HCMP 1218/2020 and
HCAL 738/2022
(Heard together)
[2022] HKCFI 2688

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1218 OF 2020

BETWEEN

LAI CHEE-YING — Plaintiff

and

COMMISSIONER OF POLICE — Defendant

AND

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 738 OF 2022

BETWEEN

LAI CHEE-YING — Applicant

and

COMMISSIONER OF POLICE — Putative Respondent

Before: Hon Wilson Chan J in Court

Date of Hearing: 22 August 2022

Date of Judgment: 30 August 2022

J U D G M E N T

A. INTRODUCTION AND BACKGROUND

1. This is the rolled-up hearing of Mr Lai Chee-Ying (the "**plaintiff**")'s application for leave to apply for judicial review and the substantive application for judicial review (if leave to apply for judicial review were to be granted) ("**JR Application**") in HCAL 738/2022; and the adjourned hearing of the Commissioner of Police (the "**Commissioner**")'s summons in HCMP 1218/2020 dated 21 July 2022 ("**21 July Summons**") for directions.

2. The background leading up to the JR Application has been summarised in the Commissioner's Skeleton Submissions as follows:

(1) On 10 August 2020, Police officers conducted a search at the plaintiff's residence on the strength of a search warrant (writ no 7531/2020) issued on 6 August 2020 (the "**2020 Warrant**"). Various items were seized during the search ("**Seized Materials**"), including the plaintiff's two iPhones namely (i) a white iPhone 11 Pro Max (Police reference: 498, the "**White iPhone**") and (ii) a green iPhone 11 Pro Max (Police reference: 499, the "**Green iPhone**"). During the execution of the 2020 Warrant, steps were taken by the Police

to avoid the search and seizure of journalistic materials ("**JM**").[1]

(2) As the 2020 Warrant did not authorise the search and seizure of JM and the plaintiff claims in HCMP 1218/2020 *inter alia* that the Seized Materials may contain JM, a protocol has been put in place by order of this court dated 19 November 2020 and as varied on 26 February 2021 and 4 August 2022 ("**Protocol**") in HCMP 1218/2020 to determine claims made by the plaintiff in respect of Legal Professional Privilege ("**LPP**") as well as JM.

(3) On 8 July 2022, as part of the ongoing criminal investigation and based on the latest circumstances and evidence available before the Police, the Commissioner has applied for, and obtained, a search warrant from a (designated) Magistrate under section 2 of Schedule 1 of the Implementation Rules for Article 43 of the National Security Law ("**NSL**") ("**Implementation Rules**") (the "**2022 Warrant**").

(4) The 2022 Warrant specifically authorizes the search etc of any parts of the digital contents of the two iPhones and their copies, including such digital contents which are subject to JM claims in HCMP 1218/2020 ("**Digital Contents**"). In view of HCMP 1218/2020 and the Protocol, the 2022 Warrant expressly provides that the two iPhones and their copies may only be unsealed pursuant to this court's further order/directions, since the Seized Materials and their Master and Working Copies produced under the Protocol had hitherto been sealed pursuant to this court's orders.

[1] Paragraph 5 of the Affirmation of Hung Ngan filed on 12 August 2022.

(5) Therefore, on 21 July 2022, the Commissioner filed the 21 July Summons for directions that the Digital Contents including those parts on which JM claims have been made but excluding those on which LPP is claimed be made available to the Police.

(6) At the directions hearing on 5 August 2022, upon the plaintiff's undertaking to commence judicial review proceedings to challenge the validity of the 2022 Warrant, the 21 July Summons was adjourned to be heard together with the plaintiff's JR Application.

3. As can be gleaned from the Form 86, and as confirmed by the plaintiff's skeleton submissions lodged on 15 August 2022 ("**P Skel**") and at the hearing, the plaintiff puts forward one sole ground for challenging the validity of the 2022 Warrant, namely, that, as a matter of construction, the phrase "*specified evidence*" as defined in section 1 of Schedule 1 of the Implementation Rules somehow does not cover JM, so that the Magistrate simply did not have the power to order the search and seizure of JM.

4. Section 1 of Schedule 1 of the Implementation Rules provides, *inter alia*, that:

> "*specified evidence* (指明證據) means anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security."

5. Section 2(2) of Schedule 1 of the Implementation Rules in turn provides as follow:

> "(2) A magistrate may issue a warrant authorizing a police officer with such assistants as may be necessary to enter and search any place if the magistrate is satisfied by information on

> oath that there is reasonable ground for suspecting that any specified evidence is in the place." (Emphasis supplied)

6. The plaintiff submits that the legislature designed the protections in Part XII of the Interpretation and General Clauses Ordinance, Cap 1 ("**IGCO**") to allow law enforcement bodies access to JM only on them first complying with strict procedures supervised by a judge, not a magistrate. These protections are absent from Schedule 1 of the Implementation Rules. Where the NSL or the Implementation Rules intend to derogate from existing protections, they say so in clear terms. The plaintiff goes on to submit that against this background, "*specified evidence*" defined in section 1 of Schedule 1 of the Implementation Rules does not include JM as defined in Part XII of the IGCO. The 2022 Warrant is unlawful in so far as it authorises the seizure of JM as "*specified evidence*".

7. The Commissioner, on the other hand, submits that the plaintiff's contention is a construction argument contrary to the express language of NSL 43 and Schedule 1 to the Implementation Rules. Accordingly, the Commissioner submits that the plaintiff's ground of review is devoid of merits and that leave should be refused.

(1) First, the Commissioner submits that there is no basis for the plaintiff to contend that section 2 of Schedule 1 of the Implementation Rules should, notwithstanding the absence of any express provision to such effect, exclude JM in its entirety (by carving out all JM from "*specified evidence*" without any discretion for the Magistrate) so as to give way to Part XII of the IGCO. In contending that Schedule 1 of the Implementation Rules does not cover JM because no such balancing exercise as the IGCO regime is found therein, the

plaintiff is labouring under serious misconceptions. Once such misconceptions are clarified, the fundamental premise of the plaintiff's argument falls away, ie that somehow respect for press freedom equates the exclusion of JM from the scope of "*specified evidence*" under the Implementation Rules. Read in its proper context, the clear wording of the Implementation Rules accordingly does not permit the construction advanced by the plaintiff.

(2) Second, the Commissioner deals with the six points advanced under Section F of P Skel, none of which (whether singularly or cumulatively) support the construction put forth by the plaintiff.

8. At this juncture, it is also important to highlight and bear in mind what this JR Application is <u>not</u> about:

(1) There is, rightly, <u>no</u> systemic challenge against the constitutionality of the Implementation Rules (and/or the sufficiency or inadequacy of the requirements thereunder).

(2) There is no attempt by the plaintiff to seek, and the court has no room to adopt, any remedial interpretation. Indeed, it is <u>not</u> the plaintiff's case that the Hong Kong courts have jurisdiction to authorize search and seizure of JM under Schedule 1 of the Implementation Rules but that the requirements of Part XII of the IGCO (or alternatively similar requirements) should be read into Schedule 1 – instead, on the plaintiff's construction, the courts simply have no jurisdiction over JM under Schedule 1. The plaintiff confirms at paragraph 2 of the P Skel that the plaintiff "does not rely on

s 83 of IGCO, nor does he argue that Part XII of IGCO needs to be "read into" Schedule 1 of IR".

(3) The challenge is <u>not</u> against the Commissioner's decision to apply for the 2022 Warrant and/or the manner in which it was applied for. In any event, the Commissioner's decision to apply for the 2022 Warrant is not amenable to judicial review as it does not by itself bring about substantive legal consequences: *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372 at §31.

9. It is of course trite that leave to apply for judicial review will only be granted if it is demonstrated that the intended grounds of challenge are reasonably arguable with a realistic prospect of success: *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676, §15.

B. THE PLAINTIFF'S CONSTRUCTION IS BOUND TO FAIL

B1. Fundamental misconceptions in the plaintiff's construction

10. <u>First</u>, whilst the plaintiff says that he is not arguing that "Part XII of IGCO needs to be "read into" Schedule 1 of IR", he is in fact going a step further, which is to say that Part XII of IGCO is <u>the only lawful regime</u> to protect JM (as if the regime itself, as opposed to the right to freedom of the press and of speech that the regime seeks to protect, were somehow "entrenched" in, for example, the Basic Law). However, Part XII of IGCO cannot be taken as the only way in which procedural safeguards can be meaningfully imposed in relation to the search and seizure of JMs.

(1) Such argument was considered but rejected by Alex Lee J in *A v Commissioner of Police* [2021] 3 HKLRD 300, §36. As

further explained by Alex Lee J in §§39-44, JM as a relevant consideration in the exercise of its discretion could be duly taken into account by the court under Schedule 7 of the Implementation Rules. Such reasoning should apply *mutatis mutandis* to Schedule 1. It can be noted that the word "*may*" is contained in section 2(2) of Schedule 1, just like it is contained in section 3(2) of Schedule 7 of the Implementation Rules.

(2) It needs to be borne in mind that the IGCO was a response by the legislature in the form of a "complete, self-contained code" (*So Wing Keung v Sing Tao Ltd* [2005] 2 HKLRD 11, §37(1)) which is only applicable (i) where the court is dealing with "a person on whom there is or may be conferred under a provision in any Ordinance, being a provision to which section 83 applies" (IGCO, section 84(1)), and (ii) "in the absence of an express provision to the contrary" (IGCO, section 83). Hence, as the plaintiff accepts (at paragraph 2 of P Skel), that the Implementation Rules is "not an ordinance", it follows that the IGCO simply has no application.

(3) In any event, unlike the applicants in *A v Commissioner of Police* (supra), it is not even the plaintiff's case that the courts should read into Schedule 1 a comprehensive scheme similar to the one contained in Part XII (specifically section 85) of the IGCO - instead the plaintiff boldly asserts that the courts have no jurisdiction over JM under Schedule 1. The construction advocated by the plaintiff would result in deprivation of the court's jurisdiction over JM under the NSL and the Implementation Rules.

(4) I agree that these are plainly objectionable, absurd and anomalous consequences which militate strongly against the plaintiff's construction.

11. Second, to take a step back, press freedom simply does not equate any blanket prohibition against the seizure, production or disclosure of JM.

(1) As held by Ma CJHC (as he then was) in *So Wing Keung* (ibid), §36(2), "the protection of journalistic material is of course not absolute either, for sometimes it may be in the public interest that journalistic material should be seized or exposed. …" (Emphasis supplied)

(2) In fact, Ma CJHC went on at §43 to emphasise that in carrying out the balancing exercise, JM cannot even be regarded as a "paramount consideration".

> "(1) First, the Judge said in para. 46 of his judgment that the scheme contained in Pt.XII of the IGCO had to be viewed 'through the prism' of art.27 of the Basic Law of the Hong Kong Special Administrative Region guaranteeing the freedom of the press. This is apt to confuse. If all that was meant was that Pt.XII deals with the permissible limits to the freedom of the press, then I would have no quarrel with this as a proposition. If, however, what was meant was that in approaching Pt. XII applications there should be a bias in favour of this basic freedom and to regard that as some sort of paramount consideration, I would disagree. … If there is any paramount consideration at all, it is the public interest which is mentioned in at least three provisions: s.84(3)(d), s.87(2) and the catch-all s.89(2) … The public interest requires the Court to consider all aspects of any given case, with no bias or predisposition towards any particular factor. Often, a balancing exercise between competing interests is involved.
>
> (2) The balancing exercise that Pt.XII focuses on is the freedom of the press seen against the need effectively to investigate and deal with crime. In *Apple Daily Ltd v Commissioner of the Independent Commission Against*

> *Corruption (No 2)* [2000] 1 HKLRD 647, Chan CJHC said at p 674D-E:
>
> 'The court in discharging this constitutional duty must balance two competing aspects of the public interest, namely, the interest in the detection of crimes and bringing criminals to justice on the one hand and the interest in the protection of the citizens' rights and privacy on the other … '" (Emphasis supplied)

(3) This is consistent with the common law position in England. In *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 at 1174F-1175A, Lord Wilberforce said this:

> "… Although, as I have said, the media, and journalists, have no immunity, it remains true that there may be an element of public interest in protecting the revelation of the source. … The court ought not to compel confidence bona fide given to be breached unless necessary in the interests of justice … There is a public interest in the free flow of information, the strength of which will vary from case to case. In some cases it may be very weak; in others it may be very strong. The court must take this into account. …" (Emphasis supplied)

(4) Thus, Alex Lee J was clearly right when his Lordship held at §43 of *A v Commissioner of Police* (supra) that JM is a relevant consideration in the exercise of the court's discretion, but no more than that.

(5) This is particularly so given that "the law has not developed and crystallised the confidential relationship in which they stand to an informant into one of the classes of privilege known to the law" (*Attorney General v Clough* [1963] 1 QB 773, 792, citing *McGuinness v AG of Victoria* (1940) 63 CLR 73; see also Passmore on Privilege (4th ed, 2019), §1-289).

(6) Thus, it has never been the law that, save where some form of balancing exercise is specifically prescribed in the same legislation, the default position is that any statutory power ordering disclosure or production etc must automatically be

construed as excluding JM from its scope of application. That has never been, and cannot be, the law.

12. Third, it follows that the plaintiff's attempted comparison between JM and LPP (or, for that matter, any established class of privilege) is hopelessly inapt.

(1) Whilst statutory safeguards for search and seizure of JM stem from the need to protect the closely connected right to freedom of the press and the freedom of expression (cf *A v Commissioner of Police* (supra), §26(1)), LPP, unlike JM, is "entrenched by Article 35 of the Basic Law" and "does not involve a balance of interests" ie "we should not engage in the exercise of assessing whether the public interest in having relevant information for the prosecuting authority should outweigh the public interest of protecting materials which are subject to LPP" (*Citic Pacific Ltd v Secretary for Justice (No 2)* [2015] 4 HKLRD 20, §38).

(2) Accordingly, unlike JM, where LPP is involved - in whatever factual or legal context - there can only be one answer[2] (as entrenched in our constitution) ie no disclosure or production may be ordered or allowed.

13. Fourth, that the NSL or the Implementation Rules operate separately and additionally to the IGCO regime is further reinforced by the text itself as well as the surrounding context.

(1) By the clear wording of NSL 43, the NPCSC self-evidently intended to confer on the Police additional powers in handling

[2] Subject of course to the application of the 'fraud exception' in which case, technically, LPP does not in fact apply or arise.

cases concerning offences under the NSL. Indeed, this court accepted, at §59(5) of its decision dated 10 June 2021 in *Next Digital Ltd v Commissioner of Police (No 2)* [2021] 5 HKC 411 ("**June 2021 Decision**"), that "the Police is vested with power both under the NSL and the PFO in investigating offences against national security and is entitled to invoke both powers in their investigations". Hence, "the investigating authority [is entitled] to choose whichever provision most conveniently suits its purpose, provided only that the conditions precedent prescribed by that [statute] for such an application are met" (*Philip KH Wong, Kennedy YH Wong & Co v Commissioner of ICAC* [2008] 3 HKLRD 565, §52), thereby recognising that different statutes, bearing different conditions precedent, may serve different purposes depending on the relevant circumstances.

(2) Further, Schedule 6 of the Implementation Rules specifically refers to JM, which is expressly defined as having "the meaning given by section 82 of the [IGCO]". This is significant for at least two reasons.

(a) First, it confirms that the IGCO has no direct application to the Implementation Rules, for otherwise the drafters need not specifically import the definition from the IGCO.

(b) Second, it means that the drafters, who clearly had in mind the IGCO regime, chose to introduce only the definition of JM but decided not to import the entire IGCO regime. The omission of the IGCO regime was therefore a deliberate decision.

(c) Indeed, this is consistent with the "*expression unius*" principle, ie that "there was no reason for the drafter to mention some only of the possible items unless the intention was that they were to be the only ones dealt with, so that the rest are excluded" (Bennion, Bailey and Norbury on Statutory Interpretation (8th ed, 2020) §23.12).

(d) The Court of Appeal applied the said principle in *Sze Hei Fa v Chinese Medicine Practitioners Board of the Chinese Medicine Council of Hong Kong* [2005] 1 HKLRD 58, §94, indicating that the principle "in modern language means 'to express one thing is to exclude another'". In that case, it was held at §§93-94 that that the authority is expressly compelled by other provisions of the Chinese Medicine Ordinance, Cap 549, to carry out a review reinforces the conclusion that no review mechanism exists under section 92 where there is no provision for review.

(e) It is also entirely proper to take into account Schedule 6, for a "legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument" (Bennion, §21.1) and that the drafters "may be assumed to have intended to create a rational and coherent legislative scheme" such that "where what is expressed in one place frequently throws light on the meaning intended elsewhere" (Bennion, §23.14).

(3) Moreover, in the absence of any constitutional status enjoyed by the IGCO regime, there is - putting the plaintiff's case to

its highest - at most and at best a conflict between the IGCO regime and the framework under the Implementation Rules. In this regard, NSL 62 expressly provides that:

> "This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law."

(4) As mentioned above, NSL 43 confers additional powers on the Police in handling cases concerning offence endangering national security and authorises the Chief Executive, in conjunction with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region, to make the Implementation Rules. The Implementation Rules are "a necessary part of the NSL and its implementation": *HKSAR v Leung Kam Wai* [2021] HKCFI 3214, §9. Hence, in case of any inconsistencies between local laws (including IGCO) and the Implementation Rules (which are made pursuant to NSL 43), the latter should clearly prevail.

14. Fifth, it follows that, as a matter of statutory interpretation, and contrary to the plaintiff's submission, "*specified evidence*" clearly cannot be construed to somehow exclude JM.

(1) As mentioned above, the absolute exclusion of JM does not flow or follow from the protection of a free press as if night follows day. See above at paragraph 11.

(2) "*Specified evidence*" is defined in section 1 of Schedule 1 of the Implementation Rules to mean "anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security" (emphasis added). According to the Shorter Oxford English Dictionary (2007 ed),

"anything" means "a thing of any kind". In Chinese, the wording used is "任何物件". According to 現代漢語詞典, "任何" again denotes "不論什麼".

(3) It bears emphasis that "[i]n determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning which leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute": *Pinner v Everett* [1969] 1 WLR 1266, 1273C (Lord Reid).

(4) Thus, on a plain and ordinary reading, the word "anything" or "任何物件" covers all types of materials so long as they contain (or is likely to contain) evidence of an offence endangering national security. The definition is drafted in "wide and embracing terms" (cf *Lai Chee Ying v Secretary for Security* [2021] 4 HKLRD 695, §56 in the context of the phrase "deal with" as found in section 3 of Schedule 3 of the Implementation Rules).

(5) Indeed, "any statutory provision must be understood in its context taken in its widest sense": *Town Planning Board v Society for the Protection of the Harbour Limited* (2004) 7 HKCFAR 1, §28; see also *Comilang Milagros Tecson v Director of Immigration* [2018] 2 HKLRD 534, §66 and *HKSAR v Ma Chun Man* [2020] HKCFI 3132, §16 (in which

the principles were applied in the construction of NSL 20 and 21). In the present context, the wide ambit of the natural and ordinary meaning of "*specified evidence*" is consistent with the intention of NSL 43 and the Implementation Rules which is to provide the law enforcement authorities with wider investigating measures as well as the legislative intention of the NSL ie to "effectively prevent, suppress and impose punishment for any act or activity endangering national security": *Lai Chee Ying v Secretary for Security* (supra), §§42-43. It follows that there is no reason to read down "*specified evidence*" to exclude JM in a manner that is contrary to the plain meaning it is capable of bearing (cf *Lai Chee Ying v Secretary for Security* (supra), §§59-63). Such a restricted definition does not accord with the above stated legislative intention of NSL.

(6) Accordingly, the plaintiff's approach (of limiting the definition of "*specified evidence*") would equate to asking this court "to read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained" or, indeed, to "read in" section 83 of IGCO into NSL as if the latter is an "Ordinance", which is simply impermissible: *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, §63. As held by the Court of Final Appeal, at §§62-63:

> "62. Much of the argument presented to the Court has proceeded on the footing that remedial interpretation mandates an approach to statutory construction which differs from, and is more radical than, that permitted by accepted principles of common law statutory interpretation. Strong English authority supports this view (*R v A (No 2)* [2002] 1 AC 45 at pp 67G-68E, per Lord Steyn; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at pp 570G-572C, per Lord Nicholls of Birkenhead; *Sheldrake v*

DPP [2005] 1 AC 264 at pp 303G-304C, per Lord Bingham of Cornhill). It is, however, necessary to establish precisely what that difference is.

> 63. The modern approach to statutory interpretation insists that context and purpose be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity may be thought to arise (*Medical Council of Hong Kong v Chow Siu Shek* (2000) 3 HKCFAR 144 at p 154B-C; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at p 315 per Mason J (dissenting, but not on this point); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384). Nevertheless it is generally accepted that the principles of common law interpretation do not allow a court to attribute to a statutory provision a meaning which the language, understood in the light of its context and the statutory purpose, is incapable of bearing (*R v A (No 2)* [2002] 1 AC 45 at pp 67G-68H, per Lord Steyn). A court may, of course, imply words into the statute, so long as the court in doing so, is giving effect to the legislative intention as ascertained on a proper application of the interpretative process. What a court cannot do is to read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained." (Emphasis supplied)

(7) In the circumstances, it is wrong for the plaintiff to argue that, in the absence of an express deeming provision (such as section 83 of IGCO), the definition of "*specified evidence*" should somehow be construed as excluding JM. On a proper interpretation, "*specified evidence*" is wide enough to cover anything that contains or is likely to contain evidence of an offence endangering national security, including JM. There is no need for any express wording referring to JM. To contend otherwise would necessitate a statutory deeming provision (section 83 of IGCO) which the plaintiff does not (and cannot) rely on.

(8) In paragraph 60 of P Skel, the plaintiff submits that the constitutional and common law protection of the freedom of the press requires the court that issued the warrant to carry out a balancing exercise between the freedom of the press and the

public interest of criminal investigation. In my view, such a balancing exercise indeed comes with the word "*may*" in section 2(2) of Schedule 1 of the Implementation Rules (see: *A v Commissioner of Police* (supra), §39). In that regard, JM is only a relevant consideration in the exercise of the court's discretion which the court is entitled to take into account (see: *A v Commissioner of Police* (supra), §§43 & 44). However, in carrying out the balancing exercise, JM cannot be regarded as some sort of "paramount consideration". Rather, the paramount consideration is the public interest, which includes the need effectively to investigate and deal with crime (see: *So Wing Keung* (supra), §43(1)&(2)). Although there is a public interest in the free flow of information, the strength of which will vary from case to case. In some cases it may be very weak; in others it may be very strong (see: *British Steel Corporation v Granada Television Ltd* (supra)).

15. Sixth, the plaintiff's reliance on the principle of legality does not assist him.

(1) It is important to bear in mind that in the first place, there is no right for JM to be excluded altogether from the subject of a search warrant. There is, at most, a right to have freedom of the press as a relevant consideration to be duly taken into account in the issuance of a search warrant, but as held above the IGCO regime is not the only lawful way to carry out such consideration.

(2) Further, in any event:

(a) The principle of legality refers to the presumption that "'fundamental' common law rights cannot be

overridden by general words but only by express words or necessary implication": Bennion, §27.1. However, whether the statutory provision "may impose restrictions on fundamental rights and freedom is a matter of proper construction. The authorities do not suggest as a general principle that general wording can never be so interpreted", and the court can still give primacy to the statutory provision's context and purpose: *Leung Kwok Hung v Secretary for Justice (No 2)* [2020] 2 HKLRD 771, §§346-351 (Poon CJHC, Lam VP, as he then was, and Au JA). The principle of legality therefore does not permit the court to "disregard an unambiguous expression of Parliament's intention": *Ahmed v HM Treasury (No 2)* [2010] 2 AC 534, §117 (Lord Phillips PSC).

(b) Indeed, the principle of legality "is meant to guard against the risk that the full implications of general or ambiguous statutory language said to have abrogated or curtailed fundamental rights or freedoms went unnoticed by the legislature": *A v Commissioner of ICAC* (2012) 15 HKCFAR 362, §29. However, the present case is not one of the scenarios caught by the rule. For example, as mentioned above, Schedule 6 of the Implementation Rules specifically refers to the definition of JM given by section 82 of the IGCO but not the rest of Part XII of IGCO. This means the drafters had in mind the IGCO regime, but chose not to incorporate the same. For argument's sake, if there had been any abrogation of freedom of the press by the

Implementation Rules, that was not "unnoticed by the legislature".

(c) As Lord Dyson MR and Elias LJ noted in *R (Nicklinson) v Ministry of Justice* [2015] AC 657, §65 (717C), the principle of legality has been adopted in a number of cases, and "it is to be noted that they are all detailed and specific rights".

(d) The comparison between NSL 42 (bail) and NSL 46 (jury trial), on the one hand, and section 2 of Schedule 1 of the Implementation Rules, on the other, is therefore inapt. NSL 42 and 46 operate as an exception to the local legislations or practices, while NSL 43 provides additional power to law enforcement authorities. In any event, the mere fact that IGCO has no application to section 2 of Schedule 1 does not mean that it is an "exception" to IGCO. Rather, Part XII of IGCO and section 2 of Schedule 1 are two independent and self-contained regimes (*A v Commissioner of Police* (supra), §43).

16. Properly understood, therefore, the plaintiff's argument (ie that press freedom means that the IGCO regime is the only route by which law enforcement officers may obtain a search warrant covering JM, and hence Schedule 1 of the Implementation Rules somehow cannot cover JM) is completely untenable and falls to be rejected.

B2. The plaintiff's contentions are of no merit

17. Furthermore, as submitted by the Commissioner, in so far as the plaintiff elaborates on his "ground of review" under Section G of P Skel, such contentions do not assist the plaintiff.

18. In Section G of P Skel, the plaintiff makes 6 points which culminate in the conclusion at paragraph 65 that "the Magistrate erred in authorising the [Commissioner]'s officers to seize JM under s 2 of Sch 1 of" the Implementation Rules:

(1) That "the general words deployed in ss 1 and 2 show no intention to displace the guarantee of press freedom" (§57 P Skel);

(2) That "the general words in ss 1 and 2 need to be contrasted to the language of NSL 42 (bail) and NSL 46 (jury trial)" which "make incontrovertible inroads on existing fundamental rights" (§58 P Skel);

(3) That "even within Sch 1, there is an express derogation of a judicial norm" (§59 P Skel);

(4) That "the intention of the drafters is made even more evident by the absence of an express mechanism requiring a magistrate to conduct any balancing exercise" (§60 P Skel) and that "the Magistrate cannot carry on any actual balancing exercise in the circumstances envisaged under s 2" (§61 P Skel);

(5) That the term "*specified evidence*", if "given such a wide construction as to encompass JM, by the same logic, it would authorise the search and seizure of legal professional privilege" (§§35-36, 62 P Skel); and

(6) That the plaintiff's construction "in no way diminishes the Commissioner's power to access JM when investigating offences endangering national security" (§64 P Skel).

19. I agree the 6 points advanced are devoid of merit and do not advance the plaintiff's case on the construction of "*specified evidence*".

20. As to Points 1, 2 and 3 (see paragraph 18 above), they are essentially of the same point *viz* that clear words are required to displace press freedom which is protected under the Basic Law. However:

(1) That the Basic Law protects the freedom of the press does not mean that JM cannot be disclosed or ordered for production save under the IGCO (see paragraph 14(8) above).

(2) There is no basis to assert that press freedom means that JM cannot be disclosed or ordered for production unless (i) an application is made under Part XII of IGCO only and (ii) the very requirements of Part XII of IGCO (and nothing else) are complied with.

(3) Press freedom itself has never translated into an absolute ban against the search or seizure of JM unless and until (i) an application is made under Part XII of IGCO and (ii) the IGCO requirements are fulfilled.

(4) Indeed, even for the provision in any Ordinance which authorizes the issue of a search warrant, all that section 83 of the IGCO does is to provide a rebuttable presumption (ie a deeming provision), in the absence of an express provision to the contrary, that such Ordinance shall not be construed as authorising the search of JM. It does not purport to confer

on the IGCO any exclusive or constitutional status. *A fortiori* (and in the absence of such deeming provision), no such presumption could apply to the NSL or the Implementation Rules which, not being Ordinances, confer additional powers.

(5) Hence, there is simply no need for the NSL or the Implementation Rules to "refer to JM as evidence excepted from the protections of Part XII of IGCO" (paragraph 57.3 of P Skel). This is a red herring and really puts the cart before the horse. There is nothing to substantiate the contention that the IGCO regime indiscriminately applies "by default" in the first place. Hence, no express wording is required to exclude JM from something which was not applicable in the first place. In other words, the correct analysis is the other way round: that the drafters of the NSL could have but did not incorporate the IGCO regime in the Implementation Rules.

21. As to Point 4 (see paragraph 18 above), "the absence of an express mechanism requiring a magistrate to conduct any balancing exercise" does not mean the drafters intended to exclude JM.

(1) The basis of the plaintiff's contention is that some "balancing exercise" identical or akin to the IGCO regime needs to feature in any legislation which *prima facie* covers JM, otherwise JM is automatically and by default excluded.

(2) However, that Schedule 1 contains no express mechanism does not mean that a Magistrate would not conduct any balancing exercise, particularly where section 2(2) of Schedule 1 provides that a Magistrate "may" (not "must" or "shall") issue a warrant, and hence it plainly involves an

exercise of judicial discretion after balancing all relevant factors. As Alex Lee J held in *A v Commissioner of Police* (supra) §§40-43, although Schedule 7 of the Implementation Rules "makes no express reference to JM", JM still enjoys a "special status" under the Implementation Rules, in the sense that it is a relevant consideration in the exercise of the court's discretion (see further, paragraph 14(8) above).

(3) Importantly, it bears emphasis that there is no basis to suggest that a "balancing exercise" identical or akin to the IGCO regime is mandatory to give effect to press freedom. Indeed, in his discussion on the relevance of JM in *A v Commissioner of Police* (supra), Alex Lee J made clear at §43 that "for avoidance of doubt, although I am of the view that JM does enjoy a 'special status' for the purpose of Sch 7, it is only in the sense that it is a relevant consideration in the exercise of the court's discretion"; hence his Lordship specifically rejected any attempt of reading the IGCO regime into the Implementation Rules.

(4) Whilst the likely existence of JM must be brought to the Magistrate's attention, there is no basis to suggest that the Magistrate would not (or should not) properly consider such factor in any balance exercise, or that the Magistrate would somehow fail to exercise his judicial discretion properly. In any case, once the factor is brought to the Magistrate's attention and consideration, in the absence of any constitutional or statutory guidelines, it is not for the court to superimpose or "read in" any prescribed form of "balancing exercise" (which would be the effect of the plaintiff's contention that in the absence of any such "balancing

exercise", no JM can be touched upon). Insofar as it is necessary, the following should be borne in mind:

(a) Whilst "it is for the courts…to decide what is a relevant consideration…it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense…": *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 764G per Lord Keith;

(b) Hence, "where a material consideration has been considered, it is up to the relevant authority to determine the weight to be attached to it": *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, §97 per Ma CJ, citing with approval the following remarks by Lord Hoffmann in *Tesco Stores*, 780F-G:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process."

(5) In the premises, the Magistrate is entitled to and capable of considering the relevance of potential implications on the freedom of expression and freedom of the press as a result of search and seizure of JM in an application made under section 2 of Schedule 1, even though there is no express

mechanism akin to Part XII of IGCO (or the one in Schedule 6 of the Implementation Rules). Indeed, Schedule 7 of the Implementation Rules similarly contains no express mechanism akin to Part XII of IGCO (hence the applicants' arguments in *A v Commissioner of Police* (supra) to read in IGCO requirements into Schedule 7).

22. For completeness, contrary to the plaintiff's contention at paragraphs 61 and 66 of P Skel that the Magistrate "did not" carry out any balancing exercise, there is no evidence by the plaintiff that the Magistrate did not take into account considerations of the competing public interests underlying search and seizure of JM.

(1) Applying *A v Commissioner of Police* (supra) §46, that which ought to be drawn to the Magistrate's attention, ie that "it is likely that the materials which [the Commissioner] seeks to obtain…might include JM" was fairly and squarely brought to the Magistrate's attention.

(2) On the face of the 2022 Warrant, the Magistrate was clearly informed of and had taken into account the fact that (i) the Digital Contents may contain JM and (ii) the plaintiff's JM claims in respect of the Digital Contents are subject to determination in HCMP 1218/2020. Having considered these matters, the Magistrate was satisfied that the Digital Contents should be made available for search etc.

(3) The above is reflected in the wording of the 2022 Warrant which specifically authorised the search etc of any parts of the Digital Contents "that are: (i) subject to any claims of journalistic materials by the plaintiff in HCMP 1218/2020 (which are pending determination by the Court of First

Instance in HCMP 1218/2020), or (ii) journalistic materials (whether as agreed by the parties in HCMP 1218/2020, or as determined by the Court of First Instance in HCMP 1218/2020)".

(4) Notwithstanding these, the plaintiff boldly asserts that because "on the face of the NSL Warrant, the Magistrate authorised police officers to search and seize digital content 'regardless' of whether it amounted to JM", that constitutes "a blanket authorisation relieving the Magistrate of the burden to carry out a balancing exercise before the police can access the JM". I agree that this is a bad argument. That the Magistrate, upon considering the evidence before him and after balancing all relevant factors, decided to authorise search and seizure even though (ie regardless of whether) the digital content might contain JM, does not mean that the Magistrate did not carry out any balancing exercise at all in reaching his conclusion.

(5) Indeed, what the plaintiff alleges is a bare assertion contradicted by what is stated on the face of the 2022 Warrant. In this regard, it has always been held that what is stated on the face of a warrant can be legally significant in that it demonstrates, for example, that specific requirements have been considered and satisfied: see *Y v The Commissioner of ICAC* [2020] HKCFI 161, §§24-25, citing *Apple Daily Ltd v Commissioner of ICAC (No 2)* [2000] 1 HKLRD 647 and *Philip KH Wong, Kennedy YH Wong & Co v Commissioner of ICAC (No 2)* [2009] 5 HKLRD 379.

(6) As this court held in its June 2021 Decision at §70(1):

"Rule 2(2) of Schedule 1 to the NSL Implementation Rules provides that a magistrate may issue a warrant 'if the magistrate

> is satisfied by information on oath that there is reasonable ground for suspecting that any specified evidence is in the place.' In considering the police officer's application, the Chief Magistrate must have directed himself to the aforesaid requirement. It goes without saying that, by his very act of issuing the Warrant, he must have been satisfied by the information laid before him that the requirement under rule 2(2) was met."

(7) It follows that, as mentioned above, given that the Magistrate did consider the likely existence of JM, there can be no complaint that he failed to take into account relevant factors in issuing the 2022 Warrant (nor can the plaintiff suggest that the Magistrate did not carry out any balancing exercise). Indeed, what the plaintiff alleges is a bare assertion contradicted by what is stated on the face of the 2022 Warrant.

(8) In any event, in so far as the plaintiff seeks to delve into what was placed before the Magistrate in support of the application for the 2022 Warrant, this is simply not permissible. This is because "affidavits or affirmations used to support applications for search warrants constitute one of the classes of documents to which public interest immunity attaches, so long as the investigation in aid of which the warrants were sought continues": *Apple Daily Ltd v The Commissioner of ICAC (No 2)* (supra), 663C-D per Keith JA (with whom Chan CJHC, as he then was, and Nazareth V-P agreed). See also *So Wing Keung* (supra), §47, in which Ma CJHC summarised the position as follows:

> "In *Apple Daily Ltd*…the Court of Appeal held that public interest immunity attached to the whole of the affidavit used to support an application for a search warrant under section 85 and they were therefore privileged from disclosure: see 659E-664C. This Court is bound by that decision on this aspect, forming as it does part of the *ratio decidendi* of the case. Mr Dykes cited to us various authorities to suggest that if public interest immunity attached at all, this could not be automatically applied to the whole document. It was necessary, he contended, to go through

each part of the supporting affidavit to see whether public interest immunity attached. These submissions, interesting and important though they are, will have to await the decision of the Court of Final Appeal. I might perhaps add that even if Mr Dykes were right in his submissions, having read the affirmation in support of the section 85 application, I think it is abundantly clear that public interest immunity should attach to the whole of it in the present case." (Emphasis supplied)

(9) In *P v Commissioner of ICAC* (2007) 10 HKCFAR 293, §5, the Court of Final Appeal confirms that the affirmation used at the *ex parte* stage "is protected by public interest immunity", approving *So Wing* Keung (supra), 59F-J (ie §47 as excerpted above). The court went on to hold at §53 that:

"As has been noted (see para 24), in applying for an *ex parte* order under s 14(1)(d), the ICAC has the responsibility of putting the matter fully and fairly before the court. But material non-disclosure in the sense in which it is used as a ground of discharge of interlocutory orders obtained *ex parte* in civil cases cannot be entertained as a ground for the discharge of an *ex parte* order authorizing a s 14(1)(d) notice as such a ground would be incompatible with the statutory scheme. The intent of the scheme is that the integrity and effectiveness of the investigation should not be affected. And the documents relating to the application are protected by the confidentiality provision in O 119 and public interest immunity. In these circumstances, in order not to jeopardize the investigation, questions as to what has or has not been disclosed at the *ex parte* stage and whether the matter allegedly not disclosed is material cannot be meaningfully tested and the ground of material non-disclosure cannot apply in this context. This ground should not have been entertained by the Judge in the present case. In any event, the ICAC maintained that its visit to the Mainland subsidiary in Zhongshan on 21 June 2005 was not material and did not have to be disclosed as the records obtained did not relate to the sums they were investigating." (Emphasis supplied)

(10) See also *R v Inland Revenue Commissioners, ex p Rossminster* [1980] AC 952, 999B-D, 1001A-B, 1011A-1012D (as cited with approval by the Court of Final Appeal in *P v Commissioner of ICAC* (ibid), §5). See also, recently, *Y v Commissioner of ICAC* (supra), §20.

(11) Accordingly, there is simply no basis to attack the Magistrate's exercise of his discretion in issuing the 2022 Warrant (which is in any case outside the scope of the Form 86).

23. Similarly, there cannot be any plausible basis for suggesting that the Magistrate "cannot" or "could not" have conducted any such balancing exercise.

(1) First, in so far as it is directed at *this* Magistrate's exercise of his discretion on *this* application it is untenable for reasons explained above at paragraph 22.

(2) Second, so far as it is suggested that somehow no (designated) Magistrate can plausibly conduct such a balancing exercise:

(a) Such contention is without merit. It is well-established that whether to issue a search warrant is a discretionary power. See, for example, *A v Commissioner of Police* (supra). Hence, whilst Schedule 1 spells out the requirements that have to be satisfied on any application, they do not exhaust the considerations that can be taken into account by the Magistrate in considering whether, and how, to exercise the discretionary power in question. Nothing in Schedule 1 restricts or limits that exercise.

(b) Furthermore, in the absence of any specific statutory provision, there is no basis to presume that a Magistrate is somehow not sufficiently qualified to carry out such an exercise (insofar as this is indeed suggested by the plaintiff). That it is the responsibility of CFI and

District Judges to consider the question of JM under the IGCO is again part and parcel of that regime. It in no way suggests that any question concerning JM must necessarily go beyond the capability or jurisdiction of a Magistrate.

(3) Third, the plaintiff contradicts himself because, whilst alleging that the Magistrate cannot carry out any such balancing exercise, the plaintiff is perfectly able to suggest, at paragraph 67 of P Skel, the several factors which the Magistrate should balance "[i]f authorised to carry out a balancing exercise". Hence, even on the plaintiff's case, the plaintiff must accept that, if authorised to carry out a balancing exercise, the Magistrate can and could (as opposed to "cannot" or "could not") carry out a balancing exercise.

(4) Indeed, at §46 of *A v Commissioner of Police* (supra), Alex Lee J provided the answer by stating that: "if the Commissioner has reasons to believe that it is likely that the materials which he seeks to obtain by way of a production order might include JM, then in the fulfilment of his duty to act fairly and to place all material information before the Judge, he should bring that to the attention of the Judge for his consideration". That would be sufficient to enable the Magistrate to carry out the balancing exercise.

24. As to Point 5 (see paragraph 18 above), the plaintiff's argument that "*specified evidence*" cannot not cover LPP does not avail him:

(1) The comparison between LPP and JM is inapt for the reasons set out at paragraph 12 above.

(2) As mentioned above, it is accepted that LPP is a well-established and constitutionally protected ground for refusing disclosure which is recognised by the Implementation Rules: see, for example, section 3(10)(a) of Schedule 7 of the Implementation Rules. The Commissioner does not seek to inspect or otherwise access Seized Materials which are protected by LPP, whether under the 2020 Warrant or the 2022 Warrant.

(3) In any event, even on the wording of the Implementation Rules itself, LPP merely operates as an exception to the disclosure requirements under the Implementation Rules. It necessarily follows that LPP in fact *prima facie* falls within the definition of "*specified evidence*".

25. As to Point 6 (see paragraph 18 above), it is disingenuous for the plaintiff to argue that excluding JM from section 2 of Schedule 1 would not diminish the Police's power to access JM when investigating offences endangering national security.

(1) As mentioned above, the plaintiff's challenge is one that goes to the court's jurisdiction. If the plaintiff's challenge is successful, this means the Hong Kong courts would have no jurisdiction to exercise any coercive power over any JM under Schedule 1 of the Implementation Rules.

(2) Worse still, applying the plaintiff's logic, whenever a local legislation provides for a different set of procedural safeguards for a particular right or measure, all provisions under NSL and the Implementation Rules related to that right or measure would be disapplied in the absence of an express provision to the contrary. This would no doubt adversely

affect the legislative intention of NSL ie to "effectively prevent, suppress and impose punishment for any act or activity endangering national security": *Lai Chee Ying v Secretary for Security* (supra), §§42-43.

(3) It is not open to the plaintiff to argue that the Police could still obtain JM under the IGCO. The clear intention of NSL 43 is to confer additional powers on the police in investigating offences endangering national security (*A v Commissioner of Police* (supra), §43). There is no reason why the Police should be confined to the IGCO regime when section 2 of Schedule 1 is capable of covering JM, and the Police should be free to choose whichever provision that suits its purpose (*Philip KH Wong v Commissioner of ICAC (No 2)* (supra)).

(4) Accordingly, contrary to the plaintiff's argument, to accept the plaintiff's construction would indeed fundamentally and drastically restrict the Commissioner's powers under the NSL/Implementation Rules which clearly cannot be permissible.

B3. Conclusion as to the JR Application

26. In the premises, I accept the Commissioner's submission that the intended judicial review by the plaintiff is bound to fail and leave should accordingly be refused.

C. THE 21 JULY SUMMONS AND ORDER OF THE COURT

27. For the reasons set out above, the grounds raised by the plaintiff are not reasonably arguable with a realistic prospect of success.

Accordingly, I refuse the plaintiff's application for leave to apply for judicial review in HCAL 738/2022.

28. As the court is with the Commissioner that leave should be refused, it follows that the 2022 Warrant remains valid and open for execution.

29. The directions sought in the 21 July Summons are simply to give effect to the 2022 Warrant by making available to the Police such Digital Contents including those parts on which JM claims have been made but excluding those on which LPP is claimed.

30. Accordingly, I make an order in terms of paragraph 1 of the 21 July Summons.

31. For the avoidance of doubt, I order that the Protocol in so far as it relates to JM claims be dispensed with.

32. I see no reason why costs should not follow the event. Accordingly, I order that the costs of the proceedings in HCAL 738/2022 and the costs of and occasioned by the 21 July Summons (including all costs reserved, if any) be paid by the plaintiff to the Commissioner, such costs are to be taxed if not agreed with a certificate for 3 counsel.

33. The above order as to costs is *nisi* and shall become absolute in the absence of any application within 14 days to vary the same.

34. Lastly, I express my gratitude to counsel on both sides for their helpful assistance in this matter.

(Wilson Chan)
Judge of the Court of First Instance
High Court

Mr Philip J Dykes, SC, leading Mr Steven Kwan, Mr Albert N B Wong and Ms Samantha Lau, instructed by Messrs Robertsons, for the plaintiff/applicant

Mr Jenkin Suen, SC, leading Mr Michael Lok (for preparing written submissions only) and Ms Ellen Pang, instructed by the Department of Justice, for the defendant/putative respondent