

Court of Final Appeal clarifies the requisite mental element of money laundering offence in Hong Kong

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The Court of Final Appeal (CFA) has recently clarified in *HKSAR v Harjani Haresh Murlidhar* that an honest belief that the property does not represent the proceeds of an indictable offence would not suffice as a defence in a prosecution for the offence of money-laundering under section 25 of the Organized and Serious Crimes Ordinance (OSCO). A defendant may still be convicted even if the Court finds as a matter of fact that he genuinely did not believe the property dealt with represented proceeds of an indictable offence, if that belief is proven to be unreasonable by objective standards with reference to the facts and circumstances known to him.

This recent decision serves to remind individuals and businesses who are accustomed to processing monies to remain vigilant in detecting signs of illegality. Whilst one might genuinely believe property he deals with is clean, such a belief will be tested against an objective reasonableness standard. Where there are clear signs of illegality but one fails to conduct proper due diligence despite knowledge of such signs, he may still be found guilty of the money laundering offence for dealing with the relevant property.

OSCO Section 25 and the lower courts' view

Section 25(1) of OSCO provides that a person commits an offence if he deals with a property which he knows or has reasonable grounds to believe in whole or in part directly or indirectly represents any person's proceeds of an indictable offence¹.

The case of *Harjani Haresh Murlidhar* concerns the meaning of "having reasonable grounds to believe" under section 25(1). The facts of the case are interesting. A contract was made by emails for the sale by Company A to Company B of a shipment of fertilizer for approximately US\$10 million. Company B was required to make a down-payment of 5% of the purchase price. The emails were hacked and modified so as to deceive Company B into paying the 5% down-payment into an account of the defendant's company (Company C)² at the Hong Kong branch of State Bank of India. The Defendant then withdrew cash from Company C's bank account. He was subsequently arrested and charged with conspiracy to deal with the down-payment monies knowing or having

¹ Section 25(1), OSCO is subject to section 25A which provides that a person will not be guilty under section 25(1) if he discloses his knowledge or suspicion that the property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence as soon as it is reasonable for him to do so to the relevant authorities.

² Company C was incorporated by the Defendant and another person. Both of them were the signatories for the bank accounts concerned. The other person was also charged as a co-conspirator.

reasonable grounds to believe that it represented the proceeds of an indictable offence.

At trial, the Defendant gave evidence of facts and matters which he claimed had affected his belief about the nature of the monies in the account in support of his defence that he did not believe that the monies represented proceeds of a crime. The District Court found him guilty of the money laundering offence on the basis that his so-called belief was ill-founded and equivalent to turning a blind eye to obvious suspicion. The Defendant was sentenced to imprisonment for 3 years and 9 months.

On appeal, the Court of Appeal held that the trial judge erred by not applying the correct law to his assessment on how the defendant's claim as to his beliefs impacted upon whether he had the *mens reas* of "*having reasonable grounds to believe*". The Court of Appeal interpreted the CFA's decisions in *HKSAR v Pang Hung Fat*³ and *HKSAR v Yeung Ka Sing Carson*⁴ as imposing a subjective test of belief, so that if the court concludes that the defendant (subjectively) believed, or may have believed, that the property was not tainted, that would mandate an acquittal. It was therefore held that the District Court was wrong in requiring that any such genuinely held belief must also be reasonably held. That said, the Court of Appeal considered the trial judge had nevertheless correctly rejected the defendant's claim as to his beliefs as being untruthful.

The CFA considered, however, that the Court of Appeal erred in explaining the test of "*reasonable grounds to believe*". In considering a defendant's claim that he did not believe the property was tainted, the Court must also consider whether a reasonable person in the position of the

defendant could have failed to believe that the property was tainted.

CFA's reformulated test

The CFA, whilst recognising that the test of "*reasonable grounds to believe*" had been addressed in its decisions in *Pang Hung Fai and Carson Yeung*, saw the need to reformulate the test as follows:

- (i) What facts or circumstances, including those personal to the defendant, were known to the defendant that may have affected his belief as to whether the property was the proceeds of crime?
- (ii) Would any reasonable person who shared the defendant's knowledge be bound to believe that the property was tainted?

If the answer to question (ii) is "*yes*", the defendant is guilty. If it is "*no*", the defendant is not guilty. Whilst the court should not omit from consideration "*the personal beliefs, perceptions and prejudices*" of the defendant, it did not follow that such beliefs, perceptions and prejudices would necessarily carry any weight, let alone determinative weight, in deciding his guilt or innocence. The question remains as to whether any reasonable person would have concluded that the property was tainted despite having such beliefs, perceptions and prejudices.

Applying the test, the court will convict a defendant if the court concludes that no reasonable person in the defendant's position could have failed to believe that the property was tainted, even if the defendant asserts that he did not so believe.

³ (2014) 17 HKCRAR 778

⁴ (2016) 19 HKCFAR 279

The CFA also recognised that there could be cases where the court accepts that the defendant genuinely did not believe the property was tainted but concludes that such belief was not reasonable, in which case the defendant will still be convicted. Such outcome is, however, only likely to arise in the rare circumstances where it is apparent that the defendant lacks the reasoning abilities of the normal person.

Implications

The CFA's reformulation of the test made clear that a claim of a subjective genuine belief that the property is clean is not a defence in itself. Rather, the Court will look at circumstances known to the defendant and assess whether, from a reasonable person's perspective, he would be bound to believe that the property is tainted.

Therefore, for individuals and businesses who are accustomed to processing monies, vigilance is key. To protect themselves from allegations of money-laundering, they should satisfy themselves

that they hold a genuine and reasonable belief that the property is clean - in particular, that such belief is supported by immediate rigorous proof or due diligence enquiry into the property if there are red flags that call for such actions.

All corporates should also maintain sound systems and controls to ensure that circumstances and red flags which raise suspicions of money laundering are escalated to relevant pre-designated individuals/departments, which would carry out appropriate follow-up enquiries. In order to ensure that such systems and controls function as intended, adequate and frequent training should be provided to staff so that they understand how and when to identify and report red flags. Where signs of money laundering are detected (minor as they could be), it is advisable to conduct a full inquiry into the matter before dealing with any related property, instead of keeping an eye closed (to what could appear to be a minor risk) in hope of later relying on the weak or even futile argument that it genuinely and reasonably does not believe the property is tainted.



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