



Litigation Newsletter



Protecting your data.



The Data Protection Act 2004 (DPA in this article) came into force in Gibraltar in 2007. The DPA together with its Regulations is a dutiful transposition of Directive 95/46/EC, of the EU, that wellspring of harmonisation.

What is "data" and why the need to protect it? The former is any information of, about or concerning persons (natural only, not corporate entities although the latter's employees or agents or contacts in person would be covered by the DPA). The latter question is answered by reference to an individual's constitutional right to pri-

vacancy – in this case, of personal information which can range from name, address and age to bank account and credit card details. It is worth noting at this stage that what is termed as "sensitive data" – that relating to religious or philosophical beliefs, race or ethnic origin, political opinions, health, sexual habits and trade union membership – is accorded additional protection by the DPA.

Whilst there is a need to protect the privacy of personal data, daily life requires that data be processed which includes storage, compiling, classify-

ing, dissemination and transfer to other third parties in the course of conducting the business in hand, including, of course, the business of the individual (the "data subject") him or herself).

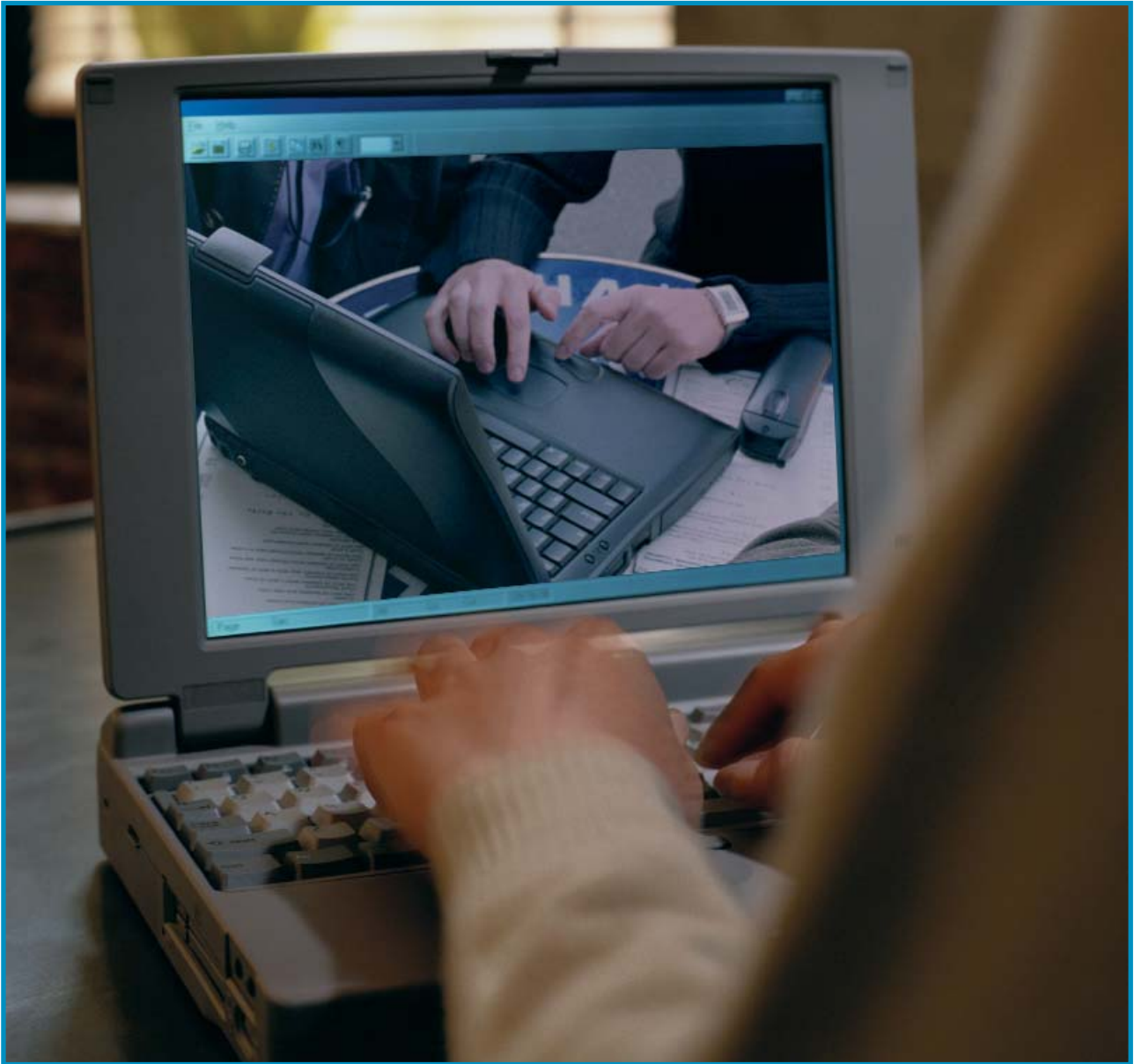
The Directive and DPA therefore seek to strike a balance between the competing interests of privacy and freedom of movement of information by banning the processing of data except where the protective measures apply.

In the first place the "data controller" (who decides the purposes and means of processing) must meet all the conditions of data quality and security which are that the data

- (1) must be obtained and processed "fairly" (which making the data available to the individual ("the data subject"), on request – subject to certain conditions and limitations) and "lawfully."
- (2) be accurate, complete and up-to-date.
- (3) be collected and kept for specified, explicit and legitimate purpose;
- (4) not used in manner incompatible to that purpose;
- (5) be adequate, relevant and not excessive in relation to that purpose; and
- (6) not be kept longer than that purpose requires.

There must also be technical and organisational security measures to protect data from accidental or unlawful destruction, amendment or unauthorised use. That at (3) and (5) do not





apply where the data is collected or used for historical, statistical or scientific use so long as the individual is not identifiable – anonymous but identifiable data is subject to the DPA.

Secondly, at least one of the following conditions must be met to render the processing legitimate.

- (1) the data subject has “unambiguously” consented to processing, as opposed to “express consent” in the case of “sensitive data”; or the processing is necessary;
- (2) to perform or prepare to perform a contract to which the data subject is a party or to comply with another legal obligation imposed on the data controller;

- (3) to prevent damage to the data subject’s health, property or vital interest;
- (4) necessary for the administration of justice, or for performance of a statutory duty or one imposed on the Government or any of its Ministers;
- (5) for the purpose of the “legitimate interests” pursued by the controller or a third party to whom data has been disclosed, except where such rights are overridden

by the European Convention on Human Rights or the Gibraltar Constitution.

The “legitimate interests” ground covers a whole host of possibilities. It can allow processing of data in the manner adopted by the controller or processor for its business. For example, it could arise where a bank or other concern handling large amounts of data has been disclosed, except where such rights are overridden





third party is based outside the EEA there is an obligation to ensure that the country in which the third party is based has similar protection by law or EU model clauses are inserted in the contracts with the third party ensuring the processor's legal DPA obligations are complied with.

Apart from having access to data (which can be refused, for example, in cases of criminal investigation or national security), the data subject is certain constraints, entitled to object to the collection and processing of data or seek its erasure or rectification, the latter where there has been a breach of the DPA or Regulations.

The DPA applies to processing of data where (1) the controller is established and the processing is part of its activities or (2) the controller is established outside Gibraltar, the UK or EEA state

but makes use of processing equipment in Gibraltar other than solely for transit purposes.

All processing operations and the identities of the relevant controllers and processors must be registered in Data Protection Register maintained by the Data Protection Commissioner. The Register is open to inspection by members of the public.

The DPA also creates a range of offences essentially for breaches of various aspects of it. Enforcement and other administrative sanctions are also possible consequences of a breach.

There are also provisions of the DPA concerning the use of client data for marketing purposes, placing of security cameras and recording of telephone calls. Here there remains the obligation of informing potential and



existing data subjects of the collecting and processing of data and the measures taken to protect it, which is a thread running through the whole of the DPA.

Judging by the fact that one imparts data for as wide and varied situations as for booking an event or to be surgically operated, the reach of the DPA's tentacles are wide-ranging and potentially problematic as with the retention by the police for further possible criminal records relating to suspects released or found innocent. However, there is no reason to doubt that this law is here to stay and, given the fine balancing acts it seeks to perform between privacy and free movement of data (arguably successfully in the main) every reason to believe that it is. And more problems arise where the rules of protection are not observed as has recently been demonstrated spectacularly by the catastrophic loss of data in the possession and control for the purposes of processing by UK's Revenue and Customs.

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Privy Council Judgment – 2007

The Claimant was hit on the head by a falling acrow at a building site where his building contractor company was working. He was a director of this company and owned the company's shares together with his wife.

The Claimant's solicitors brought a claim for personal injury outside the required 3 year limitation period. The claim was therefore statute barred and failed on limitation grounds. This led the Claimant to bring a claim for professional negligence against his solicitors who were represented by Hassans.

The conventional approach to professional negligence claims is not to seek to try the original claim but to measure the prospects of success and damages on a broad percentage basis. It was argued that this approach should be departed from (as in clinical negligence cases following the decision in Gregg v Scott) and that an "all or nothing" test applied. The Board however, refused to depart from the conventional approach given that the Gregg v Scott approach had not been argued in the courts below.

In assessing the prospects of success the Board and the judges in the courts



below had to consider not only the prospects of success in law but also the prospect of recovering any damages which may have been granted. The latter involved consideration of whether recovery could have been made from the company or its insurers.

The various courts reached the following judgments on these 2 issues:

Supreme Court:	(1) 25%
	(2) 25%
	Total:
	(25 x 25= 6.25)
	rounded up 7%
Court of Appeal	(1) 100%
	(2) 80%
	Total: 80%
Privy Council	(1) 70%
	(2) 40%
	Total: 28%

The Privy Council disagreed with the Court of Appeal and its judgement both on liability and recoverability and there-

fore substituted its own assessment in both regards. Not only was the Privy Council appeal a success on the result but it also raised several points of interest.

Although it had been said in the lower courts (and it was the general view of the profession) that there was no equivalent in Gibraltar to English law on third party rights against insurers, the Board concluded that a provision in Gibraltar which had previously been considered to apply only to motor vehicle insurance was in fact of general application.

As stated previously, this appeal also raised the important issue of the test to be applied in professional negligence cases. Even though the Board on this occasion did not apply an "all or nothing" test, it will be interesting to monitor developments in this area of the law.

A full copy of the judgment can be downloaded from www.privy-council.org.uk.



Commercial Agents and Compensation

Following termination of a commercial agency contact by a supplier, the agent is entitled to "compensation" for the loss of the business that derives from the termination in accordance with the Commercial Agents Act which transposes Council Directive 86/653/EEC.

In the recent English case of Lonsdale v Howard & Hallam Limited, the House of Lords has provided guidance as to how compensation for termination of a commercial agency contract is to be calculated. Whilst traditionally the courts had favoured awarding an amount based on 2 years gross commission without deduction, the House of Lords has now introduced a



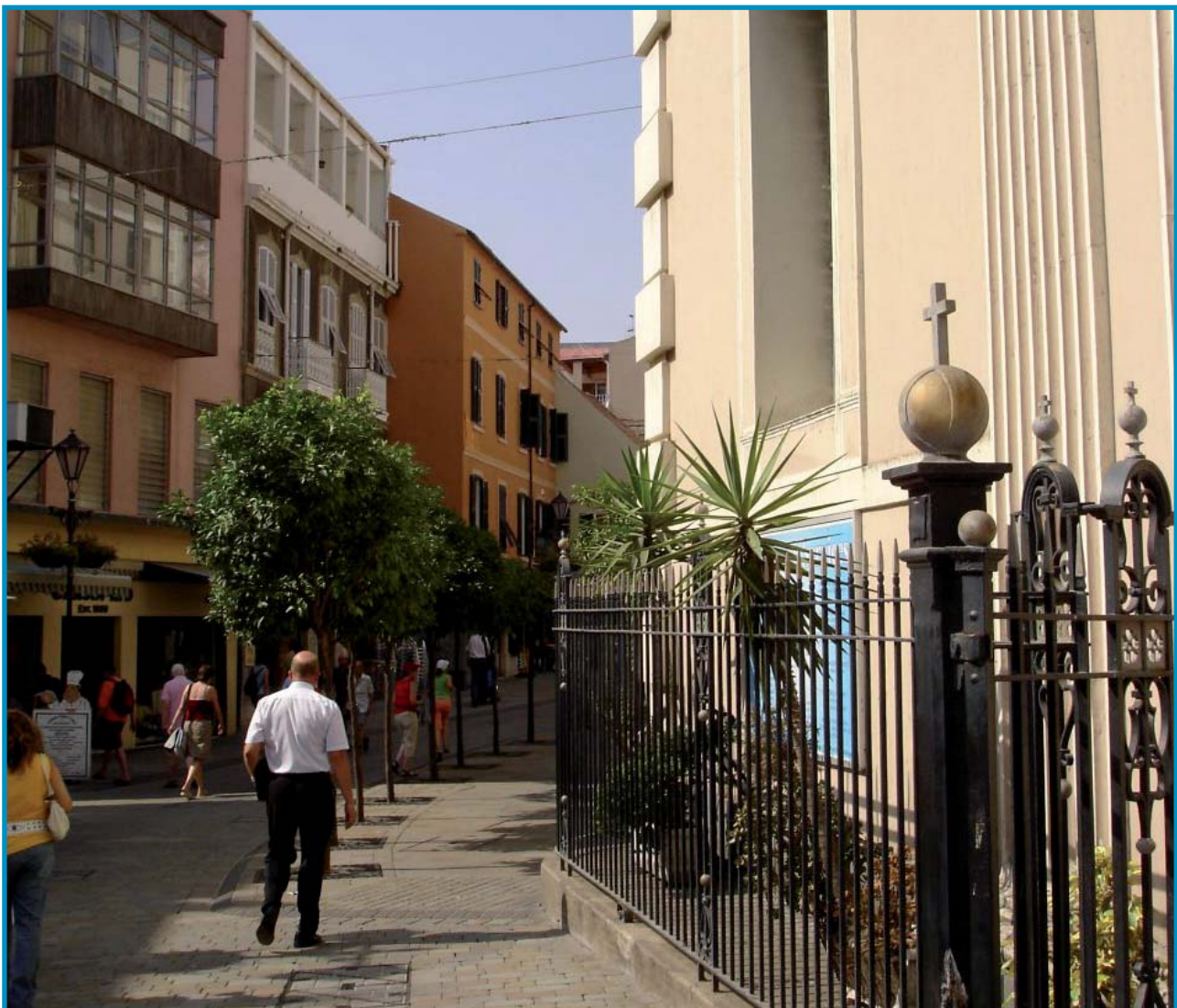
new approach reflecting the market value of the agency business as at the date of termination, based on the value of goodwill in the agency.

The correct approach is therefore to carry out a commercial valuation of the agency business based on the amount that a hypothetical buyer could reasonably be expected to pay for the rights the agent had been enjoying as at the date of termination having regard to the state of the principal's business and the value of its goodwill. This means that compensa-

tion is not capped at a maximum amount.

In the light of this decision, businesses employing self-employed sales agents may wish to conduct a review of their standard agency agreements. Some businesses may even favour the inclusion of indemnity award provisions in their agency agreements which would cap any compensation payable and would avoid costly and time-consuming litigation over value.

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The litigation department's offices have now moved to **55 Line Wall Road**, next to the firm's main office.



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Judiciary 2008

President of the Courts of Gibraltar Sir Murray Stuart Smith

Supreme Court

Chief Justice (Acting) The Hon. Mr Justice Dudley
Additional Judge (Acting) The Hon. Mr Justice Pitto

Court of Appeal

President Sir Murray Stuart Smith
Justices of Appeal Sir Philip Otton
Sir William Aldous
Sir Paul Kennedy, JJA

Magistrates Court

Stipendiary Magistrate & Coroner (Acting) Mrs Karen Prescott

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