IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 76/2022
[2022] NZSC 127

BETWEEN	JIAXIN FINANCE LIMITED (IN LIQUIDATION) First Applicant
	QIANG FU Second Applicant
	FUQIN CHE Third Applicant
AND	THE KING Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	R M Mansfield KC and S L Cogan for Applicants D G Johnstone for Respondent
Judgment:	4 November 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Jiaxin Finance Ltd (Jiaxin), Mr Qiang Fu and Ms Fuqin Che were convicted in the High Court of various offences under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the Act).[1] Their appeal against conviction and an

[1] *R v QF* [2019] NZHC 3058 (Walker J) [HC judgment]. They were subsequently sentenced in *R v Jiaxin Finance Ltd* [2022] NZHC 366, [2020] NZCCLR 18.

application to adduce further evidence were both dismissed by the Court of Appeal.[2] Mr Fu and Ms Che now seek leave to appeal the decision of the Court of Appeal.[3]

Background

[2] Drawing on the description in the judgment of the Court of Appeal, the facts giving rise to the charges can be summarised as follows.[4] Jiaxin is a money remitter and currency agent exchange business. It is a reporting entity under the Act. The High Court found Jiaxin was a family enterprise in which Mr Fu (the sole director and shareholder) and Ms Che (Mr Fu's mother) acted in concert in respect of the business relating to Mr Xiaohua Gong, a businessman living in Canada. The Crown case was that Mr Gong used New Zealand to launder proceeds from an illegal Chinese pyramid scheme.[5]

[3] Ms Che's business relationship with Mr Gong had begun in December 2011 when Global Concept Capital Investment and Finance Ltd (Global Concept) conducted financial transactions for Mr Gong. Global Concept was owned and directed by Mr Fu but run and managed by Ms Che. Global Concept failed an onsite inspection conducted by its anti-money laundering/countering financing of terrorism (AML/CFT) supervisor, the Department of Internal Affairs, on 31 March 2015. Shortly after that, Mr Fu advised the Department that it had stopped trading. Jiaxin was incorporated in August 2014.

[4] The relevant transactions carried out by Jiaxin, and formerly by Global Concept, relied on informal systems to transfer funds between China and

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2 *Jiaxin Finance Ltd v R* [2022] NZCA 287 (Kós P, Goddard and Katz JJ) [CA judgment].

3 The notice of application stated the application was brought by Jiaxin Finance Ltd (Jiaxin), Mr Fu and Ms Che. However, a memorandum was filed noting that Jiaxin was placed into liquidation and that counsel were no longer instructed to act on behalf of it.

4 CA judgment, above n 2, at [4]–[11].

5 In 2021, the High Court approved a settlement between the New Zealand Police and Mr Gong that enabled forfeiture of some $70 million in cash and property held by Mr Gong in New Zealand: CA judgment, above n 2, at [5].

New Zealand. The Court of Appeal described the typical mode of such transfers in this way:[6]

> (a) The customer provides the remitter with their New Zealand bank account number, into which the remitter is to pay New Zealand dollars (NZD).
>
> (b) The remitter provides the customer with its Chinese bank account number, into which the customer is to pay renminbi (RMB).
>
> (c) Once the remitter receives RMB in its Chinese account, it transfers NZD from a New Zealand account into the customer's New Zealand account, less the remitter's commission.

[5] The first charge related to 14 deposits (at different branches) made between 21 and 23 April 2015, totalling $710,722, into Mr Gong's bank account. Ms Che managed those deposits. A little later, in May 2015, Mr Fu began to document transactions involving Mr Gong and conducted via Jiaxin third-party accounts.[7] The trial Judge found the transactions were done at the behest of Ms Che and that in total, between 21 April 2015 and 10 May 2016, Mr Fu and Ms Che remitted around $53 million for Mr Gong, via 311 transactions. Some of these transactions (to a value of approximately $17 million) were conducted through brokers. These events gave rise to the remaining charges.

The proposed appeal

Charge 1 — meaning of "structure"

[6] Charge 1 was an allegation that Ms Che committed an offence under s 101 in that she "structured a transaction" to avoid AML/CFT requirements under the Act when making the 14 deposits referred to above.[8] A "transaction" is defined to include any deposit or transfer of funds whether in cash, cheque, or by electronic or other non-physical means.[9]

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6 At [8].

7 As explained in the HC judgment, above n 1, at [6]–[7], New Zealand banks may close down accounts when suspected of being used to remit funds because of a perceived high compliance risk. This forces remitters to open and operate multiple accounts in the name of others, with their permission. These are known as "third party accounts".

8 These requirements are those set out in pt 2 of the Act.

9 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 5.

[7] Ms Che wishes to argue that the meaning of "structure" gives rise to two points of law. The first of these relates to the definition of "structure" and would have the Court address whether it is an element of the offence that there was originally a single sum. The second aspect is whether knowledge of the AML/CFT requirements allegedly sought to be avoided is an element of the offence. In terms of the first question, Ms Che says that here there was no "structuring" because there was no evidence that the deposits did not "simply correspond" to the amounts Mr Gong transferred from China. On the second aspect, she states there was no evidence she had knowledge of the AML/CFT requirements nor of the relevant thresholds at the bank before further scrutiny is triggered.

[8] These arguments would have this Court reprise arguments considered by the Court of Appeal. The Court rejected the submission that "structuring" "implies the reformulation of inputs — here the funds received by Ms Che — which she then deposited in the 'transaction'" in issue.[10] Rather, the Court said that "structure" had its ordinary meaning of "[t]o build or form into a structure".[11] The Court continued that the relevant transaction here was "the series of deposits" and that, in this respect, "[t]he focus is less on inputs — the source — but upon the *outputs* — that is, the cash deposits made — and whether they amount in combination to a transaction to avoid" any AML/CFT requirements.[12]

[9] We accept that a point of law as to the approach to be taken to the construction of "structure" may arise. However, as the Court of Appeal noted, "the inference was compelling that this was a single transaction, structured by Mr Gong and Ms Che in concert, as a number of smaller transactions".[13] In these circumstances, where "structure" is part of the wider phrase, "structure a transaction",[14] this case is not an appropriate one to consider the broader question. Nor is there an appearance of a miscarriage of justice.[15]

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10 CA judgment, above n 2, at [46].

11 At [46] citing JA Simpson and ESC Wiener *The Oxford English Dictionary: Soot to Styx* (2nd ed, Clarendon Press, Oxford, 1989) vol 16 at 960.

12 At [46].

13 At [46].

14 The applicants did not challenge the Court of Appeal's view that a transaction "may be a single deposit or series of related deposits, connected by source, time, method or recipient": at [45].

15 Senior Courts Act 2016, s 74(2)(c).

[10] In rejecting the second of the proposed appeal grounds the Court of Appeal considered it was not clear why a knowledge requirement would be added to the statutory language. The Court continued:[16]

> The inevitable inference from the facts here, the course of the deposits and the discussions between principals, was that the deposits were made to test the bank's preparedness to accept varying sums sent to Mr Gong's account without demanding [CDD] information. A transaction structured as to tests limits, for the purposes of avoiding them, [met the element of the charge].

[11] As the respondent submits, the purpose of the structuring required to be proven is "to avoid the application of any requirements [in the Act]". Particularly in light of the factual finding, nothing raised by Ms Che calls into question the Court of Appeal's approach to this element of the charge. The criteria for leave to appeal are not met.

Charge 2 — failure to conduct customer due diligence

[12] Jiaxin, Mr Fu and Ms Che (the latter two as secondary parties) were charged with failing to conduct customer due diligence as required by the Act in relation to Mr Gong as Jiaxin's customer for the $53 million remittances from China.[17] In relation to this charge the applicants wish to argue that, where there is a "chain" of people involved, it is unclear on whom a reporting entity should be carrying out customer due diligence. This is said to be a matter of general and public importance and of general commercial significance. The applicants also wish to challenge the factual findings on this issue.

[13] The Court of Appeal rejected the factual arguments for the applicants, most relevantly upholding the finding of the High Court that Mr Gong was Jiaxin's customer to the knowledge of both Mr Fu and Ms Che. The Court of Appeal also discussed factors supporting the conclusion that Ms Che operated as an agent of Jiaxin and was not working at arms' length from the company. On this basis, as the Court of Appeal said, the legal arguments the applicants wish to re-visit on the proposed appeal fall away. No question of general or public importance or of general commercial significance accordingly arises. Nor does anything raised by the

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16 CA judgment, above n 2, at [47].
17 Sections 78 and 91.

applicants give rise to an appearance of a miscarriage in the Court of Appeal's careful assessment of the facts.

Charges 3 and 4 — failing to report suspicious transaction

[14] These charges were brought under ss 92 and 95 of the Act against Jiaxin as principal and Mr Fu and Ms Che as secondary parties and alleged failure by Jiaxin as a reporting entity to keep adequate records relating to suspicious transactions (the 311 payments by which the $53 million remittances were made — charge 3) and to report those suspicious transactions (charge 4).

[15] The proposed appeal on these charges would have the Court reprise the argument made in the Court of Appeal, namely, that properly interpreted the reporting entity must subjectively form the relevant suspicion before it commits the offence.

[16] The Court of Appeal considered that there was no basis to import a requirement for subjective knowledge into the words "the reporting entity has reasonable grounds to suspect" in s 92(1)(b). The Court did not consider that the requirement in s 92(1)(c) which refers to the reporting entity failing to report the transaction within a specified timeframe "after forming that suspicion" affected that interpretation. Rather, the Court adopted the approach of the High Court which was to read s 91(2)(c) as simply referring to the knowledge in s 91(2)(b) which must then be reported. That approach gave "effect to the Act by requiring reporting entities to undertake proper monitoring of client activity, without being able to fall back on sheer ineptitude, short of wilful blindness, as a defence".[18]

[17] Whether the test is an objective or subjective one may be a question of general or public importance. But the question does not arise here. That is because both Courts found that on the evidence Mr Fu and Ms Che in fact considered Mr Gong's transactions to be suspicious, and that they should have been reported under the Act.[19] In addition, the Courts below considered the fact that the dealings with Mr Gong were undertaken by way of an exception to the compliant business practices which had been

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18 At [79].

19 HC judgment, above n 1, at [245]; and CA judgment, above n 2, at [80]. Both applicants denied that in evidence.

set up for the company after Global Concept ceased trading was telling. The High Court Judge put it in this way:[20]

> I am left sure by the Crown evidence that this was a conscious undertaking by both individuals acting in concert to retain a profitable seam of business while minimising oversight because of the risk that Mr [Gong]'s business would otherwise cease.

[18] Again, the criteria for leave to appeal are not met.

Admissibility of evidence

[19] It follows from the above that there is no need to address whether the Court of Appeal was correct to reject the application to admit evidence from a United Kingdom based transnational crime consultant. But, in any event, we see that argument as having insufficient prospects of success to warrant an appeal. The Court of Appeal criticised the evidence on a number of bases observing, amongst other matters, that it contained "statement[s] of the obvious" or did not "advance matters far".[21] The Court also considered the evidence was not fresh as it could and should have been called at trial.

Result

[20] The application for leave to appeal is accordingly dismissed.

Solicitors:
Dominion Law, Auckland for Applicants
Crown Law Office, Wellington for Respondent

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20 HC judgment, above n 1, at [247].
21 CA judgment, above n 2, at [26].