

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2020-404-002357  
[2021] NZHC 857**

UNDER the Overseas Investment Act 2005

BETWEEN THE CHIEF EXECUTIVE OF LAND  
INFORMATION NEW ZEALAND  
Plaintiff

AND BIN ZHAO  
Defendant

Hearing: 29 March 2021

Appearances: K R Muirhead and M A H Te Pa for Plaintiff  
R J Connell on Instructions for D P H Jones QC for Defendant

Judgment: 22 April 2021

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**JUDGMENT OF EDWARDS J**

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*This judgment was delivered by me on 22 April 2021 at 11.00 am  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Counsel: D P H Jones QC, Auckland

Solicitors: Meredith Connell, Wellington

Copy To: Connell and Connell, Auckland

[1] In 2014, Mr Zhao entered into a lease of sensitive land at 112 Coatesville Heights, Rodney, Auckland (Property). He did so in breach of the Overseas Investment Act 2005 (Act).

[2] Mr Zhao has admitted liability for his breach and entered into a settlement agreement with the Chief Executive of Land Information New Zealand (Regulator). That agreement includes recommending that this Court order Mr Zhao to pay a civil penalty of \$49,000 and \$15,000 towards the Regulator's costs.

### **Agreed facts**

[3] Mr Zhao is 61 years of age. He is a Chinese citizen and is now a permanent resident in New Zealand. He lives in New Zealand with his wife and son. Mr Zhao owns businesses in both New Zealand and China, and owns several residential and commercial properties in New Zealand.

[4] In February 2014, Mr Zhao and his wife were visiting New Zealand and staying with Mr Feng and Ms Fu, the vendors of the Property. They visited the Property at that time and entered into an oral agreement to purchase the land for the sum of NZD 6,000,000. Two weeks later, Mr Zhao transferred CNY 6,000,000 to Ms Fu as an advance payment towards the purchase price of the Property.

[5] The vendors instructed their lawyer, Mr Richard Chen, to arrange for the sale. Mr Zhao travelled back to New Zealand on 29 April 2014 to finalise the purchase. Upon arrival, the vendors informed Mr Zhao that he could not purchase the land because he did not meet the residency requirements.

[6] On 4 May 2014, Mr Zhao, and the vendors, met with Mr Chen to sign the documents he had prepared. They executed a written agreement for the sale and purchase of the Property. That agreement provided that Mr Zhao was acquiring a fee simple estate in land for the sum of NZD 6,000,000 inclusive of GST if any and the deposit was "as the parties agreed". The agreement was conditional upon Mr Zhao obtaining consent from the Regulator under the Act to acquire the Property. The application for consent was not made, and, as the date of this judgment, Mr Zhao has not settled the purchase of the land.

[7] On the same day the parties executed the sale and purchase agreement, they also executed a deed of lease for the property (Lease). The Lease terms provided that Mr Zhao, as the tenant, was acquiring a lease for the Property commencing on 5 May 2014. The lease was for a term of 10 years, with a right of renewal for a further 10 year term. The annual rent was NZD 1 plus GST. The standard terms in the Lease providing for rent reviews were struck out. The Lease was not conditional upon Mr Zhao obtaining consent from the Regulator under the Act to lease the Property.

[8] Mr Zhao spoke with Mr Chen before executing the Lease but did not seek independent legal advice.

[9] In addition to the sale and purchase agreement and the Lease, the vendors also executed a power of attorney. That purported to appoint Mr Zhao as the vendors' attorney in relation to the Property, including granting him the power to sell, exchange, mortgage, charge, or pledge any real or personal property related to the Property.

[10] In May 2018, Mr Zhao, through his former solicitor, Ms Reid, reported his breach of the Act. The Regulator commenced an investigation into Mr Zhao's involvement in transactions relating to the Property. Further information regarding the accepted breach of the Act was forwarded to the Regulator on Mr Zhao's behalf by Ms Reid on 25 September 2018. Mr Zhao also attended a voluntary interview with the Regulator's staff.

[11] This proceeding was commenced on 30 November 2020. Mr Zhao has filed a notice of admissions admitting liability for giving effect to an overseas investment in the Property without first obtaining consent. As liability is admitted, the sole issue for the Court is to determine the quantum of the penalty to be imposed under s 48(2) of the Act.<sup>1</sup>

### **Legislative framework**

[12] The Act regulates investments by overseas persons in New Zealand. At the time Mr Zhao contravened the Act, the purpose of the Act was to:<sup>2</sup>

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<sup>1</sup> High Court Rules 2016, r 15.16.

<sup>2</sup> Overseas Investment Act 2005, s 3.

... acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—

- (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
- (b) imposing conditions on those overseas investments.

[13] Under the Act, an overseas person includes an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand.<sup>3</sup> A transaction requires consent under the Act if it will result in an overseas investment in sensitive land or in significant business assets.<sup>4</sup>

[14] Section 12(a) provides clarity on what are overseas investments in sensitive land:

## **12 What are overseas investments in sensitive land**

An **overseas investment in sensitive land** is the acquisition by an overseas person, or an associate of an overseas person, of all or any of the following ...

- (a) an estate or interest in land if—
  - (i) the land that the estate or interest relates to is sensitive land under Part 1 of Schedule 1; and
  - (ii) the estate or interest acquired is a freehold estate or a lease, or any other estate or interest, for a term of 3 years or more (including rights of renewal, whether of the grantor or grantee), and is not an exempted interest; or ...

[15] Section 42 of the Act provides that it is an offence for an overseas person to give effect to an overseas investment without the consent required by the Act. Consent was required in this case because Mr Zhao was an overseas person as defined in the Act.

[16] Under s 48 of the Act, the Court may order a person in breach of the Act to pay a civil penalty. At the time of the admitted breach of the Act, s 48(2) provided:

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<sup>3</sup> Section 7(2)(a).

<sup>4</sup> Section 10(1).

**48 Court may order person in breach to pay civil penalty**

...

- (2) The court may order A to pay a civil pecuniary 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. ...

**Approach to fixing penalties**

[17] The approach to determining the quantum of civil pecuniary penalties follows the criminal sentencing approach which involves:<sup>5</sup>

- (a) determining the maximum penalty available;
- (b) identifying aggravating or mitigating factors of the contravening conduct to determine an appropriate starting point; and
- (c) adjusting the starting point in light of those factors specific to the defendant that warrant an uplift or reduction from the starting point.

[18] Where penalties are agreed between the parties, the Court must consider whether the penalty is within the proper range, but it is not required to embark on its own enquiry as to the appropriate penalty figure.<sup>6</sup>

**Maximum penalty**

[19] The maximum penalty that can be imposed must not exceed the higher of the four alternatives set out in s 48(2)(a) to (d) of the Act.

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<sup>5</sup> *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 [*Carbon Conscious*] at [26]-[27].

<sup>6</sup> At [24].

[20] In this case, the parties have not attempted to quantify any quantifiable gain, the cost of remedying the breach of the Act, or any loss suffered by any person arising from the breach. The parties are agreed that it is not possible to calculate the gain or loss in this case with any degree of certainty.

[21] Accordingly, the applicable maximum penalty is \$300,000 under s 48(2)(a) of the Act.

### **Starting point**

[22] There are several factors that may provide guidance in setting a starting point:<sup>7</sup>

- (a) the nature and extent of the breach;
- (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.

[23] There is a dispute between the parties as to the nature and extent of the breach. The Regulator submits that Mr Zhao's breach is moderately serious due to the significant size of the Property (20.5 hectares), the value of the Property (\$6,000,000) and the 20 year duration of the Lease term. However, it is acknowledged that Mr Zhao did not acquire all the rights of a freehold estate under the Lease, including, in particular, the right to dispose of the Property.

[24] Mr Zhao, on the other hand, contends that, as to gravity, the breach is low level. In his written submissions, Mr Jones QC, on behalf of Mr Zhao, submits that the

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<sup>7</sup> *Carbon Conscious*, above n 5, at [31].

breach related to the Lease which was incidental to the purchase. Further, Mr Zhao is now entitled to settle the sale and purchase agreement without obtaining consent because he has now become eligible under the Act to acquire the land. Although settlement has not yet been effected, Mr Zhao intends to do so. Once he is the owner of the land, the Lease will fall away.

[25] This is the first case of a self-reported breach of the Act involving a lease. I agree with counsel for the Regulator, Ms Muirhead, that breaches involving leases should not generally be regarded as less serious than those involving the purchase of freehold land. Categorising the gravity of the breach involves considering all relevant circumstances including the substance of the transaction by which land is alienated. It is a fact specific exercise.

[26] In this case, the lease was for a 10 year term with a 10 year right of renewal. This 20 year term well exceeded the three year threshold provided for in the Act, and alienated the land for a significant period of time. The size of the land (20.5 hectares) and the value of it attributed to the parties in the sale and purchase agreement (\$6,000,000) was also significant.

[27] The other legal instruments signed at the same time, namely the power of attorney and the sale and purchase agreement, are also relevant in this context. The combination of those documents means that Mr Zhao was to have effective control over the land both pre and post the intended settlement of the purchase.

[28] This structure also suggests there was an element of premeditation in trying to circumvent the controls imposed by the Act. There is no dispute that Mr Zhao was aware that he did not meet the residency requirements for purchase of the land, yet he entered into arrangements which provided for the acquisition of a long-term interest in the land without the need for the Regulator's consent.

[29] However, the circumstances in which Mr Zhao signed the Lease reduce the seriousness of the breach. Mr Zhao had limited proficiency in English, and although he was generally aware of the need to obtain the Regulator's consent, he no doubt

relied on the advice of Mr Chen, and assumed that the arrangements put in place did not breach the Act.

[30] Similarly, the extent of any loss or financial gain was minimal. Although Mr Zhao received a non-quantifiable benefit from gaining a leasehold interest in the Property for a 20 year period without first obtaining consent from the Regulator, the real gain lay in the land. That land can now be transferred to Mr Zhao without the need for the Regulator's consent.

[31] There have been six other cases of breaches of the Act involving a failure to obtain consent before making or giving effect to an overseas investment in sensitive land.<sup>8</sup> Three of those cases are of assistance in evaluating the appropriate starting point:

- (a) In *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*,<sup>9</sup> the defendant had sought and obtained consent for previous investments and relied on legal advice for a factual situation that it had not previously encountered. The legal advice was shown to be deficient. Retrospective consent had been sought and received. A starting point of \$80,000 was adopted, with a 50 per cent discount for mitigating factors. A penalty of \$40,000 and scale costs of \$6,003.50 were ordered to be paid.
- (b) *Chief Executive of Land Information New Zealand v Tang*<sup>10</sup> involved an agreement for sale and purchase of sensitive land in the sum of \$5,128,000. Three months after signing the agreement, Mr Tang entered into a deed of nomination with overseas persons under which they obtained equitable and then legal interests in the property after title was transferred. The quantifiable gain on the resale was approximately

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<sup>8</sup> *Carbon Conscious*, above n 5; *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382, (2018) 19 NZCPR 460 [*Tang*]; *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561; *Chief Executive of Land Information New Zealand v BCH Investments Ltd* [2019] NZHC 1630; *Chief Executive of Land Information New Zealand v FFG Investment Ltd* [2019] NZHC 3293 [*FFG Investment*]; and *Chief Executive of Land Information New Zealand v Chor Ltd (as trustee of Chor Trust)* [2020] NZHC 1254.

<sup>9</sup> *Carbon Conscious*, above n 5.

<sup>10</sup> *Tang*, above n 8.



\$269,000 each. A starting point of \$130,000 was adopted with a 15 per cent discount applied for mitigating factors. The end penalty imposed was \$110,500.

- (c) *Chief Executive of Land Information New Zealand v FFG Investment Ltd*<sup>11</sup> involved the purchase of 2.78 hectares of sensitive land for a purchase price of \$4,670,000. The property was deemed to be sensitive land because it adjoined a scenic reserve. The starting point adopted was \$103,000. A discount of 20 per cent for full cooperation and early acceptance of liability was applied with an end penalty of \$82,500 imposed.

[32] The gravity of offending in this case is less serious than that in these three cases. That is because Mr Zhao did not acquire an interest in a freehold estate in land, there was no quantifiable loss or gain, and Mr Zhao is now entitled to purchase the land without needing to obtain consent. I accept that a starting point of \$70,000 is appropriate in those circumstances.

### **Adjustment to the starting point**

[33] The second stage is to adjust the starting point for aggravating or mitigating factors personal to the defendant. Those factors include the following:<sup>12</sup>

- (a) any previous misconduct of a similar nature by the defendant;
- (b) the size of the defendant;
- (c) cooperation with the authorities;
- (d) any admission of liability; and
- (e) compliance programmes put in place by the defendant.

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<sup>11</sup> *FFG Investment*, above n 8.

<sup>12</sup> *Carbon Conscious*, above n 5, at [47].

[34] There are no aggravating features of the offending that require an uplift in this case. There are, however, mitigating features for which a discount is warranted. Mr Zhao has not previously been involved in the purchase of sensitive land in New Zealand requiring a consent and so there is no history of previous misconduct. He was purchasing the land in his own name and for non-commercial purposes. Mr Zhao reported his own breach, cooperated with the Regulator, and promptly admitted liability. The parties have agreed a discount of 30 per cent for these factors, and I accept that this is within range in the circumstances. This brings the end penalty to \$49,000.

### **Result**

[35] Mr Zhao is ordered to pay a civil penalty in the sum of \$49,000.

[36] The parties have agreed costs. Mr Zhao is ordered to pay \$15,000 to the Regulator towards its costs.

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Edwards J