Hong Kong Judicial Colloquium 2015

Mr Justice Joseph Fok[1]

Money Laundering: A Comparative Perspective

A. Introduction

1. Targeting the proceeds of serious crime by creating offences of money laundering inevitably poses difficult questions: To what extent must the 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 which have recently been or are shortly to be argued before the Court of Final Appeal ("CFA"). They 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; and

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

2. As will be seen, these issues remain contentious in Hong Kong and pending before the CFA. Given the common applicability of the relevant international conventions to the four participating jurisdictions in this Colloquium, it may be of interest to examine these issues from a comparative perspective.

B. The International Conventions

3. 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. There are three conventions of relevance, namely: (1) the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic

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Substances of 1988 ("the Vienna Convention"); (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").

4. The context of the Vienna Convention was drug trafficking and this imposed on parties an obligation to establish as criminal offences the laundering of the proceeds of drug trafficking[2] and to adopt measures to enable the confiscation of proceeds derived from drug trafficking offences[3]. The Palermo Convention obliged state parties to extend the criminalisation of money laundering to other serious offences. It criminalised money laundering in materially the same terms as the Vienna Convention[4] but in respect of "serious crime" as defined[5] and provided for the confiscation of the proceeds of such crime[6]. UNCAC contains, in relation to offences of corruption, similar obligations relating to the criminalisation of money laundering[7] and confiscation of the proceeds of corruption offences[8].

5. The three conventions have all been extended to Hong Kong[9]. They also apply to each of Australia, Canada and New Zealand[10]. In addition, each of Australia, Canada, New Zealand 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 develops and promotes AML measures internationally[11].

C. Hong Kong's relevant AML legislation

6. The earliest Hong Kong AML legislation was the Drug Trafficking (Recovery of Proceeds) Ordinance[12] 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[13]. In 1994, in order to address the activities of organized crime groups in Hong Kong, the Organized and Serious Crimes Ordinance[14] was enacted and, for the first time,

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2 Article 3.
3 Article 5.
4 Article 6.
5 Article 2.
6 Article 12.
7 Articles 23 & 24.
8 Article 31.
9 Vienna Convention: the UK signed and ratified the Vienna Convention in 1988 and 1991 respectively; 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 on 12 February 2006.
10 Each of Australia, Canada and New Zealand is a signatory and has ratified the Vienna and Palermo Conventions. Australia and Canada have signed and ratified UNCAC, to which New Zealand is a signatory.
11 FATF first promulgated its Forty Recommendations in 1990, which have since been revised and modified to cater for modern money laundering scenarios.
12 ("DTROP") (Cap.405); largely modeled upon the UK's Drug Trafficking Offences Act 1986.
13 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".
14 ("OSCO") (Cap.455).

created a money-laundering offence[15] covering the proceeds of all serious offences. In addition, Hong Kong has enacted the United Nations (Anti-Terrorism Measures) Ordinance [16] and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance[17].

7. In 1995, both DTROP and OSCO were substantially amended. The money-laundering offences and defences were repealed and replaced by the 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 recommendations contained in the FATF Report 1990-1991[18], Recommendations 4 and 5 of which stated:

> "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.
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> 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."[19]

8. The major changes to DTROP and OSCO 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 (either the person who had carried on drug trafficking or who had committed or benefitted from an indictable offence), the new offences were directed at property (either the proceeds of drug trafficking or of an indictable offence).

9. 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

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[15] 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.

[16] ("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.

[17] ("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.

[18] Explanatory Memorandum DTROP Bill 1995; HK Legislative Council, 26 April 1995, pp.3307-3308.

[19] Section 3 of the current version of the FATF Recommendations (February 2012) now provides: "3. Countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences."

indirectly represents any person's proceeds of an indictable offence, he deals with that property."[20]

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

10. Section 25A introduced (into both ordinances) a new defence and provides:

> "(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."

11. An extended meaning was given to "indictable offence" in section 25(1) and 25A by section 25(4) which provides:

> "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."

D. The actus reus of money laundering

12. In Hong Kong, in relation to the *actus reus* of the OSCO section 25 offence, the CFA has dealt with the issue of whether 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[21]. It has also dealt, more recently, with whether the offence can be committed where a person dealt with funds known not to derive from any offence but which were intended to be used in furtherance of a criminal enterprise[22].

13. To put these issues in context, 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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20 Section 25(1) of DTROP refers to "proceeds of drug trafficking" but is otherwise in similar terms.
21 *Oei Hengky Wiryo v HKSAR (No 2)* (2007) 10 HKCFAR 98.
22 *HKSAR v Li Kwok Cheung George* (2014) 17 HKCFAR 319.
23 *HKSAR v Yan Suiling* (2012) 15 HKCFAR 146 at [47].
24 *R v Montila & Others* [2004] 1 WLR 3141 per Lord Hope of Craighead at [3].

14. A well-known and more elaborate model of this basic idea is that of the Financial Crimes Enforcement Network[25]. FinCEN's model includes three stages: placement, layering and integration. (1) Placement is the initial point of entry for funds derived from criminal activities. Most criminal activity, in particular the drug trade, relies upon cash as an initial medium of exchange. This money is taken and deposited into a financial institute, typically one with little regulation, so it can enter into the financial system. (2) The second process is layering. This is the creation of complex networks of transactions, which attempt to obscure the link between the initial entry point and the end of the laundering cycle. The use of multiple layers (i.e. different jurisdictions and multiple shell corporations) makes it harder to follow the money trail. (3) The final stage is integration. Integration is the process of 'cleaning' the 'dirty money'. The 'dirty money' must re-enter in a legitimate form. This is usually done through the purchasing of assets, such as luxury goods, real estate and securities, or other financial instruments.

15. 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, namely:

> "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 of 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".[26]

16. 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[27], one must necessarily focus on the statutory wording for the purposes of determining the scope of the OSCO section 25(1) offence. As we have seen, this states that the *actus reus* of the offence is *dealing*[28] *with property which the defendant knows or has reasonable grounds to believe*

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[25] Money Laundering: A Guide for Criminal Investigators, John Madinger (3rd Ed., CRC Press, 2012), p7; ("FinCEN") FinCEN is a bureau of the U.S. Department of the Treasury; it carries out its mission by receiving and maintaining financial transactions data, analysing and disseminating that data for law enforcement purposes, and building global cooperation with counterpart organizations in other countries and with international bodies.

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

[27] 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 v Secretary for Security* (2012) 15 HKCFAR 743 at [42]-[44].

[28] 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)".

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[29]. An indictable offence includes conduct which would constitute an indictable offence if it had occurred in Hong Kong[30].

D.1 Whether proof of predicate offence necessary

17. 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*[31]. The Appeal Committee held that, in a prosecution under OSCO 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[32] 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.

18. This conclusion was affirmed by the Court itself in the more recent decision of *Oei Hengky Wiryo v HKSAR (No 2)*[33]. 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[34] 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 upon in construing the 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)[35]. It should be noted, however, that the discussion of this issue was strictly *obiter* since it was accepted in *Oei Henky Wiryo* that the sums of money that went through Oei's bank accounts were the basis of the charges of money laundering and 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[36].

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

30 OSCO, s.25(4).

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

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

33 (2007) 10 HKCFAR 98 at [96]-[109].

34 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 …").

35 (2007) 10 HKCFAR 98 at [104]-[108].

36 *Ibid.* at [98].

D.2 Whether clean monies can be laundered

19. More recently, in *HKSAR v Li Kwok Cheung George*[37], 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 OSCO 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. The issue was whether "proceeds of an indictable offence" in section 25(1) was confined to money gained from the commission of an indictable offence (the narrow interpretation) or extended to money used in furtherance of such an offence (the wide interpretation), 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.

20. The Court rejected the prosecution's wide interpretation of section 25(1) which relied on the statutory definition of "a person's proceeds of an offence", which includes "any payments or other rewards received by him at any time … in connection with the commission of that offence"[38], as being wide enough to catch "clean" money intended to be used as an instrument in furtherance of a conspiracy to defraud. Not only was this wide interpretation inconsistent with the natural and ordinary meaning of "proceeds" of an offence (which required the property dealt with to be something generated by the predicate offence), as a matter of context, the prosecution's interpretation would render express provisions in OSCO section 25A included to cover property "used in connection with" or which "is intended to be used in connection with" an indictable offence[39] redundant. Further, for the statutory definition of "a person's proceeds of an offence" to apply, the payment must be received "in connection with the commission of" the predicate offence and that must be more than some general, unspecified connection since due weight had to be given to the words "or other rewards" in the phrase "payment or other rewards". It was clear that the contemplated payment must be *in the nature of a reward* and be *a payment received in connection with commission of the relevant offence*.[40]

21. In addition, the Court held that, since the central purpose of OSCO was to strip away the economic benefits obtained by a defendant in connection with the commission of the predicate offence, property should not be regarded as his "proceeds" unless he obtained an economic benefit from that property. This was particularly so given the need, in the context of the making of a confiscation order, to show that a person had benefited from the proceeds[41]. Although not necessary to show liability under section 25(1), such benefit was a condition of making a confiscation order. Thus, under section 2(6)(a), the payments must be "in the nature

37 (2014) 17 HKCFAR 319 ("*George Li*").
38 OSCO, section 2(6)(a)(i).
39 OSCO, section 25A(1)(b) and (c).
40 (2014) 17 HKCFAR 319 at [24], [27], [30], [33].
41 *Ibid*. at [40]; OSCO, section 8(4).

of a reward" received in connection with the commission of the predicate offence. The uncoupling of the concept of "payment" from "reward" or "benefit" (Glidewell LJ's view in *R v Osei*[42]) should not be adopted in Hong Kong.[43]

22. Thus, the Court held that "clean" money, not paid or received in the nature of a reward in connection with commission of the predicate offence, does not qualify as the proceeds of crime for the purposes of section 25(1). This is not a surprising conclusion since the essence of money laundering is, as described above, the dealing with tainted proceeds arising from the commission of underlying criminal activity with a view to concealing and disguising their illegitimate source.

D.3 An apparent dichotomy?

23. As we have seen, it is not necessary in Hong Kong for the prosecution to prove the predicate offence in order for the offence under OSCO 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*[44] 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*[45].

24. 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 policy considerations, since it would make money laundering an offence of great and uncertain width. Given the *mens rea* threshold (addressed in Section E below), the wide interpretation would place lenders at risk and impose onerous obligations. By way of example, 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.[46] In *George Li*, for example, it was not clear why the defendants (charged with money laundering) had not simply been charged as parties to the underlying conspiracy to defraud, since the prosecution had submitted in closing that their participation in that charge had been established on the evidence.

25. 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

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42 (1988) 10 Cr App R (S) 289.
43 (2014) 17 HKCFAR 319 at [35]-[38], [68]-[69], [72], [74].
44 (2012) 15 HKCFAR 146 at [4], [47].
45 (2014) 17 HKCFAR 319 at [17] and see also [84].
46 *Ibid*. at [83]-[85].

dealing with clean funds, on the other, is also illustrated in the CFA's decision in *Yan Suiling*[47] 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." [48]

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. The Court held that the judge was wrong to reject the appellant's evidence that the cheque was paid into her account pursuant to an underground currency exchange arrangement for exchanging Renminbi for Hong Kong dollars and therefore wrong to draw the inference. But the Court also held that, even if the evidence had been properly rejected, 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[49].

26. One resolution of the apparent dichotomy may lie in the way in which the prosecution puts its case as to the defendant's *mens rea*. Where it is 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 s.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."[50] 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 …"[51].

27. On the other hand, where the second limb of section 25(1) – the "having reasonable grounds to believe" limb – is relied upon, the prosecution will not necessarily have to prove that the source of the property dealt with is criminal. For the offence to be established, though, it will be necessary that the irresistible inference can be drawn that the defendant had reasonable grounds to believe that the proceeds were criminal. *George Li* demonstrates that where a lender deals with his own "clean" funds, those funds are not the proceeds of crime because of what the borrower intends to do with them. Since the defendants there knew that the funds were their own clean funds, *mens rea* for the offence was negatived. This does not mean that to

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47 (2012) 15 HKCFAR 146 (a decision which therefore preceded *George Li*).
48 *Ibid*. at [47].
49 *Ibid.* at [48].
50 (2007) 10 HKCFAR 98 at [106].
51 [2004] 1 WLR 3141 at [27].

demonstrate the necessary *mens rea* for the offence, it is necessary to show that the funds are tainted but it does suggest that, depending on the facts of the particular case, where the reasonable grounds to believe limb is relied upon, it may not be possible to draw the irresistible inference as to *mens rea* unless the funds are in fact shown to be criminal. This is consistent with Chan PJ's reference to the need to apply common sense when considering all the circumstances of the case.

D.4 The actus reus of money laundering in other jurisdictions[52]

28. Australia: The AML provisions are set out at Part 10.2 of the Criminal Code Act 1995 (Cth) ("CCA") at Division 400. Sections 400.3 to 400.8 make it an offence to deal with money or property that is either the proceeds of, or may become an instrument of, crime. The definition of "instrument of crime" in section 400.1(1) states "money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission, of an offence … that may be dealt with as an indictable offence (even if it may, in some circumstances be dealt with as a summary offence)". Therefore, unlike *George Li*, the ability to prosecute a person for using (clean) money or other property as an instrument of crime may extend the range of prosecutorial power in a way that does not exist under the Hong Kong AML regime[53].

29. CCA section 400.9 provides that it is an offence to deal with money or other property if "it is reasonable to suspect that the money or property is proceeds of crime". It is not clear whether section 400.9 requires proof that the property was in fact the proceeds of crime but section 400.9(2), being a deeming provision, permits the offence in section 400.9(1) and (1A) to be made out without the identification of any particular criminal act or offence[54]. A South Australian case concerning predecessor provisions suggests that it is not necessary to prove that the property was the proceeds of crime[55]. The Court held that the prosecution was not required to prove beyond reasonable doubt that the property was the proceeds of crime. To do so would be to require too heavy a burden be placed upon the prosecution[56].

30. CCA section 400.13 makes it clear that, in order to prove that property is the proceeds of crime, it is not necessary to establish that a particular offence was committed, or that a particular person committed an offence, in relation to the property. It should be noted that whilst CCA section 400.13 does not require that a 'particular offence' be made out, the prosecution must still establish evidence of a

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52 The position in other jurisdictions is summarised very briefly in this paper in view of the constraints of its intended length.

53 Recently, though, in *Milne v The Queen* [2014] HCA 4 at [37], the High Court of Australia held, regarding "instrument of crime", that a dealing with property which was no more than a necessary condition of the commission of a subsequent offence, or the taking advantage of circumstances arising after and as a result of the dealing, did not amount to the "use" of the property in, or to facilitate, the commission of that offence.

54 *Director of Public Prosecutions (Cth) v Ngo* [2012] NSWSC 1521 at [38]-[43].

55 *R v Zotti* [2002] SASC 164 concerned section 82 of the Proceeds of Crime Act 1987 (Cth), which criminalised various forms of dealing with property "that may reasonably be suspected of being proceeds of crime".

56 *Ibid*. at [33].

specific intention in the accused to commit an indictable offence with regard to sub-sections (1)(b)(ii) of 400.3 through 400.8[57].

31. Canada: For the main money laundering offence in Canada, it would not appear to be necessary to prove that the property in question was obtained from crime. Section 462.31 of the Criminal Code (R.S.C. 1985, c. C-46) (a federal statute) provides for an offence where the accused deals[58] with property, with intent to conceal or convert that property, "knowing or believing" that that property was obtained or derived as a result of a designated offence. It is not part of the *actus reus* of this offence that the property in question be obtained from crime[59]. It is the accused's knowledge or belief that the property was obtained by crime that is the element of the offence. The Crown does not need to show that the accused's belief was correct[60].

32. New Zealand: In New Zealand, the legislation makes it clear that it must be proved that the property in question was the proceeds of a serious offence. Sections 243(2) and (3) of the Crimes Act 1961 expressly provide that the money laundering offences are in respect of property that "is the proceeds of a serious offence". The prosecution is not required to prove a specific predicate offence[61].

33. The UK[62]: It is necessary to prove that the property in question was "criminal property". The provisions considered in *Montila* were later superseded by those in the Proceeds of Crime Act 2002 ("POCA"). The main money laundering offences, contained in POCA sections 327-329, criminalise a defendant's dealings with "criminal property". This is defined in POCA section 340[63]. Proof of a specific predicate offence is not required. However, where it is possible to give the accused notice of the type of criminal activity that produced the illegal proceeds, fairness demands that this information should be supplied[64]. Criminal property should have that quality at the time of the alleged offence: the money laundering offences are not aimed at the use of clean money for the purpose of a criminal offence[65].

34. Singapore: In Singapore, the wording of the main offence creating provisions is equivocal. For one of the offences, there is authority to say that the prosecution must prove that the property in question is in fact the benefits of crime. Section 44 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits)

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57 *Chen v Director of Public Prosecutions (Cth)* [2011] NSWCCA 205 at [96].

58 *R v Daoust* [2004] 1 SCR 217 at [36]-[37], [48]-[53]; *R v Bailey* 2014 ABPC 103 (CanLII) (Provincial Court of Alberta) at [459]-[463].

59 *R v Drakes* [2006] CanLII 730 (Ontario Superior Court of Justice) at [224]; *USA v Savein* [2014] BCCA 290 (CanLII) (British Columbia Court of Appeal) at [15].

60 *R v Tejani* [1999] OJ No 3182 (Ontario Court of Appeal) at [18]-[20].

61 *R v Allison* [2006] 1 NZLR 721 at [28] (dealing with very similar predecessor provisions).

62 For a fuller overview the UK position, see Smith & Hogan's Criminal Law (14th Ed., 2015) at pp. 1130-1141.

63 POCA s.340 provides: "Property is criminal property if – (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit."

64 *DPP of Mauritius v Bholah* [2011] UKPC 44 at [34].

65 *R v GH* [2015] UKSC 24, citing at [37] the observation at [84] of *George Li*.

Act ("the CDSA") states, inter alia, that it is an offence to enter into an arrangement, knowing or having reasonable grounds to believe that by the arrangement, the retention or control of another person's benefits of criminal conduct is facilitated.[66] The same is likely to be true for the other offences. Sections 47(2) and (3) of the CDSA criminalises various forms of dealing where the accused knows or has reasonable grounds to believe that property represents another person's benefits from criminal conduct.

D.5 Still controversial?

35. In *HKSAR v Yeung Ka Sing, Carson*[67], one of the grounds of appeal against convictions for money laundering contrary to OSCO section 25(1) was that it was necessary for the prosecution to prove the predicate offence and the prosecution had not done so. 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 *HKSAR v Pang Hung Fai*[68] (discussed further below), the point was wrongly decided.

36. Leave to appeal was granted by the Appeal Committee on the basis of the following question of law, namely:

> "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 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?"[69]

E. The mens rea of money laundering

37. There are two limbs to the *mens rea* of the OSCO section 25(1) 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"[70]. Further, the FATF, in its "Third Mutual Evaluation Report" of Hong

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66 In *Ang Jeanette v Public Prosecutor* [2011] SGHC 100 at [25]-[45], the High Court held that the prosecution must prove that the property is actually the benefits of crime. It was stated at [46] that where moneys were not the benefits of criminal conduct, a prosecution would have little effect on combating transnational organised crime. *Oei Hengky Wiryo* was considered but, at [49], the Court held that it should not be followed owing to the differences in wording between the Hong Kong and Singaporean provisions.

67 CACC 101/2014, unreported, Judgment dated 13 May 2015 at [22] ("*Carson Yeung*").

68 (2014) 17 HKCFAR 778.

69 *HKSAR v Yeung Ka Sing, Carson*, FAMC 28 & 29/2015, unrep., 14 August 2015.

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

Kong (11 July 2008), has observed[71] that the second limb of the *mens rea* threshold for section 25(1) "posits a relatively low threshold of criminal negligence".

E.1 HKSAR v Pang Hung Fai[72]

38. In *Pang Hung Fai*, the Court 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*[73], 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 believe."[74] The Court held that this formulation was consistent with the reference of Lord Woolf in *A-G of Hong Kong v Lee Kwong Kut*[75] to an actual rather than probable state of affairs and to Chan PJ's reference 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 (see above).[76]

39. 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.

40. 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 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[77].

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71 At para.117.

72 (2014) 17 HKCFAR 778.

73 [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.

74 (2014) 17 HKCFAR 778 per Spigelman NPJ at [52], [57].

75 [1993] AC 951 at p.964D-E.

76 (2014) 17 HKCFAR 778 at [70]-[75].

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

In so holding, the Court rejected the Court of Appeal's earlier *mens rea* test based on the *Shing Siu Ming* line of authority[78].

E.2 An ongoing issue posed by Pang Hung Fai?

41. In *Carson Yeung*, the Court's decision in *Pang Hung Fai* is sought to be relied upon in support of the argument that *Oei Hengky Wiryo* was wrongly decided. No argument was directed to the Court of Appeal in *Carson Yeung* on this issue as it was conceded that court was bound by *Oei Hengky Wiryo*. 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[79].

42. It appears, however, from the notice of motion for leave to appeal to the CFA in *Carson Yeung* that this argument is based on Spigelman NPJ's comment that a jury may be assisted by another formulation of the *Seng Yuet Fong* 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'."[80] 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 or moral obloquy as actual knowledge"[81] 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.

43. It is noteworthy that the prosecution also sought, and has been granted, leave to appeal to the CFA to seek clarification of the following point of law, namely:

> "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?"

44. As indicated above, leave to appeal on the question of whether *Oei Hengky Wiryo* was wrongly decided has been granted. In addition, leave to appeal was granted by the Appeal Committee on the basis of the following question of law, namely:

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78 *Ibid*. at [44]-[48], [52]-[55].
79 *Ibid*. at [17].
80 *Ibid*. at [55]-[56].
81 *Ibid*. at [77].

"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?"

E.3 Mens rea for money laundering in other jurisdictions

45. Australia: For most of the Australian money laundering offences in Division 400 of the CCA, there are multiple standards of *mens rea* that are required to be proved. These range from that of intention, recklessness and negligence, with each different mental standard having a different maximum sentence. The most serious offence is committed where the money or property is, and the person believes it to be, the proceeds of crime, or intends that it will be become an instrument of crime. The mid-level offence is committed in circumstances where the money or property is the proceeds of crime or there is a risk that it will become an instrument of crime and the person is reckless as to those facts. The lowest level offence is committed where the person is negligent as to the facts. The mental element of the offence of money laundering must be shown to exist at the time of the "dealing" alleged. Division 5 of the CCA defines the different "fault elements", including knowledge, intention, recklessness and negligence. Section 400.9 also contains a money laundering offence for persons who possess or deal with property that is reasonably suspected of being proceeds of crime[82]. For an offence under that section, there is no fault element and hence no requirement to prove any knowledge or belief on the part of the accused that the money was the proceeds of crime[83].

46. Canada: In Canada, the *mens rea* of the offence of laundering proceeds of crime has two elements: (1) intent to conceal or convert property or proceeds of property, and (2) knowledge or belief that the property or proceeds were derived from a relevant offence.[84] The term "convert", in the first element, does not require intent to conceal or disguise the illicit origin of the property[85]. Regarding the second *mens rea* element, the Crown does not need to show that the accused's belief was correct[86]. Additionally, wilful blindness can be a substitute for actual knowledge[87].

47. New Zealand: The *mens rea* of the offences of engaging in a money laundering transaction in sections 243(2) and (3) of the Crimes Act 1961 is "knowing

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82 For the test regarding reasonable grounds to suspect, see *George v Rockett* (1990) 170 CLR 104 at 112-113: as stated in that case (at p.112), the test "requires the existence of facts which are sufficient to induce that state of mind in a reasonable person".

83 *Shi v R* [2014] NSWCCA 276 at [42].

84 Section 462.31(1) of the Criminal Code (C-46); *R v Daoust* [2004] 1 SCR 217 at [56].

85 *R v Daoust* [2004] 1 SCR 217 at [63] affirming the decision of *R v Tejani* [1999] OJ No 3182 (Ontario Court of Appeal) at [28]-[29].

86 *R v Tejani* (*supra*) at [18]-[20]; *USA v Dynar* [1997] 2 SCR 462 at [69]-[70].

87 *R v Tejani* (*supra*) at [38]-[41].

or believing that all or part of the property is the proceeds of a serious offence, or being reckless as to whether or not the property is the proceeds of a serious offence". As to recklessness, the question is whether the defendant "was reckless as to whether the property was the proceeds of a serious offence. This is when the defendant can see at least some of the possible consequences, is willing to take the risk, and nonetheless deliberately takes that risk. Putting it another way: A man is reckless when he is consciously aware that certain bad consequences or risks might happen if he goes ahead with his proposed actions, but despite this deliberately decides to carry on regardless of the risks involved."[88] However, under section 243(4), a person only engages in a money laundering transaction if he deals (or assists another to deal) with property for the purpose of concealing it. The Court of Appeal has held that concealment means more than simply conversion of the property[89] and it is suggested this has reduced the scope for a person to be found guilty of recklessly laundering money[90]. Where an activity is undertaken with the intention to conceal criminal proceeds, however, that will constitute money laundering and the efficacy of the chosen concealment method is immaterial[91].

48. The UK: The *mens rea* of the main money laundering offences is "very wide"[92] and includes knowledge or suspicion that the property is the proceeds of criminal conduct: see POCA sections 327-329 and 340. There is no requirement to prove dishonesty, nor that the accused was aware of the precise criminality which created the property. Suspicion is an ordinary English word. The accused had to think that there was a possibility, which was more than fanciful, that the relevant facts existed. A vague feeling of unease would not suffice. The statute does not require that the suspicion has to be clear or firmly grounded and targeted on specific facts, or based upon reasonable grounds.[93]

49. Singapore: The mental element required in CDSA, sections 43, 44, 46 and 47, is that of "knowing or having reasonable grounds to believe"[94].

F. Framing a charge of money laundering

50. The definitions of "dealing" and "property" in OSCO are wide[95] and, since the aim of money laundering is to conceal and disguise the proceeds of crime, there is potentially a myriad of ways in which a person can relevantly deal with property

88 *Karaka v R* [2013] NZCA 125 at [16]-[21].

89 *R v Rolston* [2008] NZCA 431 at [105], *Marsh v R* [2010] NZCA 130 at [66]-[70].

90 Reckless launderers: an arrested development, D. Johnstone and M. Connell [2010] NZLJ 305.

91 *Wong v R* [2008] NZSC 5 at [6]-[8].

92 Smith & Hogan (14th Ed.) at p.1136.

93 *R v Da Silva* [2006] EWCA Crim 1654 at [16]-[19].

94 As to the latter state of mind, see *Ang Jeanette v Public Prosecutor* (*supra*) at [70]: it involves a "lesser degree of conviction than certainty but a higher one than speculation".

95 As to "dealing", see FN[28] 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".

contrary to OSCO section 25(1). Moreover, where in practice a relevant part of the money laundering process involves a series of payments of the proceeds of crime into a bank account (at the placement or layering stage), it may be unwieldy and oppressive to charge each such payment into the bank account as a separate offence. Nevertheless, the framing of a charge of money laundering, because of the variety of ways in which property may be dealt with, may raise the question as to whether the count on an indictment is bad as being in breach of the rule against duplicity.

51. 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[96]. 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, a number of 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.

52. The first exception, applicable to all offences, is where the different acts, viewed realistically, form only one transaction[97]. The second and third exceptions apply to theft and fraud offences. The second exception is referred to as the "general deficiency" exception[98] 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[99] 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.

53. 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.

F.1 HKSAR v Salim Majed & Anor[100]

54. In *Salim Majed*, the two appellants faced charges under section OSCO 25(1) arising from their having opened bank accounts for others into which victims of an international e-mail and mail fraud deposited monies. They also made certain withdrawals of monies from the accounts. It was the prosecution case that the appellants were allowing others to use the accounts with their permission, such that

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96 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."

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

98 Archbold Hong Kong (2015 Ed.), para.1-135; *R v Tomlin* [1954] 2 QB 274.

99 Archbold Hong Kong (2015 Ed.), para.1-133-134; *Barton v DPP* [2001] EWHC (Admin) 223.

100 [2014] 6 HKC 678 ("*Salim Majed*").

they dealt with the proceeds when the accounts were used to receive the monies. The judge found that each of the withdrawals constituted a dealing with property. He also found that the conduct of the appellants amounted to aiding and abetting another person to deal with the monies in the accounts. On appeal, the Court of Appeal quashed the appellants' convictions because they had not been charged with any withdrawals of monies and the judge's theory of accessory liability was never raised prior to the delivery of the reasons for verdict so they never had an opportunity to address the judge on this basis of liability[101].

55. 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 accounts[102]. The duplicity ground of appeal raised the question of whether on the facts of the case the charges could, nevertheless, be said not to be duplicitous.

56. After referring to the three exceptions to the rule against duplicity[103], the Court of Appeal noted the appellants' contention that section 25(1) is not a continuing offence but rather a transactional one with the *actus reus* being constituted by a dealing in property so that, where more than one dealing with property was covered by the charge with each dealing taking place on a separate occasion, the charge must be bad for duplicity. The prosecution did not seek to argue that the section 25(1) offence is a continuing offence but contended that the one transaction exception described in *DPP v Merriman* applied to the appellants.

57. The Court of Appeal analysed the criminal conduct alleged against the appellants as being the aiding and abetting of the principal offenders to deal with property (by opening the bank accounts for others to use) whilst possessed of the relevant *mens rea* in respect of that property. There was no evidence that the appellants knew what kind of dealings would take place in relation to the accounts or the source of the monies that made up those dealings or how or in what circumstances those monies had been obtained. The Court of Appeal added that the prosecution's case was presented as if the charge was a conspiracy to money launder but that it was not and that the charges were each substantive offences. Here, the actual form of dealing was the receipt of monies and no act by the unknown principal offenders in relation to the accounts was relied upon.[104]

58. Accordingly, 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

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101 [2014] 6 HKC 678 at [86]-[88], [110]-[113].
102 *Ibid*. at [7]-[10].
103 *Ibid*. at [127]-[138].
104 *Ibid*. at [144]-[145].

exception to the duplicity rule in *DPP v Merriman* did not apply. Further, the Court of Appeal 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.[105]

59. The consequence of this decision has considerable significance for the prosecution of money laundering offences in Hong Kong for the reasons identified above. The prosecution applied for leave to appeal and 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."[106]

F.2 Carson Yeung[107]

60. The issue of duplicity also arose in *Carson Yeung*, but with a different outcome. In that case, it had not been argued at trial that the money laundering charges were duplicitous. Instead, after the Court of Appeal's judgment in *Salim Majed* was handed down, an amended ground of appeal relying on that judgment was added to the then pending appeal[108].

61. In *Carson Yeung*, the charges alleged dealing by the appellant in a total sum of over HK$721 million into each of five bank accounts over a period of about six years between 2001 and 2007. There were multiple deposits (963 in total) by cash, cheques or transfer into the five 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.[109] 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

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105 *Ibid*. at [147]-[149].
106 *HKSAR v Salim Majed*, FAMC 71/2015, unrep., 10 February 2015.
107 CACC 101/2014, unrep., 13 May 2015.
108 *Ibid*. at [14], [36].
109 *Ibid*. at [4], [37].

a common transaction, nor did they fall within the general deficiency or continuous conduct exceptions.[110]

62. However, notwithstanding the duplicity, the Court of Appeal considered that there was no prejudice to the appellant such that his trial was unfair. The prosecution had provided the defence with comprehensive reports detailing the transactions in the bank accounts and in related securities accounts with an analysis of identifiable transactions connected with particular deposits. Expert evidence for the defence sought to support the defence that there was a legitimate explanation for the provenance of the monies deposited in the accounts. The 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."[111]

63. Leave to appeal to the CFA 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*.

F.3 Single charges of multiple money laundering acts in other jurisdictions

64. Australia, New Zealand and the UK, have legislation permitting a single charge to cover multiple acts of money laundering. Thus, in Australia, section 400.12 of the CCA allows several contraventions of the AML scheme to be 'rolled-up' into a single charge. Section 400.12(1) states: "A single charge of an offence against a provision of this Division may be about 2 or more instances of the defendant engaging in conduct (at the same time or different times) that constitutes an offence against a provision of this Division". Moreover, the explanatory memorandum that accompanied the bill inserting Division 10 in the CCA referred to the purpose of section 400.12 as follows: "for procedural convenience, this allows for the combination of charges in relation to the proposed offences. It also prevents the structuring of dealings with a view to manipulating the value based penalty scheme. The provision achieves this by allowing the total value to be taken into account when there are multiple dealings"[112]. A count charging the accused of money laundering (contrary to the Confiscation Act 1997), relying on a large number of ongoing transactions involving the accounts and funds of the accused, was held not to be bad for duplicity[113].

65. In New Zealand, the Criminal Procedure Act 2011[114] at section 17(1) states that a charge must relate to a single offence. However, a charge may be "representative",

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110 *Ibid*. at [58]-[59].

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

112 This provision may also be applied to a count of conspiracy to money launder charge: see *HAT & Ors v The Queen* [2011] VSCA 427 at [22].

113 *R v Ferguson and Anor* [2005] VSC 527 at [25]-[26].

114 The Criminal Procedure Act 2011, which commenced on 1 July 2013, was introduced to simplify New Zealand criminal procedure. The Act repeals most of the Summary Proceedings Act 1957 and the procedure

as stated in sections 17(3), 20(1) and (2), in effect allowing for 'rolled-up' charges. A charge may be representative if multiple offences of the same type are alleged to have been committed in similar circumstances and: the offences are committed over a period of time, and the nature and circumstances of the offences make it unreasonable for the complainant to particularise dates or other details (section 20(1)); or it is likely that the same plea would be entered by the defendant to all offences if charged separately, and it would be unduly difficult for them to be managed separately due to the number of offences (section 20(2)).

66. Representative charges must include particulars of the offences of which the charge is representative (for example, particulars of values, amounts or quantities) and the dates on or between which the offending is alleged to have occurred (section 17(6)). The Court may, in the interests of justice, order that a representative charge be amended or divided into two or more charges, or that two or more charges be amalgamated into a representative charge (section 21(1)). In *R v Qiu*[115], the Supreme Court held at paragraph 8 that representative charges are appropriate in two situations: "Section 329(b) of the Crimes Act 1961 provides that every count shall in general apply on to a single transaction. However, it is not uncommon for a pattern of offending to be charged by one or more representative counts, particularly when criminal acts of a similar nature are alleged to have happened frequently and, for understandable reasons, a complainant is unable to distinguish between them in terms of their dates or details. Further, it is appropriate and not unusual to charge as a single count a continuing course of conduct which it would be artificial to characterise as separate offences. But it is another thing to charge as a single count repetitive acts which can be distinguished from each other in a meaningful way."

67. In the UK, the new Rule 14.2(2) of the Criminal Procedure Rules[116], provides that "[m]ore than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission". Additionally, as noted in the explanatory note to the 2007 rules, in "some circumstances the new rules allow more than one incident of the same offence to be charged in a single paragraph of an indictment, which was not explicitly permitted" by the former rules. "The new rule clearly encompasses the 'exceptions' that had developed under the common law and encompasses the forms of count previously held to be permissible under the single activity or single transaction principles, but the use of the expression 'course of conduct' is likely to open the door far wider"[117]. In *R v Middleton*[118], the court, applying Rule 14.2(2), allowed money laundering charges to be 'rolled-up' into a single charge. Wilkes J there noted at [40] that the Criminal Procedure Rules Committee, in formulating Rule 14.2(2) and in giving guidance in the *Practice*

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sections of the Crimes Act 1961 and replaces them. Section 17(1), in effect, replaced section 329 of the Crimes Act 1961.

115 [2008] 1 NZLR 1.

116 Introduced by the Criminal Procedure (Amendment) Rules 2007 (S.I. 2007 No.699).

117 Archbold (2015 Ed.) at §1-222.

118 [2008] EWCA Crim 233.

Direction (Criminal Proceedings: Further Directions)[119], were doing no more than codifying the existing law as stated by Lord Diplock in *DPP v Merriman* [1973] AC 584.

68. In Canada, section 581(1) of the Criminal Code states that: "Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified". This rule is applied flexibly[120]. Hence, it has been held that money laundering charges over the course of a 13 year period did not offend the single transaction rule as a "transaction" is a flexible concept[121].

69. In Singapore, section 132 of the Criminal Procedure Code ("CPC") requires that every distinct offence must have a separate charge. A charge alleging that the accused committed two or more distinct offences is duplicitous and contravenes section 132 of the CPC. However, where each of these offences could have been proceeded with at one trial, the duplicity is merely an irregularity which can be cured by section 423 of the CPC, provided that the accused was not prejudiced in his defence and there was no failure of justice occasioned by the irregularity[122].

F.4 A pending issue for the CFA

70. The CFA has yet to address the issue of duplicity, either in general or specifically in relation to money laundering. Clearly, the risk of framing a duplicitous charge of money laundering is very real. The processes of placement and layering in the money laundering model are likely to involve multiple activities, such as depositing cash or cheques, transfers of funds by wire or other electronic means. Since these 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: where the proceeds are derived from drug trafficking, the relevant offence will arise under DTROP rather than OSCO. It is, of course, possible for prosecutors to side-step the risk of duplicity by charging a conspiracy (cf. *Salim Majed*) but this is not an attractive proposition and, in some cases, may simply not be appropriate.

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119 [2007] 1 WLR 1790.

120 *Papalia v The Queen* [1979] 2 SCR 256 at pp.268-269.

121 *R v Kanagarajah* [2012] ONCJ 636 (CanLII), Ontario Court of Justice, per De Filippis J at [114]-[121], upheld by the Ontario Court of Appeal: see [2014] ONCA 513 at [13]-[14].

122 *Lim Chuan Huat & Anor v PP* [2002] 1 SLR 105; *See Yew Poo v PP* (1949) 15 MLJ 131; *Ramachandran v PP* [1972] 2 MLJ 183; and *Chuan Hoe Engineering v PP* [1996] 3 SLR 544.

G. Reflections on the comparative perspective

71. The questions of law for which leave to appeal has been granted in *Salim Majed* and *Carson Yeung* raise live issues and the CFA will hear both appeals together in late May 2016. The contents of this paper are naturally, therefore, without prejudice to the arguments that may be advanced in those cases.

72. Nevertheless, the particular issues with which the CFA has previously been concerned in relation to money laundering raise interesting questions as to the scope of the AML regime, which may arise also in other jurisdictions. To what extent is there a possibility, as was argued in *Pang Hung Fai*, that the morally blameless could be found guilty of money laundering? What, for example, of a known bank robber who handed his friend HK$1 million cash saying (as was in fact the case) he had won it in a casino in Macao? Have *mens rea* standards less than knowledge exposed innocent handlers of funds to convictions for money laundering? Are charges alleging multiple-dealing instances of money laundering, if not bad for duplicity, onerous and unfair for defendants?

73. There are also broader, more general, issues to consider. The impetus for domestic AML legislation has been the relevant series of AML international conventions. Save in jurisdictions where such conventions give rise to directly enforceable rights and duties, their implementation depends on domestic legislation. In the circumstances, it is legitimate to ask whether states have any incentive to take a conservative line in enacting AML legislation. There certainly seems to be little evidence of legislative caution in enacting AML legislation[123]. If that be so, one might ask if there has been a tendency towards robust rather than conservative domestication of the convention provisions. This is all the more so when one has regard to the reporting structure in relation to AML regimes which takes the form of mutual enforcement reports by FATF. These reports assess the extent to which individual countries have complied with convention obligations and FATF recommendations. Success is measured in terms of the numbers of prosecutions and convictions. This may be contrasted with the very different perspective of observations by the UN Human Rights Committee on country reports concerning compliance with human rights conventions assessing the extent to which the rights of individuals are protected.

74. Unlike more traditional forms of legislation directed at criminal activity, AML legislation, while at the same time serving the goal of limiting and disrupting the activities of criminal individuals and organisations, is potentially a source of positive revenue for states. It has recently been reported that, since OSCO's enactment, Hong Kong has seized HK$2.7 billion of laundered funds and that a further HK$8.4 billion

[123] Smith & Hogan (*supra*) refers at §27.4 (p.1128) to the "series of complex and draconian statutes over the last two decades" passed by successive governments to combat money laundering.

of such suspected funds have been restrained[124]. Therefore, in addition to the incentive to satisfy FATF recommendations, states have a financial incentive to enact broad AML legislation under which restraint and confiscation orders may be made.

75. It is telling that, in Hong Kong, there have been no prosecutions of legal persons, as opposed to individuals, for money laundering. This is notwithstanding the very onerous reporting obligations placed on financial institutions. In view of the ambit of the AML offence and the defence under OSCO section 25A, there may be a tendency for institutions to err on the side of caution in over-reporting activity as suspicious, whether or not it is genuinely money laundering. Certainly, there would not appear to be any disincentive to over-report.

76. Unlike the human rights context, there is likely to be little sympathy for those who may be subject to prosecution under AML regimes. Moreover, there are no obvious rights groups to support individuals who are the targets of such prosecutions. Their financial circumstances may possibly disqualify them from legal aid funding for legal representation. Defendants may therefore have to be self-reliant in challenging legislation or resisting any overzealousness in prosecutorial policies.

77. In the circumstances, there are clear policy and political reasons why AML legislation may tend towards robustness. In this context, the judiciary's role as the guardian of individual rights becomes all the more important. The issue of duplicity and encouragement towards prosecutorial restraint[125] in the way in which money laundering charges are preferred may be seen an example of this. Indeed, the UK Supreme Court has recently commented that courts should be willing to use their powers to discourage inappropriate use of the provisions of POCA to prosecute conduct which is sufficiently covered by substantive offences[126].

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[124] "City grabs back HK$2.7b from gangsters, launderers and traffickers", South China Morning Post, 26 July 2015. See also, the statistics published by the Joint Financial Intelligence Unit of the HKSAR Government at http://www.jfiu.gov.hk/en/statistics.html.

[125] See, e.g., *R (on the application of Wilkinson) v DPP* [2006] EWHC 3012 (Admin) at [7].

[126] *R v GH* (*supra*) at [49].