviously to enable ML to justify its decision to terminate her employment and/or to defend it in proceedings instituted by the Appellant in the various courts and tribunals where she seeks to challenge the validity of the said decision.

44. With this in mind, had ML taken all practicable steps to fulfill the duty imposed upon it by DPP2 to ensure the accuracy of the data? We note that the duty is not absolute. All that is required of ML is to take "all practicable steps". If despite having taken these steps, it had failed to ensure the accuracy of the data kept by it, ML nevertheless *cannot* be said to have breached DPP2.

45. The Commissioner, whilst investigating the case which is the subject of AAB No. 50/2009, specifically asked ML what steps it took to ensure the accuracy of the data and this was Deacons' answer on ML's behalf (see AB 50/2009, 267): "Yes, our clients did instruct us to take all practicable steps to verify whether the Complainant was actually a party to the Court Cases..... For example we conducted a public record search for members of Certified Public Accountants (CPA) at [the URL of a website]. There is only one CPA with the exact name "Jessie Yung Mei Chun", and there is no other CPA called "Jessie Yung". Since the Complainant is a CPA (which is confirmed by a copy of the

enclosed Certificate of Membership dated 21 April 2005 certifying that Ms. Yung was admitted as a CPA on 15 July 1993). Therefore we can confirm that the plaintiffs in Case No. S62322 and Case No. S9653 [Actions 1 and 2] are in fact the Complainant. Our clients also instructed us to write to e.CreditManagement.com Limited to ascertain whether the Complainant was in fact a party to the Court Cases. We are still waiting for their response. A copy of our letter dated 13th August to e.CreditManagement.com Limited is enclosed for your reference" (AB, 50/2009, 318).

46. There never was any response from e.Credit. This is not surprising since e.Credit had, on its website, issued a disclaimer to the effect that it was not their responsibility to guarantee the unique identification of each subject searched which matches with one or more records stored in its database. The disclaimer also reminded the user that the search subject could have same or similar name(s) with some records contained in its database and further stated that the user is strongly advised to verify the identity of the searched subject with whom a positive match is found (AB 50/2009, 493). In other words, what e.Credit was telling its users was this: "Even if a positive match is found, you must verify the identity of the searched subject yourself. We will not do it and it is not our responsibility to do so".

47. The Appellant submitted that what ML did was inadequate and insufficient to fulfill its duty under DPP2 since, on receiving no reply from e.Credit, ML did not even follow up the matter.

48. Could (or should) ML have done more? We have seen that the Commissioner, when investigating the case, did in fact do more than what ML did. He made extensive enquiries with the Small Claims Tribunal and managed to obtain much more material and information than what Deacons/ML had obtained. Despite all this, however, it was still not possible to verify whether the Appellant was a party to Actions 3 and 4.

49. We have given this matter careful consideration. It seems to us that the reason why the Commissioner managed to obtain the information/material from the Small Claims Tribunal is probably due to the fact that his Office is a statutory and quasi-official body which has fairly extensive powers of investigation conferred upon it by the Ordinance. As ML pointed out, Small Claim Tribunal actions are not matters of public/open record. If any private individual or corporation (without the status and statutory powers possessed by the Commissioner) were to make enquiries with the Tribunal, he/she/it would probably not be able to obtain the information/material which the Commissioner managed to obtain.

50. The Appellant herself approached the Small Claims Tribunal for information. According to the Appellant's own account as stated in her letter to the Commissioner dated 4 April 2008 (AB 50/2009, 193-4), this was what happened: "I went to the Small Claims Tribunal and checked with the staff there. They showed me the computerized record showing the addresses of the parties. I noted that although the name was the same as mine, the addresses were wrong. As I was not the party to these cases, I could not check further details." In other words, she did not manage to obtain anything beyond what e.Credit had already

provided to ML. As for the alleged discrepancy in the addresses, ML was in no position to notice this since it had no knowledge of whether or not the Appellant had more than one address in Hong Kong.

51. Having considered all the circumstances of this case, we have come to the view that, unsatisfactory thought it may seem, ML had indeed taken all practicable steps to ensure the accuracy of the data. As we have mentioned earlier, the duty to do so is not absolute and the fact that it had failed to do so does not mean that it was in breach of DPP2. It follows that the Appellant's first point of complaint is not substantiated.

52. As regards the Appellant's second point of complaint, we find some difficulty in understanding what she meant by it. We have looked at the relevant entries in the said report and note that the plaintiffs in Actions 1 and 2 are described as "Jessie Yung Certified Public Accountant" and not "Jessie Yung" or "Yung Mei Chun" as she claims. If, however, in her second point of complaint, she is merely making the same point she made in AAB No. 50/2009 that a distinction should be drawn between her business name and her personal name and that the two are different persons/legal entities then, as pointed out earlier in our decision on AAB No. 50/2009, this submission is misconceived and we reject it.

53. It follows that this appeal must also be dismissed.

54. Accordingly, we hereby dismiss both the Appellant's appeals in AAB No. 50/2009 and AAB No. 25/2010. We turn now to the question of costs.

Costs

55. These appeals were originally scheduled to be heard on 29 May 2013. On the morning of the scheduled hearing, the Appellant faxed a letter to the Board informing the Board that she was unable to attend the hearing because of illness and applied for an adjournment. In the letter, she undertook to provide a medical/sick leave certificate to the Board. The Commissioner objected to the application, but said that if, despite his objection, the Board was minded to grant it, then he would ask to be given the costs of the adjournment in any event. We granted the adjournment, directed that a medical certificate be provided within 7 days and reserved the question of costs to be dealt with at the end of the hearing of the appeals.

56. The Appellant provided a medical certificate issued by Dr. Yim Wai Shun dated 29th May 2013 to the Board on the same day. The certificate stated that she was suffering from an upper respiratory tract infection which made her unfit for work and one day's sick leave on 29 May 2013 was recommended.

57. In the circumstances, we are satisfied that the Appellant was indeed unable to attend the scheduled hearing on 29 May 2013 due to illness and we make no order as to costs as regards the adjournment.

58. We proceed now to deal with the costs in relation to the 3 appeals, namely AAB Nos. 18/2010, 50/2009 and 25/2010, themselves.

59. Section 21(1)(k) of the Administrative Appeals Board Ordinance, Cap. 442 gives the Board power, subject to section 22, to make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal. Normally, in civil litigation, the general rule is for costs to follow the event. However, as far as this Board is concerned, the rule is modified to some extent by section 22(1), which provides that:

> The Board shall only make an award as to costs under section 21(1)(k)-
>
> (a) against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner; and
>
> (b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

60. The Commissioner applied for costs in respect of AAB Nos. 18/2010 and 25/2010 on the ground that the Appellant had conducted her case in these two appeals in a frivolous and vexatious manner.

61. The appeal in AAB No. 18/2010 was withdrawn by the Appellant at the outset on the morning of 4 July 2013. In his application for costs in respect of this appeal, the Commissioner put forward two lines of argument, which we shall deal with below.

62. Firstly, it is submitted that the Appellant should have informed the Board and the Commissioner of her decision to abandon earlier and saved a lot of time and costs. It is contended that her failure to do so amounted to conducting

the appeal in a frivolous or vexatious manner. We enquired from the Appellant as to when the decision to withdraw the appeal was made. She replied that the decision was made late at night the previous day. The Commissioner submitted that this was "unlikely the case" as the Appellant had received the appeal bundles long before the original scheduled hearing on 29th May 2013 and must have had ample time to read them and to arrive at a decision whether or not to proceed with AAB 18/2010 well before the night of 3rd July 2013. However, we do not think we should draw this inference. It is, in our view, quite possible that, despite having had ample time to read the appeal bundles, the decision to abandon the appeal in AAB No. 18/2010 was not made until the night before the hearing on 4th July 2013. Moreover, as there is no evidence to contradict this claim by the Appellant, we are bound to accept it as the truth and that the Appellant had informed us of her decision at the first available opportunity. The Commissioner prayed in aid of an authority, i.e. AAB No. 53 of 2006, which we have read and considered. As the Appellant has rightly pointed out (in paragraphs 27-30 of her written submission dated 18th July 2013), this case is distinguishable from the present one on the facts. The Commissioner's first line of argument therefore fails.

63. The Commissioner's second line of argument is that both AAB Nos. 18/2010 and 25/2010 were appeals which were clearly hopeless and unarguable. Hence it was frivolous and vexatious for the Appellant to have commenced and pursued them.

64. A proceeding is frivolous when it is not capable of reasoned argument, without foundation or where it cannot possibly succeed. A proceeding is

vexatious when it is oppressive and/or lacks bona fides (para. 18/19/8, p. 420-421 of Hong Kong Civil Procedure 2013).

65. As regards AAB No. 18/2010, the Commissioner gave his reasons for his submission that it totally lacked merits and was bound to fail in respect of his decision not to issue an enforcement order, namely that the nature of ML's contravention of DPP1(2) was one single incident and unlikely to be repeated since the Appellant had already left ML's employment (para. 5 of his written submission dated 11th July 2013). This, however, constitutes only a small part of the entire appeal. Besides, at para. 11 of her written submission dated 18th July 2013, the Appellant put forward arguments going the other way which, in our view, are by no means blatantly or manifestly lacking in merit. We shall not descend upon a detailed consideration of the merits as they have not been the subject of full submissions before this Board. Suffice it to say that we find the respective cases of *both* parties to be reasonably arguable.

66. As regards the rest of the issues raised by AAB No. 18/2010, it was not until the Appellant pointed out that the Commissioner has failed to deal with them in his submission dated 11th July 2013 that these were dealt with in the submission dated 5th August 2013, and then only by essentially repeating the material contained in his Result of Investigation and Statement. With respect, we do not think that this suffices to show that the appeal in AAB No. 18/2010 was bound and/or doomed to fail and that therefore it was a frivolous appeal. Again, we shall refrain from going into a detailed analysis of the merits of these issues since they have not been the subject of full submissions before this Board.

67. As regards AAB No. 25/2010, the Commissioner basically reiterated his submissions already mentioned hereinabove, viz. that the Appellant's complaint in this appeal shares the same issue (and arises out of the same facts) as that which is the subject matter of AAB No. 50/2009, namely whether or not the Appellant was a party to the same 4 cases in the Small Claims Tribunal (Actions 1 to 4). The Commissioner expressed the view that the Appellant should not have commenced AAB No. 25/2010 without awaiting the outcome in AAB No. 50/2009 because, if the Board should decide to dismiss the appeal in AAB No. 50/2009, then it must logically follow that the one in AAB No. 25/2010 would also fail. We respectfully disagree with this submission. As we pointed out in paragraph 41 above, the two appeals, although sharing the same factual background, relate to different issues and different provisions of the Ordinance. They do not, as the Commissioner submitted, stand or fall together; nor do they involve the re-litigation of matters which have already been decided. We do not, therefore, find that it was either frivolous or vexatious for the Appellant to have commenced AAB No. 25/2010 without awaiting the outcome of AAB No. 50/2009. Insofar as there is reliance by the Commissioner on the authority in AAB No. 60/2011, we can only say we agree with the submission of the Appellant (at paras. 40 & 41 of her written submission dated 18th July 2013) that the appeals involved in that case are distinguishable from the ones which are now before us.

68. The Commissioner further submitted that, as it was clear all along to all parties (including the Appellant) that she was a party to Actions 1 and 2, it was frivolous and/or vexatious of her to insist otherwise until the day of the hearing of the present appeals on 4th July 2013. In response, the Appellant denied that

she had insisted that she (as sole proprietor of the business "Jessie Yung Certified Public Accountant") was not a party to the actions until the hearing on 4th July 2013. She informed the Board that she had already conceded this as early as 9th May 2012 during the hearing before this Board of AAB No. 7/2010. This fact is not disputed by the Commissioner.

69. It follows from the above that none of the grounds raised by the Commissioner in support of his submission that the Appellant had conducted her case in AAB Nos. 18/2010 and 25/2010 in a frivolous/vexatious manner have been substantiated. Accordingly, we reject the Commissioner's application for costs against the Appellant.

70. We turn now to consider the Appellant's application for costs against the Commissioner. In a nutshell, this application is based upon the Appellant's allegation that the Commissioner's application for costs against her is made in a frivolous and vexatious manner and that therefore it would be unjust and inequitable not to order costs against him.

71. We say at once that the mere fact of the Commissioner's application having failed does *not* automatically mean that it would be, in the words of the statute, "in all the circumstances of the case unjust and inequitable" not to order costs against him. On the contrary, having considered all the circumstances of the case, we find that the conduct of the Commissioner's application falls short of what is stipulated in section 22(1)(b) of the Administrative Appeals Board Ordinance. Although we have refused the application, we find that we are unable to go the extent of saying that it was manifestly unarguable; nor do we

find that there is any basis upon which one could say that the application was made in bad faith. Accordingly, we reject the Appellant's submission that the Commissioner's application for costs was made either frivolously or vexatiously.

72. It follows from this that the Appellant's application for costs against the Commissioner also fails.

73. We therefore make no order as to costs in respect of all 3 of the appeals in AAB Nos. 18/2010, 50/2009 and 25/2010.

74. Last but not least, we would wish to thank both parties for their very helpful assistance which greatly assisted us in reaching our decision.

(signed)

(Mr Thong Keng Yee)

Deputy Chairman

Administrative Appeals Board