

Background

3. The conduct of the Bank giving rise to the complaint was as follows.
4. By a marketing agreement dated 18 December 2003 (“**1st Cross-Marketing Agreement**”) entered with CIGNA Worldwide Insurance Company (“**CIGNA**”), the Bank agreed to provide certain data of customers to CIGNA. By that agreement the Bank intended to assist to promote from time to time insurance products that are provided by CIGNA to all its existing credit card customers and new credit card customers who joined the Bank after the commencement date of the agreement. The Bank would send promotional materials for the products of CIGNA for offer to the Bank’s customers. It was agreed that all promotional products should bear the Bank’s logo and/or reference to the Bank. This Agreement was disclosed during the hearing of the appeal and requested by the Board.
5. Ms Wong was a customer of the Bank. In January 2005 she submitted an application for a “Walker Shop Visa” credit card which was approved by the Bank. The Bank subsequently issued her a credit card.
6. The application form (“**Application Form**”) was signed on 25 January 2005 by Ms Wong, agreeing to the terms set out in the form. There was a “Notice to Customers relating to the Personal Data (Privacy) Ordinance” (“**Notice**”) accompanying the application form.
7. The Bank at the end of February 2005 when sending Ms Wong the credit card enclosed a copy of a document entitled “Wing Lung Credit Card Cardholder Agreement” (“**Agreement**”).
8. In a monthly statement dated 14 March 2005 issued to Ms Wong, there were statements reminding Ms Wong that the Bank may in future send her promotional materials on other products or services. Ms Wong was asked to inform the Bank should she decide not to receive the said materials.
9. On 29 June 2005 the Bank and CIGNA entered into an agreement known as “Cross-Marketing Agreement” (“**2nd Cross-Marketing Agreement**”). Only an extract of the agreement was disclosed to this Board. According to that agreement, the Bank would provide customer information to CIGNA. CIGNA would represent the Bank to promote the insurance products of CIGNA over the telephone.
10. In November 2007, a Mr Alex Liu telephoned Ms Wong and introduced himself as a representative of the Bank. Ms Wong agreed to

purchase an insurance product which Mr Liu was promoting and she provided him with her identity card number and birth date as requested. She was led to believe that she had purchased an insurance product from the Bank.

11. In December 2007, Ms Wong received an insurance policy from CIGNA. In January 2008, her credit card statement showed she was debited with two transactions both dated 19 December 2007 and \$680 each. Only then did she discover that her insurance policy was with CIGNA. Mr Alex Liu was a representative of CIGNA, not of the Bank. The Bank never disclosed to her that CIGNA would contact her to promote insurance products as if they were the Bank's. She complained to the Commissioner who subsequently issued an enforcement notice.

Data Protection provisions

12. The relevant provisions of the Ordinance that concern us are Principle 3 of Schedule 1 of the Ordinance :

"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)."

13. Section 2 of the Ordinance provides that

"use" (使用), in relation to personal data, includes disclose or transfer the data"

The Appeal

14. The Bank submitted that the Commissioner had erred both in fact and in law.

The Application Form

15. The first observation of this document is that the print is so small that no one could reasonably be expected to be able to read the content without the aid of some form of magnifying glass. As will be referred below, the printed contents of paragraphs 4 and 5 relied upon by the Bank appear to be a prominent example. One might ask this simple question: what prescribed consent could have been obtained from Ms Wong if she could not even read the document properly?

16. Whilst this Board does not wish to encourage people to sign a document without reading the content and only to rely later upon a non est factum plea, the very design of this application form in our view simply discouraged people from reading the fine print. It is also worthwhile to mention in §24.1 (b) of the Code of Banking Practice issued by the Hong Kong Association of Banks (Hong Kong Banking Code). It says credit card issuing banks are advised to print their terms and conditions in a size that is easy and clear to read.

17. With this preliminary observation we go into the provisions.

18. The Bank relied upon the following small print provisions extracted from the Agreement :

“4. 客戶資料可能會用於以下各方面：(i) 向客戶提供服務和信貸便利的日常運作；[...] (vii) 為客戶研究、設計財務服務或有關產品；(viii) 作財務服務或有關產品的宣傳；[...]及(xv) 與上述有關的其他用途。

5. 本集團會把客戶的資料保密，但可能提供與以下各方面作為第 4 段所列示的用途：(i) 任何代理人、承包商、索償調查公司、或在行政、電訊、電腦、支付或證券結算或其他與本集團業務運作上提供有關服務的第三者；[...] (vii) 本集團的任何保險公司或代理人、經紀、商戶或其他商業夥伴 [...]

[...]

11. 任何人士如欲索取資料或改正資料，或欲知道本集團對資料的政策及實際上如何運用，及持有其本人那些資料，請向下列人士提出：資料保護主任 永隆銀行有限公司 香港中環德輔道中 45 號 電話：(852) 2826 8333 傳真：(852) 2810 0592

[...]

13. 中英文本如有任何歧異之處，皆以英文本為準。”

19. In English, these provisions read :

“4. The purposes for which data relating to a customer may be used are as follows : ... (vii) researching, designing financial services or related products for customers’ use (viii) marketing services or products of the Group and/or selected companies ; (xv) purposes relating thereto.

5. Data held by the Group relating to a customer will be kept confidential but the Group may provide such information to the following parties for the purposes set out in paragraph 4 :-

(i) any agent, contractor, claim adjuster or third party service provider who provides administrative, telecommunications, computer, payment or securities clearing or other services to the Group in connection with the operation of its business; ... (vii) any insurance company or agent, broker, merchant or other business partners of the Group ...

...

11. The person to whom requests for access to data or correction of data or for information regarding policies and practices and kinds of data held are to be addressed as follows:-

The Data Protection Officer

Wing Lung Bank Ltd

45 Des Voeux Road Central Hong Kong

Tel : (852) 2826 8333 Fax (852) 2810 0592

...

13. In case of discrepancies between the English and Chinese versions, the English version shall apply and prevail.”

20. The Bank submitted that the Commissioner had incorrectly understood the Notice associated with the Application and decided that the information would only be provided to companies within the group, but not

insurance companies outside the group. Having read the terms and conditions in the Application Form, the Notice (and the Agreement and the subsequently monthly statement), Ms Wong should have had reasonable expectation that her personal data would be transferred to third parties. *Tam Heung Man Mandy v Hong Kong Institute of Certified Public Accountants* [2007] 5 HKC 1 at pp.30-3 was relied upon.

21. The Bank said Clause 5(vii) of the Notice specifically refers to “*any insurance company or agent, broker, merchant or other business partner of the Group*”. This reference could mean, so it was argued, companies *outside* the group of the Wing Lung Bank or its business partner.

22. However, we think that the context and circumstances of the Notice must be clearly understood. The credit card in the present case was issued to Ms Wong as a consumer and not to a company or an individual in the context of negotiating commercial contract where greater care is expected. This is particularly relevant to our preliminary observation that the prints were so small that it discouraged applicants from reading the contents.

23. We believe this distinction between consumer and business applicants may first be drawn as the Ordinance has its long title that it is “to protect the privacy of individuals in relation to personal data”. Under Section 2 of the Ordinance “personal data” (個人資料) means any data relating directly or indirectly to a living individual.

24. Further, we are of the view that if the data user had the intention of providing the personal data to a third party, it must be clearly stated in a legible manner. Small prints are of little if any use for important terms that would bind a consumer customer. The provisions sought to be relied upon are clauses selected from documents in which the print had to be enlarged for submission purpose. This further proves the point that the consumer would have had difficulties in reading the terms in fine print.

25. Furthermore, the problem with the small prints in the present case appears to be this. First of all the customer has to go to Clause 5 which says “*Data held by the Group relating to a customer will be kept confidential but the Group may provide such information to the following parties for the purposes set out in paragraph 4 ... (vii) ...*”.

26. The customer then has to go to Clause 4 which says that “The purposes for which data relating to a customer may be used are as follows”, and then sub-clause (viii) to find “*marketing services or products of the Group and/or selected companies*”.

27. One does not expect consumer customers to go from one clause to another in a small print document to find for themselves what was intended in relation to their personal data. This is not a reasonable expectation of what a consumer should do and must do. They are quite entitled to be drawn specific attention to the fact of being approached by other business companies. Personal particulars set out on an identity card form part of the “privacy” of a citizen and are protected by Article 39 of the Basic Law, Article 17 of the ICCPR and Article 14 of the Bills of Rights. An express waiver of such rights should therefore be sought before business promotion from third party companies could be made.

28. *Tam Heung Man* was a case where the Applicant (Ms Tam, legislative councilor representing the accountancy functional constituency) applied for judicial review of the decision of the Hong Kong Institute of Certified Public Accountants in refusing to distribute her newsletter. However, the ground that this would infringe Data Principle 3 was not relied upon when the decision was made. Saunders J when deciding on the purpose made it clear :

“184. ... that freedom of speech, the role of a legislator, the importance of the ability of a legislator to communicate with electors, and the unique situation of the functional constituencies in Hong Kong, means there is a further purpose of the register when the [Legislative Council Ordinance] and [Professional Accountants Ordinance] are read together. That is that the register may be used to enable elected representatives of the accountancy functional constituency to communicate with electors and potential electors. Of course it might only be used in such a way as will not offend other Data Protection Principles”.

29. We do not think *Tam Heung Man* which concerns both public interests and constitutional principles considerations, would assist the Bank in its arguments.

30. We also draw comfort from Principle 1(3)(b) of the Ordinance which says all practicable steps shall be taken to ensure that a data subject is, amongst other things, explicitly informed, on or before collecting the data, of the purpose (in general or specific terms) for which the data are to be used and the classes of persons to whom the data may be transferred.

31. On the evidence that is before us, it is clear the Bank has not taken any sufficient step to make sure the terms of the declaration and paragraphs

4 & 5 were brought to the attention of Ms Wong at the time she filled in the form.

32. We believe that express consent should be given, as is normally the case, by for example inviting the customer to tick a box specifying whether the customer would agree to the possibility of using personal data for promotion by third party business.

Relevant time

33. The Bank then submitted that on a true construction of Data Principle 3, the conduct of the Bank did not constitute a breach of that principle.

34. The argument runs like this. Data Principle 3 states that “*Personal Data shall not, without the 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)*”.

35. The Bank says “*at the time of collection of the data*” only appears under (a) and not (b), and therefore not suitable for application under situation (b). Therefore Principle 3 should be understood to mean :

- (a) the *original* purpose at the time of collection of the data, and
- (b) the purpose in future as derived from the *original* purpose.

36. *Shi Tao v Privacy Commissioner for Personal Data* [2008] 1 HKC 287 (297C) was relied upon.

37. In *Shi Tao*, the question was whether the particular use of the personal data (ie disclosure to the Chinese authorities personal data of a data subject leading to his arrest and conviction in China) should be regarded as a use for a purpose consistent with the purpose of collection under DPP3, in order to determine whether there was prescribed consent from the data subject. See §96 *Shi Tao*. This question focused on the purpose at the time of provision of personal data and does not assist in the interpretation of Data Principle 3 in the present case.

38. We found the Bank’s argument of “extended” purpose difficult to accept. Principle 3(b) clearly refers to any “extended” purpose must be directly related to the original purpose. Promotion by a different service provider namely CIGNA was not the original purpose and was not a purpose

directly related to the original purpose of collecting personal data from Ms Wong.

The Agreement

39. The Bank relied upon the following provisions extracted from the Agreement :

“Summary of Major Terms & Conditions of Wing Lung Credit Cardholder Agreement

永隆銀行有限公司(本行)樂意應閣下要求提供一份永隆銀行信用咭持咭人合約(持咭人合約)全文予閣下。如有任何關於持咭人合約條款的疑問,請致電本行熱線 2928 6668 查詢。

以下為部份持咭人合約條款僅供閣下參考,一切條款概以持咭人合約全文為準,請詳細參閱。下列括弧內的條款乃指持咭人合約條款。[...]

。 。 。

Wing Lung Bank Limited (“Bank”) is pleased to provide you with a full copy of the Wing Lung Credit Card Cardholder Agreement (Cardholder Agreement) upon your request. If you have any question on the terms and conditions of the Cardholder Agreement, please call our hotline at 2928 6668.

For your information, certain terms and conditions of the Cardholder Agreement are highlighted below. Please refer to the full terms and conditions of the Cardholder Agreement which shall prevail. References to Clauses in brackets below are to the Clauses of the Cardholder Agreement...

聲明及簽署 DECLARATION AND SIGNATURE

Walker Shop Footwear Ltd. (Walker Shop)提供本人(等)之個人資料予永隆銀行(“銀行”),作為申請 Walker Shop VISA 咭之用。本人(等)證實上述填報之資料及附上之文件全屬正確,並授權銀行及 Walker Shop 可以任何其認為適當之途徑以確該等資料之真確性及與有關方面交換資料及索取其他關於本人(等)的信貸資料。本人(等)並同意銀行有權將本人(等)資料交予 Walker Shop 以便 Walker Shop 為本人(等)提供專有服務。本人(等)並知悉及同意銀行可根據不時給予本人(等)之結單、通函、章則及條款內所載有關披露個人資料的政策作指定用途及向旨定人仕披露或轉移本人(等)的個人資料。同時,本人(等)同意銀行可根據《個人資料(私隱)條例》所述的核

對程序核對本人(等)的個人資料及其他有關於本人(等)的個人及其他資料，並透露該資料作促銷，信貸審查或收取欠款等用途。

本人(等)並同意遵守隨每張永隆信用卡附上之永隆信用卡持卡人合約，電訊理財條款(若適用)及永隆網上銀行條款(若適用)。

...

I/we agree and authorize the Walker Shop Footwear Ltd (Walker Shop) to provide my / our personal data and information to Wing Lung Bank Ltd ("the Bank") for Credit Card application. I/We the undersigned declare the above information and documents enclosed are true and authorise the Bank and Walker Shop to disclose to, verify and exchange such information with and to obtain other credit information of myself/ourselves from whatever sources the Bank may consider appropriate. I/We agree the Bank has the right to provide my information to Walker Shop for the company to provide services to me/us. I/We also acknowledge and agree that from time to time, all personal data relating to me /us ("the data") may be used and disclosed by the Bank for such purposes and to such persons in accordance with the Bank's policies on use and disclosure of personal data as set out in statements, circulars, notices or terms and conditions made available to customers. I/We further agree that the data and such other personal data and information relating to me/us may be used for conducting matching procedures (as defined in the Personal Data (Privacy) Ordinance) or be disclosed for marketing, credit checking and debt collection purposes.

I/We agree to be bound by the terms and Conditions of Wing Lung Bank Credit Card Cardholder Agreement, if applicable, Telebanking Agreement and Wing Lung NET Banking Agreement, a copy of which will be sent to me/us with the VISA Card(s) upon approval of this application."

40. The Bank also relied upon the following provisions in the Agreement, as extracted from page 182 of the hearing bundle :

"閣下在使用或簽署信用卡前，請細閱及理解本持卡人合約（尤其是第3(b)，4(d)及(e)，6(a)，7，8，9(a)及(b)，10，11(d)，12，13(b)及(e)，14(a)及17)。閣下一經簽署或使用信用卡，即視作已接納下列條款，並受其約束。如有任何關於下列條款的疑問，請致電本行熱線2928 6668查詢。

[...]

2. 本合約的適用性

(a) 所有由本行向任何人士提供的有關信用卡或信用卡戶口的授信及服務，均受當時實行的本合約條款所約束。任何人士一經簽署或使用信用卡或容許他人使用信用卡（若仍未受到本合約的條款所約束）會即時受到

[...]

11. 紀錄

[...]

(c) 各持卡人現授權行按照在向客戶所提供的結單、通函、條款及條件通知書內所列出的本行使用及透露個人資料政策，使用或透露本行可能擁有關於持卡人的任何資料。在不影響前述的原則下，該等資料可不時用作直接推銷及/或推廣本行、本行的關連人士及小心選擇的第三者的產品及特別優惠之用途。若持卡人不希望該等資料用於此用途，持卡人可書面通知本行之資料保護主任，地址為香港德輔道中 45 號（電話號碼：2826 8333，傳真號碼：2810 0592）。

[...]

15. 終止

(a) (i) 賬戶人可隨時以書面通知本行終止信用卡戶口...”

41. We believe that understanding the meaning of those provisions requires some detailed and serious reading of their terms. This requirement does not assist a consumer customer such as Ms Wong in understanding that she would be dealing with people other than the Bank or Walker Shop Footwear Ltd.

42. Further observations may be made here.

43. First, such documents of the Bank were sent to the Ms Wong only after collection of her personal data was completed; thus not satisfying the spirit of Principle 1(3)(b).

44. Second, on a plain reading of Paragraph 5(vii), “any insurance company” refers to any insurance company of the Bank’s Group, not any separate or outside insurance company like CIGNA. Even if CIGNA falls within “other business partners of the Group”, which is not a fair reading, if one applies the *ejusdem generis* rule, we do not think it advances the Bank’s case.

Monthly Statement

45. We do not think the monthly statement is of assistance to the Bank. First of all to bring an implied waiver or waiver by conduct, the customer must be expected to read the statements relied upon by the Bank, namely :

“歡迎閣下成為永隆信用咭尊貴客戶，我們日後可能向閣下介紹其他產品或服務的資料。如閣下不願意接收該等資料，請以書面通知本銀行[香港郵箱 520 號 “資料保護主任” 收]…”

46. We do not think the evidence supports the finding one way or another that Ms Wong was actually aware of this statement, or indeed she must have been aware of this statement.

English practice and Hong Kong Banking Code and the Cross-Marketing Agreement

47. The Information Commissioner’s Office in the UK had issued a guideline on “*disclosure of personal data for a new purpose or to a third party*”.

48. The Bank said both the English guidelines and the Hong Kong Banking Code are relevant to explain and state the law relevant to personal

data. The Commissioner refers to his guideline published in 2004 (and subsequently amended in 2009) on "Personal Data Privacy: Guidance on Cross-Marketing Activities". The Commissioner's requirement in 2009 was that, if at the time the company collected the data it had no particular cross-marketing activities in mind but subsequently decided to do so, then prior to the transfer of customers' personal data to a partner company it must ensure that such use of the data is within the original purpose of collection of the data and consider informing the relevant customers of its intention to do so and reasons to do so. The 2004 guideline of the Commissioner was different mainly in that the word "ensure" was not used.

49. We are not concerned with competing opinions on personal data protection policies in different jurisdictions. Having different stages of developments in data privacy, different practices and different legislations, the UK guidelines are necessarily different from that of Hong Kong and would be useful for reference, but not necessarily directly applicable or instructive.

50. The Hong Kong Banking Code was drawn up by bankers doing their best to comply with the Ordinance. It is again useful for general reference but cannot serve as the authority or a statute cast in stone.

51. We found the Commissioner's guideline in 2004 requiring notification was already a sensible one to reasonably alert data user to alert to the requirement of ensuring data subject be properly notified in cross-marketing activities. The 2009 Guideline merely makes it more consistent with Data Principle 3.

52. With those general observations, we come down to specific consideration of the present case. We were provided with two copies of cross-marketing agreements between the Bank and CIGNA made in 2003 and 2005. However, we consider that the sale and purchase between the Bank & CIGNA of Ms Wong's data is not a purpose which has the prescribed consent from her. In our view, it is not one of the stated purposes included in paragraph 11(c) of the Agreement document provided to Ms Wong.

53. As schedule 3 of the Cross-Marketing Agreement between the Bank and CIGNA indicated, both parties envisaged the sale and purchase of no less than 200,000 relevant data of the Bank's customers within a 12-month period.

54. Relevant data is defined in the Cross-Marketing Agreement to mean the names and telephone numbers of the Bank's customers. We failed to see how such kind of commercial activity is something that Ms Wong can be said to have already given her prescribed consent, just because she had received the application form and the Agreement. Such use of Ms Wong's data is not the purpose for which it was first collected and its use by the Bank cannot be said to relate directly to the original purpose the data was collected, namely, the purpose was quite simply the application for a credit card and vetting of the applicant for the purpose of considering of the application.

55. The fact that Ms Wong was reminded of her right to opt-out in her monthly bank statement is our view neither here nor there.

56. In this connection, 2 matters arise. First, the Guidance on Cross-Marketing Activities issued by the Commissioner in March 2004 says "*if at the time a company collects the personal data of its customers it already has in mind the carrying out of cross-marketing activities in the future, it should notify the relevant individuals according to DPP 1(3) that their data may be used for the purpose of cross-marketing activities, and describe generally the other partner company or companies to who such data may be transferred. The notification should be given on or before the collection of the data.*"

57. The 1st Cross-Marketing Agreement entered into by the Bank and CIGNA was dated 18 December 2003 and the relationship was said to have concluded on 9 November 2008. In other words when Ms Wong submitted her Walker Shop visa application form, the cross-marketing activities were well underway. There was however no evidence of notification being given by the Bank.

58. Second, although a definition for relevant data is provided in the Cross-Marketing Agreement, more data than that was specified in the Banking Code in relation to a bank customer were transferred by the Bank to CIGNA which included address, gender, date of birth, partial identity card number and credit card number. We note that §8.4 (b) of the Banking Code says without the prescribed consent of its customer, a bank should not disclose his/her name and address to a company which is not a related company to its Group for the purposes of marketing. It is not an advice that the Bank has complied with. The amount of personal data for the purposes of cross-marketing here was not confined to name and telephone number. We do not think it was right if there appears to be no safeguard a data

subject has if there is simply no limit on the amount of personal data that can be legitimately transferred.

59. Finally, what troubled this Board further is according to the Cross-Marketing Agreement, the Bank was an appointed insurance agent of CIGNA which therefore became the principal of the Bank. However, the Bank also permitted and authorized the telemarketers of CIGNA to represent themselves as personnel of the "credit card marketing department" of the Bank. It is rather confusing to understand who was the principal and who was the agent. It all depends on the type of activity one is referring to.

60. Thus in this case, Ms Wong received a call from a Mr Alex Liu who claimed to represent the Bank's credit card marketing department when he was in fact a CIGNA staff. Such misrepresentation ultimately led to the revocation of the health policy that Ms Wong bought as it was her intention to buy insurance policy from the Bank, obviously a respectable banking institution with sufficient financial credentials, and she did not expect to be told only later that the insurer was in fact CIGNA (and in saying so we do not suggest CIGNA was in any way inferior). For long term relationship or investment like insurance policy, it is only right that a customer be fully appraised of the background and financial standing of the insurer before he/she decides whether to buy it or not. Any possible misrepresentation should be avoided as to the true identity of an insurer. In our view, whilst the legitimacy of this type of commercial activity may fall within the ambit of another statutory body, it forms such an important feature in this case that simply calls for scrutiny under the auspice of the Ordinance and hence the Commissioner.

Conclusion

61. In conclusion we are not satisfied the Bank is successful and the appeal should be dismissed. We thank Counsel for their most helpful and able submissions.



(Mr Andrew Mak)
Deputy Chairman
Administrative Appeals Board