

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 25 OF 2009

BETWEEN

AMERICAN INTERNATIONAL ASSURANCE Appellant
COMPANY (BERMUDA) LIMITED

and

PRIVACY COMMISSIONER Respondent
FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 29 January 2010

Date of handing down Written Decision with Reasons: 12 February 2010

DECISION

1. This is an appeal by American International Assurance Company (Bermuda) Limited ("the Appellant") from the decision of the Privacy Commissioner for Personal Data ("the Commissioner") who issued an Enforcement Notice on 29th July 2009 requesting the Appellant to take

certain action pursuant to Section 50 of the Personal Data (Privacy) Ordinance (Cap 486).

Facts of the Case

2. The facts of the case are relatively simple. The Commissioner received a complaint from Ms. Tse Tsui Wah (“the Complainant”) that the agents of the Appellant had been making cold calls which she did not want to receive from the Appellant who had undertaken to put her name on an “opt-out” list. The Commissioner carried out an investigation resulting in the issue of the Enforcement Notice.

3. The essential events of the case could be briefly set out in the following chronology:

24 th October 2005	The Appellant informed the Commissioner that the Complainant’s name was put on the opt-out list.
16 th January 2007	Mr. Kenny Wong Hon Lam, a career representative of the Appellant, telephoned the Complainant and offered her insurance restructuring services.
22 nd January 2007	The Complainant lodged a complaint with the Commissioner.
8 th February 2007	Mr. Wong Sheung Ming, another career representative of the Appellant, telephoned the Complainant also offering certain insurance

	restructuring services.
23 rd February 2007	The Complainant informed the Commissioner of the telephone call.
August 2007 to September 2007	Certain measures were taken by the Appellant to prevent recurrence of such matter.
19 th September 2007	The Complainant was informed of the Appellant's measures taken and she seemed to be satisfied with the result.
17 th October 2007	Lee Kam Ho, another career representative of the Appellant, contacted the Complainant on phone for direct marketing.
17 th October 2007	The Commissioner was informed of the call and was requested to make further investigation.
29 th July 2009	After an investigation for about two years since the last event, the Deputy Commissioner released the investigation report and issued the Enforcement Notice.

Issues of the Appeal

4. For the purpose of this appeal it is common ground that the three career representatives were in breach of Data Protection Principle 3 contained in Schedule 1 to the Ordinance in at least two ways:

(a) Ignoring the warning on the opt-out list that the Appellant's

staff and agents must not approach any person on the list by mailing advertising materials or performing cold calls; and

(b) Ignoring the restrictive clause imposed by the Website containing the phone directory of the Hong Kong Government.

5. The issues before this Board are:
 - A. Whether the Appellant is liable for the breach under the Ordinance; and
 - B. Whether the Enforcement Notice is valid.

Liability under Ordinance

6. We agree with the view of Mr. Robin McLeish, counsel for the Appellant, how the principal could incur liability under the Ordinance is quite different from that of common law but we come to different conclusion. Section 65(2) clearly provides as follows:

“(2) Any act done or practice engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Ordinance as done or engaged in by that other person as well as by him.”

7. For the purpose of this Appeal Mr. McLeish does not deny that

the three representatives are actual agents of the Appellant. As it has also been conceded that the agents were in breach of Principle 3, we are of the view that the wordings of Section 65(2) are very clear that the principal i.e. the Appellant is liable under the Ordinance.

8. It appears to us that that section has a strong flavor of strict liability. That is not unreasonable -- to ensure that the principal will find some ways to procure observance of the Data Protection Principles.

Validity of Enforcement Notice

9. The Enforcement Notice was issued pursuant to Section 50(1) of the Ordinance which states:

“(1) Where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user –

- (a) is contravening a requirement under this Ordinance; or
- (b) has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated,

then the Commissioner may serve on the relevant data user a notice in writing –

- (i) stating that he is of that opinion;
- (ii) specifying the requirement as to which he is of that opinion and the reasons why he is of that opinion;

- (iii) directing the data user to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period specified in subsection (7) within which an appeal against the notice may be made) as is specified in the notice; and
- (iv) accompanied by a copy of this section."

10. The Deputy Privacy Commissioner considers that the remedial measures taken by the Appellant in August and September 2007 were not sufficient in that the measures have not taken into account of a situation where the public domain does not expressly prohibit the use of the personal data for direct marketing but has expressly provided the purpose of disclosure of the data. In paragraph 26 of the Investigation Report, the Deputy Commissioner states: "Even if the public domain does not explicitly prohibit the use for direct marketing purpose this does not mean that the merchants can use the personal data in such particular manner (i.e. direct marketing)." (words within the brackets provided)

11. For the aforesaid reason, the Deputy Privacy Commissioner issued the Enforcement Notice, the purpose of which is to cater for the aforesaid situation.

12. We have reservation whether we have to deal with such situation. The contravention that has been expressly conceded by the Appellant is a

breach of Principle 3 in the two ways mentioned in paragraph 4 of this Decision i.e. ignoring the warning on the opt-out list and ignoring the restrictive clause. There is no evidence to show that the breach arises from the situation mentioned in paragraph 10 above. We are of the view that the Enforcement Notice should be limited to those situations concerning the two matters of contravention mentioned in paragraph 4 and to find some ways to rectify those situations to prevent further recurrence of similar incidents. Going far beyond that limitation renders the Enforcement Notice not valid.

13. The Board has considered the measures mentioned by Ms Josephine Ho Kit Hung, a Senior Manager & Legal Counsel of Law Department of the Appellant, in Paragraph 7 of her Affirmation dated 13th January 2010 and finds that they are insufficient for a different reason and may not be effective.

14. The Board thinks that the measures taken were not sufficient because the staff of the same company did not accidentally commit the breach once, but three times. It is our view that the Appellant should give a clear strong warning embedded in a manual or a code of practice to all members of the staff to make them realize that any breach will have serious consequences e.g. a threat for summary dismissal. The measures must be tough enough to make the staff think twice before they use any personal data found in the public domain.

15. We accept the submission made by Mr. McLeish that the Enforcement Notice may have criminal liability consequences. The Commissioner should be very careful in issuing such Notice.

16. We also accept the submission that it is unfair to put the Appellant in a competitive disadvantage. We find that the situation mentioned in the Investigation Report quoted in paragraph 10 above concerns the whole industry.

17. Our suggestion is that the Commissioner should conduct a general consultation including the insurance profession, other stakeholders as well as the public on what measures should be taken in respect of the different situations including the one that described in paragraph 10 above and whether such measures should be translated into a code of practice under section 12 of the Ordinance.

18. The public should be educated and be made aware of their rights under the different scenarios. It is wrong to wait for a case to come and use it as a precedent to warn all persons in the trade.

Conclusion

19. It is our finding that the Appellant is liable for the breach because of the vicarious liability as defined by Section 65(2) of the Ordinance.

20. For the reason that the Enforcement Notice does not deal with the contravention by the Appellant and goes far beyond rectification of the contravention we set aside the Enforcement Notice and to that extent the appeal is allowed. We do not intend to amend the Enforcement Notice. From the correspondence between the parties we find that the Appellant has been very cooperative and we are sure that the Appellant will take our advice and act accordingly.



(Mr Christopher Chan Cheuk, BBS)

Chairman

Administrative Appeals Board