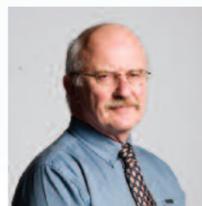


THE LAWS OF MOTION



By John Forsyth, Legal Journalist

Paul Motion reveals to John Forsyth how his team at BTO scored a notable victory over the Information Commissioner.

Hinterlands are always interesting. If you want to meet the lawyer who is the Scottish regional rep for the organisation that keeps airworthy the UK's last Vulcan bomber then BTO partner Paul Motion is your man.

And though it would take a lot of pedalling to offset a couple of minutes Vulcan revving he is also a director of the bicycle care and repair charity, the Bike Station.

He probably remains the only lawyer ever to be advertised in the Edinburgh Festival Fringe programme as "an event".

But if you are in trouble with the Information Commissioner about a data protection matter you will be interested to hear more about his day job and the successful challenge he and his BTO Data Protection Defence Team mounted in 2013 to a £250,000 fine levied by the Information Commissioner on Scottish Borders Council. Uniquely the four day appeal hearing was run by a BTO Solicitor Advocate Senior/Junior counsel team, comprising Paul and ex-prosecutor Laura Irvine.

It was the first time a "monetary penalty" imposed by the Information Commissioner under the powers given to it in an amendment in 2010 to the Data Protection Act, had been overturned.

The Information Commissioner had imposed the £250k penalty on Scottish Borders Council when in 2012 some paper files referring to some of the Council's pensioners were found in a recycling skip in a Midlothian supermarket car park. It was not a glorious moment for the council.

This seemed to point to a serious breach of the data protection act and indeed a £250K penalty was issued by the ICO. However, BTO took a closer look at the legislation. The actual "breach" had occurred seven years earlier, when the scanning contractor wasn't tied down to a suitably tight contract. The statute set out that the penalties should be imposed where the actual breach was "likely to cause substantial damage or distress". BTO presented expert evidence that persuaded the tribunal that it would have been impossible for the information in the paperwork to be used for any kind of identity fraud such as a driving licence or passport application.

Paul explains, "At its simplest we argued that if parliament had put in a 'threshold test' of 'substantial' damage and distress we were entitled to present evidence that it had not been met as there had been no actual damage. We also challenged whether pension files ending up in a skip in 2012 was a 'likely' result of a contractual lacuna in 2005.

The tribunal struck the fine out completely. While that was success enough in the Borders Paul thinks there remain further unresolved issues. The BTO team raised but having quashed the monetary penalty the tribunal did not rule on questions, for example, about whether such "monetary penalties" are criminal sanctions. If they are, the Human Rights Act will apply to the investigations the Information Commissioner carries out when a breach is believed to have happened.

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Paul adds, "The phrase used in the legislation is "monetary penalty" but in plain English that means a fine to most people. The underlying purpose is punishment and deterrence and that is indicative of criminal sanction. Our view is that a fairly fundamental question arises in the requirement that a data holder should co-operate with an ICO investigation - including sharing of information that at some point can become evidence against it in what is effectively a prosecution. It is arguable that the protections of the ECHR Articles 6 and 7 should kick in and at the very least the data holder should be entitled to legal advice at the outset about what it should be 'sharing'."

It will take another case and in all likelihood a trip from the tribunals to the courts to sort that matter out. Paul grins as he recalls that his third team member Lindsay Urquhart somehow managed to pay the Borders fine less a £50K early payment discount and still keep open the right to appeal - "To this day the ICO and the tribunal are still not quite sure how we did that: the loophole is now closed so it is another issue that would benefit from a court ruling".

Data Protection is one of the three specialist teams within BTO that Paul heads. The others are Online Reputation and Technology & Intellectual Property. He has been convener of the Law Society of Scotland Technology Committee since 2000.

He has a passion about the role of information technology within the practice of law in three distinct respects.

The first is as an essential tool in modernising the service that a legal firm can offer its clients.

The second is making far better use of the IT within the civil justice system not only as a means of controlling the amount of paper that has to be generated and then managed in even modest cases but also as an aid to search and disclosure of parties' electronic records.

The third, as in the SBC case, is making sense for clients of legislation and regulation where the best intentions of parliament or regulators may sometimes create new and unanticipated complexities.

Paul traces the transformation of his own attitude to technology to his decision to work as a litigation lawyer for three and a half years in New Zealand in the early 1990s.

"They were so much further ahead than we were in Scotland. Shortly after I arrived I was involved in a very big civil case and discovered there was an electronic document management system in place. I could press a button and a searchable list of documents or productions or whatever was needed would be generated that would have taken several staff three days to pull together in Scotland where even the fax was looked on as pretty suspect. I thought, 'this is the way to go'."

The other culture revelation in New Zealand was the absence of the rigid restrictions on rights of audience. On his return to Scotland Paul was a recruit to the early ranks of solicitor advocate.

"I enjoy the challenge of presenting a case. That is, making the connections between the legal argument and the evidence that addresses the questions that the judge has to answer. The majority of casework doesn't reach a proof but you have to be ready. Going back to the SBC case we originally expected it to be a paper exercise only but it clearly got the First Tier tribunal interested

and we ended up giving four days of evidence and argument in North Shields (the Tribunal's initial interpretation of a Scottish venue...) and Edinburgh."

Interestingly, although the respective paths of Paul Motion and BTO did not converge until 2006 it turns out they were travelling in the same direction since the mid-1990s.

"Brechtin Tindall Oatts, as it was,

took an early decision to embrace solicitor advocacy as a new service offering to clients. It was then largely a litigation firm majoring in insurance defender work. The appeal of solicitor advocacy to the clients was that it made it easier to work alongside each other on a consistent basis.

It's no secret, of course, in the early 2000s that both insurers and law firms were looking more carefully at their costs and BTO decided to broaden our business and also, being originally a merger of two Glasgow firms, to establish a bigger presence in Edinburgh. I think there were 10 staff in Edinburgh in a New Town office when I joined in 2006. There are 32 now. Our recent move into One Edinburgh Quay is a more suitable location and gives us room to grow."

When Paul joined in 2006 the firm had 21 Partners. He is now one of 40. BTO's financial results have been consistently impressive in a sector, especially since the 2008 crash, that has seen a great deal of crisis driven "merger"

The firm has gone quietly about broadening its range of services. Paul says, "We took a conscious decision three years or so ago to grow organically and to diversify. We discussed which areas of law we wanted to move into and then identified and recruited experienced, quality staff to fit."

Since then BTO has added family law, construction and medical defence teams and most recently recruited the corporate law team from Levy & McRae and has increased its success rate in tendering within the local authority and public sector. The SBC case has not gone unnoticed.

In terms of applying individual hinterland to corporate strategy, it doesn't do any harm to get the occasional Vulcan bomber into the sky as long as you remember to pedal like fury the rest of the time.

