IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-111
[2021] NZHC 1379

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	SEUNG HEUN LEE First Defendant
	DOUBLE PINE INVESTMENT LIMITED Second Defendant
	MEDITATION TOUR LIMITED Third Defendant

Hearing:	27 May 2021
Appearances:	F J Cuncannon and M A Hori Te Pa for the Plaintiff TGH Smith for the Defendants
Judgment:	27 May 2021
Reasons:	11 June 2021

REASONS JUDGMENT OF MUIR J

This judgment was delivered by me on Friday 11 June 2021 at 11.00 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Counsel:
TGH Smith, Thorndon Chambers, Wellington

Solicitors:
F J Cuncannon and M A Hori Te Pa, Meredith Connell, Wellington
W P Sussman, Bell Gully, Auckland

Results judgment

[1] On 27 May 2021 I gave, in response to an indicated preference by the parties that I do so, a results judgment approving agreed penalties. What follows are my reasons.

Introduction

[2] The parties to this proceeding sought orders that the first, second and third defendants each pay agreed pecuniary penalties following their respective breaches of the Overseas Investment Act 2005 ("the Act"). As liability is admitted, the sole issue for determination is the appropriate quantum of penalties to be imposed under s 48(2) of the Act.

[3] It is accepted by all parties that:

(a) the first defendant, Seung Heun Lee, acquired equitable and legal interests in sensitive land in Northland at:

(i) Reinga Road;[1]

(ii) Access Road;[2] and

(iii) Riverstone Lane;[3]

(b) the second defendant, Double Pine Investment Limited ("Double Pine") acquired equitable and legal interests in sensitive land in Northland at:

(i) Haruru Falls Retreat;[4]

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1 Reinga Road has a total land area of 0.5109 hectares.
2 Access Road has a total land area of 4.7978 hectares.
3 Riverstone Lane is comprised of two properties, 8 and 10 Riverstone Lane, with a combined land area of 0.6227 hectares.
4 Haruru Falls Retreat is comprised of 31 stratum in freehold titles (a small number of which are owned by unrelated third parties) and has a land area of 1.7830 hectares.

(ii) Pungaere Road;[5] and

(iii) Totara North;[6]

(c) the third defendant, Meditation Tour Limited ("Meditation Tour"), acquired an equitable interest in sensitive land in Northland, namely, Macadamia Lane.[7]

[4] The defendants have engaged with the Chief Executive of Land Information New Zealand ("the Regulator") as to an appropriate level of penalties. The parties now seek this Court's imprimatur to the following orders:

(a) that the first defendant, Mr Lee, pay the agreed pecuniary penalties of:

(i) $297,500 in respect of Reinga Road;

(ii) $71,250 in respect of Access Road; and

(iii) $71,250 in respect of Riverstone Lane;

(b) that the second defendant, Double Pine, pay the agreed pecuniary penalties of:

(i) $624,750 in respect of Pungaere Road;

(ii) $71,250 in respect of Haruru Falls Retreat; and

(iii) $71,250 in respect of Totara North;

(c) that the third defendant, Meditation Tour, pay the agreed pecuniary penalty of $39,375 in respect of Macadamia Lane.

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5 Pungaere Road has a total land area of 156.3696 hectares.
6 Totara North has a total land area of 24.7645 hectares.
7 Macadamia Lane has a total land area of 6.6613 hectares.

[5] The parties also seek orders that each of the defendants pay $10,000 towards the Regulator's costs and disbursements.

[6] I turn first to the factual background to this proceeding.

Background

The parties

[7] The first defendant, Mr Lee, is a citizen of the Republic of Korea and a New Zealand resident. He is the founder of various meditation-based enterprises, including Brain Education (also known as Dahn Yak Yoga), Dahn Yoga and Body & Brain Yoga. At all relevant times, Mr Lee was an "overseas person" for the purpose of s 7(2)(a) of the Act. This is because he was not a New Zealand citizen and was not ordinarily resident in New Zealand under s 6(2) of the Act.

[8] Two companies were incorporated to invest in and/or manage properties intended as part of Mr Lee's meditation tourism business in New Zealand.

[9] The first company, Double Pine, was incorporated on 26 November 2015. At the time it was incorporated, and at all relevant times subsequently, Double Pine was an overseas person under s 7(2)(c) of the Act. This is because Mr Lee, an overseas person himself, held 100 per cent of the shares in Double Pine.

[10] The second company, Meditation Tour, was incorporated on 24 April 2014. From 13 November 2015 onwards, Meditation Tour was an overseas person under s 7(2)(c) of the Act. As with Double Pine, this is because Mr Lee held 100 per cent of the shares in Meditation Tour.

Mr Lee's property interests

[11] On or around 26 June 2015, Mr Lee entered into written agreements to purchase Reinga Road and 85 Access Road respectively, thereby acquiring an equitable interest in the properties. Four days later, on 30 June 2015, transfers of title to Reinga road and to 85 Access Road were registered to Mr Lee whereby he acquired a legal interest in the properties.

[12] In or around July 2014, Mr Lee entered into a written agreement to purchase 10 Riverstone Lane. Later that month, Mr Lee's associate, Ms Esther Lee, entered into a written agreement to purchase 8 Riverstone Lane.

[13] Subsequently, on or around 26 June 2015, Mr Lee entered into a written agreement to purchase 8 Riverstone Lane from Ms Lee and duly obtained an equitable interest in the property. Four days later, on 30 June 2015, a transfer of title to 8 Riverstone Lane was registered to Mr Lee whereby he acquired a legal interest in the property.

[14] At no time prior to acquiring interests in Reinga Road, Access Road or Riverstone Lane did Mr Lee obtain consent from the Regulator under pt 2, subpt 2 of the Act to make the investments.

Double Pine's property interests

[15] On various dates between 20 November 2015 and 4 October 2016, Double Pine entered into 10 written agreements to purchase 27 of the 31 freehold titles forming part of Haruru Falls Retreat. Upon execution of those agreements, Double Pine obtained equitable interests in Haruru Falls Retreat. Between 20 January 2016 and 21 November 2016, transfers of title to Haruru Falls Retreat were registered to Double Pine whereby it acquired a legal interest in the properties.

[16] On or about 22 January 2016, Double Pine entered into a written agreement to purchase Pungaere Road. On 1 April 2016, a transfer of title to Pungaere Road was registered in its favour.

[17] On or around 21 February 2016, Double Pine entered into a written agreement to purchase Totara North. By no later than 1 March 2016, Double Pine obtained an equitable interest in Totara North. On 3 June 2016, a transfer of title to Totara North was registered to Double Pine. Upon transfer, Double Pine obtained a legal interest in Totara North.

[18] At no time prior to acquiring interests in Haruru Falls Retreat, Pungaere Road or Totara North did Double Pine obtain consent from the Regulator under pt 2, subpt 2 of the Act.

Meditation Tour's property interest

[19] On or around 3 August 2016, Meditation Tour entered into a written agreement to purchase Macadamia Lane. At no time prior to acquiring its equitable interest did it obtain consent from the Regulator under pt 2, subpt 2 of the Act.

Value of transactions

[20] All of the above properties ("the properties") were intended for or are being used for meditation tourism run by Mr Lee, Double Pine and Meditation Tour. They have a combined area of approximately 195 hectares and were purchased for a total of $10,382,420.

The Regulator's investigation

[21] Subsequently, the Regulator commenced an investigation into whether these acquisitions had occurred in breach of the Act. At that point the defendants sought specialist and independent legal advice. They accepted liability for breach at an early stage.

[22] The defendants co-operated with the Regulator during the investigation by voluntarily providing information, including:

(a) written responses to questions;

(b) documents and other information; and

(c) Mr Lee also voluntarily participated in an interview with the Regulator's staff.

[23] On or around 28 June 2019, Mr Lee, Double Pine and Meditation Tour applied for retrospective consent in respect of their acquisitions. These applications were declined on 19 March 2020. Following that decision, Mr Lee and entities under his control proactively sought to resolve with the Regulator the implications of the various breaches, including by:

(a) agreeing to admit the breaches of the Act and pay civil penalties; and

(b) commissioning valuation reports in respect of the properties in order to determine their current market value for the purpose of assessing the appropriate civil penalties payable in respect of each property.

Admissions

[24] Mr Lee admits that:

(a) he was an overseas person under s 7(2)(a) of the Act at all relevant times; and

(b) he breached s 42 of the Act by:

(i) signing the written agreement to purchase Reinga Road, thereby gaining an equitable interest in Reinga Road, and by becoming the registered proprietor of Reinga Road, thereby gaining a legal interest in that property, without obtaining consent under the Act;

(ii) signing the written agreement to purchase Access Road, thereby gaining an equitable interest in Access Road, and by becoming the registered proprietor of Access Road, thereby gaining a legal interest in that property, without obtaining consent under the Act; and

(iii) signing the written agreements to purchase Riverstone Lane, thereby gaining an equitable interest in Riverstone Lane, and by

becoming the registered proprietor of Riverstone Lane, thereby gaining a legal interest in that property, without obtaining consent under the Act;

[25] Double Pine admits that:

(a) it was an overseas person under s 7(2)(c) of the Act at all relevant times; and

(b) it breached s 42 of the Act by:

(i) signing the written agreements to purchase Haruru Falls Retreat, thereby gaining an equitable interest in Haruru Falls Retreat, and by becoming the registered proprietor of the 27 stratum in freehold titles to Haruru Falls Retreat, thereby gaining a legal interest in that property, without obtaining consent under the Act;

(ii) signing the written agreement to purchase Pungaere Road, thereby gaining an equitable interest in Pungaere Road, and by becoming the registered proprietor of Pungaere Road, thereby gaining a legal interest in that property, without obtaining consent under the Act; and

(iii) signing the written agreement to purchase Totara North, thereby gaining an equitable interest in Totara North, and by becoming the registered proprietor of Totara North, thereby gaining a legal interest in that property, without obtaining consent under the Act.

[26] Meditation Tour admits that:

(a) it was an overseas person under s 7(2)(c) of the Act at all relevant times; and

(b) it breached s 42 of the Act by entering into the written agreement to purchase Macadamia Lane, thereby gaining an equitable interest in Macadamia Lane, without it obtaining consent under the Act.

[27] The defendants have filed a notice of admissions admitting all seven of the causes of action in the Regulator's statement of claim. The defendants accept that the Regulator is entitled to seek judgment in respect of their breaches of the Act under r 15.16 of the High Court Rules 2016.

[28] As liability is admitted, the sole issue for determination by this Court is the quantum of penalties to be imposed under s 48(2) of the Act.

Legislative framework

[29] The Act regulates investments by overseas persons in New Zealand. It recognises that it is a privilege for overseas persons to own or control sensitive New Zealand assets by:

(a) requiring criteria be met before consent is granted for overseas investments in those assets; and

(b) imposing conditions on overseas investments.

[30] Under s 7(1), persons are "overseas persons" if they themselves are overseas persons or they are more than 25 per cent owned or controlled by an overseas person. In particular, an overseas person includes an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand.[8]

[31] Under s 10(1), a transaction requires consent under the Act if it will result in an overseas investment in sensitive land or in significant business assets. An overseas investment in sensitive land is the acquisition by an overseas person, or an associate of an overseas person, of an estate or interest in land if:[9]

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8 Overseas Investment Act 2005, s 7(2)(a).
9 Section 12(a).

(a) the land is "sensitive" under sch 1 pt 1 of the Act; and

(b) the estate or interest acquired is a freehold estate or a lease, or any other estate or interest, for a term of three years or more, and is not an exempted interest.

[32] Consent must be obtained for a transaction before the overseas investment is given effect under the transaction.[10] Each overseas person making the overseas investment must apply for consent to an overseas investment transaction.[11]

[33] 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.[12] In this case, consent was required under s 22 because, at the relevant times, Mr Lee was an overseas person under s 7(2)(a) of the Act and Double Pine and Meditation Tour were overseas persons under s 7(2)(c) of the Act.

[34] At the time of the admitted breaches of the Act, s 48 relevantly provided that:

> **48 Court may order person in breach to pay civil penalty**
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> (1) On the application of the regulator, the court may order a person (A) to pay a civil pecuniary 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.
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> (2) The court may order A to pay a civil pecuniary penalty not exceeding the higher of—
>
> (a) $300,000; or
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> (b) any quantifiable gain (for example, the increase in the value since acquisition) by A in relation to the property to which the

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10 Section 11(1).
11 Section 22(1)(a).
12 Section 42(1).

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 penalty assessment

[35] In fixing an appropriate civil penalty under s 48 of the Act, this Court has typically adopted the same method as used in determining the quantum of pecuniary penalties imposed under s 80 of the Commerce Act 1986.[13] In particular, it follows the criminal sentencing approach which involves:[14]

(a) firstly, determining the maximum penalty available;

(b) second, identifying aggravating or mitigating factors of the contravening conduct to determine an appropriate starting point; and

(c) third, adjusting the starting point in light of those factors specific to the defendant that warrant an uplift or reduction from the starting point.

[36] The many previous decisions on s 48 also acknowledge that:[15]

(a) there is significant public benefit when defendants acknowledge wrongdoing, thereby avoiding time-consuming and costly litigation; and

(b) the Court has a role in promoting resolutions by accepting a penalty that is within an appropriate range. That is because to require a proposed penalty to coincide precisely with the penalty that the Court

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13 See, for example, *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558; *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561; *Chief Executive of Land Information New Zealand v Chor Ltd* [2020] NZHC 1254; *Chief Executive of Land Information New Zealand v Smith Road Farm Ltd* [2021] NZHC 795; and *Chief Executive of Land Information New Zealand v Zhao* [2021] NZHC 857.

14 See *Zhao*, above n 13, at [17].

15 See for example *Carbon Conscious*, above n 13, at [24].

might have imposed risks deterring defendants from negotiating a resolution.

[37] The following factors are relevant to setting a starting point:[16]

(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.

[38] Aggravating and mitigating factors specific to the defendant include:[17]

(a) any previous misconduct of a similar nature by the defendant;

(b) the sophistication of the defendant;

(c) any co-operation with the authorities;

(d) any admission of liability; and

(e) any compliance programmes put in place by the defendant.

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16 At [31].
17 At [47].

[39] The quantum of discounts available for mitigating factors such as admissions of liability and co-operation depend upon the particular circumstances of the case. In this respect, factors such as the timeliness of the admissions, the strength of the Regulator's case and the nature and extent of co-operation may be relevant.

[40] Where the parties agree as to an appropriate penalty, the Court must consider whether that penalty is within the proper range but is not required to embark on its own enquiry as to an appropriate penalty figure.[18]

[41] I turn now to assess whether the proposed penalties fall within such a range.

First stage: determining the maximum penalty

[42] Any penalty imposed by the Court must be sufficient to satisfy the needs of both specific and general deterrence. At the relevant time, s 48(2) prescribed that the maximum civil penalty that may be imposed could not exceed the higher of:

(a) $300,000; or

(b) the amount of any quantifiable gain by a defendant in relation to a property for which 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.

[43] The parties agree that, in the circumstances of this case, quantifiable gain is appropriately assessed by reference to capital gain, being the difference between the purchase price and current market valuation. The parties have agreed that this approach is appropriate because it is not sensible to interrogate and apportion the significant expenditure made in improving the properties and the revenue from Mr Lee's meditation tourism business. I accept that approach as appropriate. There have been very significant improvements to some of the properties including, for

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[18] At [24].

example, sinking a bore and road construction. The properties have also been used in a profit making commercial enterprise. The Chief Executive considers it disproportionate and counterproductive to engage in an examination at this level of minutiae. I agree.

[44] To quantify the relevant capital gains the defendants have obtained current market valuations prepared by independent registered valuers and property advisors.

[45] Of the seven properties involved, only two have attracted quantifiable gains in excess of $300,000. Mr Lee has made a quantifiable gain of $350,000 in respect of Reinga Road,[19] and Double Pine has made a quantifiable gain of $735,000 in respect of Pungaere Road.[20] Accordingly, the amount of those gains are the appropriate maximum penalty and starting point for the contraventions relating to those properties under s 48(2)(b).

[46] The parties agree that the defendants have not achieved any quantifiable gain in excess of $300,000 in respect of any of the remaining five properties. Accordingly, each investment attracts a maximum penalty of $300,000 under s 48(2)(a).[21]

Second stage: fixing an appropriate starting point

[47] Accepting that the appropriate starting point in respect of Reinga Road is $350,000 and in respect of Pungaere Road is $735,000, I turn then to consideration of the appropriate starting point for the balance five properties being:

(a) Access Road and Riverstone Lane, owned by Mr Lee;

(b) Haruru Falls Retreat and Totara North, owned by Double Pine; and

(c) Macadamia Lane, owned by Meditation Tour.

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19 The purchase price for Reinga Road was $1,600,000 and the current market valuation of that property is $1,950,000.

20 The purchase price for Pungaere Road was $1,125,000 and the current market valuation of that property is $1,860,000.

21 The parties agree that the other limbs in s 48(2) do not apply in this case.

Nature and extent of the breach

[48] The Regulator submits that the nature and extent of the defendants' breaches were serious in light of the combined size, value of the properties (in dollar terms and in terms of environmental value) and the fact that the acquisitions were made in the context of a commercial meditation tourism business. The total area involved in respect of the balance properties was 38.6293 hectares and the purchase price $7,657,420.[22]

Nature and extent of any quantifiable gain made from the breaches

[49] Across the balance of the properties the defendants have recorded an overall capital loss of $682,420.[23] They have also received some non-quantifiable benefit by use of the properties to establish a commercial tourism operation without:

(a) first applying for and satisfying the statutory criteria for an overseas investment in sensitive land; and

(b) being subject to any conditions that may have been imposed under any such consent.[24]

Whether the breaches were intentional, negligent or inadvertent and the circumstances of the breaches

[50] The parties agree that overseas investors should seek independent and appropriately qualified advice before making investments in New Zealand. However, it is accepted in this case that Mr Lee was poorly served by his former business and legal advisors who did not advise him of the need for consent under the Act, particularly having regard to the fact that:

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22 Total acquisitions were 195.5098 hectares for a total sum of $10,382,420. The current market value of the combined seven properties is now $10,785,000.

23 By comparison the cumulative totality adjusted starting point proposed in respect of these properties is $432,500.

24 Under s 25(1)(c) in its then form, consent could be granted subject to any conditions that the relevant Minister or Ministers thought appropriate.

(a) the agreements for sale and purchase were in English and Mr Lee confirmed in his interview with the Regulator that:

(i) he had limited proficiency in the English language; and

(ii) he did not read the agreements before he signed them;

(b) there was substantial land area involved, the properties were of natural significance, they had a substantial combined purchase price and were being acquired for commercial tourism purposes, all obvious "red flags" for any professional organisation representing Mr Lee's interests.

[51] In these circumstances, the Regulator considers that Mr Lee's breaches of the Act, and the associated breaches of Double Pine and Meditation Tour, were in the category of "inadvertent".

Where do the proposed penalties sit in the context of other cases?

[52] The imposition of penalties under the Overseas Investment Act is an intensely fact-specific exercise. While the assessment of penalties in analogous cases may provide some guidance in this respect, the Court of Appeal has warned against close comparison with other decisions.[25] A measure of caution is therefore required. Nevertheless, the Regulator submits that five cases in particular may assist the Court in evaluating an appropriate penalty range in respect of the balance properties. These decisions involved the acquisition of equitable and/or legal interests in freehold estates by individuals and companies in contravention of s 42 of the Act.

[53] In *Chief Executive of Land Information New Zealand v Tang*, Mr Tang was an experienced business person with interests in China and New Zealand who had previously bought land in New Zealand.[26] He entered into an agreement to purchase one property that was sensitive land for $5,128,000 and accordingly obtained an equitable interest in that property. He later entered into a deed of nomination with a

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25 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [62].

26 *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382, (2018) 19 NZCPR 460 at [21].

number of overseas persons under which they obtained equitable and later legal interests in the property. Those individuals later on-sold the property for a quantifiable gain of approximately $269,000 each.

[54] Justice Lang accepted that Mr Tang had "undoubtedly received poor legal advice" but nevertheless found him negligent in failing to obtain consent under the Act.[27] As Mr Tang did not achieve a quantifiable gain, the maximum penalty was $300,000. A starting point of $130,000 was adopted and a 15 per cent discount applied for Mr Tang's acceptance of liability, remorse and cooperation. He was ordered to pay an end penalty of $110,500.[28] A starting point of $270,000 was adopted in respect of the remaining defendants leading to end penalties of between $229,500 and $243,000. This effectively required them to disgorge their quantifiable gains.

[55] In *Chief Executive of Land Information New Zealand v Hong*, Mr Hong and Mr Ke were overseas persons who entered into an investment partnership with Mr Churchill, a New Zealand citizen.[29] That partnership qualified as an overseas person. Mr Hong and Mr Ke also incorporated two companies that qualified as overseas persons.

[56] The investment partnership purchased a farm of approximately 79 hectares for $4,480,000 with one of the two companies as the nominated purchaser. The defendants failed to obtain consent under the Act. Following the Regulator's investigation, the property was sold by the company to a third party for $10,100,000. The company was ordered to disgorge its net quantifiable gain from the re-sale of the property, being $2,747,360, less a 15 per cent discount for co-operation.[30] This resulted in an end penalty of $2,335,256.

[57] The partnership also purchased a lodge on approximately 44 hectares for $2,550,000. Consent under the Act was neither sought nor obtained.[31]

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27 At [21]–[23].
28 At [39].
29 See *Hong*, above n 13.
30 It is unclear from the judgment how the net quantifiable gain was calculated having regard to the apparent $4.62 m profit on the resale.
31 At [8].

[58] All acquisitions were considered "negligent and careless" as opposed to deliberate.[32]

[59] Having identified fraudulent conduct by Mr Churchill in respect of the lodge, Mr Hong and Mr Ke arranged for it to be transferred out of the partnership arrangement to one of the incorporated companies. This was a deliberate breach of the Act as the parties had, by that point, become aware of the restrictions imposed on overseas persons. The company was ordered to dispose of the lodge under s 47 of the Act but was not ordered to pay a pecuniary penalty.

[60] In respect of each of the initial acquisitions of the lodge and farm Woolford J adopted a starting point of $130,000 per defendant. In respect of the lodge he accepted that this was negligent and careless as opposed to deliberate.[33] In respect of the farm that appears to be an appropriate inference also.[34]

[61] In *Chief Executive of Land Information New Zealand v FFG Investment Ltd*, Mr Cai, a New Zealand resident, entered into an agreement to purchase 2.78 hectares of sensitive land for a purchase price of $4,760,000.[35] He nominated FFG Investment Ltd, an overseas person, to complete the settlement. FFG Investment Ltd held legal and equitable title from September 2013 until February 2016 before selling the land to Grand Sky Ltd. Grand Sky Ltd was also an overseas person at the time of the agreement though later ceased to be so due to changes in its shareholding. FFG Investment Ltd and Grand Sky Ltd were the defendants in the proceeding. Each admitted liability under the Act in acquiring interests in sensitive land without the consent of the Overseas Investment Office.[36]

[62] As there had been no quantifiable gain, the maximum penalty for each contravention was $300,000. A starting point of $103,000 was adopted in respect of FFG Investment Ltd. This was reduced to an end penalty of $82,500 following a discount of 20 per cent for co-operation, early acceptance of liability and agreement

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32 At [25].
33 See *Hong*, above n 13 at [25].
34 The Regulator submits and I agree that the apparent reference to the contrary in [28] of the judgment is in error and that this paragraph in fact refers to the second transfer of the lodge.
35 *Chief Executive of Land Information New Zealand v FFG Investment Ltd* [2019] NZHC 3293.
36 At [2].

as to penalties. A starting point of $54,000 was adopted in respect of Grand Sky Ltd. A discount of 25 per cent was then allowed for similar reasons, including an undertaking to retain sufficient funds from the sale of its sections to enable it to meet any civil penalty that the Court might impose. This resulted in an end sentence of $40,500.[37]

[63] In *Chief Executive of Land Information New Zealand v West Drury Holding Ltd*, Mr Yin, an overseas person, held 39 per cent of the shares in West Drury Holding Ltd ("WDHL").[38] WDHL acquired 23.3 hectares of sensitive land for a purchase price of $9,200,000 without the requisite consent. A starting point of $160,000 to $170,000 was adopted in light of the significant value of the land and an end penalty of $125,000 imposed. WHDL was entitled to a full 25 per cent discount.

[64] In *Chief Executive of Land Information New Zealand v Smith Road Farm Ltd*, the Song family incorporated three companies which acquired property with a total value of $11,600,000 and total size of 3,663 hectares.[39] Two of the companies were overseas persons and all three were associates of overseas persons. Justice Downs adopted the parties' recommended starting points and applied discounts of 25 per cent. This resulted in end penalties of $236,250, $138,750 and $127,500 alongside an order to disgorge $879,304.

Starting points in respect of Mr Lee

[65] The parties agree that Mr Lee must disgorge his quantifiable gain in relation to Reinga Road. That necessitates a starting point of $350,000.

[66] The parties further agree that a starting point of $130,000 is appropriate in respect of both Access Road and Riverstone Lane. They submit that these sums accurately reflect the relative culpability of Mr Lee in relation to the defendants in the cases discussed above.

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37 At [25].
38 *Chief Executive of Land Information New Zealand v West Drury Holding Ltd* [2021] NZHC 704.
39 See *Smith Road Farm Ltd*, above n 13, at [8].

[67] Mr Lee is an experienced investor and educator. However, he was not aware of the requirements of the Act at the time he acquired the properties as a result of no or inadequate advice on the part of those representing him. His was not an intentional breach of the legislation.

[68] I note that the suggested starting point is equivalent to that identified for Messrs Tay, Hong and Ke. Each of these three defendants were held to be negligent whereas the agreed position in relation to Mr Lee is that he was merely "inadvertent". Arguably therefore Mr Lee is less culpable than Messrs Hong, Tay and Ke. Mr Tay had also undertaken previous land transactions in New Zealand. While identifying this issue, the defendants do not, however, contend for a lower starting point on that account.[40]

[69] In addition, the acquisition price for Access Road and Riverstone Lane (combined $1,319,000) was significantly less than the $9,200,000 price in *West Drury Holding Ltd* where a starting point of $160,000–$170,000 was adopted in respect of a similarly "inadvertent" breach. And the land area involved (5.4205 hectares) was also significantly less than *West Drury Holding Ltd* (23.3 hectares) and *Smith Road Farm Ltd* (3663 hectares).

[70] In these circumstances, I consider the proposed starting points for Access Road and Riverstone Lane to be appropriate.

[71] Consistent with *Hong* the Regulator then proposes a totality adjustment reducing the combined start point from $260,000 to $180,000–$200,000 with both parties agreeing the mid-point sum of $190,000 to be appropriate. I agree that there is proper scope for recognition of totality principles within a regime broadly based on criminal sentencing principles and that the approximately 27 per cent reduction is within an appropriate range.

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[40] In my overall assessment of whether the proposed penalties are within range, I do, however, take the point into consideration as a counterweight against a possible argument (not explored in submissions) that because there was a quantifiable gain of $266,000 in respect of the Riverstone Lane property, that sum should have been used as a starting point rather than $130,000 (despite the fact that there were other very significant losses among the residue five properties—the loss in value of Haruru Falls Retreat was $1,038,000 and on Macadamia Lane was $100,000). Gains on Access Road ($90,000) and Totara North ($100,000) were, in turn, lower than the suggested starting point for those properties ($130,000).

[72] Accordingly, I am satisfied the end result—being a starting point for Reinga Road of $350,000 and for Access Road and Riverstone Lane of $190,000 (combined)—is appropriate.

Starting points in respect of Double Pine

[73] The parties agree that Double Pine must disgorge its quantifiable gain in relation to Pungaere Road. That necessitates a starting point of $735,000.

[74] The parties further agree that a starting point of $130,000 is appropriate in respect of each of Haruru Falls Retreat and Totara North. I likewise agree, for similar reasons to those expressed in relation to Mr Lee. Again I proceed on the accepted basis that the breaches were "inadvertent". Again, the combined purchase price ($5,138,420) was significantly less than in *West Drury Holding Ltd* and *Smith Road Farm Ltd*. The area involved (26.5475 hectares) was also significantly less than *Smith Road Farm Ltd*, albeit comparable to *West Drury Holding Ltd*.

[75] The Regulator again submits that a discount from the combined $260,000 starting point is appropriate to reflect the totality of Double Pine's contraventions. I agree and therefore again adopt the parties' suggested starting points of:

(a) $735,000 for Pungaere Road; and

(b) $190,000 for Haruru Falls Retreat and Totara North together.

Starting point in respect of Meditation Tour

[76] The Regulator submits that there is no material difference in culpability between Meditation Tour (in respect of Macadamia Lane) and Double Pine (in respect of Haruru Falls Retreat and Totara North). However, a lower starting point is said to be warranted to reflect:

(a) the fact that Meditation Tour only acquired an equitable interest in one property for a short period of time;

(b) the smaller size of Macadamia Lane, being 6.6613 hectares; and

(c) its current market value of $1,100,000 ($100,000 less than the initial purchase price).

[77] The Regulator submits that Meditation Tour's position is analogous to Grand Sky in *FFG Investment Ltd* to the extent that Grand Sky's acquisition was of an equitable interest only and it held the interest for 27 days only. In that case the starting point for Grand Sky was assessed at $54,000. In this case, the Regulator proposes a starting point in the range of $50,000–$55,000 with the parties ultimately agreed that the penalty should be set at the mid-point of this range. Again, I consider that consistent with authority and principle.

Third stage: adjustment for factors personal to the defendants

[78] The Regulator does not seek an uplift for any aggravating factors personal to the defendants. I can identify none either.

[79] In respect of mitigating factors, it identifies early acknowledgment of wrongdoing and co-operation with authorities. Discounts of between 20 and 35 per cent have been recognised on these grounds previously.[41] However, relying on the decisions in *Agria* and *Hong*,[42] the Regulator submits that where there is a quantifiable gain, discounts reduce the desired deterrent effect and should therefore be more limited, albeit still recognising the value of co-operation. It therefore proposes, and the Lee interests accept, a discount of 15 per cent in respect of the penalties imposed for Reinga Road and Pungaere Road and 25 per cent in respect of the penalties imposed on the remaining five properties.

[80] I regard such discounts as appropriate.

[81] I do not overlook the significant contribution that the defendants have made to the Far North Region as recorded in the agreed statement of facts:

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41 See *Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd* [2019] NZHC 514 at [77] applied in *Hong*, above n 13 (discounts of 25%); *FFG Investment Ltd*, above n 35 (discounts of 20 and 25%); *West Drury Holding Ltd*, above n 38 (discount of 25%); *Smith Road Farm Ltd*, above n 13 (discounts of 25%); and *Zhao*, above n 13 (discount of 30% in circumstances where the defendant had self-reported his breach to the Regulator).

42 See *Agria*, above n 41, at [61], n 26; and *Hong*, above n 13, at [32].

> The Regulator acknowledges that Mr Lee and his Meditation tourism business have made a very significant contribution to the Far North region. This has had a positive impact on the tourism sector and the local economy through job creation (and more recently preservation) and in generating and promoting opportunities for local businesses. Those local businesses benefitted by an increase of well over 1,000 tourists per annum, many of whom visited during the "off season" so providing continuity of employment for [m]any in the region. Mr Lee and the companies have also engaged constructively with local iwi and hapu in the Far North Area.

[82] The defendants do not, however, seek a discrete discount in this respect.[43]

Result

[83] I am satisfied that the proposed penalties are comfortably within the proper range. To that end, I have already endorsed the agreement as to penalty entered into by the parties. I compliment them on having reached their agreement.

[84] For completeness I record the following orders made on 27 May 2021:

(a) Mr Lee is to pay civil pecuniary penalties of:

(i) $297,500 in respect of Reinga Road; and

(ii) $71,250 for each of Access Road and Riverstone Lane.

(b) Double Pine is to pay civil pecuniary penalties of:

(i) $624,750 in respect of Pungaere Road; and

(ii) $71,250 for each of Haruru Falls Retreat and Totara North.

(c) Meditation Tour is to pay a civil pecuniary penalty of $39,375 in respect of Macadamia Lane.

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[43] Again I identify this as counterweight to the possible argument referred to in fn 40 above.

[85] I also record my previous order that each of the defendants is to pay $10,000 towards the Regulator's costs. For the avoidance of doubt I note that apart from this agreed contribution, costs are to lie where they fall.

Muir J