Hong Kong University/UCL/Peking University

Third Rule of Law Conference

Mr Justice Joseph Fok[1]

Development of the law in Hong Kong on Money Laundering

A. Introduction

1. My speech this morning is an expanded version of a presentation given in Beijing last week. In turn, the contents of this speech are largely derived from a paper delivered at a Judicial Colloquium held in Hong Kong in September 2015 and it adds to a growing number of recent seminars and talks on the subject of money laundering.[2]

2. Those who derive profit from criminal activity naturally have a strong incentive to protect and preserve the proceeds of their wrongdoing from others. Given the source of their wealth, securing it involves disguising and concealing assets; and money laundering has become a significant criminal activity. The UN Office for Drugs and Crime suggests that the annual aggregate of money laundering in the world could be between 2 to 5 per cent of the world's GDP equivalent to between US$800 billion to US$2 trillion.[3]

3. Targeting the proceeds of serious crime by creating offences of money laundering inevitably poses difficult questions: To what extent must the

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[2] The topic was the subject of the Department of Justice's 2015 Criminal Law Conference on 24 Ocotber 2015 and also the subject of a Hong Kong Bar Association seminar presented by Ms Clare Montgomery QC on 6 November 2015.

[3] See the website of the UN Office on Drugs and Crime at https://www.unodc.org/unodc/en/money-laundering/globalization.html; see also Peter Alldridge, *Money Laundering Law* (Hart publishing, 2003) at p.4.

criminal source of the money be identified and proved? How much must the person dealing with the funds know about their provenance? Where numerous transactions over long periods are relied on to establish money laundering, as a matter of procedural fairness, how should the offence be charged? These are all issues relating to the scope and interpretation of Hong Kong's anti-money laundering ("AML") legislation and can be broadly formulated as follows:

(1) Whether, on a charge of dealing with the proceeds of crime contrary to the relevant AML legislation, it is necessary for the prosecution to prove, as an element of the offence, that the proceeds being dealt with were in fact proceeds of a predicate offence?

(2) What is the appropriate *mens rea* for the offence of money laundering and does this import a necessity for the prosecution to prove the predicate offence?

(3) Whether indictments containing charges of multiple-dealing instances of money laundering are duplicitous?

4. Had these questions been posed earlier this year (2015), you might have answered (1) and (2) simply and definitively by reference to decisions of the Court of Final Appeal ("CFA"); and to (3) you would have said, "Wait until June this year (2015) when the CFA is hearing a case raising that very issue."[4] So by today's date, you would confidently have expected to answer all three questions with a degree of certainty.

[4] *HKSAR v Salim Majed*, FAMC 71/2015, unrep., 10 February 2015.

5. Alas, that was not to be[5] and, as we shall see, you will have to await the outcome of appeals fixed to be heard in the middle of next year to know the (hopefully) definitive answers to these questions.

6. But first some background.

B. The International Conventions

7. Money laundering, it need hardly be said, has been around for a long time. Given its long history, it is perhaps surprising that coordinated international attention to money laundering dates only from the late 1980s, for it was only then that international conventions were signed imposing obligations on state parties to criminalise the concealment or disguising of property known to have derived from, first, drug trafficking and then, subsequently, other serious criminal offences. Two separate factors probably contributed to this international attention: first, the increasing globalisation of the world economy and the removal of exchange controls and other barriers to the free movement of capital, leading to the great ease with which money can be moved from one jurisdiction to another; secondly, the realisation of a link between money laundering and terrorist financing.

8. There are three conventions of particular relevance:

(1) The United Nations Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances of 1988 (the Vienna Convention);

[5] In consequence of the same issue being raised in another case (*Carson Yeung*), *Salim Majed's* hearing date in June 2015 was vacated so that the two appeals could be heard together.

(2) The United Nations Convention Against Transnational Organized Crime of 2000 (the Palermo Convention); and

(3) The United Nations Convention Against Corruption of 2003 (UNCAC).

9. The context of the Vienna Convention was drug trafficking and it imposed on parties an obligation to establish as criminal offences the laundering of the proceeds of drug trafficking[6] and to adopt measures to enable the confiscation of proceeds derived from drug trafficking offences.[7] The Palermo Convention obliged state parties to extend the criminalisation of money laundering to other serious offences. It criminalised money laundering in the same terms as the Vienna Convention[8] but in respect of "serious crime" as defined[9] and provided for the confiscation of the proceeds of such crime.[10] UNCAC contains, in relation to offences of corruption, similar obligations relating to the criminalisation of money laundering[11] and confiscation of the proceeds of corruption offences.[12]

10. The three conventions have all been ratified by the PRC and extended to Hong Kong.[13] In addition, the PRC and Hong Kong are members of the Financial Action Task Force on Money Laundering ("FATF"), an inter-governmental body founded by the G-7 in 1989, which sets standards, and

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6 Article 3(b).
7 Article 5.
8 Article 6.
9 Article 2.
10 Article 12.
11 Articles 23 & 24.
12 Article 31.
13 Vienna Convention: the UK signed and ratified the Vienna Convention in 1991; on 6 and 10 June 1997, the Governments of the UK and the PRC respectively notified the UN Secretary-General that the Convention was to be extended to Hong Kong. Palermo Convention: the PRC signed the Palermo Convention in 2000 and ratified it in 2003; it was extended to Hong Kong on 27 September 2006. UNCAC: the PRC signed the Convention in 2003; it was extended to Hong Kong in January 2006.

develops and promotes AML measures internationally.[14] They are both also members of the Asia/Pacific Group on Money Laundering ("APG"), whose purpose is to ensure the adoption, implementation and enforcement of internationally accepted anti-money laundering and counter-terrorist financing standards as set out in recommendations made by the FATF.

C. Hong Kong's relevant AML legislation

11. The earliest Hong Kong AML legislation was the Drug Trafficking (Recovery of Proceeds) Ordinance[15] enacted in 1989, section 25(1) of which created a new offence of assisting a person to retain or conceal the proceeds from drug trafficking.[16] In 1994, in order to address the activities of organised crime groups in Hong Kong, the Organized and Serious Crimes Ordinance[17] was enacted and, for the first time, created a money-laundering offence[18] covering the proceeds of all serious offences. In addition, Hong Kong has enacted the United Nations (Anti-Terrorism Measures) Ordinance[19] and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.[20]

12. In 1995, both DTROP and OSCO were substantially amended. The money-laundering offences and defences were repealed and replaced by the

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[14] FAFT first promulgated its Forty Recommendations in 1990, which have since been revised and modified to cater for modern money laundering scenarios.

[15] ("DTROP") (Cap.405); largely modeled upon the UK's Drug Trafficking Offences Act 1986.

[16] This was based on and closely followed section 24(1) of the UK's Drug Trafficking Offences Act 1986, save that the mens rea in DTROP was "knowing or having reasonable grounds to believe", whereas that in the 1986 Act was "knowing or suspecting".

[17] ("OSCO") (Cap.455).

[18] OSCO, section 25; there are, of course, other offences under both DTROP and OSCO, including non-disclosure offences and ancillary offences which assist investigation and enforcement, but the main money laundering offence is the dealing offence in section 25.

[19] ("UNATMO")(Cap.575); modelled on DTROP and OSCO, UNTAMO addresses terrorist financing. From a technical perspective, there is no offence under the UNATMO that is not caught under OSCO.

[20] ("AMLO")(Cap.615); this imposes customer due diligence and record-keeping requirements on specified financial institutions and empowers the relevant authorities to supervise compliance with those requirements.

current offences and defences in sections 25 and 25A of each of the two respective ordinances. These changes were, in part, in order to give effect to a number of FATF's Forty Recommendations.[21]

13. The major changes to the two ordinances were two-fold: first, whereas the former money-laundering offences made it an offence to assist another to retain the proceeds of his offence, the new offences permitted the principal offender who committed the predicate offence to be charged with laundering the proceeds of his offence, as well as a third party who dealt with those proceeds; secondly, whereas the former offences were directed at persons, the new offences were directed at property.

14. Section 25(1) of OSCO now provides:

> "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."[22]

On conviction upon indictment, the offence is punishable by a fine of up to HK$5,000,000 and by imprisonment of up to 14 years (section 25(3)).

15. Section 25A introduced (into both ordinances) a new defence for a person who, having dealt with property which he knows or suspects to be criminal proceeds, discloses his knowledge or suspicion as to its origins to an authorised officer (i.e. the police). The section materially provides:

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[21] Explanatory Memorandum DTROP Bill 1995; HK Legislative Council, 26 April 1995, pp.3307-3308. FATF Recommendations 4 and 5 were: "4. Each country should take such measures as may be necessary including legislative ones, to enable it to criminalize drug money laundering as set forth in the Vienna Convention. 5. Each country should consider extending the offence of drug money laundering to any other crimes for which there is a link to narcotics; an alternative approach is to criminalize money laundering based on all serious offences, and/or on all offences that generate a significant amount of proceeds, or on certain serious offences."

[22] Section 25(1) of DTROP refers to "proceeds of drug trafficking" but is otherwise in similar terms.

"(1) Where a person knows or suspects that any property –

(a) in whole or in part directly or indirectly represents any person's proceeds of;

(b) was used in connection with; or

(c) is intended to be used in connection with;

an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if –

(a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or

(b) that disclosure is made –

(i) after he does that act;

(ii) on his initiative; and

(iii) as soon as it is reasonable for him to make it."

C. The actus reus of money laundering

16. Let us now consider the *actus reus* of the OSCO section 25 offence.

17. Money laundering is described and defined variously in a large number of different sources but is generally understood to involve "a scheme whereby the proceeds of crime are 'laundered' by transforming them into other types of property so that they are clothed with legitimacy and their origin is concealed."[23] "In its typical form money laundering occurs when criminals who profit from their criminal enterprises seek to bring their profits within the legitimate financial sector with a view to disguising their true origin. Their aim is to avoid prosecution for the offences that they have committed and confiscation of the proceeds of their offences."[24]

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[23] *HKSAR v Yan Suiling* (2012) 15 HKCFAR146 at [47].

[24] *R v Montila & Others* [2004] 1 WLR 3141 per Lord Hope of Craighead at [3].

18. The only statutory definition of "money laundering" in the Hong Kong AML legislation is to be found in Schedule 1, Part 1 of the AMLO:

> "An act intended to have the effect of making any property:-
> (a) that is the proceeds obtained from the commission of an indictable offence under the laws of Hong Kong, or any conduct which if it had occurred in Hong Kong would constitute an indictable offence under the laws of Hong Kong; or
> (b) that in whole or in part, directly, or indirectly, represents such proceeds,
> not to appear to be or so represent such proceeds."[25]

19. All of these general definitions of money laundering appear to proceed on the basis that the proceeds being laundered are in fact derived from a relevant predicate offence. However, notwithstanding those general definitions, to determine the ambit of the domestic criminal law of Hong Kong,[26] one must necessarily focus on the statutory wording for the purposes of determining the scope of the section 25(1) offence. As we have seen, this states that the *actus reus* of the offence is *dealing*[27] *with property which the defendant knows or has reasonable grounds to believe represents the proceeds of an indictable offence*. The act of dealing must have occurred in Hong Kong, although the property may have come from overseas and represent in whole or in part directly or indirectly the proceeds of predicate offences that took place outside this jurisdiction.[28] An indictable offence includes conduct which would constitute an indictable offence if it had occurred in Hong Kong.[29]

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25 A similar definition of "money laundering activities" is contained in the Securities and Futures Ordinance (Cap.571), Sched.1, Part 1.

26 The international conventions lay down legislative baselines but do not dictate the form of the domestic legislation. Signatories can enact domestic legislation that is harsher or more extensive in reach than the baselines: see *Oei Hengky Wiryo* at [105]. For the non-direct applicability of international conventions at the level of domestic Hong Kong law, see *Ubamaka Edward Wilson v Secretary for Security and Another* (2012) 15 HKCFAR 743 at [42]-[44].

27 By OSCO, section 2, "dealing" is defined to include "(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)".

28 *HKSAR v Yeung Ah Lung & Anor* [2004] 4 HKC 477 at [14]-[20].

29 OSCO, s.25(4).

20. The issue of whether the prosecution has to prove that the property dealt with by the defendant was actually the proceeds of an indictable offence was first considered in the CFA by the Appeal Committee in *HKSAR v Wong Ping Shui & Another*.[30] The Appeal Committee held that, in a prosecution under section 25(1), the prosecution did not have to prove this. It rejected the argument that the money laundering offence was akin to the offence of handling stolen goods[31] in respect of which the prosecution had to prove that the goods handled were in fact stolen goods at the time they were handled. It held that the *actus reus* of the money laundering offence is dealing with "property" and that the status of the property is only an element of the *mens rea* of the offence.

21. This conclusion was affirmed by the Court itself in the more recent decision of *Oei Hengky Wiryo v HKSAR (No 2)*.[32] In that case, the appellant had argued that the Court should not follow *Wong Ping Shui* but should instead follow the House of Lords decision in *R v Montila* (*supra*) where it was decided that the relevant UK legislation[33] required the prosecution to prove that the property was in fact the proceeds of crime or drug trafficking. The four matters on which Lord Hope relied in *Montila* in construing the relevant UK legislation, and which it was argued also applied to the Hong Kong legislation, were held not to be applicable to the construction of section 25(1).[34] It should be noted, however, that the discussion of this issue in *Oei Henky Wiryo* was strictly *obiter*

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30 (2001) 4 HKCFAR 29 at pp.31-32.

31 Under section 24(1) of the Theft Ordinance (Cap.210).

32 (2007) 10 HKCFAR 98 at [96]-[109].

33 Viz. Criminal Justice Act 1988, section 93C(2) (materially providing: "A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he …"); and Drug Trafficking Act 1994, section 49(2) (materially providing: "A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he …").

34 (2007) 10 HKCFAR 98 at [104]-[108]: viz., (i) the wording in the Vienna Convention; (ii) knowledge must be of true fact; (iii) no defence if property not in fact proceeds of indictable offence; (iv) headings and side notes to relevant sections.

since it was accepted that the sums of money that went through Oei's bank accounts and were the basis of the charges of money laundering represented either directly or indirectly the proceeds of bookmaking in Hong Kong so that the appeal would fail whether or not *Montila* represented the law of Hong Kong.[35]

22. More recently, in *HKSAR v Li Kwok Cheung George*,[36] the CFA addressed the issue of whether the offence of money laundering could be committed by dealing with "clean" or untainted property. In that case, the appellants were convicted under section 25(1) for conspiring to implement a scheme to conceal another conspiracy. The scheme involved circular payments of funds belonging to a finance company which were intended to be returned to that company after having been used to effect a deception of investors and regulators.

23. Were "proceeds of an indictable offence" in section 25(1) confined to money gained from the commission of an indictable offence or did they extended to money used in furtherance of such an offence, so that the offence could be committed by a person dealing with funds known not to derive from any offence but which were intended to be used as part of a fraudulent conspiracy?

24. The Court rejected the prosecution's interpretation of section 25(1) as being wide enough to catch "clean" money intended to be used as an instrument in furtherance of a conspiracy to defraud. This contention was based on the statutory definition (in section 2(6)(a)) of "a person's proceeds of an offence",

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35 *Ibid.* at [98].

36 (2014) 17 HKCFAR 319.

which includes "any payments or other rewards received by him at any time … in connection with the commission of that offence".[37]

25. The Court held that money known to be clean could not be the subject of a money laundering charge. This, I would suggest, is not a surprising conclusion since the essence of money laundering is, as already noted, the dealing with property known or reasonably believed to be tainted proceeds arising from the commission of underlying criminal activity with a view to concealing and disguising their illegitimate source.

26. Is there an apparent dichotomy here? As we have seen, *Oei* holds that it is not necessary in Hong Kong for the prosecution to prove the predicate offence in order for the offence under section 25(1) to be established. Given the international dimension of money laundering, a need to prove the underlying criminal activity from which tainted proceeds are derived could pose insuperable difficulties and would doubtless significantly dilute the efficacy of the AML regime. *Oei Hengky Wiryo* was applied by the CFA in *HKSAR v Yan Suiling*[38] and also in *George Li*, where it was expressly noted that the discussion in the judgment was to be understood to proceed on the basis of *Oei Hengky Wiryo*.[39]

27. On the other hand, in *George Li*, the Court considered that the adoption of the prosecution's wide interpretation of the meaning of "proceeds of an indictable offence" would have highly detrimental consequences, since it would make money laundering an offence of great and uncertain width. Given the *mens rea* threshold (which I shall shortly address), the wide interpretation would place lenders at risk and impose onerous obligations. By way of example,

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37 OSCO, section 2(6)(a)(i).
38 (2012) 15 HKCFAR 146 at [4], [47].
39 (2014) 17 HKCFAR 319 at [17] and see also [84].

a bridging loan sought by a customer who intended to use the funds for a criminal enterprise might potentially expose the lender to liability for money laundering. This might also distort the practice of prosecutors who would find it hard to resist the temptation to bring money laundering charges made easy to prove whenever it was possible to prove a payment and some broad connection with some indictable offence.[40]

28. The apparent dichotomy between the absence of a need to prove the predicate offence, on the one hand, and the exclusion from the ambit of section 25(1) of the dealing with clean funds, on the other, is also illustrated in the CFA's decision in *Yan Suiling*[41] where Chan PJ observed:

> "Money laundering usually involves a scheme whereby the proceeds of crime are 'laundered' by transforming them into other types of property so that they are clothed with legitimacy and their origin is concealed. This did not seem to have happened in the present case. While this is not something which needs to be proved to substantiate the charge, it is a matter which applying common sense, one would bear in mind when considering all the circumstances of the case." [42]

In *Yan Suiling*, the issue giving rise to that observation was whether the trial judge's inference that the appellant had reasonable grounds to believe that the cheque paid into her bank account represented the proceeds of an indictable offence was justified. The Court held that an unexplained receipt of a large sum of money without more did not support the irresistible inference that she must have had reasonable grounds to believe the money represented the proceeds of crime.[43]

29. One resolution of the apparent dichotomy may therefore lie in the way in which the prosecution puts its case as to the defendant's *mens rea*. Where it is

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40 *Ibid*. at [83]-[85].
41 (2012) 15 HKCFAR 146 (a decision which therefore preceded *HKSAR v Li Kwok Cheung George*).
42 *Ibid*. at [47].
43 *Ibid.* at [48].

alleged that the defendant knew that the property was the proceeds of an indictable offence, it may be necessary to prove that the property was in fact such proceeds. Thus, in *Oei Hengky Wiryo*, McHugh NPJ said: "Moreover, in practice, it is likely that the first limb of section 25(1) – the 'knowing' limb – can seldom be used unless the prosecution proves that the property did in fact represent a person's proceeds of an indictable offence."[44] This is because, as Lord Hope said in *Montila*, "A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point …".[45]

30. On the other hand, where the second limb of section 25(1) – the "having reasonable grounds to believe" limb – is relied upon, the fact that money dealt with is known to be "clean" will preclude a conviction for the offence of money laundering. Thus, it may be argued that in such a case it is in practice necessary for the prosecution to prove that the source of the money in question is criminal. How far the prosecution will need to go towards proving the predicate offence may depend on the circumstances of the particular case. In some cases, depending on the circumstances, it may be possible to draw an irresistible inference that the defendant had reasonable grounds to believe the property he was dealing with represented the proceeds of an indictable offence without going so far as to prove the predicate offence itself. However, in other cases, it is possible the prosecution might need to go that far in order for the inference to be properly drawn. This may be said to be consistent with Chan PJ's reference to the need to apply common sense when considering all the circumstances of the case.

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44 (2007) 10 HKCFAR 98 at [106].

45 [2004] 1 WLR 3141 at p.3149C-D.

31. As we shall see, the issue as to the need to prove the underlying predicate offence has been resurrected.

E. The mens rea of money laundering

32. Let us now consider the *mens rea* of the section 25(1) offence.

33. There are two limbs to the *mens rea* of the offence, namely: (i) knowledge, and (ii) having reasonable grounds to believe, that the relevant property dealt with represents the proceeds of an indictable offence. There is little controversy regarding the first limb, although as already noted, it probably entails the prosecution proving the illicit quality of the property dealt with. The second limb has recently been considered by the CFA. Before analysing that decision, it is noteworthy that the then DTROP equivalent offence was described by Lord Woolf as "Draconian".[46] Further, FATF, in its "Third Mutual Evaluation Report" of Hong Kong (11 July 2008), has observed[47] that the second limb of the *mens rea* threshold for section 25(1) "posits a relatively low threshold of criminal negligence".

34. In *HKSAR v Pang Hung Fai*,[48] the CFA considered questions relating to the *mens rea* of the offence. The Court held that the test to be applied was set out in the earlier Appeal Committee decision in *Seng Yuet Fong v HKSAR*,[49] namely: "To convict, the jury had to find that the accused had grounds for believing; and there was the additional requirement that the grounds must be reasonable: That is, that anyone looking at those grounds objectively would so

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46 *A-G of Hong Kong v Lee Kwong Kut* [1993] AC 951 at p.964H.

47 At para.117.

48 (2014) 17 HKCFAR 778.

49 [1999] 2 HKC 833 at p.836E-F: this was the application for leave to appeal to the CFA from *HKSAR v Shing Siu Ming* [1999] 2 HKC 818, referred to below.

believe."[50] The Court held that this formulation was consistent with the reference of Lord Woolf in *A-G of Hong Kong v Lee Kwong Kut*[51] to an actual rather than probable state of affairs and to Chan PJ's reference in *Yan Suiling* to the need to be able to draw the irresistible inference a person must have had reasonable grounds to believe the proceeds represented proceeds of an indictable offence.[52]

35. The principal question raised in *Pang Hung Fai* was whether, in determining whether a person has reasonable grounds to believe the property dealt with represents the proceeds of an indictable offence, the tribunal of fact is entitled to take into account, in addition to the facts relating to the person's dealing with the property and known by him to exist, his perception and evaluation of those facts as constituting or contributing to reasonable grounds for believing the property does not represent such proceeds. The issue was important in *Pang Hung Fai* on the facts of the case because the appellant businessman had dealt with a sum of just over HK$14 million remitted to his account by a person (Kwok) who had been his close friend for over 30 years and whom he knew to be chairman and a major shareholder of a listed company in Hong Kong. The appellant and Kwok frequently helped each other out with interest-free loans in case of cash flow difficulties. It was his defence to the money laundering charge that he trusted Kwok implicitly and had no reason to believe that the money remitted to his account was (as it turned out) the proceeds of a fraud perpetrated by Kwok.

36. The Court held that the personal beliefs, perceptions and prejudices of an accused could be taken into account when applying the statutory formulation since they fit within the concept of a "ground" which a particular person could

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50 (2014) 17 HKCFAR 778 per Spigelman NPJ at [52], [57].
51 [1993] AC 951 at p.964D-E.
52 (2014) 17 HKCFAR 778 at [70]-[75].

be said to have "had". Whether any such perception or evaluation was entitled to weight and, if so, what weight would be a matter for the tribunal of fact when assessing the whole of the evidence and in many cases the tribunal might entirely discount such evidence.[53] In so holding, the CFA rejected the Court of Appeal's earlier *mens rea* test based on the case of *HKSAR v Shing Siu Ming*[54] positing a two-stage test involving a subjective evaluation of what facts were known to the accused and then an objective evaluation of whether those facts would lead a common sense, right-thinking member of the community to believe that the proceeds constituted proceeds of an indictable offence but uninfluenced by the personal beliefs, perceptions and prejudices of the defendant.[55]

37. A number of separate issues have arisen from the Court's decision in *Pang Hung Fai*, to which I shall shortly return.

F. Framing a charge of money laundering

38. Before doing so, let us next consider a procedural issue.

39. The definitions of "dealing" and "property" in OSCO are wide.[56] Because of the variety of ways in which property may be dealt with, the framing of a charge of money laundering may raise the question as to whether the count on an indictment is bad as being in breach of the rule against duplicity.

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53 *Ibid*. at [83]-[85].

54 [1999] 2 HKC 818.

55 *Ibid*. at [44]-[48], [52]-[55].

56 As to "dealing", see FN27 above. OSCO, s. 2 defines "property" as including both movable and immovable property within the meaning of s.3 of the Interpretation and General Clauses Ordinance (Cap.1). Cap.1, s.3 defines property as including "(a) money, goods, choses in action and land; and (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition".

40. It is the general rule in Hong Kong that no one count in a criminal indictment should charge a defendant with having committed two or more separate offences.[57] A charge that reveals more than one offence will be regarded as duplicitous and, unless amended, will be quashed. To the rule against duplicity, there are, however, exceptions which have developed as a means of striking a balance between the right of an accused to a fair trial and the demands of justice. There are three recognised situations in which charges based on a number of different criminal acts have been allowed.

41. The first exception, applicable to all offences, is where the different acts, viewed realistically, form only one transaction.[58] The second and third exceptions apply to theft and fraud offences. The second exception is referred to as the "general deficiency" exception[59] and applies where individual acts cannot be identified during a period of criminal activity but the prosecution alleges that by the end of that period of criminal activity or by a particular accounting date, the victim has suffered an accumulated loss of a particular amount. The third exception is referred to as the "continuous offence" exception[60] where there is a continuous course of conduct involving the same victim and the continuous course of conduct is composed of a number of quite separate acts of the same nature.

42. Two recent decisions of the Court of Appeal in Hong Kong have highlighted the issue of duplicity in the context of prosecutions for money laundering. As will be seen, leave to appeal to the CFA has been granted in both.

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57 Archbold Hong Kong (2015 Ed.), para.1-123; Indictment Rules (Cap.221C), r.2(2): "Where more than one offence is charged in an indictment, the statement and particulars of each offence shall be set out in a separate paragraph called a count, and rules 3 and 4 of these Rules shall apply to each count in the indictment as they apply to an indictment where one offence is charged."

58 *DPP v Merriman* [1973] AC 584; *Jemmison v Priddle* [1972] 1 QB 489.

59 Archbold Hong Kong (2015 Ed.), para.1-133-134; *R v Tomlin* [1954] 2 QB 274.

60 Archbold Hong Kong (2015 Ed.), para.1-135; *Barton v DPP* [2001] 165 JP 779.

43. The first case is *HKSAR v Salim Majed & Anor*.[61] The Court of Appeal quashed the appellants' convictions for money laundering in relation to the operation of certain bank accounts because the basis on which they were convicted was not that on which they were charged.[62]

44. Of relevance in the present context is the question, considered by the Court of Appeal, of whether it would be appropriate to order a retrial. In this regard, one of the grounds of appeal was whether the charges were defective by reason of duplicity. The charges were drafted to cover a period of time, the amounts particularised were aggregate amounts representing a number of different transactions during the period of time and the different transactions were all deposits into the relevant accounts.[63]

45. The Court of Appeal held that the activity, spanning as it did a period of some two and a half months and involving different receipts on different occasions from different victims could not be said to be one offence, so that the exception to the duplicity rule in *DPP v Merriman* did not apply. The Court of Appeal further held that neither the general deficiency nor continuous act exceptions could apply because, here, each dealing by way of deposit of monies into the various accounts could be identified and each deposit was made by a different victim. Since the counts were duplicitous, an order for retrial would not be appropriate.[64]

46. The consequence of this decision has considerable significance for the prosecution of money laundering offences in Hong Kong. The prosecution

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61 [2014] 6 HKC 678.
62 [2014] 6 HKC 678 at [86]-[88], [110]-[113].
63 *Ibid*. at [7]-[10].
64 *Ibid*. at [147]-[149].

applied for leave to appeal and, in February 2015, the Appeal Committee granted leave to appeal on the following point of law:

> "In the context of the offence of money laundering under section 25 of the Organized and Serious Crimes Ordinance, Cap.455 ('the Ordinance'), how does the rule against duplicity operate? In particular, whether the offence of money laundering, capable of being committed in any of the modes of 'dealing' as included in its definition under section 2 of the Ordinance, is or could be a continuing offence [so] that the rule against duplicity does not apply; and how do the exceptions to the rule against duplicity (namely 'one transaction' as in *DPP v Merriman* [1973] AC 584, 'general deficiency' as in *R v Tomlin* [1954] 2 QB 274 and the 'continuous course of conduct' as in *Barton v DPP* [2001] 165 JP 779) appl[y] to a charge of money-laundering which alleges multiple dealings some of which [involve] money from known and different sources."[65]

47. The issue of duplicity also arose in *HKSAR v Yeung Ka Sing, Carson*[66] but with a different outcome.

48. In *Carson Yeung*, the charges alleged multiple deposits by cash, cheques or transfer into five bank accounts and each of the charges concerned the aggregate amount of deposits in the respective periods. Some of the depositors or remitters were known, others not.[67] The Court of Appeal held that, given the obviously different provenance of the multiple deposits of money in the bank accounts over a period of six years, the charges were duplicitous. It held that these multiple acts were not to be regarded as connected with one another by a common purpose so as to be regarded as a common transaction, nor did they fall within the general deficiency or continuous conduct exceptions.[68]

49. However, notwithstanding the duplicity, the Court of Appeal considered that there was no prejudice to the appellant such that his trial was unfair. The

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65 *HKSAR v Salim Majed*, FAMC 71/2015, unrep., 10 February 2015.
66 CACC 101/2014, unrep., 13 May 2015.
67 *Ibid*. at [4], [37].
68 *Ibid*. at [58]-[59].

Court of Appeal accepted the prosecution submission that, "although the charges included within each of them multiple incidents relied on by the prosecution in proof of the respective charge, the differentiation between the various incidents was not only readily apparent to the defence and the judge but also addressed separately by each of them in turn. So, even if the prosecution had been required to condescend to stipulate multiple individual counts, the defence case would have remained the same."[69]

50. Leave to appeal to the CFA having been granted to the appellant (as we shall see in a moment), leave has been granted to the prosecution as respondent on the same question of law as that for which leave has been granted in *Salim Majed*.

G. Other outstanding controversial issues

51. I have earlier mentioned that a number of separate issues have arisen from the CFA's judgment in *Pang Hung Fai*. These relate both to the *actus reus* and *mens rea* of the offence of money laundering and arose from the Court of Appeal's judgment in *Carson Yeung*.[70]

52. In *Carson Yeung*, one of the grounds of appeal against convictions for money laundering contrary to section 25(1) was that it was necessary for the prosecution to prove the predicate offence and the prosecution had not done so. No argument was directed to the Court of Appeal in *Carson Yeung* on this ground as it was conceded by the appellant that the Court was bound by the CFA's judgment in *Oei Hengky Wiryo* to the contrary. However, it was contended that, having regard to the Court's judgments in *George Li* and *Pang*

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69 *Ibid*. at [60]-[65].

70 CACC 101/2014, unreported, Judgment dated 13 May 2015 at [22].

Hung Fai, *Oei Hengky Wiryo* was wrongly decided and the appellant reserved the right to argue the point in the CFA. In *Pang Hung Fai* itself, Spigelman NPJ referred to *Oei Hengky Wiryo* as establishing that it was unnecessary for the prosecution to prove that the monies dealt with were, as a matter of fact, the proceeds of an indictable offence but observed that, in that case, the prosecution nevertheless had done so.[71]

53. It is now apparent[72] that the argument that *Oei Hengky Wiryo* was wrongly decided is based on Spigelman NPJ's comment that a jury may be assisted by another formulation of the *mens rea* formulation, on the basis that the word "believe" in section 25(1) is used in the sense of "know" so that "[t]he two mental elements in the subsection should be understood as if they read: 'knew or ought to have known'."[73] It appears to be suggested this may impose a stronger test than what, on its face, the *Seng Yuet Fong* test requires and, what may be said to be, its equiparation of "believe" and "know" may suggest the need to prove the predicate offence. Reference is also made to Spigelman NPJ's comment in *Pang Hung Fai* that "the mental element of the 'reasonable grounds' alternative is regarded as being at the same level of moral obloquy as actual knowledge"[74] and it is contended that it is illogical to require proof of the tainted origin of the specified proceeds in "knowing" cases but not in "reasonable grounds" cases.

54. Leave to appeal was granted by the Appeal Committee to raise the question of whether *Oei Hengky Wiryo* was wrongly decided:

> "On a charge of dealing with proceeds of crime contrary to s.25(1) of the Organized and Serious Crimes Ordinance (Cap.455) ('OSCO'), is it necessary for the

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71 *Ibid*. at [17].
72 This became clear in the application for leave to appeal to the CFA in *Carson Yeung*.
73 *Ibid*. at [55]-[56].
74 *Ibid*. at [77].

> prosecution to prove, as an element of the offence, that the proceeds being dealt with were in fact proceeds of an indictable offence? Was *Oei Hengky Wiryo* (2007) 10 HKCFAR 98 wrongly decided on this issue?"[75]

55. In addition, the prosecution also sought, and has been granted, leave to appeal to the CFA to seek clarification of the perceived conflict between the formulations of the *mens rea* test:

> "When considering whether a defendant had reasonable grounds to believe in the context of s.25(1) of the [OSCO], how does a trial judge reconcile the formulation set out in *Seng Yuet Fong v HKSAR* (1999) 2 HKC 833 and the formulation 'knew or ought to have known' set out in *HKSAR v Pang Hung Fai* (2014) 17 HKCFAR 778? Under what circumstances should the trial judge apply these two formulations?"

56. Finally, leave to appeal was also granted by the Appeal Committee on the basis of the following question of law concerning the *mens rea* of the offence, namely:

> "In considering the *mens rea* element of a charge contrary to s.25(1) of OSCO, to what extent does a trial judge need to make positive findings as to a defendant's belief, thoughts, intentions at the material time even though the judge rejects the defendant's testimony? In particular, where the trial judge rejects the defendant's testimony, to what extent can the judge remain oblivious to the defendant's actual reason(s) for dealing with the specified proceeds in making the finding that the defendant had reasonable grounds to believe that the proceeds he dealt with were proceeds of crime?"

H. Concluding remarks

57. This, then, is the current state of the law in Hong Kong on money laundering on the important questions posed at the outset. Despite the temptation to do so, since the issues for which leave to appeal has been granted are pending for decision by the CFA, I will not express any views on them as it would be inappropriate for me to do so.

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[75] FAMC 28/2015, Determination dated 14 August 2015

58. The question of duplicity is obviously one of some practical importance. Clearly, the risk of framing a duplicitous charge of money laundering is very real. Money laundering is likely to involve various different activities. Since the activities will be designed to camouflage rather than draw attention to the movement of individually large sums, they will often be split into multiple transactions spread over what may be a relatively lengthy period. Different actors may be involved in making deposits into an account in which the monies known or believed to be the proceeds of crime are received. A range of different criminal activities carried out by different individuals with different victims may be the source of the monies being laundered. It is, of course, possible for prosecutors to side-step the risk of duplicity by charging a conspiracy but this is not an attractive proposition and, in some cases, may simply not be appropriate.

59. The other questions raise issues as to the *actus reus* and *mens rea* of the offence of money laundering previously thought to have been settled. They raise interesting and important issues as to the scope of the offence. The appeals in *Carson Yeung* and *Salim Majed* are to be heard together from 31 May to 2 June 2016 and your interest in their outcome may now, perhaps, have been piqued.

Beijing and Hong Kong, November 2015