IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2022-404-491
[2023] NZHC 1014

BETWEEN	HOK LAI ONG (aka SIMON ONG) Appellant
AND	DEPARTMENT OF INTERNAL AFFAIRS Respondent

Hearing: 17 April 2023

Appearances: C T Patterson and J True for Appellant
O Salt for Respondent

Judgment: 2 May 2023

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Tuesday, 2 May 2023 at 11:30 am.

Registrar/Deputy Registrar

A. Tila-Muagututia
Deputy Registrar
High Court

Solicitors: Meredith Connell (Office of the Crown Solicitor), Auckland
Blackwells (A Doo), Auckland

Counsel: C T Patterson, Auckland
J True, Hamilton

[1] In a reserved decision dated 9 November 2022, Judge P Winter found a charge laid under ss 118(3B) and (5) of the Gambling Act 2003 (the Act) against Hok Lai Ong to be proven.[1] Mr Ong now appeals against the finding of guilt.

Charge

[2] Mr Ong was charged with, on or about 24 November 2015, at Auckland, being a director of United Hospitality Management Limited (UHML), which operated a class 4 gambling venue known as Aroha Restaurant and Bar, indirectly received $16,000 from Impact Sport, which was a grant recipient or potential grant recipient.

Factual background

[3] Mr Ong was a director of UHML trading as Aroha Restaurant and Bar (the premises) in which gaming machines had been installed. UHML had entered a venue agreement with Infinity Foundation Limited (Infinity) dated 1 April 2015 at which time UHML was trading as Happy Japanese Restaurant from the same premises.

[4] Infinity was a corporate society as defined in s 4 of the Act that held a class 4 operator's licence. Section 31 of the Act provides that class 4 gambling may only be conducted by a corporate society that holds a class 4 operator's licence and a class 4 venue licence for the place where the gambling is conducted. The venue agreement dated 1 April 2015 recorded the terms and conditions upon which gaming machines were to be placed in the premises in anticipation of Infinity applying for a class 4 venue licence for the premises. The venue agreement was specified to expire on 31 March 2016. Mr Ong had signed the venue agreement "For and on behalf of the venue operator".

[5] Infinity later applied for, and was granted, a class 4 venue licence for the premises. The earliest venue licence produced in evidence by the sole prosecution witness, the Manager Investigations for the Department of Internal Affairs (DIA), was dated 23 December 2015 and named the premises as the Aroha Restaurant. The licence included the following statement:

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1 *Department of Internal Affairs v Hok Lai Ong* [2022] NZDC 20398.

> The authority granted by this licence commences on 24 May 2014 and is associated with a class 4 operator's licence which expired on 31 October 2015. This class 4 venue licence continues in force pursuant to ss 56(6) and 72(6) of the Act.[2]

[6] The DIA witness stated that from records held by the Department, he was aware that a class 4 venue licence was issued to Happy Japanese restaurant, effective from 24 May 2014 to 31 October 2015. The DIA witness also said that the DIA issued a temporary amended class 4 venue licence reflecting the name change from Happy Japanese Restaurant to Aroha Restaurant, referring to the class 4 venue licence dated 23 December 2015.

[7] One further class 4 venue licence was produced in evidence. It was dated 5 January 2016. This later licence included the following statement:

> This licence has been amended. The amendment authority commenced on 05 January 2016. The general authority granted for this licence is associated with a class 4 operator's licence which expired on 31 October 2015. This class 4 venue licence continues in force pursuant to ss 56(6) and 72(6) of the Act.

[8] The DIA witness said that the Department issued Aroha Restaurant with this licence after Infinity had paid the requisite licensing fees.

[9] As to the operation of the gaming machines, the prosecution produced a Gaming Machine Profits (GMP) Report for the Aroha Restaurant from January 2016 to September 2017, which recorded total profits of $4,350,047.89. Of significance, however, is that the monthly profits grew from a low level in January as follows:

Jan 2016	$20,286.08
Feb 2016	$88,287.93
Mar 2016	$120,148.89
Apr 2016	$158,901.27
...	
Sep 2017	$320,852.34

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[2] Section 72(6) of the Act provides:
Unless the associated operator's licence is cancelled, suspended, or not renewed, a class 4 venue licence continues in force after its expiry date if –
(a) The corporate society has applied for a renewal before the expiry date; and
(b) The application has not been refused.

[10] The prosecution did not produce any evidence that gaming machines were operative in the premises in 2015, although the DIA witness stated:

> Q. Can you please comment on whether there was an active licence for Aroha as of the date of the 24th of November 2015?
>
> A. Yes there was an active licence for Aroha Restaurant, or Happy Japanese as it was probably called at that time, for – the top left of that document is GMV 1207 so game machine venue 1207, the names can change but that will always be attributed to that specific venue and I can confirm that was in fact in place, at the time.
>
> Q. And that would still have the same venue operator being United Hospitality Management Limited?
>
> A. Yes that's correct.

[11] UHML itself had no licences issued by DIA. It was merely a party to the venue agreement with Infinity dated 1 April 2015. Under the agreement, Infinity was to install and operate gaming machines owned by itself at the premises. It was also responsible for maintenance and repairs. UHML was responsible for taking meter readings on all the gaming machines, collecting all the proceeds from the gaming machines and banking the proceeds within five days of the weekly reading into a dedicated bank account operated by Infinity. Infinity would in turn pay UHML an agreed venue payment.

[12] After deduction of authorised expenses, the money banked by UHML was available to Infinity for distribution to the community in the form of grants. Organisations seeking funding for an "authorised purpose" were able to make written application to Infinity for a grant. Application forms were to be located at the premises and be available at all times. Such applications had to be sent directly to Infinity and were not under any circumstances to be given to or accepted by UHML.

[13] One of the organisations to which Infinity made regular grants was Sport 4 Everyone (S4E), later renamed Impact Sport. S4E was owned by Mr S Done. Mr Ong and Mr Done knew each other. Mr Ong's wife, Ms Cerine Tan, was employed by S4E as a Chinese community sport liaison officer.

[14] Following an examination of S4E's bank account statements, the DIA identified that a total of $30,270 had been deposited into Ms Tan's bank account by

S4E between 24 December 2014 and 23 November 2015. There was also a further sum of $4,700 in cash that had been deposited into her account on 15 December 2014, when the account was opened.

[15] The DIA was able to establish that 11 of the deposits made into Ms Tan's account were financed by grant funding from Infinity for the authorised purpose of paying S4E's Chinese community sport liaison officer's salary. The officer was at all material times Ms Tan.

[16] There were four relatively insignificant withdrawals from the account up until 23 November 2015, but for the most part, the payments made by S4E accumulated in the account until the balance reached $34,481.34 on 23 November 2015.

[17] On 24 November 2015, the sum of $16,000 was transferred from Ms Tan's Kiwibank account to the ANZ business bank account of UHML of which Mr Ong was one of the signatories. The transfer included the reference "Aroha". Internet banking logs obtained from Kiwibank revealed additional references "Capital from Simon" and "Investment". The ANZ bank statement recording the deposit had the notation "Capital from Simon". The deposit of $16,000 increased the balance in the bank account from $56,755.12 to $72,755.12. On the same day, there were two payments made out of the account. The first payment of $1,035 carried the notation "Auckland Concrete Dr... Cut concrete... for Bar". The second payment of $8,050 carried the notation "Unique Constructions... UCL Steven Builder... Construtor". Then, on the following day, the sum of $19,400 was paid to Precision Autos, apparently to assist with the purchase of an Audi A4 motor vehicle.

[18] The DIA witness gave evidence that S4E's grant applications to Infinity had an abnormally high approval rating from Infinity, its primary source of grants. The allegation against Mr Ong is that he indirectly received the sum of $16,000 from S4E via its employee — his wife, Ms Tan. The Judge noted the prosecution case was that this money was a kick-back, which had influenced his decision to grant funding through Infinity to S4E.

District Court decision

[19] After reciting the factual background, the Judge noted Mr Ong's defence that the Aroha Restaurant did not become a class 4 venue until 2016. Therefore, as a director of UHML trading as Aroha Restaurant, he could not be guilty of the offence alleged to have occurred on 25 November 2015 when Happy Japanese Restaurant was the class 4 venue on the licence. The Judge then set out the relevant contractual provisions in the venue agreement and the statutory provisions that applied. The Judge was of the view that there was no change to the identity of the venue operator. It remained UHML throughout, but with a change to its trading name. As a class 4 venue, Aroha Restaurant occupied the same physical space as Happy Japanese Restaurant and was the same place used to operate the same class 4 gaming machines. The licence number attributed to the venue operator also remained the same.

[20] UHML was therefore the venue operator and Happy Japanese Restaurant the class 4 venue at the time of the alleged offending on 24 November 2015. Importantly, Mr Ong remained a "key person" of UHML as defined under s 4 of the Act at the requisite time of the offending when Ms Tan transferred the sum of $16,000 into UHML's business bank account at the ANZ Bank.

[21] The Judge concluded:

> [21] There can be no doubt that the defendant who was at all material times a director of UHML and a key person, did have a significant influence in the management and operation of UHML, which was the venue operator at that time. The receipt of the sum of $16,000 by UHML and the subsequent use of those funds to purchase the motor vehicle for the same amount, that is the sum of $16,000, is a breach of s 118(3B) of the Act. There is no doubt that the transaction could reasonably be perceived as influencing decisions to be taken on the grant application made in favour of S4E.

Grounds of appeal

[22] There are two broad grounds of appeal. First, Mr Ong submits the Judge was in error in finding that at the time of the relevant transaction he was a key person in respect of a class 4 venue licence. Mr Ong submits that no direct evidence was produced at trial that a class 4 venue licence was in place at the time of the relevant

transaction and, further, that no evidence was produced to establish that the relevant venue hosted any operational gaming machines at the relevant time.

[23] Secondly, there was insufficient evidence produced at trial to prove Mr Ong knowingly received money that could reasonably be perceived as influencing decisions taken or to be taken on applications for grants.

Approach on appeal

[24] An appeal against conviction following a Judge-alone trial must be allowed if the Judge has erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred[3] or if a miscarriage of justice has occurred for any other reason.[4]

[25] "Miscarriage of justice" means any error, irregularity, or occurrence in or in relation to or affecting the trial that:[5]

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

[26] There will be a real risk that the outcome was affected when "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong."[6] The appellant does not have to establish "a miscarriage of justice in the sense that the verdict is actually unsafe", but that there is a real possibility that it is unsafe.[7]

[27] A miscarriage is more than an inconsequential or immaterial mistake or irregularity.[8] The focus must, therefore, be on the actual, rather than theoretical, effect of any error.

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3 Criminal Procedure Act 2011, s 232(2)(b).
4 Section 232(2)(c).
5 Section 232(4).
6 *R v Sunsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110].
7 At [110].
8 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [30] and [31].

[28] Under s 233 of the Criminal Procedure Act 2011, if the Court allows an appeal against conviction it must set aside the conviction; and, in the Court's discretion, may acquit the appellant, direct a new trial be held or make any other order, including no order, that the Court considers justice requires.

Discussion

[29] In the prosecution of Mr Ong for an alleged offence under s 118(3B), the following elements must be proved beyond reasonable doubt before he can be found guilty:

(a) Mr Ong was a key person in relation to a class 4 venue licence;

(b) He knowingly received money; and

(c) The money could reasonably be perceived as influencing decisions taken or to be taken on applications for grants.

Key person?

[30] A key person is defined in s 4 of the Act as including, in relation to a class 4 venue licence, a person who is a director of a venue operator. The venue agreement between Infinity and UHML dated 1 April 2015 specifically named UHML as "the venue operator". Mr Ong was a director of UHML and signed the venue agreement as a director under the notation "SIGNED for and on behalf of the Venue Operator". The venue agreement was specifically said to expire on 31 March 2016. Therefore, at the date of the relevant transaction, 24 November 2015, the venue agreement remained in force.

[31] Although the two class 4 venue licences, which were produced are dated 23 December 2015 and 5 January 2016, the licence dated 23 December 2015 stated, "the authority granted by this licence commences on 24 May 2014". In addition, the DIA witness said in evidence that as of the dates of 24 November 2015 there was an active licence for Aroha Restaurant or Happy Japanese Restaurant, as it was probably

called at the time. He stated, "I can confirm that [the licence] was in fact in place, at the time".

[32] In my view, it is immaterial that the premises changed its name or may have been closed for a period for renovations. Similarly, it is immaterial that the gaming machines may have been inoperative during the period of renovations or that neither Happy Japanese Restaurant nor Aroha Restaurant appeared on a nationwide list of class 4 venues as at 30 September 2015 downloaded from the internet.

[33] I agree with the Judge that Mr Ong was a key person. He was a director of a venue operator in relation to a class 4 venue licence.

Knowing receipt of money?

[34] There is no doubt that the sum of $16,000 was paid into the business bank account of UHML on 24 November 2015. It had come from an account in the name of Mr Ong's wife, G K Tan, which had been opened on 15 December 2014. Between 15 December 2014 and 24 November 2015, the only deposits made into the account (apart from a cash deposit of $4,700 to open the account and a little interest) were salary payments from S4E, which in turn had been paid to S4E as grants by Infinity.

[35] There was, however, no direct evidence that Mr Ong knew of the receipt of the money by UHML. There was no evidence as to the signatory or signatories of Ms Tan's account nor who had entered the reference "Capital from Simon"[9] in the bank records.

[36] Although Mr Ong was one of two directors of UHML, the bank statements were addressed to a Taupo address. Mr Ong lived in Auckland. The DIA witness said he had obtained information from the ANZ Bank that Mr Ong and his business partner operated the bank account, but the extent of each partner's involvement was not further elucidated. Mr Ong has not been interviewed. His business partner has not been interviewed. Nor has Ms Tan. Ms Tan was, however, served with a notice under ss 333(1)(a) and (b) of the Act requiring her to provide the DIA with information about

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9 Mr Ong is known as Simon.

her role as Chinese community sport liaison officer for S4E. She was, however, not asked to provide any information about the payment of $16,000 on 24 November 2015.

[37] There also appears to be an assumption that the $16,000 payment was used to buy an Audi A4 the following day. The Judge also seems to have been mistaken when he found that the payment to Precision Autos was for the same sum of $16,000. It was a sum of $19,400, which was paid to Precision Autos from the account, not $16,000. There were also two substantial payments out of the account after receipt of the sum of $16,000 and before the payment of $19,400 to Precision Autos. These two payments totalled $9,085 and appear to be payments for renovations to the premises ("Cut concrete... for Bar").

[38] Although more could have been done by DIA, in particular, through interviewing and taking statements from Mr Ong's associates or by calling witnesses other than the DIA investigations manager, I am of the view that it can reasonably be inferred to a standard of beyond reasonable doubt from all the documentation that Mr Ong knowingly received the money and applied it either for purposes of renovations or to purchase an Audi A4 motor vehicle ("Capital from Simon").

Could money be reasonably perceived as influencing decisions on grant applications?

[39] The second aspect that needs to be proved in relation to the $16,000 payment is that it could reasonably be perceived as influencing decisions taken or to be taken on application for grants. In his decision, the Judge recorded the prosecution case was that the money was a kick-back, which had influenced Mr Ong's decision to grant funding through Infinity to S4E. There is, however, no suggestion that Mr Ong had any role in granting funding through Infinity to S4E.

[40] The Act is designed to keep the roles of venue operators quite separate from corporate societies which distribute profits to community groups through grants. Although venue operators are required to have application forms available in the venue for patrons, they are prohibited from receiving or accepting application forms. They are to be sent directly by applicants to the corporate society.

[41] On appeal, counsel for DIA put it in a slightly different way. Counsel submitted that an outside observer could reasonably perceive that the money Mr Ong received might influence decisions taken or to be taken on grant applications by Infinity. That is, the money received by Mr Ong from S4E could create a perception that Infinity would be encouraged to make grants to S4E (in particular, relating to Ms Tan) in order that Mr Ong would retain his venue agreement with Infinity.

[42] The DIA therefore sees the $16,000 as a kick-back to Mr Ong for maintaining the relationship with Infinity. Counsel notes the standard to be applied in determining whether a reasonable perception of influence existed — whether the payment could, or not would, be perceived by a reasonable person as influencing decisions taken on applications for grants.

[43] Counsel submits that the element does not require proof of an actual quid pro quo (or proof of an actual impropriety). In this case, counsel submits that the evidence establishes Mr Ong knowingly received money from his wife, Ms Tan, at the end of the following transactional history:

(a) Mr Ong's class 4 venue (gambling proceeds) → Infinity

(b) Infinity (grant funds) → S4E (salary) → Ms Tan ($16,000) → UHML (Mr Ong)

[44] Counsel submits as a key person it would be improper for Mr Ong to financially benefit from grant funds, particularly when those funds are sourced entirely from Infinity (the same corporate society that holds the class 4 licence for Mr Ong's venue).

[45] I agree. That is, however, a separate offence under s 118(2) of the Act to deal with such impropriety. It provides:

> **118 Certain persons must not seek, receive, or offer benefits with improper conditions attached**
>
> ...
>
> (2) A key person in relation to a class 4 venue licence must not knowingly receive or seek money, a benefit, an advantage, privilege, or gift from

> the following persons, if the receipt has an improper condition attached to it and whether the receipt or condition is direct, indirect, formal, informal, or otherwise:
>
> (a) a holder of a class 4 operator's licence:
>
> (b) a key person in relation to a class 4 operator's licence.

...

[46] Mr Ong has, however, not been charged under s 118(2), but under s 118(3B). Counsel talks generally about perceptions of conflict in the current case and suggests that the money was originally intended for use in the fit-out of Aroha Restaurant. Counsel acknowledges, however, that prima facie there was nothing unusual in the money paid to S4E, a grant applicant. He goes on to submit however, that the grant applicant S4E, at this stage, is only one step removed from Mr Ong. If S4E had paid Mr Ong directly, a reasonable observer would clearly find a reasonable perception of impropriety or conflict of interest in the distribution of grant funds, which were intended solely for the benefit of the community. In this case, there was another half step that occurred in the circle of transactions, in that grant funds were first received by Ms Tan, before that money was then transferred to her husband, Mr Ong. Counsel submits that the addition of this last step does little to distinguish the appearance of impropriety or bias to an external observer.

[47] The question to be asked, however, is much narrower and is drawn from the specific wording of s 118(3B) — could Mr Ong's receipt of $16,000 reasonably be perceived as influencing decisions taken or to be taken by Infinity on applications for grants? The DIA has not produced any evidence that the decision-makers in Infinity even knew of the payment of $16,000 made by Ms Tan to her husband, Mr Ong.

[48] Counsel also acknowledges that there was nothing unusual in the money paid to S4E, a grant recipient, so how could the payment of $16,000 influence decisions taken or to be taken on grant applications by Infinity? The difficulty in shoehorning the perceived conflict of interest into s 118(3B) is reflected in the wording of the particulars set out in the charging document. The particulars state:

> Being the Director of United Hospitality Management Limited, which operated a class 4 gambling venue known as Aroha Restaurant and Bar, indirectly received $16,000 from Impact Sport (formerly S4E), which was a grant recipient or potential grant recipient.

[49] The particulars do not refer to Infinity nor to any perception that decision-makers in Infinity may be influenced by the payment of $16,000 when making decisions on grant applications. The mere indirect receipt by Mr Ong of $16,000 from S4E is not an offence under s 118(3B).

[50] It appears that this issue was not the focus in the District Court hearing and there was no extended analysis in the judgment of the requirement. In those circumstances and looking at the matter afresh, I am of the view the prosecution failed to prove beyond reasonable doubt that the payment of $16,000 could reasonably be perceived as influencing decisions by Infinity taken or to be taken on applications for grants.

Result

[51] The appeal is allowed. The finding of guilty and any conviction entered is quashed. Mr Ong is acquitted on the charge under s 118(3B) of the Act.

Woolford J