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MONEY LAUNDERING OFFENCES UNDER THE CORRUPTION, DRUG TRAFFICKING AND OTHER SERIOUS CRIMES (CONFISCATION OF BENEFITS) ACT

Interpretative Difficulties and a Proposed Solution

The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act sets out a series of money laundering offences. These provisions target the "benefits of criminal conduct", which is a concept originally created for use in confiscation proceedings following a conviction under the Prevention of Corruption Act. That same concept, while suitable for use in confiscation proceedings, is very difficult to apply in the typical money laundering scenario, where there is no court proceeding, no convicted predicate offender, and where the predicate crimes are very different from corruption. This article argues that Parliament could not have intended this, and that Parliament actually meant to target "proceeds of criminal conduct" in the money laundering offences. Judicial interpretation to that effect would resolve many of the difficulties. But legislative reform may be timelier and more comprehensive, and can unify the confiscation, money laundering and suspicious transaction reporting provisions around a single, objective and robust definition of the targeted property.

Kenny **FOO**
LLB (Hons) (National University of Singapore), LLM (Taxation) (New York University);
Advocate and Solicitor (Singapore), Attorney and Counsellor-At-Law (New York);
*Managing Director, J.P. Morgan.**

I. Introduction

1 The crime of money laundering has burst onto the public consciousness in recent years. Whether in the mainstream media, or in national and international politics, a consensus has formed that anti-money laundering ("AML") laws need to be strengthened and more vigorously enforced. This has, predictably, resulted in a surge of

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legislative activity and an uptick in enforcement in many countries. Singapore is no exception.

2 Singapore's AML rules are contained in the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[1] ("CDSA"). These rules target, for the most part, the "benefits of criminal conduct".[2] But the definition of "benefits of criminal conduct" was developed in a different context and, read literally, is very difficult to apply in typical money laundering scenarios. This article explores the practical difficulties of identifying the "benefits of criminal conduct" in daily commerce, and argues that it is open to the courts to solve these difficulties by ruling that, for purposes of the money laundering offences, "benefits of criminal conduct" really means "proceeds of criminal conduct". Legislative reform is also possible and this article offers a few thoughts on how that might unify the confiscation, money laundering and suspicious transaction reporting provisions.

II. Overview of the money laundering offences

3 Although the AML rules are contained in the CDSA, the main focus of the CDSA is *not* money laundering. The CDSA's objective is to strip criminals of economic gains derived from criminal conduct by instituting a confiscation regime; the AML rules (and the suspicious transaction reporting rules) exist to support this confiscation regime[3] by "[preventing] ill-gotten gains from being laundered into other property *so as to avoid detection and confiscation by the enforcement agencies*"[4] [emphasis added].

1 Cap 65A, 2000 Rev Ed.

2 The anti-money laundering rules also target the "benefits of drug dealing", but the issues are the same.

3 This is apparent from the long title of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed), from a chronological perspective (the confiscation provisions also pre-date the anti-money laundering provisions) and from the wording of some of the original provisions themselves. Section 43(1) of the Drug Trafficking (Confiscation of Benefits) Act – one of the original anti-money laundering rules enacted in Singapore – criminalised the concealment or transfer of property "for the purpose of avoiding prosecution for a drug trafficking offence or the making or enforcement in his case of a confiscation order".

4 *WBL Corp Ltd v Lew Chee Fai Kevin* [2012] 2 SLR 978 at [31].

4 In addition to the statutory rules, the Monetary Authority of Singapore ("MAS") has issued AML directions and regulations that have the force of law.[5] Most enforcement actions – particularly against financial institutions – are grounded in these MAS directions and regulations. Industry associations have also issued practice notes, companies have detailed internal policies, and so on. For the most part, day-to-day AML compliance is governed by these extra-statutory guidelines and policies. But at times it is necessary to return to the language of the CDSA itself. The bringing or defending of criminal charges for money laundering offences are obvious examples. However, the statutory provisions also cast a long shadow across the entire arc of daily commerce; when deciding whether to proceed with a transaction, or whether to receive or acquire property, or whether to file a suspicious transaction report ("STR"), much turns on the precise wording of the statute.

5 The statutory AML rules are found mostly in Pt IV, and the confiscation provisions are found in Pt II, of the CDSA. Both Pt II and Pt IV of the CDSA contain parallel provisions that address drug dealing and criminal conduct respectively. This article focuses on the AML rules for which "criminal conduct"[6] constitutes the predicate offence[7] and will mention the provisions relating to drug dealing only where relevant. Obviously, any interpretation of the CDSA in relation to criminal conduct must also make sense in relation to drug dealing.

6 Section 44 of the CDSA makes it an offence to enter into an arrangement, knowing or having reasonable grounds to believe that, by the arrangement, a predicate offender's "benefits of criminal conduct": (a) are retained or controlled by the predicate offender; or (b) are used to secure funds placed at the predicate offender's disposal; or (c) are used for the predicate offender's benefit to acquire property.

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5 Pursuant to s 27B of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed). The Monetary Authority of Singapore also has the power to issue notices (containing binding directions) under s 55 of the Banking Act (Cap 19, 2008 Rev Ed).

6 "Criminal conduct" means doing or being concerned in any act constituting a "serious offence" or a "foreign serious offence": s 2(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

7 In this article, the drug dealing offences and serious offences within the scope of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) are referred to as "predicate offences" and the person who commits those offences as a "predicate offender".

7 Section 47 of the CDSA makes it an offence to acquire, possess, use, conceal or transfer any property that is, or represents, a predicate offender's "benefits from criminal conduct". The offence may be committed by the predicate offender himself ("primary laundering") or by a third party who knows or has reasonable grounds to believe that the property is, or represents, the predicate offender's benefits from criminal conduct ("secondary laundering").[8]

8 All of these AML provisions and the corresponding confiscation provisions target property that is, or represents, the "benefits of criminal conduct".[9] The confiscation provisions supply the definition of "benefits of criminal conduct" applicable to both sets of provisions. This is unsurprising since the AML rules exist to support the confiscation regime.

III. Identifying "benefits of criminal conduct" under the CDSA

A. The five-stage characterisation process

9 Section 8(1) of the CDSA provides that "benefits derived by any person from criminal conduct" means "any property or interest therein … held by the person at any time … being any property or interest therein disproportionate to his known sources of income, and the holding of which cannot be explained to the satisfaction of the court".[10] This suggests a five-stage characterisation process:

(a) *Identification*: property held by the predicate offender is identified.

(b) *Valuation*: the property is assigned a value.

(c) *Comparison*: the value of the property is compared to the predicate offender's known sources of income to determine if there is a disproportionate relationship between the two.

8 "Primary laundering" and "secondary laundering" are not statutory terms, but were used by the Court of Appeal in *WBL Corp Ltd v Lew Chee Fai Kevin* [2012] 2 SLR 978 at [39].

9 Variations of this term are used throughout the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed), with no material distinction in their meaning. See, for example, "benefits *derived … from* criminal conduct" (s 5), "benefits *from* criminal conduct" (s 47) and "benefits *of* criminal conduct" (s 44(1)(*a*)) [emphasis added].

10 Section 7(1)(*a*) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) provides an equivalent definition for benefits derived from drug dealing offences.

(d) *Explanation*: if the value of the property is disproportionate to the predicate offender's known sources of income, the court has to consider any explanation given for the holding of such property.

(e) *Conclusion*: having heard the explanation (if any) given for the predicate offender's holding of such property:

(i) if the court is satisfied with the explanation, then the property does not constitute "benefits derived from criminal conduct"; and

(ii) if the court is not satisfied with the explanation, it must conclude that the property constitutes "benefits derived from criminal conduct".

B. The characterisation process in post-conviction court proceedings: Effective and efficient

10 The five-step characterisation process, outlined above, works well in confiscation proceedings under Pt II of the CDSA. Applications for confiscation orders are heard by a judge (or registrar[11]), assisted by counsel and with the benefit of full evidence given under oath and subject to cross-examination. The offender, already convicted of a predicate offence, is often present in person or by counsel; third parties asserting an interest in the offender's property may also be present. With all of these inputs, the judge applies the law to the facts to produce reasonably consistent and objective conclusions. If he requires more time for his decision, he can reserve judgment; if he gets it wrong, his decision may be appealed. The five-step characterisation process was designed to operate in this context, and it performs its function admirably.

C. The characterisation process in daily commerce: Fraught with difficulty

11 However, the characterisation rules are more often applied under radically different conditions. Although confiscation proceedings and AML *prosecutions* are conducted in a courtroom setting, the vast majority of AML *compliance* (or non-compliance) takes place in the heat and dust of daily commerce. The person applying the rules – let us call him a "banker" (although he may be a tradesman or hawker or merchant or jeweller) – must ensure that he does not commit the

11 A registrar may also hear such applications: ss 4(3A) and 5(4) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

offence of money laundering. To do this, he must make difficult decisions of fact and law, often with incomplete or unreliable facts and little or no knowledge of the law (domestic or foreign). He must work under commercial and time pressures, making multiple decisions each day, with the threat of harsh penalties[12] in the event that he is wrong. The alleged predicate offender may be absent or, if present, cannot be compelled to provide true and complete information (or any information at all); he may not even have been charged with, much less convicted of, any predicate offence. The banker faces a deficiency of crucial decision-making inputs, but must nonetheless make a decision.

12 Unfortunately, that is not the end of his troubles. A banker who attempts to work through the five-step characterisation process to identify any "benefits derived from criminal conduct" quickly discovers a second set of problems, this time inherent in the statutory wording itself. To see this, one simply needs to replace references to "benefits of criminal conduct" (and its variants) in the AML provisions with the definition provided in s 8(1) of the CDSA. Take, for example, s 47(2) of the CDSA, which reads:

> Any person who, knowing or having reasonable grounds to believe that any property is, or in whole or in part, directly or indirectly, represents, another person's benefits from criminal conduct —
>
> (*a*) conceals or disguises that property; or
>
> (*b*) converts or transfers that property or removes it from the jurisdiction,
>
> shall be guilty of an offence.

13 Substituting the words from s 8(1) of the CDSA for the phrase "benefits from criminal conduct", s 47(2) of the CDSA would now read:

> Any person who, knowing or having reasonable grounds to believe that any property is, or in whole or in part, directly or indirectly, represents, another person's *property that is disproportionate to his known sources of income, and the holding of which cannot be explained to the satisfaction of the court* —
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property or removes it from the jurisdiction,
>
> shall be guilty of an offence.

12 Sections 44 and 47 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) both carry a maximum sentence of a $500,000 fine and ten years' imprisonment (or both); in the case of non-natural persons, the maximum fine is $1,000,000.

14 Likewise, s 47(3) of the CDSA would now read:

> Any person who, knowing or having reasonable grounds to believe that any property is, or in whole or in part, directly or indirectly, represents, another person's *property that is disproportionate to that other person's known sources of income, and the holding of which cannot be explained to the satisfaction of the court*, acquires that property, or has possession of or uses such property, shall be guilty of an offence.

15 This substitution has similar effects in ss 43, 44 and 46 of the CDSA. Not only are the provisions now more convoluted (a surmountable problem), they employ a definition that is subjective[13] in nature (a rather more intractable problem). Taken out of a courtroom setting, the "comparison" stage of the characterisation process requires a banker to make a subjective judgment on a question of degree, while the "justification" and "conclusion" stages require him to predict the content and outcome of an imaginary dialogue between a predicate offender and a judge. The banker's difficult situation here is a tangle of at least five distinct problems: one relates to the statutory language, two relate to the absence of a convicted offender, and two relate to the absence of a judge.

16 The first problem is that the term "disproportionate" is rather imprecise. Whether something is disproportionate to another thing is a question of degree requiring some subjective judgment on the part of the observer. At either extreme, of course, any reasonable person would conclude that the holding of the property in question is (or is not) disproportionate to a predicate offender's known sources of income. For example, most readers will agree that ownership of $6m in cash, in addition to houses and a condominium in Singapore, is disproportionate to a known annual income of $120,000.[14] But what if the offender's known income was $1m? Or $2m? And so on. Some imprecision is tolerable in confiscation proceedings, where judges can be relied on to make such findings with some degree of consistency and objectivity. However, the same imprecision is an unfair burden on bankers, who have to make these judgments without all the resources available to a court, and who risk fines or imprisonment if they make a mistake.

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13 "Subjective" in this case is used in the philosophical sense, *ie*, existing in a person's mind rather than in the outside world; conversely, "objective" is used to describe something as existing outside the mind, based on facts that can be proved. In this sense, whether any property is "disproportionate to his known sources of income" is subjective, and so is whether anything can be explained "to the satisfaction of the court".

14 This example is taken from *Singapore Parliamentary Debates, Official Report* (20 March 1992) vol 59 at col 1384 (Prof S Jayakumar, Minister for Home Affairs).

17 The second problem relates to the reversal of the onus of proof. In a post-conviction confiscation proceeding, the Prosecution needs only to show that the predicate offender holds property that is disproportionate to his known sources of income; thereafter the onus of proving that property does *not* represent his "benefits derived from criminal conduct" shifts onto the predicate offender. This reversal of the onus of proof is harsh. It amounts to a presumption that the predicate offender is guilty of other crimes of which he was not charged. The presumption may be justified on the basis that it applies only to offenders convicted of crimes of a particular nature and that such matters are within the offender's own special knowledge.[15] But no banker or other third party should be required to apply the same presumption in a money laundering context where his client or counterparty has not been convicted of (or, in most cases, not even charged with) a serious offence. Applying the presumption in such cases is not only unjustified, it is also inconsistent with the requirement, in money laundering cases, for the Prosecution to prove that the property being laundered is actually the proceeds of criminal conduct.[16]

18 The third problem lies in the reference to a predicate offender's "known sources of income". To whom must the sources of income be known? In a confiscation proceeding, it is quite clear that "known" means "known to the court", which implies a finding of fact made by the court based on evidence led by the parties or their counsel. In daily commerce, however, is a banker to imagine what a *court* would know, or simply rely on what the *banker* himself knows? It is unrealistic to require a banker to imagine what evidence his client may or may not lead in a hypothetical court proceeding. But directing a banker to rely only on what is known *to him* does not necessarily solve the problem. He may not know much. On the other hand, a banker may know more than a court will. He may know, for example, of matters that his client may choose *not* to disclose to a court, such as: (a) illegal sources of income that do not involve criminal conduct or drug dealing; (b) legal sources of income that may implicate other parties or impinge on religious or political sensitivities; or (c) legal sources of income that have not been

15 *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at cols 1718–1719 and 1735 (Prof S Jayakumar, Second Minister for Law).

16 *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at [45]–[46].

declared to government agencies.[17] It is not clear whether the banker is permitted to take these sources of income into account when assessing if any property held by his client is disproportionate to that client's "known sources of income".

19 The fourth problem lies in the word, "explained". Who is responsible for providing an explanation? In confiscation proceedings, it is clear that the predicate offender has to offer an explanation for the holding of property that is disproportionate to his income. However, in an AML prosecution (other than a prosecution for primary laundering) or when making an AML compliance decision, would a banker have to be able to provide the explanation, or simply show that he had no reasonable grounds to believe that his client would be unable to provide an explanation?[18]

20 The fifth problem lies in applying the "satisfaction of the court" standard where there is no court proceeding. In a confiscation proceeding where a judge or registrar presides, the application of this standard is straightforward. However, outside of a court proceeding, this standard requires a banker to imagine whether a hypothetical court would be satisfied with any hypothetical explanation for a person's holding of property that is disproportionate to his known sources of income. A banker would not have the internal or external resources to make that judgment.

21 In the vast majority of cases, these difficulties make the AML rules virtually impossible to apply rationally and consistently outside of a post-conviction confiscation hearing. There are, of course, exceptional situations. These include:

17 Tax evasion is, of course, a predicate offence. However, there are many other situations where a person may desire privacy from government prying even in the absence of tax evasion. For example, some sources are not taxable in a person's country of residence (and hence need not be declared) but a disclosure in court may expose him to the predations of corrupt officials, kidnappers, *etc*. A further example would be income from assets that were moved out of the country in violation of exchange control regulations (such violations not constituting predicate offences).

18 Section 44(4) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) seems to suggest that the banker would have to do the explaining (*ie*, show that he had no reasonable ground to believe that the arrangement related to any person's proceeds derived from criminal conduct); s 44(4), however, is a defence that is relevant only if the elements of the offence itself are first made out – and this is where the question of who has to do the "explaining" to a court remains unanswered.

(a) In some cases, the facts may be so extreme as to preclude any reasonable doubt as to the provenance of the property or the conduct of a client or counterparty.[19]

(b) A banker may be a co-conspirator with the offender, or may have aided or abetted the commission of the predicate offence, and hence cannot deny that he has special knowledge of the provenance of the property or of the conduct of the offender.

(c) A publicly listed company may have special knowledge of its senior executives' sources of income and their dealings in the company's shares.

22 *WBL Corp Ltd v Lew Chee Fai Kevin*[20] is an example of the third category. WBL was a company listed on the Singapore Stock Exchange ("SGX") and Lew was a senior executive of the company. Whilst in possession of non-public price-sensitive information about WBL, Lew sold his WBL shares for $447,773.26 ahead of a profit warning issued by WBL on the SGX (the "Insider Trade"). As a result of the profit warning, the price of WBL shares fell sharply. As a result of the Insider Trade, Lew avoided a potential loss of $27,000. Thereafter, Lew purported to exercise his share options and tendered the proceeds from the Insider Trade (plus an additional $37,336.74) as payment of the exercise price. WBL filed a STR in respect of the proceeds of Lew's sale of the WBL shares, and Lew was subsequently found liable for insider trading under s 218 of the Securities and Futures Act.[21] WBL also refused to issue shares to Lew in exchange for his payment under the stock options, on the ground that WBL would contravene s 44(1) of the CDSA if it did so. Lew brought an action for breach of contract.

23 Neither the High Court nor the Court of Appeal had any difficulty with the wording of s 44(1) of the CDSA, nor with finding that Lew had derived a "benefit from criminal conduct" in the form of the $27,000 of loss he avoided as a result of the Insider Trade.[22] This is unsurprising. After all, these were court proceedings and the definition of "benefits of criminal conduct" was designed for use in this context.

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19 Take, for example, a politically exposed person in a high-risk jurisdiction moving eight-figure or nine-figure sums in bulk cash on a privately chartered aeroplane.

20 [2012] 2 SLR 978.

21 Cap 289, 2006 Rev Ed. See *Monetary Authority of Singapore v Lew Chee Fai Kevin* [2010] 4 SLR 209 (HC) and *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913 (CA) (appeal dismissed).

22 The High Court and Court of Appeal were apparently able, on the facts of the case, to make this determination without going through the five-step process suggested by s 8(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

24 What *is* notable is the position of WBL at the time it was asked to issue shares to Lew. WBL either had, or was given, all the information it needed to determine whether issuing shares to Lew would cause it to violate s 44(1) of the CDSA. Lew was a full-time senior employee of WBL, so WBL was intimately acquainted with his sources of income. Lew himself informed WBL of his Insider Trade. WBL had the information to accurately compute the economic gain (or loss avoided) as a result of the Insider Trade. Lew told WBL that the funds he had tendered as payment for the shares consisted of the proceeds of the Insider Trade. WBL had the assistance of internal and external legal counsel. Taken together, these inputs formed a factual matrix that was uncharacteristically conducive to an out-of-court identification of the "benefits of criminal conduct".

25 But these situations are the exception, not the norm. In the vast majority of cases, the difficulties outlined earlier make the operation of the AML rules ineffective and unfair. To the extent that the AML rules are meant to *deter* money laundering, the lack of clarity either blunts or exaggerates their deterrent effect. To the extent that they are meant to *punish* money laundering, the lack of clarity is unfair. Commercial actors are forced to choose between over-conservatism and blatant disregard of the rules. Over-conservatism is the prevailing *zeitgeist*, imposing a heavy cost on the financial sector and throwing sand into the wheels of commerce.

IV. A false solution: File suspicious transaction reports indiscriminately

26 In practice, it is often said that, when in doubt, a banker can always file an STR to avail himself of the protections afforded by s 40 of the CDSA and, in the case of a pending transaction, await clearance from the regulator. However, quite apart from the fact that this does not directly address the issues: (a) the STR filing provision targets the "proceeds" of criminal conduct, and not the "benefits" derived from criminal conduct, so it may not be appropriate to file a STR; (b) it is unattractive as a matter of policy to say, "the criminal law is unclear but you can always ask the authorities what to do"; (c) as a matter of principle, violations of client privacy may be justified in the interests of combating serious crime, but less so in the interests of addressing difficulties in statutory construction; and (d) the indiscriminate filing of STRs presents its own commercial and legal risks.[23]

23 The notion that suspicious transaction report filings are a universal, risk-free prophylactic in all cases of doubt is debatable and deserves separate discussion.

V. A judicial solution: Read "benefits" to mean "proceeds" in the anti-money laundering provisions

A. Adopting a purposive and pragmatic approach to construing the CDSA

27 Parliament could not have intended to enact a criminal statute, under which it is impossible – in the vast majority of situations – for a person to determine whether his conduct violates its provisions. If a literal reading of the AML provisions produces this result, one must consider the possibility that the relevant wording was the result of a drafting error or a failure to consider the application of the rules outside of a post-conviction court proceeding. In such cases, the courts ought to take "a purposive and pragmatic approach in construing the CDSA"[24] in order to give effect to Parliament's true intent, even if it means departing from the plain language of the statute.

28 The power of the courts to do this, and the principles that guide the exercise of such powers in Singapore, were considered in an illuminating speech by the learned Chief Justice in 2013[25] and, more recently, by Associate Professor Goh Yihan in this Journal.[26] For present purposes, we need only to refer to the criteria laid down in the English cases and approved by the Court of Appeal in *Kok Chong Weng v Wiener Robert Lorenz*[27] ("*Kok Chong Weng*"):

> In *Wentworth Securities Ltd v Jones* [1980] AC 74, Lord Diplock stated (at 105–106) that three conditions had to be fulfilled before the court could read words into an Act which were not expressly included in it, *viz*: (a) it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that Parliament sought to remedy with the Act; (b) it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, the eventuality that was required to be dealt with so that the purpose of the Act could be achieved; and (c) it was possible to state with certainty what the additional words would be that the draftsman would have inserted and that Parliament would have approved had their attention been drawn to the omission. In *Inco Europe Ltd* at 592, Lord Nicholls of Birkenhead framed the third requirement in a broader fashion as follows: that the court must be abundantly sure of 'the substance of the provision Parliament would

24 *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at [75], *per* V K Rajah JA.

25 The 25th Singapore Law Review Annual Lecture: "The Interpretation of Documents: Saying What They Mean Or Meaning What They Say" by Chief Justice Sundaresh Menon (delivered on 10 September 2013); transcript published under the same title at (2014) 32 Sing L Rev 3.

26 Goh Yihan, "Where Judicial and Legislative Powers Conflict" (2016) 28 SAcLJ 472.

27 [2009] 2 SLR(R) 709 at [57].

> have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed'. In our view, given the broad wording of s 9A of the Interpretation Act, the broader formulation of Lord Nicholls is more consonant with the legislative purpose of that provision.

29 Accordingly, we turn to examine each of the three requirements approved by the Court of Appeal in *Kok Chong Weng* and consider whether a court would be justified in construing the words "benefits of criminal conduct" in the AML provisions to mean something other than as defined in s 8(1) of the CDSA.

B. The objective of the statute

30 Reading the provisions of the CDSA as a whole, it is possible to determine the precise mischief that Parliament sought to remedy with the Act. To begin with, the long title of the CDSA declares plainly its purpose: "to provide for the confiscation of benefits derived from, and to combat, corruption, drug dealing and other serious crimes and for purposes connected therewith". The Court of Appeal has held that the AML rules were enacted to "prevent ill-gotten gains from being laundered into other property so as to avoid detection and confiscation by the enforcement agencies".[28] Finally, referring specifically to s 44(1)(*a*) of the CDSA (and, by extension, to the other AML provisions addressing secondary laundering), the Court of Appeal has held that one of the key objectives of the 1999 legislation[29] was to align Singapore's legislation with the requirements of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ("Vienna Convention") and the United Nations Convention Against Transnational Organized Crime 2000 ("Palermo Convention").[30] V K Rajah JA (as he then was) summed up the relevant provisions of the Conventions and the requirements they imposed on parties to the Conventions as follows:[31]

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28 *WBL Corp Ltd v Lew Chee Fai Kevin* [2012] 2 SLR 978 at [31].

29 The Drug Trafficking (Confiscation of Benefits) (Amendment) Act 1999 (Act 25 of 1999) amended and consolidated the then existing confiscation and anti-money laundering provisions. The 1999 statute is discussed at para 39 below.

30 "Given that the CDSA was enacted shortly after Singapore's accession to the Vienna Convention, it is plain that one of the key objectives behind its enactment was to align our domestic legislation with the requirements of the Vienna Convention.": *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at [28], *per* V K Rajah JA.

31 *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at [30]. "Property derived from an offence" and "the proceeds of crime" are direct quotes from the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (hereinafter "Vienna Convention") and the United Nations Convention Against Transnational Organized Crime 2000 (hereinafter "Palermo Convention").

> [According] to the clear wording of Art 3 of the Vienna Convention and Art 6 of the Palermo Convention, what should be criminalised under the legislation of each State Party is the laundering of *property derived from offences* or *proceeds of crime*. Indeed, the conduct that should be criminalised under Art 6 (*ie*, conversion or transfer of property, or concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property) is that which is accompanied by *knowledge* that such property is '*derived from an offence*' or '*the proceeds of crime*'. [emphasis in original]

31 It is clear, therefore, that the mischief that Parliament sought to remedy with the AML provisions of the CDSA was the laundering of "property derived from offences" or "the proceeds of crime".

C. The draftsman's omission

32 The next step is to determine whether the draftsman had "by inadvertence overlooked, and so omitted to deal with, an eventuality that was required to be dealt with so that the purpose of the Act could be achieved". One such eventuality is rather obvious: the AML rules must, in the vast majority of cases, guide the conduct of daily commerce independent of any court proceeding. But there are at least three other such eventualities. To discern them, we must delve into the history of the CDSA and its predecessors.[32]

33 The CDSA is derived from two earlier statutes: the Drug Trafficking (Confiscation of Benefits) Act 1992[33] ("DTCOBA") and the Corruption (Confiscation of Benefits) Act 1989[34] ("CCOBA"). These two statutes were, in turn, largely modelled on the UK Drug Trafficking Offences Act 1986[35] ("UKDTOA"), with changes to take into account local conditions.[36]

34 The UKDTOA was enacted in 1986, after the House of Lords ruled that large sums money that had been traced into the hands of drug

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32 In the following discussion, references will be to the Singapore, the UK and Hong Kong legislation as originally enacted (including the section numbering). Some of these provisions may have since been amended, renumbered or repealed.

33 Act 29 of 1992.

34 Act 16 of 1989.

35 c 32.

36 *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at cols 1718 and 1781–1786 (Prof S Jayakumar, Second Minister for Law), *Singapore Parliamentary Debates, Official Report* (3 March 1989) vol 53 at col 14 (Prof S Jayakumar, Minister for Law) and *Singapore Parliamentary Debates, Official Report* (20 March 1992) vol 59 at col 1375 (Prof S Jayakumar, Minister for Home Affairs).

traffickers could not be forfeited under s 27 of the UK Misuse of Drugs Act 1971.[37] The UKDTOA introduced confiscation[38] and AML[39] provisions concurrently. Both sets of provisions targeted the "proceeds of drug trafficking", which was defined as "payments or other rewards received in connection with … drug trafficking".[40] The UKDTOA also provided several assumptions to help overcome evidential difficulties (*eg*, for determining whether a person had benefited from drug trafficking and for assessing the value of his proceeds), but these assumptions could be applied only by a court presiding over post-conviction confiscation proceedings; they were not applicable in any other context or proceeding.[41]

35 In Singapore, confiscation provisions were first introduced, not to complement the anti-drug trafficking legislation, but to complement the anti-corruption legislation. The CCOBA was enacted in 1989, following a spate of corruption scandals that highlighted the limits of a court's confiscation powers under the Prevention of Corruption Act[42] ("POCA"). While the CCOBA borrowed much of the language and structure of the UKDTOA, it was different in two important ways:

> (a) The draftsman did not take the UKDTOA wording and simply substitute "corruption" for "drug trafficking". Instead, the draftsman expanded the reach of the confiscation provisions by –
>
> > (i) targeting the defendant's "benefits derived … from corruption" *generally*, thereby covering all instances of corruption and not just *the particular instance of corruption* of which the offender is convicted;[43] and

37 c 38. *R v Cuthbertson* [1981] AC 470; D Hodgson, *Profits of Crime and Their Recovery: A Report of the Committee Chaired by Sir Derek Hodgson* (London: Cambridge Studies in Criminology, 1984).

38 Drug Trafficking Offences Act 1986 (c 32) (UK) s 1.

39 Drug Trafficking Offences Act 1986 (c 32) (UK) s 24.

40 Drug Trafficking Offences Act 1986 (c 32) (UK) s 2(1)(a); the definition applies "for the purposes of this Act", *ie*, to both confiscation and anti-money laundering provisions.

41 Drug Trafficking Offences Act 1986 (c 32) (UK) s 2(2).

42 Cap 241, 1993 Rev Ed; originally the Prevention of Corruption Ordinance 1960 (Ordinance 39 of 1960).

43 Corruption (Confiscation of Benefits) Act s 4(1). This was an intentional departure from s 1(5) of the UK Drug Trafficking Offences Act (c 32) (on which the Corruption (Confiscation of Benefits) Act was modelled), which directed the confiscation of an amount only "in respect of the offence or offences concerned". See *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at col 1718 (Prof S Jayakumar, Second Minister for Law) and at cols 1728–1729 (Mr Heng Chiang Meng).

(ii) defining "benefits" by reference to a POCA evidentiary rule[44] that employed subjective language and reversed the onus of proof.[45]

(b) Unlike the UKDTOA, the CCOBA introduced confiscation provisions on a standalone basis, *ie*, without any accompanying AML provisions. Therefore, when defining "benefits derived from corruption", the draftsman did not need to consider its application to AML provisions.

36 When introducing the 1988 Bill, the Second Minister for Law took great pains to explain that the particular nature of corruption and the limitation of the existing legislation called for these new, draconian provisions:[46]

> Methods of corruption are always undercover and very difficult to detect. Corruption is cunning in hiding its tracks over a long period of time. Therefore, we must be prepared to adopt any new legal procedures which will serve as further deterrents against corruption. This Bill provides an effective new weapon in dealing with corruption. It strikes effectively at the unexplained assets of persons convicted of corruption offences. Under the Bill, the courts can make confiscation orders in respect of such unexplained assets and can restrain their disposal before the court proceedings are concluded against such persons. This will be in addition to other penalties which the court may impose under existing law.

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44 Section 23(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed), which has since been renumbered as s 24(1), provides:

> In any trial or inquiry by a court into an offence under this Act … the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the court as corroborating the testimony of any witness in the trial or inquiry that the accused person accepted or obtained … any gratification and as showing that the gratification was accepted or obtained … corruptly as an inducement or reward. [emphasis added]

Since the confiscation proceedings envisioned in the Corruption (Confiscation of Benefits) Act would follow a conviction under Prevention of Corruption Act, it was logical to maintain a consistent evidentiary rule across both sets of proceedings. A similar evidential rule was adopted in s 13(1) of the Kidnapping Act (Cap 151, 1985 Rev Ed); the original Kidnapping Ordinance was enacted in 1961, one year after the original Prevention of Corruption Ordinance.

45 Corruption (Confiscation of Benefits) Act s 5(1)(*a*). The definition of "benefits derived from criminal conduct" shifted the onus of proof, at least partially, to the defendant. In the five-stage characterisation process outlined at para 9 above, the Prosecution bears the burden of the "identification", "valuation" and "comparison" stages; thereafter, the onus of "explanation" falls entirely upon the defendant.

46 *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at cols 1717–1718 (Prof S Jayakumar, Second Minister for Law).

> I think Members know that we already have the Prevention of Corruption Act. However, this existing law is not sufficiently adequate to deal with the confiscation and recovery of corruption benefits. Under the present law, a person convicted of a corruption offence is ordered to pay by way of penalty only a sum equal to the amount of the gratification which he has received or the value of that gratification. This payment of penalty, it may be noted, is confined to the value of the gratification received for the offence for which he was convicted or for other offences for which consideration was taken into account.
>
> But let us take the case of an offender who has been corrupt prior to that particular offence for which there was discovery and for which he was charged. He may have assets which are clearly disproportionate to his known sources of income and for which he can give no satisfactory explanation. Such assets, under existing law, cannot be confiscated unless it is proved that he has actually derived those assets by corruption. But these are matters which are specially within his own knowledge and it would be difficult, if not, impossible to obtain evidence concerning them.

37 Another Member of Parliament explained why it was necessary to pursue an offender's gains from other instances of corruption that may have gone undetected:[47]

> [Now] the Government can only recover from specific instances in which it can prove corruption. My question is this. Should the Government spend more public money, more public time, trying to prove each and every act of corruption to recover the ill-gotten gains of corruption even after the person has been convicted of corruption? Yet, if the Government will not do this, then obviously corruption pays. It does because a corrupt person can admit to one single act of corruption. Restitute the money from that single act, go to prison for that act and then later come out to enjoy the ill-gotten gains from the many other acts he may have committed. I am glad that this Bill covers this loophole.

38 In 1992, Parliament enacted the DTCOBA. The DTCOBA bore a close resemblance to the UKDTOA, both in its structure and orientation: it contained confiscation[48] provisions supported by AML[49]

47 *Singapore Parliamentary Debates, Official Report* (30 March 1988) at cols 1728–1729 (Mr Heng Chiang Meng).

48 Drug Trafficking (Confiscation of Benefits) Act s 4.

49 Drug Trafficking (Confiscation of Benefits) Act ss 41 and 43.

and STR[50] provisions, and was designed to complement the Misuse of Drugs Act.[51] However, instead of adhering closely to the wording of the UKDTOA (which referred to the "proceeds of drug trafficking" in both the confiscation and AML provisions), the draftsman of the DTCOBA adopted the CCOBA's "benefits derived from corruption" formula in *both* the confiscation and AML provisions.[52]

39 In 1999, the CCOBA's "benefits derived from corruption" formula was extended to yet another set of confiscation and AML provisions when the CCOBA was consolidated into the DTCOBA and renamed the CDSA by the Drug Trafficking (Confiscation of Benefits) (Amendment) Act.[53] This consolidation followed Singapore's accession to the Vienna Convention in 1997.[54] In the "new" CDSA:

> (a) the confiscation provisions of the CCOBA and the DTCOBA were preserved, largely intact, with references to "criminal conduct" substituted for "corruption" in the provisions derived from the CCOBA;[55]

50 Drug Trafficking (Confiscation of Benefits) Act s 38. The original suspicious transaction reporting provision was permissive rather than mandatory. The Monetary Authority of Singapore subsequently issued binding guidelines requiring financial institutions to make such disclosures. Eventually, the Drug Trafficking (Confiscation of Benefits) (Amendment) Act 1999 (Act 25 of 1999) made the filing of disclosures mandatory for both financial institutions and other parties.

51 Cap 185, 2008 Rev Ed.

52 The substitution of "benefits derived from drug trafficking" for "proceeds of drug trafficking" in the Drug Trafficking (Confiscation of Benefits) Act was incomplete. The phrase "proceeds of drug trafficking" survived in s 41(4)(*a*), which provides a specific defence to a charge under that section. However, the Drug Trafficking (Confiscation of Benefits) Act did not retain the UK Drug Trafficking Offences Act 1986 (c 32) definition of "proceeds of drug trafficking" nor provide its own definition.

53 The Drug Trafficking (Confiscation of Benefits) (Amendment) Act 1999 (Act 25 of 1999) (a) amended the Drug Trafficking (Confiscation of Benefits) Act to apply to "criminal conduct"; (b) consolidated key provisions of the Corruption (Confiscation of Benefits) Act into the Drug Trafficking (Confiscation of Benefits) Act; (c) repealed the Corruption (Confiscation of Benefits) Act; and (d) changed the name of the resulting legislation to the "Corruption, Drug Trafficking and Other Serious Offences (Confiscation of Benefits) Act".

54 *Singapore Parliamentary Debates, Official Report* (1 June 1998) vol 69 at col 46 (Mr Wong Kan Seng, Minister for Home Affairs).

55 This is clear from a reading of the new s 4A of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 84A, 1993 Rev Ed), and further confirmed by the Minister for Home Affairs during the Second Reading of the Bill; see *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at col 1733.

(b) the AML provisions of the DTCOBA were preserved and further extended with the addition of parallel provisions to address "criminal conduct";[56] and

(c) the STR provision was repealed and re-enacted to create a mandatory filing obligation in respect of the "proceeds" of a predicate offence.[57]

40 It is submitted that when the CCOBA's "benefits derived from corruption" formula was adopted in the DTCOBA in 1992 and then in the CDSA in 1999, the draftsman overlooked four eventualities that would have to be dealt with in order for the purpose of the AML provisions to be achieved:

(a) The AML provisions, unlike the confiscation provisions, would have to be understood and applied by commercial actors in their conduct of daily commerce, independent of any court proceeding.

(b) The AML provisions, unlike the confiscation provisions, would have to be applied most often in situations that do not involve a convicted predicate offender.

(c) The AML provisions (and the later confiscation provisions) would apply to a wide variety of offences that do not share the peculiar characteristics of corruption that necessitated the draconian approach taken in the CCOBA. These characteristics include the following:

(i) Corruption is considered to be a particularly insidious offence, striking at the heart of good governance and threatening the very survival of Singapore as a society and economy.[58]

(ii) Corruption is "always undercover", "very difficult to detect" and "cunning in hiding its tracks

56 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 84A, 1993 Rev Ed) ss 41A and 43A.

57 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 84A, 1993 Rev Ed) s 38.

58 Corruption was said to "sap the efficiency of our public service and the spirit of our society", to undermine our political stability, to cause "disunity and eventual chaos and even rebellion", to "eventually destroy the whole society", to "destroy the society, the very social, economic, political fabric of that society, that nation", *etc*; *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at cols 1722–1730. With the possible exception of drug trafficking, one would be hard pressed to characterise the other predicate offences as extinction-level threats to the nation.

over a long period of time";[59] corrupt practices "are often not discovered or, if they are discovered, they may be discovered only after a long time".[60]

(iii) Corruption tends to be, or become, an ongoing pattern of behaviour, so the instance of corruption that is detected is seldom the only instance of corruption that has occurred.[61]

(iv) In order to effectively deter corruption, it is not enough to confiscate the property gained from the instance of corruption for which the offender is convicted. It is necessary to confiscate the defendant's gains from *all* instances of corruption – regardless of whether such other instances are proved, or prosecuted or even detected.[62]

(v) Matters relating to property derived by the offender from such other instances of corruption are "specially within his own knowledge and it would be difficult, if not impossible, to obtain evidence concerning them".[63]

(d) The AML provisions would apply to a wide variety of predicate offences where the POCA evidentiary rule is inapplicable when proving the predicate offence. In corruption cases under the POCA, where the POCA evidentiary rule applied, there was much to be said for an equivalent evidentiary rule in the confiscation proceedings under the CCOBA that inevitably followed a conviction. However, most non-corruption predicate offences are tried under the ordinary rules of evidence (and some drug offences are tried under their own special

59 *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at cols 1718–1719 (Prof S Jayakumar, Second Minister for Law).

60 *Singapore Parliamentary Debates, Official Report* (3 March 1989) vol 53 at col 15 (Dr Lee Siew Choh).

61 *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at col 1718 (Prof S Jayakumar, Second Minister for Law) and col 1728 (Mr Heng Chiang Meng). Both the Minister and Mr Heng thought that serial offenders were, if not the norm, then at least common enough to warrant legislating for.

62 *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at col 1722 (Mr Tang See Chim) and cols 1728–1729 (Mr Heng Chiang Meng).

63 *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 at col 1718 (Prof S Jayakumar, Second Minister for Law). The Minister made a similar point in relation to benefits derived from drug trafficking: *Singapore Parliamentary Debates, Official Report* (20 March 1992) vol 59 at cols 1383–1384 (Prof S Jayakumar, Minister for Home Affairs). No such point was made in relation to "criminal conduct" generally in the debates leading up to the Drug Trafficking (Confiscation of Benefits) (Amendment) Act 1999 (Act 25 of 1999).

> evidentiary rules under the Misuse of Drugs Act). In such cases, where the POCA evidentiary rule does not apply to the predicate offence, there is no reason to apply the POCA evidentiary rule to the associated money laundering offence.

D. The substance of the provision that Parliament would have made

41 In order to be "abundantly sure" of the substance of the provision that Parliament would have made, had the error in the Bill been noticed, we turn now to examine Parliament's words and actions in the light of Singapore's obligations under the Vienna and Palermo Conventions.

42 As discussed above,[64] the AML provisions of the CDSA were enacted to fulfil Singapore's obligations under international Conventions to criminalise the laundering of the "proceeds" of certain criminal offences.[65] Of course, these Conventions merely lay down the minimum requirements for local legislation, and it is for each State Party to decide whether or not it wishes to enact domestic legislation that is more extensive in reach.[66] The question, therefore, is whether the choice of the word "benefits" in the AML provisions to denote the targeted property evinces an intention to enact a set of provisions more extensive in reach than required by the Conventions. The parliamentary speeches leading up to the enactment of the CDSA and its predecessor statutes suggest that there was no such intention.

43 When introducing the Drug Trafficking (Confiscation of Benefits) (Amendment) Bill 1999,[67] the Minister for Home Affairs said:[68]

> [T]his Bill seeks to amend the DTA to extend the asset confiscation and anti-money laundering provisions of the DTA beyond drug trafficking to cover other serious crimes. To give effect to this,

64 See paras 30 and 39 above.

65 *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at [30].

66 *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at [32], *per* V K Rajah JA, citing *R v El Kurd (Ussama Sammy)* [2001] Crim LR 234 CA (Crim Div) and *Oei Hengky Wiryo v HKSAR (No 2)* [2007] 1 HKLRD 568. In addition, the Vienna Convention specifically provides in Art 24 that a State Party may adopt more strict or severe measures than those provided in the Convention; Art 34(3) of the Palermo Convention is to similar effect.

67 Bill 16 of 1999, which subsequently became the Drug Trafficking (Confiscation of Benefits) (Amendment) Act 1999 (Act 25 of 1999).

68 *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at col 1733. Clauses 23 and 25 of the Bill introduced the new s 41A and s 43A, which have since been renumbered as s 44 and s 46 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

> clauses 23 and 25 of the Bill seek to provide for the money laundering offences arising from *benefits* of serious offences.

44 However, in the rest of his speech, the Minister referred to the targeted property variously as "*proceeds* of serious crimes", "illegal *proceeds*", "drug trafficking *proceeds*", a drug trafficker's "*proceeds*", "serious crime *proceeds*" and "corruption *proceeds*".[69] When introducing cl 20, which created the new mandatory STR filing obligation (and which actually used the word "proceeds"), the Minister similarly referred to property that represents "*proceeds* of drug trafficking or serious crimes".[70]

45 Since the words "benefits" and "proceeds" are used interchangeably in the parliamentary speeches, one might infer, at least, that Parliament appeared to be more concerned with the provenance of the property than with the mode of identification or proof. But the Minister did not merely use the two words interchangeably. In the speech quoted above, the Minister used the word "benefits" to refer to the property targeted by the AML provisions only *twice* (at the beginning of his speech); in contrast, he referred to such property as "proceeds" *thirteen* times.

46 This is not an idle count of words. If further evidence of Parliament's intention were required, the following passage from the Minister's speech should lay all doubt to rest:[71]

> All Financial Action Task Force members, which include most of the Western developed countries and Hong Kong among others, have already extended or taken measures to extend the scope of their anti-money laundering regime to include the *proceeds of serious crimes*. Singapore, which joined the Financial Action Task Force in 1991, *should do likewise*, to demonstrate that we are committed to being a responsible partner in international initiatives to combat crime.
>
> Apart from international trends, it is also important for our local enforcement efforts to target the *proceeds of a wide range of serious crimes* ….
>
> Many of the amendments in the Bill merely extend current provisions covering *drug trafficking proceeds* to *serious crimes proceeds*.
>
> [emphasis added]

47 All of this strongly suggests that, although the Bill used the terms "benefits of drug trafficking" and "benefits of criminal conduct",

69 *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at cols 1731–1736.
70 *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at col 1734.
71 *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at cols 1732–1733.

Parliament actually thought that it was enacting, and intended to enact, provisions that targeted "proceeds of drug trafficking" or "proceeds of criminal conduct".[72] There is no indication that Parliament intended to enact AML provisions that were more extensive in reach than required by the Vienna and Palermo Conventions.[73] It is therefore possible to say with confidence that Parliament would have approved the use of the terms "proceeds of drug trafficking" and "proceeds of criminal conduct" in the money laundering provisions, had its attention been drawn to this matter.

E. The courts can read "benefits" to mean "proceeds" in the anti-money laundering provisions

48 Given that all three requirements laid down in the English cases and approved by the Court of Appeal in *Kok Chong Weng* are met, it is open to a court – in an appropriate case – to construe "benefits of criminal conduct" in the AML provisions to mean "proceeds of criminal conduct".[74] This construction would express Parliament's true intention more clearly and coherently. It would also, in a single stroke:

> (a) address the linguistic and practical difficulties outlined above[75] by eliminating the subjective aspects of identifying the targeted property; and

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72 In *WBL Corp Ltd v Lew Chee Fai Kevin* [2012] 2 SLR 978 at [31], the Court of Appeal took the view that s 44(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) is "very specific" in targeting the "benefits" from criminal conduct rather than "the proceeds from criminal conduct". But it appears that the Court of Appeal was simply pointing out that the two phrases mean different things, rather than opining on what Parliament intended to convey by those words. In addition, that comment was made by the Court of Appeal when reviewing the High Court's identification of the targeted property (*ie*, in the context of a court proceeding); it was not considering WBL's ability (or otherwise) to identify the targeted property when Lew purported to exercise his share options. In any event, the statement was, as the Court of Appeal itself noted at [22] of its judgment, *obiter dicta*.

73 See *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at col 1739 (Mr Wong Kan Seng, Minister for Home Affairs):

> I do not believe that we should be more stringent than the other countries. Since we are part of the international community in this area, we should therefore be in line with what the other countries are doing. We are not doing more; we are not doing less than what others are doing. We are in keeping with the international mood and climate and the trend as required of the other countries.

The Minister was speaking about broadening the *mens rea* required for money laundering, but his comments reflect the overall approach adopted by the Government in relation to international trends.

74 And, likewise, to construe "benefits of drug dealing" to mean "proceeds of drug dealing".

75 See paras 16 and 18–20 above.

(b) address the problem of unfairness toward innocent third parties outlined above[76] by eliminating the reversal of the burden of proof and by requiring a closer and more robust nexus between the targeted property and the criminal conduct than presently required.

F. Options for defining "proceeds of criminal conduct"

49 But the work of the court in construing the AML provisions (ss 43, 44, 46 and 47 of the CDSA) to refer to the "proceeds of drug dealing" or the "proceeds of criminal conduct" respectively would be incomplete if it did not also supply a working definition of "proceeds". This is because "proceeds", "proceeds of drug dealing" and "proceeds of criminal conduct" are not expressly defined in the CDSA.

(1) The ordinary or dictionary meaning of "proceeds"

50 In the absence of an express definition of "proceeds" in the CDSA, a natural starting point for its interpretation would be the ordinary dictionary meaning of the word. This approach was endorsed by the Hong Kong Court of Final Appeal in *HKSAR v Li Kwok Cheung George*,[77] where it was asked to rule on the meaning of "proceeds of an indictable offence" for purposes of s 25(1) of the Hong Kong Organized and Serious Crimes Ordinance[78] ("HKOSCO"). Section 25(1) of the HKOSCO corresponds broadly with ss 47(2) and 47(3) of the CDSA. Although "proceeds of an offence" is expressly defined in s 2(6)(a) of the HKOSCO, the Court of Final Appeal first considered, and approved, the ordinary meaning of the word:[79]

> Leaving aside section 2(6)(a) for the moment, if one were to give the word 'proceeds' its ordinary meaning in the phrase 'represents any person's proceeds of an indictable offence' in section 25(1), such proceeds would be taken to mean money or property which is derived from or results from the commission of the relevant indictable offence.
>
> This corresponds with the word's dictionary meaning. Thus, the Oxford English Dictionary defines 'proceeds' as: 'That which proceeds, is derived, or results from something; that which is obtained or gained by any transaction; produce; outcome; profit'.
>
> That must be the starting-point in the process of construction.

76 See para 17 above.
77 [2014] HKCFA 48.
78 Cap 455.
79 *HKSAR v Li Kwok Cheung George* [2014] HKCFA 48 at [21]–[23], *per* Ribeiro and Fok PJJ.

51 Such use of "proceeds" in its ordinary sense – to denote "money or property that is derived from or results from the commission of the relevant offence" – accords with the general sense and tenor of the AML and STR provisions. It is also consistent with the usage in:

(a) the specific money laundering defences provided by s 43(4)(*a*) and s 44(4)(*a*) of the CDSA, which use the terms "proceeds of drug trafficking" and "proceeds of criminal conduct" respectively;

(b) s 39 of the CDSA, which requires STR filing in respect of the "proceeds" of drug dealing or criminal conduct; and

(c) Pt III of the CDSA, which sets out provisions that address the application,[80] and insolvency treatment,[81] of sums that are the "proceeds" of a realisation of property[82] or the "proceeds" of the enforcement of a charge.[83]

52 With specific reference to the "proceeds of drug dealing" and the "proceeds of criminal conduct", a court may draw on two additional sources: the Vienna and Palermo Conventions, and the forebears of s 39 of the CDSA.

(2) "Proceeds" as used in the Vienna and Palermo Conventions

53 Given that the AML provisions of the CDSA were enacted to fulfil Singapore's obligations under the Vienna Convention and the Palermo Convention, the definitions provided in the respective Conventions are relevant in ascertaining the meaning of the terms "proceeds of drug dealing" and "proceeds of criminal conduct". Indeed, given the view expressed above – that Parliament did not intend to extend the reach of the AML provisions beyond the requirements of the respective Conventions – the definitions set out in the Conventions should provide not only the substance of these terms but also delineate their outer boundaries.

54 Article 3 of the Vienna Convention requires State Parties to criminalise the conversion, transfer, concealment, acquisition, use or possession, *etc*, of "property derived from any offence or offences"

80 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) s 20(1).

81 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ss 23 and 24.

82 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ss 16 and 19.

83 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) s 17.

specified in the Convention (*ie*, drug offences). The quoted words, it would seem, constitute a self-sufficient definition of "proceeds of drug trafficking".[84]

55 Similarly, Art 6 of the Palermo Convention requires State Parties to criminalise the conversion, transfer, concealment or disguise of the true nature, acquisition, use or possession, *etc*, of the "proceeds of crime". Article 2(e) of the Palermo Convention defines "proceeds of crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offence".

56 It is open to a court, in construing the AML provisions of the CDSA, to adopt either of these formulations as the definition for "proceeds of drug dealing" or "proceeds of criminal conduct".

(3) "Proceeds" of an offence under the UK and Hong Kong statutes

57 But there is a compelling reason to adopt an even more nuanced construction of "proceeds of drug dealing" and "proceeds of criminal conduct". Looking first at the AML provisions, we observe that s 43(4)(*a*) and s 44(4)(*a*) of the CDSA, which set out specific defences to a money laundering charge, use the terms "proceeds of drug dealing" and "proceeds of criminal conduct" respectively. These provisions are derived from s 41(4)(*a*) of the DTCOBA, which is in turn derived from s 24(4)(*a*) of the UKDTOA. These provisions in the CDSA, DTCOBA and UKDTOA are virtually identical in wording. However, there is a crucial difference between the UK legislation and the Singapore legislation: s 2(1)(a) of the UKDTOA defines "proceeds of drug trafficking" as "payments or other rewards received by a person … in connection with drug trafficking carried on by him or by another", while the DTCOBA and the CDSA lack any express definition. Nonetheless, it is submitted that the near-verbatim adoption of s 24(4) of the UKDTOA strongly suggests that the draftsman of the Singapore provisions intended that the phrase "proceeds of drug trafficking" should bear the same meaning in the Singapore legislation as it did in the UKDTOA, but inadvertently omitted to insert a definition corresponding to s 2(1)(a) of the UKDTOA. It is difficult to imagine that the draftsman intended any other meaning.

84 "Proceeds" is defined in Art 1(p) of the Vienna Convention as "property derived from or obtained, directly or indirectly, through the commission of an offence"; note that the word "proceeds" is used, not in Art 3, but in Art 5 of the Convention. Article 5 deals with the *confiscation* of the proceeds of drug trafficking. The point is that, in the Vienna Convention, there is a substantial overlap between "proceeds" and "property derived from an offence", such that the two terms are almost interchangeable.

58 Turning to the STR provisions, we observe that s 39 of the CDSA requires a person to make a disclosure to a Suspicious Transaction Reporting Officer if he knows or has reasonable grounds to suspect that any property represents the "proceeds" of any act that may constitute drug dealing or criminal conduct. Again, no definition of "proceeds" is provided. The parliamentary materials do not identify the model on which s 39 of the CDSA is based, but one can make an educated guess: s 39 of the CDSA is a combination of s 25A(1) of the Hong Kong Drug Trafficking (Recovery of Proceeds) Ordinance[85] ("HKDTROPO"), s 25A(1) of the HKOSCO[86] and s 26B(1) of the UKDTOA.[87] All of these provisions target the "proceeds" of a predicate offence.[88] Here again, even though the CDSA did not *explicitly* adopt the statutory definitions of "proceeds" provided in the Hong Kong[89] and UK[90] legislation, the near-verbatim adoption of portions of the UK and Hong Kong provisions suggests that the Singapore draftsman intended that the phrase "proceeds of drug trafficking" should bear the same meaning in the Singapore legislation as it did in the UKDTOA, HKDTROPO or HKOSCO.

59 If these inferences are correct, it follows that – notwithstanding the absence of an express definition of "proceeds" in the CDSA – the statutory definitions of "proceeds" in the UK and Hong Kong statutes have been *implicitly* incorporated into the CDSA provisions that reproduce the wording of the respective UK and Hong Kong provisions.

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85 Cap 405.

86 Section 25A of the Hong Kong Organized and Serious Crimes Ordinance (Cap 455) is identical to s 25A of the Hong Kong Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), save for substituting "an indictable offence" for "drug trafficking". These provisions were introduced into the respective ordinances in 1995, four years before Singapore introduced the suspicious transaction report filing requirement in its present form.

87 Section 26B was inserted into the UK Drug Trafficking Offences Act 1986 (c 32) in 1993.

88 Section 25A of the Hong Kong Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) refers to "any person's proceeds of … drug trafficking"; s 25A of the Hong Kong Organized and Serious Crimes Ordinance (Cap 455) refers to "any persons' proceeds of … an indictable offence"; and s 26B of the UK Drug Trafficking Offences Act 1986 (c 32) refers to "drug money laundering", which is defined in s 26B(7) as "doing any act which constitutes an offence under section 23A or 24 of this Act, or section 14 of the Criminal Justice (International Co-operation) Act 1990". Section 23A of the UK Drug Trafficking Offences Act criminalised the acquisition, possession or use of proceeds of drug trafficking; s 24 criminalised the assisting of another to retain the benefit of drug trafficking; and s 14 of the Criminal Justice (International Co-operation) Act 1990 (c 5) (UK) criminalised the concealment or transfer of proceeds of drug trafficking.

89 Section 4(1) of the Hong Kong Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) defines a person's "proceeds of drug trafficking"; s 2(6) provides a virtually identical definition in relation to indictable offences.

90 Drug Trafficking Offences Act 1986 (c 32) (UK) s 2(1)(a).

60 But one must proceed cautiously here. The Hong Kong statute defines "proceeds" more broadly than the UK statute:

> (a) Section 2(1) of the UKDTOA provides that "proceeds of drug trafficking" means "any payments or other rewards received by a person … in connection with drug trafficking carried on by him or by another".
>
> (b) Section 4(1) of the HKDTROPO provides a more expansive definition of a person's "proceeds of drug trafficking":
>
> > (i) any payments or other rewards received by him at any time in connection with drug trafficking carried on by him or another;
> >
> > (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and
> >
> > (iii) any pecuniary advantage obtained in connection with drug trafficking carried on by him or another.[91]

61 Given that the implicit incorporation of the UKDTOA definition took effect when the DTCOBA was enacted in 1992, and that the Hong Kong definition came into being only in 1995 and could have been incorporated into the Singapore legislation only in 1999 via the re-enacted s 39 of the CDSA, the argument for adopting the more expansive Hong Kong definition is considerably weaker. Such an argument would imply that Parliament intended, when re-enacting the STR provisions in 1999, to also alter the scope of AML provisions that had been enacted in 1992. It is hard to imagine that Parliament would do this without a clear statement to that effect.

62 In addition, it would be unwise to import the third limb of the Hong Kong definition, which refers to any "pecuniary advantage obtained in connection with drug trafficking", notwithstanding its use in the HKDTROPO and HKOSCO and, more recently, in ss 71(5) of the UK Criminal Justice Act 1988[92] and 340(6) of the UK Proceeds of Crime Act 2002.[93] The operation of the AML rules outside of a court proceeding requires the identification of specific items of property (or sums of money) that are the subject of a proposed transaction or arrangement, and a "pecuniary advantage" often does not lend itself to

91 Section 2(6) of the Hong Kong Organized and Serious Crimes Ordinance (Cap 455) provides a virtually identical definition in relation to indictable offences.

92 c 33.

93 c 29.

such specific identification.[94] For these reasons, it is submitted that s 2(1)(a) of the UKDTOA is the preferred model for a definition of "proceeds of criminal conduct" (or of drug dealing, as the case may be) in the CDSA.

G. Choosing a definition of "proceeds"

63 Of the three possible definitions of "proceeds" outlined above, the one provided by the UKDTOA appears to have the most palpable connection to the CDSA, and should be adopted.

64 Nonetheless, the choice of the specific wording of the definition may be less important than the fact that each definition of "proceeds" discussed above (except the third limb of the HKDTROPO definition) requires an objective and robust connection between the offence and the specific item of targeted property. A robust connection between the predicate offence and the property is essential, not only for the identification of the initial "proceeds", but also – to borrow the words of Justice Clark in *OJSC Oil Co Yugraneft v Abramovich*[95] – for establishing a "proprietary base" from which subsequent property can be traced or followed, through a "series of transactional links", into other property "representing" the proceeds of the offence.

VI. Legislative reform

65 A judicial "cure" for the defects in the AML provisions, while effective, is subject to an obvious limitation: a court can act only when an appropriate case comes before it. Rather than wait for the vagaries of criminal litigation to deliver the right opportunity to the courts, Parliament can move proactively to make the necessary changes. Indeed, if Parliament chooses to act, it should not stop at simply substituting "proceeds" for "benefits" in the AML provisions of the CDSA and providing express definitions of "proceeds" or "proceeds of drug dealing" or "proceeds of criminal conduct". Parliament should go further and consider whether to adopt "proceeds" as the descriptor of the targeted property for the confiscation provisions as well (with any

94 Anti-money laundering provisions are concerned with questions of provenance or quality. A person dealing with property must focus on *that item* of property involved in the transaction before him. A "pecuniary advantage" is a benefit that can be measured in dollar terms, but is often not localised in an identifiable item of property or sum of money that can be concealed, disguised, converted transferred, *etc*, and therefore presents nothing on which the anti-money laundering rules can fasten. These issues are explored – particularly as they relate to pecuniary advantages resulting from income tax evasion – in a separate article.

95 [2008] EWHC 2613 (Comm) at [349].

necessary onus-of-proof adjustments). The statutory amendments would thus, with respect to the provisions relating to criminal conduct:

(a) adopt the phrase "proceeds of criminal conduct" as the descriptor of the targeted property uniformly across the confiscation, AML and STR provisions of the CDSA;[96]

(b) define "proceeds of criminal conduct" to mean "any payments or other rewards received in connection with any criminal conduct";

(c) reverse the onus of proof for identifying the targeted property, but only as an evidential rule and only for purposes of confiscation proceedings before a court;[97] and

(d) specify that the starting point for assessing the amount to be recovered under a confiscation order is the net gain to the offender rather than his gross "proceeds".

66 Corresponding amendments could be introduced in relation to the provisions dealing with drug dealing offences.[98] These proposed changes can be achieved through a series of small amendments to the CDSA with minimal impact to the existing case law and other guidance

96 Apart from the obvious attraction of a single criteria for identifying the targeted property across all three sets of provisions, this approach comports with Parliament's insistence that Singapore's rules align with international practice. The Vienna Convention and the Palermo Convention both require State Parties to legislate for the confiscation of the "proceeds" of predicate offences and criminalise the laundering of such "proceeds".

97 This would be consistent with the Vienna Convention and the Palermo Convention, both of which contemplate the reversal of the onus of proof when identifying the targeted property in confiscation proceedings but not when identifying the target property for the money laundering offences. Indeed, Parliament should consider further limiting the reversal of onus of proof to confiscation proceedings following a conviction for: (a) corruption, drug dealing and kidnapping; or (b) a list of offences selected on the basis of the characteristics of corruption set out at para 40 above.

98 An even better idea might be to subsume "drug dealing offences" into "serious offences" and eliminate the provisions dealing with drug dealing offences, leaving a single set of provisions dealing with criminal conduct. For symbolic reasons, the words "drug trafficking" can be retained in the long and short titles of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed), just as "corruption" was retained in the title of the Act following the repeal of the Corruption (Confiscation of Benefits) Act and corruption offences being subsumed under the category of "serious offences"; see *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at col 1736 (Mr Wong Kan Seng, Minister for Home Affairs).

already in place.[99] The result of these amendments would be a return to the proven and internally consistent schema of the UKDTOA, with the POCA-style evidentiary rules limited in application to only the confiscation provisions (as Parliament might have originally envisioned).

VII. Conclusion

67 The AML rules are criminal laws that must be interpreted, and complied with, by a great number of people in daily commerce. The penalties for non-compliance are harsh. The rules ought, therefore, to be clear in their meaning and unambiguous in their application. As currently drafted, the AML rules fall short of these requirements. Whether by judicial interpretation or legislative intervention, something ought to be done to make them robust, objective and easy to comply with. Given the recent uptick in AML enforcement activity, one hopes that it is done soon.

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99 Of course, the entire Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) could be rewritten based on a new model, such as the UK Proceeds of Crime Act 2002 (c 29). This has the advantages of adopting the latest thinking of the UK on anti-money laundering matters. But a substantial rewrite would have a knock-on effect on existing Monetary Authority of Singapore regulations and guidance, on legal opinions issued by counsel, on bank compliance manuals and thousands of man-hours invested in compliance training across the finance industry (and other regulated industries), in return for uncertain benefits. A more modest proposal for reform is therefore preferable.