

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

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

**CIV-2023-404-653
[2025] NZHC 212**

BETWEEN

**THE CHIEF EXECUTIVE OF LAND
INFORMATION NEW ZEALAND
Plaintiff**

AND

**ANDREW JAMES JARVIS
First Defendant**

**HEIDI MITCHELL SUSTAINABLE
LIMITED
Second Defendant**

**WILLIAM DAVID MITCHELL
Third Defendant**

**AJN LAND LIMITED
Fourth Defendant**

**MARZIO KEILING
Fifth Defendant**

Hearing: On the papers

Appearances: S Earl and J T Lowyim for Plaintiff
C Langstone for First Defendant

Judgment: 19 February 2025

Reissued: 20 February 2025

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

This judgment was delivered by Justice Lang
On 19 February 2025 at 3.00 pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:.....

[1] The Overseas Investment Act 2005 (the Act) is designed to regulate the manner and circumstances in which overseas persons and associates of overseas persons may acquire sensitive land in New Zealand. Sensitive land includes non-urban land that is more than five hectares in size.¹ Overseas persons who wish to acquire such land must first obtain consent from the Chief Executive of Land Information New Zealand (the Chief Executive) as the Regulator appointed for the purpose of administering the Act.²

[2] The first defendant, Mr Andrew Jarvis, is a solicitor. In this proceeding, the Chief Executive seeks an order requiring Mr Jarvis to pay pecuniary penalties under s 48 of the Act. These may be imposed where a person breaches the requirements of the Act.

[3] The Chief Executive contends Mr Jarvis breached s 43 of the Act. This makes it an offence for a person to enter into a transaction, or knowingly or recklessly take any step for the purposes, or having the effect, of defeating, evading or circumventing the operation of the Act. The Chief Executive seeks the orders to reflect Mr Jarvis' culpability in structuring two sets of land purchase transactions that breached the provisions of the Act.

[4] Mr Jarvis admits he breached s 43 of the Act in structuring the transactions in the way that he did. He and the Chief Executive have also agreed upon the appropriate penalties to be imposed. They have agreed that Mr Jarvis should pay a penalty in the sum of \$100,000 for the first set of transactions and \$175,000 for the second. In addition, he is to contribute the sum of \$10,000 to the Chief Executive's costs.

[5] The Chief Executive and Mr Jarvis now seek the Court's approval of those penalties, as well as formal orders imposing them.

Background

Transactions involving William Mitchell and Heidi Mitchell Sustainable Ltd

[6] In April 2011, Mr William Mitchell, a British citizen who resides in Singapore, contacted Mr Jarvis' law firm seeking advice about acquiring forestry land in

¹ Overseas Investment Act 2005, s 12(a) and sch 1, pt 1 table 1, row 2.

² Sections 10(1)(a) and 30(1).

New Zealand. During subsequent discussions, Mr Jarvis became aware that Mr Mitchell was residing in Singapore and that he was seeking to acquire several forestry blocks in New Zealand. These ranged in size from 10 to 20 hectares.

[7] Mr Jarvis was aware that Mr Mitchell would require consent under the Act to acquire the blocks and told him that this was likely to be an expensive process. He told Mr Mitchell that the consent process would cost between \$20,000 and \$40,000 for each of the blocks that he wished to purchase.

[8] On 5 May 2011, Mr Jarvis sent Mr Mitchell a letter of engagement. The services that his firm agreed to provide to Mr Mitchell related to advice on the application of New Zealand legislation to purchases of land by overseas investors, together with advice regarding the conveyancing aspects of the purchase.

[9] In April and May 2011, Mr Jarvis and Mr Mitchell discussed the best way to proceed with the purchase of the land. Mr Jarvis advised Mr Mitchell that he could avoid the necessity to obtain consent to the transactions if he incorporated a company in New Zealand to purchase the land. A New Zealand citizen would need to own the majority of the shares, with Mr Mitchell owning a minority. Mr Mitchell would then lend funds to the company to enable it to buy the land, with the option to buy back the remaining shares at any time for a nominal price. Mr Mitchell would then lodge a single application for consent to the acquisition of all the forestry blocks at the same time.

[10] Mr Jarvis advised Mr Mitchell that the share “buy-back” could be effected through the New Zealand shareholder agreeing to hold the shares in the company on bare trust in favour of Mr Mitchell.

[11] On 27 May 2011, Mr Jarvis arranged for a company called Heidi Mitchell Sustainable Ltd (HMSL) to be incorporated. Three days later, on 30 May 2011, Mr Mitchell entered into agreements on HMSL’s behalf for the purchase of four forestry blocks on the east coast of the North Island. Each of the blocks constituted sensitive land under the Act because it was non-urban land that exceeded five hectares. The agreements did not contain any condition requiring the purchaser to obtain consent under the Act for the proposed purchase.

[12] Over the new few weeks, Mr Jarvis arranged for the drafting and execution of documents under which a New Zealand citizen agreed to hold the shares in HMSL as bare trustee for Mr Mitchell. The trustee agreed to transfer the shares to him at his request and to vote at meetings of the company's shareholders in accordance with his wishes.

[13] The purchase of the blocks was completed on 4 and 5 July 2011, and legal title to each of the blocks was then transferred to HMSL.

[14] Between August and November 2011, Mr Mitchell entered into three further agreements under which he agreed to purchase four forestry blocks on the East Coast of the North Island on behalf of HMSL. Each of these blocks was also sensitive land because each was non-urban land that exceeded five hectares in size. None of the agreements was conditional on HMSL obtaining consent to the acquisition of the blocks.

[15] The purchase of the four additional blocks of land was completed between 13 September and 5 December 2011.

[16] At no time prior to acquiring any of the blocks of land did HMSL or Mr Mitchell obtain consent under the Act to purchase the blocks.

Transaction involving Marzio Keiling and AJN Land Ltd

[17] Mr Marzio Keiling is a German citizen. On 20 June 2014, Mr Keiling sent an email to Mr Jarvis advising that he was a colleague of Mr Mitchell and also resided in Singapore. Mr Keiling said he was aware Mr Jarvis had advised Mr Mitchell previously. He said he wanted to acquire land in New Zealand using the same structure Mr Mitchell had used to purchase the forestry blocks. Mr Keiling sought Mr Jarvis' legal advice about this proposal, including whether it would "work".

[18] On 24 June 2014, Mr Jarvis advised Mr Keiling that he would be happy to assist him to acquire forestry land in New Zealand. He advised that the proposed structure would be reviewed by an accountant to consider any tax issues. On or about 20 August 2014, Mr Jarvis sent a letter of engagement to Mr Keiling. This

recorded that Mr Jarvis and another solicitor in his firm would advise Mr Keiling in relation to a proposed forestry purchase, the structure of the transaction and “OIA consent issues”.

[19] On 28 August 2014 Mr Jarvis incorporated a company called AJN Land Ltd (AJN) to purchase land in New Zealand on Mr Keiling’s behalf. The incorporation documents recorded that a New Zealand resident was AJN’s sole director and shareholder.

[20] On 19 September 2014, Mr Jarvis sent an email to Mr Keiling providing legal advice regarding the application of the Act to the proposed purchase. The advice concluded that the structure Mr Jarvis had created meant that the company would not “on the face of it” come within the definition of an overseas person under the Act.

[21] On 23 September 2014, Mr Keiling advised Mr Jarvis that he had found a forestry block to the north of Auckland that he wished to purchase. As with the blocks of land purchased by Mr Mitchell, the forestry block Mr Keiling sought to purchase was sensitive land because it was non-urban land that exceeded five hectares in size.

[22] On 24 September 2014, the real estate agent acting for the vendor of the property sent an email to Mr Jarvis in which he said he assumed Mr Jarvis had discussed with Mr Keiling the potential applicability of the Act to the proposed purchase and that there would therefore be “no surprises”. Mr Jarvis told the agent that Mr Keiling’s involvement with the transaction was limited to being the provider of funds and as an advisor. He said Mr Keiling was not involved in the ownership of AJN.

[23] On 6 October 2014, AJN entered into an agreement to purchase the property. This was not conditional on the purchaser obtaining consent under the Act. Between 13 and 14 October 2014, Mr Jarvis arranged for documents to be prepared and signed creating a similar structure as had been used in the purchases by HMSL. The purchase of the property was subsequently completed on 27 November 2014. At no stage prior to that date had Mr Keiling or AJN obtained consent under the Act to acquire the land.

Approach

[24] The approach to be taken to the assessment of penalties under the Act is now well established. In broad terms, it follows the approach taken by the courts in sentencing for criminal offending. This involves identifying the aggravating or mitigating factors of the contravening conduct to determine an appropriate starting point. The starting point is then adjusted to reflect factors that relate to the offender personally. These may warrant an uplift or reduction from the identified starting point.

[25] However, as this Court pointed out in *Chief Executive of Land Information New Zealand v Tang*, the principles and purposes of sentencing in criminal cases include the factors set out in ss 7, 8 and 9 of the Sentencing Act 2002.³ In contrast, the primary objective of pecuniary penalties imposed under statutes such as the Act and the Commerce Act 1986 is individual and general deterrence.⁴

[26] In broad terms, the following factors are relevant to setting the starting point:⁵

- (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, negligent or inadvertent;
- (e) the level of civil pecuniary penalties that have been imposed in previous similar cases; and
- (f) the circumstances in which the breach took place.

[27] Factors that may aggravate and mitigate the penalty to be imposed include:⁶

³ *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [16].

⁴ *Chief Executive of Land Information New Zealand v Trinity Green Estate Partnership* [2023] NZHC 2330 at [11].

⁵ *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 at [31].

⁶ At [47].

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

[28] Where the parties have reached agreement regarding the penalty to be imposed, the Court is not required to make its own assessment of the appropriate figure. Instead, the Court is only required to determine whether the proposed penalty is within the appropriate range.⁷ If it is, the Court may make the orders the parties agree to be appropriate.

This case

[29] Mr Mitchell and Mr Keiling required consent for the purchase of sensitive land by HSML and AJN because they were both “overseas persons” and had the ability to exercise control of more than 25 per cent of the voting power of those companies.⁸

[30] Mr Jarvis accepts that he breached s 43 of the Act by recklessly assisting Mr Mitchell and Mr Keiling to set up company structures that defeated, evaded or circumvented the requirements of the Act. At the time of the admitted breaches, s 48(2)(a) of the Act provided the Court with the power to order an offender to pay a civil penalty not exceeding the sum of \$300,000.⁹

Starting point

[31] This Court has already considered the penalties to be imposed on HMSL, Mr Mitchell and AJN.¹⁰ The starting points adopted in their cases effectively required HMSL and AJN to disgorge the profits they made when they sold the land that they

⁷ *Chief Executive of Land Information New Zealand v Tang*, above n 3, at [2] and [19].

⁸ Overseas Investment Act 2005, s 7.

⁹ The section was subsequently amended to increase the maximum level of the penalty to \$500,000.

¹⁰ *Chief Executive of Land Information New Zealand v Jarvis* [2024] NZHC 3010.

purchased in contravention of the Act to third parties. That issue does not arise in relation to Mr Jarvis, because the only financial benefit he derived from the transactions was the legal fees he charged to set up the structures that were used to evade the operation of the Act.

[32] The parties agree that the starting point for Mr Jarvis' breaches of the Act falls within the range between \$120,000 and \$150,000 in the case of the HMSL transactions and \$220,000 to \$240,000 in the case of the AJN transaction. They say these reflect the fact that the breaches were moderately serious. Although Mr Jarvis had no specific expertise in relation to transactions to which the Act applies, he was nevertheless an experienced lawyer. Further, both Mr Mitchell and Mr Keiling engaged him to provide advice specifically about issues that may arise under the Act in relation to the land they intended to purchase. His culpability lies in the fact that, in knowledge of the requirements imposed by the Act and the fact that Mr Mitchell and Mr Keiling were overseas persons, he devised and implemented the structures that were used by their companies to avoid those requirements. This enabled HMSL and AJN to acquire 111 and 160 hectares respectively of sensitive land for the purposes of commercial investment. His conduct was reckless because he facilitated the transactions without having carefully reviewed the restrictions imposed by the Act.

[33] In this context the penalties imposed in two other cases provide some assistance. In *Chief Executive of Land Information New Zealand v HK Search Ltd*, a lawyer nominated a company that was an associate of an overseas person to buy sensitive land in New Zealand.¹¹ In nominating this company as purchaser the lawyer provided advice that was contrary to advice given by another solicitor who specialised in providing advice about transactions to which the Act applies. The defendant knew that he was acting outside the scope of his expertise in making the nomination. The starting point of between \$120,000 and \$150,000 reflected the fact that the breach was reckless but not known. As in the present case, the defendant made no financial gain other than the legal fees he earned on the transaction.

[34] In *Chief Executive of Land Information New Zealand v Hong*, a lawyer and another were involved in a deliberate breach of the Act by transferring ownership of

¹¹ *Chief Executive of Land Information New Zealand v HK Search Ltd* [2022] NZHC 444.

sensitive land to an overseas person after becoming aware of their obligations under the Act.¹² Although the conduct was deliberate, the culpability of the defendants was reduced because the transaction was undertaken to avoid them suffering harm through the fraudulent conduct of a business associate. Further, they always intended to, and did in fact, seek retrospective consent for the transaction. In that case, this Court approved a starting point in the range of \$200,000 to \$220,000.

[35] The breaches in relation to the HMSL transactions are factually similar to that in *HK Search*. However, I agree that the breach in relation to the AJN transactions is more serious because Mr Jarvis was expressly engaged by Mr Keiling to give advice about consent issues under the Act and subsequently provided advice that was incorrect. He did not rectify his advice even after the vendor's real estate agent sought confirmation that no issues arose in relation to the Act. This unfortunate situation was compounded when Mr Jarvis responded by incorrectly describing Mr Keiling's role in the transaction.

[36] Taking these factors into account I consider the starting points that the parties have proposed in relation to the two sets of transactions to be within the appropriate range having regard to the approach taken in *HK Search* and *Hong*.

Aggravating factors

[37] There are no aggravating factors personal to Mr Jarvis that would justify increasing the starting point.

Mitigating factors

[38] Several mitigating factors need to be taken into account. The first is that Mr Jarvis cooperated with the Chief Executive by providing documents relating to the transactions in question during the investigation phase. He also admitted the breaches after engaging at an early stage to resolve the litigation once it commenced. The parties consider a discount of 20 per cent is appropriate and I consider this to be within the appropriate range.

¹² *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561.

Conclusion

[39] As already noted, the parties suggest a penalty in the sum of \$100,000 for the HMSL transactions. This reflects a starting point in the middle of the suggested range of \$120,000 to \$150,000, less a discount of 20 per cent to reflect mitigating factors and an adjustment for totality. They suggest a penalty in the sum of \$175,000 for the AJN transaction, being a starting point in the middle of the suggested range of \$220,000 to \$240,000, less a discount of 20 per cent for mitigating factors and an adjustment for totality.

[40] For the reasons I have already given I am satisfied that the starting point and adjustments suggested by the parties are within the appropriate range. I therefore make the following orders under s 48(2) of the Act:

- (a) Mr Jarvis is to pay a civil pecuniary penalty in the sum of \$100,000 in respect of the HMSL transactions;
- (b) he is to pay a civil pecuniary penalty in the sum of \$175,000 in respect of the AJN transaction; and
- (c) he is to contribute the sum of \$10,000 towards the Chief Executive's costs.

Lang J

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