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Office of the Privacy Commissioner for Personal Data: Investigation Report on the Ransomware Attack on the Servers of the Hong Kong Institute of Bankers

Simon Deane and Ally Leow

The Office of the Privacy Commissioner for Personal Data (“PCPD”) released an investigation report (“Report”) into a data breach incident relating to the Hong Kong Institute of Bankers (“HKIB”) on 9 February 2023.

On 11 January 2022, HKIB notified the PCPD that 6 of HKIB’s servers containing personal data (“Servers”) had been attacked by ransomware and maliciously encrypted by a hacker (“Incident”). HKIB stated that the firewall (“Firewall”) it used was purchased from and maintained by a service provider (“Provider”). It maintained that both HKIB and the Provider were not aware of the vulnerability in the Firewall which allowed the hacker to perform the attack.

PCPD found that HKIB, as a data user under the Personal Data (Privacy) Ordinance (Cap.486; “PDPO”), contravened Data Protection Principle 4(1) in failing to take all practicable steps to ensure that the personal data involved were protected from unauthorised or accidental access, processing, erasure, loss or use. The PCPD also found that the Incident was caused by HKIB’s failure to patch the affected system, and there were inadequacies in HKIB’s management of data security risk and security measures in respect of its information system. The PCPD further considered that HKIB adopted a lax approach towards service providers in the maintenance of critical network infrastructure, resulting in ineffective security measures against cybersecurity risks and threats. An enforcement notice was served on HKIB directing it to remedy and prevent recurrence of the Incident or similar breaches.

To view the PCPD’s Media Statement, please see [here](#). To access a full copy of the Report, please see [here](#).

Legislative Council Panel on Constitutional Affairs: Report on the Work of the Office of the Privacy Commissioner for Personal Data in 2022

Simon Deane and Ruby Hui

The PCPD released a report in February on its work during the course of 2022.

In order to increase the public's awareness of and compliance with the Personal Data (Privacy) (Amendment) Ordinance 2021 ("**Amendment Ordinance**") that came into effect on 8 October 2021, the PCPD carried on with various publicity and education campaigns during 2022, ranging from announcements on television and radio channels to seminars and webinars.

Further, through the issue of guidelines, release of media statements and responses to media enquiries, the PCPD continued its advisory role in respect of personal data privacy issues of great concern, including, but not limited to, the new anti-doxxing regime, vaccine pass arrangements, personal data privacy risks arising from working from home, use of drones, precautions against personal data fraud and regulations for cross-border transfer of personal data. The PCPD also took an active role in the enforcement of the Personal Data (Privacy) Ordinance by handling complaints, investigations and checks.

To view the PCPD's report, please see [here](#).

Court of Final Appeal clarifies the rule of construction on loan amendment or extension agreements

Simon Deane and Jennifer Lok

The Court of Final Appeal in *Totalcorp (Nominees) Limited v Hong Kong Sai Kung Ngong Wo Resort Development Limited* [2022] HKCFA 28 rejected the lower courts' findings on the existence of an inferred agreement and held that a new agreement between the lender and borrower providing for retrospective revisions to the rate of interest over the relevant period did not create a new loan to pay off the existing loan.

Background

In February 2015, the plaintiff granted a loan to the defendant in the principal amount of HK\$45 million. The loan was secured by a legal charge over various lots of land in Sai Kung belonging to the defendant. The initial loan was for a term of 3 months, with interest at the rate of 2.5% per month, to be deducted from the loan proceeds at the outset.

The defendant was unable to repay the loan on its due date and the maturity date was extended four times, each documented in a loan extension application letter signed by the defendant and agreed by the plaintiff. It was not disputed that up to and including the fourth extension, the rates of interest charged by the plaintiff (which were in the region of 3.5% to 4% per month on the principal amount with arrears of interest up to 5 July 2015 ("**Original Indebtedness**") fell within the then threshold prescribed by the Money Lenders Ordinance (Cap. 163) ("**MLO**").

It transpired in the trial that a demand letter ("**Demand Letter**") was issued by the plaintiff's solicitors to the defendant approximately one year after the date of the fourth extension. The demand letter set out the calculation of the defendant's indebtedness in accordance with the terms of the four extensions up to 31 May 2016, with a statement that "further interest continued to accrue on the sum of HK\$63,241,006.00 [*i.e. the outstanding indebtedness as at 31 May 2016*] ("**2016 Indebtedness**") at the rate of 4% per month from 1st June 2016 until the date of payment." If the aforesaid statement was true, according to the judgment of the court of first instance (albeit overturned by the Court of Appeal), this would amount to the rate of interest exceeding the statutory interest rate cap of 60%.

On October 2016, the parties entered into a further agreement ("**Final Agreement**"), in which the parties agreed to revise retrospectively the rate of interest over the whole period of extension to 3.8% per month and declared all documents previously signed to cease to be effective and be superseded. The documents listed in the Final Agreement were those previously signed concerning the payment of interest on the subject loan including the initial loan application and the applications for the four extensions but there was no mention of the Demand Letter.

Decision of the Court of Final Appeal

The Court of Final Appeal considered that there was no basis for finding that there had been an agreement that the monthly interest rate of 4% would accrue on the 2016 Indebtedness instead of the Original Indebtedness from the Demand Letter. It followed that there was no agreement between the parties in contravention of the MLO, and it was not necessary to deal with the question of whether the original loan was illegal or unenforceable.

The Court of Final Appeal disagreed with the lower court's interpretation of the rule of construction laid down in *BS Lyle Ltd v. Chappell* [1932] 1 KB 691 and the cases following it, and clarified that none of these authorities was suggesting that whenever the parties agreed to vary the terms of a loan, by extending the term or changing the rate of interest, that must count as entering into a new loan. Whether or not a new loan is created is a matter of construction that must be interpreted based on the terms of the agreement between the parties and with reference to the intention of the parties.

Implications for the new usury rates under the MLO

The legislative amendments to lower the statutory limit of effective rates of interest stipulated under the MLO (from 60% per annum to 48% (illegal) and from 48% per annum to 36% (allows the courts to reopen the transaction)) took effect from 30 December 2022 with no retrospective effect.

The decision of the Court of Appeal provides useful guidance for money lenders who intend to amend, extend or provide refinancing in relation to their loan agreements entered into prior to 30 December 2022. Any amendment, extension or agreement entered into on or after 30 December 2022 in connection with an existing loan which is expressed to create a new loan by its terms must comply with the new usury rates. On the other hand, if the parties make it clear that they are only amending the terms of the existing loan, then whether the old usury rate or the new usury rate will apply will depend on whether such amendment or agreement is categorised as an "agreement for the repayment of a loan or for the payment of interest on a loan". It seems that an extension or refinancing of an existing loan will be regarded as an agreement for repayment of a loan, and will be governed by the new usury rates under the revised MLO.

HKMA: Frequently Asked Questions in relation to Anti-Money Laundering and Counter-Financing of Terrorism

Simon Deane and Sally Lau

The Frequently Asked Questions ("FAQs") in relation to Anti-Money Laundering and Counter-Financing of Terrorism ("AML/CFT") have been developed by the Hong Kong Association of Banks with input from the Hong Kong Monetary Authority. There was an update to the FAQs on 5 October 2022.

The FAQs aim to assist Authorized Institutions ("AIs") to understand the relevant AML/CFT requirements. AIs are expected to have regard to the FAQs in meeting their AML/CFT legal and regulatory obligations. AIs should also consider the money laundering and terrorist financing risks to which they are exposed and their own circumstances before taking action on matters in respect of which the FAQs may be relevant.

The recent update of the FAQs covers various areas, such as AML/CFT systems, identification and verification of identity, ownership and control structure, person purporting to act on behalf of the customer, connected parties and due diligence.

To access a full copy of the update of the FAQs, please see [here](#).

Want to know more?

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