

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 13 of 2011

BETWEEN

LAM SHUK YEE

Appellant

and

THE PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 2 November 2011

Date of handing down Decision with Reasons: 24 November 2011

DECISION

Note: references in this Decision to "AB" are references to the Appeal Bundle referred to in paragraph 7 herein.

THE FACTS

1. On 1st April 2011, the Appellant, Madam Lam Shuk Yee (“Madam Lam”) lodged a complaint against one Mr. Chan Tat Yeung (“Mr. Chan”) with the Respondent, the Privacy Commissioner for Personal Data (“The Commissioner”).

2. Madam Lam and Mr. Chan are residents of Villa Sapphire, 8 Tsing Fat Street, Tuen Mun, New Territories (“The Villa”). At all material times, both of them were also members of the Committee of the Incorporated Owners of the Villa (“The Committee”). Mr. Chan was (and still is) the Chairman of the Committee.

3. On 29th March 2011, during an Owner’s General Meeting of the Villa, and in response to a query raised by a resident as to why there were police vehicles frequently entering the Villa, Mr. Chan read out incident reports compiled by the security personnel of the managers of the Villa. One of these reports dated 17th March 2011 recorded that a Miss Lam residing at 15B Block 1 had made a complaint to the police against another resident of the Villa for using the Villa’s car park for the washing and repair of vehicles, thereby causing a nuisance.

4. Madam Lam stated that she was the only “Miss Lam” residing at 15B, Block 1 of the Villa and that, by reading out the incident report, Mr. Chan had unlawfully disclosed her personal data to all the residents who attended the Owner’s General Meeting, including the person(s) whom she had complained against for causing the nuisance in the Villa’s car park. She further alleges that this disclosure by Mr. Chan was premeditated and actuated by an improper and/or malicious motive so as to cause her embarrassment and to force her out of the Committee. She also claimed that this improper disclosure of her

personal data had put her personal safety and that of her family at risk (see AB, 120-121; 148; 160-161; 170; 199-200).

5. According to Madam Lam, Mr. Chan had obtained the incident reports from the managers of the Villa beforehand and taken them to the meeting even though this matter was not on the agenda. He then “collaborated” with another resident who was present at the said meeting so that the latter would raise a query about the entry of police vehicles to the Villa to which he would then respond by reading out the reports. Further, the proceedings of the meeting were being recorded, but just before the query was raised, Mr. Chan, for no apparent reason, terminated the recording. Madam Lam, however, had her own recording device with her at the time (AB, 161) and a CD containing a recording of the meeting (including the relevant parts in the meeting where the query was raised and the incident report was read out) was presented to the Commissioner on 19th April 2011 (AB, 166-7).

THE APPEAL

6. Having considered Madam Lam’s complaint, the Commissioner decided not to pursue the complaint any further by reason of sub-sections 39(2) (b) and (d) of the Personal Data (Privacy) Ordinance, Cap. 486 (“the Ordinance”). Madam Lam was informed of this decision by a letter from the Commissioner dated 30th May 2011 (AB, 173-175) and she now appeals to this Board against the said decision.

7. At the hearing of this appeal, Madam Lam appeared in person and the Commissioner was represented by counsel, Mr. Jeffrey Lau. Neither party called any

oral evidence. However, a bundle of documents relating to the appeal was submitted for our consideration in the form of an Appeal Bundle (“AB”) which we received as evidence pursuant to section 21(1)(b) of the Administrative Appeal Boards Ordinance, Cap. 442. Both parties made submissions on the various documents contained in the AB.

8. Mr. Chan, the person to be bound by the decision of this Board, was absent. However, we were informed that the Board’s Secretary had duly served him with a notice of hearing of this appeal pursuant to section 16 of the Administrative Appeals Board Ordinance. Furthermore, he was also given an Appeal Bundle and a written reminder of the hearing two weeks ago. In the circumstances, we were satisfied that he had been duly informed of the hearing and had chosen not to appear. The hearing therefore proceeded in his absence.

THE RELEVANT STATUTORY PROVISIONS

9. The following provisions in the Ordinance arise out of and are relevant to this appeal:

Section 2(1), the “definition section”, provides as follows:

"data" (資料) means any representation of information (including an expression of opinion) in any document, and includes a personal identifier

"personal data" (個人資料) means any data-

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and

(c) in a form in which access to or processing of the data is practicable;

"data user" (資料使用者), in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data;

"data protection principle" (保障資料原則) means any of the data protection principles set out in Schedule 1

Section 4 provides: A data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this Ordinance.

Data protection principle (DPP) 3 in Schedule 1 provides as follows:

3. Principle 3-use of personal data

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)

Section 39 (2)(b) and (d) provides:

(2) 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 of the case-

- (b) the act or practice specified in the complaint is trivial;
- (d) any investigation or further investigation is for any other reason unnecessary.

Section 39(3) provides:

(3) Where the Commissioner refuses under this section to carry out or continue an investigation initiated by a complaint, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant-

- (a) of the refusal; and
- (b) of the reasons for the refusal.

THE ISSUES

10. In determining whether or not the Commissioner was in error in refusing to pursue the complaint further, we think that the following issues arise for the decision of the Board, namely, is there prima facie evidence :

- (a) that the person complained against (viz. Mr. Chan) was a “data user” as defined in the Ordinance?
- (b) that if Mr. Chan was a data user, did he divulge “personal data” (as defined) of Madam Lam without her consent in circumstances which constituted a contravention of DPP 3 in Schedule 1 of the Ordinance? and that,
- (c) if there is such prima facie evidence as described above, was the Commissioner nevertheless justified in refusing to carry out (or continue) an investigation on the grounds that “the act or practice specified in the complaint is trivial or that any investigation or further investigation is for any other reason unnecessary”?

THE BOARD'S DECISION ON THE ISSUES

11. Counsel for the Commissioner accepts that Mr. Chan was a data user at the material time. We would respectfully agree. The Committee performs the duties and exercises all the powers of management of the Incorporated Owners of the Villa pursuant to section 29 of the Building Management Ordinance, Cap. 344. The incident reports contained data concerning the occurrence of events within the Villa. As Chairman of the Committee, Mr. Chan, either alone, or jointly or in common with the other members of the Committee, had control over the collection, holding, processing and/or use of the data in the incident reports. Indeed, Mr. Chan in his letter dated 21st July 2011 admits that it was on his orders that the reports were compiled by the managers (AB, 129).

12. Mr. Lau, however, contends on behalf of the Commissioner that the data read out to the Owner's General Meeting was not "personal data". He submits that the data did not contain what he described as a "unique identifier". His argument is that, despite Madam Lam being the only "Miss Lam" residing at 15B Block 1 of the Villa, this fact does not rule out the possibility that there might be visitors to the said unit, whose surname is also Lam, making a complaint about the nuisance caused by another resident of the Villa. With respect, we reject this submission. In our view, by providing the surname, gender and address of Madam Lam to the meeting, Mr. Chan had made it practicable for the identity of Madam Lam to be directly or indirectly ascertained by any person attending the said meeting, especially in the light of the fact that it is not disputed that Madam Lam was the only "Miss Lam" residing at 15B Block 1 of the Villa. It must

be appreciated that the persons attending the meeting were Madam Lam's fellow residents of the Villa, many of whom were probably acquainted with her and who would know that she lives in 15B Block 1. A person may be "practically identified" even if his/her full name or identity card number is not disclosed. For instance, a "Wong Sir" may be practically identified in a girls' school if he is the only male teacher there with the surname Wong. Besides, we find it is quite fanciful to suggest that a mere visitor to that address would take the trouble to complain about a nuisance being caused in the Villa, not to mention the question of whether such visitor would even have the locus to do so.

13. Mr. Lau accepts (and we agree) that the data in the incident reports was in a form in which access to or processing of the data was practicable. At paragraph 18 of the Commissioner's statement in relation to his decision (AB, 138), the Commissioner had submitted that "the verbal mentioning of the data is not in a form in which access to or processing of the data is practicable". Mr. Lau now informs us that this line of argument is no longer pursued by the Commissioner and we shall therefore say nothing more about that.

14. Accordingly, we rule that the data divulged by Mr. Chan was indeed "personal data" within the meaning of the Ordinance.

15. The Commissioner's "fall back" position is that, even if Mr. Chan *did* divulge Madam Lam's personal data, such act was not in contravention of DPP 3 of Schedule 1 of the Ordinance. Mr. Lau contends that, before the Commissioner is bound to investigate the complaint, the burden is on Madam Lam to prove to the Commissioner that Mr. Chan's disclosure of her personal data was neither for a purpose for which the data was to be used

at the time of the collection of the data nor one directly related to that purpose. Mr. Lau submits that she had failed to discharge this burden. For our part, we doubt if such a heavy burden should be imposed on a complainant. Mr. Lau placed heavy reliance on a decision of this Board in Lau Kai Ming v Privacy Commissioner For Personal Data, AAB No. 32/2004, para. 29 of which contains this passage:

“...If there is no prima facie evidence of contravention of the Ordinance by the complained practice or act, the Privacy Commissioner can exercise his discretion to refuse investigation under section 39. The Appellant should bear in mind that complaining of a contravention of the Ordinance by others is equivalent to accusation of committing an offence, which is a serious accusation. Therefore, the complaint should have basis, including evidence and justifications. The Privacy Commissioner has to consider if there is any basis for the complaint, i.e. prima facie evidence and justifications, before deciding to investigate...”

16. We should point out that the above passage appears in the context of a case where the complainant was unable to provide to the Commissioner any information regarding the identity of the data user who allegedly disclosed his personal data to others. It was held that the “complaint” was not even one which complied with the criteria as stipulated in section 37 of the Ordinance which required the identity of the data user to be specified in the complaint. The Board further held that the disclosure of the relevant data was exempted from the operation of DPP 3 by section 58(1) of the Ordinance. The case is thus clearly distinguishable from the present one. In any event, we think that this case does no more than to say that all a complainant needs to do is to show that there is a prima facie case that a requirement (or requirements) of the Ordinance might have been contravened by a named person or persons. It does not impose a burden of proof on a complainant to prove this fact to the satisfaction of the Commissioner before the

Commissioner may exercise the investigatory powers conferred upon him by section 38 of the Ordinance. The legislature clearly intends to facilitate complaints being properly formulated and proceeded with. Indeed, section 37(4) provides that it is the duty of the Commissioner to provide appropriate assistance to an individual who wishes to make a complaint and requires assistance to formulate the complaint.

17. With that in mind, we proceeded to consider the Commissioner's "fall back" position as described above. We asked counsel what the Commissioner perceives as the purpose for which the data was to be used at the time it was collected. Mr. Lau informed us that the Commissioner had not taken any steps to ascertain what that purpose was and hence has no idea. However, he submits that it may be inferred that the collection of the data in the incident reports must have been for a purpose related to the management of the Villa. Although the matter concerning the entry of police vehicles into the Villa was not on the agenda of the Owner's Meeting, counsel submits that the Chairman was under a duty to answer questions from residents concerning the management of the Villa, and that, since the Owner's Meeting must have been held to discuss matters relating to the management of the Villa, his answering of such questions and the disclosure of the data must have been for the purpose for which the data was to be used at the time of its collection (or a purpose directly related thereto).

18. Assuming that the purpose of collection of the data was as Mr. Lau invites us to infer it was, at first blush, it seemed to us that this was quite powerful argument which we were bound to accept. Upon further and more careful reflection, however, we have decided otherwise. In our view, Mr. Chan's act went beyond what was reasonably required for the effective/efficient management of the Villa. In fulfilling his duty as

Chairman of the Committee to answer a query from one of the residents concerning the entry of police vehicles into the Villa, he could have simply stated that a resident of the Villa had made a complaint to the police about a nuisance caused by another resident, without disclosing any of Madam Lam's personal data. We can test the matter by asking this question: If Mr. Chan had *not* disclosed any of Madam Lam's personal data would it have affected the management of the Villa in any way? We think not.

19. We also find that the Commissioner erred in (1) failing to recognize the significance of the alleged improper/malicious motive on the part of Mr. Chan in disclosing Madam Lam's personal data at the meeting and (2) failing to investigate the same. The significance is two-fold:

- (a) First, if there *was* in fact such a motive then it would be quite clear that the disclosure of Madam Lam's personal data would *not* be related the purpose for which the said data was collected or any purpose directly related thereto. It would have been for an improper purpose. Ergo, it follows that there *must* have been a blatant breach of DDP 3 of Schedule 1 of the Ordinance. At paragraph 21 of the Commissioner's statement relating to his decision (AB, 139), the Commissioner stated as follows: *"Taking the Appellant's case to its highest and presuming the existence of such ill motive (which is not admitted), the Respondent submits the mere existence of any ill motive by Mr. Chan (if any) does not necessarily mean there must be a breach of DPP 3"*. Before us, however, Mr. Lau concedes that if Mr. Chan had disclosed Madam Lam's data to the meeting with an improper or malicious motive/purpose, then this would

certainly have constituted a breach of DPP 3. This concession, in our view, is rightly and fairly made.

(b) The second point of significance is that, if there really *was* such a motive, it would be quite possible that Mr. Chan might repeat such disclosures unless restrained from doing so by an enforcement notice.

20. The matter of whether or not there was an ill motive on the part of Mr. Chan in disclosing Madam Lam's personal data is, if we may most respectfully say so, a matter which cries out for investigation.

21. Mr. Lau submits, however, that the Commissioner was not bound to investigate a bare allegation by Madam Lam of improper or malicious motive on the part of Mr. Chan. We would have thought that it was the Commissioner's duty to investigate any matter which comes to his attention which indicates that a DPP might have been contravened. However, even if we are wrong in this respect, we think that there is more than just a bare allegation in this case. It is an undisputed fact that, although the matter of police vehicles entering the Villa was not on the agenda, Mr. Chan took with him the incident reports to the Owner's General Meeting, having obtained them beforehand from the managers. His explanation (at AB, 129) was that he had received owners' enquiries before the meeting about the presence of the police vehicles in the Villa and thus had to be prepared to answer these enquiries at the meeting. Madam Lam's response (AB, 199) was that the relevant incidents occurred about two weeks before the meeting and thus he would have had more than enough time to deal with the enquiries *before* the meeting. There is also Madam Lam's allegation that Mr. Chan terminated the recording of the meeting's proceedings just

before the query relating to the presence of the police vehicles was raised. The Commissioner never enquired whether, and if so why, Mr. Chan did this. Mr. Chan did not deal with this matter in his letter dated July 21st 2011 (AB, 129), despite having been sent (and presumably having read) Madam Lam's Notice of Appeal and enclosures (AB, 115-123), which contained, inter alia, an account of this incident (at AB, 120).

22. In this context, we have an observation to make regarding the respective roles of this Board and that of the Commissioner. It is this: Whilst Madam Lam's allegation of improper or malicious motive on the part of Mr. Chan is no doubt useful and relevant as a factual background to this appeal, it is not for this Board to attempt to resolve or make any finding on Mr. Chan's motives in disclosing Madam Lam's personal data. The Board's task is to determine whether or not the Commissioner's decision not to proceed any further with regard to the complaint (given the factual background as described aforesaid) was correct. It is no part of the Board's function to determine and resolve any dispute which may exist between Madam Lam and Mr. Chan nor to make any ruling/finding regarding whether or not Mr. Chan's act of disclosure of the personal data of Madam Lam was premeditated and/or actuated by a malicious motive. It is for the Commissioner to investigate the matter and to decide what should be done in the light of his investigations.

23. Mr. Lau further submits to us that it is not part of the Commissioner's business to be involved in what was essentially a private dispute between two individuals, as otherwise he might be in danger of being used by one against the other. We respectfully disagree. There is no such restriction on the Commissioner's powers. Other statutory bodies like, for instance, the Preliminary Investigation Committees of the Medical and Dental Councils of Hong Kong frequently investigate cases involving alleged medical

malpractices on the part of doctors and dentists against a background where it is abundantly clear that an aggrieved or dissatisfied patient is about to launch a civil suit against his physician for compensation. If these statutory bodies have no qualms about doing so, then the Commissioner should not either. The fact is there is nothing wrong with a complainant seeking compensation. Indeed, the Ordinance specifically provides for it in section 66. The important thing is whether the complaint is made in good faith and motivated by a concern on the part of the complainant for his/her privacy, and not because of a personal feud with the person complained against (see para. 8(c) of the Commissioner's Complaint Handling Policy). As far as the present case is concerned, there is no suggestion, nor is there any evidence which shows, that Madam Lam's complaint was made otherwise than in good faith.

24. We therefore reject Mr. Lau's submission that the Commissioner was correct in deciding not to investigate Madam Lam's allegation that Mr. Chan disclosed her personal data with an improper motive and for an improper purpose.

25. In conclusion, we find that there is prima facie evidence which indicates that a data user (Mr. Chan) had disclosed personal data of an individual (Madam Lam) without her consent and under circumstances which constitute a contravention of DPP 3 of Schedule 1 of the Ordinance. We also find that Madam Lam's claim of an ill motive on Mr. Chan's part in disclosing that data was one which ought to have been investigated. It is now our task to determine whether, despite this conclusion and finding, the Commissioner was nevertheless justified in refusing to carry out or continue an investigation pursuant to section 39(2)(b) and (d) of the Ordinance.

26. With respect to the Commissioner, we do not think the matter is trivial. Madam Lam was (and still is) understandably embarrassed and distressed by the disclosure of her personal data, especially when this was done in a general meeting of her fellow residents attended by more than 30 people (AB, 119), including the person(s) against whom she lodged a complaint to the police. Even if the Commissioner is justified in thinking that neither her personal safety nor that of her family is thereby put at risk, we think it is common sense that a disclosure of this nature at a general meeting would not endear her to at least some of her fellow residents.

27. At the hearing of this appeal, Madam Lam alluded to the fact she has since resigned from the Committee under pressure and that her family car had recently been vandalized. We shall refrain from speculating on who did this act and why. This is a police matter and not one which should concern us. Suffice it to say that, as indicated earlier, we do not find this matter to be trivial, nor can we see any other reason why it is rendered unnecessary for there to be an investigation (or further investigation) by the Commissioner. In particular, we disagree with the Commissioner's view that the damage or harm caused to her is so insignificant that her case ought to be ignored. Indeed, if Mr. Chan *had* improperly disclosed Madam Lam's personal data, brushing her complaint aside would have the effect of sending out a message to Mr. Chan that he can continue to do so with impunity.

28. We have given due consideration to paragraph 8 of the Commissioner's Complaint Handling Policy (the Policy). We are satisfied that Madam Lam's complaint was made in good faith and out of genuine concern about her privacy being infringed. There is no suggestion by the Commissioner, nor any evidence, that the complaint was

vexatious or that mediation through him would benefit the parties nor is there any evidence or suggestion that the parties should be able to resolve their differences without the intervention of the Commissioner. We have already held that the data protection principles are engaged in this case and there is prima facie evidence that at least one of them (DPP 3) has been breached. Neither of sub-paragraphs 8(g) nor (h) of the Policy are applicable to the present case. The Commissioner seems to have put his case that he had correctly exercised his decision not to proceed solely on the basis of sub-paragraph 8(a) of the Policy, namely that, in his view, the case is trivial and that the harm (if any) done to Madam Lam appears to be minimal. For the reasons stated above, we respectfully disagree.

29. Before we proceed to state the outcome of this appeal and the order we propose to make as a result thereof, there is one last matter we should, perhaps for the sake of completeness, mention. In her Notice of Appeal, Madam Lam mentioned as one of her grounds of appeal an allegation that the Commissioner was in breach of section 39(3) of the Ordinance in that he failed to inform her of his decision not to pursue the complaint any further within the 45 day time limit as provided for by that sub-section (AB, 119). The Ordinance does not go on to state what would happen if the Commissioner fails to inform a complainant within the prescribed time limit. In Yuen Man Tak v Privacy Commissioner for Personal Data, AA No. 35/2003, it was held (and we agree) that such failure does not render the Commissioner's decision void.

30. It may well be that if a complainant becomes aware that the Commissioner has reached a decision not to pursue his complaint and has failed to inform the complainant of his reasons for the decision for more than 45 days after receipt of his complaint, the

complainant would then be entitled to go to court for an order of mandamus to compel the Commissioner to do so. In the present case, however, even assuming that the Commissioner was late in fulfilling his statutory duty under section 39(3), the fact remains that he has now already given his reasoned decision. This was done by a letter dated 30th May 2011 (AB, 116-8). That being the case, we think the question of whether or not the Commissioner has breached section 39(3) is now of little or no consequence. It is therefore unnecessary for this Board to determine this issue and we would accordingly refrain from doing so.

THE BOARD'S CONCLUSION AND ORDER

31. It follows from the foregoing that this appeal should be allowed. The present position is that we have ruled that Mr. Chan, being a data user, has collected and divulged personal data of Madam Lam to others. The only remaining question is whether or not he did so in contravention of a DPP and hence this question is one which the Commissioner should further investigate. First of all, he should investigate what the purpose of the collection of the data was. If the outcome of the investigation is, as we have assumed, that the collection of the data was for the management of the Villa, then the Commissioner should abide by the Board's ruling (see paragraph 18 herein) that the disclosure of the data went beyond the purpose for which the data was collected (and any purpose directly related thereto) and find that DPP 3 has indeed been contravened. However, in the event that his investigations reveal some *other* purpose, then he should proceed to consider whether that purpose or the manner of collection of the data was proper and whether the disclosure of the data was (or was not) for that purpose (or any

purpose directly related thereto). He should then consider if any DPP had been contravened.

32. As indicated above, we are also of the view that Madam Lam's claim that the disclosure of her personal data was premeditated and actuated by a malicious/ill motive should be investigated. If such investigations reveal that Madam Lam's claim *is* substantiated, then we have no doubt that the Commissioner would (indeed, *must*) find, as we have found (and as the Commissioner has conceded) at paragraph 19(a) herein, that there was indeed a contravention of DPP 3 by Mr. Chan. Under such circumstances, the disclosure of Madam Lam's personal data would *certainly* be for an improper purpose and hence be in breach of DPP 3.

33. Section 21(1)(j) of the Ordinance provides that, for the purposes of an appeal, the Board may, subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit. Section 21(2) provides that the Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the respondent with the Secretary under section 11(2)(a)(ii), if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy. Section 21(3) then provides that the Board, on the determination of any appeal, may order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order.

34. The Appellant was given a copy of the Commissioner's Complaint Handling Policy on 4th April 2011 when receipt of her complaint was acknowledged by the Commissioner. We are satisfied that she was, or could reasonably have been expected to be aware, of the policy. Having carefully considered the Commissioner's Complaint Handling Policy and in particular paragraphs 8 and 9 (see paragraphs 26-28 herein), we have decided, in the exercise of the Board's power/discretion under section 21(3), to order as follows:

That the case being the subject of this appeal, as determined by the Board hereinabove, be sent back to the Commissioner for him to consider:

- (a) whether or not Mr. Chan was in breach of DPP 3 in Schedule 1 of the Ordinance or any other DPP; and
- (b) without prejudice to the generality of (a) above, exercising his powers of investigation in respect of:
 - (i) the purpose for which the data was collected (and whether the said purpose was proper); and
 - (ii) whether or not there was any premeditation and ill/malicious motive on the part of Mr. Chan when he disclosed the said data.
- (c) In the event that a breach or breaches of a DPP is/are found, what appropriate measures ought to be taken to prevent its/their recurrence.

COSTS

35. Finally, we turn to the question of costs. 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.

36. At the end of the hearing of this appeal we asked both parties whether, in the event they win this appeal, they would have anything to say in respect of costs. Madam Lam indicated she had no submissions to make on the matter of costs. Mr. Lau, very fairly, said that the Commissioner would not seek costs against Madam Lam even if he wins the appeal. Under these circumstances, we have decided to make no order as to costs.



(Mr. K. Y. Thong)
Deputy Chairman
Administrative Appeals Board