

Disproportionality in Asset Recovery

Reflections on Recent Cases in the United Kingdom and Hong Kong

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Introduction

- ***R v Waya*** (UKSC 14 Nov 2012) 9 judges agreed that courts must refuse to make disproportionate confiscation orders and make only proportionate ones
- **Proceeds of Crime Act 2002 (UK) amended** (in force 1 June 2015)
 - Order less than full recoverable amount if it would be “disproportionate to require the defendant to pay” that amount

Introduction

- **Human Rights Act 1998, s1(1)(b) (UK)**
 - A1P1: “...No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law...” 2nd para: protection from laws deemed “necessary to control the use of property in accordance with the general interest...”
- **Basic Law, Art. 105 (Hong Kong)**
 - “...protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for unlawful deprivation of their property.”

Overview of Thoughts

- **Lack of clarity** in judicial approaches to disproportionate restraint and disproportionate confiscation
- With restraint, access to **judicial review seems to be key**, and one HK case did not see the “no consent” regime as even engaging the right to property
- With confiscation, courts need to confront **tension between two different approaches** to proportionality and I advocate moving towards ‘supervening proportionality’

Judicial Approach to Proportionality

Interpretive Proportionality

- Legislative read narrowly to ensure proportionate outcomes
- Consistent with canon of strict interpretation for penal legislation
- Changes the effect of the legislation for everyone
- Line drawing may introduce problems

Supervening Proportionality

- Two-stage approach: Legislation read ordinarily and outcomes corrected at second stage applying proportionality principles
- Achieve individualised results without changing legislative effects for all
- Need coherent set of proportionality principles

Judicial Approach to Proportionality

Interpretive Proportionality

- Seen in House of Lords 2008 trilogy (*May*, *Jennings*, *Green*) before supervening proportionality recognised
- HK case (*Wayland Tsang*) circumscribes 'benefit' even more
- Seen to some extent in majority approach in *Waya* – apply complex property law concepts to describe precise benefit obtained

Supervening Proportionality

- Seen in dissenters' approach in *Waya*, distinguish between POCA benefit and 'real benefit'
- Better approach: respects legislative intent, more coherent and avoids 'double proportionality', problematic distinctions and complexity
- Courts should move exclusively to supervening proportionality

What's the Test?

Prescription Proportionality

- Whether law's restriction on rights justified
- Legitimate aim
- Rational connection
- No more than necessary – less intrusive means
- Severity of effects outweighs aim's importance

Individualised Proportionality

- Law fine, but application to D disproportionate
- Borrow from *Bedford* (2013 SCC) and Canadian Charter, s7
- Arbitrariness
- Overbreadth
- Gross disproportionality

What's the Test?

Disproportionate Restraint

- Object: preservation of property for confiscation
- Unable to achieve object
- Exceeds object in a systemic and detrimental manner
- Effects grossly disproportionate to circumstances of case

Disproportionate Confiscation

- Object: recovery of financial benefit obtained
- Unable to achieve object
- Exceeds object in a systemic and detrimental manner
- Effects grossly disproportionate to the circumstances of case

Hong Kong Cases on Restraint

- **Indefinite ‘administrative’ restraint of funds**
 - *Interush Ltd v Commissioner of Police* [2015] 5 HKC 158 (CFI) (5 Aug 2015)
 - Held: ‘no consent’ scheme did not engage right to property; contract matter for bank
 - Inconsistent with *Garnet Investments Ltd* (2011 Guernsey CA) on engagement point
 - Availability of judicial review and lawsuit against bank – important safeguards

Hong Kong Cases on Restraint

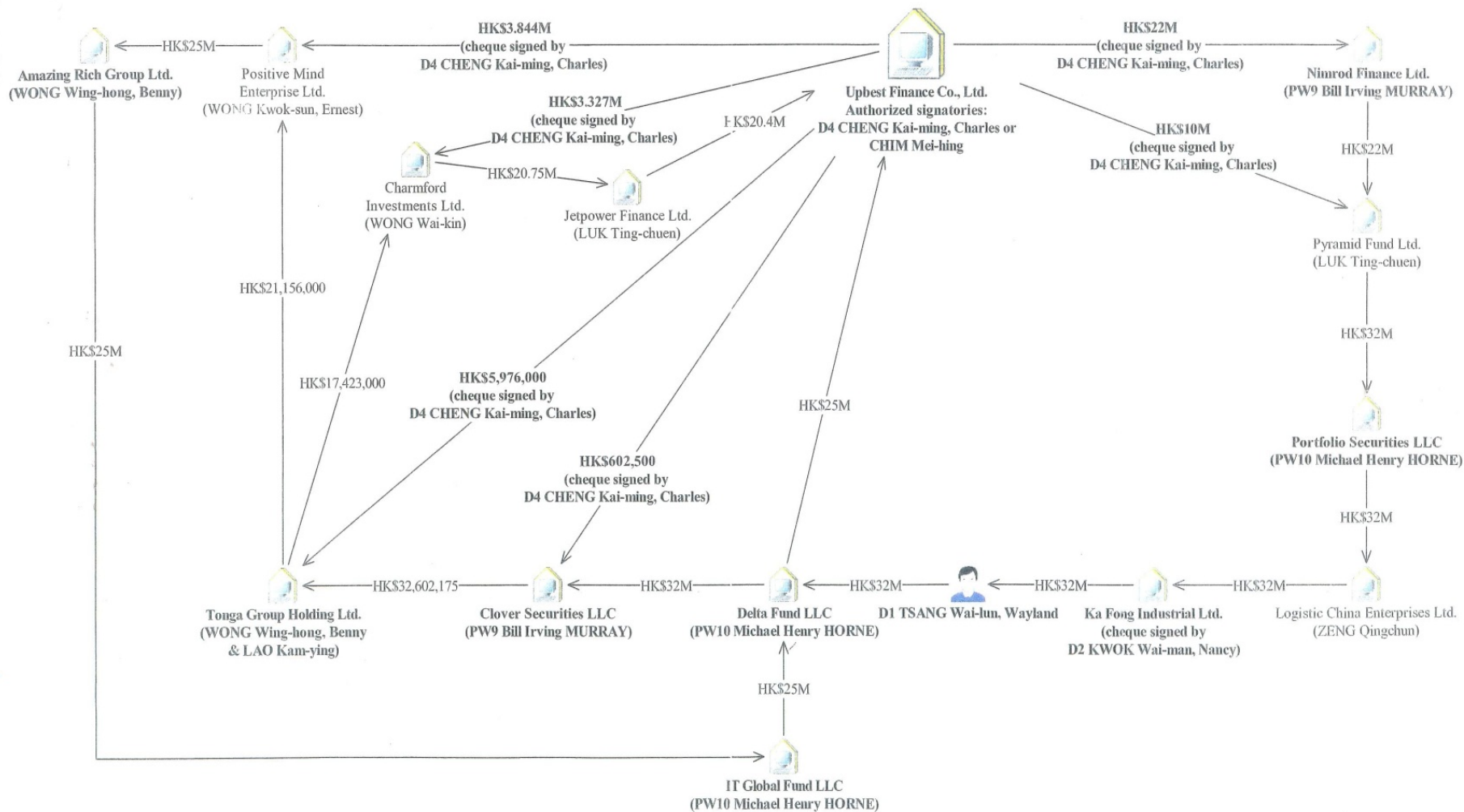
- **Indefinite judicial restraint of funds**
 - *Securities and Futures Commission v C* [2008] HKCFI 959 (CFI)
 - Held: SFC's general power to restrain suspected insider dealing proceeds did not violate right to property
 - Wide judicial power to vary or discharge on ground of unfair "prejudice" to any person

Hong Kong's *Wayland* *Tsang Case*

HKSAR v Tsang Wai Lun Wayland (2014) 17
HKCFAR 319 (cited by UKSC in *R v GH* (Feb 2015))

- A money laundering appeal, not confiscation
- **Tsang** (husband) and **Kwok** (wife) were directors/
SHs of Grand Field, a listed company
- **Cheng** and **Li** were executive directors of Upbest
("lender")
- Facts: \$32M loan of "clean money" used to deceive
Stock Exchange into believing that (fake) mainland
JV interest sold

Cash Flow re HK\$32M on 31.7.2003



This chart is the summary of evidence from P215 to P266 which are covered by the Bankers' Affirmation (P309).

Hong Kong's *Wayland Tsang* Case

- Held: \$32M was NOT the proceeds of an indictable offence; appeals allowed, convictions quashed
- Proceeds of = “any payments or other rewards received...in connection with the commission” of an offence, BUT “**payments**” must be in the nature of a reward
- Implications for confiscation?
 - Purposive interpretation: recovery of economic benefit from crime; HL trilogy cited with approval
 - But removes more than mere couriers/custodians from benefit net

Hong Kong's *Wayland Tsang* Case

- Hypothetical (para 69)
 - Z launders \$3M of drug proceeds for \$100,000 fee
 - Only confiscate \$100,000 even if \$3M is still in Z's account
- Reasoning: Z was never intended to benefit from this sum
- Ignores fact that once funds were in Z's bank account, Z had sole control/authority over funds.
- Illustrates a strong interpretive proportionality approach, but perhaps goes too far and unnecessary once supervening proportionality is recognised.

Thank you.



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