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Top Hong Kong court rejects "thought crime" defence in money laundering appeal

In a judgment dealing with the conviction of the former Birmingham City Football Club chairman Carson Yeung, Hong Kong's Court of Final Appeal reaffirmed that, on a charge of dealing with proceeds of crime contrary to section 25(1) Organised and Serious Crimes Ordinance (OSCO), prosecutors have no need to prove that property handled by a defendant is the proceeds of crime, only that the defendant had reasonable grounds to believe it was. The ruling also clarified the mental element of the offence, rejecting the suggestion that an offence can be committed by negligently failing to realise that property was the proceeds of crime.

Carson Yeung appealed against his conviction in the District Court on five counts of dealing with property believed to be proceeds of an indictable offence for having laundered HKD721 million in Hong Kong. Yeung was originally sentenced to six years in jail.

Section 25(1) OSCO says that *"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."*

The question before the Court was whether it was 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.

The District Court had heard that various parties, including a Macau casino, had made more than 400 deposits into accounts held by Yeung and his father. The prosecution did not seek to identify the offences from which the monies were said to have derived. Instead, the prosecution case was that Yeung must have had reasonable grounds to believe that the monies in question were derived from proceeds of crime.

Yeung gave evidence that the monies in the accounts in his name had come from legitimate sources including his casino winnings and share dealings. The trial judge rejected Yeung's evidence and said that Yeung had used his father's name to open accounts and had used these accounts to conceal the source of the funds.

Key issues

- Prosecutors do not need to prove that property handled by a defendant is the proceeds of crime to establish an offence under OSCO.
- All that is required is that the defendant had reasonable grounds to believe that the property did represent the proceeds of crime, and that the grounds were reasonable when viewed objectively.
- The CFA clarified the test for the mental element of the offence.
- The CFA also gave leave to appeal on a separate case as to whether a specific act needs to be proven to establish the offence of misconduct in public office.

Proof of proceeds of crime

Counsel for Yeung, Clare Montgomery QC, tried to persuade the CFA that an earlier CFA decision in 2007[1] had been wrongly decided and that the legislation ought properly to be understood as requiring it to be shown that the property dealt with by the accused *in fact* represented some person's proceeds of crime.

Ms Montgomery pointed to UK legislation including the Criminal Justice Act 2008 where the definition of *"criminal property"* requires proof of the underlying offence and that the property should be shown to be the actual proceeds of criminal conduct. She argued this was the intention of the Hong Kong legislature when formulating section 25 OSCO.

The CFA held that when OSCO was originally enacted in 1994, it did require such proof but that this requirement had been abolished by amendments made to OSCO the following year.

In the CFA's words, the 1995 amendments had *"radically changed and expanded the basis of liability, abandoning the original requirement of proving the defendant's involvement in an arrangement concerning a person's actual proceeds of criminal conduct."*

The Hong Kong approach can therefore be distinguished from the current approach in the UK, which requires proof that the laundered money in fact arose from indictable sources.

"Thought Crime"?

Yeung also argued in his defence that accepting the prosecution case meant a defendant could be convicted for a *"thought crime".* The CFA rejected this assertion saying: *"A person who is convicted of dealing with property in one or more of the ways in OSCO s 2 in circumstances where he had reasonable grounds to believe that it represented the proceeds of an indictable offence can hardly be said to have been convicted merely on the basis of his thoughts."*

The CFA observed that if a defendant does not know, but has reasonable grounds to believe, that funds are tainted, the defendant can claim immunity under section 25A OSCO by disclosing his suspicion to an authorised officer with legal powers to investigate the source of the funds.

The judges said there were good policy reasons for their findings: *"the predicate offence is likely to have taken place in one or more foreign jurisdictions, not susceptible to proof in Hong Kong, and the proceeds of such crimes are likely to have passed through various layers and transformations aimed at concealing their provenance."*

Critics point out, however, that the test in Hong Kong means a person can be convicted, even if no underlying crime is ever cited by prosecutors nor proven to the satisfaction of the court.

The *mens rea* test clarified

Another important aspect of the *Yeung* case is that it clarifies a confusion arising from an earlier CFA decision in *HKSAR v Pang Hung Fai*[2].

In *Pang*, the CFA had endorsed the test for the mental element of the offence under section 25(1) taken from a previous case[3] that *"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."*

However, the CFA in *Pang* had gone further, saying *"in s.25(1), the word 'believe' is used in the sense of 'know'. The two mental elements in the subsection should be understood as if they read: 'knew or ought to have known'."*

The CFA in *Yeung* noted this alternative formulation appeared "*not to sit comfortably with the rest of the Pang Hung Fai judgment*" and that *"the phrase 'ought to have known' is generally taken to connote negligence."*

Without expressly overruling itself, the CFA said the connotation of *"negligence"* was unintended, and that *"the phrase 'knew or ought to have known' should not be invested with any greater significance."*

"Sweetener" enough?

On 12 July, the day following the Carson Yeung ruling, the CFA tackled another high profile financial crime

[1] *Oei Kengky Wiryo v HKSAR (No 2)* [2007] HKCFAR 98

[2] [2014] 17 HKCFAR 778

[3] *Seng Yuet Fong v HKSAR* [1999] 2 HKC 888

issue, when it gave leave to appeal to the former chief secretary of Hong Kong, Rafael Hui, and the former chairman of Hong Kong property developer Sun Hung Kai Properties (SHKP), Thomas Kwok, against their 2014 convictions for misconduct in public office. The Court granted the appeal to determine *"whether in the case of a public officer, being or remaining favourably disposed to another person on account of pre-office payments, is sufficient to constitute the conduct element of the offence of misconduct in public office."*

Central to the issue is the validity of the so-called *"sweetener"* doctrine, which says it is not necessary for prosecutors to prove a specific *quid pro quo* to establish misconduct in public office offences.

Prosecutors successfully argued that Hui had received USD8.5 million from Kwok to help ensure that the government maintained a *"favourable disposition"* towards SHKP. The Court of Appeal dismissed an appeal against the convictions in February 2016, in which the appellants argued that prosecutors had not been able to point to any specific act that Hui had done to favour SHKP.

The hearing will take place in May 2017.

Financial crime trends

Taken together, these two decisions show the continuing trend in Hong Kong to clarify the prosecutorial burden in cases involving financial crimes such as money laundering and bribery. In some ways, the decisions may assist the prosecution in proving charges involving complex patterns of transactions or conduct.

For financial institutions, which play a critical role in identifying and reporting suspicious activity, the *Yeung* case serves as a reminder of the importance of filing timely and complete Suspicious Transaction Reports to discharge their obligations and claim immunity under Hong Kong's anti-money laundering legislation and regulations.

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