THE DISTRICT COURT OF

WESTERN AUSTRALIA

873 of 2016

THE QUEEN

and

FEI LI

SWEENEY DCJ

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON THURSDAY, 1 DECEMBER 2016 AT 10.40 AM

MS S.J. OLIVER represented the Commonwealth of Australia

MR M.T. TROWELL QC with MR E.W.L. GREAVES appeared for the Accused

SWEENEY DCJ:

This is the defence's application, pursuant to section 108 of the Criminal Procedure Act that there is no case to answer. The principles on a no case submission are well-established.

And the question is whether the evidence of the Crown, taken at its highest, is capable of establishing beyond a reasonable doubt, the guilt of the accused.

In a circumstantial case and this is a circumstantial case in part, the question is whether on the assumption that all of the evidence of primary facts considered at its strongest, from the point of view of the case for the prosecution is accurate.

And on the further assumption that all inferences most favourable to the prosecution, which are reasonably open are drawn, is the evidence capable of producing in the mind of a reasonable person satisfaction, beyond a reasonable doubt, of the guilt to the accused?

The accused is charged that:

> On 29 April 2015 at Perth he dealt with money, it being reasonable to suspect that the money was proceeds of crime and at the time of dealing the value of the money was $100,000 or more, contrary to section 400.9 of the Criminal Code.

In a nutshell, the evidence is uncontroversial, that on 29 April 2015 three transactions occurred in the office of Global Forex, of which the accused is a director and manager.

Whereby Global Forex, through the conduct of the accused, conducted three international funds transfers, known as a remittance arrangement, in the names of a Mr Huang, Mr Chen and Ms Yang. Each transaction was for $50,000.

Those three people were not the source of the funds, they were friends or friends of Mr Tseng, whom he contacted for the purpose of getting them to help him to remit some funds.

Mr Tseng was also not the source of the funds. He was here on a student visa and made some money driving people. The source of the funds was a person known to the State's[sic] main witness Mr Tseng as Fatty.

Fatty, may or may not have been the original source of the funds himself. Mr Tseng had been a driver for Fatty and had entered the Global Forex offices multiple times and arranged for money to be transferred overseas on Fatty's instructions to him.

Mr Tseng's evidence was that initially Fatty went into the office with him and that over time he placed trust in Mr Tseng and Mr Tseng entered the office alone to arrange the transactions on Fatty's instructions.

The evidence, on balance, establishes that on 29 April 2015 Mr Tseng went to the office of Global Forex in advance of Mr Huang, Mr Chen and Ms Yang and handed over the money to the accused and also informed the accused the three different accounts in China to which the money was to be transferred.

The accused began the process of counting the money and either after or during that process the three arrived together or close in time and entered the office, whether together or not, provided their passports, telephone numbers and addresses to the accused, who recorded those details and scanned their passports and then they signed the standard form document used by Global Forex for such transfers.

That document, which I'll call the remittance form as a neutral description, sets out the reference number for the transaction, the date, the name of the person, the currency received, the amount received, the transfer fee of $10, the exchange rate being offered, the currency in which the transfer is to be paid, the amount in that currency to be paid and the beneficiary account to receive the funds.

It contains a customer declaration to the effect:

> I confirm that all information I have provided is accurate and I understand relevant requirements of Austrac -

- that's A-u-s-t-r-a-c -

> - under Australian law. I declare this money remittance service is not used for any illegal purpose and the funds are from legitimate sources. The information provided is in accordance with the regulations for the prevention of money laundering, terrorist financing and illegal activities.

The evidence is capable of establishing that each of the three people signed the remittance form and handed it back to the accused, who then cut the document into two halves, handed them their customer copy and retained the remitter copy for the records of Global Forex.

Once outside the office each person was paid $100 for their involvement by Mr Tseng. Mr Tseng was also paid around 200 to $400 for his services to Fatty including his taxi driving services. There is no suggestion that the identifying information provided by the three was not entirely genuine. I infer they gave their real names using real passports, real addresses and real telephone numbers.

There is no evidence that the accused was informed of anything about the transaction by Mr Tseng apart from the amount of money involved and the bank accounts into which the money was to be transferred. I will note there is no language barrier here. All three people and Mr Tseng and the accused speak Mandarin. The accused also speaks English and Mr Tseng has reasonable English.

There is no evidence that the three had any discussions with the accused over and above those conversations necessary to provide their passports and identifying particulars. There is no evidence that the accused had ever been told anything about the source of the money by Mr Tseng or Fatty or anyone else.

On the evidence he had seen Fatty several times and Mr Tseng numerous times in connection with sums of money being transferred. To prove that the accused committed this offence the Crown must prove:

(1) that he dealt with money, in this case by receiving or possessing it;

(2) that at the time he dealt with it, it was reasonable suspect that - it was reasonable to suspect that the money was the proceeds of crime;

and:

(3) that at the time of the dealing the money exceeded $100,000.

Although three separate transactions are involved it is permissible under the Act for the Crown to roll them up into one charge and refer to the total sum. The first and third elements are not in dispute. The second element is in dispute. The Crown must prove that at the time the accused dealt with the money it was reasonable to suspect that it was the proceeds of crime.

Section 400.9(2) provides various ways in which that element is taken to be satisfied; in other words, by which it is deemed that at that time the accused dealt with that

money it was reasonable to suspect that it was the proceeds of crime.

One such pathway is if the Crown proves that in dealing with the money the accused's conduct of receiving or possessing the money amounted to an offence on the part of Global Forex against section 139 of the Anti-Money Laundering and Counter-Terrorism Financing Act, then it is taken to be proved that it was reasonable to suspect that the money was the proceeds of crime.

The Crown has expressly disavowed any other means by which the second element could be proved. It was invited by his Honour Judge Stevenson during a section 98 hearing prior to trial to broaden out its case to rely upon all the facts and circumstances of the case to draw the inference that it was reasonable to suspect that the money was the proceeds of crime.

At that time the Crown made it clear it wished to confine its case on the second element to proof of an offence pursuant to one three - section 139. At the outset of this trial I again raised the issues ventilated before his Honour Judge Stevenson and invited the Crown to broaden out its case but the Crown remained content to confine its case as to the second element to proof of an offence pursuant to section 139.

A person commits an offence pursuant to section 139(1) if (1) the person is a reporting entity; (2) the person commences to provide a designated service; (3) the person does so using a false customer name; (4) at least one provision of division 2, 3 or 4 of Part 2 of the Act applies to the provision of the designated service.

Alternatively, a person commits an offence pursuant to section 139(3) if:

(1) the person is a reporting entity;

(2) the person commences to provide a designated service;

(3) the person does so on the basis of customer anonymity;

(4) at least one provision of division 2, 3 or 4 of Part 2 of the Act applies to the provision of the designated service.

There are therefore two alternative means by which the Crown could prove an offence pursuant to section 139, the first involving the use of a false customer name and the

second involving customer anonymity. Apart from that difference the remaining elements of the two different offences are in common.

The remaining elements are not seriously in dispute. Global Forex is a reporting entity and a non-financier. It's not in issue that it was carrying on the business of giving effect to remittance arrangements by which it accepted an instruction from a transferer entity for the transfer of money under designated remittance arrangements.

It is accepted that on 29 April 2015 and generally it provided designated services, namely accepting an instruction from a transferer entity for the transfer of money under a designated remittance arrangement.

It's not necessary to find that the accused committed the offence pursuant to section 139. Global Forex was the reporting entity. But it is not an issue that any conduct on his part was conduct in the course of his capacity as a manager and direct of Global Forex and, therefore, Global Forex as the reporting entity committed any offence constituted by his conduct.

Section 400.9 only requires the conduct to amount to an offence pursuant to section 139 to have the effect of proving the second element of the offence pursuant to section 400.9 against the accused. It does not require it to be proof of an offence by the accused, although no doubt, he would be an aider if it were necessary to prove personal liability.

It is also not an issue that at least one provision of division two, three or four of part two of the Act applied to the provision of the designated service. Part two imposes obligations on reporting entities to carry out a procedure to verify a customer's identity before providing a designated service. It is not an issue that Global Forex was subject to those requirements.

The Act itself does not specify just what the applicable customer identification procedure is. I'm informed that as part of submitting a required risk management program to Austrac identifying how it will manage its risk in effect being used in money laundering or terrorism financing, the reporting entity must define its own customer identification procedure.

The rules pursuant to the Anti-Money Laundering and Counter-Terrorism Financing Act provide that a reporting entity must comply with part 4.2 of the rules which require

as a minimum that the reporting entity collect the customer's full name, date of birth and residential address.

Verification is required by a primary photographic document such as a passport or two forms of documentary identification. The reporting entity's plan must also include a program to enable it to assess in what circumstances it will collect beneficial owner information in respect of customers and beneficial owners of customers. Without more information about that, and this has formed no part of the Crown's case, I would construe that to be a reference to trustees and corporate entities.

It is clear enough that the accused was following a standard procedure within Global Forex in taking a photocopy of the person's passport, scanning, I should say, the person's passport which bears their name, photograph and date of birth. And in taking their name, telephone number and address and that that procedure complies with those requirements set out in the rules.

That being the case, what is left for the Crown to prove to prove an offence occurred pursuant to section 139 is either that the person, Global Forex, acting through its director, the accused, commenced to provide a designated service and did so using a false customer name which would amount to an offence pursuant to section 139(1).

Or that the person commenced to provide a designated service on the basis of customer anonymity which would amount to an offence pursuant to section 139(3). A false customer name means a name other than a name by which the customer is commonly known. Customer anonymity is not defined. The word anonymous is an ordinary English word. It means nameless, of unknown name.

The offence is somewhat - or the offences, I should say, is somewhat strangely drafted but as I read the two sections, the offence is not remitting the money but commencing to provide the designated service and doing so by using a false customer name or alternatively on the basis of customer anonymity. It is common ground that the fault element in either offence pursuant to section 139(1) or (3) is recklessness.

As I mentioned earlier, pursuant to division four of part two, a person must not begin to provide a designated service if they have not previously carried out the applicable customer identification procedure. That

includes checking the customer's identity and making a copy of any documents used to do so.

If the customer in each transaction was Mr Huang, Mr Cheng and Ms Yang, then it cannot be argued that the accused commenced to provide the designated service and did so by using a false customer name or alternatively on the basis of customer anonymity. That then raises the key question, just who is the customer?

The Crown's case on the second element depends on the jury being satisfied that the customer was Mr Tseng. That is how it opened. The Anti-Money Laundering and Counter-Terrorism Financing Act specifies who the customer is for any particular designated service.

Section 6 defines 54 different designated services just under the category of financial services. There are other categories which do not concern this case. And it is common ground that the relevant designated service in this case is item 31. The table then specifies who the customer is for such a service.

Item 31 specifies that the customer is the transferrer entity. The transferrer entity is a defined term. It is the person from whom an instruction is accepted for the transfer of money under the remittance arrangement.

So putting that together, the customer is the person from whom an instruction is accepted for the transfer of money under the remittance arrangement. The customer is therefore not to be equated with the source of the money or the owner of the money or the person on whose behalf the money was remitted.

That is confirmed by the fact as originally enacted, transferrer entity was defined as the person from whom money or property is accepted so as to enable its transfer under the arrangement. Such a definition was fraught with confusion. Anyone dealing in large sums of cash from a business employing Armaguard to an elderly lady enlisting her son may use another to physically handle the money.

In substituting the definition, parliament did not specify the owner of the money or the source of the money or the person on whose behalf the money was remitted. It focused on the person from whom the instruction was accepted. Instruction is not a defined term.

The defence argument is that the remittance record constitutes the instruction or at least confirms in writing

the instruction given by that person at the same time as signing it for the transfer of money under the remittance arrangement.

And therefore the person who signed the remittance record is the customer and that in those circumstances the evidence being clear that the identification details of the person who signed the authorisation are genuine and have been verified.

No reasonably instructed person could be satisfied that Global Forex, through the accused, commenced to provide a designated service to its customer using a false customer name. That is, a name other than a name by which the customer is commonly known. Or alternatively, on the basis of customer anonymity, that is, on the basis that the customer would remain nameless, of unknown name.

The Crown, on the other hand, argues that there is evidence from which the jury could reasonably infer that the person from whom an instruction was accepted for the transfer of money under the remittance arrangement was none of the people who signed the remittance forms but was Mr Tseng.

The Crown says, in effect, these were sham customers signing the remittance forms with the effect that the customer, Mr Tseng, achieved anonymity or was identified by a false name in that he, Mr Tseng, was not known by their names.

As I mentioned earlier, section 6 of the Anti-Money Laundering and Counter-Terrorism Financing Act specifies who the customer is for any particular designated service and defines 54 different designated services just under the category of financial services. This is for the purpose of defining who is to be the subject of the customer identification procedure.

It is evident from the tables in section 6 of that legislation and the reporting entity's requirements for plans and customer identification and verification and from the objects of the Act as set out in section 3 that part of the fight against money laundering and financing of terrorism is gathering verified information on the corporate entities and human beings involved in various transactions for potential investigative purposes.

There needs to be certainty in the characterisation of the person who is to be the subject to the customer identification procedure because failure to subject the

right person to the customer identification procedure carries potential criminal sanctions.

A breach of section 139, either subparagraph (1) or subparagraph (3), is a criminal offence with a penalty of two years' imprisonment attached. A penal statute should be construed strictly against the Crown. That informs the meaning to be ascribed to the phrase:

> The person from whom an instruction is accepted for the transfer of money.

I note that is not the person who gives an instruction but the person from whom an instruction is accepted. I consider that reflects the commercial and legal reality of the situation that in any such transaction the remitter, that is Global Finance, offers remitting services at certain exchange rates and for certain fees by way of an invitation to treat. And the customer offers to pay the remitter for its services and the remitter accepts the offer.

Even if that is not the correct legal characterisation the emphasis in the phrase is not on what instructions Global Forex might receive but on what instructions it accepts and acts upon in providing the service.

I find that no properly instructed jury, acting reasonably, could find that Global Finance accepted an instruction from Mr Tseng to transfer funds. It received money from him and it possessed it for the purpose of counting it prior to the person arriving who would be signing the remittance form. The accused counted the money. This was a lot of money and obviously that took some time.

Global Forex also received information from Mr Tseng as to the bank account to which the money would be transferred. One could characterise that as information anticipating the awaited instruction in the sense of a direction that, once Global Finance received an instruction to remit funds, that was the account into which the funds should be remitted.

But the mere provision of bank details did not amount to the instruction to remit the funds itself. The information concerning the bank account details only took effect once Global Forex accepted an instruction to remit funds. It, in effect, became information which was incorporated into the instruction to remit the funds.

There is no suggestion on the evidence that on the strength of receiving the money and the bank account details for the

transferee Global Finance was then in a position to remit the money. The evidence is to the contrary. Mr Tseng gave no such instruction to Global Finance. There is no suggestion that the remittance took place on his instruction and then the three people signed the remitter form after the event of the remittance as a mere sham record.

To the contrary, Mr Tseng contacted them and waited on them. Their attendance was necessary to the transaction. Mr Tseng agreed that if they had not attended and signed the remitter form the money would not have been sent. There is no suggestion that Mr Tseng was prepared to be the customer and participate in the customer identification procedure.

Had they not attended and signed the remitter form Global Finance was not in a position to comply with its customer identification procedure which it had to do prior to providing the service of remitting the money. And the evidence establishes that Global Finance was clearly in the habit of complying with its customer identification procedure.

I accept the defence submission that the remitter form, as I have named it, constituted the instruction which Global Finance accepted to remit the funds. There is no strict requirement for an instruction to be in writing and one could argue that the written form evidenced the instruction to be inferred from words and conduct, namely the signing of the form. But that overlooks the focus not on the instruction that is given but the instruction that is accepted.

I find the only reasonable inference from the evidence at its highest is that Global Finance, which had recordkeeping obligations, would only accept the instruction constituted by the signatory participating in the customer identification procedure and then signing this form that Global Forex had created.

While the question of the identity of the customer is a question of fact, I consider there to be no evidence from which a properly instructed jury could conclude beyond a reasonable doubt, as it would need to do, that Global Finance accepted an instruction from Mr Tseng.

On that basis the Crown cannot prove that Global Forex committed an offence pursuant to section 139 subparagraph (1) or subparagraph (3) and therefore cannot

prove the second element of the offence charged pursuant to section 400.9.

I should add that during the course of argument certain hypotheticals were posed.

A lawyer or accountant, who does all the legwork for a transaction on behalf of his client and liaises with a financial institution and provides information necessary to ready the paperwork in advance, is not the customer. And is not the person who instructs the bank to disperse funds. The provision of information does not of itself constitute an instruction.

One can also imagine an elderly person unfamiliar with finances, but wanting to send some money to a relative overseas, being assisted by a family member, who provides all the information for the transaction and physically takes charge of cash and hands it over.

Notwithstanding all of that assistance, the elderly person who signs the instruction, is clearly the customer from whom the instruction is accepted.

It is no answer to say, as the Crown says, but such transactions are not suspicious. That is putting the cart before the horse.

The question of the person from who Global Finance accepted an instruction, is not determined by whether or not the circumstances were suspicious. Where the circumstances do give rise to a reasonable suspicion, it has reporting obligations. That is a separate matter.

It also, of course, is at risk of committing an offence pursuant to section 400.9.

I do not accept that section 6, which defines the customer for such a designated service, places an obligation on a reporting entity, to attempt to investigate behind the scenes to determine from whom it ought to accept an instruction.

Section 6 also appears to require one customer to be identified, not a number of people who might, depending on the construction, to put on the phrase, the person from whom an instruction is accepted, possibly meet the description.

The reasons I have given above, are sufficient to rule that the accused as no case to answer. On the basis of these

reasons, it could not be contended that the designated service, was provided by using a false customer name, or alternative on the basis of customer anonymity.

These reasons, of course, have nothing to say about whether the accused dealings with Mr Tseng, that day and the three people who gave the instructions to remit, gave rise to a reasonable suspicion, that the money was proceeds of crime, contrary to section 400.9 of the Criminal Code, Commonwealth. As proved by overall facts and circumstances of the day.

The Crown chose not to rely upon the overall facts and circumstances of the day and it is not necessary for me to comment on the strength of its case.

Were it reasonably open to the jury to find that Global Finance accepted an instruction from Mr Tseng to remit the money and that he was therefore the customer, I also consider it tortures the language of section 139(3) to suggest that the designated service was provided in circumstances of customer anonymity.

I accept the defence submission that anonymity, relates to a scenario whereby the customer is allowed to remain nameless. Not where he is entirely mis-described as another person entirely.

I do not consider a properly instructed jury acting reasonably, could have been satisfied that the designated service was provided in circumstances of customer anonymity.

I have reached no firm view on whether, if Global Finance accepted and instruction from Mr Tseng to remit the money, it would have been reasonably open to the jury to find, that the designated service was provided by using a false customer name. It is unnecessary to decide the point.

They are my reasons.