

ADMINISTRATIVE APPEALS BOARD  
ADMINISTRATIVE APPEAL NO. 31/2017

BETWEEN

FU LOK MAN JAMES

Appellant

and

PRIVACY COMMISSIONER FOR  
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr Erik Ignatius SHUM Sze-man (Deputy Chairman)
- Miss Carmen CHAN Ka-man (Member)
- Miss Julia LAU Pui-g (Member)

Date of Hearing: 30 July 2018

Date of Handing down Written Decision with Reasons: 10 August 2018

DECISION

**Introduction**

1. This is the third appeal lodged with the Administrative Appeals Board (“the Board”) by the same Appellant against a decision of the Respondent not to

pursue the complaint of the Appellant. The case originated from an incident back in 2010 when the Appellant made a complaint to the Companies Registry (“CR”) to the effect that one Mr. Fu Wing-lok George (“George”) had made false declaration to the CR in the latter’s application to CR to deregister a limited company known as Coronet Leather Ware Company Limited (“the Company”) that all shareholders of the Company had agreed with the deregistration. It is to be noted that the Appellant was not a shareholder of the Company.

### **The Respondent’s First Decision and the Board’s Decision in the First Appeal**

2. The Appellant was dissatisfied with the fact that his identity was disclosed by CR to George by a letter dated 3<sup>rd</sup> June 2011 and thus he lodged a complaint to the Respondent on 8<sup>th</sup> August 2012 (“the First Complaint”). After investigation, the Respondent decided not to pursue further the First Complaint (“the First Decision”) on the ground that there was no prima facie case indicating contravention by CR of Data Protection Principle 3 (“DPP3”) in Schedule 1 of the Personal Data (Privacy) Ordinance, Cap 486 (“PD(P)O”) in relation to the disclosure of the Appellant’s identity to George. The Appellant appealed against the First Decision to the Board in AAB No. 33/2012 (“the First Appeal”). The Board in its decision dated 16<sup>th</sup> April 2013 concluded that “Data Protection Principle 3 has not been contravened by disclosure of the Appellant’s identity to George Fu, it becomes unnecessary for us to determine whether the exemption in section 58(2) is applicable” (see paragraph 31 of the Board’s Decision in the First Appeal).

3. However, despite the above finding and conclusion the Board in the First Appeal went on to enquire about the disclosure by CR of the identity of the Appellant to the accountant of the Company (“the Accountant”) and concluded that CR in so doing had breached DPP3 and hence allowed the First Appeal and exercised its power under sections 21(1)(j) and 21(3) of the Administrative Appeals Board Ordinance, Cap 442 (“the Appeals Board Ordinance”) to reverse the First Decision of the Respondent and remit the case to the Respondent to consider the said matter of disclosure by CR to the Accountant and the breach resulting thereof (see paragraphs 46 and 47 of the Board’s Decision in the First Appeal).

#### **The Respondent’s Second Decision and the Board’s Decision in the Second Appeal**

4. After the Board’s Decision in the First Appeal, there were exchanges between the Respondent and the Appellant on the one hand and between the Respondent and the CR on the other hand. In light of the Board’s Decision in the First Appeal, CR conducted a review of its procedure in handling objection cases relating to applications for deregistration under the then section 291AA of the Companies Ordinance, then Cap 32 (“the Companies Ordinance”). After taking into account the final version of the revised procedure to be implemented by CR, the explanation of CR and communications between the Respondent and the CR, the Respondent was satisfied with the review and concluding revised procedure of CR and decided to exercise its power under section 39(2)(d) of PD(P)O not to pursue further the matter remitted back to it by the Board (“the Second Decision”).

5. It was against the Second Decision that the Appellant lodged the second appeal to the Board again in AAB No. 13/2014 (“the Second Appeal”). The issues to be resolved in the Second Appeal were summarized by the Board at paragraph 35 of its decision dated 17<sup>th</sup> November 2015 (“the Board’s Decision in the Second Appeal”). The issues which may relate to the present Appeal are numbered (C) and (D) in that Decision.

6. The Board hearing the Second Appeal found that on issue (C) which related to an allegation that CR had in the course of investigation by the Respondent misrepresented to and misled the Respondent by withholding an email dated 17<sup>th</sup> June 2011 from George to the CR, the said allegation is a complaint of breach of section 50B(1)(c) of PD(P)O and that such a complaint does not fall within the jurisdiction of the Board since it is not a complaint referred to in sections 37 and 2(4) of PD(P)O. The detail analysis of the said decision of the Board appeared in paragraphs 47 to 52 of its Decision in the Second Appeal.

7. The Board did add in its Decision in the Second Appeal that “the question of jurisdiction aside, if we were required to consider the merits of the Appellant’s new allegation [as summarized above], we would have agreed with the decision of the Respondent on Issue C [as summarized above]”.

8. On issue (D) which related to the merits of the Respondent’s Second Decision not to pursue the matter remitted by the Board in its Decision in the First Appeal, the Board in the Second Appeal agreed with the conclusion of the Respondent that in light of the remedial measures/improvements made by the CR, an investigation of the contravention of DPP3 relating to the disclosure of the Appellant’s identity to the Accountant could not reasonably be expected to

bring about a more satisfactory result and hence the Respondent was amply justified for not pursuing the said complaint further (see paragraphs 54 to 58 of the Board's Decision in the Second Appeal).

### **The Respondent's Third Decision and the Present Appeal**

9. Subsequent to the Board's Decision in the Second Appeal the Respondent received yet another complaint dated 26<sup>th</sup> September 2017 ("the Third Complaint") in which the Appellant alleged that CR had misrepresented to the Respondent in the course of handling the First Complaint. The Third Complaint may be summarized as follows,

- (1) CR misrepresented to the Respondent in respect of the nature of his original complaint contained in the Appellant's letter dated 23<sup>rd</sup> May 2011 to CR. The Appellant alleged that his complaint alleged existence of forged document used by George whereas CR's description of his complaint (as stated in CR's letters dated 3<sup>rd</sup> June 2011 and 3<sup>rd</sup> October 2012) as a request to CR to review the application for deregistration of the Company lodged by George on the ground that the other members had never signed any papers to dissolve the Company. The above shows that the CR misrepresented to both the Respondent and the Board in the First Appeal.
- (2) The CR did not produce any evidence in support of its conducting any criminal investigation and/or no prosecution having been carried out by the CR against George and hence CR's conduct

amounted to misrepresentation by the CR to the Respondent as well as to the Board in both the First and Second Appeals.

10. The Respondent by a letter dated 10<sup>th</sup> November 2017 (“the Third Decision”) to the Appellant informed the latter of the Respondent’s decision not to pursue the Third Complaint further under section 39(2)(d) of PD(P)O and paragraph 8(e) of the Respondent’s Complaint Handling Policy (Fifth Revision). It was against that Third Decision that the Appellant appealed to this Board in the present appeal.

11. This Board has considered all the submissions of both the Appellant and the Respondent including the written submissions and grounds stated in the Appellant’s Notice of Appeal dated 5<sup>th</sup> December 2017, his written submissions dated 16<sup>th</sup> March 2018 and his Skeleton dated 19<sup>th</sup> July 2018, and the Respondent’s Third Decision dated 10<sup>th</sup> November 2017 and Statement relating to the Decision dated 14<sup>th</sup> February 2018 and the oral submissions made by them at the appeal hearing.

12. This Board does not find it necessary to set out in detail the respective submissions of the parties in the present Decision. Essential and more important arguments of the parties will be referred to in the course of the analysis of the issues of this Appeal.

**Parameters of the present Appeal: The Board will not deal with matters which had already decided in the previous appeals to the Board**

13. This Board will at this outset point out that the issues, subject matters and the Board’s Decisions in the First and Second Appeals, insofar as they are

relevant to the present Appeal, have been summarized hereinabove. They could be seen in detail in the respective Decisions in the First and Second Appeals. They include the following,

- (1) Whether the Respondent's First Decision of not pursuing further the First Complaint relating to the disclosure of the Appellant's identity to George by the CR was correct; the Board in the First Appeal answered in the affirmative.
- (2) Whether the Respondent's Second Decision of not pursuing further the Second Complaint relating to the disclosure of the Appellant's identity to the Accountant was correct; the Board in the Second Appeal answered in the affirmative.
- (3) Whether CR had in the course of investigation by the Respondent misrepresented to and misled the Respondent by withholding an email dated 17<sup>th</sup> June 2011 from George to the CR. The Board in the Second Appeal decided among other matters that on merits that ground failed (see paragraph 6 hereinabove).

14. There is no new evidence submitted to the Respondent in relation to any of the matters summarized in paragraph 13 above by the Appellant. Therefore, insofar as the Appellant may seek to re-open his case in the present Appeal in respect of the substantive complaints about possible breaches of the data protection principles or in relation to misrepresentation arising out of or in relation to the email dated 17<sup>th</sup> June 2011, they had been decided in the previous First and Second Appeals. The Appellant did not take any steps to set aside those Decisions of the Board after the previous Appeals and hence is bound by

them. For the above reasons this Board would not entertain any grounds of appeal relating to the said matters which had been fully argued and disposed of by the Boards in the previous appeals. As a matter of fact, to be fair to the Appellant, he did not appear to urge this Board to re-open the above issues decided in the previous Appeals.

15. As a result of the foregoing analysis and holding of this Board, the matters relating to breach of any data protection principles are no longer relevant on the face of the history of the appeals. The emphasis of the Appellant has shifted to allegations of misrepresentations of CR and dishonest conduct of the Respondent. One of the questions to be addressed is how would those allegations affect the Third Decision of the Respondent in the context of data protection principles against which the Appellant appealed in the present Appeal. This Board will resolve the said question in the following paragraphs. It should be pointed out, however, that the Appellant does not seem to appreciate he had lost focus on the main theme of his complaints to the Respondent which related to breach of data protection principles and has diverted to emotional attacks relating to the allegations of misrepresentations of CR and alleged dishonesty of the Respondent.

### **Whether the Board has jurisdiction to entertain the grounds of the present Appeal**

16. The next matter this Board will address is one of jurisdiction of the Board under the Administrative Appeals Board Ordinance, Cap 442.

17. The jurisdiction of the Administrative Appeals Board is derived from section 3 of Cap 442 which refers to the Ordinances stated in column 2 of the



Schedule to the Appeals Board Ordinance and the kind of decision mentioned in column 3 thereof. PD(P)O appears as item 29 of the Schedule and column 3 of item 29 provides,

“A decision of the Privacy Commissioner for Personal Data -

- (a) to impose conditions on his consent to the carrying out of a matching procedure under section 32(1)(b)(i);
- (b) to refuse to consent to the carrying out of a matching procedure under section 32(1)(b)(ii);
- (c) to refuse under section 39(3) to carry out an investigation initiated by a complaint;
- (ca) to terminate under section 39(3A) an investigation initiated by a complaint;
- (d) not to delete under section 46(5) a matter from a report under the Ordinance;
- (e) not to serve an enforcement notice under section 47;
- (f) to serve an enforcement notice under section 50. ”

18. From the nature of the Third Decision appealed against, only paragraph (ca) is relevant. The question is therefore whether the broad grounds of appeal as summarised in paragraph 9 hereinabove and other peripheral grounds raised relating to alleged misrepresentations by the CR or dishonest conduct of the Respondent could be valid grounds to challenge the Third Decision.

19. In this respect paragraphs 47, 48 and 51 of the Board's Decision in the Second Appeal are referred to. The Board in that Second Appeal dealing with the allegation of CR withholding the email dated 17<sup>th</sup> June 2011 reasoned that the allegation was a complaint of breach of section 50B(1)(c) of the PD(P)O which attracted criminal sanction and hence was not a matter falling within the investigation role of the Respondent under sections 37, 38 and 39 of the PD(P)O and therefore outside of the jurisdiction of the Board. On this question of law this Board's view differs from the above.

20. Though misrepresentations made by anybody to the Respondent may potentially be a subject matter of criminal investigation and sanction under PD(P)O, it does not follow that any alleged misrepresentation could not or may not be taken into account in the course of investigation by the Respondent before coming to a conclusion in respect of a complaint of breach of any data protection principle. If it is found that such allegation of misrepresentations had affected the decision of the Respondent (including a decision not to further investigate the breach of data protection principle), the allegation must be relevant to any Board's consideration whether to set it aside since it would have been tainted by the misrepresentation. The fact that the allegation may be at the same time a subject matter of criminal investigation or prosecution under section 50B of PD(P)O does not affect the above scenario.

21. By reason of the above analysis this Board at the appeal hearing put to the Respondent's Counsel the following proposition, namely, the test on the jurisdictional issue is whether the allegation of misrepresentation had affected the decision of the Respondent of terminating the investigation concerning breach of data protection principle. If upon enquiry by the Board the answer is positive clearly the allegation could form a valid ground of appeal against the

said decision of the Respondent. However, if the answer is negative the ground is not valid in the challenge. In any event, the Board in order to come to any conclusion on jurisdictional issue has the duty to enquire on the above question and cannot simply classify the allegation as under section 50B of PD(P)O and ignore it as being unrelated to the said decision of the Respondent. The Respondent's Counsel agreed with the above proposition, which is what this Board hereby decides and upon which approach this Board will proceed.

22. On the complaint of the Appellant that CR misrepresented to the Respondent in respect of the nature of the Appellant's complaint to CR, the so called difference is totally insignificant and could not have possibly affected the nature and course of investigation by the Respondent on the subject matter of possible breach of DPP3 which focussed on disclosure of the Appellant's identity to George and the Accountant. It was decided in the First Appeal that there was no breach of DPP3 in terms of the said disclosure to George. It was also decided in the First Appeal that there was a breach of DPP3 in terms of the said disclosure to the Accountant. However, that breach was remedied by CR's review of its internal procedure as found in the Second Appeal. Looking the matter in the above light, it is difficult to discern how the so called difference would in any way affects the above conclusions.

23. The so called difference can be stated as follows. The Appellant submitted that his original complaint was "allegation of forged documents" (see Appellant's reference to his letter to CR dated 23<sup>rd</sup> May 2011) whereas CR's summary to the Respondent in its letters dated 3<sup>rd</sup> June 2011 and 3<sup>rd</sup> October 2012 was "not all members of the Company agreed to the deregistration of the Company". This Board finds the above distinction drawn by the Appellant

most trivial, technical and unreal. Such difference is particular insignificant in the context of the Respondent's investigation into the potential breach of DPP3.

24. The essence of the Appellant's complaint to CR was that the other shareholders of the Company never signed any papers to dissolve the Company (see paragraph 9 of the Appellant's letter dated 23<sup>rd</sup> May 2011 to CR) implying that the said shareholders did not agree to the deregistration. The latter was exactly what CR conveyed in its letter dated 3<sup>rd</sup> June 2011. In the context of the investigation by the Respondent of any breach of DPP3 focussing on disclosure of the Appellant's identity to George and subsequently the Accountant, the above subtle distinction could not possibly have any effect on the way the Respondent's investigation proceeded and its decisions. The Respondent disavowed such effect on its Decisions; to what assertion this Board totally agrees. In the premises, the above allegation of misrepresentation has no substance and effect in the context of the Third Decision and could not form any valid ground of appeal against the Third Decision.

25. As to the next allegation of misrepresentation by CR in its letter dated 3<sup>rd</sup> June 2011 regarding a suspected criminal offence being committed by George under section 291AA(14) of the then Companies Ordinance, the point raised by the Appellant is that CR had not produced any evidence in support of such criminal investigation or prosecution. At the appeal hearing the Appellant submitted, somewhat strange and contradictory to his original complaint to CR, that it was wrong for CR to even refer to criminal investigation when there was no evidence at all to support the Appellant's allegation of forgery against George. Again the said allegation has to be analysed in the context of the course of investigation of possible breach of DPP3 by the Respondent. Whatever CR might have stated in its letter dated 3<sup>rd</sup> June 2011 to George

reminding him that there was a suspected offence under section 291AA(14) of the then Companies Ordinance, it could not possibly have any effect on the Respondent's investigation under PD(P)O and its Decisions.

26. Furthermore, this Board agrees with the observations stated in paragraph 43 of the Board's Decision in the Second Appeal concerning the distinction of "criminal investigation" and "criminal prosecution" and repetition of the same ground relied on and dismissal by the Board in the First Appeal, which will not be reproduced herein.

27. In the premises, there is no substance in the said allegation of misrepresentation which could not be a valid ground of appeal against the Third Decision.

28. In the course of this Appeal the Appellant again raised the matter relating to the withholding of an email dated 17<sup>th</sup> June 2011 from the Respondent. The Appellant again alleged that the said "withholding" amounted to misrepresentation by CR. This matter and allegation had been repeatedly raised by the Appellant and was disposed of as being groundless in the Board's Decision in the Second Appeal in relation to issues (B) and (C) summarised therein. This Board agrees with the conclusion and reasoning of the Board as stated in the Decision of the Second Appeal (see in particular paragraphs 47, 52 and 53 thereof and paragraph 36 of the Board's Decision in the First Appeal). Since the matter had been dealt with and dismissed in the Second Appeal and no further step had been taken by the Appellant to set the same aside, the dismissal of the said ground is binding on the Appellant and this Board will not entertain the said ground which is without merit in any event. Furthermore, as submitted by the Respondent this Board for the reasons given in the previous Board's

Decisions in the First and Second Appeals finds that CR had never withheld the subject email from the Respondent which could not possibly amount to any misrepresentation.

29. Finally, the Appellant raised a serious complaint against the Respondent that in paragraph 3 of its Third Decision letter dated 10<sup>th</sup> November 2017 to the Appellant the Respondent had erroneously referred to “CR’s letter of 3<sup>rd</sup> June 2011 to George” instead of “George’s 17<sup>th</sup> June 2011 email”. The Appellant therefore submits that the Respondent had acted dishonestly and “adopted the same tricks as the CR”. This Board finds this ground to be highly artificial and completely devoid of merits. It is regrettable that the Appellant made such wild, serious and unfair allegation against the Respondent by reason simply of one mistake in the said paragraph 3 when the phrase “George replied in a letter to CR” should have been stated as “George replied in an email to CR”.

30. This Board accepts the submission of the Respondent that the said paragraph, objectively viewed, sought to set out in chronological order a brief re-cap of the background of the relevant incidents relating to the communications between CR and George. The re-cap started with a statement that CR looked into the matter by making written inquiries with George and other shareholders of the Company (thereby reflecting CR’s letter dated 3<sup>rd</sup> June 2011 to George and other shareholders); then it stated the important content in the said letter that CR disclosed the Appellant’s identity to George; the third sentence stated that a copy of the said letter was also copied to the Company’s Accountant; and the last sentence stated that George replied to CR confirming that all members of the Company agreed to dissolve the Company (it is in the last statement that the above “mistake” was made).

31. This Board finds that the above statements contained in the said paragraph 3 were factually correct in the main events and were a fair summary of the important inquiries and response from George. The so called mistake was unimportant and could not possibly have given rise to any serious misunderstanding, not to speak of affecting the Third Decision of the Respondent now the Appellant challenged in the present Appeal. This ground of appeal is totally devoid of merits, purely technical and vexatious.

32. In the premises, this Board finds all the grounds of appeal relied on by the Appellant unmeritorious and the present Appeal is therefore dismissed.

33. The Respondent did not ask for costs of the present Appeal and therefore this Board makes no order as to costs.

34. It was brought to the Board's notice that one day after the conclusion of the appeal hearing, that is on 31<sup>st</sup> July 2018, the Appellant lodged a purported Appellant's statement to the Board's Secretary. The Board rejected the submission of the said statement by a letter dated 31<sup>st</sup> July 2018 sent to the Appellant through the Secretary which letter is self-explanatory. This Board repeats herein that parties including the Appellant had ample time before and at the appeal hearing to present statements and make submissions to the Board and there is nothing special about the present case to warrant a departure from the usual practice that after conclusion of the appeal hearing no further statement or submission would be received by the Board, lest there will be no end to the procedure. At the appeal hearing the Appellant did not ask for time to lodge any further document and hence at the conclusion of the hearing the Board declared that it would deliberate on the matter and deliver its Decision in writing. In the circumstances there is no good reason for the Appellant to

present any further document to the Board which may attract further reply from the Respondent. The above are the reasons why the purported Appellant's statement is rejected.

(signed)

(Erik Ignatius SHUM Sze-man)

Deputy Chairman

Administrative Appeals Board