

## The Anti-Money Laundering Law concerns under OSCO

### Executive Summary

The money laundering provisions under the Organized and Serious Crimes Ordinance, Cap. 455 (“OSCO”), contain draconian and unfair provisions. The following are some of the major concerns posed by these provisions:

- (1) A person can be convicted of money laundering irrespective of whether or not the proceeds were in fact the proceeds of crime;
- (2) The personal attributes of a defendant are not accounted for. Wives can be penalised for their husband’s criminal acts, even if they did not know these acts were criminal on the basis that they had “reasonable grounds to believe” the proceeds were from crime. Further, the ordinance makes no room for distinguishing between those who are well educated and those who have a limited education background;
- (3) A person may be convicted even though he holds a subjective and honest belief that the property is NOT the proceeds of an indictable offence, provided the reasonable right-thinking person would so believe;
- (4) A person may be convicted even though the circumstances as established by the evidence provided reasonable grounds for believing in two alternative and competing scenarios, one being that the proceeds were derived from crime, the other being that the proceeds were not derived from crime. The Court of Appeal approved the principle that “the words of this section are aimed at condemning the man who reasonably foresees that he *may* be dealing in the proceeds of an indictable offence yet nevertheless goes on to do it.” (*HKSAR v Yam Ho Keung* CACC 555/2001, emphasis added)
- (5) It is an offence to deal with the proceeds of conduct that takes place outside Hong Kong, if the conduct would amount to an indictable offence had it occurred in Hong Kong and even if it is not an offence in the country where the conduct was committed; and)
- (6) The offence is added to indictments and charge sheets even though the crime the subject of the money laundering is on the indictment.

### History

The money-laundering laws of Hong Kong were initially confined to proceeds involved in drug trafficking offences under the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap. 405 (“DTROP”). In 1995, the Financial Action Task Force (“FATF”) extended money-

laundering recommendations to include organized and serious crimes. OSCO was introduced to cover dealing with the proceeds of indictable offences. For the purpose of this paper, the main focus will be on OSCO.

### **The Relevant Provisions**

Section 25(1) of OSCO states that: “*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.*”<sup>1</sup>

“Dealing” is defined under section 2 as:

- (a) *receiving or acquiring the property;*
- (b) *concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);*
- (c) *disposing of or converting the property;*
- (d) *bringing into or removing from Hong Kong the property;*
- (e) *using the property to borrow money, or as security (whether by way of charge, mortgage or pledge or otherwise).*

Section 25(4) states “*in this section and section 25A, references to an indictable offence include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong.*”<sup>2</sup>

The state of mind required under the ordinance is that a person knows or has reasonable grounds to believe that the money represents the proceeds of an indictable offence. Where the prosecution is able to prove that the defendant knew the proceeds were from a crime, there is no difficulty in holding that the offence was committed.<sup>3</sup> There is nothing unfair about this. In practice, it is exceptionally unusual for the prosecution to even attempt to prove the crime on this basis. However, proving simply that the defendant had reasonable grounds to believe the proceeds were illicit, may give rise to unfairness in some cases. . In reality, the crime has been reduced to dealing in property which is suspicious.

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<sup>1</sup> Section 25(1) Organised and Serious Crimes Ordinance, Cap.455

<sup>2</sup> Section 25(4) Organised and Serious Crimes Ordinance, Cap.455

<sup>3</sup> Archbold News Hong Kong Sweet & Maxwell 2011

### **The First Concern: Dealing with proceeds of (not necessarily) an indictable offence**

As the law stands, it is not necessary for the prosecution to prove that an indictable offence took place. The court in **HKSAR v Wong Ping Shui Adam**<sup>4</sup> held that under section 25(1) the quality of the proceeds being dealt with is an element of the defendant's state of mind irrespective of whether the proceeds were from an indictable offence. This decision was affirmed by the Court of Final Appeal in **Oei Hengky Wing v HKSAR**.<sup>5</sup> The court in this case decided not to follow the House of Lords in **R v Montila and Others**<sup>6</sup> whereby the burden rests on the prosecution to prove that the property "*is or represents another person's proceeds of criminal conduct or drug trafficking.*"

It should be noted that international money laundering conventions and agreements do not require the criminalisation of dealing with proceeds which have not been proven to be proceeds of crime. As stated by Lord Hope in *Montila*, after considering a number of international conventions and treaties on money laundering (at p.3152):

"Common to all three international instruments was the proposal that those third parties whose actions were to be criminalised were people who *knew* that the property which they were dealing with *was the proceeds of drug trafficking or criminal conduct*. Reasonable suspicion is not mentioned in any of them. It was of course open to the legislature to find its own solutions to the problem in the domestic system. There is no doubt that the effectiveness of the measures that were being introduced was assisted by enabling prosecutions to be brought where there was no evidence of actual knowledge but reasonable grounds to suspect could be established. But to broaden the scope of the third party offences still further so as to bring cases within their reach where the Crown could not prove that the property that was being dealt with was the proceeds of drug trafficking or criminal conduct *would have been a significant departure from what had been asked for by the international instruments*. One would have expected some indication of this to be given to Parliament, and there was none." (emphasis added)

As a result of **Montila**, the English law has been amended to require the prosecution to identify at least the class or kind of conduct which is said to have produced the proceeds the subject of the charge.

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<sup>4</sup> [2001] 1 HKLRD 346

<sup>5</sup> [2007] 1 HKLRD 568

<sup>6</sup> [2004] 1 WLR 3141

**The Second and Third Concern: What constitutes “reasonable grounds to believe?”**

“Reasonable grounds to believe” entails an objective and subjective element. Objectively, one must show what a common sense, right-thinking member of the community would consider sufficient to lead a person to hold a particular belief and subjectively, that these grounds were known to the defendant. This is another major concern as it is not necessary to prove that a common sense, right-thinking member of the community would himself have held such a belief nor that the defendant himself held that belief.<sup>7</sup> The Court of Appeal in the case of **HKSAR v Ma Zhujiang & Another**<sup>8</sup> affirmed that the phrase “having reasonable grounds to believe” does not require proof that the Defendant in fact believed.

The fact that the appellant in the case of **HKSAR v Siu Kam Lin**<sup>9</sup>, was a housewife, who had been educated to primary three, had been married to the 1<sup>st</sup> accused since 1983, while having limited working experience and relied solely on her husband, did not exonerate her from “having reasonable grounds to believe” that the proceeds were illicit. In this case, the appellant was convicted of having reasonable grounds to believe the money her husband had transferred into her account between 5 January 2004 and 28 March 2008 were the proceeds of an indictable offence.

This shows that the issue seldom reverts to analysis of the subjective element or whether it can be demonstrated that the accused was aware of the grounds upon which such a belief could be held. OSCO fails to reflect that not every person can be judged according to the same standard. What may be regarded as suspicious to a well educated individual may not be by one who has a limited education. This is an issue where wives are acting upon their husband’s instructions or a husband takes advantage of his wife’s trust by using her bank account to facilitate his misconduct (as was done in the above case). It should be noted that the trust a wife has in her husband may not necessarily lead her to believe that his conduct amounts to an offence.

It is questionable, at the least, as to whether the criminal law of Hong Kong should permit a person to be convicted of an offence, usually resulting in a significant period of imprisonment, when he neither knew nor suspected that he was dealing with the proceeds of crime.

It is also to be noted that with regard to sentence the Courts draw no distinction between a person with actual knowledge and one convicted only on the basis of “reasonable belief” – see **XU XIA LI** [2004] 4 HKC 16 at paras 7, 9, 12-15.

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<sup>7</sup> HKSAR v Lung Ming Chu CACC 165/2008

<sup>8</sup> [2007] 4 HKLRD 285

<sup>9</sup> CACC 186/2009

### The Fourth Concern

The Court of Appeal in *HKSAR v Wan Yet Kwai* CACC 372/2008 approved the following line of reasoning in interpreting the phrase “having reasonable grounds to believe” (at para 29):

“Does the fact that there were reasonable grounds to believe a limited number of scenarios mean that the defendant did not have reasonable ground to believe in any one of them? To pose the question is really to answer it. *It seems clear to me that when an event can reasonably be explained on the basis of a few grounds, the man contemplating the issue holds reasonable ground for belief in them all.* By using the term 'having reasonable grounds to believe' the draftsman and the legislature clearly made a conscious departure from the old phrase 'knowing or believing'. The effect is to make the offence a wide one. It means that people who deal in cash in circumstances which produce the limited list of inferred explanations as arises here are caught by the section. Another way of putting it is that the words of the section are aimed at condemning the man who reasonably foresees that he may be dealing in the proceeds of an indictable offence yet nonetheless goes on to do it. I do not consider that such a man was not within the sights of those who promoted the Organised and Serious Crimes Ordinance.” (emphasis added)

And at para 32, the Court of Appeal went on to state that:

“In summary, to employ the analysis of Judge Line, if a person, although he cannot know for certain, nevertheless has reasonable grounds to believe that, having regard to all the circumstances, he may well be dealing in the proceeds of an indictable offence, and if that person goes ahead and deals then he commits an offence under s.25(1). *This is so even if there also exist reasonable grounds for believing in some alternative scenario.*” (emphasis added)

The principle that there could be reasonable grounds to *believe* in two *competing* scenarios does not do justice to the phrase “having reasonable ground to *believe* that [the] property ... *represents* proceeds of an indictable offence”. If two competing scenarios are equally possible on the circumstances as known to a reasonable person, then the logical conclusion is that the reasonable person has *no* basis for *believing* in one scenario over the other. It is logically possible for a reasonable person to *believe* that an animal hiding behind a wall may *either* be a cat or a dog, but in these circumstances he has no reasonable grounds for believing that it *is* a dog,

A person should not be convicted if there are reasonable grounds to believe that the proceeds are not proceeds of crime.

### **The Fifth Concern: Criminalising acts in Hong Kong that are legal overseas**

Section 25(4) aims to cover conduct in a foreign state that would amount to an indictable offence had it been committed in Hong Kong.

In the case of **HKSAR v Lok Kar-win Kevin & Others**<sup>10</sup> the appellants were professional footballers who were part of a conspiracy to fix a match in which they were representing Hong Kong against Thailand in a World Cup qualifying game in Bangkok. On the condition they lost, they would collect gambling winnings upon their return to Hong Kong. The Court of Final Appeal held that section 25 aimed at criminalizing dealing in Hong Kong with property derived from conduct which is indictable, irrespective of where the conduct occurred and whether it was an offence in that country. It was held:

*“it is plain from the wording of s 25 that the section aims at criminalising dealing in Hong Kong with property derived from conduct which is indictable here, regardless of where that conduct occurred. Subsection (4), as Burrell J rightly says, makes clear that the determining factor is the conduct complained of as judged by Hong Kong law, not whether that conduct is an offence in the foreign country where the conduct took place.”*

Burrell J had himself said:

*“Hong Kong is concerned with its own perception of what should be regarded as criminal activity, not the standard of foreign countries and therefore the section spells out in s 25(4) that the determining factor is the conduct complained of and not whether that conduct happened to be an offence in the foreign country. Section 25(4) is specific and unambiguous and caters exactly for the situation where there has been conduct abroad and not where there has been the commission of a foreign offence abroad.”*

(Whether the apparent effect of Lok Kar-win has been tempered by the recent case of *HKSAR v Tam Hung* CACC 127/2010 (a decision of the Court of Appeal) remains to be seen. (In that case a convicted defendant argued successfully on appeal that he should have been acquitted as he “... knew and could prove that the moneys concerned were actually not the proceeds of any indictable offence, foreign or domestic.”)

Notwithstanding *Tam Hung*, the dicta in *Lok Kar-win*, being that of the Court of Final Appeal remains of concern to practitioners.

### **The Sixth Concern: The addition of the offence to indictments and charge sheets**

The offence is added to indictments and charge sheets even though the crime the subject of the money laundering is on the indictment. This not only overloads an indictment but has the practical effect of forcing an accused person to testify where he might otherwise choose not to do so. This practice is becoming more common although in Australia it may now attract a

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<sup>10</sup> [2000] 1 HKLRD 733

stay of proceedings. The Australian courts note that the practice is not to charge handling and theft on the same indictment and the analogy is a close one. (This reflects both Hong Kong and English practice as well.) The implication of this is that the courts may not be receptive to this increased use of charges. The point has not yet been taken in Hong Kong.

It is also understood that, in the USA, money laundering charges are not added to indictments in such circumstances.

### **Conclusion**

It may be legitimate to ask why (in almost every case) the prosecution elects these cases to be heard before a single judge of the District Court and not a jury of common-sense, reasonable, right-thinking members of the community?

OSCO was enacted to combat organised criminal activities and to provide the courts with the power to confiscate the proceeds of organised crime. It appears from many cases that it is used for other cases where there are no sophisticated schemes, plans or organisation involved. Instead of targeting cases which require speculation that an individual had reasonable grounds to believe that the proceeds were from an indictable offence, it would be well worth placing more emphasis on large syndicates and triad societies where criminal activity can be proved and a direct link between the proceeds and the offence can be established.

Hong Kong Bar Association

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