IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2024-470-102
[2025] NZHC 3795

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	DANIEL ROBERT KLAUS First Defendant
	MICHAEL BRUCE NEWCOMB Second Defendant

Hearing: 30 July 2025

Appearances: S Earl for the Plaintiff
No appearances for the First and Second Defendants

Judgment: 8 December 2025

JUDGMENT OF HARVEY J

This judgment is delivered by me on 8 December 2025 at 2.00 pm pursuant to r 11.5 of the High Court Rules

S Hewlett
Deputy Registrar

STEPHEN HEWLETT
Deputy Registrar
High Court of New Zealand

Solicitors:
Meredith Connell, Auckland

Introduction

[1] Daniel Klaus is an Australian citizen. With a New Zealand associate, Michael Newcomb, he formed Let's Go Property Investments Ltd to purchase 91 hectares of land at Raupunga, Northern Hawkes Bay for $4.5 million. The land included a grove of olive trees. Mr Klaus wanted to convert cryptocurrency into cash and the land was available for purchase using a non-cash transaction platform. He obtained legal advice that he would not be breach the Overseas Investment Act 20 if a New Zealand director, later Mr Newcomb, held 76 per cent of Let's Go's shares and Mr Klaus held the balance. Mr Newcomb says he understood that the venture was to continue to produce olive oil. However, when Mr Klaus asked Mr Newcomb to guarantee a mortgage over the land, he resigned as sole director. The shares he held in Let's Go were transferred to Mr Klaus who then sold the land for $3 million.

[2] The Chief Executive of Land Information New Zealand (the Regulator) alleges Mr Klaus knowingly breached the Act by creating Let's Go to buy the land on his behalf. The Regulator seeks civil penalties and costs against Mr Klaus and also against Mr Newcomb. Messrs Klaus and Newcomb did not participate in this proceeding. It has been set down to be determined by formal proof.[1] The plaintiff's claim is supported by the affidavit of Svetlana Malivuk, a Senior Investigator for the Regulator.

Background

[3] Mr Klaus was facing challenges with his business in Australia, and wanted to convert his cryptocurrency into cash. To achieve this, he expressed an interest in purchasing a property in rural Hawkes Bay, containing an olive grove. The owner suggested that Mr Klaus use a company to buy the land. As an Australian citizen, and therefore an "overseas person" under the Act, Mr Klaus would need to obtain the Regulator's consent.[2] As foreshadowed, on 29 April 2021, Mr Klaus sought legal advice from O'Sullivan Clemens Law (OSC). They advised that if he created a company with a New Zealand director who was a 76 per cent shareholder, he would

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1 See *The Chief Executive of Land Information New Zealand v Klaus* HC Auckland CIV-2024-470-102, 26 March 2025.

2 Overseas Investment Act 2005, s 10.

not need the Regulator's consent. OSC also advised that he could register a mortgage over the property to protect his interest.

[4] In May 2021, Messrs Klaus and Newcomb agreed to incorporate a company to purchase the property. Mr Newcomb would be the director and 76 per cent shareholder, and Mr Klaus would hold the balance. On 14 May 2021, OSC incorporated Let's Go and the company then bought the property on 18 May 2021. Mr Klaus paid the purchase price with his cryptocurrency. Mr Newcomb signed the sale and purchase agreement and the residential land statement. Both documents stated that Let's Go did not require consent under the Act. Mr Newcomb also signed documents enabling Mr Klaus to register a mortgage against the property.

[5] Mr Klaus represented to Mr Newcomb that the company would purchase the property so they could run a business together. Mr Newcomb is said to have experience in beverage development and bottling, and confirmed in an interview with the Regulator that Mr Klaus became a distributor for his company across Australia. However, as mentioned, Mr Klaus's intention was to on-sell the land to convert his cryptocurrency into cash. It is unclear whether Mr Newcomb was aware of this plan.

[6] Around 20 May 2021, Mr Klaus asked Mr Newcomb to guarantee repayment of a proposed development loan for the property. Mr Newcomb then resigned. Around mid-May 2021, Mr Klaus relisted the property for sale. On 26 May 2021, Mr Klaus obtained Mr Newcomb's shares in Let's Go and on 17 June 2021, replaced him as sole director. On 18 June 2021, Mr Klaus discharged his mortgage over the property.

[7] On 29 June 2021, the Regulator received a report of a suspected breach of the Act. After reviewing the land records of the property, and the Companies Office records of Let's Go, the Regulator contacted Mr Klaus. He was asked to explain the purchase, the reasons for Let's Go's structure, and any legal advice he had received. On 26 July 2021, Mr Klaus told the Regulator that he intended to sell the property urgently. On 12 August 2021, the Regulator asked Mr Klaus to sign an undertaking to protect The Regulator's position if he sold the property, but Mr Klaus refused. The property brokers, who had initially appraised and listed the property, then stopped acting for Mr Klaus because of due diligence concerns. Even so, on 23 November

2021, Mr Klaus sold the property for $3.1 million to the Ngati Pāhauwera Development Trust. Mr Klaus's new lawyers then transferred the proceeds to him.

Statutory framework

[8] The Act regulates investment by overseas persons. Section 3 provides:

> **3 Purpose**
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> (1) 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—
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> (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
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> (b) imposing conditions on those overseas investments.

[9] Under s 7(2)(a), an "overseas person" includes an individual who is not a New Zealand citizen or ordinarily resident here. Section 10 provides that consent is required if a transaction will result in an overseas investment in sensitive land under s 12. Section 12 defines an overseas investment in sensitive land as follows:

> (1) 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 **section 12 interest**):
>
> (a) an estate or interest in land if—
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> (i) the land that the estate or interest relates to is sensitive land under Part 1 of Schedule 1; and
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> (ii) the estate or interest acquired is—
>
> (A) a freehold estate; or
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> (B) if the land that the interest relates to is residential land, any interest in land (other than an exempted interest) for a total term (as calculated in accordance with Schedule 1A) of 3 years or more; or
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> (C) if the land that the interest relates to is sensitive (but not residential) land, any interest in land (other than an exempted interest) for a total term (as calculated in accordance with Schedule 1A) of 10 years or more:

(b) rights or interests in securities of a person (**A**) if A owns or controls (directly or indirectly) an estate or 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 more than 25% 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 more than 25% ownership or control interest in A that—

(A) results in an ownership or control interest in A that equals or exceeds their ownership or control interest limit as set out in subsection (2); or

(B) is in securities of A of a different class to the class in which their existing interest is held; or

(C) gives the overseas person or the associate (either alone or together with its associates) any or more disproportionate access to or control of a strategically important business; or

[10] Section 42 provides that it is an offence for an overseas person to give effect to an overseas investment without the consent required by the Act. Under s 43, it is an offence to knowingly or recklessly enter into a transaction that defeats, evades or circumvents the operation of the Act. Section 48 provides that the Court may order a person in breach or involved in a breach to pay civil pecuniary penalty

The issues

[11] The Regulator seeks judgment against Messrs Klaus and Newcomb for civil pecuniary penalties per s 48 under four heads:

(a) Did Let's Go give effect to an overseas investment in breach of s 42?

(b) Was Mr Klaus, with Mr Newcomb's assistance, involved in the purchase of the property in breach of s 42?

(c) Did Mr Klaus breach s 43 by arranging to purchase and relist the property?

(d) Did Mr Klaus breach s 43 regarding his acquisition of Let's Go's shares?

Did Let's Go give effect to an overseas investment in breach of s 42?

[12] A person who is required to apply for consent to an overseas investment transaction commits an offence if that person gives effect to the overseas investment without the consent required by the Act.[3] Ms Earl submitted Mr Klaus was required to apply for consent to an overseas investment transaction to give effect to the overseas investment and he failed to do so. Therefore, Let's Go's purchase is said to be in breach of the Act. Section 10 provides that a "transaction" requires consent under the Act if it will result in an "overseas investment in sensitive land".[4] As consent was absent, counsel contended, this was a breach of s 10.

[13] Ms Earl argued that Let's Go's purchase required consent for three key reasons. First, a "transaction" under s 10 includes the sale or transfer of property or securities.[5] Second, an "overseas investment in sensitive land" includes an acquisition by an overseas person or an associate of the overseas person of an estate or interest in sensitive land under pt 1 of sch 1 of the Act.[6] Third, Mr Klaus is an "overseas person" because he is neither a New Zealand citizen nor is he ordinarily a resident here.[7]

[14] Counsel submitted that Let's Go is an "associate of an overseas person" as Mr Klaus controlled the company or directed it as evidenced by Mr Klaus initiating, negotiating and paying for Let's Go's purchase of the property.[8] In an interview with Ms Malivuk, when asked why Mr Newcomb held 76 per cent of the shares and acted as sole director, Mr Klaus replied "[b]ecause that was a requirement for me to purchase the property."

[15] He alone instructed OSC, demonstrating his control over the company. In addition, Ms Earl contended that Mr Newcomb's position as sole director and majority shareholder is immaterial as he held those positions to satisfy legal requirements. That contention appears to be consistent with the communications enclosed in Ms Malivuk's affidavit. Mr Newcomb did not visit the property, negotiate the purchase,

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3 Section 42(1).
4 Section 10(1)(a).
5 Section 6(1).
6 Section 12(1)(a).
7 Section 7(2)(a).
8 Section 8(1)(a).

or pay any of the purchase price, which he confirmed in his interview with Ms Malivuk. Ms Earl says he only participated in Let's Go at Mr Klaus's request; he did not pay for his shares nor received payment when transferring them and he did not negotiate Let's Go's purchase of the property.

[16] Furthermore, counsel argued that the property also amounts to sensitive land under pt 1 of sch 1 of the Act because it is "non-urban land" over five hectares.[9] The property comprises eight adjoining lots controlled by one person (making them "associated land" per s 8(4) of the Act) which together had an area of approximately 91 hectares.

[17] After considering counsel's submissions and the available evidence, I agree that the purchase of the property by Let's Go was an overseas investment in breach of ss 42 and 10 of the Act.

Was Mr Newcomb involved in the purchase of the property in breach of s 42?

[18] The Regulator submitted that Mr Newcomb was involved in the contravention of s 42 of the Act. The Regulator contended that Mr Klaus, with Mr Newcomb's assistance, procured Let's Go's purchase of the property in breach of s 42. Section 48(1)(e) allows the Court, on the Regulator's application, to order a person "involved in" a contravention or commission of an offence under the Act to pay a civil pecuniary penalty. As mentioned, a contravention under the Act has occurred. The issue under this cause of action is whether Mr Klaus, with the assistance of Mr Newcomb, was involved in that contravention.

[19] Pursuant to s 6(7), a person who is "involved":

> (a) has aided, abetted, counselled, or procured the contravention, the commission of the offence, or the failure; or
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> …
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention, the commission of the offence, or the failure.

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9 Schedule 1 pt 1.

[20] According to the authorities, "procure" means to produce by endeavour, setting out to see that a thing happens, and taking the appropriate steps to produce that happening.[10] "Knowingly concerned in" and "party to" mean intentional involvement, and knowing the essential facts constituting the contravention (although not necessarily knowing that they result in a contravention).[11] "Aiding" and "abetting" also require the same knowledge alongside intentional help or encouragement.

[21] The essential facts are those which would lead the Court to conclude that Let's Go gave effect to an overseas investment transaction without consent. These are:

(e) the citizenship status of Messrs Klaus and Newcomb;

(f) Let's Go's structure on paper compared to the reality of Mr Klaus's beneficial ownership and control;

(g) the size and type of the property; and

(h) the occurrence of the purchase.

[22] The Regulator argued that, as described above, Mr Klaus procured Let's Go's purchase of the property and was knowingly concerned in and party to it. Similarly, the Regulator also claimed that Mr Newcomb aided and abetted Let's Go's contravention of the Act and was directly knowingly concerned in and party to it. Under s 48(4), the Regulator submitted that this has been proved on the balance of probabilities.

[23] I agree with counsel's submissions that, based on the available evidence, Mr Klaus, with Mr Newcomb's assistance, procured Let's Go's purchase of the property in breach of s 42. While Mr Klaus did not hold the title of director nor own the majority of the company's shareholding at the time of the purchase, his role in the company and the purchase both implicate him in "procuring" and "knowingly concerning" himself in Let's Go's contravention. Mr Klaus's actions in "procuring" and "knowingly concerning" himself in the contravention include that he personally initiated, negotiated, planned and paid for the property on behalf of Let's Go. That

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10 *Attorney-General's Reference (No 1 of 1975)* [1975] 2 All ER 684 at 686.
11 *Commerce Commission v Hodgson* [2014] NZHC 649 at [8].

appears to be supported by Ms Malivuk's evidence, including her interviews with both defendants.

[24] Equally concerning was the fact that Mr Klaus had received legal advice on how to proceed with the lawful purchase of the property but then arranged to have all the shares in Let's Go transferred to himself once Mr Newcomb refused to guarantee a "development loan" and resigned as sole director. Ms Earl says that Mr Klaus either knew or ought to have known that by doing so he would be breaching the Act. This issue is considered in more detail later in this judgment in the context of penalties.

[25] Mr Newcomb's actions too amount to "aiding" and "knowingly concerning" himself in the contravention. Alongside knowing the essential facts constituting the contravention, namely his and Mr Klaus's citizenship, he also knew Let's Go's formal ownership arrangements diverged from its true ownership and control. Mr Newcomb characterised his involvement in Let's Go as necessary for Mr Klaus to purchase the property. In Mr Newcomb's interview with Ms Malivuk, he confirmed that Mr Klaus had instructed the lawyers, and when he had arrived to OSC's offices to sign the relevant documents they were already readily prepared documents to engage his involvement.

[26] I am satisfied that Mr Klaus was, with Mr Newcomb's assistance, involved in Let's Go's purchase of the property in breach of s 42.

Did Mr Klaus breach s 43 by arranging to purchase and relist the property?

[27] Ms Earl submitted that Mr Klaus breached s 43 when arranging to purchase and relist the property. Section 43(1) provides:

> **43 Offence of defeating, evading, or circumventing operation of Act**
>
> (1) Every person commits an offence who knowingly or recklessly enters into a transaction, executes an instrument, or takes any other step, for the purpose of, or having the effect of, in any way, directly or indirectly, defeating, evading, or circumventing the operation of this Act.

[28] Counsel contended that Mr Klaus always intended to buy and immediately on sell the property to cash out his cryptocurrency. Unable to buy the property himself,

he arranged for the incorporation of Let's Go, with Mr Newcomb playing the necessary roles for compliance, concealing his ultimate aim from Mr Newcomb.

[29] In addition, Ms Earl argued that, consistent with this aim, Mr Klaus negotiated and paid the purchase price, registered his interest via the mortgage, and exercised day to day control over Let's Go as evidenced by his exclusive role in instructing its solicitors. Despite Mr Klaus's representations to Mr Newcomb about developing the property, Mr Klaus had already taken steps to relist it before Mr Newcomb took up his office in Let's Go. This again appears to be consistent with the affidavit evidence of Ms Malivuk. A real estate agent disclosed to Land Information New Zealand that Mr Klaus was discussing the on-sale of the property as early as May 2021 and was happy to accept a lower value than that which he had paid.

[30] Through these steps, Mr Klaus defeated the intended effect of the Act. Overall, I agree that, on the balance of probabilities, Mr Klaus breached s 43 by arranging to purchase and relist the property.

Did Mr Klaus breach s 43 regarding his acquisition of Let's Go's shares?

[31] Ms Earl separately contended that Mr Klaus breached s 43 when he acquired 100 per cent of Let's Go's shares. By acquiring more than 25 per cent ownership of Let's Go, Mr Klaus made an overseas investment in sensitive land, per s 12(b)(i) of the Act, but without consent. That section provides:

> **12 What are overseas investments in sensitive land**
>
> (1) An **overseas investment in sensitive land** is the acquisition by an overseas person, of all or any of the following (a **section 12 interest**):
>
> …
>
> (b) rights or interests in securities of a person (**A**) if A owns or controls (directly or indirectly) an estate or 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 more than 25% ownership or control interest in A; or

[32] When Mr Klaus obtained Mr Newcomb's 76 per cent shareholding in Let's Go, he was acquiring rights or interests in security of the company which owned an estate

and thus was making an overseas investment in sensitive land per s 12(1)(b)(i). The "person" for the purposes of s 12(1)(b), is the company, Let's Go.

[33] The Regulator argued that Mr Klaus knew he could not own more than 24 per cent of the shares in Let's Go without consent. That is supported by his concession to Ms Malivuk that he knew it was a requirement of purchasing the property that the Mr Newcomb would have a 76 per cent shareholding. Further, Mr Klaus arranged the share transfer contrary to the advice of OSC, which he conceded in his interview with Ms Malivuk.

[34] However, to cash out his cryptocurrency, he arranged with Mr Newcomb to acquire his shares and arranged for and executed the transfer document. Counsel submitted that by taking these steps, Mr Klaus knowingly or recklessly executed an instrument or took a step for the purpose of, or having the effect of, defeating, evading or circumventing the operation of the Act. He acted contrary to the advice he had received and did not seek advice from OSC or otherwise notify OSC about the share transfer before he acquired 100 per cent of the shares. For these reasons, Ms Earl contended that the Court should find on the balance of probabilities that Mr Klaus breached s 43 of the Act.

[35] Once again, taking account of the evidence and submissions of counsel, I accept the Regulator's argument that Mr Klaus breached s 43.

Liability

[36] Overall, I consider all four causes of action are made out on the balance of probabilities. That is Let's Go gave effect to an overseas investment in breach of s 42. Mr Klaus, with Mr Newcomb's assistance, was involved in Let's Go's purchase of the property in breach of s 42. Mr Klaus breached s 43 by arranging to purchase and relist the property. Mr Klaus breached s 43 regarding his acquisition of Let's Go's shares.

Approach to the imposition of penalties

[37] In combination with ss 42 and 43, s 48 empowers the Court to order the defendants to pay a civil pecuniary penalty for their offending.[12] The Court has generally adopted the method of determining the quantum of pecuniary penalties imposed for breach of the provisions to the Commerce Act 1986.[13] That is:[14]

(i) determining the maximum penalty;

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

(k) adjusting the starting point in light of factors specific to the defendant that would warrant either an uplift or reduction from the starting point.

[38] In broad terms, the following factors are relevant to setting the starting point:[15]

(l) the nature and extent of the breach;

(m) the nature and extent of any loss or damage caused by the breach;

(n) the nature and extent of any financial gain made from the breach;

(o) whether the breach was intentional, negligent or inadvertent;

(p) the level of civil pecuniary penalties that have been imposed in previous similar cases; and

(q) the circumstances in which the breach took place.

[39] Factors that may aggravate and mitigate the penalty to be imposed include:[16]

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12 As discussed above, The Regulator submitted that Messrs Klaus and Newcomb were involved in Let's Go's offending under the Act. However, The Regulator does not seek a penalty against Let's Go as it has been removed from the Companies Register. Instead, it only seeks penalties against Messrs Klaus and Newcomb.

13 *Chief Executive of Land Information v Ramanaidu* [2025] NZHC 537.

14 At [22].

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

16 At [47].

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

(s) the size of the offender;

(t) any cooperation with the authorities;

(u) any admission of liability; and

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

What penalties have been imposed in comparable cases?

[40] Each of the cited cases proceeded on a different basis to the present application. In those cases, the penalty was agreed. In those circumstances, the Court was tasked with assessing whether the agreed penalty is within the correct range, but is not required to embark on its own enquiry as to an appropriate figure. In the formal proof context, the Court must undertake its own assessment.

[41] The Regulator referred to three cases under s 48 for breaches of s 42 which involved similar offending. In *Carbon Conscious*, in the context of a $300,000 maximum penalty, the Court adopted a starting point of $80,000 for an overseas person who relied on poor legal advice and deliberately breached s 42 by purchasing 115 hectares of non-urban land for $335,000.[17] Then in *Clevedon-Kawakawa*, in the context of a $300,000 maximum penalty, the Court adopted a starting point range of $190,000–$210,000 for an associate of an overseas person who breached s 42 by negligently agreeing to buy approximately 88 hectares of non-urban land under two contracts (one for $7.2 million and one for $2.3 million).[18] In *Hong*, in the context of a $300,000 maximum penalty, the Court adopted a starting point of $130,000 each for two overseas persons who breached s 42 by negligently purchasing 79 hectares of non-urban land for $4.48 million.[19]

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17 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, above n 15.

18 *Chief Executive of Land Information New Zealand v Clevedon-Kawakawa Road Ltd* [2021] NZHC 1831.

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

[42] The Regulator then referred to penalties imposed for breaches of s 43. In *HK Search*, in the context of a $300,000 maximum penalty, the Court adopted a starting point of $120,000–$150,000 for a lawyer (Dr Choi) who breached s 43 by recklessly, and contrary to the specialist advice of another lawyer, enabling an associate of an overseas person to buy approximately 18 hectares of non-urban land for $3 million.[20] In *Hong*, in the context of a $300,000 maximum penalty, the Court adopted a starting point of $220,000–$250,000 each for two overseas persons (Messrs Hong and Ke) who breached s 43 by deliberately transferring approximately 44 hectares of non-urban land for $2.557 million after becoming aware of their obligations under the Act, but in a mitigating effort to protect themselves from a fraudulent associate.[21]

[43] In *Jarvis and others*, in the context of a $300,000 maximum penalty, the Court adopted a starting point of $100,000–120,000 for an overseas person (Mr Mitchell) who breached s 43 by recklessly causing his associate company to purchase 111 hectares of non-urban land for $626,350 when he knew he could not do this in his personal capacity.[22] In *Jarvis*, the Court adopted starting points of $120,000–$150,000 and $220,000–$240,000 in respect of two separate breaches of the Act under s 43 for a lawyer (Mr Jarvis) who recklessly enabled two associates of overseas persons to purchase 111 hectares and 160 hectares of non-urban land for $626,350 and $1.27 million respectively.[23]

Mr Klaus

Maximum penalty

[44] Under the first, third and fourth causes of action, Mr Klaus faces a maximum penalty of $500,000, amounting to a total maximum penalty of $1.5 million. The Regulator sought payment, per s 48, of $440,000–495,000 from Mr Klaus. Ancillary orders are also sought for payment of up to $30,000 by each of Messrs Klaus and Newcomb toward the Regulator's costs.

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20 *Chief Executive of Land Information New Zealand v HK Search Ltd* [2022] NZHC 444.
21 *Chief Executive of Land Information New Zealand v Hong*, above n 19.
22 *Chief Executive of Land Information New Zealand v Jarvis* [2024] NZHC 3010.
23 *Chief Executive of Land Information New Zealand v Jarvis* [2025] NZHC 212.

Starting point

[45] The Regulator submitted that the offending is moderately serious as the property of about 91 hectares was purchased for about $4,844,654.77.[24] While the Regulator accepted Mr Klaus's conduct must be assessed in its totality, he had committed three separate breaches of the Act, with an overall maximum penalty available of $1.5 million.

[46] Regarding penalties, Ms Earl contended that these should be higher than those explored in earlier case law for two reasons. First, the maximum penalty for an individual under s 48(2) was increased from $300,000 to $500,000.[25] Counsel contended that Mr Klaus's overall culpability calls for a starting point in the range of $400,000–450,000 to reflect the higher maximum penalty applicable, citing several comparator cases in support.[26] The Regulator argued that the increase in the maximum penalty reflects Parliament's intention to impose sterner penalties, and the starting point must reflect this when comparing with previous cases. This also includes a totality adjustment in accordance with precedent.[27]

[47] Second, counsel submitted that Mr Klaus's actions were deliberate. Creating Let's Go was the first breach. While he did receive legal advice, this was essentially perfunctory. Moreover, Ms Earl contended that this was a serious breach of the legislation. Consequently, counsel argued, the Court should take account of this factor when considering the penalties. Ms Earl contrasted Mr Klaus's deliberate conduct with Mr Newcomb's which was more at the level of negligence. Moreover, Ms Earl submitted that Mr Klaus's behaviour was more egregious because he arranged for transfer of Mr Newcomb's share in the company to himself when he knew this would be a breach of the Act.

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[24] With reference to the size and prices of the properties considered in *Chief Executive of Land Information New Zealand v Trinity Green Estate Partnership* [2023] NZHC 2330 at [7]; *Chief Executive of Land Information New Zealand v Clevedon-Kawakawa Road Ltd* [2021] NZHC 1831 at [36]; and *Chief Executive of Land Information New Zealand v West Drury Holding Ltd* [2021] NZHC 704 at [30].

[25] Pursuant to the Overseas Investment (Urgent Measures) Amendment Act 2020.

[26] See above at [42].

[27] *Chief Executive of Land Information New Zealand v Hong*, above n 18, at [29].

[48] Although Mr Klaus did not expect to make a financial gain, and was even willing to make a loss, his conduct was financially motivated in that he aimed to use the transaction to cash out a reasonable amount of his cryptocurrency. To achieve this, he was prepared to circumvent New Zealand law. The Regulator contended this aggravated his conduct significantly. In short, the Regulator argued that the evidence suggested Mr Klaus intentionally, or at the very least recklessly, breached the Act.

[49] Ms Earl highlighted features of Mr Klaus's offending that was similar to the offending in *Chief Executive of Land Information New Zealand v Hong*, *Chief Executive of Land Information New Zealand v HK Search Ltd*, and *Chief Executive of Land Information New Zealand v Jarvis*.[28] Like the offender in *Hong*, Mr Klaus is said to have deliberately breached the Act. Like the offender in *HK Search Ltd*, Mr Klaus set up Let's Go to have the appearance of being compliant with the Act but always intended to have beneficial ownership of it, and his subsequent acquisition of 100 per cent of Let's Go's shares must have been with the knowledge that the company structure no longer complied with the Act. Like the offender in *Jarvis*, Mr Klaus caused Let's Go to buy the property when he knew he could not buy it himself.

[50] However, Ms Earl contended that Mr Klaus's conduct calls for a higher penalty than those cases because he was involved in Let's Go's contravention of the Act: he breached s 43 on two occasions and his offending is characterised by a high degree of disregard for the law, motivated by his own financial interests.

[51] I agree that this was moderately serious offending considering the size of the property and the sale price. The evidence indicates that Mr Klaus was either negligent or reckless as to whether his actions were a breach of the legislation. I consider the question of whether Mr Klaus's breaches were intentional to be finely balanced, but, in any case, I am not required to make a finding on that question.

[52] Some of that evidence, deposed by Ms Malivuk, included that a legal executive at OSC advised Mr Klaus that he would be required to apply for consent if he wanted

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[28] *Chief Executive of Land Information New Zealand v Hong*, above n 19; *Chief Executive of Land Information New Zealand v HK Search Ltd*, above n 20; and *Chief Executive of Land Information New Zealand v Jarvis* [2024], above n 22.

to purchase the property in his own name. He responded "I wanna buy under company to save all the drama. How can I construct a company so I can own it through company?" He then formed Let's Go, acquired the property and took control of the company, all in spite of the legal advice he had received from OSC advising that he could not have a shareholding in Let's Go of above 24 per cent. However, Ms Earl accepted that Mr Klaus did not make a quantifiable financial gain. Nor does there appear to be any quantifiable damage to have been caused by the breach.

[53] Broadly, I consider the two most comparable cases to be *Chief Executive of Land Information New Zealand v Clevedon-Kawakawa Road Ltd* and *Chief Executive of Land Information New Zealand v Hong*. In *Clevedon-Kawakawa Road Ltd*, an overseas person breached s 42 by negligently agreeing to buy approximately 88 hectares of non-urban land under two contracts, one for $7.2 million and one for $2.3 million. The Court considered the appropriate range of starting points to be $190,000–210,000. The overseas person accepted that they ought to have known of the existence of restrictions. However, the overseas person obtained and acted in accordance with the advice given to it by its then legal adviser.

[54] In *Hong*, two overseas persons breached s 43 by transferring approximately 44 hectares of non-urban land for $2.57 million after becoming aware of their obligations under the Act, but in a mitigating effort to protect themselves from a fraudulent associate. The Court adopted a starting point of $220,000–250,000. I agree with Ms Earl's submission that Mr Klaus's offending was more serious than *Clevedon-Kawakawa Road Ltd* and *Hong*. Mr Klaus was involved in Let's Go's contravention of the Act and he breached s 43 on two occasions. He also showed a general disregard for the law and sought to find ways to circumvent any obligations he may face as an individual under the overseas investment scheme.

[55] Ms Earl placed significant emphasis on the increase in the maximum penalty from $300,000 to $500,000 in arguing for a higher starting point than in other cases. While I consider that to be a factor, I do not consider it to be determinative. Comparator cases remain relevant.

[56] Counsel submitted that a starting point between $400,000–450,000 is appropriate. I am reluctant to accept those figures, considering the highest in any range of starting points in any of the comparator cases was $250,000 in *Hong*. Even then, Woolford J agreed that it should be reduced to reflect totality, given the interrelated nature of the breaches in that case. Ultimately, a starting point of $205,000 was adopted for each of the two overseas people. I also note the fact that this is an undefended hearing, and each of the figures reached in the comparator cases was achieved through negotiation. While I consider Mr Klaus's offending to be more serious than the comparator cases, I do not consider it is so much more serious to justify a starting point at almost double the range of those comparator cases.

[57] In summary, I consider a starting point of $350,000 to be appropriate for Mr Klaus. This captures the intent of Parliament in increasing the maximum penalty, the moderate seriousness of the offending, and to reflect the principle of totality. It is unnecessary for me in a formal proof context to assess the appropriate range.

Personal factors

[58] The Regulator identified two aggravating factors. First, Mr Klaus has previous misconduct with regulatory or compliance authorities, which demonstrates a pattern of disregard for regulatory obligations and indicates a need for specific deterrence. Second, Mr Klaus stopped communicating with the Regulator and her solicitors and appeared to evade service of the proceeding.

[59] The Regulator has identified two mitigating factors: that Mr Klaus agreed to interviews; and that he provided documentation to the Regulator.

[60] The Regulator noted that Mr Klaus declined to hold any sale of proceeds on trust as requested. Although there was no quantifiable gain, it is submitted that it was still available to Mr Klaus to retain some of the sale proceeds to meet any eventual penalty imposed. The Regulator submitted that Mr Klaus's aggravating factors exceed his mitigating factors and warrant an uplift of 10 per cent. I disagree. I consider the aggravating and mitigating factors cancel each other out. The lack of any reduction to appropriately balance the seriousness of Mr Klaus's breaches of the Act with his initial cooperation with the Regulator.

End penalty

[61] I have concluded that a starting point of $350,000 is appropriate to reflect the seriousness of the offending, and that no adjustment is to be made for personal factors. That results in an end penalty of $350,000. I consider this to appropriately reflect Mr Klaus's offending.

Mr Newcomb

Maximum penalty

[62] Under the second cause of action, Mr Newcomb faces a maximum penalty of $500,000. The Regulator seeks payment, per s 48, of $200,000 from Mr Newcomb. Ancillary orders are also sought for payment of up to $30,000 by each of Messrs Klaus and Newcomb toward the Regulator's costs.

Starting point

[63] Ms Earl argued a starting point of $200,000 reflected Mr Newcomb's lower culpability in the context of the increased maximum penalty. On the other hand, it also recognised his business experience and the size and value of the property. In general, the Regulator considered Mr Newcomb's culpability is similar to those who breached s 42 in *Clevedon-Kawakawa* and *Hong*. The Regulator also accepted that there appears to have been no financial motivation on Mr Newcomb's part, although it appears he was induced on the basis the property would be purchased as a joint investment and for business purposes.

[64] As for Mr Newcomb, it is unclear how much legal advice Mr Klaus passed on to Mr Newcomb, but Mr Newcomb knew that citizenship issues had determined Let's Go's structure. Therefore, the Regulator submitted that on some level he knew the transaction engaged regulatory restrictions of some kind. The Regulator contended that as an experienced businessman involved in a transaction of substantial financial value, Mr Newcomb's failure to take advice or confirm the lawfulness of the transaction indicates at least negligence, if not recklessness.

[65] On the available evidence, Mr Newcomb was negligent or reckless in his breach. However, he had a much lesser role in the offending than Mr Klaus and he gained nothing from his participation. Mr Newcomb's role extended to helping facilitate Mr Klaus's offending. That does not excuse Mr Newcomb from liability, but it does go some way in reducing his culpability. Mr Newcomb's offending most similar to *Jarvis*, where the Court adopted starting points of $120,000–150,000 and $220,000–240,000 in respect of two separate breaches of the Act under s 43 for a lawyer who recklessly enabled two associates of overseas persons to purchase 111 hectares and 160 hectares of non-urban land for $626,350 and $1.27 million respectively. However, Mr Jarvis was much more actively involved in the purchase and in advising the overseas persons. He arranged for the drafting and execution of documents. He also arranged for a company to be incorporated to purchase land.

[66] I consider Mr Newcomb's offending to be similar in character, but significantly less serious. While Mr Newcomb signed a series of documents that aided breaches of the Act, he did not arrange for their drafting or execution. And, while Mr Newcomb participated in the incorporation of Let's Go, it would be a mischaracterisation of the situation to say that he had arranged for Let's Go to be incorporated.

[67] With regard to that, a starting point of $100,000 is appropriate.

Personal factors

[68] The Regulator identified the following aggravating factor: Mr Newcomb stopped communicating with the Regulator and her solicitors and appeared to evade service of the proceeding. That said, the Regulator identified three mitigating factors: Mr Newcomb agreed to interviews, he provided documentation to the Regulator and appears to have no previous issues with regulators. The Regulator submitted that Mr Newcomb's aggravating factors cancel out his mitigating factors, resulting in no adjustment to his starting point.

[69] I asked counsel whether Mr Newcomb would have been aware of the risk of a serious penalty. Ms Earl referred to the letter from the Regulator to Mr Newcomb. I note however, that while it refers to Mr Newcomb getting legal advice, it does not highlight expressly the risk of a significant financial penalty. If it did, and he had been

aware, then he may have participated in the proceedings. Put another way, if as he said during his interviews, he was not aware of Mr Klaus's scheme, then that may be a factor in mitigation, it might be argued. Overall, I consider that a reduction of 10 per cent is appropriate. Notwithstanding him ceasing to cooperate in the investigation, there was some communication and Mr Newcomb has no previous compliance issues.

End penalty

[70] A starting point of $100,000 is appropriate to reflect the seriousness of the offending, and that a 10 per cent reduction is to be made for personal factors. That results in an end penalty of $90,000. I consider this to appropriately reflect Mr Newcomb's offending.

Costs

[71] Courts have typically awarded the Regulator costs between $10,000–15,000. I consider an award of $15,000 to be appropriate. In addition to that $15,000, the Regulator seeks an additional contribution of $15,000 from each defendant towards its costs for the additional steps necessitated by the defendants' disengagement from the Regulator and its solicitors. In total, the Regulator seeks costs in the region of $30,000. I do not consider that appropriate. Any adjustment for the defendant's disengagement occurs at stage two of assessing the penalty. Any further award of costs for their disengagement would be double counting.

Decision

[72] The application is granted, and the following orders are issued:

(w) Mr Klaus must pay a civil pecuniary penalty under s 48(2)(a) of $350,000.

(x) Mr Klaus must pay costs of $15,000 to the Regulator.

(y) Mr Newcomb must pay a civil pecuniary penalty under s 48(2)(a) of $90,000.

(z) Mr Newcomb must pay costs of $15,000 to the Regulator.

Harvey J