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CASE UPDATE

Defining “Loss or Damage” in the Right of Private Action Under the Personal Data Protection Act

*Bellingham, Alex v Reed,
Michael* [2021] SGHC 125

2 July 2021

LEGAL UPDATE

In this Update

In *Bellingham, Alex v Reed, Michael* [2021] SGHC 125, the High Court provided guidance on the scope of “loss or damage” which may give rise to a right of private action under the Personal Data Protection Act.

03
INTRODUCTION

04
BACKGROUND

04
THE DISTRICT COURT DECISIONS

05
THE HIGH COURT DECISIONS

05
LOCATION OF SECTION 32 OF THE PDPA

06
LEGISLATIVE PURPOSE OF SECTION 32(1) OF THE PDPA

07
PUBLICLY AVAILABLE INFORMATION OBTAINED THROUGH UNLAWFUL USE OF PERSONAL DATA

08
COMMENTARY

INTRODUCTION

KEYPOINT

As of late, courts across several foreign jurisdictions such as the UK Supreme Court and the ECJ have been grappling with the issue of whether non-material damages incurred by individuals caused by personal data breaches are compensable. This inquiry is complicated by the role of the EU General Data Protection Regulation (“GDPR”) and varying pre-GDPR judicial positions and attitudes of the various jurisdictions.

Recently, an opportunity arose for the Singapore High Court to address a similar issue in the local context. In the decision of *Bellingham, Alex v Reed, Michael* [2021] SGHC 125 clarified the scope of “loss or damage” of Section 32(1) of the Personal Data Protection Act 2012 (No. 26 of 2012) (“**PDPA**”) as it stood in 2018 when the acts complained of took place. Following amendments to the PDPA in February this year, Section 32(1) has been repealed and replaced by Section 48O of the PDPA. Nevertheless, as the two provisions are very similar, it is likely that the court’s interpretation of Section 32(1) would apply in respect of Section 48O. Unless otherwise stated, all subsequent references to the PDPA are to the pre-amendment.

Under Section 32(1) of the PDPA, individuals were given a right of private action in relation to a contravention of almost any of the PDPA’s provisions relating to data protection (specifically, Parts IV, V and VI of the PDPA prior to the recent amendments):

*“Any person who suffers **loss or damage** directly as a result of a contravention of any provision in Part IV, V or VI by an organization shall have a right of action for relief in civil proceedings in a court.”*

This case was an appeal against the District Judge’s decision granting an injunction against the Appellant, Alex Bellingham (“**Bellingham**”), in civil proceedings commenced under Section 32(1) of the PDPA. The proceedings were originally commenced by IP Investment Management Pte Ltd and IP Real Estate Investments Pte Ltd but the Respondent, Michael Reed (“**Reed**”) was subsequently added as a plaintiff in those proceedings.

The High Court decided that Reed did not have a right of private action under Section 32(1) of the PDPA because he had not suffered any loss or damage within the meaning of the provision. The appeal was allowed and the order made by the DJ was set aside.

BACKGROUND

IPIM is a fund management business that is part of the IP Investment Management group of companies (“**IPIM Group**”). IP Investment Management (HK) Ltd (“**IPIM HK**”) is another company in the IPIM Group. IP Real Estate is a company within the IP Global group of companies (“**IP Global Group**”) which the IPIM Group is related to.

Bellingham was employed by IP Real Estate on 1 June 2010. On 1 March 2016, IP Real Estate seconded Bellingham to IPIM HK. Amongst other things, Bellingham managed the “Edinburgh Fund”. All the investors in the Edinburgh Fund were customers of IPIM and IP Real Estate (the “**Customers**”). The Customers disclosed their personal data in confidence to IPIM and/or IPIM HK, which managed their investments. The Edinburgh Fund was scheduled to be terminated in the second half of 2018, with the Customers exiting from the fund in that period.

Bellingham subsequently left his employment and joined a competitor of IPIM known as Q Investment Partners Pte Ltd (“**QIP**”). Bellingham contacted some of the Customers, including Reed. On 15 August 2018, Bellingham sent an email to Reed at his personal email address reaching out to, *inter alia*, “... [touch] base regarding [Reed's] upcoming Edinburgh exit...”.

On 21 August 2018, Reed sent an email to IPIM's director, Mark Ferguson, querying the fact that QIP had information about his investment in the Edinburgh Fund. Subsequently, on 28 August 2018, the Reed further sought clarifications from Bellingham as to the latter's knowledge of his dealings with IP Global and, in particular, the Edinburgh Fund.

On 1 October 2018, IPIM and IP Real Estate commenced civil proceedings in the District Court against Bellingham pursuant to Section 32(3) of the PDPA, seeking, *inter alia*, an injunction restraining Bellingham from using, disclosing or communicating to any person or persons any “Personal Data” of Reed and two other of their Customers.

THE DISTRICT COURT DECISION

Before the District Court, the issue arose as to whether IPIM and IP Real Estate had the necessary standing to bring an action under Section 32 of the PDPA.

On 20 March 2019, IPIM and IP Real Estate applied to join Reed as a plaintiff. Subsequently, Reed was joined as a plaintiff in the civil proceedings before the District Court.

The District Court found that IPIM and IP Real Estate lacked standing to commence the proceedings under Section 32 of the PDPA. Reed was held to have the requisite standing to pursue a claim against Bellingham under Section 32 of the PDPA insofar as it relates to the use of his own personal data. Reed's application was granted by the DJ.

A modified prohibitive injunction was granted against Bellingham, restraining him from using, disclosing or communicating to any person or persons any personal data of Reed. Bellingham was also ordered to undertake to destroy all personal data of Reed covered by the prohibitive injunction.

THE HIGH COURT DECISION

Bellingham brought an appeal against the order granted by the District Court. For the reasons described below, the High Court allowed the appeal and set aside the order granted by the District Court.

The crux of the issue was the scope of "loss or damage" under Section 32(1) of the PDPA and whether it should be interpreted narrowly to refer to the heads of loss or damage under common law (pecuniary loss, damage to property, personal injury including psychiatric illness) or widely to include distress and loss of control over personal data.

In ascertaining the possible interpretations of this provision, the High Court had analysed its location in the scheme of the PDPA and its legislative purpose.

LOCATION OF SECTION 32 OF THE PDPA

The High Court noted that Section 32 was located in Part VII of the PDPA which provides for enforcement of Parts III to VI of the PDPA¹. Part VII of the PDPA also provides avenues for enforcement by the Personal Data Protection Commission ("**PDPC**"). In particular, Section 29 of the PDPA permits the PDPC to give such directions as it thinks fit pursuant to an organisation's non-compliance with any provision in Parts III to VI of the PDPA.²

Section 32(1) of the PDPA may be distinguished from Section 29, where the former required there to be an additional "loss or damage". Since there would inevitably be loss of control over personal data in every case of a contravention of Parts III to VI, Section 32(1) could not

have been intended to apply where the alleged loss or damage is simply a loss of control over personal data.

¹ In the present version of the PDPA, Section 48O is located in in Part IXC, which provides for the enforcement of Parts IV to VIB, and Division 3 of Part IX or Part IXA of the PDPA.

² Section 29 of the PDPA has since been repealed by the amendments. Sections 48I and 48J of the present PDPA provides for a similar range of powers, including enhanced financial penalties that the PDPC may impose.

LEGISLATIVE PURPOSE OF SECTION 32(1) OF THE PDPA

The High Court proceeded to ascertain the legislative purpose underlying Section 32(1) of the PDPA. In reaching the conclusion that Parliament intended for “loss or damage” to be interpreted narrowly to refer to heads of loss or damage applicable to torts under common law (i.e., that it does not include distress or loss of control over personal data), Chua J considered prevailing academic opinion and the Second Reading of the Personal Data Protection Bill.

Firstly, Chua J concurred with the view of the amicus curiae that Section 32(1) of the PDPA created a statutory tort. Consequently, the interpretation of “loss or damage” should be to further the specific purpose of the provision as such. There was nothing in the PDPA that indicated otherwise.

Secondly, it was noted that at the Second Reading of the Personal Data Protection Bill (“**PDPB**”) in 2012, the Minister stated the rationale for the PDPB was to safeguard individuals’ personal data and to enhance Singapore’s competitiveness as a trusted business hub. Section 3 of the PDPA also expressly describes the purpose of PDPA, which is *“to govern the collection, use and disclosure of personal data by organisations in a manner that recognises both the right of individuals to protect their personal data and the need of organisations to collect, use or disclose personal data for purposes that a reasonable person would consider appropriate in the circumstances”*.

Further, the data protection frameworks in key jurisdictions, including Canada, New Zealand, Hong Kong, the EU and the UK were studied in the formulation of the PDPB. Nevertheless, express references to any form of emotional harm or loss of control over personal data which were present in the relevant foreign legislative provisions were noticeably absent in Section 32(1) of the PDPA.

The High Court also noted that the positions in Canada, New Zealand, Hong Kong, the EU and the UK were primarily due to the recognition of

the right of privacy under the International Covenant on Civil and Political Rights (189 UNTS 137) or Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, both of which do not apply to Singapore. There is also no discrete constitutional right to privacy in Singapore. Therefore, it may be concluded that the PDPA adopts a balanced approach and is not driven by any recognition of the right to privacy as a fundamental right.

In light of all of the above, High Court found that Reed had not shown that he had suffered “loss or damage” such as to give rise to a right of action under Section 32(1) of the PDPA. As such, the appeal was allowed and the District Court order was set aside.

Nevertheless, given that the issue was decided for the first time, the High Court subsequently granted Reed leave to appeal against the decision. Reed has since filed his appeal pursuant to the leave granted.

PUBLICLY AVAILABLE INFORMATION OBTAINED THROUGH UNLAWFUL USE OF PERSONAL DATA

In addition to its main finding, the High Court opined on the limitations of the “publicly available information” exception.

Under the PDPA, “publicly available”, in relation to personal data about an individual, refers to personal data that is generally available to the public, and includes personal data which can be observed by reasonably expected means at a location or an event at which the individual appears and that is open to the public.

Pursuant to Section 17 of the PDPA read with the Second Schedule para 1(c), the Third Schedule para 1(c), and the Fourth Schedule para 1(d),³ organisations are not required to obtain consent for the collection, use or disclosure of publicly available personal data.

However, Chua J clarified that organisations cannot rely on Section 17 of the PDPA where personal data that is publicly available is obtained only through the unlawful use of other personal data.

On the facts of the case, the High Court held that Bellingham was not entitled rely on Section 17 of the PDPA to collect, use or disclose Reed’s email address without his consent because Bellingham had conceded that he would not have been able to find Reed’s email address without the use of Reed’s name.

³ Following the amendments to the PDPA, the relevant provisions are now Section 17 read with the First Schedule to the amended PDPA.

COMMENTARY

Until the Court of Appeal hears and decides on Reed’s subsequent appeal, the High Court decision helpfully delineates the scope of “loss or damage” which would give rise to a right to private action under Section 32(1) of the PDPA (which broadly corresponds to Section 48O of the present amended PDPA). In any event, it is useful to bear in mind that, as the High Court noted, where individuals are found to have no right of private action under Section 32 of the PDPA, they may have recourse to the range of remedies available under Section 29 (which broadly correspond to Sections 48I and 48J of the present PDPA). While these do not include the award of damages, the PDPC is empowered to give directions for non-compliance and impose enhanced financial penalties. Nevertheless, it remains open that there may be other circumstances, different from the present case, where the courts would accept a claim under Section 48O of the PDPA. Making a complaint to the PDPC is not a pre-requisite for making a claim under Section 48O and the directions which the PDPA may decide to issue is not a substitute for the relief which may be granted by a court, such as an injunction to restrain an organisation from conduct that may cause loss or damage. Further, the PDPA is principally concerned with the potential impact of a contravention on the affected individuals. Section 48O is not limited to individuals and instead confers the private of private action on any “person” (which, as defined in the Interpretation Act, may include corporate bodies and other juridical persons).

Similarly, it is presently uncertain in other jurisdictions where the law is heading in this regard. In the UK Court of Appeal decision of *Lloyd v Google* [2019] EWCA Civ 1599, which the Singapore High Court declined to follow, it was held that individuals may claim damages for the mere loss of control over their personal data in a class action. The decision subsequently went on appeal before the UK Supreme Court. At the time of writing, its decision has yet to be pronounced.

This situation is mirrored in the ECJ, which faces a similar question on whether individuals may claim damages for non-material damages arising from infringements of the GDPR. The Austria Supreme Court had submitted a reference on the matter in OBH 6Ob35/21x, which has yet to be heard at the time of writing.

Given the diversity of courts tackling the issue, it is interesting to see how Singapore’s approach to the protection of individuals’ personal data may be contrasted with the jurisprudential and legislative trajectory

of foreign jurisdictions. While it remains undecided as to where the individual courts would head, the need for legal and data privacy industries to bear in mind potential divergences in national perspectives and approaches towards personal data protection in navigating new and emerging legal developments remains key.

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