

countability” will ring hollow.

3. Concluding Remarks

When it is contested whether particular things correspond to matters of disclosure or to matters of nondisclosure, whichever is supported, it is difficult to prove. It is desirable to classify matters of disclosure and matters of nondisclosure categorically to some degree, giving careful consideration to the secrets in administration and individual privacy, and to reflect that at the stage of making and collecting documents.

The Freedom of Information Act was enforced in Japan several days after this decision. Opening information to the public in the local government proceeds beyond the contents of this decision at least, too. While this decision goes against the fashion, and takes legislative discretion and administrative discretion more seriously than “the right to know” and “accountability”, it seems to be favorable that opening information to the public proceeds as a result of legislative discretion and administrative discretion. But opening information to the public as a result of the legislative discretion or the administrative discretion is something different to opening information to the public based on a right to know, and accountability. There are many problems in this decision.

3. Law of Property and Obligations

Supreme Court 3rd P.B., March 27, 2001

NTT v. Hara

55 (2) MINSHU 434, 1760 HANREI JIHO 19, 1072 HANREI TAIMUZU
101, 1288 SAIBANSHO JIHO 17, 1628 KIN'YU SHOJI HOMU 50

When a telephone contractor's minor used a pay information service in a so-called DialQ2 service, the first class telecommunication enterprise could not sue that telephone contractor for the payment of

the telephone charge over 50%, because of the breach of the principle of *bona fide* and the sense of equity.

Reference:

Civil Code Article 1; Nippon Telegram Telephone Stock Corporation Act (before 1995's revision law No. 98) Article 1 (2).

Facts:

Y made a telephone contract with X, who manages an internal telecommunication enterprise, and has been provided with it's service. His monthly telephone charge was within 10,000 yen. However, the son of Y (A), who was a 3rd grade junior high school student at this time, used pay information service in a so-called DialQ2 service, through Y's telephone, without Y's consent, from January 2, 1991, to the beginning of February of that year, and then Y was asked to pay about 100,000 yen as charges for the 2 months' telephone calls. At that time Y did not know of that service. Y refused to pay that charge, and then X sued Y for that charge.

The telephone contract between X and Y was regulated by the telephone service contract covenant at that time. In its article 118, section 1, the telephone contractor was obliged to pay the charge for the telephone call through his telephone, even if someone-else telephoned.

By the way, in this DialQ2 service, the information service provider provides a pay information service via X's telephone network, and X claims from the contractor who used that service for the information service charge instead of the provider and for the telephone charge. And when that service begun, it was generally and easily used through the telephone. However the information which was provided through that service, contained very many harmful programs for young people, such as adult programs, which caused necessarily long time use and large amount of charges. On this account, many lawsuits concerning X's claim have been brought across the whole country.

The issues in this case are as follows; the covenant article 118, section 1, applies to the telephone charges concerning the DialQ2 service and, if it applies, NTT's claim is a breach of the principle of *bona fide*.

The court of first instance dismissed X's claim as follows; the purpose of the covenant article 118, section 1, is to fix the payer of the telephone charge, to hold the cost to a minimum and finally to reduce the contractor's charge and respond to the public interest in the popularization and preservation of the telephone. But, since the DialQ2 service increased the contractor's charge uselessly, it is contrary to that purpose, and it was impossible for Y, who did not know of that service, to prohibit and limit A's using that service. Accordingly this article did not apply to A's use, and Y did not bear this charge. X appealed.

But the court below, supposing that this article was applied to A's use, dismissed X's appeal as follows; X could not ask Y to pay the telephone charge concerning A's use based on this article, because of the breach of the principle of *bona fide*. Since at the beginning of that service X did not make that service known to everyone sufficiently and the preventive measures taken by X against trouble were insufficient, and the charge was more expensive than Y could have imagined. X filed a *jokoku* appeal.

Opinion:

Even if many troubles have been involved in the DialQ2 enterprise, it should not be evaluated completely negatively. But at the beginning of that service, X was responsible to make the contents and the risks known to everyone and to prevent the dangers. Since that service contains the risks that the charges would increase considerably, on contrary to a usual telephone call. But, at that time, X carried out these duties insufficiently. Therefore Y could not recognize the contents and the risks, and then Y was asked to pay a large amount of charges. Consequently, it was hardly acceptable from the point of the view of the principle of *bona fide*, that Y would be responsible for the payment of the whole charge because of the existence of this article. It was appropriate that the limit of Y's responsibility was 50% of that charge, considering that the telephone contractor, Y, could control the telephone. The original judgment was partly reversed and the Supreme Court itself judged that the *jokoku* appeal was partly reversed. In this case there are two concurring opinions.

Editorial Note:

This Supreme Court decision finally settled a series of disputes concerning the use of the DialQ2 service from 1990 to 1991.

Besides, from the theoretical point of view, this decision has significance as follows; the decision limited X's claim for the charges for the telephone call, which was based on that article, to 50%, comparing the public enterprise's social responsibility with the telephone contractor's responsibility as the administrator of a telephone. In this way, this decision gave a flexible and appropriate function in disputes settlement to the principle of *bona fide*, and thus has considerable significance.

However, some questions are posed to this theory with regard to the function of the principle of *bona fide*. Besides it is possible to think that the fact that Supreme Court 2nd P.B., December 15, 2000 accepted NTT's claim on a similar dispute at a similar time presents a division of opinions in the Supreme Court with regard to the principle of *bona fide* or the sense of equity.

By the way, after this dispute, NTT improved the DialQ2 enterprise, and then this decision's range is limited to disputes before that improvement. And the telephone contractor's use of that service is also out of its range.

4. Family Law

Supreme Court 1st P.B. May 1, 2000, Case No. (kyo) 5 of 2000

Kono v. Kono

54(5) MINSHU 1607, 52(12) KASAI GEPPU 31, 1715 HANJI 17

When a father and mother whose marriage has broken down are living apart, the Family Court may order visitation and contact between child and the parent who is not living with the child.

Reference:

Civil Code, Article 766.