

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 52/2023
[2023] NZSC 124

BETWEEN SIU JUN ZHOU
 First Applicant

 LEVONZ INVESTMENT LIMITED
 Second Applicant

AND COMMISSIONER OF POLICE
 Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: A J Ellis for Applicants
 P D Marshall and M W McMenammin for Respondent

Judgment: 14 September 2023

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
- B The application for leave to appeal is dismissed.**
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REASONS

[1] The respondent (the Commissioner of Police) applied to the High Court for profit forfeiture orders under the Criminal Proceeds (Recovery) Act 2009 (the CPR Act) against the first applicant, Mr Zhou, and a company associated with him, Levonz Investment Ltd (Levonz).¹ The High Court Judge made the orders.² She found that the unlawful benefit obtained by Mr Zhou was \$2,214,000 and ruled that

¹ There was also an application for asset forfeiture orders but this did not need to be determined, on the basis that the profit forfeiture orders were made.

² *Commissioner of Police v He* [2022] NZHC 533 (Doogue J) [HC judgment].

the Commissioner was entitled to recover that amount under the CPR Act. Mr Zhou and Levonz appealed to the Court of Appeal, but their appeal was dismissed.³

[2] The background to the CPR Act proceedings was that Mr Zhou, a Ms He and others were involved in a large-scale synthetic cannabis supply operation. Mr Zhou pleaded guilty in 2015 to a charge of possessing a psychoactive substance for the purpose to sell or supply. In 2019, Mr Zhou pleaded guilty to a charge of selling or supplying non-approved psychoactive substances and two charges of possession for supply of such substances. The amount involved was approximately 173 kilograms. Mr Zhou also pleaded guilty to charges involving possession of weapons and of ammunition. Mr Zhou was sentenced to 26 months' imprisonment on the drugs charges, with concurrent one-year terms imposed in relation to the other charges.⁴

[3] In the High Court, Mr Zhou conceded that he had unlawfully benefited from significant criminal activity, which enlivened the jurisdiction under the CPR Act.⁵ He also conceded that the value of the benefit was presumed to be the value stated in the application (\$2,214,000). But he sought to rebut the presumption as to the value of that benefit on the balance of probabilities, as provided for in s 53(2) of the CPR Act. The High Court Judge found he failed to achieve this, and that was upheld by the Court of Appeal.

[4] The appeal to the Court of Appeal was based on three grounds. The first was that the High Court Judge had been wrong that Mr Zhou failed to rebut the presumption that the benefit was \$2,214,000. The second was that the Commissioner had recovered twice from the benefit received by Mr Zhou and Ms He (Ms He was subject to a forfeiture order of \$3,510,000). The third was that the High Court Judge was wrong to find Mr Zhou would not suffer from undue hardship. All three grounds of appeal failed.

³ *Zhou v Commissioner of Police* [2023] NZCA 137 (Collins, Venning and Gendall JJ).

⁴ *R v He* [2019] NZDC 24130.

⁵ The High Court recorded his counsel's submission that, on the balance of probabilities, the Commissioner could prove an unlawful benefit: HC judgment, above n 2, at [32].

[5] The application for leave to appeal to this Court is out of time, but the Crown does not object to an extension of time to make the application. We grant the extension.

[6] As mentioned above, it was conceded in the Courts below that the jurisdiction was enlivened and that the value of the benefit was presumed to be at least \$2,214,000. There are now effectively concurrent findings of the Courts below that there is no basis to make an order for less than \$2,214,000, because the presumption is not rebutted, there is no double recovery (or, if there is, it does not matter) and there is no undue hardship.

[7] The application for leave to appeal is advanced on the basis that it is not proposed to take issue with the findings of the Courts below but rather on the basis that, if leave is granted, a new argument will be advanced. The applicants wish to argue that the CPR Act regime is criminal in nature and therefore triggers rights under ss 9, 21, 25(d) and 26(2) of the New Zealand Bill of Rights Act 1990 and also art 10 of the Bill of Rights 1688, which prohibits the imposition of “excessive fines”. The essence of the proposed argument is that Mr Zhou, having served a sentence of imprisonment, has now been subjected to a second criminal proceeding (the CPR Act proceeding) involving the imposition of a second penalty and, given the size of the penalty, this amounts to an excessive fine. They also submit that there was a miscarriage of justice as the Courts below did not apply the criminal standard of proof.

[8] The respondent opposes the grant of leave. Counsel for the respondent make the point that this Court usually refuses to give leave on points that have not been taken in the Courts below, citing *LM v R* and *Cuthers v R*.⁶ They also submit the proposed argument would confront the very plain wording of the CPR Act. And, they submit, even if the proposed argument were accepted, there would be arguments available to the respondent to resist the contention that there were breaches of rights arising from the process followed in the present case.

[9] We accept that there may be an argument that the question of whether the regime created by the CPR Act is criminal in nature would raise a matter of public

⁶ *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643; and *Cuthers v R* [2016] NZSC 109.

importance.⁷ But we do not consider that it would be appropriate to grant leave to appeal to this Court to argue the point in circumstances where it has not been argued in either of the Courts below. That means we do not have the benefit of decisions in the lower Courts assessing the merits of the proposed argument to inform our decision as to whether leave should be granted or, if leave were granted, to inform our assessment of the merits of the argument on appeal. In addition, the challenge now proposed runs counter to the concessions made in the High Court that the regime applied to Mr Zhou and the basis on which the case was argued below. In those circumstances we do not consider any risk of a miscarriage of justice arises.⁸

[10] The application for leave to appeal is dismissed.

Solicitors:
Malley & Co, Christchurch for Applicants
Crown Law Office, Wellington for Respondent

⁷ Senior Courts Act 2016, s 74(2)(a).

⁸ Section 74(2)(b).