

June 2024

Hong Kong's Court of Final Appeal ("CFA") Unanimously Upholds The Letter Of Consent Regime



In January 2022 following the High Court's decision in *Tam Sze Leung & Ors* ("**Applicants**") v *Commissioner of Police* we wrote the article: '*Hong Kong's Letter Of No Consent Regime Declared To Be Ultra Vires The Organized & Serious Crimes Ordinance ("OSCO")*' ([see here](#)).

In May 2023 after the Police's successful outcome in the Court of Appeal we then wrote: '*Hong Kong's Old Letter Of Consent Regime To Return?*' ([see here](#)).

This article deals with the CFA's recent important judgment in the matter which unanimously dismissed all the Applicants' appeals. What the CFA held and how it reached its decision is particularly relevant to banks and we explain why below.

Facts

The Applicants: (i) are members of the same family; (ii) were suspected by the Securities and Futures Commission ("**SFC**") of engaging in stock market manipulation (pump and dump) offences between September 2018 and November 2020; (iii) reputedly had made HK\$300 million; and (iv) held this with four Hong Kong banks¹.

The SFC believed money laundering had happened and referred the matter to the Police which informed the banks of the suspicion the Applicants' accounts contained the proceeds of an indictable offence. Until then the banks were unaware of any issues. The banks were asked by the Police to urgently file suspicious transaction reports ("**STR**")² which then led to them disabling or freezing the accounts concerned when Letters of No Consent ("**LNC**") were issued to them by the Joint Financial Intelligence Unit ("**JFIU**").

¹ Bank of China Hong Kong, Bank of East Asia, the Hongkong & Shanghai Banking Corporation and Hang Seng Bank.

² The relevant regime is described in **footnote 1** of our May 2023 article.

Appeals

The CFA heard the Applicants' appeals on the following questions of law:

- (i) Whether the regime operated by the Police and the LNC issued for the Applicants' accounts: (a) are ultra vires or improper (**Question 1**); (b) comply with the constitutional requirements of the Basic Law ("BL") and Hong Kong Bill of Rights ("BOR")³ (**Question 2**); and (c) are procedurally unfair (because there was no notice of the decision to issue the LNC, no independent hearing and no opportunity to make representations) (**Question 3**); and
- (ii) Whether the 2019 Court of Appeal decision in *Interush Ltd v Commissioner of Police* was correct to hold the existing LNC regime was a necessary and proportionate restriction of the right to enjoy private property (**Question 4**).

Before giving its reasons for the dismissal of the Applicants' appeals, the CFA considered: (i) the context of the Police's acts; (ii) Hong Kong's international and domestic anti-money laundering obligations⁴; and (iii) the criminal, regulatory and reputation risks faced by banks. The most relevant points made by the CFA were as follows.

Hong Kong's money laundering offence in section 25(1) OSCO⁵ targeted the perpetrator and the proceeds of their crimes but also caught banks when they dealt with the accounts knowing or having reasonable grounds to believe their contents were suspicious. The CFA noted that this motivated banks to be unwilling to take risks about customers' transactions. Also noted was the fact that banks were on the frontline of global anti-money laundering efforts because the targeted funds pass through them and only they are able to detect and scrutinise them.

Insofar as the reporting duty under section 25A(1) OSCO⁶ is concerned, the object was to make disclosure a condition of an immunity which is conferred when an STR is made: (i) before the bank deals with the account and the consent of the JFIU to proceed has been given⁷; or (ii) after the bank deals with the account but as soon as is reasonable thereafter on the bank's own initiative⁸. With respect to civil liability, section 25A(3) OSCO protects a bank from any such liability arising out of making a STR⁹. The CFA's decision stated that the onus is on banks to decide whether suspicious circumstances requiring disclosure to the JFIU exist and that when a decision not to make a disclosure is reached in good faith it is unlikely there would be criminal liability.

The CFA further noted that AMLO laid down the requirements for detailed due diligence when forming a business relationship with customers or conducting transactions involving an amount above HK\$120,000. When AMLO's requirements cannot be complied with the relationship should be terminated and no transaction happen.

³ Namely: (i) the fundamental rights to property in Articles 6 and 105 BL; (ii) the rights to private and family life in Article 14 BOR; and (iii) the right to access legal advice and the Courts in Articles 35 BL and 10 BOR.

⁴ Including: (i) the United Nations' Vienna and Palermo Conventions; (ii) OSCO; (iii) Drug Trafficking (Recovery of Proceeds) Ordinance; (iv) United Nations (Anti-Terrorism Measures) Ordinance; (v) Weapons of Mass Destruction (Control of Provision of Services) Ordinance; (vi) United Nations Sanctions Ordinance; and (vii) Anti-Money Laundering and Counter-Terrorist Financing Ordinance ("**AMLO**").

⁵ The offence is to knowingly or with reasonable grounds to believe deal with a person's property which is wholly or partly directly or indirectly the proceeds of an indictable offence.

⁶ The duty to report occurs when a suspicion exists that a person's property: (i) is wholly or partly the proceeds of an indictable offence; (ii) was used in connection with; or (iii) will be used in connection with an indictable offence. The suspicion held and all related information should be provided to the JFIU.

⁷ See section 25A(2)(a) OSCO.

⁸ See section 25A(2)(b) OSCO.

⁹ The section states disclosure to the JFIU will not breach of any restriction upon the discloser imposed by contract or by any enactment, rule of conduct or other provision and shall not render them liable in damages for any loss arising from the disclosure.

Banks accordingly needed working systems to: (i) conduct customer due diligence; (ii) continuously monitor customer accounts; (iii) investigate suspicious transactions; (iv) cease dealing with the account holder and to freeze the funds where suspicions are unresolved; and (v) report their suspicions to the JFIU.

Where the Police had credible information (like here from the SFC) raising suspicions about particular customers and accounts, they may share this with a bank and request assistance. While a cooperative relationship was expected between the Police/JFIU and a bank's Money Laundering Reporting Officer, at the end of the day the CFA stated it was the bank which must make its own decisions about an account in light of its knowledge about the customer and whatever communications it had with the Police.

When the Police inform a bank of their suspicions, the bank will undoubtedly appreciate the risks it runs if it then improperly deals with the funds. The most significant risk is money laundering. Therefore without inquiries and such suspicions being dispelled, information provided by the Police is likely to constitute reasonable grounds to believe that the funds represent the proceeds of an indictable offence. The desire to avoid money laundering then causes the bank to freeze the account. While everything was instigated by the Police, the CFA held freezing an account is the bank's own act made in compliance with its legal and regulatory duties.

Finally and with respect to LNC, while the Police are not consenting to the bank dealing with the property and immunity is not being granted, the LNC and the Police do not freeze or order a bank to freeze an account. That is the bank's act.

Question 1

The CFA held that the Police are subject to a duty to prevent and detect crime¹⁰ and held the ultra vires and improper arguments in Question 1 were flawed because they mischaracterised the actions of the Police. When properly analysed, the communications between the Police and banks in this matter were lawful measures taken by the Police to prevent money laundering pursuant to their duties.

These communications did not involve the Police freezing or ordering the banks to freeze the accounts. The banks did that themselves motivated to comply with their anti-money laundering obligations and avoid criminal, regulatory and/or reputational sanction. The CFA held it was the bank which disabled and froze its customer's account when it decides that suspicions surrounding the funds and/or customer exist. Where accounts are restrained pursuant to a LNC, that was a temporary measure to prevent the dissipation of suspicious property pending further investigations and the invoking of restraint and confiscation orders from the Court¹¹. The steps taken to issue the LNC were not a misuse of power by the Police but consistent with their obligations to prevent and detect crime.

Question 2

A LNC is the withholding of an immunity against liability under OSCO's section 25(1) for money laundering. The suspicion resulting in the LNC could be removed following enquiries by a bank, or the account could be disabled. Whatever happened were the acts of the bank not those of the Police therefore the Police did not prevent the Appellants from using their property or infringe their rights under the BL.

¹⁰ The duties of the Police are listed in section 10 of the Police Force Ordinance.

¹¹ OSCO's sections: (i) 14 and 15 authorize restrain orders preventing anyone realizing the suspicious property concerned; and (ii) 8 empowers the Court to make a confiscation order when a person convicted of a crime has benefitted from the offence. It is the benefit which is confiscated because no-one should profit from their wrongdoing.

With respect to proportionality, the Police's acts were aimed at investigating and detecting crime and denying the use of banking services to persons seeking to dispose of the proceeds of crime. All were unquestionably legitimate aims both reasonable and necessary.

Even if the Police's action froze the accounts, the CFA held this was merely temporary and provisional securing of suspicious assets until investigations were advanced enough to enable a decision to be made to start criminal proceedings, or to consent to the release of the funds. The limited nature and duration of a LNC¹² was a fair balance between the anti-money laundering aims of society and individual property rights.

Question 3

The CFA held the complaint of procedural unfairness was misconceived. Firstly, as stated, the Police's acts did not freeze the Appellants' accounts and there was no determination of the Appellants' rights to their property at this stage.

Secondly, a LNC did not involve a public hearing and the suspect the opportunity to make representation it being noted that section 25A(5) OSCO imposed a clear statutory non-disclosure obligation to avoid prejudicing any money laundering investigation¹³. The CFA also noted the complaints made by the Appellants about not being given a chance to make representations rang hollow when they had consistently chosen to exercise their right of silence.

The Appellants' appeals could not circumvent the facts that: (i) restraint orders had been obtained from the High Court so that the earlier actions by the bank and/or the Police had been overtaken by such orders; and (ii) the complaint about the Police using an unauthorised '*freezing*' mechanism instead of seeking restraint orders under section 15 OSCO was undermined by the fact that the High Court had already granted the restraint orders.

Question 4

Interush had directly challenged the constitutionality of OSCO's section 25A. There the Court of Appeal held the LNC regime engaged with fundamental property rights but doing so was, nonetheless, proportional.

The CFA reiterated that it did not believe LNC by themselves froze the accounts of the Applicants which was the act of the banks. Accordingly, *Interush* adopted an analysis which the CFA did not support but it held that the Court of Appeal arrived at the correct result.

Final Comments

It is by now beyond any doubt that Hong Kong's LNC regime and how it has been operated by the Police is constitutional.

Banks should be under no illusion after this decision that the onus falls on them to decide whether or not they should report, freeze or deal with a customer's account when there are issues found. Whatever course of action is taken and why needs to be justified and fully documented.

Please contact us if any advice is needed. Thank you.

This article was written by Ian Childs, practice group leader of the commercial litigation team in Hong Kong.

¹² Paragraph 45 of the CFA's decision sets out the Police's procedure when it has information of possible money laundering. All Money Laundering Reporting Officers and compliance professions should read this to understand the process.

¹³ It is a criminal offence knowing or suspecting a STR has been made to disclose this to when it might prejudice any investigation.

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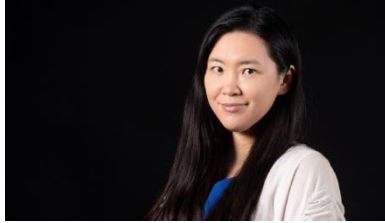


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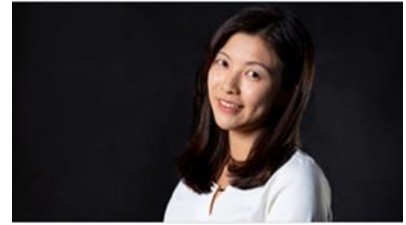


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