IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-004-3151
[2020] NZHC 366

THE QUEEN

v

JIAXIN FINANCE LIMITED, QIANG FU and FUQIN CHE

Hearing:	3 March 2020
Appearances:	SS McMullan and K Guildford for Crown DPH Jones QC for Jiaxin Finance Limited and Qiang Fu K Maxwell for Fuqin Che
Sentence:	3 March 2020

SENTENCING NOTES OF WALKER J

Introduction

[1] By verdicts delivered on 22 November 2019, Jiaxin Finance Limited (Jiaxin) as principal, Ms Fuqin (Lily) Che and Mr Qiang (Michael) Fu (as parties) were found guilty of the following charges under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, (AML/CFT Act).[1]

(a) In respect of Ms Fuqin Che:

(i) Charge 1: On one charge under s 101 of the AML/CFT Act of structuring a transaction to avoid the application of one or more AML/CFT requirements.

(ii) Charge 2: On one representative charge under s 91 AML/CFT Act of failing to conduct customer due diligence.

(iii) Charge 3: On one representative charge under s 95 AML/CFT Act of failing to keep adequate records relating to a suspicious transaction.

(iv) Charge 4: On one representative charge under s 92 AML/CFT Act of failing to report a suspicious transaction.

(b) In respect of Jiaxin Finance Limited:

(i) Charge 2: On one representative charge under s 91 AML/CFT Act of failing to conduct customer due diligence.

(ii) Charge 3: On one representative charge under s 95 AML/CFT Act of failing to keep adequate records relating to a suspicious transaction.

(iii) Charge 4: On one representative charge under s 92 AML/CFT Act of failing to report a suspicious transaction.

---

1 *R v QF, FC and JFL* [2019] NZHC 3058.

(c) In respect of Mr Qiang (Michael) Fu:

(i) Charge 2: On one representative charge under s 91 AML/CFT Act of failing to conduct customer due diligence.

(ii) Charge 3: On one representative charge under s 95 AML/CFT Act of failing to keep adequate records relating to a suspicious transaction.

(iii) Charge 4: On one representative charge under s 92 AM/CFT Act of failing to report a suspicious transaction

[2] Convictions have now been entered. All three parties now appear before me for sentencing.

[3] This is the first sentencing decision for criminal offending under the AML/CFT Act. My sentencing notes today are therefore unavoidably longer than is common-place. I do not intend to set out the offending in any detail. My reasons for the verdicts are available.[2] They set out in detail the nature of the charges and my findings in respect of the charges.

[4] I will, however, briefly provide context for my sentencing remarks.

Background

The offending

[5] Jiaxin is a money-remitter and currency exchange business. It is a reporting entity under the AML/CFT Act. The Act requires it to undertake a wide-range of anti-money laundering and countering finance of terrorism compliance activities. Those activities, set out in the AML/CFT Act, are designed to protect the services Jiaxin offers from the risk of misuse by those seeking to launder funds in New Zealand.

---

2 *R v QF, FC and JFL* [2019] NZHC 3058.

[6] Mr Fu is Jiaxin's sole director and shareholder. He actively manages and operates the business. Ms Che is his mother. Although holding no formal position in the company, I concluded on the trial evidence that Jiaxin was a family enterprise in which mother and son acted in concert in respect of the seam of business relating to Mr A. Indeed, it was her long-standing relationship with Mr A which was the genesis of the transactions underpinning the charges. Mr A had been a customer of Ms Che from as long ago as 2011. He had previously conducted transactions through a predecessor company to Jiaxin – Global Concept Capital Investment and Finance Limited (Global Concept) owned by Mr Fu but run and managed by Ms Che.

[7] Jiaxin was incorporated from August 2014, and in September 2014 it took over an existing money remittance business, including their customer base. In March or April 2015 Global Concept failed an onsite inspection conducted by the Department of Internal Affairs (DIA). Mr Fu advised DIA that he had ceased trading through Global Concept. 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. At no time was Ms Che's relationship with the Jiaxin business disclosed to the external consultant.

[8] In the meantime, Ms Che continued to transact business for Mr A. Between 21 April and 24 April 2015, Ms Che made 14 separate cash deposits totalling $710,722 into Mr A's bank account. These transactions formed the basis for the first charge faced by Ms Che alone – structuring a transaction to avoid the proper application of the AML/CFT Act.

[9] In May 2015, Mr Fu began to document transactions conducted through Jiaxin third-party accounts involving Mr A. The transactions were at the behest of his mother. In total, between 21 April 2015 and 10 May 2016, Mr Fu and Ms Che remitted around NZ$53 million over 311 transactions for Mr A. Some of these transactions (at a value of approximately NZ$17 million) were conducted through brokers.

[10] The second charge was that Jiaxin, as principal, and Mr Fu and Ms Che as parties, failed to conduct customer due diligence (CCD) on Mr A. The central issue

in respect of this charge was whether it was Mr A or Ms Che who conducted the transactions through Jiaxin. Based on the totality of the evidence presented, it was clear that CDD was required to be conducted on Mr A. I held that despite efforts to quarantine Jiaxin, Mr A 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 A and Jiaxin in the light of Jiaxin's AML/CFT obligations and scrutiny by DIA.

[11] 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. 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 A'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.

Approach to sentencing under the AML/CFT regime

[12] The AML/CFT Act came into force on 30 June 2013. It introduced a rigorous regime for the monitoring of New Zealand's financial system to prevent and punish the financing of terrorism and money laundering. It constituted a significant step up in the regulatory framework governing financial institutions and transactions in New Zealand;[3] and I emphasise this case is all about the regulatory framework and not substantive money laundering.

[13] Money laundering describes a variety of techniques used to convert the proceeds of criminal endeavours into useable cash and assets cleaned of any trace of the original crime. As noted, money remittance businesses are vulnerable to misuse by those who wish to launder money as, unlike transfers through the formal banking

---

[33] *Dept of Internal Affairs v Ping An Finance* [2017] NZHC 2363, [2018] 2 NZLR 552 at [20]

system where the flow of funds is transparent from start to finish, the flow of funds is opaque. Only the individual money remitter has true visibility.

[14] Three cases have been taken in New Zealand by the DIA against money remittance businesses under the civil regime.[4] In each, significant civil pecuniary penalties have been ordered.

[15] The criminal penalties in respect of the charges proved against the defendants are provided for in s 100 of the AML/CFT Act. In addition, Ms Che was found guilty of an additional charge of structuring a transaction. The penalties for that charge are governed by s 105 of the AML/CFT Act. In each instance, the maximum penalty is either or both a term of imprisonment of not more than two (2) years and a fine of up to $300,000 in respect of an individual. In the case of a body corporate or partnership, the maximum penalty is a fine of up to $5 million.

Approach to sentencing.

[16] The methodology set out in the Sentencing Act 2002 applies in the context of setting criminal penalties.[5] This requires that I first set a starting point based on the nature and circumstances of the offending itself, adjusted to take the principle of totality into consideration. The next step is to assess whether an adjustment to the starting point is required – up or down, based on any aggravating or mitigating factors applicable to the personal circumstances of Jiaxin, Ms Che and Mr Fu.

Purposes and principles

[17] I am guided by the purposes and principles in the Sentencing Act 2002, in particular s 7, which sets out the purposes of sentencing. While the risk of re-offending by those found guilty of these sorts of offences may be low, the community still requires a sentence which acts as a deterrent to others. Other particularly relevant purposes in the context of a sentence for offending under the AML/CFT regulatory

---

4 *Dept of Internal Affairs v Ping An Finance* [2017] NZHC 2363, [2018] 2 NZLR 552; *Dept of Internal Affairs v Qian DuoDuo* [2018] NZHC 1887; *Dept of Internal Affairs v Jin Yuan Finance Ltd* [2019] NZHC 2510.

5 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

regime are accountability for the harm; promoting in the offenders a sense of responsibility, acknowledgement of that harm, and denunciation.

[18] I must also have regard to the principles of sentencing set out in s 8 of the Sentencing Act 2002. Section 8 outlines those principles to be taken into account. Particularly relevant in this case include the need to take into account the gravity of the offending and degree of culpability; the seriousness of the type of offence in comparison with other types of offences; imposition of the maximum penalty prescribed if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; imposing a penalty near to the maximum if the offending is near to the most serious of cases for which the penalty is prescribed; and the principle of imposing the least restrictive outcome appropriate in the circumstances.

[19] I am mindful in this exercise that money laundering is an activity which is highly detrimental to the New Zealand financial system and very difficult to detect. This is one reason why the AML/CFT regime must deal robustly with non-compliance which risks permitting laundering by third parties.

[20] As stated, there is no guideline sentencing judgement at appellate level for offending under the AML/CFT regime. There are, however, three decisions in respect of the equivalent civil regime. In each of the civil penalty judgments, the criminal sentencing methodology was expressly referenced. For example, in *Ping An*,[6] the Court accepted the view that the appropriate methodology to determine quantum was the adoption of a four-step approach based on a modified sentencing approach in criminal cases. I note that this is a slightly different test to the three-pronged approach in criminal sentencing, since totality considerations are typically taken into account when setting the starting point in respect of criminal offending. Nonetheless, given the approach adopted in *Ping An* and subsequent cases, the approach in those decisions provide some comparative guidance. I stress, however, that sentencing is an individual exercise which focuses on the offending by the particular party and an assessment of their culpability.[7]

---

6 *Dept of Internal Affairs v Ping AN Finance Group NZ Co Ltd* [2017] NZHC 2363.
7 *Zhang v R* [2019] NZCA 507 at [10].

Crown submissions

[21] The Crown submits that the most important purposes in this sentencing exercise are deterrence and accountability. It submits that this is supported by the express statutory purpose of the AML/CFT Act because compliance under the regime is risk-based. All reporting entities have a degree of autonomy and there is a consequent risk of abuse which is difficult to detect by authorities.

[22] Counsel for the Crown, Mr McMullan, says that non-compliance facilitates money laundering activities which pose a significant risk to New Zealand's international reputation. He further emphasises the principles in s 8(b)–(d) of the Sentencing Act 2002. Mr McMullan seeks support from s 94 of the AML/CFT Act in terms of indicating aggravating and mitigating circumstances to be taken into account, though the section is expressly aimed at pecuniary, i.e. civil liability matters. I accept they are instructive.

[23] Taking into account in particular the premeditated nature of the offending and its extent, combined with the profit motivation, Mr McMullan submits that the appropriate starting point must address the defendants' conduct in totality (with the exception of the additional charge in respect of Ms Che). Assessing the gravity of the offending in respect to charges 2 – 4 to be near to the most serious of its kind, the Crown submits that a starting point in the region of 60 per cent of the maximum of each charge, subject to totality as I say, is appropriate. Mr McMullan states that a fine is additionally appropriate because a community-based sentence would not meet the purpose of the Act. He leans on the decisions for civil pecuniary penalties since in those instances, the approach by the Court was the same and the conduct was also assessed as serious. However, Mr McMullan describes the offending as more insidious than the offending in *Ping An* – or rather the civil liability acts in *Ping An*, because it was much harder to detect.

[24] He also submits that each of the Act's requirements representing the charges serve a distinct purpose which needs to be reflected within the concept of totality.

[25] On this basis, the Crown suggests a starting point of 75 per cent of the maximum for a single charge, to reflect the seriousness of each separate offence, but

taking into account the similarity of the separate offences and the distinct nature of the breaches. This amounts to a starting point of 18 months' imprisonment and a fine of $225,000 for each of Mr Fu and Ms Che. In respect of Jiaxin, the Crown's starting point is accordingly a $3.75 million fine.

[26] In respect of charge 1, relating only to Ms Che, the Crown submits that a starting point of 50 per cent of the maximum is warranted but advocates, again on the principle of totality, a further $50,000 fine and an increase of six months' imprisonment.

Defence submissions – Jiaxin and Mr Fu

[27] Mr Jones QC submits that the starting points for the penalties proposed by the Crown are unsustainable, manifestly excessive and completely punitive. In practical terms, he points to the inevitable destruction of an otherwise compliant business with consequent impacts on full-time employees, and also on Mr Fu as shareholder and director.

[28] He challenges the appropriateness of imprisonment which he says ignores the hierarchy of sentencing in s 10A of the Sentencing Act 2002, and illegitimately elevates the seriousness of the offending.

[29] Mr Jones essentially submits that disgorgement of profit is the proper approach. There is some evidence about the normal commission rates applicable to remittance transactions in the evidence of Mr Miao at trial. He relies on these indications of an extremely low commission rate of up to about approximately 0.5 per cent as indicating that the potential net profit on the relevant transactions equating to $36 million would come to approximately NZ$180,000 gross. He suggests this is the highwater mark of the profitability of the transactions since where transactions had to be put through Mr Miao's company, any commission or profitability would be substantially less.

[30] Mr Jones therefore submits that the appropriate starting points for the penalties are:

Jiaxin

(a) A fine equating to the net profit from the transactions undertaken from Mr A so that the company loses any financial advantage obtained. He submits that the Court needs to avoid any duplication of the penalty between the company and the other defendants since they are linked and the penalty should reflect that.

Mr Fu

(b) He advocates a starting point of community detention for Mr Fu as a stand-alone sentence rather than a notional term of imprisonment. In the alternative, if a term of imprisonment was considered, he submits a notional sentence of no more than 12 months is appropriate.

(c) Mr Jones points to the Criminal Proceeds (Recovery) Act 2009 proceedings against Mr Fu, suggesting that they mean a fine is not appropriate at any level.

I understand the submission to be that these starting points are collective, i.e. community-detention instead of a fine.

Defence submissions – Ms Che

[31] On behalf of Ms Che, Ms Maxwell submits that a fine on its own, or in the alternative, a community-based sentence may be justified. She accepts that deterrence is a primary purpose of this sentencing exercise, along with holding the defendant accountable to the community. She highlights s 8(g) of the Sentencing Act 2002 – that the Court must impose the least restrictive outcome appropriate in the circumstances, in accordance with the hierarchy of sentences. She also draws attention to ss 13 and 20 of the Sentencing Act 2002.

[32] In respect of the assessment of the offending and its gravity, Ms Maxwell submits that while there was premeditation, the extent of the respective acts was not significant. They related to a single client only in an otherwise largely compliant business. She therefore seeks to distinguish the conduct observed and penalised in *Ping An* and *Jin Yuan Finance Ltd*.[8] She points out there is no evidence of financial benefit to Ms Che personally.

[33] Ms Maxwell acknowledges my finding that the structure adopted by Jiaxin was designed to mislead the DIA, but emphasises that both defendants appear to have honestly believed that what occurred was lawful; which is relevant, given uncertainty about the objective or subjective nature of the test for suspicious transaction reporting. Ms Che did not give evidence at the trial and Ms Maxwell relies on the evidence of Mr Fu.

[34] Taking into account the particular circumstances of the offending, Ms Maxwell submits that the Crown's submissions as to starting point do not justify such a stern combination of sentences. She emphasises the related nature of the offending, which relates, as I have said, to one targeted customer. The starting point advocated by Ms Maxwell, in the event that something in addition to a fine is considered appropriate, is a community-based sentence.

[35] In respect of the additional charge on which Ms Che was also convicted, Ms Maxwell submits that the appropriate way to respond is by means of an uplift to the starting point adopted for charges 2 – 4. She reiterates that the appropriate approach is to consider, first, the imposition of a fine and only if one of the factors in s 13(a)–(d) applies should a different penalty or combination of penalties be considered. In terms of starting point, Ms Maxwell again references a community-based sentence such as community work; and if the Court considers a more serious penalty warranted, then a sentence of electronic monitoring which itself carries a considerable measure of denunciation and deterrence.

---

[8] *Dept of Internal Affairs v Ping AN Finance Group NZ Co Ltd* [2017] NZHC 2363; *Dept of Internal Affairs v Jin Yuan Finance Ltd* [2019] NZHC 2510.

Analysis – starting point

[36] The first step is to set a starting point for the charges. This is the point which reflects the culpability of offending, but before any allowances are made for aggravating and mitigating circumstances personal to the offender.[9] It is at this stage that totality will be taken into consideration to ensure proportionality between the penalty ultimately imposed and the gravity of the offending.

[37] In this case, the defendants face three separate representative charges: failure to conduct CDD, failure to keep records, and failure to report a suspicious transaction. Ms Che is subject to a fourth charge: structuring a transaction to avoid the application of the AML/CFT Act.

[38] All these charges have the same maximum penalty. This suggests that the legislature does not recognise any difference in seriousness in respect of each offence.

[39] The Crown submits that both a sentence of imprisonment and fine in respect of Ms Che and Mr Fu are warranted in the circumstances along with a substantial fine for Jiaxin.

[40] Rather than concertina these two potential sentencing options, I propose to adopt a two-stage approach to address what type of sentence should be applied. Section 13 of the Sentencing Act requires that I regard a fine as the presumptively appropriate sentence. This presumption is displaced if I am satisfied of any of the following things:

(a) The purpose or purposes for which the sentence is being imposed cannot be achieved by imposing a fine; or

(b) The application of any of the principles in s 8 make a fine inappropriate; or

---

9 *Zhang v R* [2019] NZCA 507 at [17].

(c) Any provision applicable to the particular offence in this or any other enactment provides a presumption in favour of imposing any other sentence or requires me to impose any other sentence; or

(d) A fine on its own or in addition to a sentence of reparation, would otherwise **be clearly inadequate** in the circumstances.

[41] Is a fine alone "clearly inadequate in the circumstances of this case?" Mr Jones submits that imprisonment illegitimately elevates the seriousness of the offending. Ms Maxwell argues that a combination of a sentence of imprisonment (albeit commuted to home detention) would still be excessive.

[42] Mr Jones also argues that a fine against Mr Fu is not appropriate because he still faces Criminal Proceeds (Recovery) Act proceedings. This also applies to Ms Che.

[43] I do not accept that the restraint proceedings are a relevant consideration. Section 10B of the Sentencing Act deals specifically with the interaction between sentencing and the criminal proceeds regime. It provides that a sentencing judge is obliged to take an instrument forfeiture order into account when imposing a sentence. However, it is clear that this section only applies to instrument forfeiture orders. It does not extend to any other forms of forfeiture orders.[10]

[44] More material is the fact that those proceedings are unresolved. The argument that duplicative penalties are to be avoided is best directed to those proceedings, rather than my sentencing decision. It follows that any potential for forfeiture orders in the associated proceedings, and in respect of which I make no comment, have no bearing on the sentence. They do not justify a reduction in the sentence.

[45] I begin then by setting a starting point for the imposition of a fine.

[46] The offending was premeditated in the sense of representing a deliberate work-around of the AML/CFT regime to avoid scrutiny and to conceal Ms Che's involvement in Jiaxin's operation. There was also concealment through the

---

10 *Henderson v R* [2017] NZCA 605.

investigative process. The structure adopted was motivated by an incentive to maximise revenue by retaining a seam of profitable business. It had the added advantage of supporting the rest of Jiaxin's informal money remittance business by facilitating the transfer of funds to China.

[47] The extent of that particular benefit is, however, entirely speculative. I am presented with no specific evidence of its value. I therefore place little weight on it. In terms of the impact of the offending, any lack of compliance in any circumstances risks damage to the integrity of New Zealand's financial system.

[48] On the other side of the ledger, it is also clear that Jiaxin was predominantly a compliant business. The offences were committed at an early stage of what was a significant step up in the regulatory framework governing financial institutions and transactions in New Zealand. This was at a time when organisations, and even consultants, were coming to grips with the legislation; and money remitters were facing a hostile banking environment requiring transaction agility, including the use of third party accounts. The offending relates to a period before judicial clarification of the test for suspicious transaction reporting, and at a time when there was some confusion in the marketplace.[11] Mr Jones refers to the iterative Risk Assessments for Jiaxin in which implicitly, if not explicitly, there was reference to a subjective test for suspicious transaction reporting.

[49] It is also critical to remember that this is a compliance case and not a substantive money laundering case.

[50] Although the three pecuniary penalty cases to date were civil cases they provide guidance. In part, the fact they were civil reflects the prosecutorial discretion of the DIA. In the case of *Ping An,* the money remitter had conducted over 1,588 transactions involving a total of $105.4 million. It failed to report 173 suspicious transactions over the relevant period. The starting point in setting pecuniary penalties

[11] It was prior to the decision of Toogood J in *Department of Internal Affairs v Ping An Finance Group NZ Co Ltd* [2017] NZHC 2363.

was 65 per cent of the maximum for failure to conduct CDD. Similar starting points were set in Jin *Yuan,*[12] where 55,097 transactions valued at $278 million were in issue.

[51] I am not persuaded that the conduct of the defendants in this case was necessarily more serious than the civil liability acts in either *Ping An* or *Jin Yuan,* notwithstanding the different onus of proof and additional mens rea requirements in a prosecution, and Mr McMullan's cogent countering submissions. The transaction values in those cases were considerably higher, and the non-compliance was systemic covering a significant number of customers. Knowledge of those customers was completely absent, unlike here. A close reading of the Court's conclusions in those cases indicates a very high level of culpability in the calculated and contemptuous disregard for the Act's requirements.

[52] It is also important to consider the issue of totality which is a cornerstone of sentencing. This is particularly acute in this case because fines should generally be imposed cumulatively rather than concurrently.[13] The overarching consideration is that the total sentence must represent the overall criminality of the offending and the offender, but this does not require that the total sentence be arrived at in any particular way. The precise internal mechanics by which one reaches the total is less important than overall fairness and the public interest in deterrence and accountability (among the other principles set out in the Sentencing Act).[14]

[53] The Crown acknowledge that there is a degree of interrelationship between charges 2 – 4. While I accept that each of the AML/CFT Act's requirements serves a distinct purpose, in these circumstances where transactions related to one customer only, this aspect is of lesser import. I consider 'overlap' rather than interrelationship to be more apposite.

[54] As the Crown acknowledges, setting a starting point for <u>each</u> offence in the range of 60 per cent would result in penalties out of all proportion to the seriousness and gravity of the offending as a whole. The Crown submits that the totality of the

---

12 *Department of Internal Affairs v Jin Yuan Finance Ltd* [2019] NZHC 2510

13 *PF Olsen Ltd v Bay of Plenty Regional Council* [2012] NZHC 2393 at [45].

14 See *Munro v Ministry of Agriculture and Fisheries* Greymouth, HC AP7/95, 2 November 1995 at 3; *R v Xie* [2007] 2 NZLR 240 (CA) at [17].

offending reflected in charges 2 – 4 is met by a starting point set at 75 per cent of the maximum available for a single charge (in respect of both imprisonment and fine).

[55] A fine must serve two main purposes. It should suffice to ensure that the defendants do not profit from their activities. It should also be higher than just the profit returned in order to deter and punish the offenders.

[56] It is obvious that the defendants were motivated by profit making. In the Reasons for Verdicts I referred to a WeChat message between Ms Che and Mr Fu in which Mr Fu asked, in relation to Mr A, "is there more money from him next week?":[15]

> Ms Che: he didn't say
>
> Ms Che: you are addicted to making money
>
> Mr Fu: this thing is easier with money, without capital it is too much hard work
>
> Ms Che: we made quiet (sic) a bit of profit this time, right?
>
> Mr Fu: I am doing the calculation now

[57] However, any assessment is complicated by the fact that there is no reliable evidence of the quantum of the profit or benefit. Mr Jones submits that actual profit is low based on slim evidence from a witness from a rival firm at trial that commission rates were in the range of 0.5 per cent. On this basis, the projected profit on transactions of $53 million would be only $265,000 with an after-tax profit of considerably less.

[58] In my judgement, this is not a realistic basis on which to calculate anticipated profit. Neither is a reliance on self-reported transaction volumes and revenues. It ignores, for example, the financial benefits derived from exchange rate differentials between the rate quoted to customers and the exchange rate available to the money remitter. Examples of potential profit derived from the exchange rate differential are outlined in my Reasons for Verdict.[16]

---

15 At [244].
16 At [185] and [186].

[59] I record that no financial accounts were presented to me. Mr Jones says that actual calculations of benefits from the transactions would be inherently complex and a near impossible task.

Conclusion as to starting point

[60] All counsel accept there are various ways to approach starting points. In respect of charges 2 – 4, taking into consideration all factors, I propose to set a global starting point of 60 per cent of the maximum fine available for a single charge. I do so on the basis that the offending, although serious, falls below the most serious of its kind in the context of an industry coming to grips with the regulatory scheme. I therefore adopt the following starting points:

(a) Jiaxin – a fine of $3 million;

(b) Mr Fu – a fine of $180,000;

(c) Ms Che – a fine of $180,000.

[61] Ms Che is also convicted of a further charge of structuring a transaction to avoid the application of the AML/CFT Act. The maximum penalty for this offence is also two year's imprisonment and a fine of up to $300,000.

[62] The Crown, relying on two Australian decisions under the equivalent legislation, suggests a starting point of 50 per cent in the first instance. However, when considering totality, the Crown submits that the appropriate sentence is the imposition of a further fine of $50,000 and an increase of six months' imprisonment.

[63] The Australian cases have limited utility. However, I accept that a further fine is warranted. The starting point for this offence is a fine of $45,000.

[64] This leads to the following starting points:[17]

(a) Jiaxin – $3 million;

(b) Mr Fu – $180,000;

(c) Ms Che – $225,000.

Aggravating and Mitigating factors relevant to each defendant

Mr Fu

[65] Mr Fu, I start with you.

[66] The Crown seeks to rely on relevant previous convictions in China. The Crown cites four convictions for offending relating to forex trading and a money exchange business. The convictions are apparently recorded in a statement in the Chinese language dated November 2017, from the Ministry of Public Security of the People's Republic of China. The statement has been faxed, by way of verification, to New Zealand Police and has been translated by a member of the DIA. The convictions appear to relate to dealing in foreign exchange without permission. The convictions date back to March 2013.

[67] The Crown maintains that those convictions justify an increase of between 10–15 per cent to your sentence (both as to the duration of imprisonment and fine) as they show deterrence and public protection are of particular importance to the sentence imposed on you.

[68] You have challenged the adequacy of proof of any conviction, and further maintain that any conviction from China is inherently unreliable and fundamentally flawed because of the absence of the rule of law in the People's Republic of China. You put the Crown to proof as to the existence of your conviction, as you are entitled to do. Your counsel has also provided an excerpt from an affidavit made in an unrelated

---

[17] As I specify when setting the final sentences, these starting points may be apportioned between the different charges to ensure each is properly recognised as a discrete element of the sentence.

proceeding from an expert on the Chinese legal system. The expert deposes, among other things, that fair trial rights in China are so flawed and deficient that there is no way of evaluating whether a convicted person is in fact guilty or the innocent victim of an inherently unfair process.

[69] A foreign conviction is to be taken into account under s 9(1)(j) of the Sentencing Act[18] because a prior conviction is evidence of prior misconduct.[19] To the extent that prior convictions, wherever entered, evidence character which either contributed to offending or evidences a risk of reoffending, they must be taken into account.[20]

[70] However, these principles cannot trump any requirement that a conviction must be reliably proved to the requisite standard. I intend no criticism of the DIA when I say that, in this instance, the documentary evidence of conviction falls well short of that which I would expect to receive as part of a sentencing submission. In addition, the exact nature of the regulatory non-compliance, which appears to be referenced in the material, is also not clear from the translation of the Chinese language facsimile.

[71] In these circumstances, it is not necessary to address the substantive points submitted on your behalf by Mr Jones. I put the assertion of prior convictions to one side. They do not warrant any increase to the start point. Equally, however, I am not prepared to apply a discount for good character, despite Mr Jones' submission that I am required to treat you in this Court as a first time offender.

[72] The Crown does not point to any other features personal to you other than the requirement that I consider your financial capacity which could increase or decrease the fines to be imposed.[21] There are no features in the Provision of Advice to the Court (PAC) report which warrant consideration.

[73] There is nothing before me to suggest that you lack the means to pay a fine. I note that the Commissioner of Police has restrained a significant amount of assets from

---

18 *Fry v R* [2014] NZCA 174 at [4].
19 *R v Patterson* [2008] NZCA 75 at [35].
20 *Wipa v R* [2018] NZCA 219 at [28].
21 Sections 40(1) and (2) Sentencing Act 2002

your home. You have indicated to this Court in relation to bail matters that you continue to run Jiaxin's business which implies that you have ongoing income.

[74] Turning to mitigating factors. Mr Jones points to the unresolved Criminal Proceeds (Recovery) Act proceedings against you, and in respect of which your assets have been restrained. Although your counsel is correct when he suggests that those proceedings may be pursued with vigour by the Commissioner of Police, for the reasons discussed, this does not impact your sentencing today.

[75] Mr Jones also submits that a significant fine against Jiaxin in addition to you as the sole director and shareholder would be duplicative. However, in my view, the policy of the AML/CFT Act, like many other Acts in related regulatory fields, are intended to promote deterrence by also punishing individuals responsible for the conduct at issue. In short, effective deterrence demands individual responsibility. I do not accept therefore that fining both Jiaxin, and you as the directing mind of the corporation, amounts to double punishment. The legislation envisages penalties for individuals and corporations and there is "no principle of equivalence or self-cancellation in your respective wrong-doings."[22] Jiaxin was convicted as principal and you as a party to the offending with the added protections of party liability.

[76] Having said that, the fines imposed on each of you and Jiaxin need to produce a fair and just outcome when viewed in the round, having regard to proportionality, fairness and justice. To that extent, the fine for Jiaxin is germane to that assessment.

[77] Finally, Mr Jones points to the impact of a sentence of home detention on your business interests. He suggests that any penalty which restricts your movements would be disproportionately severe.

[78] Weighing the submitted aggravating and mitigating factors, I have concluded that no adjustment to the starting point of a fine of $180,000 is warranted.

[79] I turn now to the issue of whether such a fine on its own is clearly inadequate in the circumstances such that I need also to consider a term of imprisonment, or

---

22 *Moir Farms (Maimai) Ltd v Dept of Conservation* [2011] NZAR 694 (HC).

indeed whether any of the factors in s 13 are engaged. To my mind, the Crown has not persuaded me that both are necessary to achieve the purposes and principles of sentencing. The fines I am imposing are substantial. They punish your behaviour, are high enough to deter others from offending, and help ensure you have not profited from your offending. I consider the fines are not clearly inadequate in the circumstances, although I acknowledge that it is a 'fine' assessment. I am satisfied that a conviction and a fine alone achieves the outcome mandated by the AML/CFT regime and the Sentencing Act.

Jiaxin

[80] I turn to Jiaxin. Jiaxin has no previous convictions. As such a discount is generally warranted. I accept, however, that prolonged or premeditated offending, as opposed to a momentary lapse relevantly reduces the credit afforded.[23]

[81] Mr Jones submits that a significant monetary penalty on Jiaxin would have the effect of crushing it to the extent that it may have to liquidate. However, an economic impact, even a severe impact, is an ordinary consequence of offending.

[82] I am prepared to give credit for Jiaxin's prior record and to take into account the impact on Mr Fu as sole shareholder and director. The starting point is reduced by 15 per cent, bringing the fine to $2.55 million.

Ms Che – factors personal to you

[83] The Crown does not point to any aggravating factors other than premediated and prolonged conduct over a period of time, and lack of forthrightness with the DIA on the investigation.

[84] Ms Che, you have no previous convictions. You are 65 years old and have suffered ill health since 2013. You are now retired. Your counsel, Ms Maxwell suggests that a fall from grace for a woman in your position is punishment in itself,

---

[23] *Hamilton v R* [2015] NZCA 28 at [28].

and your previous good character (represented by lack of previous convictions) bears witness to a reduced probability of reoffending.

[85] I have read a testimonial from your daughter-in-law with whom you live, and a testimonial from friends who speak of your active involvement in the Chinese community. You clearly have an important family role caring for your grandchildren. Your daughter-in-law describes you as the main spiritual and economic pillar of your family, along with Mr Fu.

[86] On the less helpful side of the coin, I am, however, concerned that the PAC report suggests that you do not have any real insight into your offending against the AML/CFT regime. You appear to lack remorse and still consider that you have done nothing wrong.

[87] Ms Maxwell on your behalf submits that a discount of 10-15 per cent is warranted. Considering all the combined factors, I conclude that the appropriate discount in your case is 10 per cent. This reduces the fine I will impose on you to $202,000 (rounded down).

[88] For the reasons I have already canvassed in respect of your son, I am not persuaded that an additional sentence is needed to reflect the purposes and principles of the Sentencing Act 2002; whether imprisonment is commuted to home detention or community detention in some form. In my judgment, a substantial fine achieves the principles and objectives of sentencing.

Conclusion – summary of fines imposed

[89] Mr Fu and Ms Che, would you please stand.

[90] Mr Fu, on charges 2 – 4 of being a party to offending by Jiaxin Limited, I impose a total fine of $180,000 made up as follows:

(a) Charge 2, failing to conduct CDD on Mr A – $60,000;

(b) Charge 3 (representative) – failing to keep adequate records relating to a suspicious transaction – $60,000;

(c) Charge 4 (representative) – failing to report a suspicious transaction – $60,000.

[91] Ms Che, on charges 1 – 4 I impose a total fine of $202,000 made up as follows:

(a) Charge 1 – $40,000;

(b) Charge 2 (representative) – $54,000 (rounded down);

(c) Charge 3 (representative) – 54,000 (rounded down);

(d) Charge 4 (representative) – $54,000 (rounded down).

[92] In respect of Jiaxin Finance Limited, I impose a fine of $2.55 million, as follows:

Charge Two – Failing to conduct CDD on Mr A – $500,000;

Charge Three (representative) – Failing to keep adequate records relating to a suspicious transaction – $1,025 million;

Charge Four (representative) – Failing to report a suspicious transaction – $1,025 million.

[93] Ms Che and Mr Fu, please stand down.

.....

Walker J