ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 10/2013

BETWEEN

SHRESTHA RAJENDRA KUMAR — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

- Mr YUNG Yiu-wing (Deputy Chairman)
- Mr Richard HO Kam-wing (Member)
- Mr HUI Yung-chung, BBS, JP (Member)

Date of Hearing: 9 October 2013

Date of Handing down Written Decision with Reasons: 10 December 2013

DECISION

Complaint

1. The Appellant had a foreign exchange margin trading account with a bank ("the Bank"). On 10 August 2011, the Bank executed buy orders on behalf of the Appellant to close out his account and informed the Appellant on the same day. He did not think these orders were executed in good faith and he suspected that the Bank had earlier on blocked his attempt to make a deal on line to protect his position.

Eventually he made a complaint to the Hong Kong Monetary Authority. In the meantime, he made a Data Access Request to the Bank which was the subject-matter of a complaint to the Respondent made on 11 November 2011. After making enquiries, the Respondent decided not to pursue the complaint further on 22 August 2012.

2. On 15 May 2012, the Appellant made another Data Access Request ("the Request") to the Bank whose response failed to satisfy the Appellant. On 27 June 2012 he made a complaint to the Respondent alleging non-compliance of the Request. The Appellant is appealing against the decision of the Respondent made on 18 March 2013 not to pursue this complaint.

The Request

3. In the Request, the Appellant asked for his personal data which he categorised into the following items:

A. All phone conversation digital recording between the Appellant and the Bank's FX Margin Trading Hotline from 12 October 2011 at 4:00 p.m. to 15 May 2012 at 4:00 p.m.;

B. All phone conversation recording between the Appellant and the Bank's FX Margin Trading Hotline from 12 October 2011 at 4:00 p.m. to 15 May 2012 at 4:00 p.m.;

C. FX Margin trading rates of USD/CHF, USD/JPY & USD/HKD (Tick interval) from 2011-08-10 at 2:39:47 a.m. to the time when the Bank bought (USD/CHF) CHF3,200,000 at the rate of 0.7099 as the Appellant's financial service provider;

D. FX Margin trading rates of USD/CHF, USD/JPY & USD/HKD (Tick interval) from 2011-08-10 at 2:20 a.m. to 2011-08-10 at 2:50 a.m.;

E. The margin level (Margin Call Percentage) at around 2:42 a.m. of 10 August 2011 and the details of the Bank's Calculation with actual time;

F. Margin call percentage in tick interval or shortest interval and details of the Bank's calculation from 10 August 2011 at 02:39:47 a.m. to the time the Bank bought (USD/CHF) CHF3,200,000 at the rate of 0.7099 in the Bank's capacity as the Appellant's financial service provider;

G. All phone conversation recording between the Appellant and the Quality Assurance Department of the Bank from 10 August 2011 to 15 May 2012 at 4:00 p.m.;

H. The identity of the person who executed the above mentioned bought order on 10 August 2011;

I. Recordings of two phone conversations between the Appellant and the staff members of the Bank on 09 September 2011, and their identities;

J. The identity of the person who informed him of the margin call balance around 11:20 am on 20 September 2011;

K. The Margin Call Percentage of flowing movement with details of the Bank's calculation in respect of some 11 specified time spots on 10 August 2011 between 02:24:53 a.m. and 02:45:48 a.m.;

L. The number of times from 10 August 2011 to 15 May 2012 the Bank informed the Appellant of the Margin Call Percentage in the Appellant's FX Margin account, the identities of the persons who so informed him and the recording of the conversations; and

M. Copies of all related information about the Appellant's FX Margin Trading account which the Bank had provided to the Hong Kong

Monetary Authority and to the Office of the Privacy Commissioner for Personal Data.

The Bank's Response to the Request

4. The Bank responded to the Request by letter of 22 June 2012 enclosing a CD containing six telephone conversation recordings which were part of the data requested under item L. As to other data requested, their responses were:

(1) the Bank needed more time to prepare items A, B and G, and would give a substantive reply by 20 July 2012;

(2) Items C, D, H, I, J and the rest of the data under item L did not amount to the personal data of the Appellant;

(3) Items E, F and K were not recorded in the Bank's database; and

(4) the Bank invoked the secrecy provisions of the Banking Ordinance and the Personal Data (Privacy) Ordinance and stated it was prohibited from providing the Appellant with item M, which formed part of the investigation by the Hong Kong Monetary Authority and the investigation by the Office of Privacy Commissioner for Personal Data.

Enquiry and Follow-up by the Respondent

5. The Appellant confirmed with the Respondent that the Bank had subsequently provided him with items A, B and G of the Request on 19 July 2012. When asked what data contained in items C, D, E, F, and K were his personal data, the Appellant could only give the Respondent his account of the unsuccessful online banking transactions and the Bank's execution of the stop loss orders on 10 August 2011 and reiterated his contention that any transaction details in his account was his personal data.

6. The Respondent enquired with the Bank and then the Hong Kong Monetary Authority. It was confirmed that the Appellant had made a complaint to the Hong Kong Monetary Authority about the acts and conduct of the Bank in the handling of his FX margin trading account. As the Bank was assisting the Hong Kong Monetary Authority in the investigation, it was duty bound by the secrecy provisions of the Banking Ordinance not to disclose the information or documents it had provided to the latter. Similarly, the Bank was duty bound by the secrecy provisions of the Personal Data (Privacy) Ordinance not to disclose information given to the Respondent. In this regard, the Respondent intervened. As a result the Bank was able and did provide the Appellant his personal data contained in its correspondence with the Respondent, redacting those data not relating to the Appellant and the Bank also offered upon payment of incidental costs of $30 to provide copies of correspondence between it and the Appellant, and, between the Bank and the Respondent. All these materials and information were included in item M of the Request.

Decision of the Respondent

7. The Respondent reached his decision after considering all circumstances. He gave the following reasons relating specifically to each item and in respect of the overall circumstances.

8. Items A, B and G---A data user has to comply with the Request within 40 days and if unable to do so must notify the data subject in writing and inform him of the reasons. As the Bank had subsequently provided the Appellant the copies of these items, he did not think there was a prima facie case that the Bank had not complied with the Request so far as these items were concerned.

9. Items C and D---These were FX margin trading rates. The Appellant did not provide any information to show that they were his personal data. It did not appear to the Respondent that these were personal data of the Appellant.

10. Items H, I, J and L---The Respondent noted that copies of telephone conversation recording under item L were supplied to the Appellant and he agreed with the view of the Bank that the identities, say, the names, staff numbers, and their registration numbers with the Hong Kong Monetary Authority, were personal data of those persons mentioned in items H, I, J and L, and were not the personal data of the Appellant.

11. Items E, F and K---The Bank claimed that these were not recorded in their database. Furthermore, there data consists of Margin call percentage and the Bank's calculation but there was no information to show that the identity of the Appellant could be ascertained from these data. Therefore the Respondent did not think the data amounted to his personal data.

12. Item M---The Respondent accepted the position of the Bank. It was duty bound by the secrecy provision of the Banking Ordinance and could not provide the information without being in breach of the said provisions. As to the information supplied to the Respondent, the Respondent had examined clean copies of the documents the Bank provided to the Appellant upon the intervention of the Respondent, he was satisfied the redacted parts related to the personal data of others and they were not personal data of the Appellant.

13. Overall Consideration---It appeared clearly to the Respondent that the Appellant was trying to gather information for instituting legal action against the Bank. Applying the principles enunciated in the High Court Case: HCAL 60/2007, the Respondent thought that the true issue was not one concerning personal data privacy, but one which some other redress mechanism would be appropriate. For all these reasons, the Respondent decided not to pursue the complaint.

Appellant's Arguments

14. Mr Kong, counsel for the Appellant, outlined the grievance of the Appellant had in the course of dealing with the Bank. It arose from the FX margin trading

about the time between 02:20 am and 02:41 am on 10 August 2011 in the Appellant's account. The basic allegation against the Bank was that the Bank had been grossly negligent if not fraudulent in closing out his short positions involving a total of 64 lots. When the margin level breached 70%, the Bank was entitled to close the positions in his account, this the Appellant did not dispute. What he disputed were in effect two issues. Firstly, he did not believe his margin level breached 70% and at the very least the Bank failed to provide the necessary market information to justify their stop loss orders, were they executed at all. Secondly his two attempts to place buy orders using online banking facilities totalling 20 lots to strengthen his position failed and the failure was allegedly due to the Bank's improperly blocking the system. These attempts were made before the Bank purportedly closed out his positions. After that, the Bank ignored his instructions to buy all lots.

15. By the above background materials, Mr Kong sought to impress on the Board that there were reasonable suspicions on claim of the Bank that it had exercised its right properly to close out the short positions of the Appellant. He stressed that it was within the right of the Appellant, contractual or otherwise to demand the Bank to provide data evidence that it had acted properly as claimed. In so far as the right of the Appellant as a data subject was concerned, the simple and the only argument presented was that the transaction details of his account must be his personal data.

Decision of this Board

16. It is convenient to deal with Item M first. The Bank has upon the intervention of the Respondent had already provided him his personal data which it had supplied to the Respondent in the course of enquiry into this complaint. The Appellant should have no cause for complaint and he did not. As to the other information in item M, the Bank relied on the secrecy provisions of the Banking Ordinance Cap. 155 and the Respondent accepted its position. Neither Mr Kong nor

the Appellant addressed the Board on the merit of this contention of the Bank and its acceptance by the Respondent.

17. Perhaps the Bank and the Respondent misunderstood the ambit of item M, thinking that the Appellant was requesting all information the Bank provided to the Monetary Authority. But it is not so extensive. On closer look at the description of item M, only the information relating to or about the Appellant's FX margin trading account was included. The Bank and the Respondent merely relied on the fact that the Bank was "assisting the Monetary Authority" in the investigation. They were right in this regard, but clearly they had not considered the extent of the duty of the Bank.

18. Section 120 of the Banking Ordinance provides that:

> (1) Except as may be necessary for the exercise of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, every person to whom this subsection applies- (Amended 64 of 1987 s. 26)
>
> (a) shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the exercise of any function under this Ordinance;
> (b) shall not communicate any such matter to any person other than the person to whom such matter relates; and
> (c) shall not suffer or permit any person to have access to any records in the possession, custody or control of any person to whom this subsection applies.

Two flaws in the Bank's contention can be noted. Firstly, the information requested under item M related to the Appellant and as such the information fell within the exception stated in section 120 (1) (b). Secondly, the information

originated from the Bank itself and was not something it came to know or possess or obtained in the course of investigation and therefore if it had chosen to communicate such transaction details as requested to the Appellant it would not have been in breach of the said secrecy provisions under the Ordinance.

19. The next issue to consider is whether decision of the Respondent would have been different if the secrecy provisions were more properly considered. The information or data the Appellant alleged to be his personal data were transaction details, including cut off rates at the time intervals specified that might have an impact in the transaction. As has been said neither the Appellant had explained to the Respondent nor Mr Kong to this Board at the hearing how those data about market movements and the calculation from them could be the personal data of the Appellant when they were not used in the actual transactions. Under these circumstances the Respondent concluded that these were not his personal data for the aforementioned reasons. Therefore even if these items were included in item M, they would not be the personal data of the Appellant and therefore there was no prima facie evidence that the Bank was under a duty to disclose to the Appellant and was not guilty of non-compliance of the Request. The decision of the Respondent would not have been affected.

20. The Appellant sought to establish that the Bank was not acting in good faith and doubted whether the buy orders in closing out his account were properly made, if made at all. To this end he required information on market movement at the time and transactions details. Mr Kong argued it would be easy for it to provide such data and therefore it had no excuse not to supply them. This is beside the point. The Respondent is not concerned with how the Bank should treat its customers fairly in a general sense. His concern and power is restricted by his office. These market information could not have been the personal data until an actual transaction took place in the account of the Appellant. In this regard the Respondent noted that the transaction details with supporting market information at the time of transactions together with margin call percentages etc. calculated from the market information had

been provided to the Appellant. The Bank claimed call percentages were generated by its computer on a real time basis but those requested were not in its database. It is not unreasonable for the Respondent to accept the Bank's claim and in any event he was rightly of the view that these call percentages and detailed calculations by the Bank were not the personal data of the Appellant under the circumstances.

21. About the telephone recordings the Bank provided under various items, the Appellant complained that they were incomplete and some were fabricated. However he failed to elaborate what went missing and what the fabricated part was. The Respondent was right in regarding that this was a serious allegation. He was of the view that there was nothing to suggest that the Bank was withholding information or fabricating it apart from the bald and vague assertion of the Appellant. His conclusion that there was no prima facie evidence that the Bank had failed to comply with the request for the telephone recordings under various items in the Request was justified.

22. In the premises, there was no prima facie evidence that the Bank had failed to comply with the Request. According to the stated policy of the Respondent, he could exercise his discretion not to pursue the complaint any further under these circumstance. The Respondent had another reason. The overall view taken by the Respondent is also correct. The Appellant was clearly attempting to gather evidence to substantiate his case against the Bank the alleged misconduct or mishandling of his margin trading account. Firstly, he doubted that the buying orders in closing out his account were actually made. Secondly he did not believe that the Bank was entitled to close out his account as the critical margin level had not been reached. Thirdly, one may think he wanted to fish out information to show that the closing out action was not taken timely and he himself was blocked by the Bank when he attempted to reduce his short positions online.

23. Section 39(2)(ca) of the Personal Data (Privacy) Ordinance clearly provides that:

> "The Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all circumstances of the case--that the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to the personal data."

The Respondent was of the opinion that the primary subject matter is not about privacy. His opinion was fully justified and he rightly relied on this section as part of the reasons for his decision.

24. For all these reasons, the decision of the Respondent cannot be faulted and the appeal is dismissed.

(signed)
(Yung Yiu-wing)
Deputy Chairman
Administrative Appeals Board