IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001765
[2016] NZHC 558

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Applicant
AND	CARBON CONSCIOUS NEW ZEALAND LIMITED First Respondent
	KATEY LR INVESTMENTS LIMITED Second Respondent

Hearing: 4 February 2016

Counsel: D G Johnstone for the Applicant
I J Thain and B R Saldanha for the Respondent s

Judgment: 4 April 2016

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards
on 4 April 2016 at 4.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Meredith Connell, Auckland
DLA Piper, Auckland

[1] The respondents were parties to a transaction which resulted in an overseas investment in sensitive land without consent under the Overseas Investment Act 2005 (the Act).

[2] The Chief Executive of Land Information New Zealand has sought an order under s 48 of the Act imposing a civil penalty on the first respondent (CCNZ) for that contravention.

[3] The parties have agreed on a penalty in the sum of $40,000, and costs of $6,003.50. Orders are sought in those terms.

Agreed facts

[4] The circumstances giving rise to the contravention of the Act are set out in an agreed statement of facts.

[5] CCNZ is a subsidiary of an Australian listed company, Carbon Conscious Ltd. Both companies are involved in planting forests for the purposes of earning and selling carbon credits. CCNZ is defined as an "overseas person" under s 7(1) of the Act as it is a "25 per cent or more subsidiary" of a company incorporated outside New Zealand.

[6] In March 2011, CCNZ entered into an agreement with Origin Energy Resources New Zealand Ltd (Origin) for the planting of forests in New Zealand and the delivery of carbon credits generated by those forests. The agreement required 225 carbon lots to be planted in both 2011 and 2012.

[7] To meet these obligations, CCNZ acquired a number of properties with the necessary consent under the Act. The 2011 planting season was completed successfully. Further land was required to meet the planting commitments for 2012. In August 2012, the general manager of CCNZ at the time, Mr Reynolds, identified a suitable property (the Riverbank property) to purchase for planting purposes. The Riverbank property was deemed to be "sensitive land" under the Act.

[8] As an overseas person purchasing sensitive land, CCNZ was required to obtain consent under the Act prior to purchasing the property. However, the time which would have been required to obtain consent under the Act posed difficulties for CCNZ in meeting its 2012 planting obligations under its agreement with Origin.

[9] CCNZ sought legal advice on this issue. On that legal advice, the second respondent, Katey LR Investments Ltd (Katey LR), was incorporated. Mr Reynolds' wife was the sole shareholder and director of that company. Katey LR was the nominated purchaser of the Riverbank property.

[10] On 22 August 2012, CCNZ executed a letter of intent by which CCNZ stated that it would support Katey LR in the acquisition of the land by entering into a forestry right to acquire the trees planted and their carbon production. The price for the forestry right was $335,000. The letter of intent also provided that Katey LR would grant CCNZ an option to acquire the land in consideration for the $335,000 already paid for the forestry right.

[11] On 24 August 2012, Katey LR executed a sale and purchase agreement for the Riverbank property for the sum of $335,000.

[12] Katey LR countersigned the letter of intent on 28 August 2012.

[13] A subdivision was required before the purchase by Katey LR could be settled. As an interim arrangement, the vendor granted Katey LR a forestry right (which was signed on 28 August 2012) and a sub-forestry right was subsequently granted to CCNZ.

[14] Planting began almost immediately and was completed in mid-September 2012.

[15] The subdivision was completed and a new title issued on 11 February 2013. Katey LR became the registered proprietor of the Riverbank property on 10 April 2013.

[16] By agreement dated 8 February 2013, Katey LR agreed to sell the Riverbank property to a CCNZ nominee for $335,000. The agreement was conditional upon consent being granted under the Act for the acquisition of the land by CCNZ's nominee. On 24 April 2013, CCNZ's nominee applied for consent under the Act. A decision on that application is pending.

Statutory framework

[17] The Act regulates investment by overseas persons in New Zealand. The stated purpose of the Act is:

> **3 Purpose**
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> The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—
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> (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
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> (b) imposing conditions on those overseas investments.

[18] Pursuant to s 10 of the Act, consent is required if a transaction will result in an overseas investment in sensitive land. Section 11(1) requires consent to be obtained for such a transaction before the overseas investment is given effect under the transaction. The overseas person or associate making the overseas investment must apply for consent.

[19] There is no dispute that CCNZ is an overseas person, and Katey LR is an associate of CCNZ pursuant to s 8(1)(c) of the Act. There is also no dispute that the Riverbank property was sensitive land. The parties are agreed that CCNZ made an overseas investment through Katey LR. The overseas investment was given effect when Katey LR executed the sale and purchase agreement on 24 August 2012. That investment was made without consent and was therefore in contravention of the Act.

[20] Section 48 provides the power to order a person in breach of the Act to pay a civil penalty. That section provides:

48 Court may order person in breach to pay civil penalty

(1) On the application of the regulator, the court may order a person (A) to pay a civil penalty to the Crown or any other person specified by the court if A has—

(a) contravened this Act; or

(b) committed an offence under this Act; or

(c) failed to comply with a notice under section 38 or section 39 or section 40 or section 41; or

(d) failed to comply with a condition of a consent or of an exemption.

(2) The court may order A to pay a civil penalty not exceeding the higher of—

(a) $300,000; or

(b) any quantifiable gain (for example, the increase in the value since acquisition) by A in relation to the property to which the consent or exemption relates or for which a consent should have been obtained; or

(c) the cost of remedying the breach of condition; or

(d) the loss suffered by a person in relation to a breach of condition.

(3) A person cannot be ordered to pay a penalty under this section and be required to pay a fine under any of sections 42 to 46 for the same conduct.

(4) For the purposes of this section, the court must determine whether a person's conduct falls within subsection (1) on a balance of probabilities.

[21] As liability is not contested in this case, the sole issue to be determined is the quantum of any penalty imposed under subs (2).

Approach to fixing penalties

[22] This is the first case of its kind under the Act. Counsel are agreed that the approach for determining the quantum of pecuniary penalties under the Commerce Act 1986 should apply equally to the fixing of penalties under the Act.

[23] The Commerce Act approach follows the established framework for criminal sentencing, although recognising that deterrence is the dominant consideration in Commerce Act cases, but only one factor in criminal sentencing.[1] The approach involves the following steps:

(a) the determination of the maximum penalty;

(b) the establishment of an appropriate starting point for the offending that will achieve the objective of deterrence in light of other relevant aggravating and mitigating factors of the offending; and

(c) the adjustment of the starting point to discount or increase the penalty on the basis of any considerations specific to the defendant.

[24] The Court's approach to penalties which have been agreed between the parties under the Commerce Act requires the Court to consider whether the proposed penalty is within the proper range, but not to embark on its own enquiry as to an appropriate figure.[2] The policy behind such an approach was explained by Rodney Hansen J in *Commerce Commission v Alstom Holdings SA* as follows:[3]

> … there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[25] The focus of the Court's exercise therefore is on the final figure and it is neither appropriate nor necessary that each step of the methodology by which the figure was set is accepted by the Court.[4]

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1 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [12]–[14].

2 *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [38], and *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011 at [15]; and *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21].

3 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

4 *Commerce Commission v Whirlpool SA*, above n 2, at [17]–[18].

[26] There are a number of different statutes which provide for pecuniary penalties to be imposed by the Court. The Commerce Act is the most analogous of those regimes to the Act. The principles which underlie the approach to fixing pecuniary penalties, and the considerations which inform the Court's approach to agreed penalties in the Commerce Act arena apply equally to pecuniary penalties under the Act.

[27] I am therefore satisfied that the Court's approach to determining pecuniary penalties under the Commerce Act provides an appropriate framework by which pecuniary penalties may be fixed under the Act.

Maximum penalty

[28] The maximum penalty that can be imposed is the higher of the four alternatives set out in s 48(2)(a) to (d).

[29] In this case, the parties are agreed that no quantifiable gain is ascertainable; there are no identifiable costs of remedying the breach; and no identifiable loss is suffered by a person in relation to a breach of condition. The maximum penalty is therefore $300,000 as set out in s 48(a).

Starting point

[30] The guiding factor in choosing a starting point is the need to provide specific and general deterrence.

[31] Factors that will be relevant to setting a starting point will be context dependent and fact specific. The Law Commission has identified a number of "core" factors which are likely to provide some guidance to fixing the quantum of pecuniary penalties across a number of regimes. Those factors are:[5]

(a) The nature and extent of the breach;

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[5] Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R113, 2014) at [16.47].

(b) The nature and extent of any loss or damage caused by the breach;

(c) The nature and extent of any financial gain made from the breach;

(d) Whether the breach was intentional, inadvertent or negligent;

(e) The level of pecuniary penalties that have been imposed in previous similar situations; and

(f) The circumstances in which the breach took place.

[32] I have considered the appropriate starting point in light of each of these factors as set out below.

Nature and extent of the breach

[33] The nature of the breach in this case involved a deliberate circumventing of the Act's controls on overseas investment. Katey LR was incorporated so as to avoid the need for CCNZ to obtain consent, and to disguise and distance CCNZ from the ultimate purchase of the property.

[34] The various elements of the scheme were put in place over a period of some eight months, beginning in August 2012 and continuing up until CCNZ's nominee applied for consent to acquire the property from Katey LR. However, the scheme itself was directed at a single purchase of land and was not designed to operate beyond that purchase.

[35] As discussed further below, the fact that the scheme was put in place as a result of legal advice mitigates what would otherwise be an intentional and deliberate breach of the Act's provisions.

The nature and extent of any loss or damage/or financial gain

[36] The parties are in dispute about whether there was in fact any commercial gain made through the breach. CCNZ considers that had it known that the scheme

breached the Act, it would not have proceeded and it would have been able to reach a satisfactory commercial arrangement with Origin such as deferring planting to the subsequent year. The Chief Executive does not accept that position and considers that CCNZ would likely have breached its agreement with Origin, had it not proceeded with the purchase without the necessary consent, which would have resulted in monetary and reputational consequences.

[37] However, the parties agree that in the event that there was such a commercial gain, it is not readily quantifiable. There are also no identifiable costs of remedying the breach, or identifiable losses suffered by a person in relation to a breach of condition.

[38] In the particular circumstances of this case, I do not consider this factor to weigh heavily in the overall assessment of penalty.

Whether the breach was intentional, inadvertent or negligent

[39] The Chief Executive accepts that CCNZ did not intentionally or knowingly breach the Act. Both respondents relied on their legal advice that structuring the transaction in this manner was not a breach of the Act.

[40] Ultimate responsibility for legal compliance rests with the parties who must obtain consent. However, the very purpose of seeking legal advice in this situation was to overcome the timing difficulties posed by making an application under the Act in a way which was nevertheless in accordance with the law.

[41] I consider the complete reliance on legal advice puts CCNZ's culpability at the lower end of the range.

Level of pecuniary penalties imposed in similar cases

[42] This appears to be the first case in which a civil penalty pursuant to s 48 of the Act has been sought.

[43] There are no comparable cases internationally, as few Commonwealth countries restrict investment by foreigners, or actively impose civil penalties for breaches.

The circumstances in which the breach took place

[44] The circumstances in which the breach took place are set out above. In essence, the scheme was adopted to allow CCNZ to purchase land to begin planting so as to avoid breaching its agreement with Origin. The overseas investment transaction allowed it to meet those contractual obligations.

[45] I do not consider the circumstances give rise to any aggravating or mitigating features which would require the starting point to be adjusted.

Starting point

[46] The parties' adoption of $80,000 as the starting point meets the deterrence objective, and also recognises that CCNZ's conduct is towards the lower end of the culpability spectrum due to its complete reliance on erroneous legal advice.

Adjustment for offender-specific factors

[47] In the Commerce Act context, factors bearing on the offender which are relevant to sentence include:[6]

(a) Any previous misconduct of a similar nature by the offender;

(b) The size of the offender;

(c) Any co-operation with the authorities;

(d) Any admission of liability; and

(e) Any compliance programmes put in place by the offender.

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6 See for example *Commerce Commission v Alstom Holdings SA*, above n 3, at [21].

[48] Each of these factors is considered below.

Previous misconduct

[49] CCNZ has not previously contravened the Act. Rather, it has sought and obtained consent for a number of previous investments. Counsel stresses that part of the scheme involved CCNZ eventually obtaining consent and it has indeed applied for that consent.

Size of the offender

[50] The goal of specific deterrence requires that the penalty take into account the size and resources of the offender.

[51] The annual report for the Carbon Conscious Group (including CCNZ) dated 30 September 2014 reports the net assets of the group as AUD $12.44m.

[52] In my view, there is no specific adjustment required for the size and resources of CCNZ given the particular circumstances in which the offending took place.

Co-operation/admissions of liability

[53] The parties are agreed that CCNZ has been co-operative throughout the investigation into its conduct and the legal proceedings. CCNZ has also admitted liability from an early stage. This has been of benefit to the community because it has led to an early disposal of proceedings and saved significant time and cost, both for the Court and for the parties.

Approach to compliance

[54] CCNZ's approach to compliance to the Act has been evident in previous applications for consent, and the current application made for the purchase of the Riverbank property.

[55] The current contravention came about only as a result of reliance on erroneous legal advice. Once the flaws in that legal advice were realised, CCNZ changed legal representation.

Discount

[56] Discounts of up to 50 per cent have been given in the Commerce Act context for admissions of liability and co-operation with the authorities.[7]

[57] The parties have adopted a 50 per cent discount in this case. I agree that such a discount is appropriate in the circumstances.

Overall penalty

[58] I consider the overall figure of $40,000 is an appropriate penalty to provide both specific and general deterrence of offending of this type in the future.

[59] I am also satisfied that an award of costs on a 2B basis, amounting to $6,003.50, is appropriate in all the circumstances.

Result

[60] CCNZ is ordered to pay the sum of $40,000 and the sum of $6,003.50, being costs on a 2B basis.

Edwards J

[7] *Commerce Commission v EGL Inc*, above n 1, at [26]; *Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011 at [52] (a one third discount was given in this case); and *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [24] and [49].