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Obiter

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As you will see from the pages of this issue we have been hard at work to provide you with a quality publication and we only hope to build on this and better ourselves in the future. If you therefore have any comments about this issue then please do not hesitate to contact us at the address at the bottom of the next page.

We sincerely hope that you will enjoy reading this second issue of Obiter and that you find something useful within these pages. If you have any ideas for future development of obiter then again we would very much like to hear from you.

Lawfile

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The Editor

Alan Lowe

Dear Reader,

Welcome to the second issue of "Obiter", your free legal e-journal from Lawfile.

As many of you will already know we launched "Obiter" last month and were pleased to be able to send it to well over 1,000 readers at that time.

Since we launched the first issue of "Obiter" we have seen many new subscribers join our mailing list and many of the new subscribers asked us for the November issue to be sent to them also. As a direct result of the volume of these requests we have decided that each month we will add the previous issue of "Obiter" to the website. That issue of Obiter will only appear on the website for a single month before it is removed.

We were pleased to receive congratulations for the quality of the e-journal and of the articles from many of our readers and also from others who had a copy of "Obiter" sent on to them by our subscribers, (this is something which we encourage—but would prefer for these people to subscribe to "Obiter" themselves).

We are desperately looking for contributions for the January issue of "Obiter" and as I am about to take on a full time job working for the National Health Service would welcome assistance from our readers in canvassing law professionals for articles.

It has been suggested by one of our contributors that we should become a peer review journal and so would like to ask you, as our readers, for your comments on this matter. If you would like to comment then please e-mail me at ajjlow@lawfile.org.uk

Yours sincerely,
Alan Lowe

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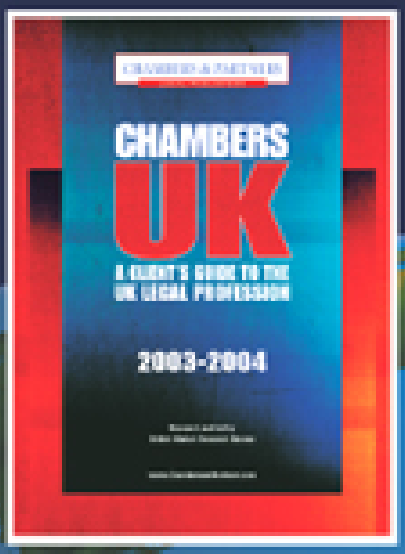

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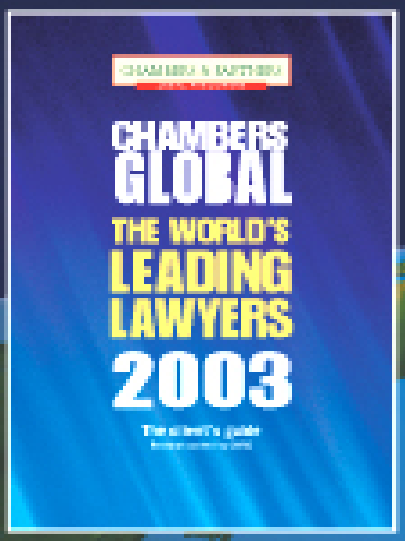

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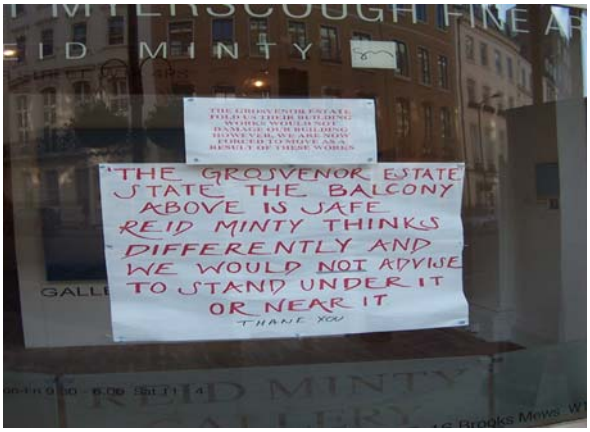
"DEVELOPERS FROM HELL" - Neighbour disputes are not just a residential owner occupier problem.

By Andrew D Thompson, BSc(Hons) Dip Mgmt MRICS MEWI

The common misconception is that neighbour problems and party wall disputes are residential homeowner issues suitable only for small regional solicitors scratching a living in the suburbs. The reality is shockingly different when your client's business is faced with a scheme the other side of a very old wall which is all that separates them from a major construction project.

The photographs come from Grosvenor Street in the heart of West End London. The suffering firm is that of Reid Minty, solicitors, who over the last two years have discovered the Party Wall legislation in a very close and next door sense. The development by Hammerson/Grosvenor Estate is now a feature of Property News articles with issues such as seeping concrete into the boardroom, (Property Week 20 September 2002, Page 3), acting as a reminder to all that neighbourly issues can hit to the very centre of a business.



Photograph 1 - View of Reid Minty office front window October 2003

Therefore, how do you avoid this happening to your clients? The Party Wall legislation exists to both facilitate a development but also to safeguard the basic rights of an adjoining owner. The Act has been live across England and Wales since the 1 July 1997 and has developed out of a long line of London Building Acts with, as yet, no reported cases under the nationwide legislation. The Act is a surveyor centred piece of legislation with the emphasis being on a technical and practical dispute resolution rather than the court process. This is both the great strength and potentially in my opinion the weakness of the Act.

Photograph 2 - Cracking and temporary propping alleged to result from adjacent development.

The Act is very specific in scope and general noise, dust and vibration from the construction activities across the site are outside the scope of an Award. This means that the Court of Appeal ruling of *Andreae v Selfridge & Company Limited (1937)* is still the start for an adjoining owner in terms of common law protection. This is based on the tort of nuisance. This case is a mixed blessing to an adjoining owner in that the sections on *"The common and ordinary use of Land"* combined with *"Reasonable care & skill"* appear to protect the developing party. They do provide a head of claim if serious problems arise. However, unlike the party wall process which is negotiated before the works a common law claim is reactive with settlement months or years after the event. The common law provides no right of technical support in terms of a surveyor and a party seeking to prepare and present a claim is faced by a full design team of professionals acting for the developing party. In terms of a business the problem could be the loss of clients or customers which a party cannot fully explore in a claim due to the restrictions of our civil law system.

Business managers will spend hours of effort on SWOT (Strength, Weakness, Opportunity, Threat) analysis tools but this type exercise seldom factors the neighbouring buildings potential to become a development site as a Threat factor. I have dealt with a major trading bank in the City of London which had only a few months before demolition located all

the computerised trading equipment responsible for vast amounts of money on to a party wall. This was despite years of negotiations in which the bank had been involved. The justification for the wall mounted location by the Director of IT being the risk of vibration due to people walking on the floor due to the very sensitive nature of the equipment to vibration and dust. When the demolition contractor started to remove the adjacent building the threat to the core business of vibration level well above foot steps was beyond belief and resulted in a total review by the bank as to how it approached risk assessments and threats.

Business supported by their legal advisers needs to look at how to protect themselves when presented with the risk presented by a development. This does mean time, effort and up front cost. The surveyors under the party wall legislation are empowered to produce an Award which when published gives the owners the statutory right of appeal within 14 days of receipt. If that right of appeal is not exercised by either owner within 14 days the Award is binding and cannot be overturned unless an error is found at the heart of the Award in terms of a point of law. This is not long if a solicitor has not already read, understood and reviewed the background case law on the topic of Party Walls particularly in the real world when the client will have sat on the document for a week before sending it to your office. I suspect that many bad Awards are getting through the system due to both a lack of understanding and a general failure to appreciate the importance of what an Award can mean to the core business activity of an adjoining owner. In my view the important counter balance in the Act is the right of appeal enjoyed by the owners and whilst a small number of appeals could signify successful working a total lack suggests a failure of meaningful review of the end product by owners and their legal advisors. The view of some solicitors is that they simply pass a notice to a known surveyor to their firm when one crosses their desk, take no further interest in the issue and more importantly they do not scrutinise the end Award when published. This is I believe a failure of duty to your client as the most powerful counter balance in the Act for an owner faced by a major commercial development is to appeal when they are not protected or considered in specifics by an Award.

Therefore, what is required to resolve the situation and return an even balance to the process?

Learn the Act.	The legislation is in modern language and relatively short. Discover areas such as security expenses and the counter notice provisions, and encourage your client to use them when necessary.
Study the process.	Solicitors should be ready to review the final Award when published and take an interest in the implications of the development to your client's business. The Party Wall surveyor is limited by the Act in terms of what may be covered by an Award. The Award cannot deal with the general operations on site. However, the Award should address the basic rights of an adjoining owner in terms of damage and unnecessary inconvenience from direct party wall works. The solicitor should therefore ask does the development impact on more general issues such as Rights of Light, general scaffolding or tower crane access all of which are outside pure party wall matters? If it does who is looking at these points and should a separate client instruction be issued to the surveyor to deal with technical points outside the Act? The most common mistake is to assume the Award is an all powerful covering all adjacent works. In reality the Award it is a limited and very specific document dealing with only the scope of work at the boundary listed in the Act. Commonly the answer comes down to cost with an adjoining owner not prepared to meet up front costs to protect themselves. This is due to a failure to appreciate the potential risk.

If in doubt have another surveyor provide a second opinion.	Nothing in the Act states an owner cannot pay independently for a second surveyor to cast an eye over the Award if an appeal is being considered. Remember your client may already be paying for a firm of surveyors (managing agents etc.) to advice on their property portfolio. Therefore ensure the service, offered by these people when you are drafting their contracts, stipulates that the checking of any Party Wall legislation Award within the 14 day period forms part of their duties. This is again an issue of forward thinking and risk management. This is not a criticism of the party wall surveyor who is bound by a statutory duty to prepare an Award. It is in my view essential that such an important document is both read and understood. The review of what the technical implications will be on the client's business operation is needed before works start. Section 7(1) of the Act protects against "unnecessary inconvenience". Therefore an owner's has the right of appeal if the balance has not been achieved? This point cannot be debated after the 14 day period. The appointed Party Wall surveyor is by law a neutral figure and must not apply client bias. Business managers need advice as to what a development will mean in terms of their organisational needs and as such need support to allow SWOT and STEEP analysis to be reviewed and updated in terms of this specific risk. Does your client need to install noise and vibration monitors to record and prepare evidence for a claim in common law nuisance? It is no good once demolition has started and major disruption is being suffered to start to try and find suitable specialists who can install and report on your problem.
If in doubt appeal.	This is a right under the Act of both owners. Do not accept generic standard documents which do not address the specifics of a dispute or protect the rights of an adjoining owner or occupier.

The Party Wall process is intended to be a balanced piece of legislation but to work effectively the current heavy advantage towards the developing owner needs to be addressed by professional scrutiny of the process. Whilst in the first instance this is provided by a competent surveyor in the role of the technical negotiation, the role of the solicitor and the necessity for review of legal issues during the appeal period should not be underestimated or forgotten. The appeal process is a right under the legislation which, if used, can help address the balance. The impact of a proposed development on a business should not be under estimated and the importance of the Award should be viewed in that light. In addition adjoining owners may have other rights outside of the party wall process which unless they received advice they may not be aware of how they can influence the works in the immediate locality of their business.

Whilst in no way diminishing the important technical role Chartered Surveyors have in neighbourly matters dispute resolution this must not be at the expenses of clients benefiting from independent business centred advice from their solicitors. The combined skills of the solicitor and Chartered Surveyor will provide a client faced by adjacent development with a fair opportunity of redressing the balance.

Wilks with Party Wall legislation problems but with all the issues that come out of a development in our tight urban centres. This can include compensation valuation, rights of light injury, planning objections or access negotiations.

Andrew D Thompson is a Chartered Building Surveyor and a Royal Institution of Chartered Surveyors registered expert witness in the area of neighbourly matters. He is a Member of the Expert Witness Institute. Head & Eve have a team of specialist Neighbourly Matters surveyors who deal not only


Information Privacy: Are We Really Concerned?

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Abstract

There are several articles that examine personal data protection in Malaysia. However, these studies analysed the proposed Personal Data Protection Bill, which has not even been tabled in the Malaysian Parliament. There is no reference made to the existing law, neither any examination made to see if any relevant legal protection may be afforded to personal data. This paper analyses the deficiencies of the legal Status Quo. In this paper, it is argued convincingly that for typical Internet transactions, existing legal principles in Malaysia do neither allow to establish the rights of providers nor the liabilities of receivers of private data. With that in mind, the discussion focuses on the examination of the existing laws in Malaysia. However, concise comparison is made to the USA and the UK to demonstrate the possible outcome if similar occurrence were to happen in those two countries.

Introduction

The information revolution has provided part of the world's population with a de facto information superhighway that we know as the Internet. Use of these networks for on-line purchases and some transactions forms just part of the growth in global electronic commerce (e-commerce), which is actually a broader use of information technologies by businesses and the government. Its revenues are projected to reach US $152 billion this year in Europe, and the global revenue from e-commerce in Europe, US and Japan achieved a total of US$657 billion in 1997. In 2002, the global figure for e-commerce projected was to reach US$1,500 billion. The potential growth for e-commerce in Malaysia still remains huge. From a modest RM12.5 million in on line sales achieved in 1997, Malaysia was projected to achieve over RM647 million in online sales in 2002 (Larson, 1998).

However, the users remain extremely concerned about the level of privacy and security of this technology that's sweeping the world like a storm. Rapid growth generally brings about several concerns. One survey conducted showed that only one third of all local Internet users have made online purchases in 2001. A recent survey result also indicated that 70% of corporate purchasing decision-makers indicated that security concerns hindered them from buying over the Internet. (Larson, 1998). Another general survey among individuals of general public, to determine peoples attitude towards security showed that, 58% who had not yet purchased online cited insecure communications (51%), potential untrustworthiness of the vendors (43%) and no need to buy online (46%) as their concerns towards e-commerce (S.M Furnell and T.Karweni, 1999).

One aspect of information privacy which is usually is overlooked is the situation where the personal data have been personally submitted to others, under the impression or assurance that this other will not disclose the data in any way, is disclosed without the consent of the data subject.

There are several articles that examine personal data protection in Malaysia. However, these studies analysed the proposed Personal Data Protection Bill, which has not even been tabled in the Malaysian Parliament. There is no reference made to the existing law, neither any examination made to see if any relevant legal protection may be afforded to personal data.

This paper analyses the deficiencies of the legal Status Quo. In this paper, it is argued convincingly that for typical Internet transactions, existing legal principles in Malaysia do neither allow to establish the rights of providers nor the liabilities of receivers of private data.
With that in mind, the discussion focuses on the examination of the existing laws in Malaysia. However, concise comparison is made to the USA and the UK to demonstrate the possible outcome if similar occurrence were to happen in those two countries.

2. Definition

2.1. Data & Information

The Interpretation Acts 1948 and 1967 of Malaysia do not define the terms information and data. The Concise Oxford Dictionary defines information as facts or knowledge provided or learned as a result of research or study. It defines data as facts and statistics used for reference or analysis. In

the Draft Legislation on Personal Data Protection year 1998, the term 'personal data' has been defined as any information recorded in a document in which it can practically be processed wholly or partly by any automatic means or otherwise which relates directly of indirectly to a living individual who is identified or identifiable from that information or from that and other information in the possession of the data user.

However, since this definition is meant to be used in relation to the provisions in the draft legislation and until today this draft has yet to be tabled to the Malaysian Parliament, this definition will be of no assistance until such legislation is passed by the legislature. In the absence of any contrary definition and for the purpose of this paper, both terms, information and data, shall be understood according to its literal interpretation given above.

2.2. Privacy and Its scope

It is not easy to define privacy. Even Warren and Brandeis, the writers of the most celebrated article 'Right to Privacy' that was reported in Harvard Law Review – avoided defining this term. They simply cited what Judge Cooley said as the right 'to be let alone'.

To use this definition will lead to endless and limitless scope of what may be claimed as the right to privacy. This very broad definition is unlikely to be legally acceptable. It is not legally right to 'let alone' any person who has done or is about to do any act that may harm others. Similarly, it is legally wrong to 'let alone' a criminal for the crime he has committed or is about to commit. Hence it can be said that the right that is claimed as 'privacy right' should be defined as the right of individual to be let alone so long what he/she does or omits to do is legal and harmless (to others – especially because the exercise of right to privacy shall not infringe others' privacy right).

Nonetheless this definition does not provide a definite scope of right to privacy. In order to avoid endless discussion on what is and is not part of the right to privacy, this right can be classified in two ways:

1. Right to privacy of person's own self, which is the right of individual to do anything (so long it is lawful) to himself, his private life and about his persona and determine what can and cannot be done about these. (Therefore it was held in Roe v. Wade that The Court held that a woman's right to an abortion fell within the right to privacy; while it cannot be said so in Malaysia as abortion is illegal)
2. Right to information privacy; that is the right of an individual to determine what personal information about him that can and cannot be disseminated, and in what manner.

This paper will concentrate on the discussion of information privacy – to examine its existence in the absence of general statutory provision on personal data protection in Malaysia.

The paper examines to what extent the situation in Malaysia is similar to the one in the USA. Additionally, Malaysia's legal situation is compared to that of the UK, where external principles (European regulation) on data protection had and have to be incorporated in a legal system based on common law principles

3. Malaysian Law

The law in Malaysia can be found in both written and unwritten sources. The written sources of law include the Federal Constitution, Legislation, and Subsidiary Legislation – commonly known as Regulations. As for the unwritten sources of law, Malaysian law is very much influenced by the English common law principles and rules of equity.

3.1 Federal Constitution

Looking at the provisions of the federal constitution, articles 5 and 13 seems to be relevant. Article 5 of the Federal Constitution provides that 'no person shall be deprived of his life and personal liberty save in accordance with law.' This implies that so long as what one does is legal; he has the right to do whatever he wishes free from any interference of others. This may be used as a safeguard for one's right to privacy. Similarly, right to property (Art. 13 of the Federal Constitution) entitles the owner of the property to exclude others from his/her property, thus ensuring such person exclusive freedom on his property.

However, whether the wording of Article 5 of the Federal Constitution is meant to protect one's right to privacy as part of one's right to personal liberty is yet to be tested in courts. Even if it can be interpreted as to include one' right to privacy, this provision may be read to give such freedom against physical interference. Thus, this provision will not be helpful in the context of cyberspace activities where many kinds of non-physical interference in one's life and personal

liberty may occur.

Similarly, art 13 dispels physical interference of others that will amount to infringement of right to property. However, it is yet to be tested if this right entitles such an owner to stop others from prying or using any devices or means to eavesdrop or monitor activities on one's property without being physically present on that owner's property.

In a nutshell, generally the right to information privacy is yet to be given comprehensive protection by the Federal Constitution – however it is arguable that the infringement to right to privacy – to some extent - is actionable in the court of law in Malaysia on the basis of one's right to liberty and to a lesser degree, his/her fundamental right to property, except, of course, if the intrusion is legally sanctioned or warranted.

3.2 Statutory Protection

The Malaysian Parliament has yet to enact legislation that protects the individual's right to privacy - not in its general scope, nor for certain aspect of privacy. The word privacy, however, has been used in several statutes including: Births and Deaths Registration Act 1957 (Revised 1983); Child Act 2001; Law Reform (Marriage & Divorce) Act 1976; Penal Code (Revised 1997); Private Healthcare Facilities & Services Act 1998; and in two regulations namely Communication and Multimedia (Licensing) Regulations 1999 and Private Hospitals Regulations 1973.

The word 'privacy' has been used in the context of right to data protection. This can be found in sections 4 of the Births and Deaths Registration Act 1957; s. 9 of the Communication and Multimedia (Licensing) Regulations 1999; s. 46A of the Law Reform (Marriage and Divorce) Act 1976 and s. 107 of the Private Healthcare Facilities and Services Act 1998. In each of these provisions, the word 'privacy' has been used in connection with confidentiality and security of individuals' information.

The provisions require that the person maintaining the data has to ensure that the data he keeps are well protected and safe. However, the scope of protection is limited to those types of data that are submitted in pursuance to the provision of the respective legislation/regulation. Consequently no legal protection is offered for personal data submitted in any way, other than those ways as required in legislation/ regulations.Likewise, there is no statutory protection that protects individuals against the disclosure of individuals' personal data without such individuals consent, especially since the 'supposed' Data Protection Act 1998 has yet to be tabled in the Malaysian Parliament.

3.3. Alternative - non statutory - legal protection

3.3.1. Confidential Information.

The next possible cause of action would be breach of confidential information. In *Coco* v. *A. N. Clark (Engineers) Ltd.* Megarry J held that there are three elements essential to a cause of action for breach of confidence**,** namely (a) that the information was of a confidential nature, (b) that it was communicated in circumstances importing an obligation of confidence and (c) that there was an unauthorised use of the information.

The Internet is an open network. Anything sent across the Internet could not be meant to be confidential (just like sending information by using post cards) unless if the information encrypted or sent on a secured site (SSL). Unfortunatelly, most of Internet users will forget about this when they use Internet as the mean of communication. Most Internet users take for granted that when an organizer has adopted a privacy policy such organizer would adhere to their undertaking of information privacy forgetting that nothing would protect an individual (since no Personal Data Protection legislation has been enacted in Malaysia) when the organizers breached their promise. Hence, even if it could be proven that there was unauthorised use of the information, it is unlikely that this common law principle would provide any remedy where there is unjustifiable disclosure of individuals' personal data.

3.3.2. Consumer Protection.

In Malaysia, the law on this aspect is regulated by the Consumer Protection Act 1999. Section 3 of the Consumer Protection Act 1999 defines consumer as a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and does not acquire or use the goods or services … primarily for the purpose of resupplying them in trade; consuming them in the course of a manufacturing process; or repairing or treating, in trade, other goods or fixtures on land.

Thus, unless if the internet users are in situation that they may be considered as as consumer within the meaning of

section 3 of the Act, this legislation will not be applicable. Even if it is applicable, the Act does not provide anything that may provide solution to the situation where unjustifiable disclosure of personl data has occurred.

3.4 Draft Legislation on Personal Data Protection

In year 1998, the Ministry of Energy, Communications and Multimedia prepared the draft on Personal Data Protection Legislation – supposed to be known as Personal Data Protection Act 1998.

Section 2 defines data subject as an individual who is the subject of a personal data. It also defines data user as a person who either alone or jointly with other persons, controls the collection, holding, processing or use of personal data but does not include any person who collects, holds, processes or uses data solely on behalf of another. Hence, it can be said that in the given scenario I would be identified as data subject and the contest organizers are the data user.

Part IV of the Draft provides for the rights of data subjects. Among the rights given include the rights for non-disclosure of personal data (s. 42). Section 42(1) states that, "no data user shall use or *disclose* any personal data of a data subject for purposes other than the purpose in connection with which the personal data is collected, held or processed."

Exception for such disclosure given in subsection 3 to section 42 of the Draft legislation that allows such use or disclosure if …(a) the data subject or relevant person has given his consent to the use or disclosure.

In addition to the above, a data subject would be entitled to compensation. Section 88(1) allows an individual who suffers any damage or distress by reason of a contravention of a requirement under the legislation to get compensation from the data user for such damage or distress. It is interesting to note that the term 'damage' in this section includes injury to feelings (s. 90(3)).

Unfortunately, this draft has yet to be tabled in Parliament and thus, will be of no assistance up to date.

4 Comparative Analysis

4.1. The Law in the UK

In the UK, the attempt to have legal protection for personal privacy has been started since the late 1960s. Various privacy Bills were introduced into the Parliament. Though the attempts were not successful these had led to appointment of Kenneth Younger to chair a Committee on Privacy reported in 1972 (the Younger report 1972). This was followed with the setting up of a Data protection committee in 1976 which reported in 1978 (the Lindop Report 1978).

Meanwhile in 1980 the Organisation for Economic Co-operation and Development (OECD, an international organization whose primary aims include to foster economic stability and encourage trade) adopted Guidelines governing the protection of privacy and transborder flows of personal data. In 1982 the Council of Europe, which is a pan European inter-governmental organisation, opened for signature Treaty 108 (ie the Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data). To date, these two instruments remain applicable in UK. In 1984 the Data Protection Act was enacted. In 1995 Data Protection Directive (95/46/EC) was adopted. The Directive requires that the national law of Member States must be in conformity with it. Hence the 1998 UK Data Protection Act.

Section 1(1) of the 1998 Act defines personal data as data which relate to a living individual who can be identified from those data; or from those data and other information which is in the possession of the data controller. Data controller is defined as a person who either alone or jointly or n common with other persons determines the purposes for which and the manner in which any personal data are (or are to) be processed. By virtue of this definition, those sites gathering individuals' personal data are likely to be considered as data controllers and individuals who are the subject of personal data.

In relation to unjustifiable disclosure of personal data, some principles of the 1998 Act seems to be relevant. The first principle required that "personal data shall be processed fairly and lawfully." Section 1(1) of the 1998 Act defined 'process' as to include 'disclosure of data. The term 'lawfully' is not expressly defined in the 1998 Act. However it is understood as something which is in line with the law currently enforced. Additionally, no processing (that includes disclosure) of any personal data allowed unless any of the conditions in schedule 2 is met (Section 4(3) of the 1998 Act). The conditions include that the data subject had given his consent to the processing, or the processing is necessary for the performance of the contract or at the request of data subject with a view of entering into a contract; or for compliance with any legal obligations; or in order to protect the vital

interests of the data subject; or for the administration of justice; or for the exercise of any functions conferred on any person by or under any enactments; or for the exercise of any functions of the Crown, a Minister of the Crown or a government department; or for the exercise of any other functions of a public interest by any person; or for the purposes of legitimate interest pursued by the data controller or by the third parties.

The second principle requires that "personal data shall be obtained only for one or more specified and lawful purposes and *shall not be further processed in any manner incompatible with that purpose or those purposes*." (emphasis added). Furthermore, a data subject has the right to prevent processing likely to cause damage or distress (section 10(1) of the 1998 Act).

Finally the 1998 Act allows the data subject - who suffers damage for any contravention of the requirements of the Act by the data controller (s. 13(1)) or who suffers distress for contravention relates to the processing of personal data for special purpose (s. 13(2)(b)) – to get compensation from such data controller.

Thus, it can be said that the availability of the personal data protection legislation in the UK provides sufficient safeguard to most aspects of information privacy and this let the individuals feel assured that there is legal remedy available in cases where there is any abuse or misuse of one's personal data.

4.2. The law in the USA

In the USA, the legislature's concern about privacy goes back to 1980 (the Privacy Protection Act 1980). However, instead of providing one general statute that provides for general protection of personal data, the USA government prefers to take a sector-based approach. To mention a few, the Health Insurance Portability and Accountability Act (HIPAA) has been enacted to deal with protection of health information; the Gramm-Leach Biley Act (GLB) governs financial privacy provisions; the Children's Online Privacy Protection Act (COPPA) is meant to regulate the privacy of children under the age of 13 and the Electronic Communications Privacy Act (ECPA) limits the circumstances under which federal and state government may access the contents of transactional data in both real time communications and stored communications.

It is believed that in the absence of legislation on personal data protection, self-regulation is the best solution that may provide similar protection. In this paper it is shown that the so-called self-regulated rules are unlikely to be enforceable in the court of law, at least not in Malaysia. In reality, however, in the absence of general protection for personal data, in some circumstances the position in the USA will be more or less similar with the current position in Malaysia. In situation where any businesses, in disregard of their self-adopted privacy policy, have infringed one's right to information privacy, the data subject may be left without remedy against such disclosure. In the USA to initiate an action for infringement of online information privacy, one has to base the claim on the existing law. However, the position in the USA is better then that in Malaysia because there are many existing privacy legislation that provides protection for certain types of information.

Conclusion

However the law has to protect the consumer and be fair to service providers. Since the laws in Malaysia and other parts of the world are quite vague the only way out of the problem for now is self-regulation. This indeed is required to increase the confidence among consumers about their perception on Internet security issues. The following are some of the recommendations of this paper so as to improve the current situation.

- Consumers must educate themselves to protect their confidential information and Consumer Rights.
- Consumer should be more proactive to know the sites they are visiting and be more conscious in giving personal or financial information and also take the effort to know the credibility of the organization they are dealing with.
- Internet Security and Consumer Rights to be made available in secondary education system. Citizens are taught during their young age.
- IT and Internet Security Roadshows and Exhibitions to be extended to rural areas to educate the rural folks.
- PC Ownership campaign to be extended to have more citizens to access the Internet and learn about E-Commerce and Internet Security.

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Apology to Mdm. Hurriyah El-Islamy

Last month we published an article by Mr. Saravanan Muthaiyah & Mdm. Hurriyah El-Islamy both of the Multimedia University, Malaysia. Unfortunately it appeared in the publishing of that article that the principal author of that article was Mr. Saravanan Muthaiyah. Following discussions with both of the authors it has transpired that the principal author was in fact Mdm. Hurriyah El-Islamy.

Mr. Muthaiyah has asked us to print a formal apology on his behalf to his friend and co-author Mdm. El-Islamy for this mistake which occurred as a result of the way in which the article was submitted to Obiter. The above article on pages 9-14 is again the work of both authors with Mr. Muthaiyah being the principal author.

IN JUDGMENT: Comments on Law & Culture

A Recovering Lawyer's Path from the Abyss

By Michael Sweig, J.D., President of Sweig Family Venture, LLC, and Adjunct Professor of Legal Studies, Roosevelt University, Chicago, (US)

Nearly seven years ago, I exited my dissolving law firm for the last time. I had not yet relinquished my law license or pled guilty to a felony for trust account mismanagement, but I knew these tasks were imminent. I also knew, as I literally left my law practice behind me, that I was facing the more formidable task of reinventing myself, so I could earn a living and succeed in parenthood. Moving forward from that day has been my most rewarding challenge. Since then, I have learned what I suspect many lawyers understandably overlook: we all have more gifts to give the world than just being good lawyers, and far more resources than we realize to live a fulfilling life.

To give charity anonymously is the most righteous method of giving. When I left my law practice, other than gifts to my law school and some pro bono legal work, I had not given much charity. When I began my recovery I had to learn to accept charity. A few neighbors, I suspect, who knew what tough times these were for me and my family delivered several months' worth of frozen meats to my distressed upper middle class doorstep. The anonymity of this gift allowed me dignity that would have been lost had I known the benefactor's identity. This inspiring gift was among the earliest inoculations of hope that propelled me toward recovery.

Later, as part of my probation sentence, I was required to perform five hundred hours of community service. For four years I delivered food to poor people weekly, an endeavor that became among my greatest pleasures. These deliveries were not just about food, but more about the delivery of hope. My children still do not know why I began doing this, and they have never asked. Now, as a family, we deliver food to poor people several times annually. Without parental prompting, our oldest son gave some of his inheritance from his grandfather to a local food pantry, and he volunteers weekly at a local soup kitchen.

Community service should not be simply a punishment for lawyers; it should be a pleasure. Indeed, it is a privilege all lawyers should allow themselves. Don't wait to get in trouble before you try community service. If every lawyer would perform one act of community service annually, not only would the world be better off, but perhaps the public will stop assuming the only reason a lawyer would perform community service is because he or she has done something wrong.

When I was a boy my Dad was considered for a federal judgeship. "Why do you want to be a judge?" I asked. "Because the legal profession would be terrific without clients," he quipped. Throughout my legal career, I thought this cynical remark was funny. But when challenged with a search for a vocation I could pursue with a felony, I came to realize that my clients had been my students, and that I had already logged many hours of student teaching in my role as a lawyer. Today, I am grateful for the gift of each and every one of my former clients.

Most lawyers are natural teachers; this is an enormous but overlooked element of the attorney- client relationship. I teach primarily because I love it (it helps pay bills, too). But, also, I teach because I see the contribution I make, and I love the feeling. Try teaching as a form of community service. The world needs more teachers and always will. There are many teaching possibilities on college faculties for adjuncts who have limited time.

When I lost my time-consuming law practice, I gained control of my time, even if by default. One new endeavor I undertook with my newly found time allotment was to pick my children up at school twice weekly. I have been doing this now for many years, and I will never stop.

For those of you with school age children: pick up your kids at school once weekly for a month and see if you become addicted to this practice. I predict you will. There is no greater gift you can give your children than time with them, and time with you will always be your children's greatest gift to you (once you stop embarrassing your teenagers). Surely you have heard this, but in the practice of law it is difficult to live this simple bit of age-old wisdom. Your children need you more than your clients or your partners. They are more important.

I would have been such a better lawyer if I had understood this component of life while I was still practicing law: get on the lifelong path of becoming a better person, and stay on it. Practicing law alone will not keep you on this path.

Cyberwig.com: Case Citations and Summaries

TLC Consulting Services Pty Ltd v White B14/2003 (25 June 2003)

By Graham Bassett BA, Dip Ed, MInfoTech, LLB (Hons) - Barrister-at-Law (Australia)

Courts/Judges

HCA; Application for Leave to Appeal to HCA; Gleeson CJ

Legally Relevant Facts

TLC Consulting is a dating agency. It was being investigated by the Office of Fair Trading (OFC) in Queensland who had 39 current or recent complaints for breaches of the Fair trading Act 1989 Qld (FTA) made to them. White, the respondent inspector who executed the warrant, was the representative of the OFC. White obtained a warrant in October 2002 under s89(3) of the FTA.

White believed the server at the office of TLC contained information being sought. While at the TLC office executing the warrant, White asked if TLC's records were kept on a database. He expressly informed TLC he intended to conduct a search for documentation and records in relation to the 39 complaints.

Ms Wilson, for TLC, indicated she would print out records relating to the 39 complaints subject to that course being approved by the company solicitor who was in attendance. White, she claimed, refused this offer and indicated his intention to seize and access the server.

TLC further indicated at the lower court hearing of Mullins J that the server contained:

(a) records of over 20,000 members

(b) information kept on each client included driver's licence number, passport number, credit card details, key card details, telephone contact numbers, wage details, place of employment, education and qualifications, date of birth, nationality of member and parents, medicare number, names and ages of member' children, names of members to whom the member has been introduced, email address and photographs

(c) current staff information

(d) other documents related to running of the business and another unrelated business of one of the directors being a restaurant

(e) documents that were potentially subject to legal professional privilege

Never the less, White proceeded to seize and remove the server form the premises.

Procedural History

This application to the HCA is from a decision of the Queensland Court of Appeal (QCA) in which de Jersey CJ, Davies JA and Atkinson J were presiding (TLC Consulting Services P/L v White [2003] QCA 131). That QCA appeal was from a decision of the single judge Mullins J in the Supreme Court (TLC Consulting Services Pty Ltd v White [2002] QSC 434.

The QCA has set aside the orders of Mullins J in the lower court where she had ordered the decision of the OFC to take the server to be set aside and for the server to be returned to TLC. In that lower court hearing the OFC had tried to argue that the server was "a document" and used cases to argue that when a paper document could be seized it related to seizing of the whole document. Mullins J had rejected this argument saying: "I have difficulty with the respondent's reliance on an analogy between a document and a computer server. Where part of the document is relevant to an investigation, it is logical that the whole document must be produced, in order to look at the relevant part in context. A computer server is physically the repository electronically of numerous separate records, none of which necessarily have to be looked at in conjunction with another in order to give sense to any particular record."

The QCA examined the meaning of the term "records" in s89 (1)(e)(i) of the FTA which would have allowed OFC to "search for, examine, take possession of or make copies of or extracts from records relating to goods or services supplied or to be supplied or relating to any matter the subject of an investigation under this Act". The QCA also examined the definition of 'record' in s5 of the FTA which is "any record of information however compiled, recorded or stored and any books, documents or writings". The QCA compared the term "document" in s36 of the Acts Interpretation Act 1954 which includes "any disc, tape or other article or any material from which...writings...are capable of being produced or reproduced (with or without the aid of another article or device)". Consequently, the QCA found that the definition of document contained no contrary meaning to make the s5 FTA

meaning of record unacceptable.

Mr Richter QC, appearing for TLC, attempted to argue that a server is a repository of records rather than one single record of information. de Jersey CJ found such argument to be unacceptable and circumlocutious.

The QCA found that any argument that seizure of a server went beyond the scope of a warrant because it should be limited to particular records was not acceptable. Overruling the findings of Mullins J, the QCA found that "[t]here is no reason to conclude that because the contents of the disk drive of the server relate to other matters, in addition to those immediately relevant, the server does not constitute a record "relating" to those matters immediately relevant".

Basis of Claim/Grounds for Appeal

For this application for leave to appeal to the HCA, TLC argued the Wednesbury Rule had applied to the findings of the QCA who had acted with an "egregious failure to accord natural justice and a procedural unfairness which constitutes an injustice". The Wednesbury rule applies "if a decision is… so unreasonable that no reasonable authority could ever have come to it".

Summary Analysis

Counsel for TLC, Mr Richter QC, argued that White should only have had access to the records pertaining to the 39 complaints. When asked if a person with a warrant could seize a whole filing cabinet rather than just the records in it, Mr Richter QC argued that a server is not similar to a filing cabinet because part of the server could be seized. A negative search could be done to ascertain unnecessary files. "What they could have seized was the actual records in which they were interested in and they could have done it - and we would say that this is a matter of general importance when searching computers. They, knowing they were going to search one, should have brought someone who was computer competent and literate who could have conducted a negative search on the hard drive to eliminate that which they do not want, and could have then printed out the material. The Act gives the power to do that."

Mr Richter QC argued that powers of searching have an implied limitation to search only for that which is relevant to a searcher's purposes and that such a limitation should apply in a technologically advanced world. Any power to take possession of chattels such as a server is also subject to acting reasonably.

Mr Richter QC was asked what he could of taken possession of that was less than what he did. "He could have taken possession of those records that related to the goods and services and to the subject matter of his investigation. In other words, it is the filing cabinet analogy. He had the means and ability to go through the filing cabinet without taking the whole kit and caboodle, the whole filing cabinet, which is what he did. He took the filing cabinet, not the files, and he had the ability to look for the files and to isolate the files that he wanted, and they would have been the ones that he should have had. The vice of doing anything else is the vice that occurred in this instance, that, for example, what he was taking was - he was taking the whole business. The business could not function without this at the time of taking."

Mr. Richter QC also indicated that many of the records on the server were the subject of legal professional privilege. He pointed out the danger this creates as the claimer of the privilege is normally the only one who has the right to waive it: "You cannot have a situation in which the person seeking is made the arbiter of whether or not there is legal professional privilege. The vice in what the Court of Appeal did - and it did it very quickly and did it very peremptorily, without having regard to any of the arguments that arose on the review application."

For the OFC Mr Griffin SC was asked if there had been 20,00 hard copies of the server files, ought the warrant holder be allowed to take them all if the warrant only covered 39 complaints. He answered that an inspector could take all 20,000 records because the complaints only draw attention to the business dealings of the organisation and thus all their records become examinable. The warrant allowed them to examine matters in relation to a course and conduct of business rather than a single prosecution for a particular complaint.

Mr Griffin SC rejected the argument that a negative search could be made. "In approaching the scope of the authority given by the warrant we must keep practical considerations steadily in mind. It is simply impossible for a police officer executing a warrant to make an instant judgment on the admissibility, probative value or privileged status of the documents which he may encounter in his search. Generally speaking, it is in the course of the subsequent investigation following seizure of the documents that informed consideration can be given to the documents and an assessment made of their worth or significance in the respects already

mentioned."

Gleeson CJ furthered this point when he said: "That is one of the reasons no doubt why it is conceded that taking possession of the document, or a record, includes taking it away because very often it will only be somebody who looks at it elsewhere and at leisure, and perhaps someone else who is better informed, that will be able to make a final judgment on its utility."

Decision

Grant of special leave to appeal

Court Order