IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-199
[2018] NZHC 382

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	WENBING TANG First Defendant
	XIANGHUA HUANG Second Defendant
	BINYAN ZHOU Third Defendant
	BINZHI OUYANG Fourth Defendant

Hearing:	9 March 2018
Appearances:	F Cuncannon for Plaintiff G M Illingworth QC for Defendants
Judgment:	12 March 2018

JUDGMENT OF LANG J
[on application for civil penalties under the Overseas Investment Act 2005]

This judgment was delivered by me on 12 March 2018 at 12.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Background

[1] The four defendants are Chinese citizens who do not ordinarily reside in New Zealand. Each of them contravened s 22 of the Overseas Investment Act 2005 (the Act) by acquiring an interest in sensitive land without first obtaining consent under the Act. In this proceeding the plaintiff, the Chief Executive of Land Information New Zealand (the Chief Executive), sought orders under ss 47 and 48 of the Act for the disposal of the property in question together with civil penalties and costs.

[2] The defendants filed an admission of liability on 9 June 2017. The parties have since filed a joint memorandum dated 2 March 2018 in which they agree on the penalties to be imposed. These reflect the fact that the property has now been sold. As a result, the only issue to be determined is the level of civil penalty the Court should impose. Before making such orders, the Court must first be satisfied that the agreed penalties are within the proper range.

Agreed facts

[3] On 25 June 2013, the first defendant, Mr Tang, entered into an agreement to purchase a residential property at 679 Riddell Road, Glendowie (the property) for $5.128 million.

[4] The parties used the Auckland District Law Society standard form agreement for sale and purchase of land.[1] On the first page of the agreement there is an option enabling the parties to make the agreement conditional on consent being obtained under the Act. On the 25 June 2013 agreement, this option was marked "No".

[5] Mr Tang acquired an equitable interest in the property immediately upon signing the sale and purchase agreement.

[6] On 21 August 2013, Mr Tang entered into a deed with the second, third and fourth defendants (Mrs Huang, Mr Zhou and Mr Ouyang), under which he nominated them to purchase the property. The deed of nomination was not conditional on Mrs Huang, Mr Zhou and Mr Ouyang obtaining consent under the Act to acquire the

---

1 Ninth edition, 2012.

property. On execution of the deed of nomination, Mrs Huang, Mr Zhou and Mr Ouyang each obtained an equitable interest in the property.

[7] On 28 August 2013, the transfer of title to the property was registered and Mrs Huang, Mr Zhou and Mr Ouyang each thereby became the legal owners of the property.

[8] None of the defendants has ever sought or obtained consent under the Act for the acquisition of an interest in the property.

Statutory framework

[9] The Act regulates overseas investment in sensitive New Zealand assets. Its purpose is stated in s 3:

> **3 Purpose**
>
> 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—
>
> (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
>
> (b) imposing conditions on those overseas investments.

[10] Section 10(1) of the Act states that a transaction requires consent under the Act if it will result in an overseas investment in sensitive land, as defined in s 12. Section 12 provides as follows:

> **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—
>
> (a) an interest in land if—
>
> (i) the land is sensitive under Part 1 of Schedule 1; and
>
> (ii) the interest acquired is a freehold estate or a lease, or any other 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

(b) rights or interests in securities of a person (A) if A owns or controls (directly or indirectly) an interest in land described in paragraph (a) and, as a result of the acquisition,—

(i) the overseas person or the associate (either alone or together with its associates) has a 25% or more ownership or control interest in A; or

(ii) the overseas person or the associate (either alone or together with its associates) has an increase in an existing 25% or more ownership or control interest in A; or

(iii) A becomes an overseas person.

[11] There is no dispute that the defendants meet the definition of "overseas person" under s 7(1) of the Act, in that they are neither New Zealand citizens nor ordinarily resident in New Zealand. Nor is there any dispute that the property meets the definition of "sensitive land" under Part 1 of Schedule 1 of the Act, in that:

(a) one boundary of the property adjoins land vested in Auckland Council for the purpose of a road shown on the deposited survey plan; and

(b) the road adjoins the sea; and

(c) the area of the property exceeds 0.4 hectares.

[12] Each of the defendants acquired an interest in the property in terms of s 12(a)(ii) of the Act. The transactions that led to the three defendants being registered as the owners of the property therefore amounted to overseas investments in sensitive land that required consent under the Act. Sections 22 and 23 require every overseas person making an overseas investment to apply in writing for consent. It is accepted that none of the defendants complied with that requirement.

[13] If the Court is satisfied that a person has contravened the Act, it may make a variety of orders. These include ordering the disposal of rights or interests in the property,[2] and ordering the person to pay a civil penalty.[3] Section 48(2) states that a civil penalty must not exceed:

---

2 Overseas Investment Act 2005, s 47.
3 Overseas Investment Act 2005, s 48.

(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; 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

[14] *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* is the only decision of this Court to date in which the approach to be taken when the Court is required to fix penalties under s 48 of the Act has been considered.[4] Edwards J held that the method for determining the quantum of pecuniary penalties under the Commerce Act 1986 should apply equally to the fixing of penalties in the present context.[5] Her Honour considered that, of the different statutes that provide for pecuniary penalties to be imposed by the Court, the regime under the Commerce Act is the most analogous to that provided for in the Act.[6]

[15] Under the Commerce Act approach, criminal sentencing principles are used to fix a pecuniary penalty.[7] This means the Court must assess the seriousness of the offending, identifying relevant aggravating and mitigating factors to determine an appropriate starting point. The Court then has regard to any factors specific to the defendant that may warrant an uplift in, or reduction from, the starting point.[8]

[16] However, it is necessary to bear in mind that the primary purpose of penalties under the Commerce Act is deterrence. In criminal cases the Sentencing Act 2002

---

4 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558.
5 At [22], [26] and [27].
6 At [26].
7 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [14]; *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [12].
8 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [14].

prescribes a range of sentencing purposes and principles.[9] Although the need for deterrence is one of these, it will not be the dominant concern in many cases.[10] In the context of the Commerce Act, Miller J commented:[11]

> …effective deterrence requires that the wrongdoer's unlawful gains or intended gains be eliminated but also that a rational wrongdoer takes into account ex ante, when contemplating the wrong, the probability that it will be detected and penalised. This rational approach is appropriate because general deterrence is concerned with violations that have yet to occur, viewed from the perspective of those who may be contemplating them.

I consider that the primary purpose of penalties imposed under the Overseas Investment Act is also deterrence.

[17] In *Carbon Conscious*, Edwards J identified several factors that may provide guidance when fixing the quantum of pecuniary penalties:[12]

(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.

[18] As for features specific to the offender, Edwards J drew on factors said to be relevant in the Commerce Act context:[13]

(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

---

9 Sentencing Act 2002, ss 7 and 8.

10 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [13]–[14].

11 See *Commerce Commission v NZ Bus Ltd (No 2)* (2006) 3 NZCCLR 854 (HC) at [25].

12 At [31], citing Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [16.47].

13 At [47].

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

[19] Where penalties are agreed between the parties, as in the present case, 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.[14] The policy rationale behind this is to promote acknowledgment of wrongdoing and ensure that defendants who negotiate a resolution are not deterred by the fear that the Court will reject their proposed penalty because it does not "precisely coincide with the penalty the Court might have imposed".[15]

Starting point for Mr Tang

[20] The parties in the present case have, broadly speaking, had regard to the factors listed by Edwards J in assessing starting points of the breaches that have occurred. They acknowledge the property comprised valuable residential land in a coastal setting. That type of property is precisely the type of asset that should require consent to be obtained under the Act when a purchase by an overseas person is proposed.

[21] Mr Tang's culpability lies in the fact that he instigated the actions that led to all of the breaches occurring. He has previous experience in purchasing land in New Zealand, as well as significant experience in business both in China and New Zealand. The reference to "OIA consent" on the first page of the sale and purchase agreement meant that the issue of consent under the Act needed to be considered. Consequently, Mr Tang should have been aware of the restrictions on purchasing property in New Zealand.

[22] However, the Chief Executive is satisfied that the need for consent was never raised with Mr Tang by either the real estate agents who introduced him to the property or the solicitor who acted on his behalf in relation to the transaction. The Chief Executive therefore accepts Mr Tang did not intentionally breach the Act; rather, he was negligent as to the consent requirements. Importantly, Mr Tang did not make any

---

14 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 at [24], citing *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

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

identifiable gain from his breach of the Act. He is therefore liable to a maximum penalty in the sum of $300,000.

[23] I consider, however, that Mr Tang's culpability is greater than that of the defendant in *Carbon Conscious.* In that case the defendant was aware of the potential need for consent and obtained legal advice as to a structure for the proposed transaction that would avoid that need. Edwards J approved a starting point of $80,000 that reflected the defendant's "complete reliance on erroneous legal advice".[16] Mr Tang also undoubtedly received poor legal advice. His experience as a businessman, however, and the presence of the "OIA consent" checkbox on the front page of the sale and purchase agreement ought to have alerted him to the consent requirement.

[24] The parties appear to have agreed that the starting point falls within the range between $120,000 and $140,000. I infer from the agreed final penalty that they agree the starting point should be $130,000, which is in the middle of that range.[17] I consider a starting point at that level to be at the upper end of the available range having regard to the factors the parties have identified and the penalty imposed in *Carbon Conscious.* I accept, however, that it is within range.

Starting point for Mrs Huang, Mr Zhou and Mr Ouyang

[25] Mrs Huang, Mr Zhou and Mr Ouyang have each technically contravened the Act twice, by acquiring both equitable and legal interests in the property. However, the Chief Executive accepts that the acquisition of their equitable and legal interests realistically occurred as part of a single transaction. Rather than imposing an uplift, the parties have recognised this in their proposed starting point.

[26] These defendants are experienced businesspeople, with extensive involvement in business dealings both in China and New Zealand. Each of them has been and continues to be a shareholder and director of various New Zealand incorporated

---

16 At [46].

17 The parties did not expressly state this in the joint memorandum but they agree the final penalty should be $110,000 after applying a discount of 15 per cent to reflect mitigating factors: See [33].

companies. They candidly accept they should have been aware of the restrictions on overseas persons purchasing property in New Zealand.

[27] Unlike Mr Tang, these defendants made a quantifiable gain in relation to the property. They purchased it for $5.128 million and sold it for $6.150 million. The gross qualifiable gain was therefore $1.022 million before taking into account the costs involved in selling the property.

[28] The parties have agreed the defendants should be permitted to deduct the following costs from the gross quantifiable gain:

(a) rates ($60,694.82);

(b) water charges ($221.90);

(c) insurance fees ($9,000.66); and

(d) real estate agency fees from the sale of the property ($145,722.74).

[29] These sums do not represent all the costs the defendants say they have incurred in relation to the property. They contend they have suffered an overall loss in the sum of approximately $1.535 million when all costs are taken into account. Mr Tang's son has set these out in an affidavit filed in opposition to the Chief Executive's application. The defendants have effectively waived their ability to persuade the Court to include the remaining costs in return for the Chief Executive accepting they should be permitted to deduct the sums set out above. I consider that to be a reasonable compromise.

[30] The total net quantifiable gain is therefore $806,360.42. Given that each of the defendants owned an undivided one-third share of the property, each has made a gain of just under $269,000.

[31] The parties suggest the starting point for the penalty for these defendants lies within the range of $270,000 to $300,000. They have settled on a penalty of $270,000, which effectively requires the defendants to disgorge all their quantifiable gains. I

consider that to be appropriate in the circumstances having regard to the need for the penalty to act as a deterrent.

Adjustment of penalty to reflect factors personal to the defendants

Aggravating factors

[32] There are no aggravating features personal to the defendants. None of them has any previous history of this type of misconduct. For that reason there is no need to increase the penalty to reflect aggravating factors personal to the defendants.

Mitigating factors

[33] The fact that the defendants have acknowledged liability is an obvious mitigating factor because early disposal of the proceeding saves significant time and cost and is therefore of benefit to the community.[18] Each has also expressed remorse and a desire to rectify the situation at a reasonably early stage in the plaintiff's investigation. Mr Tang, Mrs Huang and Mr Ouyang also co-operated with the proceedings by instructing counsel to accept service of the proceedings. Mr Zhou did not instruct counsel, meaning the Overseas Investment Office had to seek an order for substituted service. All defendants also signed an admission of liability. Taking these factors into account the parties suggest a discount of 15 per cent for Mr Tang, Mrs Huang and Mr Ouyang and a discount of 10 per cent for Mr Zhou.

[34] In *Carbon Conscious*, Edwards J observed that discounts of up to 50 per cent had been applied in cases brought under the Commerce Act where the defendants had provided admissions of liability and had co-operated with the authorities.[19] The parties in *Carbon Conscious* therefore suggested, and her Honour applied, a discount of 50 per cent in that case. Given that approach it could be argued that discounts of 10 and 15 per cent respectively are too low in the present case.

---

18 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 at [53].

19 At [56], citing *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 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].

[35] I consider, however, that the approach taken in *Carbon Conscious* is of limited assistance in the present context. In that case there was a dispute as to whether the defendant had made any gain on the transaction. The parties agreed, however, that any gain that may have been made was not quantifiable. Edwards J therefore imposed a civil penalty that did not take into account any quantifiable gain.

[36] The position is obviously different in cases where the defendant has made a quantifiable gain. In such cases the desirability of making allowance for mitigating factors is tempered significantly by the concurrent need to ensure the penalty does not lose its deterrent effect. A discount of 50 per cent in cases where the defendant has made a quantifiable gain will generally deprive the penalty of much of its deterrent effect.[20]

[37] Two factors become important when considering the proposed level of discount in the present case. The first is that, as I have already observed, the defendants contend their actual costs greatly exceed the gross profit made on the sale of the property. More importantly, however, the Chief Executive accepts that as a matter of policy there is considerable value in having a defendant co-operate with any investigation and acknowledge liability at an early stage. It is therefore in the public interest that defendants have an incentive to act in this way. Removal of any discount for mitigating conduct would remove that incentive.

[38] I am satisfied that the proposed discounts of 15 and 10 per cent correctly strike the balance between the two competing interests the parties have identified. They recognise the mitigating factors undoubtedly present whilst also preserving the deterrent effect of the penalties to be imposed.

Result

[39] Mr Tang is ordered to pay a civil penalty in the sum of $110,500.[21]

---

[20] During the hearing, counsel advised me that an amendment to the Act is currently before Parliament that will permit the Court to impose a civil penalty up to three times the value of any quantifiable gain. This will remove the difficulty posed by the current form of s 48(2), which does not permit the Court to impose a penalty beyond the level of the quantifiable gain.

[21] A deduction of 15 per cent produces a final penalty of $110,500 but I infer the parties have agreed to "round down" the penalty to $110,000.

[40] Mrs Huang and Mr Ouyang are each ordered to pay a civil penalty in the sum of $229,500.

[41] Mr Zhou is ordered to pay a civil penalty in the sum of $243,000.

Costs

[42] The parties propose that Mr Tang should contribute the sum of $5,000 towards the Chief Executive's costs, whilst Ms Huang, Mr Zhou and Mr Ouyang should each contribute the sum of $10,000. This is at variance with the approach taken in *Carbon Conscious,* where the parties agreed the defendant should pay costs to the Chief Executive on a category 2B basis, together with disbursements as fixed by the Registrar.

[43] Counsel advised me that the proposed orders in this case seek to follow the approach taken in cases brought under the Commerce Act. In those cases the defendant is commonly ordered to make a payment of costs designed to reimburse the Commerce Commission for investigative costs as well as legal costs. I see no reason in principle why that should not be the case, and I consider a combined contribution of $35,000 towards the costs incurred by the Chief Executive to be reasonable.

[44] I therefore make orders as to costs as sought by the parties in their joint memorandum.

Lang J

Solicitors: Meredith Connell, Auckland
McLeod & Associates, Auckland
Counsel:
G M Illingworth QC, Auckland