IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2021-404-000093
[2021] NZHC 704

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	WEST DRURY HOLDING LIMITED Defendant

Hearing: 31 March 2021

Appearances: K R Muirhead & M A Hori Te Pa for the Plaintiff
S M Bisley for the Defendant

Judgment: 31 March 2021

JUDGMENT OF VAN BOHEMEN

This judgment was delivered by me on 31 March 2021 at 1.00pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
Meredith Connell, Wellington
Buddle Findlay, Wellington

Introduction

[1] The plaintiff, the Chief Executive of Land Information New Zealand and the Regulator under the Overseas Investment Act 2005 (the Act), alleges that the defendant, West Drury Holding Ltd, acquired a legal interest in "sensitive land" without obtaining consent as required under the Act.

[2] The land is the property at 647 Burtt Road, Drury (the Property).

[3] West Drury Holding admits the breach of the Act.

[4] The parties have agreed on how the breach should be resolved. They seek orders that West Drury Holding pays a civil pecuniary penalty of $125,000 and $15,000 towards the Regulator's costs.

[5] The purpose of this hearing is to decide the quantum of the penalty to be imposed.

The relevant circumstances

[6] The Property comprises 23.3 ha of non-urban land. As such, it is "sensitive land" under s 12 and sch 1 pt 1 of the Act because it is non-urban land that exceeds the applicable five ha threshold. For that reason, any "overseas person," as that term is defined in s 7 of the Act, who wishes to obtain an interest in the Drury property must obtain consent in accordance with ss 10 and 12 of the Act.

[7] West Drury Holding acquired the Drury property on 6 June 2017 for $9,200,000.

[8] West Drury Holding is a company incorporated in New Zealand. At all relevant times, Yin Zhufeng held 39 per cent of the shares in West Drury Holding.

[9] Although Mr Yin has held a New Zealand residence class visa since 16 January 2017, he had not resided in New Zealand in the period immediately preceding the acquisition of the Drury property. As a consequence:

(a) Mr Yin was not "ordinarily resident in New Zealand" at the time of the acquisition in accordance with the meaning of that term in s 6(2) of the Act;

(b) Mr Yin was, therefore, an "overseas person" in accordance with s 7(2)(a) of the Act; and

(c) Because Mr Yin held more than 25 per cent of the shares in West Drury Holding at the time of the acquisition, West Drury Holding was also an "overseas person" in accordance with s 7(2)(c) of the Act.

[10] On 6 June 2017, title to the Drury Property was transferred to West Drury Holding, at which point West Drury Holding obtained a legal interest in the property.

[11] At no time during the transaction did West Drury Holding or its representatives or associates apply for consent under the Act. As a result, the transfer of title to the Drury Property to West Drury Holding constituted a breach of s 42 of the Act.

[12] West Drury Holding has admitted the breach.

Approach to fixing civil penalties

[13] Section 48 of the Act provides that the Court may order the payment of a pecuniary penalty for a breach of the Act.

[14] At the time West Drury Holding acquired the Property, s 48(2) provided that a civil penalty for failure to obtain consent must not exceed:

(a) $300,000; or

(b) Any quantifiable gain (for example, the increase in the value since acquisition) by the person in breach in relation to the property for which a consent should have been obtained.

[15] That is the scale of penalties that may be imposed in the present case. It is of note that the scale of the penalties that may be imposed under s 48 was significantly increased last year by the Overseas Investment (Urgent Measures) Amendment Act 2020.

[16] The Court has made a number of decisions imposing civil penalties under s 48. They include Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd,[1] Chief Executive of Land Information New Zealand v Tang,[2] Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd,[3] Chief Executive of Land Information New Zealand v Hong,[4] Chief Executive of Land Information New Zealand v BCH Investments Ltd,[5] Chief Executive of Land Information New Zealand v FFG Investment Ltd,[6] and Chief Executive of Land Information New Zealand v Chor Ltd.[7]

[17] All of these decisions except *Agria* involved a failure to obtain consent before making an overseas investment in sensitive land. *Agria* involved a breach of good character conditions in a consent.

[18] In these decisions, the Court has adopted an approach similar to that used to fix pecuniary penalties under the Commerce Act 1986. That is, the Court fixes a starting point by assessing the seriousness of the breach, taking into account relevant aggravating and mitigating factors specific to the breach. The Court then has regard to any factors specific to the defendant that may warrant an uplift in or discount from the starting point.[8]

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1 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558.
2 *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382, (2018) 19 NZCPR 460.
3 *Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd* [2019] NZHC 514.
4 *Chief Executive of Land Information New Zealand v Hong & Others* [2019] NZHC 1561.
5 *Chief Executive of Land Information New Zealand v BCH Investments Ltd* [2019] NZHC 1630.
6 *Chief Executive of Land Information New Zealand v FFG Investment Ltd* [2019] NZHC 3293.
7 *Chief Executive of Land Information New Zealand v Chor Ltd* [2020] NZHC 1254.
8 See, for example, the approach taken in *Commerce Commission v Alstom Holdings Ltd SA* (2009) NZCCLR 22 (HC) at [14], as applied in *Carbon Conscious*, above n 1, at [47]; in *Tang*, above n 2, at [15]; in *Agria*, above n 3, at [34]; in *Hong*, above n4, at [22]; and in *FFG Investment*, above n 6, at [17].

[19] The Court has also held, similar to the approach adopted in Commerce Act cases, that the primary purpose of civil penalties imposed under the Act is deterrence of both the person in breach and those who might be tempted to breach the requirements of the Act in a similar way in the future.[9] That purpose has been reinforced by the increase in the scale of penalties enacted last year.

[20] The Court has also held that where penalties are agreed between the parties the Court is not required to embark on its own enquiry as to an appropriate figure but rather to consider whether the proposed penalties are within the proper range.[10]

The Regulator's assessment

[21] Ms Muirhead and Ms Hori Te Pa, counsel for the Regulator, submit that West Drury Holding's breach was moderately serious, given the size of the property and its purchase price of $ 9,200,000. They note that West Drury Holdings accepts that it ought to have known that the Property was "sensitive land" and ought to have known that there were restrictions on overseas persons acquiring sensitive land under the Act.

[22] Counsel advise that the Regulator accepts that at the time West Drury Holding acquired the Property, West Drury Holding believed that Mr Yin was not an overseas person under s 7(2)(a) of the Act, because he had held a New Zealand residence class visa, and that West Drury Holding itself was not an "overseas person" under s 7(2)(c) of the Act. The Regulator accepts, therefore, that the breach of s 42 of the Act was inadvertent. The Regulator considers, however, that West Drury Holdings should have made explicit enquiries about its obligations under the Act.

[23] Counsel advise that the Regulator accepts that West Drury Holding has not made any quantifiable gain from its acquisition of the Property. An independent valuation report dated 9 October 2020 valued the property at $ 9,220,000, and West Drury Holding has incurred net costs of approximately $435,000 since the Property's acquisition. However, the Regulator considers that West Drury Holding has received

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9 *Carbon Conscious*, above n 1, at [24]; in *Tang*, above n 2, at [19]; *Agria*, above n 3, at [40]; in *Hong*, above n4, at [19]; and in *FFG Investment*, above n 6, at [18].

10 *Tang*, above n 2, at [19]; *Agria*, above n 3, at [36]; *BCH Investments*, above n 5, at [8].

a non-quantifiable benefit by gaining an interest in the Property for almost four years without obtaining consent.

[24] Counsel for the Regulator submit that the decisions in *Hong*,[11] *BCH Investments*[12] and *FFG Investment*,[13] which involved the acquisition of equitable and legal interests in land by companies without any quantifiable gain, may assist the Court in evaluating an appropriate penalty range. Having regard to those decisions, counsel submit that an appropriate penalty starting range is $160,000 to $170,000, which is an uplift from the starting point of $130,000 adopted for the two individuals in *Hong* but lower than the $300,000 starting point adopted in *BCH Investments*.

[25] Counsel for the Regulator are not aware of any aggravating factors and submit there should be a discount of 25 per cent to recognise West Drury Holding's cooperation with the Regulator in an early admission of liability and agreement to pay a civil pecuniary penalty.

[26] Counsel for the Regulator advise that West Drury Holding has agreed to pay $15,000 to the Regulator as a contribution to its costs, with costs to lie where they fall outside of that figure.

Defendant's submissions on penalty

[27] Mr Bisley, counsel for West Drury Holding, accepts the Regulator's methodology in determining the quantum of the civil penalty sought and the end result, and generally adopts the Regulator's submissions.

[28] Mr Bisley submits, however, that West Drury Holding's failure to make explicit inquiries about its obligations at law should not be viewed as an unusual feature of breaches of the Act and notes that in other comparable cases such as *Carbon Conscious* and *Tang* lower penalties were imposed than have been agreed in this case. That said, Mr Bisley accepts that *Hong*, *BCH Investments* and *FFG Investment* are the most closely comparable decisions.

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11 *Hong*, above n 4.
12 *BCH Investments*, above n 5.
13 *FFG* Investment, above n 6.

Discussion

Appropriate starting point

[29] By comparison to the six previous decisions involving unconsented overseas investments in sensitive land, the value of the Property, $9,220,000, is second only to that in *BCH*.[14] That in itself justifies a higher starting point than *Carbon Conscious* and *Tang* where the value of the property at issue was significantly less.[15]

[30] While the extent of the breach in the present case was moderately serious given the size of the Property (23.3 ha) and amount paid, it was only a single breach relating to one property and not part of a larger scheme, unlike *FFG*, where there was a failure on two separate occasions to obtain the required consent.

[31] It is accepted that the breach was inadvertent rather than deliberate. Mr Yin's failure to appreciate that his residence class visa did not make him "ordinarily resident in New Zealand" when he had not been living in New Zealand is understandable, even if the mistake should have been avoided by undertaking appropriate enquiries.

[32] As both sets of counsel accept, the relevant previous decisions are *FFG Investment, Hong*, and *BCH Investments*.

(a) In *FFG Investment*, a starting point of $103,000 was adopted with respect to an acquisition of 2.87 ha of residential land which was sensitive because it adjoined a reserve, unlike the land in the present case which is sensitive by virtue of its own qualities and significance;

(b) In *Hong,* a starting point of $130,000 was adopted for breaches of s 42 in acquiring a farm of 79 ha for $4,480,000 and a lodge valued at $2,550,000 through conduct that was negligent or careless, rather than deliberate;

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14 Two properties totalling almost 5 ha valued at $12,950,000.

15 $80,000 in *Carbon Conscious*, above n 1; $5.128 million in *Tang*, above n 2.

(c) In *BCH Investments,* a starting point of $300,000 was adopted with respect to the purchase of a property of 5 ha valued at $12,950,000 on which it was intended to carry out a residential subdivision and development, with the potential for significant financial gain, in circumstances where company's legal advisors had failed to alert BCL to its legal obligations.

[33] West Drury Holding has purchased a property much larger in size than any of these cases, and currently worth $9,220,000. Although the breach of the Act was inadvertent, West Drury Holding has had the benefit of title to the property for almost four years. These factors suggest that a higher starting point than *Hong* and *FFG Investment* are appropriate. By contrast, a lower starting point than the maximum penalty of $300,000 adopted in *BCH Investments* is appropriate as there is less potential for financial gain from this property than in that case.

[34] Accordingly, I am satisfied that the starting point of $160,000 to $170,000 adopted by the Regulator is within the proper range.

Adjustment of penalty to reflect specific factors

[35] There are no aggravating factors and West Drury Holding has cooperated with the Regulator. It agreed to the summary of facts; it accepted liability at an early stage and it agreed to pay the civil pecuniary penalty.

[36] In *Carbon Conscious*, a discount of 50 per cent was given to reflect admissions of liability and co-operation with the Regulator.[16] However, subsequent cases have suggested that where the defendant has not deliberately breached the Act but has not acted on erroneous legal advice, culpability is higher and a 25 per cent discount is more appropriate.[17]

[37] I am satisfied that a 25 per cent discount is appropriate, and, as a consequence, that a civil pecuniary penalty of $125,000 is appropriate.

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[16] *Carbon Conscious*, above n 1, at [56] – [57].
[17] *Hong,* above n 4, at [32]; see also *FFG Investment,* above n 6, at [25].

[38] I am also satisfied that it is appropriate for West Drury Holding to pay $15,000 towards the Regulator's costs and to make no other award of costs.

Result

[39] For its breach of s 42 of the Overseas Investment Act 2005, I order West Drury Holding to pay:

(a) A final civil pecuniary penalty of $125,000; and

(b) $15,000 towards the Regulator's costs.

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G J van Bohemen J