

Client Alert

July 2016

Hong Kong Court of Final Appeal Confirms Money Laundering Offence Does Not Require Actual Knowledge Nor Does the Property Need to be Actual Proceeds of Crime

There are increasingly aggressive efforts by regulators and now by the judiciary in Hong Kong in combating money laundering. The recent judgment of the Hong Kong Court of Final Appeal (“CFA”) in *HKSAR v Yeung Ka Sing Carson*¹ (“**Carson Yeung Appeal**”) serves as a timely reminder of the potential substantial risks in failed AML efforts. The CFA has confirmed, among other things, that on a charge of dealing with proceeds of crime contrary to s 25 (1) of the Organized and Serious Crimes Ordinance (“OSCO”), the prosecution only needs to show that when an accused dealt with certain property, he or she knew, or had reasonable grounds to believe that such property represented the proceeds of an indictable offence. The property does not need to be actual proceeds of crime. It is said by the CFA that there are strong policy reasons favouring this conclusion. This alert will discuss the *Carson Yeung Appeal* and what clients can do when faced with suspicious transactions.

Implications for clients

The *Carson Yeung Appeal* has important implications for clients who are handling and transferring funds. The prosecution will not need to prove that the property being dealt with was in fact the proceeds of an indictable offence (i.e. tainted assets). As the mental element of the offence is either knowing or having reasonable grounds of belief, actual knowledge is not required. If there are circumstances which may impose a suspicion or reasonable belief (that the relevant property is tainted), this means caution has to be exercised before dealing with it.

The CFA judgment

By way of background, in 2011, the former Birmingham City Football Club chairman Carson Yeung (“**Yeung**”) was convicted in the District Court on five counts of dealing with property believed to be proceeds of an indictable offence for laundering more than HKD700 million in Hong Kong. The District Court heard various parties including securities firms, which made more than 900 deposits into the accounts in question between 2001 and 2007. The court ruled that Yeung dealt with those deposits and found that he knew or had reasonable grounds to believe that those funds were the proceeds of an indictable offence. On 11 July 2016, the CFA dismissed Yeung’s appeal. The following are some of the key points in the CFA decision.

1. The CFA confirmed that the legislation no longer requires proof that the property dealt under section 25(1) consists of the actual proceeds of an

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¹ FACC No.5 and 6 of 2015

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- indictable offence. It is only necessary for the prosecution to establish that the accused dealt with certain property, in circumstances where he or she knew, or had reasonable grounds to believe that such property represented the proceeds of an indictable offence.
2. The mental element of the offence is either knowing or having reasonable grounds to believe that property being dealt with represents any person's proceeds of an indictable offence. If an accused is proved to have known that the property represents such proceeds, the offence is established.
3. If the defendant does not have actual knowledge, it is sufficient for the prosecution to establish that, given the circumstances of which he was aware, surrounding his dealing with the relevant property, the defendant had reasonable grounds to believe that it represented the proceeds of someone's indictable offence, whether committed in Hong Kong or abroad.
4. The harshness of the approach can be mitigated by disclosure to the authorities of suspicious transactions which has always been a central feature of our legislative regime.
5. The Court endorsed its earlier decision in *HKSAR v Pang Hung Fai* (2014) that the prosecution needs to prove that the accused "*had grounds for believing, and the grounds must be reasonable, that anyone looking at those grounds objectively would so believe.*" This involves an examination of the accused's state of mind in two aspects. First is his knowledge or appreciation of the circumstances of the proven reasonable ground. The second aspect refers to a consideration of his personal beliefs, perception and prejudices, which may exclude a culpable state of mind.

Actions to consider

The legislation gives "dealing" a wide definition to include receiving or acquiring, concealing or disguising, disposing of or converting, bringing into or removing from Hong Kong that property; or using it as security to raise funds. Clients should be highly vigilant as to the source or circumstances of any transfer or deposit of funds. The CFA decision mentions that if a person does not know but has reasonable grounds to believe that funds are tainted, the law gives him the means to immunise himself from liability by disclosing his suspicion to the authorities to facilitate further investigation. We recommend the following steps:

1. Know your client, with an on-going monitoring of the client's risk profile and understand the source of funds.
2. Establish effective mechanisms for identifying and reporting suspicious transactions.
3. Maintain an effective internal audit system.
4. Promptly seek legal advice when faced with any suspicious transactions with a view to making disclosure to the authorities.
5. Conduct regular training for employees on anti-money laundering in order to enhance their awareness.
6. Be aware of any updated information published by Financial Action Task Force on money laundering issues.

Conclusion

The *Carson Yeung Appeal* is a good reminder of the importance of compliance, in terms of safeguarding against illegal activities like money laundering. Clients should always stay alert and most importantly, disclose any suspicious transaction immediately once they have reasonable grounds to believe that it relates to money laundering.

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