### FACV No. 7 of 2023

[2024] HKCFA 8

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

**FINAL APPEAL nO. 7 OF 2023 (CiVIL)**

(ON APPEAL FROM CACV NO. 152 OF 2022)

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BETWEEN

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|  | TAM SZE LEUNG | 1st Applicant  (1st Appellant) |
|  | TAM CHUNG WAI | 2nd Applicant  (2nd Appellant) |
|  | KONG CHAN | 3rd Applicant  (3rd Appellant) |
|  | LEE KA LO | 4th Applicant  (4th Appellant) |
|  | and |  |
|  | COMMISSIONER OF POLICE | Respondent |

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| Before: | Chief Justice Cheung, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Lam PJ and  Lord Collins of Mapesbury NPJ |
| Date of Hearing: | 4 March 2024 |
| Date of Judgment: | 10 April 2024 |

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| **JUDGMENT** |

**Chief Justice Cheung and Mr Justice Ribeiro PJ:**

1. In this appeal, it falls to the Court to consider constitutional and other legal challenges raised against the practice of the Commissioner of Police (“CP”) involving the issue of “Letters of No Consent” (“LNCs”) to banks regarding their dealing with property which is suspected to represent the proceeds of an indictable offence in the context of the Organized and Serious Crimes Ordinance[[1]](#footnote-1) (“OSCO”).

A. The factual background

1. The appellants are members of the same family who had, since 2019, come under suspicion of the Securities and Futures Commission (“SFC”) for having committed (with others) offences[[2]](#footnote-2) involving market manipulation of over 10 different stocks in Hong Kong between September 2018 and November 2020. It was suspected that profits of those unlawful transactions had been transferred to accounts maintained by the appellants with four banks in Hong Kong.[[3]](#footnote-3)
2. After investigation and searches of the appellants’ premises, the SFC referred the matter to the police who took certain actions which were followed by the banks disabling or “freezing” the above-mentioned bank accounts. The steps taken by the police and the banks are set out below. They included the police informing the banks of their suspicion that the funds represented the proceeds of an indictable offence, their issue of LNCs and the banks’ subsequent maintenance of the disablement of the accounts.
3. On 18 February 2021, the appellants applied for leave to seek judicial review of the CP’s decision to issue and maintain the LNCs in respect of the appellants’ bank accounts, and to fail or refuse to consent to the withdrawal of any funds from the accounts (a practice referred to by the appellants as “the No Consent Regime”). The balances were said to amount to some $30 million to $40 million.
4. The appellants were arrested on 4 March 2021 for the offence of money-laundering. They remained silent under caution and refused to answer any questions. They were released on police bail of $100,000 each with no charges laid.
5. On 11 October 2021, the Secretary for Justice obtained a restraint order from the Court of First Instance restraining the appellants from removing from Hong Kong or disposing of, or dealing with, or diminishing the value of, their bank funds.
6. The police wrote to the banks on the next day, 12 October 2021, stating that since the restraint order had been issued, the refusal of consent to deal with funds in the relevant accounts was lifted for the banks’ compliance with that order.
7. The application for leave to seek judicial review was heard by Coleman J[[4]](#footnote-4) who upheld aspects of the appellants’ challenge on ultra vires and constitutional grounds. The Court of Appeal[[5]](#footnote-5) allowed the CP’s appeal, upholding the lawfulness of the police actions concerned.

B. The questions arising on this appeal

1. Leave to appeal was granted by the Court of Appeal[[6]](#footnote-6) on the following questions of law:
   1. Q1: Whether the No Consent Regime operated by the Commissioner and the LNCs issued by the Commissioner in respect of the Applicants’ bank accounts are ultra vires and/or whether the LNCs were issued for an improper purpose. (“The ultra vires/improper purpose question”)
   2. Q2: Whether the No Consent Regime operated by the Commissioner and the LNCs issued by the Commissioner in respect of the Applicants’ bank accounts comply with the constitutional requirements for protection of the fundamental right to property in arts 6 and 105 of the Basic Law, the rights to private and family life in art 14 of the Hong Kong Bill of Rights, and the rights to access to legal advice and to the court in art 35 of the Basic Law and art 10 of the Hong Kong Bill of Rights (“The constitutional challenge”) including in particular:
      1. Whether they fulfil the requirements of being prescribed by law. (“‘The prescribed by law’ question”)
      2. Whether they are proportionate restrictions on such fundamental rights. (“The proportionality question”)
   3. Q3: Whether the No Consent Regime operated by the Commissioner is and the issue of the LNCs in respect of the Applicants’ bank accounts was procedurally unfair at common law and/or in violation of the right to fair hearing under art 10 of the Hong Kong Bill of Rights in that there was (1) no or no adequate notice of the decision to issue the LNCs, before or after the issue; (2) no or no adequate opportunity to provide meaningful representations as to whether the LNCs should be maintained; (3) no or no adequate reasons given for the decision to issue the LNCs; and (4) no hearing before an independent and impartial tribunal in terms of art. 10. (“The fair hearing question”)
   4. Q4: Whether the case of *Interush Ltd v Commissioner of Police*[[7]](#footnote-7) was correct in holding that the “consent regime” (as defined in that judgment) is a necessary and proportionate restriction on the right to enjoyment of private property under arts 6 and 105 of the Basic Law. (“The *Interush* question”)
2. There are doubts as to the scope and intent of the *Interush* question. In that case*,* Cheung JA, giving the principal judgment in the Court of Appeal, noted that the applicants were seeking a declaration that sections 25(1) and 25A of OSCO were unconstitutional because they infringed the appellants’ guaranteed property rights under Articles 6 and 105 of the Basic Law (“BL6 and BL105”), as well as their access to court rights under BL35 and BL80 and Article 10 of the Bill of Rights (“BOR10”).[[8]](#footnote-8) It was, as his Lordship put it, a “full frontal constitutional challenge of the empowering statute itself”.[[9]](#footnote-9) We return in Section K of this Judgment to examine the analysis adopted in *Interush*.
3. When the Court of Appeal below granted leave to challenge the correctness of *Interush*, one might have thought that the appellants were being permitted to challenge afresh the constitutionality of those OSCO sections. However, Q4 attributes to *Interush* a holding that the “consent regime” – not the OSCO provisions – was a proportionate and necessary restriction on the guaranteed property rights and grants leave to question the correctness of that holding. In so doing, it reflects the appellants’ Amended Form 86[[10]](#footnote-10) where they reserved the right to contend “that the No Consent Regime [not the OSCO sections] disproportionately interferes with property rights contrary to BL6 and BL105...”
4. A question thus arises as to the exact scope of Q4, and by extension, the scope of this appeal. This uncertainty did not go unnoticed. In its leave judgment,[[11]](#footnote-11) the Court of Appeal stated:

“... the Commissioner has pointed out that although the Applicants wish to challenge *Interush*, they have not claimed in their Form 86 a declaration, as was sought in *Interush*, that sections 25 and 25A of OSCO are unconstitutional and invalid. In our view this may have an impact on the precise contours of the argument and the ultimate remedies that are available if the Applicant[s] succeed, but is not a reason for refusing to grant leave altogether. The Court of Final Appeal may itself give directions in that regard to ensure that matters that should be before the Court are properly presented.”

1. The appellants have not sought any such directions and in their Written and Supplemental Cases, as well as in the oral submissions of Counsel, they have not sought to argue that the two sections are themselves unconstitutional.[[12]](#footnote-12) They have confined themselves to challenging the use by the CP of LNCs, involving the so-called “the No Consent Regime”. What then, do the appellants mean by that expression?
2. In passages that come closest to a definition,[[13]](#footnote-13) the appellants explain that under that “Regime” (i) LNCs are not mentioned anywhere in OSCO but are an informal asset freezing mechanism developed by the police; (ii) LNCs are issued with the intention of freezing targeted property; (iii) when issued, they argue, LNCs invariably cause the recipient to refuse to deal with that property for fear of committing an offence under OSCO section 25(1); and (iv) the police are able to reverse the freeze by withdrawing the LNC or giving consent at any time.
3. The attack on the so-called “No Consent Regime” is therefore an attack on the actions taken by the police.[[14]](#footnote-14) The essential allegation is that by such actions, the police froze the appellants’ assets, infringing their protected rights. The appellants argue that this practice is ultra vires, unconstitutional (not “prescribed by law” and disproportionate), involves misuse of a statutory power for improper purposes and deprives the appellants of their rights to private and family life and to a fair hearing. To assess that challenge, it is necessary to place the impugned acts in their statutory and regulatory context.

C. The international anti-money laundering framework

1. International conventions, applied to Hong Kong, have provided an impetus for establishing a legislative and regulatory anti-money laundering framework.[[15]](#footnote-15) The first was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, known as the “Vienna Convention”.[[16]](#footnote-16) Its aim was to counter drug trafficking by committing States Parties to enacting legislation to criminalise money laundering of the proceeds of drug trafficking[[17]](#footnote-17) and to make provision for confiscation of such proceeds involving powers “to identify, trace, and freeze or seize” such property.[[18]](#footnote-18) The United Nations Convention Against Transnational Organized Crime 2000 (“the Palermo Convention”)[[19]](#footnote-19) broadens the scope of money laundering beyond the proceeds of drug trafficking to cover the proceeds of “serious crime”; while the United Nations Convention Against Corruption of 2003 (“UNCAC”)[[20]](#footnote-20) targets offences involving corruption. These latter conventions likewise require States Parties to criminalise money laundering of the proceeds of the specified crimes and to establish an institutional and operational framework involving powers of confiscation and interim freezing of property.[[21]](#footnote-21)
2. OSCO is presently the main enactment in this jurisdiction’s statutory anti-money laundering framework. Legislation exists targeting various offences including drug trafficking,[[22]](#footnote-22) terrorist activities,[[23]](#footnote-23) the proliferation of weapons of mass destruction[[24]](#footnote-24) as well as activities subject to United Nations Security Council sanctions, certified by the Central Government’s Ministry of Foreign Affairs.[[25]](#footnote-25) Our focus is on OSCO, which has the broadest coverage. It concerns the proceeds of a long list of organized and serious crimes,[[26]](#footnote-26) including stock market manipulation and money laundering offences created under the aforesaid Ordinances. The purpose of these statutes is to target financial transactions of the perpetrators and their associates, denying them banking and other financial services and depriving them of the proceeds of their crimes.[[27]](#footnote-27)
3. As pointed out by the Hong Kong Monetary Authority (“HKMA”) in their Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (“the Guideline”),[[28]](#footnote-28) anti-money laundering efforts require international coordination. Countries which host financial centres should apply a common set of standards to ensure a regulatory level playing field. To that end the Financial Action Task Force (“FATF”), an inter-governmental body, was established by the G7 summit in Paris in 1989, charged with setting such standards and promoting effective implementation of legal, regulatory and operational measures for combating money laundering. In 1990, FATF published its Forty Recommendations[[29]](#footnote-29) that are recognised as international standards.[[30]](#footnote-30) Hong Kong has been a member of FATF since 1991 and regards adherence to those standards as essential for maintaining its status as a major international financial centre of repute.[[31]](#footnote-31)
4. FATF calls on member countries to institute necessary measures, including legislation, to criminalise money laundering in respect of serious offences[[32]](#footnote-32) and to make provisions which “should include the authority to: 1) identify, trace and evaluate property which is subject to confiscation; 2) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; and 3) take any appropriate investigative measures”.[[33]](#footnote-33)
5. FATF members are also recommended to require banks and other financial institutions (which we will for brevity refer to simply as “banks”[[34]](#footnote-34)) to undertake customer due diligence[[35]](#footnote-35) and to develop internal policies and controls, designating compliance officers and maintaining an employee anti-money laundering training programme.[[36]](#footnote-36) Banks should also be required to scrutinise any complex, unusually large transactions or patterns of transactions with no apparent economic or lawful purpose. “The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.”[[37]](#footnote-37) Cooperation with competent authorities is obviously recommended.[[38]](#footnote-38)

D. The statutory and regulatory anti-money laundering scheme in Hong Kong

1. The FATF Recommendations have been actively pursued. The HKSAR has enacted not only legislation targeting perpetrators of crime and their financial transactions, but also legislation which places duties on banks to conduct customer due diligence and to report suspicious transactions. Such legislation has also authorized HKMA, as the relevant regulatory authority, to enforce anti-money laundering measures.

D.1 OSCO

1. Two OSCO offences are at the core of the present appeal and provide the starting point for examining the statutory framework.
   1. First, OSCO section 25(1) creates the offence of money laundering:

“Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person’s proceeds of an indictable offence, he deals with that property.”[[39]](#footnote-39)

* 1. Secondly, OSCO section 25A(1) imposes a duty to report to an authorized officer (a police officer for present purposes) one’s knowledge or suspicion that certain property represents the proceeds of crime:

“Where a person knows or suspects that any property ... in whole or in part directly or indirectly represents any person’s proceeds of ... an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.”

Failure to make such disclosure is an offence.[[40]](#footnote-40)

1. Section 25(1) is obviously primarily aimed at the perpetrator and the proceeds of the relevant offence. However, it is capable of also catching a bank which deals with a customer’s property which it knows or has reasonable grounds to believe is suspicious. This provides motivation for banks to be circumspect in handling their customers’ transactions. The reporting duty in section 25A(1) is mainly applicable to banks in relation to transactions involving suspect property.
2. Also of present importance is OSCO section 25A(2) under which immunity from liability under section 25(1) is conferred on a person who makes disclosure to an authorized officer. It relevantly provides:

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if—

(a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or

(b) that disclosure is made—

(i) after he does that act;

(ii) on his initiative; and

(iii) as soon as it is reasonable for him to make it.

1. Section 25A(2) thus immunises the bank where the disclosure is made before it deals with the property, in which case the officer’s prior consent (under section 25A(2)(a)) is needed. Immunity is also conferred where disclosure is made after having dealt with the property without such consent (under section 25A(2)(b)). The object is to make disclosure the condition of immunity. This is important since banking transactions take place privately and only the bank, if alive to the risk of money laundering, would be in a position to alert the authorities to suspicious transactions, enabling the police to investigate if appropriate.
2. The Ordinance evidently envisages that the bank’s disclosures to the police may include information available to the bank, relevant to their investigation. Thus, the reporting duty under section 25A(1) is to disclose knowledge or suspicion “together with any matter on which that knowledge or suspicion is based” and OSCO section 25A(3) protects the bank from civil liability arising out of making such disclosures:

“(3) A disclosure referred to in subsection (1)—

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of—

(i) the disclosure;

(ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.”[[41]](#footnote-41)

1. Police investigations are further supported by OSCO section 25A(5) which makes it an offence for a person, knowing or suspecting that a disclosure has been made under subsection (1) or (4), to disclose to any other person any matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.
2. In furtherance of the statutory purpose of depriving a perpetrator of the proceeds of crime, OSCO enables the Court of First Instance or District Court to grant restraint orders securing suspicious property towards satisfying, if the case is established, eventual confiscation orders.[[42]](#footnote-42)
   1. OSCO section 14 lays down as the main conditions for the grant of a restraint order, the requirements (i) that proceedings have been instituted against the person concerned[[43]](#footnote-43) (defined to mean that a warrant has been issued or that such person has been arrested, charged or indicted[[44]](#footnote-44)); and (ii) that there is reasonable cause to believe that he or she has benefited from the relevant offence.[[45]](#footnote-45) Where a person has been arrested and not yet charged, the court must additionally be satisfied that there is reasonable cause to believe that such person will be charged after further investigation,[[46]](#footnote-46) with the court setting an expiry date for the restraint order pending the bringing of such a charge.[[47]](#footnote-47)
   2. Where the section 14 conditions are met, OSCO section 15 authorizes the making of restraint orders (only on application by a prosecutor[[48]](#footnote-48)) to prohibit any person from dealing with any realisable property. Any person affected may apply for its discharge and the order is in any event discharged on conclusion of the proceedings.[[49]](#footnote-49)
   3. OSCO section 19(2) specifies the purpose of restraint orders, stating that “the powers [under section 15] shall be exercised with a view to making available for satisfying ... any confiscation order that may be made in the defendant’s case the value for the time being of realisable property held by any person by the realisation of such property.”
   4. OSCO section 8 empowers the court, on the application of the Secretary for Justice, to make such a confiscation order reflecting the value of the proceeds of the specified offence[[50]](#footnote-50) in cases where the person is to be sentenced and the court determines that he or she has benefited from that offence. Such an order may also be made where the person has died or absconded.[[51]](#footnote-51)

D.2 Anti-Money Laundering and Counter-Terrorist Financing Ordinance[[52]](#footnote-52) (“AMLO”)

1. As AMLO’s long title indicates, it provides “for the imposition of requirements relating to customer due diligence and record-keeping on specified financial institutions ... [and] for the powers of the relevant authorities and regulatory bodies to supervise compliance with those requirements and other requirements under this Ordinance...” In other words, it places a statutory duty on banks to act as watchdogs against money laundering.
2. It does so by imposing criminal sanctions[[53]](#footnote-53) for knowingly contravening specified provisions in Schedule 2. Those provisions[[54]](#footnote-54) lay down, *inter alia*, detailed customer due diligence requirements when forming a business relationship with the customer and conducting transactions involving an amount of $120,000 or above.[[55]](#footnote-55) If such due diligence is not satisfactorily completed, the bank is prohibited from forming the relationship or conducting the transaction; and if the relationship already exists, must terminate it.[[56]](#footnote-56)
3. Of particular present relevance[[57]](#footnote-57) is AMLO Sch 2, section 5(1) which obliges banks continuously to monitor their client relationships, providing as follows:

“(1) A financial institution ... must continuously monitor the business relationship with a customer by—

(a) reviewing from time to time documents, data and information relating to the customer that have been obtained by the financial institution ... for the purpose of complying with the requirements imposed under this Part to ensure that they are up-to-date and relevant;

(b) conducting appropriate scrutiny of transactions carried out for the customer to ensure that they are consistent with the financial institution’s ... knowledge of the customer and the customer’s business and risk profile, and with the financial institution’s ... knowledge of the source of the customer’s funds; and

(c) identifying transactions that—

(i) are complex, unusually large in amount or of an unusual pattern; and

(ii) have no apparent economic or lawful purpose,

and examining the background and purposes of those transactions and setting out the findings in writing.”

1. AMLO also provides that contravention of the specified provisions of Schedule 2 may lead to disciplinary action by HKMA which is endowed with powers to issue public reprimands, to order remedial action and “to order the financial institution to pay a pecuniary penalty not exceeding the amount that is the greater of (i) $10,000,000; or (ii) 3 times the amount of the profit gained, or costs avoided, by the financial institution as a result of the contravention.”[[58]](#footnote-58)
2. AMLO[[59]](#footnote-59) also authorizes HKMA to publish guidelines for the operation of Schedule 2 (which, as we have seen, it has done in the form of the Guideline).[[60]](#footnote-60) A failure to comply with a provision in the Guideline is taken into account in any court proceedings under AMLO and in deciding whether Schedule 2 has been contravened. We turn to consider those provisions more closely.

D.3 The Guideline (October 2018 edition)[[61]](#footnote-61)

1. The Guideline seeks to provide “practical guidance to assist [banks] and their senior management in designing and implementing their own policies, procedures and controls in the relevant operational areas, taking into consideration their special circumstances, so as to meet the relevant [AML[[62]](#footnote-62)] statutory and regulatory requirements.”[[63]](#footnote-63)
2. It requires banks to appoint a Compliance Officer (“CO”) to have the overall responsibility for the establishment and maintenance of the bank’s anti-money laundering systems; and a senior member of staff as the Money Laundering Reporting Officer (“MLRO”) “to act as the central reference point for suspicious transaction reporting”.[[64]](#footnote-64) The MLRO is to act “... as the main point of contact with the Joint Financial Intelligence Unit (“JFIU”)[[65]](#footnote-65) and law enforcement agencies” and “should play an active role in the identification and reporting of suspicious transactions”.[[66]](#footnote-66)
3. The Guideline emphasises the need for the bank to verify the customer’s identity and continuously to monitor its transactions, reiterating the requirements of AMLO Sch 2, section 5(1) cited above.[[67]](#footnote-67) It stresses that the bank should adopt a holistic approach, “monitoring activities of a customer’s multiple accounts within or across lines of businesses, and related customers’ accounts within or across lines of businesses”.[[68]](#footnote-68) And if suspicious circumstances are detected, the bank’s duty is to “take appropriate steps to further examine the transactions”.[[69]](#footnote-69)
4. Such internal investigation is likely to include seeking relevant explanations from the customer. The answers may dispel suspicions:

“Where [a bank] conducts enquiries and obtains what it considers to be a satisfactory explanation of the transaction or activity, it may conclude that there are no grounds for suspicion, and therefore take no further action.”[[70]](#footnote-70)

1. But if knowledge or suspicion has not been eliminated, a bank should file a Suspicious Transaction Report (“STR”) “even where no transaction has been conducted by or through the [bank]”; and “the STR should be made as soon as reasonably practical after the suspicion was first identified”.[[71]](#footnote-71)
2. Having placed the onus on banks to decide whether suspicious circumstances requiring disclosure to the police exist, the Guideline reassures them that a decision against disclosure, made in good faith is unlikely to attract criminal liability:

“Providing an MLRO acts in good faith in deciding not to file an STR with the JFIU, it is unlikely that there will be any criminal liability for failing to report if the MLRO concludes that there is no suspicion after taking into account all available information. It is however vital for the MLRO to keep proper records of the deliberations and actions taken to demonstrate he has acted in [a] reasonable manner.”[[72]](#footnote-72)

1. The practice of the JFIU, in response to disclosures by the bank, is explained, stressing that the bank should seek its own legal advice where necessary:

“The JFIU will acknowledge receipt of an STR made by [a bank] under section 25A of ... OSCO... If there is no need for imminent action, e.g. the issue of a restraint order on an account, consent will usually be given for the [bank] to operate the account under the provisions of section 25A(2)(a) of ... OSCO .... If a no-consent letter is issued, the [bank] should act according to the contents of the letter and seek legal advice where necessary.”[[73]](#footnote-73)

1. The bank’s continuing obligations, notwithstanding compliance with its reporting duties and consent from the police in an individual case, are underlined:

“... the statutory defence [under OSCO section 25A(2)] does not absolve [a bank] from the legal, reputational or regulatory risks associated with the account’s continued operation. [A bank] should also be aware that a ‘consent’ response from the JFIU to a pre-transaction report should not be construed as a ‘clean bill of health’ for the continued operation of the account or an indication that the account does not pose a risk to the [bank]”.[[74]](#footnote-74)

1. The Guideline also notes that there may be cases where the police request assistance from the bank, pointing out that such requests “are crucial to aid law enforcement agencies to carry out investigations as well as restrain and confiscate illicit proceeds”.[[75]](#footnote-75) The bank should thereupon “assess the risks involved and the need to conduct an appropriate review on the customer or the business relationship to determine whether there is any suspicion”,[[76]](#footnote-76) underscoring the need for the bank to make up its own mind in the light of its knowledge of its customer.

D.4 The position of banks in the anti-money laundering framework

1. The following features emerge from the foregoing survey:
   1. Banks are on the frontline of global efforts against money laundering. That is necessarily so since the targeted funds pass through their hands and generally only banks are positioned to detect and scrutinise suspicious transactions. Only they have knowledge of their customers and their banking activities.
   2. Accordingly, the statutory and regulatory rules require banks to have in place a working system to conduct customer due diligence; to maintain continuous monitoring of customer accounts; to investigate suspicious transactions; to cease dealing with the account holder and to freeze the funds where suspicions are unresolved; and to report suspicions to the police.
   3. While a bank may be closely in touch with the police in particular cases, it is required to make its own decision as to what, if any, action it should take regarding the customer’s account.
   4. Banks are generally well motivated to comply with their anti-money laundering obligations in order to avoid criminal liability under OSCO and AMLO or regulatory action by HKMA, as well as reputational damage.
   5. The evidence is that in practice, banks take compliance issues seriously. Thus, between 2018 and May 2021, the JFIU received a total of 207,146 STRs.[[77]](#footnote-77)
2. The role of the police is as the main anti-money laundering law enforcement agency. The STRs filed draw attention to possible money laundering activities, enabling the police to consider whether investigative action should be taken. Where the police have their own source of information raising suspicions about particular customers and accounts, they may share that information with the bank and request its assistance. A cooperative working relationship is expected to exist between a bank’s MLRO and the JFIU, but it is recognised that the bank must make its own decisions regarding the questioned account in light of its knowledge about the customer, whatever communications it may have had with the police.

E. The operational practice of the police

1. As an important component of the anti-money laundering framework, the CP has developed a set of operational policies and procedures set out in a published Force Procedures Manual (“FPM”).[[78]](#footnote-78) Cases like the present, where the police receive information of possible money laundering from a reputable non-banking source, here the SFC, are relatively rare. But in such cases, giving effect to the above-mentioned OSCO provisions and the FPM, the sequence of events involving the use of LNCs is likely to run as follows:
   1. Funds are deposited in the customer’s bank account. The bank thereupon incurs a debt to the customer in the amount deposited, usually repayable on demand. That debt, a chose in action, represents the customer’s property held by the bank.[[79]](#footnote-79) [Step 1]
   2. The police intimate their suspicions about an account to the bank. Given the information supplied by the police, the bank will appreciate that there may well be reason to believe that the relevant funds are the proceeds of an indictable offence. The police may request the bank to issue an STR to the JFIU in respect of those funds and may indicate that they intend to issue an LNC. [Step 2]
   3. No doubt after reviewing its own customer records, the bank disables the account, refusing any instructions from the customer to deal with the funds, if the suspicion is not dispelled. It issues an STR to the JFIU. [Step 3]
   4. If the JFIU considers that the suspicious transaction should be followed up, it refers the matter to an investigating unit which has to decide within two working days[[80]](#footnote-80) whether the bank should receive consent to deal with those funds. If the investigating unit decides that consent should be given or if it does not make a decision within the two days (without obtaining any extension), the JFIU issues a Consent Letter to the bank, which enables it to deal lawfully with the funds. [Step 4]
   5. But if the investigating unit decides that there should not be consent pending further investigation, it procures the JFIU to issue an LNC to the bank which generally continues to freeze the account. [Step 5]
   6. The FPM requires the JFIU then to use its best endeavours to obtain a restraint order from the court under OSCO section 15 or to procure the alleged victim of the crime to seek a Mareva injunction to freeze the funds in the bank. Pending the obtaining of such an order, the LNC remains in place as the investigation proceeds, but with monthly reviews. Under the FPM, the LNC lapses after 6 months if no court order has been obtained, save where an extension of time is justified in exceptional circumstances. [Step 6]
   7. If an OSCO restraint order is obtained,[[81]](#footnote-81) the court assumes supervision of the frozen account in accordance with OSCO section 15 and related provisions, leading eventually either to a confiscation order or to discharge of the restraint order and release of the funds.[[82]](#footnote-82) If no restraint order is obtained within the time limits set by the FPM, the JFIU issues a Consent Letter enabling the bank to deal with the property under section 25A(2)(a). [Step 7]
2. In the present case, at the end of November and the beginning of December 2020, the police sent e‑mails to the four banks informing them of the police suspicions, requesting them to suspend the accounts and to submit STRs, also intimating that the police intended to issue LNCs [Step 2].[[83]](#footnote-83) The banks complied, submitting STRs to the JFIU [Step 3]. The JFIU thereupon referred the matter to the Financial Investigation Division which then asked JFIU to issue LNCs to the banks. That was done and the accounts remained disabled [Step 5]. A restraint order was obtained from the court on 11 October 2021, some 10 months after the LNCs were issued [Step 7]. We were told at the hearing that an application by the appellants asking the court to refuse to extend the restraint order was unsuccessful.

F. The nature and purpose of the LNCs

1. It will be apparent that in the sequence of events described, no property belonging to the suspect is ever held or seized by the police. It is the bank which maintains the account for the customer and, in accordance with the anti-money laundering requirements discussed above, decides whether the customer should be allowed to draw on the suspect funds or whether the account should be disabled.
2. Thus, when at [Step 2] the police inform the bank of their suspicions, OSCO, AMLO and HKMA’s regulatory requirements come into play. The bank undoubtedly appreciates the statutory, regulatory and reputational risks it runs if it should deal improperly with the funds. Of most obvious significance is OSCO section 25(1). Unless, having made due inquiries, the bank is confident that the suspicion is dispelled, it runs the risk of incurring criminal liability under section 25(1) if it deals with the funds since the information provided by the police is likely to constitute reasonable grounds to believe that those funds represent the proceeds of an indictable offence. The desire to avoid such risks therefore motivates the bank to freeze the account.[[84]](#footnote-84) The freeze might have been instigated by the police but it represents the bank’s own act, done in compliance with its legal and regulatory duties.
3. The bank also comes under a section 25A(1) obligation to report to the police what it knows or suspects regarding those funds (even though the police may have instigated that suspicion). Thus, the request by the police that the bank should issue an STR at [Step 2] represents a request that the bank should comply with its statutory duty of disclosure. It may also reflect the interest of the police in obtaining any useful information possibly known to the bank which may be included in the STR.[[85]](#footnote-85)
4. In making the [Step 2] communications, the police no doubt expect and intend that the bank should comply with its anti-money laundering obligations and avoid committing the said offences so that the account is frozen and the STR is issued [Step 3]. As the CP acknowledges, the aim is “to prevent dissipation of assets by the applicants while police investigation [is] ongoing”.[[86]](#footnote-86)
5. That objective also lies behind the issue of an LNC at [Step 5]. The police thereby make it clear that they are not, at least at that stage, consenting to the bank dealing with the property whether for the purposes of section 25A(2)(a) or otherwise. As we have seen, if such consent were forthcoming, that section would create an immunity for the bank against liability under section 25(1) in respect of such dealing. Thus, withholding consent means that immunity is not being granted, but it does not mean that the police thereby freeze or order the bank to freeze the account. Having received an LNC, the bank, can usually be expected to continue freezing the account [Step 5]. But, as noted above, such freezing is not the CP’s act.
6. Where an LNC is issued, the FPM requires the police diligently to pursue their investigation so that they are able to decide (with advice from the Department of Justice) whether to pursue criminal proceedings, seeking a restraint order, or to consent to the bank releasing the funds. The LNC is thus a temporary and provisional expedient with an initial six-month limit to its duration (with a possible extension for a further six months if that can be justified). The LNC is designed temporarily to prevent dissipation of the assets with a view to invoking the court’s jurisdiction if the matter is to be pursued.
7. In the present case, the CP explains that it was necessary to maintain the LNCs for about ten months, a period longer than the usual six months, because the case involved:

“... a sophisticated money laundering scheme and a large number of accounts. Given the highly sensitive information involved and the need to balance between the integrity of the investigation process and to provide a measured and appropriate response in these proceedings, the [CP] needed time to formulate [his] response, to seek appropriate legal advice and to prepare his evidence.”[[87]](#footnote-87)

1. As we have seen, the conditions which must be satisfied under OSCO section 14 before a court will grant a restraint order pre-suppose an investigation which is to some degree advanced. There must be evidence sufficient to support the issue of a warrant, or the arrest of the person concerned, or the preferring of a charge or indictment. There must also be evidence supplying reasonable cause to believe that he or she has benefited from the relevant offence. A central plank of the appellants’ submissions at the hearing was that the only lawful means of freezing their funds was by obtaining a restraint order from the court. That argument is examined below, but we note that if that submission is correct, a surprising and crucial gap would exist during the period before investigations are sufficiently advanced to justify applying for a restraint order, when nothing could lawfully be done to prevent flight or dissipation of the suspect funds.
2. As previously noted, the evidence is that banks routinely comply with the anti-money laundering requirements. It appears that in practice, the bulk of STRs originate from the banks and that they are only rarely issued in response to police initiatives. In the vast majority of cases, financial institutions are free to deal lawfully with their customers’ funds after submitting an STR. As Supt Leung Oi-lam, Head of the JFIU, explained:

“For the period between 2018 and May 2021, JFIU received a total of 207,146 STRs. Less than 2% of the STRs received resulted in the issuance of LNCs. In the same period, law enforcement agencies in Hong Kong have taken out 120 applications for restraint orders and 119 applications for confiscation orders under DTROP[[88]](#footnote-88) or OSCO. Also, in the same period, HK$8.554 billion is restrained, HK$ l.02 billion is confiscated and HK$649.9 million is received by the Government.”[[89]](#footnote-89)

1. It therefore seems evident that LNCs are not issued indiscriminately and that the FPM’s policy that the use of LNCs must be “necessary, proportionate and reasonable” taking specified factors into account is heeded. We turn now to examine the four Questions in the context of the foregoing discussion.

G. Q1: The Ultra vires/improper purpose question

G.1 Ultra vires

1. The appellants contend that the LNCs are ultra vires because “OSCO does not confer power to operate a de facto property freezing regime by the use of such letters and attendant procedures.”[[90]](#footnote-90) The Judge accepted that argument and granted a Declaration that “The Letters of No Consent were, and the No Consent Regime as operated by the Commissioner of Police is ... ultra vires sections 25 and 25A of OSCO...”[[91]](#footnote-91)
2. Thus, the focus of the appellants’ ultra vires complaint is on the alleged freezing of the accounts by the police through their communications with the banks by e-mail at [Step 2]; and their issuing of LNCs at [Step 5]. The appellants argue that:

“Nothing in OSCO suggests that the legislature intended to authorise police to contact banks in secret and give instructions, which would invariably be obeyed, that the accounts of any person, company, or other entity should be frozen. To the contrary, as the Judge observed [CFI§§77-83], numerous features in the legislation suggest that this was not contemplated or intended.”[[92]](#footnote-92)

1. This argument has three basic flaws. First, it bases the ultra vires argument entirely on OSCO, the premise being that in order for the actions by the police to be intra vires, they have to be authorized by OSCO and that in the absence of such authorisation, those actions are ultra vires. Secondly, it mischaracterises the actions of the police at [Steps 2 and 5] as their freezing of the accounts. Thirdly, the assertion that “Nothing in OSCO suggests that the legislature intended to authorize” a freezing of assets, reflects the appellants’ erroneous core contention that the only lawful means of freezing an account is by obtaining a restraint order under OSCO section 15.
2. Regarding the first flaw, as was pointed out in the Courts below, the concept of ultra vires was “borrowed ... from company law, where powers are spelt out in articles of association and acts can be measured against them”.[[93]](#footnote-93) Thus, in a company law ultra vires case, there is no doubt as to the framework of rules against which the impugned acts are to be assessed. However, in the public law context, it is crucial not to fasten upon the wrong statute as the necessary source of the power to act. That error would result in a self-fulfilling finding of ultra vires: if one looks for authorisation of certain activities in a statute that was never intended to provide such authorisation, it naturally leads to the wrong conclusion that such activities are unauthorized and so ultra vires. That is the effect of the appellants’ argument in the present case.
3. The search for specific OSCO provisions authorising the police actions at [Steps 2 and 5] is misdirected. One candidate provision canvassed by the appellants[[94]](#footnote-94) is OSCO section 25A(2)(a). It is true that section 25A(2)(a) envisages the police giving consent for dealings with the suspect property in some cases and, by necessary implication, withholding such consent in others. But, as we have seen, section 25A(2) is not primarily about the police giving or withholding consent or their power to do so. It is principally concerned with the *conferring of immunity* in cases where disclosure has duly been made. Thus, under section 25A(2)(b), immunity is provided for on the basis of after-the-event disclosure, without requiring an authorized officer’s consent.
4. With the focus of section 25A(2) on the granting or withholding of *immunity*, section 25A(2)(a) only operates at a stage when, after investigation, the police are in a position to decide whether immunity should be granted. It does not, and is not intended to, supply legal authority for the actions of the police during the initial and pending stages of the investigation. Consent may thus be given under section 25A(2)(a) where it has been decided to take the investigation no further. Or it may be given in special circumstances, such as where consent is granted “to avoid a suspected criminal becoming aware of the suspicions that are harboured in relation to him ... [or] so as to permit a controlled transfer to take place so that funds can be traced for investigative purposes”.[[95]](#footnote-95) But section 25A(2) is not intended to govern police communications with the bank at [Step 2] or the issue and maintenance of LNCs at [Step 5]. It does not serve as a basis for assessing whether those acts are ultra vires.
5. Authorisation for those acts is to be found elsewhere. Properly viewed for what they are (ie, communications aimed at preventing money laundering and securing the suspect assets pending further investigation), such acts are performed pursuant to the statutory duties and powers of police officers laid down in the Police Force Ordinance (“PFO”).[[96]](#footnote-96)
6. PFO section 10 materially provides:

“The duties of the police force[[97]](#footnote-97) shall be to take lawful measures for—

(b) preventing and detecting crimes and offences; [and]

(c) preventing injury to life and property ... “

1. In communicating with the banks at [Steps 2 and 5], the police were taking lawful measures to prevent the crime of money laundering; to seek information in aid of their investigations aimed at detecting crime; and to prevent the flight and dissipation of (and thus loss and injury to) property suspected of being the proceeds of crime with a view to its possible confiscation.
2. The Court of Appeal referred to *Rice v Connolly*,[[98]](#footnote-98) in which Lord Parker CJ held that it is part of the common law duty of police constables to take all steps which appear necessary for preventing crime and protecting property from criminal injury. Those common law rules provide an additional basis for holding that the police actions at [Steps 2 and 5] were intra vires, although the position is more explicit under the PFO.
3. The second flaw in the ultra vires argument consists of the appellants mischaracterising the acts of the police as freezing the accounts. The communications at [Steps 2 and 5] as analysed in Sections E and F above do not involve the police freezing or ordering the banks to freeze the accounts. As we have noted, motivated by the wish to meet its anti-money laundering obligations and to avoid criminal, regulatory and reputational sanctions, it is the bank which disables and freezes its customer’s account when it decides that the suspicion is not dispelled. The bank is not the agent of the police in this connection. This point was prominently made by the Court of Appeal[[99]](#footnote-99) and, as G Lam JA pointed out:

“The withholding of consent no more ‘freezes’ an account than the giving of consent compels the bank to release money. The police have no power to require the bank to do anything.”[[100]](#footnote-100)

1. As previously noted, the bank is obliged to and does exercise its own judgment. As pointed out by the HKMA,[[101]](#footnote-101) there may well be cases where the bank is quite satisfied in the light of its customer due diligence records and after making inquiries of its customer, that the police suspicions are unfounded. It may then proceed lawfully to operate the customer’s account (which is not frozen) notwithstanding information received from the police. It is entirely unfounded to suggest, as the appellants do, that upon hearing of suspicions from the police, banks would regard such communications as “instructions, which would invariably be obeyed, that the accounts of any person, company, or other entity should be frozen”.
2. Since the actions of the police do not involve the freezing of bank accounts, a search for statutory authorisation to operate such a freeze is misguided. It is fallacious to conclude, when such search proves fruitless, that the (mischaracterised) police action is ultra vires. The acts at [Steps 2 and 5] fall within the usual statutory powers and duties of the police under the PFO.
3. The third flaw, closely related to the second, involves the contention that the (mischaracterised) act of freezing by the police is not authorized by OSCO since the only lawful means of immobilising an account is by obtaining a restraint order under OSCO section 15. Accordingly, so it is argued, the Ordinance does not authorize the police to “contact banks in secret and give instructions” leading “invariably” to the freezing of the account.
4. As we have noted, the aforesaid suggestion would leave a surprising gap given the evidential threshold for obtaining a section 15 order. We do not accept that any such gap exists. In cases like the present, PFO section 10 powers provide ample authority for the police to instigate disablement by banks of their customers’ accounts, with a view to avoiding dissipation of the funds pending further investigation and possibly seeking a restraint order from the court. As the FPM recognises, instigation of a bank’s freezing of a customer’s account is a temporary and provisional measure to secure suspect property while investigation proceeds. It is a measure that is reviewed each month and of a finite duration pending a decision as to whether the court’s jurisdiction will be invoked, when OSCO sections 8, 14 and 15 would come into play.

G.2 Improper purpose

1. The improper purpose ground (in the *Padfield* sense[[102]](#footnote-102)) is similarly misdirected. It involves the contention that, having been given a statutory power, the police misuse it for an improper purpose. What then is the relevant power and how has it been misused? The appellants rely again on OSCO section 25A(2)(a) which, as we have seen, is one part of a provision concerned with immunising persons who deal with suspicious property where proper disclosure is made. The appellants argue that the power to consent impliedly includes the power to refuse consent and that such implied power has been misused “as an active measure to freeze bank accounts pending any restraint under OSCO sections 14-15”.[[103]](#footnote-103) The appellants submit that:

“The Judge therefore rightly concluded that .... the power to withhold consent under s.25A(2)(a) of OSCO is in the context of the NCR used for an improper purpose in the *Padfield* sense [CFI§92].”[[104]](#footnote-104)

1. That argument must be rejected. As explained above, properly construed, section 25A(2)(a) is not the source of the police powers to deal with the bank at [Steps 2 and 5]. Rather, those powers derive from PFO section 10 and are exercised for lawful purposes thereunder. The appellants’ argument erroneously attributes the relevant power to section 25A(2)(a) and, on that faulty premise, argues that such power has been misused.
2. Secondly, the improper purpose argument again involves mischaracterising the actions of the police as freezing the accounts. For the reasons given above, it is not the police, but the banks, which freeze the accounts so that the alleged misuse of powers is not made out. Moreover, even if the “freezing” were properly attributed to the actions of the police, this occurred, as the appellants accept, “pending any restraint under OSCO sections 14-15”. Such a temporary measure aimed at preventing dissipation of suspect assets pending further investigation and possible invocation of the court’s jurisdiction is not a misuse of, but consistent with, the powers conferred by the PFO.

H. Q2: The constitutional challenge

1. The appellants seek to challenge the constitutionality of the CP’s issue of the LNCs, alleging that this not only infringes the right to property under the Basic Law (BL6 and BL105), but also the right to private and family life under the Bill of Rights (BOR14); and the right of access to the court and to legal advice under both constitutional instruments (BL35 and BOR10). They argue that use of the LNCs fails to meet the constitutional “prescribed by law” and proportionality requirements.
2. In dealing with such constitutional challenges, the first step is to identify the constitutional right invoked. Secondly, one has to identify the legislative rule or executive or administrative policy, decision or act which is challenged (“the impugned measure”) and examine whether and in what way that impugned measure infringes and so engages the protected right relied on. Only if that right is engaged, does one need to go on to consider legal certainty, proportionality and remedies.

H.1 The challenge based on property rights

1. The Basic Law Articles relied on by the appellants regarding property rights materially provide as follows:

BL6: “The [HKSAR] shall protect the right of private ownership of property in accordance with law.

BL105: “The [HKSAR] shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.”

1. As previously noted, the appellants identify the so-called “No Consent Regime”, shorthand for the criticised actions of the police, as the impugned measure, the relief claimed being for a Declaration:

“... that the ‘No Consent Regime’ (defined below at §64),[[105]](#footnote-105) purportedly operated under [OSCO], is ... incompatible with [the aforesaid Articles of the Basic Law and the Bill of Rights] ... and accordingly unconstitutional.” [[106]](#footnote-106)

1. Those actions are said to involve an objectionable freezing of the accounts by the police which, as we have sought to show, mischaracterises those actions. That mischaracterisation infects the constitutional challenge, undermining the contention that the impugned measure infringes the relevant protected rights.
2. The appellants’ Written Case[[107]](#footnote-107) states by way of elaboration that “the NCR [ie, the “No Consent Regime”] engages the right to use of property under BL6 and 105”. Thus, the allegation is not that the appellants have been deprived of their property altogether but that they have been deprived of the right to *use* that property (protected by BL105). This is unsurprising. Neither an LNC nor a restraint order deprives the appellants of their property in their bank funds. Unless and until a confiscation order is made by the court to be satisfied by the frozen funds, the bank remains indebted to them in the amounts of their credit balances and they would immediately recover use of the funds if the restraint is removed. Accordingly, the constitutional complaint is that the (mischaracterised) “freeze” deprives the appellants temporarily of the *use* of the funds.
3. As previously explained, the withholding of consent to deal with the funds under section 25A(2) amounts to the withholding of a grant of immunity against liability under OSCO section 25(1). The CP does not by his acts in [Steps 2 and 5] freeze, or make a “crucial contribution”[[108]](#footnote-108) to the bank’s decision to freeze or continue freezing, the funds. The “freezing” or continued “freezing” remains the bank’s doing. The CP’s acts therefore did not prevent the appellants from using the property and thus did not infringe their protected rights as alleged. BL6 and BL105 are not engaged and, on this ground alone, the constitutional challenge based on property rights cannot be sustained. In reaching this conclusion, we differ from the approach adopted by the parties who have proceeded on the basis that the said property rights are engaged.[[109]](#footnote-109) We also note that in the Court of Appeal, although G Lam JA found that the freezing of the accounts was the bank’s and not the CP’s action,[[110]](#footnote-110) his Lordship proceeded on the assumption that such rights are engaged but upheld the constitutionality of the police actions as legally certain and proportionate.

H.2 The “prescribed by law” and proportionality questions

1. Since the arguments were fully canvassed, we will deal briefly with the “prescribed by law” and proportionality questions. If, contrary to the views just expressed, the police actions did “freeze” the accounts and did deprive the appellants of use of the funds, those questions would in our view, plainly be resolved in favour of upholding the constitutionality of those actions.
2. By the combined effect of the PFO and the FPM, the criticised actions are “prescribed by law”.[[111]](#footnote-111) Such actions are governed by clear and accessible provisions which confer the applicable powers on the police and identify the principles under which their investigations and interactions with banks are to be conducted. Any challenge to such police action by judicial review would be assessed by reference to the aforesaid provisions. The powers are “prescribed by law” and no legal uncertainty exists.
3. Turning to proportionality, the impugned actions plainly have a legitimate aim. First, at the domestic level, such anti-money laundering measures are aimed at facilitating investigation and the detection of crime, as well as at denying the use of banking services to persons seeking to dispose of the proceeds of crime. The putative temporary “freezing” of bank accounts, allied with the duty of disclosure, aims to secure suspect assets pending investigation and ultimately aims to deprive perpetrators of crime of the proceeds of their conduct.[[112]](#footnote-112) These are unquestionably legitimate aims.
4. Secondly, the aim is legitimate at the international level. Enforcement of an effective anti-money laundering scheme in accordance with obligations under international conventions applied to Hong Kong is essential for Hong Kong’s international standing and repute as a major financial centre. Steps taken to comply with the HKSAR’s international obligations and to maintain such standing and repute plainly constitute a legitimate aim.
5. The impugned measure putatively involving temporary interference with use of “frozen” suspect funds is undoubtedly rationally connected with the achievement of the aforesaid legitimate aim at both the domestic and international levels.
6. Those measures are clearly no more than reasonably necessary to achieve those legitimate aims, assuming that to be the applicable standard of review for present purposes. Even if, contrary to what we have decided, the police actions “froze” the accounts, such actions were merely a temporary and provisional means of securing suspicious assets until investigations were sufficiently advanced to enable a decision to be made whether to start criminal proceedings or to consent to the release of the funds. Such interference with the appellants’ use of their funds would thus be of a limited nature and finite duration and would reflect a reasonable balance between the anti-money laundering aims of society and the protection of individual property rights.

H.3 The challenge based on the right to private and family life under BOR14

1. BOR14 provides:

“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.”

1. The appellants assert that:

“The [interfering] effect is heightened if State authorities are involved in a coordinated maneuver whereby *all* of a person’s bank accounts become inoperable at once, thereby generating a freeze on all (or substantially all) of person’s assets. This will likely lead to a grave interference with the subject’s right to private and family life under BOR 14...” [[113]](#footnote-113) (Italics in original)

1. However, as Coleman J pointed out: “... the Applicants have adduced no evidence of any hardship, and have apparently found funds otherwise to live their lives and have managed to instruct solicitors and three Counsel to present and argue the present case.”[[114]](#footnote-114) This was endorsed by the Court of Appeal.[[115]](#footnote-115) A constitutional challenge is not to be entertained on a merely hypothetical supposition that “all (or substantially all) of [a] person’s assets” are frozen.
2. In their Written Case, the appellants submit that “BOR14 is ... systemically engaged” and that “in a systemic challenge, a focal concern is the extent of interference that the impugned systemic features ‘*are capable of causing*’” [[116]](#footnote-116), citing *R(F) v Secretary of State for the Home Department*,[[117]](#footnote-117) in support.
3. That submission is misplaced. The *R(F)* case did indeed involve a “systemic” challenge against a legislative provision, the contention being that section 82 of the UK’s Sexual Offences Act 2003 was incompatible with Article 8 of the European Convention on Human Rights which protects respect for private and family life. That right was undoubtedly engaged since the challenge was against the notification requirements which the section imposed on the convicted sex offenders involved. There is no parallel in the present case. There is no “systemic” challenge to any rule which engages BOR14. Nor is that right engaged on the facts relating to the challenged actions of the police. We reiterate that the Court does not entertain constitutional challenges on the basis of facts which are not shown to exist, merely on the applicant’s suggestion that *if hypothetically they did exist*, they would be *capable* of engaging the protected right invoked.
4. The same objections apply to the appellants’ suggestion that:

“Likewise, a freeze over most or all of a person’s assets is well capable of impairing their ability to retain a lawyer for advice or take legal action to contest the freeze, thus impairing their right of access to legal advice and to the courts under BL35 and BOR10”.[[118]](#footnote-118)

1. The constitutional challenge regarding private and family life set out in Q2 was not pressed at the hearing. It fails *in limine* and there is no need to consider the legal uncertainty and proportionality arguments.

I. Q3: The fair hearing question

1. BOR10 relevantly provides:

“All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Common law fair hearing rights are no different for present purposes.

1. The appellants contend that “BOR 10 is engaged because the issuance of a letter of no consent involves a ‘determination of ... rights and obligations in a suit at law’”.[[119]](#footnote-119) The appellants argue that this is so since “[an] LNC effectively achieves an indefinite freeze of assets without the formalities of a restraint order, with potential for irreversible prejudice”; and because it “determines human rights, including the BL105 right to use property in a bank account”.[[120]](#footnote-120)
2. Their complaint, as spelt out in Q3, is of procedural unfairness:

“... in that there was (1) no or no adequate notice of the decision to issue the LNCs, before or after the issue; (2) no or no adequate opportunity to provide meaningful representations as to whether the LNCs should be maintained; (3) no or no adequate reasons given for the decision to issue the LNCs; and (4) no hearing before an independent and impartial tribunal in terms of art 10.”

1. These submissions betray two fundamental misconceptions. First, they are based on the mischaracterisation already mentioned, namely, that the so-called “No Consent Regime” involves the police freezing bank accounts and thus interferes with the appellants’ property rights relied on as constituting the rights referred to in BOR10. Secondly, they invite the court to treat the investigation process as involving a “determination of ... rights and obligations *in a suit at law*”.
2. In communicating with the banks and in issuing the LNCs at [Steps 2 and 5], the police did none of the things complained of. As discussed in Section F above, they did not freeze the accounts and certainly did not determine the appellants’ rights to those funds. It defies common sense to suggest that police investigations of suspected money laundering should be treated as if the police were conducting a “suit at law” involving a public hearing in some adjudicative forum, giving the suspects notice, reasons and an opportunity to make representations. A clear statutory purpose of OSCO is to avoid prejudicing the investigation, as demonstrated by section 25A(5) referred to in Section D.1 above. The police were fully entitled to keep sensitive aspects of their investigations confidential. Incidentally, the complaint about the appellants not being given a chance to make representations rings especially hollow since, as Coleman J pointed out,[[121]](#footnote-121) they have consistently chosen to exercise their right of silence despite being repeatedly requested to assist in the investigation. They had every opportunity, if they so wished, to make representations with a view to dispelling the suspicion. They chose to stay silent.[[122]](#footnote-122)
3. It has in any event been open to the appellants throughout to seek relief against the banks in a “suit at law” for withholding their funds. It has also been open to them to resort to the courts in bringing judicial review proceedings against the CP, as indeed they have done.
4. Accordingly, neither the BOR10 nor the common law fair hearing rights are engaged. The suggestion that the police actions involving the use of LNCs have somehow infringed those rights is untenable.

J. LNCs overtaken by restraint order

1. Another difficulty stands in the way of the appellants’ case. The actions of the police were taken always with the intention of invoking the court’s jurisdiction if and when investigations were thought to justify that course. Restraint orders have now in fact been obtained so that the earlier actions (by the bank and/or the police), preserving the position, have been overtaken by court orders which keep the “freeze” in place. The LNCs having fallen away, the declaration sought regarding the lawfulness of the so-called “No Consent Regime” has become academic.[[123]](#footnote-123) Moreover, the complaint about the police using an unauthorized “freezing” mechanism instead of seeking a restraint order under OSCO section 15 is seriously undermined by the fact that, given full access to the court, the appellants failed in their application to prevent extension of the restraint order’s validity. The “freeze” ordered by the court remains in place.

K. Q4: The Interush question

1. In Section B above, we drew attention to doubts raised by the *Interush* question and concluded that the issues in this appeal are confined to challenges to the so-called “No Consent Regime”.[[124]](#footnote-124) The appellants do not seek to make the “full frontal” argument that OSCO sections 25(1) and 25A are in themselves unconstitutional, unsuccessfully advanced in *Interush*.
2. For the reasons given above, we have concluded that none of the constitutional rights invoked by the appellants are engaged, principally because they have mischaracterised the nature and effect of the police actions at [Steps 2 and 5]. We have therefore dealt only briefly with the questions of legal certainty and proportionality. Those questions are relevant to determining whether an infringing encroachment is justified. Since no infringement has been established, those issues do not arise. Accordingly, Q4, which raises issues concerning the necessity and proportionality of the impugned police actions in the context of the *Interush* decision, appears irrelevant for present purposes.
3. *Interush* proceeded on a quite different analysis. It was concerned with a direct challenge to the constitutionality of certain OSCO provisions. Section 25A (but not section 25(1)) was held to engage the protected property rights invoked.[[125]](#footnote-125) The so-called “full frontal” challenge arose because the CP’s practice involving the use of LNCs was treated as being based on section 25A(2)(a),[[126]](#footnote-126) ie, that the grant or withholding of consent for dealing with the funds was governed by that provision. The appellant’s contention was therefore that section 25A(2)(a) was unconstitutional so that the practice based on that provision was necessarily unlawful – hence the so-called “systemic” challenge.
4. It was on that basis that the Court of Appeal in *Interush* came to consider and to reject the legal uncertainty and proportionality arguments.[[127]](#footnote-127) It held that “[the] real contention in this appeal is that of proportionality”,[[128]](#footnote-128) and went on to hold that the impugned acts were proportionate.[[129]](#footnote-129) It will be apparent that the present analysis has adopted a very different approach to section 25A(2)(a) as set out in Section G.1 above.
5. The correctness or otherwise of the *Interush* decision is obviously not the subject of this appeal and it is sufficient to note that the analytical basis of thatjudgment differs substantially, calling into question the relevance of Q4 for present purposes. It may nonetheless be pertinent to query an important aspect of the reasoning in *Interush*. On the one hand, the Court of Appeal accepted “that the ‘Letter of No Consent’ does not by itself freeze the accounts of the applicants”[[130]](#footnote-130) reiterating that:

“... the consent regime does not freeze the bank account. The freezing of the account is by the financial institution itself.”[[131]](#footnote-131)

1. Yet it held, on the other hand, that the LNC engaged the property right in that it:

“... has affected the use by the applicants of their money in the bank accounts. Although the ‘temporary freezing’ of the applicants’ accounts does not constitute a deprivation of their property, the *use* by the applicants of their property in the nature of the debt which has an economic value is affected.”[[132]](#footnote-132)

It was on this basis that a proportionality assessment was deemed necessary.

1. With respect, if the impugned acts did not freeze the accounts and the freezing or continued freezing was “by the financial institution itself”, it is not easy to see how the acts of the police are thought to have infringed the applicants’ right to use of their property.

L. Conclusion

1. Our answers to the four Questions are as follows: Q1: No. Q2: Yes. Q3: No. Q4: *Interush* adopted an analysis which we do not fully support. However, the Court of Appeal arrived at the correct result.
2. For the foregoing reasons we dismiss the appeal.

**Mr Justice Fok PJ:**

1. I agree with the joint judgment of Chief Justice Cheung and Mr Justice Ribeiro PJ.

**Mr Justice Lam PJ:**

1. I agree with the joint judgment of Chief Justice Cheung and Mr Justice Ribeiro PJ.

**Lord Collins of Mapesbury NPJ:**

1. I agree with the joint judgment of Chief Justice Cheung and Mr Justice Ribeiro PJ.

**Chief Justice Cheung:**

1. Accordingly, the Court unanimously dismisses the appeal.

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| (Andrew Cheung) | (R A V Ribeiro) | (Joseph Fok) |
| Chief Justice | Permanent Judge | Permanent Judge |

|  |  |
| --- | --- |
| (M H Lam) | (Lord Collins of Mapesbury) |
| Permanent Judge | Non-Permanent Judge |

Mr Abraham Chan SC, Mr Timothy Parker and Mr Geoffrey Yeung, instructed by O Tse & Co., for the 1st to 4th Applicants (Appellants)

Mr Benjamin Yu SC, Mr Jenkin Suen SC instructed by, Ms Crystal Chan, SPP of and Mr Peter Dong instructed by the Department of Justice, for the Respondent

1. Cap 455. [↑](#footnote-ref-1)
2. Contrary to the Securities and Futures Ordinance (Cap 571). [↑](#footnote-ref-2)
3. Bank of China Hong Kong, Bank of East Asia, the Hongkong and Shanghai Banking Corporation and Hang Seng Bank. [↑](#footnote-ref-3)
4. [2022] 1 HKLRD 480. [↑](#footnote-ref-4)
5. Cheung, Yuen and G Lam JJA [2023] 2 HKLRD 839, G Lam JA giving the judgment of the Court. [↑](#footnote-ref-5)
6. [2023] HKCA 959. [↑](#footnote-ref-6)
7. [2019] 1 HKLRD 892 (“*Interush*”). [↑](#footnote-ref-7)
8. *Interush* at §1.1. The applicants also sought to mount what were referred to as fact-specific constitutional challenges to decisions to withhold consent to proposed dealing with the relevant property. [↑](#footnote-ref-8)
9. *Ibid* at §6.27. [↑](#footnote-ref-9)
10. At §145. [↑](#footnote-ref-10)
11. [2023] HKCA 959 at §9. [↑](#footnote-ref-11)
12. See Appellants’ Supplemental Case, ASC§§12-15. [↑](#footnote-ref-12)
13. Amended Form 86, at §§58-64. [↑](#footnote-ref-13)
14. Amended Form 86, at §§108-109. [↑](#footnote-ref-14)
15. The international conventions, the introduction of anti-money laundering legislation and issues arising in our courts are reviewed in the Speech of Mr Justice Fok PJ at the Hong Kong University/UCL/Peking University, Third Rule of Law Conference (2015), https://www.hkcfa.hk/filemanager/engagement/en/upload/23/Development%20of%20the%20law%20in%20Hong%20Kong%20on%20Money%20Laundering.pdf. [↑](#footnote-ref-15)
16. Initially applied to Hong Kong by the United Kingdom in 1991 and by the People’s Republic of China as notified to the UN Secretary-General in June 1997. [↑](#footnote-ref-16)
17. Vienna Convention Art 3. [↑](#footnote-ref-17)
18. Vienna Convention Art 5. [↑](#footnote-ref-18)
19. Extended to the HKSAR by the People’s Republic of China on 27 September 2006. [↑](#footnote-ref-19)
20. Extended to the HKSAR in January 2006. [↑](#footnote-ref-20)
21. Palermo Convention Arts 6, 7 and 12; UNCAC Arts 14, 23, 24 and 31. [↑](#footnote-ref-21)
22. Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). In an earlier version, enacted in 1989, this Ordinance was the first anti-money laundering enactment implementing Hong Kong’s adhesion to the Vienna Convention. [↑](#footnote-ref-22)
23. United Nations (Anti-Terrorism Measures) Ordinance (Cap 575). [↑](#footnote-ref-23)
24. Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap 526). [↑](#footnote-ref-24)
25. United Nations Sanctions Ordinance (Cap 537). [↑](#footnote-ref-25)
26. Listed in OSCO Schedules 1 and 2. [↑](#footnote-ref-26)
27. As recognized by this Court in *HKSAR v Pang Hung Fai* (2014) 17 HKCFAR 778 at §36. [↑](#footnote-ref-27)
28. At §1.13. The Guideline is discussed in Section D.3 below. [↑](#footnote-ref-28)
29. The Forty Recommendations of the Financial Action Task Force on Money Laundering (1990). [↑](#footnote-ref-29)
30. Incorporating requirements set out in the Vienna Convention. [↑](#footnote-ref-30)
31. Guideline §1.13. [↑](#footnote-ref-31)
32. Recommendations 4 and 5. [↑](#footnote-ref-32)
33. Recommendation 8. [↑](#footnote-ref-33)
34. AMLO (referred to below) Schedule 2 also applies anti-money laundering measures to “DNFBPs” (an acronym for persons in the category described as “designated non-financial businesses and professions”, including accountants, lawyers and estate agents), but they are not of present concern. [↑](#footnote-ref-34)
35. Recommendations 12-14. [↑](#footnote-ref-35)
36. Recommendation 20. [↑](#footnote-ref-36)
37. Recommendation 15. [↑](#footnote-ref-37)
38. Recommendations 16-18. [↑](#footnote-ref-38)
39. Punishable on conviction on indictment to a fine of $5,000,000 and to imprisonment for 14 years; or on summary conviction to a fine of $500,000 and to imprisonment for 3 years. [↑](#footnote-ref-39)
40. Section 25A(7): “A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months.” [↑](#footnote-ref-40)
41. There is no evidence before the Court of the terms of the customer contracts entered into by the appellants. But common experience suggests that such contracts are likely to contain terms protecting banks against liability where they are acting in accordance with their statutory and regulatory obligations. [↑](#footnote-ref-41)
42. As discussed in *SJ v Tam Kit-I* (2023) 26 HKCFAR 63. [↑](#footnote-ref-42)
43. OSCO section 14(1)(a). [↑](#footnote-ref-43)
44. OSCO section 2(15). [↑](#footnote-ref-44)
45. OSCO sections 14(1)(c)(ii) and 14(2). [↑](#footnote-ref-45)
46. OSCO section 14(1)(ba). [↑](#footnote-ref-46)
47. OSCO sections 14(1A), 14(1B) and 14(4). [↑](#footnote-ref-47)
48. OSCO section 15(4). [↑](#footnote-ref-48)
49. OSCO sections 15(5) and 15(6). Proceedings for an offence are “concluded” as defined in section 2(16). [↑](#footnote-ref-49)
50. OSCO section 11. The proceeds must amount to at least $100,000: OSCO section 8(4). [↑](#footnote-ref-50)
51. As discussed in *SJ v Tam Kit-I* (2023) 26 HKCFAR 63. [↑](#footnote-ref-51)
52. Cap 615. [↑](#footnote-ref-52)
53. AMLO section 5(5). This offence is punishable on conviction on indictment by a fine of $1,000,000 and imprisonment for 2 years, and on summary conviction to a fine at level 6 and imprisonment for 6 months. [↑](#footnote-ref-53)
54. Specified in AMLO section 5(11). [↑](#footnote-ref-54)
55. AMLO Schs 3H and 3I. [↑](#footnote-ref-55)
56. AMLO Sch 2, sections 3(1) and 3(4). [↑](#footnote-ref-56)
57. Reflecting FATF Recommendation 15. [↑](#footnote-ref-57)
58. AMLO sections 21(1) and 21(2). [↑](#footnote-ref-58)
59. AMLO section 7. [↑](#footnote-ref-59)
60. AMLO section 7(2). [↑](#footnote-ref-60)
61. The October 2018 edition was in force at the time of the events in the present appeal. The current version was published in May 2023. [↑](#footnote-ref-61)
62. The Guideline generally refers to “AML/CFT” (“anti-money laundering/counter-financing of terrorism”). Citations in this judgment refer simply to “AML” as being of present relevance. [↑](#footnote-ref-62)
63. Guideline §1.4. [↑](#footnote-ref-63)
64. Guideline §3.7. [↑](#footnote-ref-64)
65. A Unit jointly operated by the police and the Customs & Excise Department primarily responsible for dealing with Suspicious Transaction Reports (“STRs”). See Section E below. [↑](#footnote-ref-65)
66. Guideline §3.10. [↑](#footnote-ref-66)
67. AMLO Sch 2, section 2(1)(a), Guideline §§4.3 and 5.1. [↑](#footnote-ref-67)
68. Guideline §5.6. [↑](#footnote-ref-68)
69. Guideline §7.3. [↑](#footnote-ref-69)
70. Guideline §5.11. [↑](#footnote-ref-70)
71. Guideline §7.5. [↑](#footnote-ref-71)
72. Guideline §7.20. [↑](#footnote-ref-72)
73. Guideline §7.24. [↑](#footnote-ref-73)
74. Guideline §7.26. [↑](#footnote-ref-74)
75. Guideline §7.31. [↑](#footnote-ref-75)
76. Guideline §7.35. [↑](#footnote-ref-76)
77. Affirmation of Supt Leung Oi-lam, 2.7.21, §25. We shall return to these statistics below. [↑](#footnote-ref-77)
78. Chapter 27-19. [↑](#footnote-ref-78)
79. Definitions of “property” in OSCO section 2 and Interpretation and General Clauses Ordinance (Cap 1), section 3. [↑](#footnote-ref-79)
80. Subject to extension in exceptional cases which have to be justified to the JFIU. [↑](#footnote-ref-80)
81. If a Mareva injunction has been obtained it will be dealt with in accordance with applicable procedures in the civil action. [↑](#footnote-ref-81)
82. As discussed in *SJ v Tam Kit I* (2023) 26 HKCFAR 63. [↑](#footnote-ref-82)
83. CA§23 and Respondent’s Supplemental Case, RSC§2. [↑](#footnote-ref-83)
84. There may also be other considerations, such as the risk of civil liability towards the victim of the crime if the bank continues to deal with the funds after being alerted by the police. [↑](#footnote-ref-84)
85. Mirroring OSCO section 25A(1), Guideline §7.19 states: “If after completing the review of the internal report, an MLRO decides that there are grounds for knowledge or suspicion, he should disclose the information to the JFIU as soon as it is reasonable to do so after his evaluation is complete *together with the information on which that knowledge or suspicion is based*.” (Italics supplied) [↑](#footnote-ref-85)
86. Affirmation of Yeung Chin Wing, 2.7.21 §18. [↑](#footnote-ref-86)
87. Second affirmation of Supt Leung Oi-lam, 24.9.21, §6. [↑](#footnote-ref-87)
88. Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). [↑](#footnote-ref-88)
89. Affirmation of Supt Leung Oi-lam, 2.7.21, §25. [↑](#footnote-ref-89)
90. Amended Form 86, at §6.2. [↑](#footnote-ref-90)
91. Order dated 23 March 2022. [↑](#footnote-ref-91)
92. Appellant’s written case (“AWC”) §39. As contra-indications, the appellants point to the developed procedural safeguards applicable to restraint orders and charging orders under OSCO sections 14 to 16, arguing that they demonstrate that a parallel informal and unregulated freezing mechanism was not intended. [↑](#footnote-ref-92)
93. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365 at §59. [↑](#footnote-ref-93)
94. Considered further in Section G.2 below. [↑](#footnote-ref-94)
95. As pointed out in *The Chief Officer, Customs & Excise, Immigration & Nationality Service v Garnet Investments Ltd* (Guernsey Judgment 19/2011, 6 July 2011) at §27. [↑](#footnote-ref-95)
96. Cap 232. [↑](#footnote-ref-96)
97. PFO, section 2 makes it clear that these duties apply “to all persons who, at the commencement of this Ordinance, are serving in the police force...” [↑](#footnote-ref-97)
98. [1966] 2 QB 414 at 419, cited at CA§63. [↑](#footnote-ref-98)
99. CA§§54, 58, 71, 76, 83 and 111. Citing also *The Chief Officer, Customs & Excise, Immigration & Nationality Service v Garnet Investments Ltd* (Guernsey Judgment 19/2011, 6 July 2011) at §§29, 31 and 41. [↑](#footnote-ref-99)
100. CA§58. [↑](#footnote-ref-100)
101. Guideline §§5.10 and 7.20. [↑](#footnote-ref-101)
102. *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. [↑](#footnote-ref-102)
103. AWC§43. [↑](#footnote-ref-103)
104. AWC§49. [↑](#footnote-ref-104)
105. Referred to in Section B above. [↑](#footnote-ref-105)
106. Amended Form 86, at §3. [↑](#footnote-ref-106)
107. AWC§51. [↑](#footnote-ref-107)
108. *A v France* (1994) 17 EHRR 462, §36; *MM v Netherlands* (2004) 39 EHRR 19, §39; *Van Vondel v Netherlands* (2009) 48 EHRR 12, §49, where the authorities’ participation in the interferences by the private individuals with the complainants’ privacy rights were much more direct and substantial. [↑](#footnote-ref-108)
109. AWC§51 and RWC§33. [↑](#footnote-ref-109)
110. CA§§54, 58, 71, 76, 83 and 111. [↑](#footnote-ref-110)
111. In accordance with criteria indicated in *Hysan Development Company Ltd v Town Planning Board* (2016) 19 HKCFAR 372, §30. [↑](#footnote-ref-111)
112. As noted in *HKSAR v Pang Hung Fai* (2014) 17 HKCFAR 778 at §36. [↑](#footnote-ref-112)
113. Amended Form 86, at §96.4. [↑](#footnote-ref-113)
114. At §149. [↑](#footnote-ref-114)
115. At §§114-115. [↑](#footnote-ref-115)
116. AWC§§52 and 53 (emphasis in the original). [↑](#footnote-ref-116)
117. [2011] 1 AC 331. [↑](#footnote-ref-117)
118. AWC§54. [↑](#footnote-ref-118)
119. Amended Form 86, at §117. [↑](#footnote-ref-119)
120. AWC§114. [↑](#footnote-ref-120)
121. At §129. The Court of Appeal was of the same view: CA§§107-108. [↑](#footnote-ref-121)
122. As the Court of Appeal noted: CA§§107 and 117. [↑](#footnote-ref-122)
123. Discussed by the Judge at §§35-39 and by the Court of Appeal at CA§§41-42, 118 and 120. [↑](#footnote-ref-123)
124. Amended Form 86, §§108-109. [↑](#footnote-ref-124)
125. *Interush* at §6.27. [↑](#footnote-ref-125)
126. *Interush* at §3.2 defined “consent regime”, tying it to section 25A(2)(a) stating: “Section 25A(2)(a) provides a defence for that person to continue dealing with those proceeds when an authorised officer has given his consent (“the consent regime”)...” [↑](#footnote-ref-126)
127. *Interush* at §6.42. [↑](#footnote-ref-127)
128. *Interush* at §6.38. [↑](#footnote-ref-128)
129. *Interush* at §6.52. [↑](#footnote-ref-129)
130. *Interush* at §6.18. [↑](#footnote-ref-130)
131. *Interush* at §6.49. [↑](#footnote-ref-131)
132. *Interush* at §6.18 (emphasis in the original). [↑](#footnote-ref-132)