IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-2536
[2021] NZHC 1831

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND
	Plaintiff
AND	CLEVEDON-KAWAKAWA ROAD LIMITED
	Defendant

Hearing: 17 March 2021

Counsel: K Muirhead for plaintiff
S M Bisley for defendant

Judgment: 20 July 2021

JUDGMENT OF KATZ J

This judgment was delivered by me on 20 July 2021 at 2.00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors: Meredith Connell, Auckland
Buddle Findlay, Wellington

Introduction

[1] The defendant, Clevedon-Kawakawa Road Limited ("CKRL"), acquired interests in two properties at Kawakawa Bay (together, "the Clevedon Properties").

[2] The Clevedon Properties are "sensitive land" under the Overseas Investment Act 2005 ("the Act") because they are non-urban land having a combined land area that exceeds five hectares. In addition, one of the properties adjoins the foreshore of Kauri Bay and Kahuru Point, and the properties have a combined land area that exceeds 0.2 hectares.

[3] CKRL was subject to the direction, control, or influence of an overseas person when it acquired an interest in the Clevedon Properties. It was therefore an associate of an overseas person in relation to the acquisition.[1] As an associate of an overseas person, CKRL was required to obtain consent under the Act to acquire any equitable or legal interest in the Clevedon Properties. It did not obtain the required consent.

[4] CKRL has admitted liability for breaches of the Act and has engaged constructively with the Chief Executive of Land Information New Zealand ("the Regulator") as to the appropriate resolution. CKRL has filed a notice of admissions admitting liability for giving effect to an overseas investment in the Clevedon Properties without first obtaining consent. The parties now jointly seek orders that CKRL pays:

(a) a civil pecuniary penalty of $160,000; and

(b) $15,000 towards the Regulator's costs.

[5] As liability is admitted, the sole issue for the Court to determine is the quantum of the penalty to be imposed under s 48(2) of the Act.

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1 Overseas Investment Act 2005, s 8(1)(b).

[6] The Regulator advises that this is the first proceeding in which the Court is being asked to impose a penalty for a breach of s 42 occasioned by an associate of an overseas person, rather than in respect of a direct breach by an overseas person.

The Overseas Investment Act 2005

[7] The Act regulates investments by overseas persons in New Zealand. Its purpose is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by:[2]

(a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and

(b) imposing conditions on overseas investments.

[8] Under the Act, persons are "overseas persons" if they are overseas persons themselves or if they are 25 per cent or more owned or controlled by an overseas person.[3] An overseas person includes an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand.[4] A person can also be an "associate" of an overseas person under the Act.[5]

[9] A transaction requires consent under the Act if it will result in an "overseas investment in sensitive land".[6] An "overseas investment in sensitive land" includes the acquisition by an overseas person, or an associate of an overseas person, of an estate or interest in land if the land is "sensitive" under pt 1 of sch 1 of the Act.[7]

[10] Consent must be obtained for a transaction before the overseas investment is given effect under the transaction.[8] Each overseas person making the overseas investment must apply for consent to an overseas investment transaction.[9] It is an

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2 Overseas Investment Act 2005, s 3. Given CKRL contravened the Act in December 2014, the relevant reprint of the Act is as at 20 May 2014.
3 Section 7(1).
4 Section 7(2)(a).
5 Section 8.
6 Section 10(1).
7 Section 12(a)(i).
8 Section 11(1).
9 Section 22(1)(a).

offence for an overseas person or an associate of an overseas person to give effect to an overseas investment without the consent required by the Act.[10]

Agreed facts

[11] The factual background to the breaches of the Act are set out in an agreed statement of facts, which I summarise below.

CKRL and its shareholders

[12] CKRL is a New Zealand company. At the time of CKRL's incorporation, and at all relevant times subsequently, Mr Guanxing Zhong has owned 76 per cent of CKRL's shares and has been the sole director of CKRL. Ms Cong Zhang has owned the remaining 24 per cent of CKRL shares.

[13] Mr Zhong is a Chinese citizen and New Zealand resident. Mr Zhong was not an overseas person for the purposes of the Act because he was ordinarily resident in New Zealand.[11] Ms Zhang is a Chinese citizen. Prior to 17 March 2018, Ms Zhang was an overseas person because she was not a New Zealand citizen and was not ordinarily resident in New Zealand.[12]

Original purchase of the Clevedon Properties

[14] On 21 February 2013, Mr Zhaorong Mai ("the Original Purchaser") entered into two agreements for the sale and purchase of the Clevedon Properties. One agreement ("the First Agreement") was for the purchase of a property ("the First Property") for $7,200,000. The other agreement ("the Second Agreement") was for the purchase of a further property ("the "Second Property"). After an agreed variation, the purchase price of the Second Property was $2,300,000.

[15] Mr Zhaorong Mai is a Chinese citizen. He is a friend of Mr Zhong and the de facto husband of Ms Zhang. At all relevant times, Mr Mai was an overseas person

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10 Section 42.
11 Section 6(2).
12 Sections 6(2) and 7(2)(a).

in terms of the Act, because he was not a New Zealand citizen and was not ordinarily resident in New Zealand.[13]

[16] The First Agreement and the Second Agreement each provided that the settlement date would be 6 March 2014. After several agreed variations, the Original Purchaser and the vendors of the Clevedon Properties eventually agreed to defer settlement to 15 December 2014.

[17] By 13 March 2014, the Original Purchaser had paid a total of $7,424,975 to the vendors of the Clevedon Properties as a deposit.

CKRL acquires equitable interests in the Clevedon Properties without consent

[18] On 5 December 2014, CKRL was incorporated.

[19] In December 2014, the Original Purchaser and a representative of CKRL executed a deed of nomination ("the Deed"). Under the Deed:

(a) the Original Purchaser assigned all his interests in the Clevedon Properties under the First Agreement and the Second Agreement to CKRL; and

(b) CKRL agreed to pay the "deposit" for the Clevedon Properties (being $7,424,975) to the Original Purchaser.

[20] Upon being nominated to purchase the Clevedon Properties, CKRL acquired an equitable interest in those properties.

CKRL acquires legal interests in the Clevedon Properties without consent

[21] On 16 December 2014, CKRL paid a deposit of $2,172,942.98 to its solicitors, being the amount payable for settlement of the First Agreement and the Second Agreement, including interest, plus solicitors' costs and disbursements. Later that day, title to the Clevedon Properties was transferred to CKRL.

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13 Sections 6(2) and 7(2)(a) of the Act.

[22] CKRL admits that it breached s 42 of the Act by becoming the registered proprietor of the Clevedon Properties, thereby gaining a legal interest in those properties, without first obtaining consent under the Act.

CKRL was an associate of the Original Purchaser when it acquired equitable and legal interests in the Clevedon Properties

[23] CKRL admits that it was an associate of an overseas person (the Original Purchaser) at all relevant times, because CKRL was subject to the Original Purchaser's direction, control, or influence in relation to the acquisition of the Clevedon Properties.[14] As an associate of an overseas person, CKRL was required to obtain consent under the Act to acquire any equitable or legal interest in the Clevedon Properties. At no time prior to acquiring equitable or legal interests in the Clevedon Properties, however, did CKRL apply for the required consent.

[24] CKRL has admitted that it breached the Act by acquiring first an equitable interest, and subsequently a legal interest, in the Clevedon Properties.

Penalty assessment - what is the appropriate starting point?

Approach to setting the starting point

[25] For the Act's enforcement regime to be effective, it must provide both specific and general deterrence for breaches of the Act. Deterrence is the primary purpose of penalties imposed under the Act.[15]

[26] Counsel identified seven cases in which this Court has fixed civil penalties under s 48 of the Act. Six of the seven cases concern breaches of the Act arising from a failure to obtain consent before making or giving effect to an overseas investment in sensitive land, in respect of freehold estates in land.[16] The seventh case –

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14 Section 8(1)(b) of the Act.

15 *Carbon Conscious* at [30]; *Chief Executive of Land Information New Zealand v Tang* (2018) NZHC 382, (2018) 19 NZCPR 460 [*Tang*] at [16]; *Chief Executive of Land Information New Zealand v Hong* (2019) NZHC 1561 [*Hong*] at [19]; *Chief Executive of Land Information New Zealand v FFG Investment Ltd* (2019) NZHC 3293 [*FFG*] at [18]; and *Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd* [2019] NZHC 514 [*Agria*] at [40].

16 *Carbon Conscious*; *Tang*; *Hong*; *Chief Executive of Land Information New Zealand v BCH Investments Ltd* (2019) NZHC 1630 [*BCH Investments*]; *FFG*; *Chief Executive of Land Information New Zealand v Chor Ltd* [2020] NZHC 1254 [*Chor*].

Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd – concerned penalties imposed under s 48 for breaches of good character conditions contained in consents granted under the Act.

[27] In each of the seven cases, this Court has adopted the method for determining the quantum of pecuniary penalties imposed under s 80 of the Commerce Act 1986. In particular, it has followed the criminal sentencing approach, which involves:[17]

(a) identifying the maximum penalty available;

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

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

[28] The s 48 cases also acknowledge that there is significant public benefit when defendants acknowledge wrongdoing, thereby avoiding time-consuming and costly litigation. Further, the Court has a role in promoting resolutions by accepting a penalty that is within an appropriate range. That is because the Court may risk deterring defendants from negotiating a resolution if it requires the proposed penalty to coincide precisely with the penalty that it would have imposed.[18]

[29] The following factors are relevant to setting a starting point:[19]

(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;

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17 *Carbon Conscious* at [26]-[27]; *Tang* at [14]-[16]; *Hong* at [19]; *BCH* at [6]; *FFG* at [17]; and *Agria* at [37].

18 *Carbon Conscious* at [24] citing *Commerce Commission v Alstom Holdings SA* (2009) NZCCLR 22 (HC) [*Alstom*] at [18]; *Tang* at [16]; *Hong* at [22]; *BCH* at [8]; and *Agria* at [36].

19 *Carbon Conscious* at [31]; and *Agria* at [41].

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

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

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

[30] Defendant-specific aggravating and mitigating factors include:[20]

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

(b) the size 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.

[31] The quantum of discounts available for mitigating factors such as admissions of liability, co-operation, and an absence of prior contraventions depends upon the particular circumstances of the case, such as the timeliness of the admission, the strength of the Regulator's case, and the nature and extent of any co-operation.

Approach when penalty is agreed

[32] Where penalties are agreed between the parties, the Court must consider whether the penalty is within the proper range but is not required to embark on its own enquiry as to an appropriate penalty figure.[21]

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20 *Carbon Conscious* at [47] citing *Alstom* at [21]; and *Agria* at [42].
21 *Carbon Conscious* at [24]; *Tang* at [19]; *Hong* at [18]; and *Agria* at [36].

Maximum penalty

[33] Under s 48(2) of the Act (as it stood at the time of CKRL's contravention of the Act), the relevant maximum civil penalty that may be imposed must not exceed the higher of:

(a) $300,000;

(b) the amount of any quantifiable gain;

(c) the cost of remedying the breach of condition; or

(d) the loss suffered by a person in relation to a breach of condition.

[34] Based on a valuation report prepared by Seagars (registered valuers and property advisors) the parties have agreed (and I accept) that CKRL has not made any quantifiable gain as a result of its acquisition of the properties. Accordingly, the applicable maximum penalty under s 48(2)(a) of the Act is $300,000. (The other subsections do not apply in this case.)

[35] CKRL has technically contravened the Act twice, by acquiring both equitable and legal interests in the Clevedon Properties. The Regulator accepts, however, that in this case the acquisition of the equitable and legal interests arose as part of a single transaction. Rather than apply an uplift or a totality discount, the parties have recognised this in the suggested starting point for penalty.[22] I accept that that is an appropriate approach.

Nature and extent of the breach

[36] In the agreed statement of facts, the parties record their agreement that CKRL's breach was moderately serious due to:

(a) the significant size of the Clevedon Properties, having a combined total land area of 87.93 hectares; and

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22 The same approach was adopted in *Tang* at [25].

(b) the significant value of the Clevedon Properties, given that:

(i) the First Property adjoins the foreshore of Kauri Bay and Kahura points;

(ii) they were sold to CKRL for $9,500,000.

Whether the breaches were intentional, negligent, or inadvertent

[37] CKRL accepts that, at the time it acquired the Clevedon Properties on 16 December 2014, it:

(a) ought to have known that the Clevedon Properties were "sensitive land" under the Act; and

(b) ought to have known of the existence of certain restrictions on overseas persons acquiring sensitive land under the Act.

[38] The Regulator acknowledges that, having received guidance from its then legal advisor, CKRL understood that the transaction would comply with the Act. In light of this, and CKRL's admission that it was an associate of an overseas person, the Regulator submits that CKRL's breach of s 42 of the Act was negligent. I accept that submission.

Nature and extent of any quantifiable gain made from the breaches

[39] As noted above, the parties agree that there has been no quantifiable gain from CKRL's acquisition of the Clevedon Properties based on the Seagars valuation report dated 3 August 2020. CKRL has, however, received a non-quantifiable benefit from gaining and holding a legal interest in the Clevedon Properties for a period of six years, without first obtaining consent.

Co-operation and admission of liability

[40] CKRL has admitted the breaches of the Act alleged in the statement of claim, and the facts set out in the agreed statement of facts dated 22 December 2020. CKRL

has also cooperated with the Regulator. Mr Zhong attended a voluntary interview with representatives of the Regulator in his capacity as director of CKRL. Further, CKRL (through Mr Zhong) has complied with the Regulator's requests for documents. The parties agreed to toll any limitation issues arising until 24 December 2020.[23]

Civil pecuniary penalties imposed in other cases

[41] The Court of Appeal has warned that comparisons with other penalty judgments should be approached with caution given the intensely fact-dependent nature of penalty determinations.[24]

[42] This is apparently the first proceeding under s 48 concerning penalties payable for overseas investments occasioned by an associate of an overseas person. Guidance may be obtained, however, from previous cases concerning the acquisition of equitable and/or legal interests in freehold estates, without any quantifiable gain.

[43] In *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, the defendants were parties to a transaction that resulted in an overseas investment in sensitive land by the acquisition of an equitable and legal freehold estate in land, without first acquiring consent under the Act.[25] The property had an area of 115 hectares and a purchase price of $335,000.[26] A starting point of $80,000 was adopted, which took into account:[27]

(a) the defendants' deliberate circumvention of the Act's controls on overseas investment by incorporating the second respondent, Katey LR Investments Limited, to shield the identity of the ultimate purchaser, Carbon Conscious New Zealand Limited ("Carbon Conscious"), which was an overseas person;

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23 This proceeding was commenced on 22 December 2020.
24 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [62].
25 *Carbon Conscious* at [1].
26 At [10].
27 At [33]-[46].

(b) the fact that the defendants completely relied on legal advice in deciding how to structure the transaction, which placed its culpability toward the lower end of the spectrum; and

(c) the absence of any identifiable or quantifiable commercial gain or costs arising from the breach.

[44] Ultimately Edwards J ordered the first respondent, Carbon Conscious to pay an end penalty of $40,000, together with scale costs on a 2B basis amounting to $6,003.50.[28]

[45] 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, who was a New Zealand citizen.[29] The partnership was an overseas person.[30] Mr Hong and Mr Ke also incorporated two companies that were overseas persons: Grand Energetic Company Ltd ("GEC") and IRL Investment Limited ("IRL"). Together, the defendants breached the Act in respect of two properties:

(a) First, the investment partnership bought a 79.3364 hectare farm for $4,480,000, with IRL as the nominated purchaser. The defendants were negligent in failing to obtain consent under the Act. Following the Regulator's investigation, IRL sold the farm to a third party for $10,100,000 with the Regulator's consent.[31] The Court ordered IRL to disgorge its net quantifiable gain from the sale of the farm to a third party (being $2,747,360), less a 15 per cent discount for full co-operation, resulting in an end penalty of $2,335,526.[32]

(b) Second, the investment partnership also bought a 44.421 hectare lodge for $2,550,000. However, after learning that Mr Churchill had acted fraudulently in respect of the lodge, Mr Hong and Mr Ke urgently

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28 At [60].
29 *Hong* at [4]-[7].
30 At [4].
31 At [10]-[11].
32 At [34]-[36].

arranged for the lodge to be transferred out of the partnership arrangement to GEC. Consent was not obtained under the Act on either transaction. The second transfer, although necessary because of Mr Churchill's fraud, was still deliberate because, by this time, the defendants had become aware of the restrictions of the Act.[33] With the agreement of the Regulator, GEC was ordered to dispose of the lodge under s 47 of the Act but was not ordered to pay a civil pecuniary penalty.[34]

[46] Mr Hong and Mr Ke were also each ordered to pay civil pecuniary penalties under s 48(2)(a) for breaching s 42 of the Act in respect of the lodge and the farm, and for breaching s 43 of the Act in respect of the transfer of the lodge to GEC.[35] The following starting points or ranges were adopted:

(a) a starting point of $130,000 for the purchase of the lodge and the farm in breach of s 42 of the Act, reflecting that their conduct was negligent or careless (rather than deliberate), but that they were experienced businessmen who had some knowledge of their obligations under the Act and failed to make proper inquiries;[36]

(b) a starting range of $200,000 to $220,000 for the transfer of the lodge to GEC in breach of s 43 of the Act, reflecting the deliberate nature of the breach.[37] Although this breach was deliberate, the starting range adopted was not nearer to the maximum penalty available to recognise that, once they learned of their obligations under the Act, Mr Hong and Mr Ke had intended to apply for consent, but in light of Mr Churchill's fraudulent activity felt time-pressured to complete the transaction

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33 At [8]-[9].
34 At [37].
35 Section 43 of the Act provides that "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".
36 At [26]-[27].
37 At [28].

first and seek retrospective consent later.[38] As such, the particular circumstances in this case tempered the culpability of the breach; and

(c) a global starting range of $440,000 to $500,000, and a totality adjusted starting point of $410,000 for all breaches.[39]

[47] In *Chief Executive of Land Information New Zealand v BCH Investments Ltd,* BCH Investments Ltd ("BCH") was an overseas person that acquired two adjoining properties in Auckland for $12,950,000.[40] It intended to carry out a residential development.[41] The properties were sensitive land because they adjoined a scenic reserve and had an area of almost five hectares.[42]

[48] BCH accepted that it should have undertaken enquiries into its obligations under the Act, given the size, scope and nature of the development.[43] BCH's legal advisors failed to alert BCH as to its obligations under the Act.[44] Powell J viewed it as a "negative matter" that some of the individuals involved with BCH had already been involved in proceedings brought by the Regulator under the Act (namely as defendants in *Tang*).[45]

[49] There was no quantifiable gain from BCH's acquisition of the properties.[46] The maximum penalty was therefore $300,000.[47] Given BCH's investment in a significant commercial undertaking, with the potential for financial gain, $300,000 was adopted as the starting point.[48]

[50] In *Chief Executive of Land Information New Zealand v FFG Investment Ltd*, New Zealand resident Mr Cai entered into an agreement to purchase sensitive land.[49] Lang J commented that the property was "not deemed to be sensitive land because of

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38 At [28].
39 At [29].
40 *BCH* at [1]-[2] and [10(b)].
41 At [3]-[4].
42 At [2].
43 At [10(e)].
44 At [11].
45 At [11].
46 At [10(c)].
47 At [10].
48 At [10].
49 *FFG* at [8].

its own qualities or significance",[50] but because it adjoined a scenic reserve.[51] The property had an area of 2.78 hectares and a purchase price of $4,760,000.[52] It was intended that the property be developed into a 27 lot subdivision.[53]

[51] Mr Cai then entered into a deed of nomination with FFG prior to settlement.[54] FFG was an overseas person and held equitable and legal title to the land from September 2013 until January 2016.[55] FFG subsequently entered into an agreement to sell the land to Grand Sky Ltd ("Grand Sky").[56] At the time of the agreement on 18 December 2015, Grand Sky was also an overseas person. When the sale was completed just over one month later on 27 January 2016, however, it was no longer an overseas person due to changes in its shareholding.[57]

[52] The maximum penalty for each of FFG and Grand Sky was $300,000 as there was no quantifiable gain.[58] The High Court held that the breaches were not deliberate, but they were more serious than in *Carbon Conscious.*[59] The starting point adopted for FFG was $103,000 and that adopted for Grand Sky was $54,000.[60]

Analysis of starting point for CKRL's penalty

[53] Like Carbon Conscious, Mr Hong and Mr Ke, BCH and FFG, CKRL has breached the Act by acquiring equitable and legal interests in sensitive land, albeit in a way that has not led to any quantifiable gain.

[54] This case is similar in some respects to *Carbon Conscious.* I accept the Regulator's submission, however, that CKRL's culpability is somewhat greater than Carbon Conscious, for which a starting point of $80,000 was adopted. The key differences are that the property involved in that case was less valuable than the

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50 At [21].
51 At [8].
52 At [8]-[9].
53 At [12].
54 At [10].
55 At [10]-[13].
56 At [13].
57 At [13].
58 At [20].
59 At [27].
60 At [28].

Clevedon Properties, Carbon Conscious had obtained approval for previous purchases, and it sought retrospective approval for the offending purchase once it realised it was in breach of the Act. Both Carbon Conscious and CKRL received poor legal advice but, as in *BCH,* CKRL representatives have admitted that they ought to have known that the Clevedon Properties were sensitive land, and ought to have known of the existence of restrictions under the Act.

[55] I also accept the Regulator's submission that CKRL's liability is greater than FFG, for which a starting point of $103,000 was adopted, because:

(a) FFG only acquired one property of 2.87 hectares for $4,760,000, whereas CKRL acquired two properties totalling 87.93 hectares for $9,500,000;

(b) the Clevedon Properties are sensitive land under the Act by virtue of their "own qualities and significance",[61] namely their size, that they are non-urban, and the fact they adjoin a foreshore (unlike the property in *FFG* which was less than five hectares in size and sensitive due to it adjoining a scenic reserve); and

(c) FFG held title from September 2013 to January 2016 before selling (two years' and three months) whereas CKRL has had the benefit of holding and using the Clevedon Properties for approximately six years.

[56] In *Hong* the relevant land was of greater value and size than the present case. There were four relevant transactions: the purchase of the lodge, the disposal of the lodge to a related party, the purchase of the farm and the sale of the farm to a third party. The former three transactions were negligent or careless; the last was deliberate and fraudulent.

[57] The breaches arising from the purchase of the lodge and the farm are broadly analogous to the breaches in this case. They attracted a starting point of $130,000. I accept the Regulator's submission, however, that CKRL's liability is greater than that

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[61] Contrast *FFG* at [21] per Lang J.

of Mr Hong and Mr Ke in respect of those two transactions, because Mr Hong and Mr Ke were not aware of the requirements of the Act at the time of the acquisition. CKRL's breach was negligent because (as it has admitted) it ought to have known that the Clevedon Properties were sensitive land and that it had obligations under the Act. It is not clear on what basis CKRL has admitted that it ought to have known of these matters, although I understand it may be because Mr Zhong had previously invested in property in New Zealand.

[58] *CE of LINZ v BCH lnvestments,* on the other hand, is quite different to the present case. A starting point of $300,000 was adopted, with reference to the fact that the properties formed part of a substantial commercial undertaking, in which the properties were to be retained. There was a high level of culpability in that case because the individuals concerned had previously been involved in proceedings under the Act, justifying a starting point of $300,000. This can be contrasted with CKRL's breach, which was negligent. *BCH Investments* is insufficiently similar to this case to provide helpful guidance, other than to observe that CKRL's liability is obviously significantly less than that of BCH.

[59] The starting point adopted must obviously reflect that although CKRL obtained and acted in accordance with the advice given to it by its then legal advisor, it ought to have known of its obligations under the Act and was therefore negligent in acquiring legal and equitable interests in the Clevedon Properties. CKRL's breaches, however, were not intentional or reckless. The parties have agreed (and I accept) that the breaches of the Act were moderately serious.

[60] CKRL's breaches of the Act arise from the fact that it was an associate of the Original Purchaser, because it was subject to the Original Purchaser's direction, control or influence.

[61] I accept the Regulator's submission that CKRL's culpability is not materially reduced by its associate status. On the contrary, there is a strong need to deter breaches of the Act by associates of overseas persons, given that breaches of the Act by associates of overseas persons had the potential to alienate sensitive New Zealand land in a way that is potentially difficult to monitor and detect. It will often be harder to

detect infringing acquisitions by associates as opposed to overseas persons, because the relevant transaction will often be fronted by someone who is ordinarily resident in New Zealand and who is entitled to acquire sensitive land as of right. As a result, the contravention may not be readily apparent, or might require more of the Regulator's resources to detect and investigate.

[62] As noted above, for the Act's enforcement regime to be effective, it must provide both specific and general deterrence for breaches of the Act. Deterrence is the primary purpose of penalties imposed under the Act.[62] There is a strong need to deter breaches by associates in the same way as breaches by overseas persons.

[63] Taking the various factors I have outlined into account, and considering previous penalty decisions (as discussed above), I am satisfied that the proposed penalty starting range of $190,000 to $210,000 is appropriate. Indeed, I accept CKRL's submission that the proposed starting range is likely towards the upper end of the appropriate range, particularly when considered in relation to the starting points adopted for Mr Hong and Mr Ke, and Carbon Conscious.

What is the appropriate discount to reflect factors personal to CKRL?

[64] The Regulator does not seek an uplift for any aggravating factors personal to CKRL. Rather, the issue is what discounts (if any) are appropriate to reflect mitigating factors specific to CKRL.

[65] In *Carbon Conscious*, a discount of 50 per cent was given for defendant-specific factors, including:[63]

(a) the fact that Carbon Conscious had sought retrospective consent for the transaction (which the Regulator notes was subsequently granted);[64]

(b) Carbon Conscious's early admission of liability and co-operation with the Regulator;[65] and

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62 *Carbon Conscious* at [30]; *Tang* at [16]; *Hong* at [19]; *FFG* at [18]; and *Agria* at [40].
63 At [57].
64 At [49].
65 At [53].

(c) Carbon Conscious's general approach to compliance with the Act, including by routinely seeking consent for its investments.[66]

[66] *Carbon Conscious* turned on unique facts including a defendant who had sought and obtained consent for a number of previous investments; had sought legal advice on a factual situation it had not encountered before and genuinely relied on that advice (which it transpired was seriously deficient); and subsequently sought and received retrospective consent.

[67] Subsequent cases under s 48 have indicated that discounts in the vicinity of 50 per cent will be rare given that:

(a) discounts of 33 per cent to 50 per cent are available in civil pecuniary penalty cases under the Commerce Act 1986 only where there is an early admission of liability coupled with co-operation with the regulator that includes giving evidence against another defendant, and no previous contraventions of the Act;[67] and

(b) where there is a quantifiable gain, any discount will deprive a penalty of its deterrent effect.[68]

[68] The discounts provided in previous cases include:

(a) In *Hong*, Mr Hong and Mr Ke were given a discount of 25 per cent for acknowledging liability, full co-operation and agreement to pay penalties.[69]

(b) In *FFG*:[70]

(i) FFG was given a discount of 20 per cent for full co-operation, early acceptance of liability and agreement as to penalties.

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66 At [49].
67 *Agria* at [76].
68 *Tang* at [36].
69 At [32].
70 At [29].

(ii) Grand Sky was given a discount of 25 per cent for full co-cooperation, early acceptance of liability, agreement to penalties, and undertaking to retain sufficient funds in trust from the sale of its sections to enable it to meet any civil penalty that the Court might impose.

[69] I accept the parties' submissions that, in this case, a global discount for all mitigating factors of 20 per cent appropriately balances the seriousness of CKRL's breaches of the Act with its full co-operation with the Regulator, including an early admission of liability, attending a voluntary interview, and agreement to pay a civil pecuniary penalty.

End penalty

[70] The end penalty imposed must reflect that although CKRL obtained and acted in accordance with guidance given to it by its then legal advisor, it has admitted that it ought to have known that the Clevedon Properties were "sensitive land" under the Act, and that there are restrictions on overseas persons acquiring sensitive land. The parties have agreed (and I accept) that the breach of the Act was moderately serious. However, CKRL has not made any quantifiable gain from the acquisition of the Clevedon Properties and has co-operated with the Regulator from an early stage in its investigation. It admitted liability at the first available opportunity.

[71] Taking all of these factors into account, I am satisfied that the proposed penalty of $160,000 is within the appropriate range and adequately reflects both CKRL's level of culpability and the various mitigating factors I have referred to.

Costs order

[72] CKRL has agreed to pay $15,000 to the Regulator as a contribution to its costs. I am satisfied that such a contribution is appropriate. The parties agree that, apart from the $15,000 costs contribution, costs are to lie where they fall.

Result

[73] CKRL is ordered to pay:

(a) a civil pecuniary penalty of $160,000; and

(b) a payment of $15,000 to the Regulator toward its costs.

Katz J