IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA162/2020
[2022] NZCA 287

BETWEEN	JIAXIN FINANCE LIMITED First Appellant
	QIANG FU Second Appellant
AND	THE QUEEN Respondent

CA166/2020

BETWEEN	FUQIN CHE Appellant
AND	THE QUEEN Respondent

Hearing:	4 November 2021
Court:	Kós P, Goddard and Katz JJ
Counsel:	R M Mansfield QC and S L Cogan for Appellants D G Johnstone and S S McMullan for Respondent
Judgment:	1 July 2022 at 9 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence on appeal is declined.

B The appeals against conviction are dismissed.

REASONS OF THE COURT

(Given by Kós P)

Following a Judge-alone trial occupying two weeks, Walker J convicted the appellants on each of four charges brought under the Anti-Money-Laundering and Countering Financing of Terrorism Act 2009 (the Act or AML/CFT):[1]

CHARGE	DEFENDANT	VERDICT	FINE
Charge 1: s 101 (structuring a transaction to avoid the application of AML/CFT requirements)	Ms Che[2]	Guilty	$40,000
Charge 2: s 91 (failing to conduct customer due diligence)	Ms Che Mr Fu Jiaxin Finance Ltd	Guilty Guilty Guilty	$54,000 $60,000 $500,000
Charge 3: s 95 (failing to keep adequate records relating to a suspicious transaction)	Ms Che Mr Fu Jiaxin Finance Ltd	Guilty Guilty Guilty	$54,000 $60,000 $1,025,000
Charge 4: s 92 (failing to report a suspicious transaction)	Ms Che Mr Fu Jiaxin Finance Ltd	Guilty Guilty Guilty	$54,000 $60,000 $1,025,000

[1] Subsequently the Judge sentenced the appellants to the fines shown above.[3]

[2] The appellants appeal their convictions. There is no sentence appeal.

Background

[3] The essential facts found by the Judge are summarised in her sentencing notes.[4] We draw in part on that summary here. We will deal with the particular financial transactions in issue later, when we discuss each charge. We record that name suppression previously granted to the appellants and their client, Mr Xiaohua (Edward) Gong, has lapsed.

[4] Jiaxin Finance Ltd is a money remitter and currency exchange business. It is a reporting entity under the Act. Mr Fu is Jiaxin's sole director and shareholder.

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1 *R v QF, FC and JFL* [2019] NZHC 3058 [Judgment appealed].
2 Ms Che faced charge 1 alone.
3 *R v Jiaxin Finance Ltd* [2020] NZHC 366, [2020] NZCCLR 18 [Sentencing notes].
4 At [5]–[11].

He actively manages and operates the business. Ms Che is his mother. The Judge found Jiaxin to be a family enterprise in which mother and son acted in concert in respect of the business relating to Mr Gong, a Chinese businessman living in Canada.[5]

[5] The Crown case was that Mr Gong used New Zealand to launder proceeds from an illegal Chinese pyramid scheme. Following the events giving rise to the four charges, the Commissioner of Police obtained a restraining order under the Criminal Proceeds (Recovery) Act 2009 in respect of properties, bank accounts and other assets said to have been obtained by Mr Gong following his remission of $77 million to New Zealand. In 2021, the High Court approved a settlement between Police and Mr Gong that enabled forfeiture of some $70 million in cash and property held by Mr Gong in this country.

[6] The Judge found Ms Che's long-standing relationship with Mr Gong was the genesis of the transactions underpinning the charges.[6] Their business relationship had begun in December 2011. It involved financial transactions conducted via a predecessor company to Jiaxin — Global Concept Capital Investment and Finance Limited — incorporated in January 2010, owned and directed by Mr Fu, but run and managed in fact by Ms Che.

[7] Jiaxin was incorporated in August 2014. Global Concept had failed a 31 March 2015 onsite inspection conducted by the Department of Internal Affairs (the DIA). Mr Fu then advised the DIA that Global Concept ceased trading on 8 April 2015. He engaged an external consultancy firm specialising in the field of anti-money laundering to set up Jiaxin's compliance with the AML/CFT regime. Ms Che's relationship with the Jiaxin business was not disclosed to the external consultant.

[8] In the transfers we are concerned with, Jiaxin and Global Concept relied on informal systems to transfer funds between China and New Zealand. Transfers outside of formal banking arrangements, from China to New Zealand, typically occur in the following way:

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5 At [6].
6 Judgment appealed, above n 1, at [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.

[9] Global Concept was responsible for transferring just under $2 million to Mr Gong via third-party accounts between December 2014 and January 2015. There was thereafter something of a hiatus before, on 5 April 2015, Mr Gong returned, asking Ms Che if she still undertook remittances: "[l]ong time no contact, still in the business of foreign exchange?" Ms Che responded, "I am still doing my old business", to which Mr Gong re-joined, "[s]ituation in the country is not stable".

[10] The first charge related to 14 deposits made between 21 and 23 April 2015, totalling $710,722, into Mr Gong's bank account. Ms Che managed these deposits, and probably made them herself. There can be no suggestion Global Concept was dealing with these matters: it had ceased trading on 8 April 2015. Ms Che alone faced charge 1, which alleged she had structured a transaction to avoid the application of the Act. The Judge was satisfied the Crown had proved this charge to the requisite standard.[7]

[11] In May 2015, Mr Fu began to document transactions involving Mr Gong and conducted via Jiaxin third-party accounts. The 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.[8] Some of these transactions (to a value of approximately $17 million) were conducted through brokers. These events resulted in the remaining charges.

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7 At [146].

8 Sentencing notes, above n 3, at [9].

[12] The second charge was that Jiaxin, as principal, and Mr Fu and Ms Che, as secondary parties, failed to conduct customer due diligence (CDD) on Mr Gong. The central issue in respect of this charge was whether it was Mr Gong or Ms Che who conducted the transactions through Jiaxin. The Judge noted:[9]

> Based on the totality of the evidence presented, it was clear that CDD was required to be conducted on Mr [Gong]. I held that despite efforts to quarantine Jiaxin, Mr [Gong] was "in substance" Jiaxin's customer to the knowledge of both Mr Fu and Ms Che. The structure adopted whereby Ms Che appeared to be Jiaxin's customer was intended to provide a buffer between Mr [Gong] and Jiaxin in the light of Jiaxin's AML/CFT obligations and scrutiny by DIA.

[13] The third and fourth charges related to the failure to report and keep adequate records about suspicious transactions conducted through Jiaxin between 19 May 2015 and 10 May 2016. The Judge found:[10]

> As relates to Jiaxin, there were objectively reasonable grounds for Jiaxin to consider the transactions as suspicious. The sheer volume and frequency of remittances over the relevant period without any stated commercial objective other than removal of money from China, substantiated the reasonable grounds. The only common-sense conclusion to be drawn from the way that Mr [Gong]'s transactions were managed — particularly the minimisation of Ms Che's role in Jiaxin, the way they were kept from the independent consultant and Ms Che's deliberate concealment of Global Concept transactions from DIA [—] was that Mr Fu and Ms Che themselves considered the relevant transactions as suspicious.

Legislative framework

[14] There was no material challenge to the Judge's summary of the legislative framework, and we repeat it here, subject to some additions and abridgements.

[15] It is estimated by the New Zealand Police that some $1.35 billion is laundered annually through New Zealand businesses by criminals. Money laundering "seeks to transform the proceeds of crime into clean funds by stretching the audit trail to breaking point".[11]

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9 At [10].
10 At [11].
11 Marty Robinson and Victoria Scott *The Anti-Money Laundering Regime: A Practical Guide* (LexisNexis, Wellington, 2018) at 1.

[16] The Act was the statutory response to 2003 and 2009 evaluations of New Zealand's regime to combat money laundering and terrorist financing by the Financial Action Taskforce (FATF). The FATF is an intergovernmental body "established in 1989 by the G7 Summit to develop and promote national and international policies to combat money laundering".[12] It makes recommendations to governments about the most desirable framework to combat money laundering and terrorist financing and prescribes global standards.[13]

[17] The express statutory purposes of the Act are:[14]

> (a) to detect and deter money laundering and the financing of terrorism; and
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> (b) to maintain and enhance New Zealand's international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the [FATF]; and
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> (c) to contribute to public confidence in the financial system.

[18] The Act received Royal assent in October 2009 but did not come fully into force until 30 June 2013. As Toogood J has observed, the Act constitutes "a significant step up in the regulatory framework governing financial institutions and transactions in New Zealand".[15] It imposes stringent duties on reporting entities to achieve the legislative objectives and purposes.

[19] The Act is divided into four parts. AML/CFT requirements and compliance are in pt 2, divided into sub-parts:[16]

> (a) Subpart 1 addresses CDD obligations. It prescribes a hierarchy of standards known as simplified, standard and enhanced CDD, depending on the nature and circumstances of the customer. Prohibitions on establishing or continuing business without CDD are included.

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12 At 5.
13 At 5.
14 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 3(1).
15 *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd* [2017] NZHC 2363, [2018] 2 NZLR 552 at [20].
16 We refer only to the legislation as it stood at the time of the alleged offending in 2015–2016.

(b) Subpart 2 places statutory duties on reporting entities to convey to the Commissioner of Police information that comes to their attention in respect of which they have reasonable grounds to suspect that it may be relevant to the investigation or prosecution of money laundering, or the enforcement of the Misuse of Drugs Act 1975, the Terrorism Suppression Act 2002, the Proceeds of Crime Act 1991, or the Criminal Proceeds (Recovery) Act 2009.

(c) Subpart 3 specifies that reporting entities must keep records relating to every transaction, with strict requirements for details to allow the ready reconstruction of transactions and the identification and verification of the persons involved.

(d) Subpart 4 provides that every reporting entity must have a compliance programme and a compliance officer and set minimum standards for such a programme.

[20] In pt 3, the Act provides both a civil and a criminal enforcement regime for non-compliance. Section 78 defines conduct which amounts to a civil liability act; s 91 provides that engaging in a civil liability act knowingly or recklessly amounts to a criminal offence. There are also stand-alone offences relating to "suspicious transactions", which we discuss later in this judgment.[17]

[21] "[F]inancial institution" in s 5 includes a person, who in the ordinary course of business, carries on the activity of "transferring money or value for, or on behalf of, a customer".[18] Money remittance involves that activity, and so money remitters fall within the definition of reporting entities under the Act.[19] The DIA is the relevant AML/CFT supervisor.

[22] "[T]ransaction" is relevantly defined in the same provision:

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17 See [69]–[70] below.

18 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 5 definition of "financial institution", para (a)(iv).

19 Section 5, definition of "reporting entity", para (a)(iii).

(a) means any deposit, withdrawal, exchange, or transfer of funds (in any denominated currency), whether—

(i) in cash; or

(ii) by cheque, payment order, or other instrument; or

(iii) by electronic or other non-physical means …

[23] As the Judge noted, central to the AML/CFT regime is the requirement that reporting entities have a robust risk assessment process and programme.[20] It is for the reporting entity itself to gauge its own risk in the formation of its written risk assessment document. This document requires a self-assessment guided or informed by sector risk information circulated by the DIA and Police. DIA describes this task as the foundation of an effective AML/CFT programme.[21] It enables reporting entities to design, implement and maintain a programme, which is the record of internal procedures, policies and controls for managing and mitigating risk.

Application for leave to adduce new evidence

[24] The appellants seek leave to adduce further evidence on appeal.[22] This takes the form of an affidavit from a Mr Robin McCusker, a transnational crime consultant domiciled in the United Kingdom. Receipt is opposed by the Crown.

[25] Mr McCusker's affidavit evidence is in substance aimed at evidence given at trial by Mr Robert Milnes, the practice leader in the Anti-Money Laundering Group at the DIA. It is also premised on a challenge to the judgment appealed on the basis that it treats money remittance as inherently suspicious unless the remitter demonstrates validity. In short, this is an assertion that the Judge reversed the onus. That is not our reading of the judgment at all. Indeed, the Judge makes her (correct) position clear from the outset when she says:[23]

> Money remittance or informal value transfer systems, is a broad term encompassing diverse methods of money transfer. In the present context it involves the transfer of money outside formal regulated financial systems. One such system is the informal 'hawala' system, with roots in particular

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20 Judgment appealed, above n 1, at [51].

21 Financial Markets Authority, Reserve Bank and Department of Internal Affairs *AML/CFT Programme Guideline* (May 2018) at [13].

22 Court of Appeal (Civil) Rules 2005, r 45.

23 Judgment appealed, above n 1, at [4].

> historical, cultural and economic backgrounds. Generally, this involves the transfer of funds between originator and remitter in Country A in one currency, and a corresponding transfer between remitter and originator/beneficiary in Country B in another currency. Currency does not cross borders but there is an exchange of value. It is both common and not inherently unlawful in New Zealand. …

[26] The affidavit also sets about advancing a thesis to the general effect that informal value transfer services do not necessarily present a high risk of money laundering or terrorist financing. To the extent Mr McCusker confirms such systems, whether hawala or fei ch'ien (flying money), depend upon trust, and can be, and are, used for legitimate transfers, he makes a statement of the obvious. That such systems are common among people of cultures that are minorities in New Zealand also does not advance matters far. The Act sets standards applicable to people of all cultures who live or conduct business in New Zealand. Differing cultural mores may explain or mitigate subjective elements of alleged offending, but we find little of use for the proposed evidence on that issue. Beyond that, however, the broad proposition as to risk is unsupportable. As Mr Johnstone submitted for the Crown, that thesis is:

> … contrary to recent authoritative guidance such as that contained in New Zealand's 2019 National Risk Assessment and [FATF's] April 2021 Mutual Evaluation Report on New Zealand. Indeed, it is at odds even with the aged guidance that it cites: the basic point of the [FATF] 2003 guidance was to promote FATF Special Recommendation 7 and the inclusion of informal money remittance within the scope of AML/CFT regulation in order to mitigate the clear risk of its misuse for money laundering/terrorist financing.
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> (Footnotes omitted.)

[27] Mr Johnstone also takes aim at Mr McCusker's affidavit for internal inconsistency and a series of selective quotations from authorities without reference to contrary passages or subsequent qualifications. We are satisfied these objections are substantially sound. They would be enough on their own to deny leave, on the basis of a want of cogency, and on the basis the evidence does not offer the Court the substantial help required to meet the threshold in s 25 of the Evidence Act 2006, not least for the reasons also identified at [80] below.

[28] Furthermore, this evidence is not fresh: it could and should have been called at trial and subjected to searching cross-examination at that time and in that context. That is by no means any criticism of counsel for the appellants, who were not engaged at

trial. Nor might it have mattered had the affidavit not been objectionable on the other grounds identified.

[29] The application for leave to adduce further evidence on appeal will therefore be declined.

Charge 1: Unlawful structuring of deposits to Mr Gong's bank account

[30] We take the factual background to charge 1 from the judgment appealed.[24] There is no material challenge to the following findings.

[31] Between 21 April 2015 and 23 April 2015, 14 separate cash deposits were made into an ANZ account of Mr Gong:

Date	Time	Bank	Branch	Amount
21/04/2015	13:35	ANZ	231 Dominion Road, Mt Eden	$70,000.00
21/04/2015	13:48	ANZ	Store 424A L1 Westfield, St Lukes 80 St Lukes Road	$60,000.00
21/04/2015	13:58	ANZ	Shop 529 Westfield, St Lukes 80 St Lukes Road	$40,000.00
21/04/2015	16:22	ANZ	231 Dominion Road, Mt Eden	$80,000.00
22/04/2015	12:34	ANZ	231 Dominion Road, Mt Eden	$70,000.00
22/04/2015	14:38	ANZ	985 Dominion Road Mt Roskill	$50,000.00
22/04/2015	15:00	ANZ	22 Stoddard Road, Mt Roskill	$10,000.00
22/04/2015	15:17	ANZ	231 Dominion Road, Mt Eden	$40,000.00
22/04/2015	15:24	ANZ	Shop 529 Westfield, St Lukes 80 St Lukes Road	$40,000.00
22/04/2015	15:56	ANZ	231 Dominion Road, Mt Eden	$50,000.00
23/04/2015	15:20	ANZ	231 Dominion Road, Mt Eden	$99,000.00
24/04/2015	13:29	ANZ	231 Dominion Road, Mt Eden	$60,000.00
24/04/2015	16:13	ANZ	231 Dominion Road, Mt Eden	$21,772.00
24/04/2015	16:30	ANZ	Store 424A L1 Westfield, St Lukes 80 St Lukes Road	$20,000.00

[24] Judgment appealed, above n 1, at [133]–[137].

[32] A photographic image of each of the 14 deposit slips was located on Ms Che's iPhone. The deposit slips matched the counter deposit entries in Mr Gong's bank account. Each deposit slip identified the same ANZ account of the recipient and was date and time-stamped. As the Judge noted, the deposits were spread over five ANZ branches over four days; and some deposits were made within 10 minutes of each other at ANZ branches within close proximity. Metadata demonstrates that the image on the iPhone was, in some instances, "create[d]" within minutes of the time stamp on the deposit. These were, let us be clear, large sums of cash carried from bank to bank.

[33] Ms Che acknowledged to the DIA through her solicitor that she had made cash deposits into Mr Gong's bank account between 21 April 2015 and 10 May 2016. The bank records of Mr Gong indicated that there were numerous cash deposits into the account totalling more than $7 million between December 2014 and May 2016. Some of these deposits recorded the reference "jx" or "cx" against them, but the 14 deposits here did not.

[34] The Judge noted it was possible the physical act of depositing (whether some or all deposits) was done by an employee, referencing a WeChat exchange between an employee and Ms Che on 21 April 2015:[25]

Che:	Send me the transaction receipt once you have done.
Che:	Done.
Employee:	Wait, there is a problem, I am asking city (branch) how to resolve.

She was satisfied on the evidence, however, that the depositing was carried out under Ms Che's instruction and on her behalf, even if not by Ms Che herself.

Judgment appealed

[35] Charge 1 arises under s 101 of the Act, which at the time provided:

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[25] At [136].

> **101 Structuring transaction to avoid application of AML/CFT requirements**
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> A person commits an offence if the person structures a transaction (other than a transaction that involves the cross-border transportation of cash) to avoid the application of any AML/CFT requirements.

[36] The Judge identified the three requisite elements of this charge in these terms:[26]

(a) whether the deposit in cash for Mr Gong amounted to a transaction which did not involve the cross-border transportation of cash;

(b) whether Ms Che structured those cash deposits; and

(c) whether Ms Che structured them to avoid the application of any requirements in the Act.

[37] As to the first element, the Judge concluded that the "deposits of cash into [Mr Gong's] bank account [were] clearly each a transaction which did not involve the transportation of cash across borders".[27] The Judge then said:[28]

> The question is whether they collectively comprise one transaction since the structuring relied on by the Crown is the splitting of the sum of $710,772 into multiple deposits, spread over five branches of the same bank over a period of four days.

[38] Turning to the second element — whether Ms Che "structured" the deposits — the Judge concluded:[29]

> The common elements of each individual deposit over this short period and the way [in which] they were carried out were so similar that they can only reasonably be seen to be linked or as a series forming part of one transaction.

The Judge was satisfied this element had been established to the required standard of proof.

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26 At [132].
27 At [139].
28 At [139].
29 At [140].

[39] Turning then to the third element — whether Ms Che structured the deposits to avoid the application of the Act — the Judge noted that this required "[her] to be sure that Ms Che's purpose or intention in structuring the deposits in this way was to avoid the application of any requirements" of the Act.[30]

[40] The Judge found it was highly likely that receiving banks have thresholds for cash deposits which trigger scrutiny, although she did not have evidence of that. And nor was there evidence that banks had at the time threshold limits for the depositing of cash which might explain the commercial necessity to break deposits up. As the Judge noted, however:[31]

> There is no discernible pattern in the size of the deposits save that no deposit exceeded $100,000 and one deposit was just under $100,000.

[41] The Judge referred to a WeChat message between Mr Gong and Ms Che on 20 April 2015.[32] The core element, towards the end, reads as follows:

> Mr [Gong]: It will be best if it's bigger limit
>
> Ms Che: Ok.
>
> Ms Che: I will let you know tomorrow once I tried it out.

The Judge found this exchange telling, concluding:[33]

> The depositing of cash in a series of transactions was a trial of some sort, devised by Ms Che to assist Mr [Gong].

Appeal

[42] The first criticism made of the judgment is that there was no evidence either that the 14 deposits (1) did not reflect 14 similar transfers from Mr Gong in the same amounts (so that no "structuring" occurred) or (2) that the 14 deposits derived from a single sum which would have needed to be subdivided to amount to structuring.

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30 At [141].
31 At [142].
32 At [143].
33 At [145].

[43] Secondly, Mr Mansfield, counsel for the appellants, says the Judge failed to identify with precision which requirements of the Act the allegedly structured transaction was intended to avoid, and how. In particular, the Judge did not explain how the splitting of $700,000 into 14 deposits of between $10,000 and $99,000 would avoid the obligations of ANZ to report or conduct enhanced CDD. He submits the deposits would likely have been treated as "occasional transactions" under the Act, for which the threshold value for CDD at the time was $9,999.99. Every one of the 14 deposits exceeded that amount, so none would have avoided CDD obligations. The Judge had relied on internal bank thresholds, the existence of which was highly probable. But those are matters of internal bank policy, rather than requirements of the Act. Relatedly, it was submitted the Court failed to identify anything about the 14 deposits which, if viewed as a single sum, would have been suspicious (or required reporting), that would have been less suspicious if split into 14 deposits.

[44] Thirdly, Mr Mansfield criticises the Judge's inference based on the WeChat message thread that the deposits were "a trial of some sort, devised by Ms Che to assist Mr [Gong]". Relatedly, it was submitted there was a legitimate reason for splitting the payments, namely local banks' "concerted practice of 'de-banking' money remitters by closing their accounts".

Discussion

[45] We have set out s 101 of the Act at [35] above. The expression "transaction" is defined in s 5 — set out at [22] above — and relevantly means "any deposit … in cash". "Structuring" is undefined, but the meaning given to it must be one consistent with the purposes of the Act. In our view, the purposes of the Act suggest a "transaction" may be a single deposit or series of related deposits, connected by source, time, method or recipient. Although source here is unclear, there is the requisite connection of time, method and recipient (Mr Gong) for the 14 deposits to amount to a "transaction" under the Act. In agreement with the Judge, we do not consider the deposits here needed to be shown to have existed as parts of a larger cash sum prior to the deposit.[34] We agree with Mr Johnstone that the contrary conclusion would deprive the offence provision of much of its intended efficacy.

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[34] See Judgment appealed, above n 1, at [140].

[46] Nor do we accept the submission made to the effect that the element of "structuring" implies the reformulation of inputs — here the funds received by Ms Che — which she then deposited in the "transaction" as defined. Had Ms Che received a single sum from Mr Gong, and broken it down, the inference of structuring might be stronger still. "Structure" here takes its ordinary meaning of "[t]o build or form into a structure".[35] The "transaction" said to be "structured" is the series of deposits by Ms Che into Mr Gong's bank account over three days in April 2015. The 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 of the pt-2 requirements of the Act. In context, particularly in light of the WeChat quoted at [41] above, 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.

[47] We also do not accept Mr Mansfield's submission that Ms Che had to know the receiving bank's AML/CFT thresholds. It is unclear why such a requirement should be added to the statutory language. 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, meets the third element in [36] above.

[48] We agree with Mr Johnstone's submission that the bank might later reconstruct the overall sum deposited, and seek to ask CDD questions, but in the moment as each sum was deposited without those questions being asked, the prospect of such questions diminished. The smaller sums could then be presented as the daily trading deposits of a substantial concern and it became less likely they would be challenged.

[49] Finally, the practice of "de-banking" (or "de-risking") relates to trading banks closing the bank accounts of non-trading money remitters. The evidence at trial demonstrated that a common response to this is for money remitters to set up accounts in the names of others to disguise the fact that they are being used to transact a money remittance service. As Mr Milnes said in his evidence:

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

> The third party accounts would generally be opened in the names of related (non-money remitting) entities or family members. This would provide an initial mask. A further layer could be added by creative narrations in reference and particulars fields. After a while, banks would detect this activity and close the account, resulting in money remitters opening another in its place.

However, trading bank de-risking was not a practice applied to retail customer accounts, such as Mr Gong's.

Charge 2: Failing to undertake customer due diligence

[50] Charge 2, brought under s 91 of the Act against Jiaxin as principal and Mr Fu and Ms Che as secondary parties, alleged failure to conduct CDD required by subpart 1 of pt 2 of the Act in respect of Mr Gong as Jiaxin's customer for the $53 million remittances from China.

[51] It seems common ground (and correct) that there were four elements the Crown needed to prove as against Jiaxin:

(a) that Mr Gong was Jiaxin's customer;

(b) that Jiaxin was required to conduct CDD on Mr Gong;

(c) that Jiaxin knew it needed to obtain identity information from Mr Gong (or was reckless as to that requirement); and

(d) that Jiaxin failed to obtain identity information from Mr Gong.

[52] It was common ground Jiaxin did not conduct CDD on Mr Gong, on the argued basis he was not its customer.

Judgment appealed

[53] The Judge found that "despite the best efforts of Mr Fu and Ms Che to quarantine Jiaxin, Mr [Gong] was 'in substance' Jiaxin's customer to the knowledge of both Mr Fu and Ms Che".[36] Ms Che continued to liaise between Jiaxin and

[36] Judgment appealed, above n 1, at [168].

Mr Gong to maintain continuity in the relationship and "as a convenient structure to provide a buffer between Mr [Gong] and Jiaxin in the light of Jiaxin's AML/CFT obligations and scrutiny by [the] DIA".[37]

[54] The Judge found that the "special circumstance and knowledge of Mr Fu, and therefore Jiaxin" distinguished the case from cases where "third party remitters deal at arms-length as brokers with other remitters".[38] Here, "Mr Fu and Ms Che adopted a course of conduct to consistently conceal transactions relating to Mr [Gong] from [the] DIA".[39] The Judge also noted that at trial, Mr Fu had admitted that payments to Mr Gong went "through" Jiaxin in the sense that Jiaxin third-party accounts (accounts controlled by Jiaxin) were the paying entities. It followed that the "nub of the contest" on charge 2 was simply whether Mr Gong or Ms Che conducted these transactions.[40]

Appeal

[55] Mr Mansfield advanced two primary arguments on behalf of the appellants. The first is that the Court drew impermissible inferences from the relationship between Mr Fu and his mother, and from conduct that should have been seen instead as consistent with a broker-remitter relationship. Jiaxin was entitled to rely on Ms Che as remitter in her own right, and as the person responsible to undertake CDD on Mr Gong. There was insufficient evidence from which to infer the required standard of knowledge or recklessness existed.

[56] Secondly, that the Court gave insufficient consideration to a "latent ambiguity", noted by the Judge,[41] as to whether remitters dealing with other remitters are obliged to conduct CDD on the other remitter or on their end customer (being the person on whose behalf the transaction is being conducted). Contending it was the former, Mr Mansfield submitted Jiaxin was not required to undertake CDD on Mr Gong at all.

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37 At [168].
38 At [172].
39 At [188].
40 At [198]–[199].
41 At [172].

Discussion

[57] On our appreciation of the evidence, the inferences drawn by the Judge from the relationship between Mr Fu and his mother were open to her.

[58] As Mr Johnstone submitted to us, the Judge's analysis commenced with an appropriately cautious analysis of the nature of Jiaxin's business and Ms Che's involvement. On the mother-son relationship, care was taken to observe that Mr Fu and Ms Che's shared interest in Jiaxin's success went further than the initial family investment and any "ordinary incident of the close mother-son relationship".[42]

[59] The Judge's conclusion that Mr Gong was "'in substance'" Jiaxin's customer, to the knowledge of Mr Fu and Ms Che,[43] was plainly justified on the evidence before her.

[60] The factors relied on by the Judge were four.[44] First, Mr Fu created a Jiaxin transaction record when funds were paid to Mr Gong from Jiaxin-controlled or accessed accounts. These accounted for the bulk of the payments to Mr Gong, amounting to approximately $36 million. Secondly, the money reached Mr Gong's New Zealand accounts via Jiaxin-controlled third-party bank accounts. Thirdly, Mr Fu acknowledged Jiaxin's role in processing and settling these transactions, albeit claiming Ms Che was the customer. So too he acknowledged Jiaxin was the responsible remitter when narration details in Mr Gong's New Zealand bank accounts referred to Jiaxin. Fourthly, the Judge pointed to Mr Fu and Ms Che's "consistent efforts" to conceal from the DIA not only Jiaxin's role in transactions relating to Mr Gong but Ms Che's role in both Global Concept and Jiaxin. We turn to that now.

[61] Investigators from the DIA inspecting Global Concept in March 2015 were not initially informed of Ms Che's involvement. They were provided with transaction records which omitted Mr Gong's January 2015 remittances. After Mr Fu engaged a consultant, a Mr Crowle, to assist with Jiaxin's AML/CFT compliance in anticipation of further review from the DIA, Mr Crowle told the DIA that Global Concept would

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42 At [162].
43 At [168].
44 At [166].

close and all Jiaxin business would be brought under one entity. Mr Crowle was not initially made aware of Ms Che's access to Jiaxin's bank account, or that Ms Che continued to operate from Global Concept's former premises at Dominion Road. An organisational chart of staff provided to the DIA made no mention of Ms Che. When interviewed in August 2016, Mr Fu omitted to disclose the substantial volume of transactions conducted through Jiaxin's accounts for Mr Gong. Asked about Mr Gong, his response in the context of questions about the conducting of transactions through Jiaxin's accounts and Ms Che's role, was misleading:

> Q: Can you explain to me who [Mr Gong] date of birth … is please, is he a customer of any of the entities we have talked about today?
>
> A: No.

[62] In response to a formal notice from the DIA requiring all records relating to a series of transactions, including three remittances to Mr Gong, Mr Fu provided a USB stick containing documents, but added in a covering letter in respect of the three Mr Gong transactions:

> No Records held as not a client of Jiaxin Finance.

As Mr Johnstone submitted, that answer was false, or at the very least misleading. Jiaxin did hold records of the transactions, albeit that they identified Ms Che as the customer.

[63] Accordingly, we accept Mr Johnstone's submission that Mr Fu and Ms Che's attempts to mislead the DIA were numerous and consistent. They can be contrasted with the expected conduct of a broker explaining its remitter relationships when under investigation by its regulator. The Judge was entitled to infer concealment inconsistent with the explanation offered.

[64] Ms Che's sole business with Jiaxin was Mr Gong's transactions. All other related business during this period she referred to Jiaxin. We consider the Judge was entitled to infer, as she did, that Ms Che liaised between Jiaxin and Mr Gong in order to provide continuity in the trust relationship with him after Global Concept was forced

to cease trading, and that she served as a "buffer" between Jiaxin and Mr Gong in light of Jiaxin's AML/CFT obligations and scrutiny by the DIA.[45] As the Judge put it:[46]

> Whereas Ms Che had formerly conducted these transactions under the auspices of Global Concept, she was subsequently arranging them through Jiaxin, with Mr Fu's knowledge and complicity.

[65] As Mr Johnstone also submitted, these factors were not consistent with a regular broker-remitter relationship. As he put it, Ms Che (assuming she were the remitter) did not "simply happen to use" Jiaxin's services on occasion as a broker: Jiaxin was used for the bulk of the remittances to Mr Gong. Ms Che did not have access to banking facilities that she would normally need to use as a remitter, relying entirely on Jiaxin. Ms Che did not appear to have had access to any New Zealand accounts from which she might have met any of Mr Gong's remittances. The degree of involvement of Mr Fu and of Jiaxin's internal infrastructure with "Ms Che's business", if it was that, went far beyond the involvement a regular broker might have offered to complete remittances initiated by her as remitter.

[66] Mr Fu's evidence that Ms Che's involvement with Jiaxin was merely a referral source was not credible. Nor was his suggestion Ms Che acted on her own account once Global Concept ceased trading. As the Judge noted, WeChat exchanges extracted from their cellphones "paint[ed] a picture of business associates operating together to structure and manage Mr [Gong's] transactions".[47]

[67] We therefore reject the primary argument advanced by the appellants. With that, the secondary argument really topples also. That is, as to the potential ambiguity in the application of the Act where remitters are transacting with one another at arms' length.[48] But this, patently, is not that case. Ms Che operated as an agent of Jiaxin and not at arms' length from it. It is unnecessary therefore for us to examine the secondary argument any further.

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45 At [168].
46 At [168].
47 At [164].
48 See [56] above.

[68] There being no other challenges to the Judge's analysis of the elements of the second charge, or to its application to Mr Fu and Ms Che as secondary parties, we turn now to the remaining charges.

Charges 3 and 4: Failing to retain records and report suspicious transaction

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

[70] We set those provisions out as they read at the relevant time:

> **92 Failing to report suspicious transaction**
>
> (1) A reporting entity commits an offence if—
>
> (a) a transaction is conducted or is sought to be conducted through the reporting entity; and
>
> (b) the reporting entity has reasonable grounds to suspect that the transaction or the proposed transaction is or may be—
>
> (i) relevant to the investigation or prosecution of any person for a money laundering offence; or
>
> (ii) relevant to the enforcement of the Misuse of Drugs Act 1975; or
>
> (iii) relevant to the enforcement of the Terrorism Suppression Act 2002; or
>
> (iv) relevant to the enforcement of the Proceeds of Crime Act 1991 or the Criminal Proceeds (Recovery) Act 2009; or
>
> (v) relevant to the investigation or prosecution of a serious offence within the meaning of section 243(1) of the Crimes Act 1961; and
>
> (c) the reporting entity fails to report the transaction or the proposed transaction to the Commissioner as soon as practicable, but no later than 3 working days, after forming that suspicion.
>
> ...

> **95 Failure to keep or retain adequate records relating to suspicious transaction**
>
> A reporting entity commits an offence if the reporting entity fails to keep or retain adequate records relating to a suspicious transaction.

Judgment appealed

[71] The Judge found that the offence provisions relating to "suspicious transactions" operate when a reporting institute becomes aware of "reasonable grounds objectively justifying a suspicion of a reportable transaction".[49] Section 92 did not require the suspicion to be subjectively held.[50] That did not mean the offence was a strict liability one, however, as the provision still required the defendant to possess objectively reasonable grounds, even if they did not appreciate their import.[51]

[72] Secondly, the Judge held that Jiaxin had reasonable grounds for suspicion. There were:[52]

> … multiple hallmarks of suspiciousness held by Mr Fu, and therefore Jiaxin, in respect of many of Mr [Gong's] transactions and that a reasonable person would have made a … suspicious transaction [report] to Police.

As the Judge noted:[53]

> The most telling indicia is the volume and frequency of remittances over an extended period without any stated or recorded commercial objective other than the inherent purpose of removing money from China.

[73] Thirdly, the Judge held that on the evidence Mr Fu and Ms Che in fact considered Mr Gong's transactions to be suspicious, in the sense they should have been reported under the Act, despite their denials in evidence.[54] The Judge said:[55]

> The only common-sense conclusion to be drawn is that the construct of regarding Ms Che as the customer of Jiaxin was part of the concerted and joint endeavour to quarantine Jiaxin's involvement. In reaching this view, I draw from the context, the way these transactions with Mr [Gong] were conducted, the minimisation of Ms Che's involvement in the businesses, Ms Che's

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49 At [211] citing *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd*, above n 5.
50 At [212(a)].
51 At [214]–[216].
52 At [224].
53 At [225].
54 At [245].
55 At [245].

> deliberate concealment of Global Concept transactions with Mr [Gong] in March 2015 (in respect of Ms Che only) and Mr Fu's interactions with [the] DIA. This construct, in turn, was motivated exclusively by the awareness of risk associated with Mr [Gong's] course of dealings.

[74] The Judge also held the fact that the dealings with Mr Gong were conducted by way of exception to the compliant business practices set up for Jiaxin was telling.[56] That the rest of Jiaxin's business was compliant "meant that Mr Fu had full knowledge of what compliance required and looked like".[57] The Judge also noted that there was "no plausible commercial reason" not to bring Mr Gong's custom within the rest of Jiaxin's business, which was complaint with the Act.[58] She concluded:[59]

> 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.

Appeal

[75] For the appellants, Mr Mansfield challenged the objective approach adopted by the Judge. He submits the proper interpretation of s 92 is that the reporting entity must subjectively form the relevant suspicion before it commits the offence. Particular emphasis was laid in this argument upon s 92(1)(c) — "after forming that suspicion". The provision applies therefore where either actual suspicion is held, or wilful blindness alone explains its absence.

[76] Secondly, Mr Mansfield submits that Mr Gong's transactions were neither objectively nor subjectively suspicious. In advancing that submission, Mr Mansfield in part relied on Mr McCuster's affidavit, which we have held inadmissible for want of cogency, utility and freshness.[60] But more generally, Mr Mansfield submitted that remittance of money from China using a method which avoids application of Chinese currency control regulations was "[an] obvious and reasonable … commercial objective" for which no further reasons were required. The arrangement in which Mr Gong was Ms Che's customer, and Ms Che Jiaxin's, was not an artificial construct,

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56 At [246].
57 At [246].
58 At [247].
59 At [247].
60 At [27]–[29] above.

and they should not have been found to be subjectively suspicious of Mr Gong's transactions.

Discussion

[77] We start with the subjective assessment argument.

[78] Starting with s 92(1)(b), there is no warrant to read any subjectivity into the words "the reporting entity has reasonable grounds to suspect". We consider that imposes a purely objective standard of (1) possession of information and (2) the importance of that information. Toogood J reached a similar conclusion in analysing the former s 40(1)(b) in *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd*,[61] as did Heath J in *Police v Devereux* in dealing with a similar provision in forerunner legislation to the Act.[62]

[79] We do not then read s 92(1)(c) as diluting that, by requiring actual, subjective suspicion. That would produce the entirely surprising consequence that one standard is set at para (b), but then a lesser one applies at para (c). Why would Parliament have intended to introduce a filter, excluding application in some cases, in that entirely cursory fashion? The drafting is infelicitous, inasmuch as certainty in para (b) gives way to arguable ambiguity at para (c). But that is as far as it goes, and ambiguity requires construction. As the Judge observed, the construction most reflective of the legislature's intent lies in reading para (c) as referencing the knowledge in para (b) — which must then be reported.[63] The contrary construction would "cut a swathe through the Act's protective framework and the ability to enforce it".[64] The construction the Judge gave s 92(1)(c), with which we respectfully agree, gives 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.

[80] We move to the remaining arguments. To a great degree the findings we have made already, in particular on charge 2, answer them. We agree with Mr Johnstone

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61 *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd*, above n 5, at [64].
62 *Police v Devereux* HC Auckland A03/02, 27 June 2002 at [49].
63 Judgment appealed, above n 1, at [206].
64 At [212(a)].

that the scale, frequency and lack of apparent commercial purpose for Mr Gong's remittances required an explanation going beyond the only one provided (rather than sought), viz "situation in [China] is not stable". If this might be contestable — and it was on this point the appellants sought to adduce Mr McCusker's evidence — it ceased to be when the appellants' conduct described above is considered.[65] We agree with the Judge's conclusions summarised above at [73]–[74]. If there is an explanation other than actual awareness of a significant AML/CFT risk associated with Mr Gong's remittances, it is not apparent to us.

Result

[81] The application for leave to adduce further evidence on appeal is declined.

[82] The appeals against conviction are dismissed.

Solicitors:
Dominion Law, Auckland for Appellants
Crown Solicitor, Auckland for Respondent

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65 See [60]–[66] above.