

Fighting money laundering and terrorist financing activities within the rule of law: A prosecutorial perspective

It is the duty of the Prosecutions Division ("PD") of the Department of Justice ("DOJ") to ensure that all penal and related laws are implemented effectively, *in a manner which is strictly within the rule of law*. In this regard, the principle of presumption of innocence, the right to legal representation, legal professional privilege, and the due process of law are paramount. The roles of PD in implementing the laws against money laundering ("ML") and terrorist financing ("TF") will be examined below from essentially a domestic, prosecutorial perspective.

I. Combating ML activities

A Prosecuting ML offences

Prosecution & Investigation

2. The constitutional division of the prosecutorial and investigative functions between DOJ and Law Enforcement Agencies ("LEAs") applies. Article 63 of the Basic Law provides: "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference." LEAs conduct investigations and DOJ counsel assess the cogency of the evidence gathered. We determine whether there is a reasonable prospect of conviction, and prosecutions are only initiated in accordance with the principles set out in "*The Statement of Prosecution Policy and Practice 2002*".

The charging practice & "success rate"

3. (1) Between early 1998 and May 2003, ML or ML related charges had been laid by PD against 235 defendants¹. The figures on ML prosecutions have largely been stable in the past five years. It should be noted that, in a number of cases, money laundering activities would have been part and parcel of the predicate or underlying offences giving rise to them, such as conspiracy to defraud, conspiracy to traffic in dangerous drugs, etc. They may not require separate charging, or separate conviction in a plea negotiation situation. The criminality of money laundering is often sufficiently covered, and deterred, by proceeding with the underlying

¹ The figure refers to all prosecutions authorized by PD of DOJ based on investigations conducted by the Police, C&ED, and ICAC.

offences.

- (2) The average conviction rate for ML prosecutions between 1998 and 2003 is around 78%. The overall average conviction rate for all criminal cases is around 85% for the same period. The Prosecutions Division of DOJ continues to take a robust attitude in prosecuting ML offences despite the difficulty in establishing the current "mental element" in ML offence. It is not easy to gather sufficient evidence during investigations.

The magnitude of ML activities

4. The statistics on investigations (and supervisory actions by HKMA and other regulatory bodies) are relatively high. They however do not necessarily reflect, from a statutory angle, that ML offences were as wide-spread as these figures may suggest, but they do reflect that our investigators and supervisors have been thorough in discharging their duties. These investigative and supervisory efforts could likely have created a preventive effect, and reduced the actual ML cases, by serving as a warning to potential offenders that their ML plans are unlikely to succeed, and will in any case be pursued relentlessly.

Sentencing patterns

5. Under section 25(3) of the Organized and Serious Crimes Ordinance, and the Drug Trafficking (Recovery of Proceeds) Ordinance ("OSCO/DTROP"), a person who commits an offence under sub-section (1) is liable on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years, and on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

6. The starting points of sentences should give a good indication of how the courts assess the gravity of the specific ML offence, and of the required deterrent effect in those circumstances. Many of these cases were decided by the appellate courts and a fairly stable pattern has emerged. The levels of sentence vary according to the nature of the underlying offences (see Annex II).

- (1) Bookmaking related ML offences were given sentences between 1 to 2 years.
- (2) Drug trafficking related money laundering offences were given sentences of around 7 years.

- (3) In a recent commercial fraud case (involving a conspiracy to launder property worth about HK\$360m, HCCC 100/2001), the major defendants were sentenced to imprisonment for 10 years. Lesser amounts (of a few million dollars) have attracted sentences in the region of 5 years.

The Legal profession and legal professional privilege ("LPP")

7. The extent to which section 25A(1) of OSCO/DTROP applies to the legal profession was at one time in doubt. This has been clarified to a large extent by Hartmann J in *Robert Pang v Commissioner of Police and anr*, HCAL 133 of 2002. The legal position would seem to be as follows:-

"(1) Solicitors and barristers alike, are subject to the disclosure obligation imposed by s.25A(1);

- (2) That means, they are obliged to disclose their knowledge or suspicion (together with any matter on which that knowledge or suspicion is based) in respect of any property which, among others, represents any person's proceeds of an indictable offence. Their obligations are however qualified by LPP, as comprehended by common law principles (which principles have been encapsulated by the wording in s.2(1) of OSCO). They are protected by rather high threshold. The learned judge said, at para. 130 of his judgment:

"What is to be emphasised is that a fundamental right such as LPP is not easily set aside. In respect of all matters arising out of the professional relationship between a legal practitioner and his client the presumption must be that LPP applies unless it is demonstrated not to apply. A court will not set LPP aside unless a *prima facie* case 'resting on solid ground' (see: *O'Rourke v. Darbishire, supra*) is demonstrated. That, in my view, must also be the standard that applies to legal practitioners. LPP must be maintained until a case has been demonstrated that compels a finding to the contrary; not a case proved beyond reasonable doubt but nevertheless a substantial case, one resting on solid grounds, one capable of shifting the heavy weight of a fundamental right."

"But to suspect, as the word is used in the section, does not carry with it a connotation of mere surmise. What is suspected must be demonstrated to the high degree to which I have made reference". (para. 131)

- (3) The learned judge appeared to have drawn a distinction between barristers & solicitors for the purposes of s.25A. He noted the different functions between them in the process of legal representation, and the fact that a solicitor is in a much closer relationship with his/her client (paras. 112, 147, 148). This may imply that, in practice, it may be slightly easier for a solicitor than a barrister to form the "suspicion" referred to in s.25A(1). Each case must, of course, depend on its own facts.

8. Preserving LPP has always been one of our major concerns when implementing this area of the law. As amended by the "Drug Trafficking and Organised Crimes (Amendment) Ordinance", both OSCO & DTROP now expressly provide that "..... nothing in this Ordinance shall require the disclosure of any items subject to legal privilege." Given the judicial guidance provided by Hartmann J., members of the legal profession are in a better position to understand their legal duties.

B. Domestic restraint and Confiscation of Crime proceeds under OSCO/DTROP

9. The legal framework for the recovery of proceeds of crime as stipulated in OSCO/DTROP are complex. The statistics for the past few years reveal disparities between the amounts of restrained and confiscated assets. Such disparities may properly be interpreted in the context of the present *conviction-based confiscation framework*; and the special economic climate of Hong Kong in the past few years. These factors would have reduced the amount available for ultimate confiscation:

- (1) Confiscation is based upon conviction of a scheduled offence. Conviction is determined on the "beyond reasonable doubt" standard. It is a natural result of the division between the prosecutorial and the judicial functions that a certain percentage of the defendants are acquitted (on average, about 15% for the years 1999-2002).
- (2) Defendants are presumed innocent until convicted. They are entitled to apply to vary the restraint orders to get legal expenses in respect of the criminal proceedings and living expenses while proceedings are on-going. Such proceedings, including all appeals, may take a few years.
- (3) In commercial crime cases quite often the restrained assets are comprised, partially or wholly, of victim's funds. As a matter of principle, the Secretary for Justice will not compete with genuine victims. The court will be assisted

if a statutory discretion is given to it in respect of the making of a confiscation order, such that the interests of innocent victims can be taken into account: *HKSAR v Lung Wai Hung* [1999]1 HKLRD 598, @606G.

- (4) The figures on restrained assets were estimates, and a fairly large portion of which were real property assets. There has been a continuous, substantial, downturn in real property prices in the past few years.
- (5) Confiscation orders are enforced by realizing "realisable property" of the defendants (often already restrained). Realising real property in a falling market takes time, the length of which would also be affected by appeal actions taken by the defendant. A falling market also often means that the realised amounts would be smaller than the amounts specified in the confiscation orders².

10. Under the current conviction-based framework, the amounts of assets confiscated to the government are essentially limited by the *amount of benefit* the defendant has derived from the *convicted* offence³, and by the amount of "*realisable assets*" ultimately available.⁴ We note that in a number of overseas common law jurisdictions, such as the United Kingdom and Australia, statutes providing for a broader basis for forfeiture have been enacted⁵. Whether the implementation of such new statutory arrangements will enhance the effectiveness of asset-recovery in a manner which preserves the fundamental rights of the citizens is a matter worth consideration.

II. Combating TF activities

A. Offences against TF

11. Sections 7, 8 of the United Nations (Anti-Terrorism Measures) Ordinance ("UN(ATM)O") specifically prohibits the financing of terrorist or terrorist associates. As yet there are no specific law enforcement powers provided to LEAs. The constitutional division of functions between DOJ and LEAs referred to in paragraph 2 above applies.

² A restraint case which occurred in 1998 provides a good example. An order for the confiscation of HK\$2.735 m was made in 1 February 2001. The amount was varied to HK\$1.44 m in February 2002 owing to a drop in asset value.

³ See sections 8(5), (6), (7), and 11 of OSCO (sections 3(3), (4), (5), (6), and 6 of DTROP).

⁴ See section 20(1) of OSCO (section 15(1) of DTROP).

⁵ The Proceeds of Crime Act 2002 (Australia) commenced operation this year. See also the United Kingdom Proceeds of Crime Act 2002.

B. Freezing and forfeiture

12. Section 6(1) of UN(ATM)O empowers the Secretary for Security to freeze terrorist funds by a notice in writing if the Secretary has reasonable grounds to suspect they are "terrorist property". Under section 13, the Secretary for Justice is empowered to apply to the Court of First Instance ("CFI") for the forfeiture of terrorist property. Order 115, rule 29 of the Rules of High Court applies. Section 13 is similar in structure to s.24D of DTROP. Some judicial guidance has been provided by the courts in *Commissioner of Police v Lin Xian Nian* [2000]4 HKC 404 (CFI), [2001]2 HKLRD 851 (CA). No forfeiture proceedings have yet been brought.

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3 June 2003