Reporter
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DENTONS RODYK

Regional CEO message

Happy New Year and welcome to the first issue of Dentons Rodyk Reporter 2017. Let me share our key developments in 2016 and tell you what to expect from us in 2017.

Combining with Dentons

Eight months ago, we became Dentons Rodyk or Dentons 瑞德 when we combined with the world's largest law firm, Dentons. With this combination, we have been better able to serve clients in two critical respects:

1. By calling on specialist talent on other jurisdictions to help clients with projects and matters in Singapore and the region.

2. By being able to serve clients through Dentons across the globe.

The combination has also strengthened talent and career development, translating into lawyers who are more effective and experienced.

Several partners have participated in Dentons' New Partner Induction Programme, which equips for leadership. Several associates have been seconded to Dentons offices in leading legal centres such as London, to gain first-hand and in-depth understanding of best practices.

The region

Dentons Rodyk has been strengthening ties and working relationships with leading lawyers within South East Asia. Our associated office in Indonesia is growing, and we will open in Myanmar in 2017. Like many of our clients, whose regional efforts we support, we see Myanmar as a major opportunity for business growth in the next five years.

Achievements

In the course of 2016, our firm has seen improved rankings in all major legal publications, including Chambers Asia Pacific, The Legal 500 Asia Pacific, the Asian Legal Business (ALB).

Our young partners, Hsu Li Chuan, Sunil Rai, Jonathan Guwe, Koh Kia Jeng and Zhulkarnain Abdul Rahim, were featured in various 40 under 40 lists.

Litigation senior associate Lau Wen Jin, was awarded an advocacy award when he participated in a hypothetical dispute organised by the Singapore International Arbitration Academy.

> Read more on page 2

In this issue...

Regional CEO message **1**

Business Bulletins

Entering the Sandbox – Guidelines released for FinTech entrepreneurs and entities **3**

Joint accounts – The new shield? **5**

Retention of records - Quotidian but necessary **8**

IP Edge

Liability of an internet subscriber for acts of copyright infringement over the internet **10**

Personal Data Protection Act – Obligation to protect and secure data, and what to do in case of breach **12**

And we have continued to do high quality work in major matters. We were involved in some of 2016's complex and high profile deals such as:

- Advising the BlackRock Group as Real Estate lead counsel on the sale of its 100% share interest in Asia Square Tower 1 for S$3.4 billion.
- Advised the finance parties in the grant of facilities of up to US$1.652 billion to CMA CGM S.A., part of the CMA CGM Group, to finance the acquisition of Neptune Orient Lines Limited.
- Advised the shareholders of PropertyGuru in TPG's investment in PropertyGuru. This deal won the Asian-MENA Counsel Deals of the Year 2016 award (June 2016).
- Advising Quest Laboratories in response to a suit in one of three high profile medical suits in Singapore.
- Representing PNG Sustainable Development Program Limited in response to a suit brought by the government of Papua New Guinea.

Community work

Dentons Rodyk has continued to honour its commitment to serving the broader community, including seconding a senior associate, Amogh Chakravarti, as the Law Society Pro Bono Fellow. His tough stint at the sharp end of criminal defence work will stand him in good stead in the cut and thrust of general litigation. We were also awarded The Law Society of Singapore's Contributor of the Year Award – an award we have dominated from its inception.

Welcome and promotions

The firm continues to grow strongly in targeted practice areas.

In December 2016, John Dick joined our Singapore office as a partner in our Energy & Resources and Infrastructure Practice and South East Asia Regional Practice.

On 1 Jan 2017, we welcomed former judicial commissioner, Edmund Leow, SC, with 29 years in practice, as a Senior Partner, heading up our Tax practice.

Litigator Koh Kia Jeng has been promoted to Senior Partner. Kia Jeng has an outstanding practice in construction and insolvency.

The Alumni Network

We are planning to roll out the Alumni Network in 2017 to reconnect and nurture relationships among current and former lawyers by fostering goodwill and building strategic partnerships through training, co-authorships and community service programmes. Our firm will be contacting all alumni soon. For more details, please send a note to sg.academy@dentons.com.

The future

The future is exciting for Dentons Rodyk. Dentons continues to grow globally, with rapid expansion through South America. We are developing deep and enduring relationships with our colleagues worldwide in service of clients whose needs cross borders and span continents.

I hugely appreciate the support that you have given me and my colleagues over the years.

I wish you a safe, happy, healthy and prosperous 2017.

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Business Bulletins

Entering the Sandbox – Guidelines released for FinTech entrepreneurs and entities

Guidelines on entering the Sandbox

On 16 November 2016 the Monetary Authority of Singapore (MAS) released its *"regulatory sandbox" (Sandbox) guidelines* for FinTech experiments to be conducted in a controlled environment after incorporating market feedback and road-testing against actual applications and potential experiments that may enter the Sandbox soon.

Given that the financial services industry is heavily regulated and touches our lives in many ways on a daily basis (from opening a bank account to payments to investments and more), the purpose of setting up the Sandbox is to allow finance technology (FinTech) experiments to take place within a controlled environment where legal and regulatory requirements are relaxed in certain relevant aspects in order for the new technology to be tested before being applied on a broader scale.

MAS recognizes that innovation in finance is key to enabling solutions that utilise technology to deliver financial products or services more efficiently and can make our lives better, but innovation may be curtailed if a heavy-handed or risk-adversed approach is taken through the strict imposition of regulations on such services or products. There would also be regulatory compliance costs and legal considerations that may put off budding innovations which may otherwise improve operations in the financial services industry.

MAS has therefore taken this pro-active approach of allowing a controlled environment for FinTech experiments where the cost and weight of regulatory compliance can be relaxed for the duration of the Sandbox and balanced in proportion to the risk posed by such upcoming technologies (especially where it is not possible for a start-up to anticipate every risk or meet regulatory requirements). If the experiment succeeds, then such an entity can 'exit the sandbox' and be applied on a broader scale. In the event, however, should the experiment not succeed while in the Sandbox, then it would fail safely within controlled boundaries where the impact on the public would be minimal, if any.

The guidelines are therefore intended to provide clarity on MAS' expectations on applications to the Sandbox, allow flexibility in approach and criteria, and provide transparency into the process.

Stages of the Sandbox

Briefly, there are three stages in this Sandbox approach – the application stage, evaluation stage and the experimentation stage.

Application stage

At the application stage, an applicant would submit a detailed application to MAS that appears almost akin to a business plan: an applicant defines the problem or pain point; elaborates on how the proposed financial solution is differentiated from what is already in the market; states the legal and regulatory requirements for deploying the proposed financial service; and have tested the solution on a limited basis. It is also expected that an applicant would have planned for the successful application on a wider scale, and also have a plan for the failure of the experiment.

MAS has provided an application template for the Sandbox to guide applicants (and submissions to be done to FinTech_Sandbox@mas.gov.sg): http://www.mas.gov.sg/~/media/Smart%20Financial%20Centre/Sandbox/Sandbox%20Application%20Template.docx.
In addition, another appeal of this Sandbox is that there is no administrative charge for the application.

Evaluation stage

If the application is successful and one enters the Sandbox, MAS and the applicant will jointly define the boundaries within which the experiment will take place. MAS will then determine the specific legal and regulatory requirements which it is prepared to relax, for the duration of the experiment within these boundaries. It is observed that such requirements would likely relate to the operating aspects (such as capital maintenance and management requirements) but certain requirements are still paramount and cannot be relaxed (such as measures against anti-money laundering and customer confidentiality).

Experimentation stage

At the experimentation Stage, the Sandbox entity shall notify its customers that the financial service is operating in a Sandbox and disclose the key risks associated with

> Read more on page 4

the financial service. The Sandbox entity is also required to obtain the customers' acknowledgement that they have read and understood these risks before accessing the product or service.

Concluding thoughts on the Sandbox process

As more applications are approved, further information would be made available by MAS to the public. The author praises the move as such information would be very helpful in guiding future applications by FinTech firms and entrepreneurs looking to apply technology in an innovative way to provide financial services or products that are likely to be regulated in Singapore.

In addition, after having gone through the Sandbox process, the author believes that successful applicants should also be of greater interest to venture capitalists and investors who are considering Fintech investments – this will be very helpful for the growth of emerging entities looking to scale their operations.

Finally, it is hoped that such successful experiments in the Sandbox would indeed improve our lives and maintain Singapore's position as a leading financial centre in the world.

Further readings

http://www.mas.gov.sg/Singapore-Financial-Centre/Smart-Financial-Centre/FinTech-Regulatory-Sandbox.aspx

http://www.mas.gov.sg/~/media/Smart%20Financial%20Centre/Sandbox/FinTech%20Regulatory%20Sandbox%20Guidelines.pdf

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Joint accounts – The new shield?

A case review on *One Investment and Consultancy Limited and another v Cham Poh Meng (DBS Bank Ltd, garnishee)* [2016] SGHC 208

Introduction

Although the sum involved was small, the High Court's decision in *One Investment and Consultancy Limited and another v Cham Poh Meng (DBS Bank Ltd, garnishee)* [2016] SGHC 208 is one which would have a great impact in the area of enforcement of a judgment debt – A joint account held in the names of a judgment debtor and third parties jointly cannot be subject to attachment under a garnishee order.

This decision, together with the reasons the High Court used to justify it, now casts doubt on whether a bank is able to rely on a common clause found in security documents which allows it to combine any account held by a borrower (whether solely or jointly with a third party) together with the borrower's liabilities. More importantly, it now advances the possibility of borrowers using joint accounts as a shield against enforcement by banks.

Background

The first plaintiff was a company incorporated in the British Virgin Islands and the second plaintiff was its director. On 8 January 2016, the plaintiffs obtained summary judgment against the defendant for, *inter alia*, a sum of S$1,472,561.

Pursuant to the summary judgment, the second plaintiff applied for a garnishee order against DBS Bank Ltd (DBS) for, *inter alia*, a joint account held in the names of the defendant and his wife (the Joint Account), consisting of S$117.34.

At first instance, the learned Assistant Registrar referred to the recent cases of *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295 *and Chan Yat Chun v Sng Jin Chye and another* [2016] SGHCR 4. In *Chan Shwe Ching*, it was held that a defendant's interest in a property held jointly by him and a third party as joint tenants could be attached and taken in execution to satisfy a judgment debt under a writ of seizure and sale, and in *Chan Yat Chun*, it was held that a similar approach is also taken where the defendant and the third party hold the property as tenants-in-common instead. Relying on the two cases, it was held that the Joint Account could be subject to attachment under the garnishee order. Although the learned Assistant Registrar acknowledged that the two cases mentioned above relate to a writ of seizure and sale against immovable property rather than the garnishing of money in a joint account, she held that there was no reason to distinguish the two.

DBS subsequently appealed.

The High Court's ruling

On appeal, Kannan Ramesh JC (the Judge) found for DBS, and in doing so laid out the positions of the various Commonwealth authorities, as well as the policy considerations, justifying his decision.

The Commonwealth authorities

The learned Judge first considered the various Commonwealth authorities, most of which supported the view that joint accounts could not be the subject of a garnishee order:

I. The English Position is well-established in the case of *Hirschhorn v Evans* [1938] 3 All ER 491, where the English Court of Appeal held that a joint account cannot be the subject of a garnishee order in respect of the debt of only one of the account holders. This is because to hold otherwise would be to enable a judgment creditor to attach a debt to two persons in order to answer for the debt due to him from the judgment debtor alone, which would be altogether contrary to justice. This position was later considered and confirmed in a White Paper, and as such remains unchanged.

II. The Australian Position follows the English Position: the Court of Appeal of New South Wales held in *D J Colburt & Sons Pty Ltd v Ansen; Commercial Banking Co of Sydney Ltd (Garnishee)* [1996] 2 NSWR 289 that the correctness of the English position in *Hirschhorn* was "so obvious as not to require further attention". The position was subsequently subject to legislative reform, but the court's decision still stands where the statute does not apply.

III. The positions in Hong Kong (see *Gail Stevenson and another v The Chartered Bank* [1977] HKLR 556) Northern Ireland (see *Belfast Telegraph Newspapers Ltd v Blunden (trading as Impact Initiatives)* [1995) NI 351) and India (see *Anumati v Punjab National Bank* LNIND 2004 SC 1877) all support his view as well.

> Read more on page 6

IV. The only Commonwealth jurisdiction that has departed from the position in *Hirschhorn* is Canada: In *Smith v Schaffner* [2007] NSJ No 294, the Nova Scotia Supreme Court allowed a garnishee order to be made against a joint account, as they found that "there is no reason, based on policy, equity, or logic, that if the interest of the execution debtor in the "property" of a joint account is established, that a creditor should not be entitled to have the sheriff attach the execution debtor's "interest" in the "property" by garnishee." However it was held that the burden fell on the judgment creditor to establish the interest of the judgment debtor in the joint account.

As such, the approach taken by the majority of the Commonwealth countries lent great weight in the Judge arriving at the view that joint accounts cannot be subject to a garnishee order.

Policy considerations

More importantly, the Judge examined the policy considerations surrounding this case, and categorised into two categories: (1) Prejudice to the banks, and (2) Prejudice to the innocent joint account holders.

Prejudice to the banks

The first category of policy considerations is the detriment potentially suffered by the banks.

The main issue the Judge considered is the current lack of a framework for determining each joint holder's contribution to the joint account. As it was held that there is no basis in law or fact for a presumption of the contributions of the joint account holders to be equal, such a determination would involve a "fairly involved process that is typically resolved by a full factual investigation at trial, something that banks are not equipped to conduct and that enforcement processes are ill-suited for". Furthermore, to require the banks to make such assessments could expose them to liability to the innocent joint account holders.

Even if such a framework is to be adopted, this would result in the increased operational and legal costs of compliance: in order to ensure that the innocent joint account holders are properly treated and their complaints are properly addressed, the banks would have to incur costs in notifying them and responding to their complaints. The Australian Parliament has laid down a lengthy framework for issuing garnishee orders against joint accounts, and if Singapore was to adopt this framework, this would impose a significant financial and administrative burden on the

banks. Such increased costs would ultimately be borne by the judgment creditors and debtors, thereby imposing a barrier to justice.

Prejudice to the other account holders

The second category of policy considerations is the detriment potentially suffered by the innocent joint account holders.

The first issue that arises in this category is the lack of a framework for a joint account holder to assert his share in the joint account: There is currently no requirement that an innocent joint account holder be notified, nor is there any mechanism for the innocent joint account holder to seek determination of the judgment debtor's interest in the joint account under the Rules of Court. This means that the garnishee order could be made final and the sum specified therein deducted even before the innocent joint account holder is made aware. Even if the innocent joint account holder was notified by the bank, he has no recourse save to register his objection with the bank or to incur substantial costs by seeking to participate in the formal garnishee process before the court.

> Read more on page 7

Even if the Singapore courts allow the approach in *Smith* where the burden falls upon the judgment creditor to establish the interest of the judgment debtor in the joint, the result is that the decision of the court would be based on the partisan evidence of the judgment creditor – an apparent breach of natural justice.

The second issue that arises is determining what percentage of the joint account to freeze in the period between the service of the order to show cause and the garnishee order being made final. Even if the decision to freeze half of the account was rightfully made, the order would not have prevented a judgment debtor from withdrawing the remaining money in a joint account, and this would have resulted in the innocent joint account holder shouldering the whole of the judgement debtor's debt since all that would be left in the joint account would be the frozen money, a result which would run counter to the aim of garnishee proceeds.

The High Court's conclusion

Based on the reasons mentioned above, the learned Judge allowed the appeal. It is important to note that in the course of his judgment, he acknowledged the fact that his holding would allow a debtor to deliberately channel his funds into joint accounts to shield them from garnishee orders. However, in the learned Judge's view, the benefits of introducing a policy to attach joint accounts under garnishee orders would be disproportionate to the range of operation, cost and policy difficulties which would impact on debtors, creditors and third parties alike.

Commentary

The dictum of the case is narrowly restricted to the issue of garnishee proceedings in relation to joint accounts. However it seems that the reasons adopted by the learned Judge, especially the policy considerations, are equally applicable to cases beyond the scope of garnishee proceedings. One such area of law relates to cases where the bank itself is the creditor – would borrowers be able to shield their liquid assets from the bank by channelling them into joint accounts?

A standard clause in most security documents nowadays provides for banks to have the option to combine or consolidate all or any of the accounts of a borrower, regardless of whether such accounts are held by that borrower alone or jointly with another person, with the liabilities of the borrower. As such, a standard remedy available to banks would be to set-off any liabilities of a borrower with any account with the borrower's name on it.

In light of the above case, it would seem that the enforceability of this standard clause is now cast in doubt: the policy considerations applied by the High Court to garnishee proceedings may equally apply to situations where the bank itself is the creditor seeking redress from joint accounts held jointly by a borrower and an innocent third party. This is because an innocent joint account holder will likely suffer the same prejudice he would have suffered if a garnishee order were made against the same joint account. Similarly, to introduce a framework to establish the contributions of each individual joint account holder would incur significant costs for the borrower and the innocent joint account holder, as well as operational and administrative costs for the bank.

As such, it seems that there is now doubt on whether such a remedy is available to banks in the case of a default by a borrower. As noted by the Judge in the case, it would seem that a borrower could easily ring-fence his assets from a bank by transferring funds into a joint account with a third party.

Whether or not such an extension will be adopted by the Singapore courts remains to be seen. In any case, as the learned Judge held in *obiter*, a possible alternative would be for a judgment creditor to apply for a receiver to be appointed over the joint account. However anything more than that was held to be best left for legislative reform.

Dentons Rodyk acknowledges and thanks associate Ryan Goh for his contribution to the article.

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Retention of records - Quotidian but necessary

Introduction

To keep or not to keep its records - in considering this question, a Singapore-incorporated company should be aware of certain statutorily-provided minimum retention periods it must comply with. This article discusses the minimum retention periods under the following statutes, which are the key legislations in Singapore governing the issue:

a. the Companies Act (Chapter 50 of Singapore Statutes) (the Companies Act);

b. the Income Tax Act (Chapter 134 of Singapore Statutes) (the Income Tax Act); and

c. the Goods and Services Tax Act (Chapter 117A of Singapore Statutes) (the Goods and Services Tax Act).

Companies Act

Pursuant to section 199(1) of the Companies Act, it is mandatory for every company to keep such accounting and other records that will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time. The relevant records must be kept in such manner as to enable them to be conveniently and properly audited.

Section 199(2) of the Companies Act further provides that a company must retain the records, referred to above, for at least five years commencing from the end of the financial year in which the transactions or operations to which those records relate are completed.

Under section 199(6) of the Companies Act, the company and every officer of the company who fails to comply with the section, shall be guilty of an offence and will be liable on conviction to a fine not exceeding S$5,000 or to imprisonment for a term not exceeding 12 months and also to a default penalty.

> **Read more on page 9**

Income Tax Act

Under section 67(1) of the Income Tax Act, every person carrying on or exercising any trade, business, profession or vocation:

a. shall keep and retain in safe custody sufficient records for a period of five years from the year of assessment to which any income relates to enable his income and allowable deductions under the Income Tax Act to be readily ascertained by the comptroller or any officer authorised in that behalf by the comptroller; and

b. shall, if the gross receipts from such trade, business, profession or vocation in the preceding calendar year exceeded S$18,000 from the sale of goods, or S$12,000 from the performance of services, issue a printed receipt serially numbered for every sum received in respect of goods sold or services performed in the course of or in connection with such trade, business, profession or vocation, and shall retain a duplicate of every such receipt.

The definition of "records" set out under section 67(5) of the Income Tax Act includes:

a. books of account recording receipts or payments or income or expenditure;

b. invoices, vouchers, receipts, and such other documents as in the opinion of the Comptroller are necessary to verify the entries in any books of account; and

c. any records relating to any trade, business, profession or vocation.

Section 94(1) of the Income Tax Act stipulates that any person who contravenes any of the provisions of this Act shall be guilty of an offence, whereas section 94(2) of the Income Tax Act further provides that any person guilty of an offence under this section for which no other penalty is provided shall be liable on conviction to a fine not exceeding S$1,000 and in default of payment to imprisonment for a term not exceeding six months.

Goods and Services Tax Act

Section 46(1) of the Goods and Services Tax Act provides that the following documents are required to be kept by a company which is liable to be registered under the Goods and Services Tax Act:

a. the company's business and accounting records;

b. the company's accounts;

c. copies of all tax invoices and receipts issued by the company;

d. tax invoices received by the company;

e. documentation relating to importations and exportations by the company;

f. all credit notes, debit notes or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents issued by the company; and

g. such other records as may be prescribed.

Section 46(2) of the Goods and Services Tax Act goes on to provide that any records kept in pursuance of this section shall be preserved:

a. in the case of records relating to a prescribed accounting period ending before 1 January 2007, for a period of not less than seven years from the end of the prescribed accounting period; and

b. in the case of records relating to a prescribed accounting period ending on or after 1 January 2007, for a period of not less than five years from the end of the prescribed accounting period.

Under section 46(6) of the Goods and Services Tax Act, a company which without reasonable excuse fails to comply with the section will be guilty of an offence and will be liable on conviction to a fine not exceeding S$5,000 or to imprisonment for a term not exceeding six months or to both. In the case of a second or subsequent conviction, the company will be liable to a fine not exceeding S$10,000 or to imprisonment for a term not exceeding three years or to both.

Dentons Rodyk acknowledges and thanks Sean Gallagher and Julian Foo for their contributions to the article.

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IP Edge

Liability of an internet subscriber for acts of copyright infringement over the internet

A United States film studio, Dallas Buyers Club LLC, made news last year for commencing legal proceedings against internet subscribers for copyright infringement for downloading the movie "Dallas Buyers Club".

The film studio had commenced legal proceedings against internet service providers (ISPs) in Singapore to compel ISPs to provide details of subscribers associated with certain Internet Protocol (IP) addresses.

Thereafter, the film studio issued letters of demand to the subscribers alleging copyright infringement.

Presumably, the film studio had employed technology that allowed them to trace the download or upload of the film on the internet to an IP address associated with an ISP. An IP address is only an internet address that does not identify the individual who performed the actual upload or download. For the rights owners to assert their copyright, they need to know who to assert their copyright against. The film studio therefore had to take proceedings against the ISPs in order to obtain information from the ISPs to identify the subscribers associated with those IP addresses.

Is the internet subscriber liable?

The case raises the interesting question of the extent of a subscriber's liability at law for copyright infringement committed through his internet subscription.

Under the Copyright Act, assuming that a person does not have the requisite permission from the copyright owner, he can be liable for copyright infringement in two scenarios:

- First, when he commits the infringing act of copying the copyrighted work (in this case, a film) himself, in Singapore.
- Second, if he does not commit the infringing act of copying himself, but authorises the act of infringement by another party, in Singapore.

If the subscriber is in fact the person committing the infringing act of making an unauthorised copy of the film (by downloading or uploading the film), the subscriber would of course be liable for infringement.

Based on an IP address alone, it is not possible to know for sure whether it was the subscriber who has committed the infringing act and is liable for infringement, or whether it was some other individual whom the subscriber had allowed to use his/her internet connectivity. It is commonplace for the internet subscription of a subscriber to be shared with multiple individuals. For example, a landlord could be providing internet connectivity to his tenants using his internet subscription, or a member of the same household may connect to the internet on a single family member's internet subscription.

> **Read more on page 11**

One would be hard-pressed to say definitively that the subscriber is authorising another individual's infringement of copyright simply by having allowed that other individual to use his internet connectivity. There is yet to be any decided case in Singapore where the courts have decided that a case of authorising infringement can be made out against a party that merely provides the internet connectivity used by the infringer to commit the infringement. Past decisions by our courts suggest that the following factors are relevant for determining whether a person has authorised the infringement of another:

- whether the "authoriser" had control over the means by which infringement was committed and hence a power to prevent the infringement;
- the nature of the relationship between the "authoriser" and the actual "infringer";
- whether the "authoriser" took reasonable steps to prevent or avoid infringement; and
- whether the "authoriser" had actual or constructive knowledge of the occurrence of the infringement or the likelihood of such infringement occurring.

Evidence of a subscriber merely providing the internet connectivity used to commit the infringement, would at best satisfy the first factor and is hardly determinative of the subscriber authorising any infringement.

Accordingly, there is little legal basis to impute liability for copyright infringement on a subscriber merely because his IP address (and his internet connectivity) has been used in the commission of an infringing act. A demand letter issued merely on this basis could be considered speculative. If the subscriber is not the infringer, the rights owners could also be liable for making a groundless threat of legal proceedings.

In the Dallas Buyers Club case, the Law Society issued a warning against the lawyers for sending letters threatening criminal proceedings, which is against ethical rules.

If a case of infringement cannot be made out against the subscriber, what recourse does rights owners have? Similar to the process that the rights owners have taken against the ISP for information on the subscriber, rights owners can also seek information from subscribers to ascertain the party responsible for the infringement. For instance, the subscriber could be compelled to provide information on the identity of the users that were allowed access to his internet connectivity at the relevant time. With the information, rights owners can then determine the parties responsible for the infringement. Undoubtedly, taking this approach creates additional obstacles for rights owners in enforcing their rights. However, it will ensure that the demand is made against the right person and subscribers are not unduly threatened with speculative demands.

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Personal Data Protection Act – Obligation to protect and secure data, and what to do in case of breach

Introduction

Since the coming into force of the Personal Data Protection Act (Cap 26 of 2012) (PDPA) in 2012, many organisations had focused only on part of their obligations under the PDPA, i.e. that of ensuring that their policies and practices for the collection, use and disclosure of personal data are in line with the PDPA.

In 2016 and up to the date of this article, the Personal Data Protection Commission (PDPC) has issued 13 decisions relating to the failure of organisations to protect personal data. This highlights the urgent need for organisations to take steps to examine how they protect and secure personal data in their possession.

Section 24 of the PDPA requires an organisation to "*make reasonable security arrangements to protect personal data in its possession or under its control in order to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks*."

The lessons learnt from decided cases

The cases which were under investigation by the PDPC involved various situations where personal data was compromised due to:

- inadequate supervision of physical process resulting in the sending of another person's personal data to an individual;
- unauthorised access into websites resulting in personal data of individuals being published on the Internet;
- use of outdated software;
- failure to recognise vulnerabilities associated with software or hardware;
- failure to audit systems, carry out penetration tests and to test vulnerabilities;
- ignorance of security measures required;
- failure to remove unused user accounts;

> Read more on page 13

- failure to implement secure passwords;
- failure to implement system which ensures compliance with password policy;
- failure to encrypt files containing personal data; and
- use of "auto fill" function.

In many of the cases, even though the organisation had outsourced the IT services to a third party vendor, and had relied on the third party vendor, the organisation was found to be in breach of its obligation under Section 24 of the PDPA. The PDPC issued warnings in some cases, and penalties meted out ranged from S$3,000 to S$50,000.

The message issued by the PDPC was clear – that even if an organisation appoints external vendors, it still remains responsible for ensuring that the vendors make reasonable security arrangements to protect the organisation's personal data. This is in accord with Section 4(3) of the PDPA which states that *"An organisation shall have the same obligation under this Act in respect of personal data processed on its behalf and for its purposes by a data intermediary as if the personal data were processed by the organisation itself."*

This puts many organisations (particularly small and medium sized enterprises) in a quandary as they may not have the technical ability to understand technical measures needed to protect their personal data, and rely on vendors to assist them.

Guidelines

In addition to the Advisory Guidelines on Key Concepts, the PDPC has also issued the following guidelines to assist organisations to comply with the requirement to protect personal data:

- Guide to Securing Personal Data in Electronic Medium
- Guide to Disposal of Personal Data on Physical Medium
- Guide on Building Websites for SMEs

These guidelines are not binding, but set out best practices, and are useful in assisting vendors and organisations take the necessary steps to protect personal data. The PDPC recognises that there is no "one size fits all", and that the security arrangements needed to be implemented depends on the nature of the personal data.

In summary, the steps that an organisation should take include the following:

i. take an inventory of the type of personal data it handles;

ii. categorise the personal data according to their sensitivity, and implement processes and policies appropriate to each type of personal data;

iii. conduct a risk assessment of its systems, policies, processes and practices;

iv. in addition to implementing technological measures to protect personal data, policies and physical processes should be reviewed and implemented;

v. ensure that employees are aware of the obligation to protect personal data;

> Read more on page 14

vi. limit access to personal data;

vii. implement secure passwords;

viii. consider encrypting passwords, files, communications etc;

ix. enable audit logs or other physical measures to trace unauthorised access;

x. implement incident reporting;

xi. audit its own systems, policies, processes and practices, and those of its vendors; and

xii. test vulnerabilities.

What to do in case of a data breach

In the cases investigated by the PDPC, it appears that the PDPC is prepared to be more lenient if:

- the organisation voluntarily notified the PDPC of the data breach;
- the organisation has notified the individuals concerned;
- the organisation has taken immediate remedial action;
- the organisation fully cooperates with the PDPC;
- the personal data concerned are not of a highly confidential or sensitive nature.

Conclusion

As an organisation can be held liable in the event that its vendors fail to make security arrangements to protect the organisation's personal data, it is important to ensure that its contractual arrangements with its vendors are as comprehensive as possible to protect the organisation.

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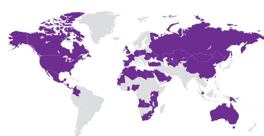

Countries
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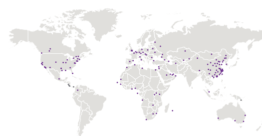

Locations
147

Total number of lawyers
7600+

All timekeepers
9900+

Total number of people
13,600+

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