

Recent interpretations suggest new direction for Organized and Serious Crimes Ordinance

Christopher Morley notes two recent cases of interest to financial professionals who might unwittingly fall foul of anti-money laundering laws

Hong Kong's anti-money laundering legislation and its interpretation by the courts will be of interest to accountants for the approach to be taken internally in their own anti-money laundering measures in both due diligence and record-keeping.

In addition, when advising clients, it may be important to understand the direction the law is taking so that accountants and/or their clients do not unwittingly fall foul of anti-money laundering laws.

Recently there have been two interesting developments in money laundering cases in the Hong Kong courts affecting the interpretation of the Organized and Serious Crimes Ordinance, both of which are set out below.

This may impact the way companies do business and write their contracts in the future, and has a domino effect on systems, compensation and debt covenants. There have been few changes, if any, in financial reporting that would have impacted businesses in this way. Below are some of the areas that could create the most significant challenges for entities as they make transition to the new revenue standard.

Honest and reasonable belief

Currently, a person can be convicted of money laundering if there exist reasonable grounds to believe that the property dealt with represents the proceeds of an indictable offence, even if that person did not in fact believe he was handling the proceeds of crime and even if the property is not in fact the proceeds of crime.

Unlike in England, in Hong Kong there is no requirement to prove the predicate of

fence. In Hong Kong Special Administrative Region v. Pang Hung-fai (CACC 34/2012), the Court of Appeal considered the conviction of Pang for dealing with the proceeds of an indictable offence. Pang was convicted following a trial in the District Court and was sentenced to two and a half years imprisonment.

The prosecution case was that a friend of Pang named Kwok had perpetrated a fraud of stealing about HK\$14 million from a listed company. Kwok asked Pang if he could deposit the funds into an account operated by Pang. The prosecution case was not that Pang knew of the fraud committed by Kwok, nor that the money was the proceeds of crime.

The prosecution instead based their case on an allegation that Pang had reasonable grounds to believe that the money put into the account was the proceeds of crime. Kwok had signed a document (prepared by Pang's book-keeper) so that Pang's company would have an accounting record of the transaction. The document read as follows:

"I will remit a sum of HK\$14,049,380 to your company on the 1st day of August 2008. Please receive (it) for (me). (I) will inform you of the information of the bank account later to have (the money) transferred back to me."

Pang relied on this document at trial to show the openness and transparency of the transaction and as evidence that he did not perceive himself to be handling the proceeds of crime. Were it otherwise, it was argued, there would be no documents and

it would have been secret and covert.

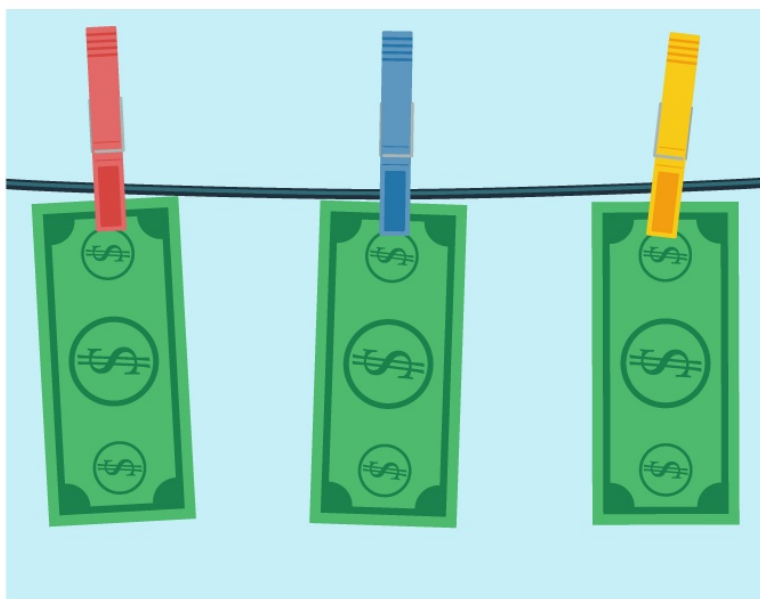
In order to prove the case, the prosecution did not need to prove the predicate offence (i.e. the fraud) committed by Kwok nor did the prosecution need to prove that the HK\$14 million was in fact the proceeds of crime.

All that the prosecution needed to prove was that there existed reasonable grounds that a common-sense, right-thinking member of the community would consider sufficient to lead a person to believe that the property represented the proceeds of crime and that these grounds were known to Pang.

The evidence relied upon by the prosecution to establish that Pang had reasonable grounds to believe he was handling the proceeds of crime were:

- The amount of money involved;
- The transnational character of the transaction (the money was deposited, via two Mainland citizens, into a Hong Kong bank account and was then remitted to an account in Cambodia);
- The avoidance of the use of Kwok's bank account when it was apparently his money;
- Pang held the money only for 26 days;
- Pang did not ask the reason for the use of his bank account or seek any details about the background to the request; and
- Kwok had never before asked Pang to hold money for him.

The defence argued that Pang was a trusting person who had never had reason to doubt the trust of Kwok, a wealthy and trusted businessman whom Pang had known for 30 years.



At the Court of Appeal, Justice Ian McWalters, as he then was, considered the phrase "having reasonable grounds to believe," citing a decision of the High Court of Australia as requiring "the existence of facts which are sufficient to induce that [belief] in a reasonable person." Whether an actual belief was so held is not relevant. Personal beliefs, perceptions or prejudices are removed from the assessment process of a reasonable person.

The then vice president of the Court of Appeal, Justice Frank Stock, however, said that it was "unattractive to conclude that the legislature intended to preclude the suspect from exculpating himself by showing that he was free of fault." Stock posited whether there should be read into the legislation a halfway-house defence.

The defence would operate in a money laundering charge where there exist objectively reasonable grounds to believe that property represents the proceeds of crime, but a defendant honestly and reasonably did

not suspect that property to be such.

The Court of Final Appeal has granted leave to appeal the conviction on the issue of whether a defendant's honest and reasonable belief that property was not the proceeds of an indictable offence is a defence to a charge under section 25(1) of the Organized and Serious Crimes Ordinance, Cap. 455.

Proceeds or "in connection with"

In the matter of HKSAR v. George Li Kwok-heung and others (FACC4/2013), the Court of Final Appeal was asked whether the offence of money laundering is committed where a person dealt with funds that were known not to derive from any offence but which were used in the furtherance of such an offence. The money involved in this case was advanced, and intended to be used, as a vehicle for deceiving the Stock Exchange of Hong Kong and shareholders of a listed company in furtherance of a conspiracy to defraud.

The Department of Justice had argued that the concept of "proceeds of an indictable offence" was wide enough to extend to money or property received in circumstances in which such receipt may be said to be "in connection with" the commission of an indictable offence even if that money or property is known not to be tainted as a benefit received on account of the commission of such offence.

The Court of Final Appeal rejected that interpretation of the Organized and Serious Crimes Ordinance. It held that the ordinary meaning of "proceeds" was money or property derived from the commission of an offence.

Further, the Court of Final Appeal accepted that the word "proceeds" had to be understood to refer only to money or property which represented an economic benefit gained by the relevant defendant in connection with the commission of the underlying indictable offence.

The lesson to be learned from both cases is that the courts may be taking a less draconian approach to the anti-money laundering legislation which is surely good news for all professionals involved in the handling of money on clients' behalf.



Christopher Morley is a Partner with the Hong Kong law firm of Morley Chow Seto.