

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 33 OF 2009

BETWEEN

HUI KING FAI

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 16 March 2010

Date of handing down Written Decision with Reasons: 28 April 2010

DECISION

Background

1. In this appeal, the Appellant is and was at the relevant time holding himself as the convener of the Association of the Rights of Occupiers of Tsuen Wan Riviera Gardens (the "Association").

2. He received a letter dated 17 July 2009 (the "**Letter Before Action**") from Messrs. S.T. Cheng & Co ("the **Solicitors**"), acting for Urban Property Management Limited (the "**Management Company**"), the Manager of Riviera Gardens and the Estate Owners' Committee of Riviera Gardens (the "**Committee**"). The Management Company was a party bound but it has elected to be absent not at the hearing.

3. The Letter before Action, in so far as may be material, stated that :-

*"We are given to understand that you are the convener or responsible officer for the [Association]. We have further been instructed that the [Association] has issued **an open letter** with defamatory content. A letter dated 16th July 2009 has been sent to the [Association]. We enclose herewith a copy of the same for your ease of reference.*

As the convener or officer of the [Association], our client will hold you responsible for any conduct of the [Association]. Accordingly, to the fullest extent allowable by law, our client will seek the same sanction against you as against the [Association].

You are, therefore, advised to procure that the [Association] comply with our client's request set out in our said letter to the [Association]."

4. The open letter (the "**Open Letter**") referred to in the Letter Before

Action was issued in the name of the Association and addressed to the residents of Riviera Gardens, raising various concerns on property management of Riviera Gardens and inviting the residents to become members of the Association and to attend the inauguration of the Association.

5. In addition, there was also a letter of 16 July 2009 issued by the Solicitors to the Association which stated that: *"the content in the [Open Letter] contains instances of untrue allegations the publication of which may tantamount to defamation ...Unless you retract your untrue statements and publish an apology to our client in such form and manner agreeable to our client to mitigate such injury, our client will seek an injunction against your organization to prevent further defamatory (sic)".*

6. The Appellant complained that the Management Company had contravened the requirements under the Personal Data (Privacy) Ordinance (the "**Ordinance**"), that the Management Company had used his home address to send the Letter Before Action to him and, by "c.c." or copying the Letter Before Action to the "Client", had therefore wrongly disclosed his name and home address ("the **said personal**

data") to other members of the Committee. This was not for the purpose in collecting his name and home address in the first place.

7. Having considered all the circumstances of the case, the Respondent decided not to carry out an investigation pursuant to section 39(2)(d) of the Ordinance and served a written notice of his decision upon the Appellant by a letter dated 25 September 2009.

8. Dissatisfied with the Respondent's decision, the Appellant lodged the present appeal to the Administrative Appeals Board pursuant to section 39(4) of the Ordinance.

Legal Requirements

9. The relevant provision in the present case is Data Protection Principle 3 ("DPP3") in Schedule 1 of the Ordinance, which provides that: -

"Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than -

(a) the purpose for which the data were to be used at the time of the collection of the data; or

(b) a purpose directly related to the purpose referred to in

paragraph (a)."

10. Section 39(2)(d) of the Ordinance confers a wide discretion on the Respondent to refuse or continue to investigate a complaint. The relevant provision is extracted as below: -

"The [Respondent] 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 of the case, any investigation or further investigation is for any other reason unnecessary."

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

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

.....

In addition, an investigation or further investigation may be considered to be unnecessary if:

(d) after preliminary enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements of the Ordinance".

The Evidence

12. The Appellant confirmed that his capacity as the convener of the Association was revealed in a letter dated 17 June 2009 to the

Management Company in making application for the use of the open area of the estate for the inauguration of the Association. The Appellant stated that he had provided his name and home address to the Management Company when he bought his property at Riviera Gardens in 2007, but he had not given his personal information to the Committee.

13. The Respondent argued that :-

- (a) on the basis of the information available, the original purpose of collection of the Appellant's address by the Management Company was for matters relating to property management of Riviera Gardens;
- (b) the subsequent use of the Appellant's address to contact him via the Letter Before Action requiring him to take action to remedy the alleged defamation against the Management Company and the Committee relating to the management of Riviera Gardens was directly related to the original purpose of collection of the said personal data;
- (c) such use of the data without the Appellant's consent was not inconsistent with DPP3;

- (d) likewise, the copying of the Letter Before Action to members of the Committee which was also responsible for the management of Riviera Gardens and allegedly being defamed would not amount to a breach of DPP3;
- (e) Having carefully considered all the relevant information available and by reason of the circumstances set out above, the Respondent decided that investigation of the complaint is unnecessary under section 39(2)(d) of the Ordinance.

14. On the other hand, the Appellant submitted that :-

- (a) as he was not the Chairman, Secretary or Treasurer of the Association, he should not be held responsible for the alleged defamation;
- (b) hence the Letter Before Action should not be sent to his home address and copied to members of the Committee;
- (c) from the contents of the Letter Before Action, the Management Company and the Committee obviously took a different view that he should be separately liable for the defamatory act of the Association;
- (d) however, the question of whether he should be held liable

for the alleged defamation is not for the Respondent to determine.

Discussion

15. There is no serious dispute that the name and address of the Appellant were his personal data. Those data were collected by the Management Company for the management of Riviera Gardens.

16. We do not agree with the Appellant's argument that the Committee is not a legal entity and hence has no legal liability concerning the management of Riviera Gardens. The management committee may not be a legal entity but it does not follow that its members collectively will not attract legal liability.

17. We also do not accept the Appellant's argument that it was not necessary for the Management Company to copy the Letter Before Action to the members of the Committee. Plainly, the matters therein concerned building management and it was right that the Committee (including its members) should know about the concern.

18. In this respect we agree with the Respondent's view that apart from the Management Company, the Committee was also targeted in the Open Letter. In addition, pursuant to clause 13 of the Deed of Mutual Covenant (as attached to the Notice of Appeal lodged by the Appellant), the Committee has an advisory role in the management affairs of Riviera Gardens and represents the owners of Riviera Gardens in all dealings with the Management Company. Hence, we accept that it is necessary for the Solicitors to copy the Letter Before Action to the Committee reporting the action taken against the Appellant in relation to the alleged defamatory act against the Management Company and the Committee.

19. The Appellant further argued that the Open Letter sent by the Association did not consist of any defamatory statements and the Letter Before Action was employed as a strategy to keep him silent. The Respondent's decision not to investigate the complaint was in violation of justice and human rights to speak out the truth.

Respondent's Approach

20. We agree that whether the statements in the Open Letter are

defamatory or not is not something that should normally concern the duties and function of the Respondent. It is worth repeating the following general principles which this Board has come across from time to time :-

- (a) The duties and responsibilities of the Respondent are derived from the Ordinance ;
- (b) It appears from experience that the Ordinance had been deployed by litigants in aid of litigation or potential litigation;
- (c) In exercising its discretion, the Respondent should normally have regard to the fact that it might be an abuse of the process to engage the Respondent under the disguise of the exercise of a person's right to privacy so as to launch a collateral attack on his opponent, in the sense that the complaint might seek an answer to a question or legal issue that had already been decided in an earlier set of proceedings;
- (d) In addition, in exercise of its discretion, the Respondent should also bear in mind that its decision can be used properly or it can be abused. It is used properly when it is

invoked for the vindication of men's rights or the enforcement of just claims in protecting personal data. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. And sometimes abuse can be shown by the very steps being taken in the complaint made to the Respondent.

- (e) In balancing a person's rights to privacy and at the same time against him using the same excuse for a purely collateral attack on his opponents thus amounting to a possible abuse of process, the Respondent was normally right to refrain from exercising his powers, as a matter of policy, under Section 39 of the Ordinance.

21. In addition, in considering whether the Respondent had properly exercised its discretion, this Board should also bear in mind that proceedings before the Board are no different from any legal process, in the sense that legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement

of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. And sometimes abuse can be shown by the very steps being taken in these appeals.

22. Therefore, the first question before this Board is whether the Appellant can say he has any legal rights. If the answer to the first question is in the affirmative, this is not the end of the matter. This Board will still have to consider the second question which is whether and if so to what extent the Appellant can be said to be bringing this appeal so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. Sometimes the two questions need not be considered separately but this approach serves as a useful tool in guiding ourselves towards the extent to which a correct decision may be mounted or limited.

23. Applying the above principles to the facts of this case, the only matter that had caused us concern was whether the names and addresses should be disclosed by the Solicitors to those members of the

Committee.

24. In the present case, the Management Company instructed the Solicitors, as agent of the Management Committee. However, it transpired that a member of Management Committee complained that the Solicitors had no authority to act on his behalf. The Solicitors was in fact subject to disciplinary proceedings of the Law Society for acting without authority of at least a member of the Management Committee.

25. This incident highlights the unfortunate fact that management companies sometimes paid little regard to the need to seek agreement of the members of the Management Committee before they acted through solicitors. Similarly it was equally important that solicitors should also appreciate that it was necessary to seek proper authority before they purported to act for management committees.

26. In our view, at the stage of a letter before action and for the purpose of making a demand, it was normally not necessary for the purpose of building management that the Solicitors should copy its letter of demand to the members of the Committee including the address

of the Appellant.

27. The Solicitors should have obliterated the address of the Appellant so that the members of the Committee would not see where he could be contacted. This was an easy act and but easily forgotten. This Decision may therefore serve as a reminder to those, including lawyers, who copied letters to other parties that they should be vigilant in such conduct.

28. We agree that it is apparent that the Appellant's name and address were collected by the Management Company for matters relating to the property management of Riviera Gardens including identifying the Appellant being a resident or owner of Riviera Gardens. Furthermore, the Appellant provided his name in the Association's correspondence with the Management Company as convener of the Association which was set up for monitoring the property management standard of Riviera Gardens. It does not necessarily follow however, that each of the members should have his address.

29. The Respondent argued that the subsequent use of the Appellant's

name and address to send him the Letter Before Action serves the purpose of bringing to his attention the reply made to the Association in respect of the Open Letter and requiring him, being the convener of the Association, to take action to remedy the alleged defamation against the Management Company and the Committee. In the Respondent's view, such use of the Appellant's personal data was for a purpose directly related to the original purpose of collection. We respectfully disagree. It may be correct for the Solicitors to use the address to issue the demand letter to the Appellant, but it was not right that the same address was copied to the members of the Management Committee.

30. It may perhaps be recorded that a minority view of this Board was that it may not even be correct for the Solicitors to use the address to issue the demand letter to the Appellant or to copy the letter to the members of the Management Committee. The reasons are as follows :-

- (a) the Appellant should have been known to the Solicitors as, and only as, the convener of the Association, and therefore the Letter Before Action should have been delivered to care of the

address of the Association;

- (b) obtaining the Appellant's home address from the Management Company was only a most convenient but improper act for making sure of its delivery, and is strictly speaking unnecessary;
- (c) the Management Company, by providing the Appellant's address under such circumstances to their Solicitors and for such a purpose, whether knowingly or not, has already breached the Data Protection Principles;
- (d) the Appellant, at the time of providing his home address to the Management Company, would not have contemplated that this information would be eventually used by a solicitor to serve correspondences on him for some act he has performed in a capacity other than that of an ordinary owner of the property being managed by the Management Company;
- (e) if the Appellant, in a hypothetical case, also acted as the convener of a concern group complaining against the work of a similar management company in an adjacent residential estate, also on a voluntary basis, the management company's solicitors would probably not be able to get his home address

to deliver a similar letter;

- (f) to take all matters too generally related to the purpose of building management as opposed to being directly related to the purpose is potentially dangerous, and there should always be a balance over the remoteness of the relationship.

31. When making our decision, we remind ourselves generally speaking, whether it is necessary to copy the letter in reply to a complainant to the management committee, together with the address of a complainant, depends of course on the specific circumstances of the case. Each case should be decided on its own facts.

32. In making our decision, we should also be vigilant in not saying or ruling whether the Appellant is in any way correct in resisting the claim by the Solicitors. This is to avoid this appeal being served as an instrument of extortion or oppression: or to exert pressure so as to achieve an improper end, against the Management Committee or its agent. We therefore say nothing about our view whether the Appellant was right in voicing out his complaint relating to the property management of Riviera Gardens or his right to defend against the

threatened litigation from the Management Company or the Committee.

Conclusion

33. In conclusion, save our concern on the copying of the address by the management company or its solicitors in the Letter Before Action to the members of the Management Committee, the appeal should be dismissed. It is now for the Respondent to decide whether it may be appropriate that further warning or investigative action ought to be taken as against the Management Company. We note that the Solicitors are not a party bound by this decision and so it is for the Respondent to decide and the Management Company to follow up on what steps should be taken to remind both itself and its agent of any future conduct in their dispute with the Appellant.



(Mr Andrew MAK Yip-shing)

Deputy Chairman

Administrative Appeals Board