IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2022-419-210
[2023] NZHC 2330

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	TRINITY GREEN ESTATE PARTNERSHIP Defendant

Hearing: On the papers

Counsel: F J Cuncannon and K R Muirhead for plaintiff
K E Cornegé and C R Stewart for defendant

Date of judgment: 25 August 2023

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 25 August 2023 at 12.30pm.
Pursuant to Rule 11.5 of the High Court Rules.

……
Registrar/Deputy Registrar

Solicitors:
Meredith Connell, Wellington
Tompkins Wake, Hamilton

[1] The Chief Executive of Land Information New Zealand, the regulator in terms of the Overseas Investment Act 2005 (the Act),[1] seeks Trinity Green Estate Partnership (the partnership) pay a civil penalty of $97,500 on its contravention of the Act.

[2] Given the regulator's application was scheduled to be heard during an unrelated three-week criminal jury trial before me, at my suggestion, the parties agreed I could determine the application on the papers. This is that determination.

Background

[3] The partnership comprised the New Zealand resident Geng Wu and New Zealand incorporated Ho No 2 Trustees Limited (Ho Ltd) in equal shares. Ho Ltd — solely owned by Suet Ching Ho, a citizen of the Hong Kong Special Administrative Region of the People's Republic of China — and therefore the partnership accordingly were "overseas persons" for the Act's purposes.[2]

[4] In March and May 2016, the partnership progressively acquired equitable and legal interests in non-urban land, larger than five hectares in area, in the Waikato's Cambridge (the land). As such, the land was "sensitive land" in terms of the Act.[3] As an overseas investment in sensitive land, the transaction required consent under the Act,[4] to be obtained before the investment was given effect under the transaction.[5]

[5] The partnership had not obtained such consent. In May 2019, the partnership voluntarily disclosed its unconsented acquisition to the Chief Executive of Land Information New Zealand (the regulator).[6] In December 2019, Suet Ching Ho divested her interest in Ho Ltd to New Zealand residents, meaning the partnership ceased to be an overseas person. For present purposes, in referring to "the partnership", I mean as an overseas person.

---

1 Overseas Investment Act 2005, s 30(1).
2 Section 7(d) and (e).
3 Section 12(a) and sch 1, pt 1, table 1, row 2.
4 Section 10(1)(a).
5 Section 11(1).
6 Section 30(1).

[6] The partnership admits the equitable and legal interests it acquired in the land gave effect to an overseas investment without the requisite consent. Such is an offence punishable by a fine not exceeding $300,000.[7] Alternatively, the regulator may seek a contravener's payment of a civil penalty not exceeding the higher (relevantly here) of $300,000 or any quantifiable gain to the contravener in relation to the land for which consent should have been obtained.[8]

[7] The regulator and partnership agree the partnership's breach — in acquiring non-urban land of some 8.5 hectares in area, at a purchase price of $6.1 million, for subdivision and building of an intended 97-lot residential development — is moderately serious offending, but gave rise to no quantifiable gain to the partnership. And they also agree — as an acquisition structured on legal advice in the interests of one of the New Zealand residents to whom Suet Ching Ho's interests became divested, which obtained no benefit from the structure and was achievable by Suet Ching Ho's direct gift to the New Zealand resident without any requirement for overseas investment in sensitive land — the partnership's breach was inadvertent. Notably, it is agreed Suet Ching Ho's financial contribution to the transaction always was available as a gift to the New Zealand resident, but she benefited from achieving the transaction without either consent or conditions as may have attached to that consent.

[8] For my determination now is the amount of the civil penalty sought by the regulator. The regulator proposes a civil penalty of $97,500, derived from a starting point in a range from $120,000 to $140,000, discounted by 25 per cent for the partnership's co-operation. The partnership, emphasising its voluntary disclosure, would accept such a penalty.

Approach to civil penalties

[9] At the time of the partnership's contravention, the Act's s 48 relevantly provided:

> **Court may order person in breach to pay civil penalty**

---

7 Section 42.
8 Section 48, as it applied at the date of the breach.

(1) On the application of the regulator, the court may order a person (A) to pay a civil penalty to the Crown or any other person specified by the court if A has—

(a) contravened this Act; or

(b) committed an offence under this Act; or

…

(2) The court may order A to pay a civil penalty not exceeding the higher of—

(a) $300,000; or

(b) any quantifiable gain (for example, the increase in the value since acquisition) by A in relation to the property to which the consent or exemption relates or for which a consent should have been obtained; or

…

(3) A person cannot be ordered to pay a penalty under this section and be required to pay a fine under any of sections 42 to 46 for the same conduct.

(4) For the purposes of this section, the court must determine whether a person's conduct falls within subsection (1) on a balance of probabilities.

[10] Given the partnership's admission, I determine on a balance of probabilities its conduct was in contravention of (and commission of an offence under) the Act. Sentencing then usually engages two steps, so that — with 'non-mechanical' reference to analogous cases,[9] and aggravating and mitigating features of the offending — I should first decide a starting point for the breach, to adjust that up or down to take into account individual circumstances, for determination of the applicable civil penalty.[10]

[11] As an exercise in sentencing for regulatory offending, "[t]he primary consideration is deterrence and penalties must be set at a level that achieves both specific and general deterrence".[11] Reservations against drawing too close analogy with criminal sentencing principle — particularly given the Act's regulatory rather

---

9 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [62], citing *Australian Competition and Consumer Commission v Telstra Corp Ltd* [2010] FCA 790 at [211].

10 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46]; *R v Taueki* [2005] 3 NZLR 372 (CA) at [8].

11 *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 9, at [28] and [55], the latter citing *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (CA) at [94]; *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011 at [28]; and *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [17].

than penal nature, and the need to have regard for the contravention in its context — are notorious.[12] Nonetheless, some have resonance: the gravity of the contravention and the culpability of the contravener; the seriousness of the contravention in the spectrum of proscribed conduct; and "the general desirability of consistency" of outcome with similar contraveners committing similar contraventions in similar circumstances.[13]

Discussion

[12] The regulator identifies 14 cases in which this Court has ordered payment of civil penalties under s 48, 13 of which relate to failures to obtain consent before overseas investment in sensitive land was given effect.[14] Although those cases all rely on the more structured pecuniary penalty regime derived from s 80 of the Commerce Act 1986 to penalise improper exercise of market power, such nonetheless is consistent with applicable sentencing principle as outlined at [11] above. I accept — in circumstances in which penalty is agreed, to promote such negotiated resolution as being of public benefit — I need only ensure the penalty falls within a proper range.[15]

[13] The regulator highlights five of those cases — each involving contravening acquisition of interests in land for commercial purposes, without quantifiable gain — for assessment of consistency.[16] Other material factors were the size and value of the

---

12 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270 (HC) at [6].

13 Sentencing Act 2002, s 8.

14 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558; *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382, (2018) 19 NZCPR 460; *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561; *Chief Executive of Land Information New Zealand v BCH Investments Ltd* [2019] NZHC 1630; *Chief Executive of Land Information New Zealand v FFG Investment Ltd* [2019] NZHC 3293; *Chief Executive of Land Information New Zealand v Chor Ltd* [2020] NZHC 1254; *Chief Executive of Land Information New Zealand v West Drury Holding Ltd* [2021] NZHC 704; *Chief Executive of Land Information New Zealand v Smith Road Farm Ltd* [2021] NZHC 795; *Chief Executive of Land Information New Zealand v Zhao* [2021] NZHC 857; *Chief Executive of Land Information New Zealand v Lee* [2021] NZHC 1214; *Chief Executive of Land Information New Zealand v Zhang* [2021] NZHC 1266; *Chief Executive of Land Information New Zealand v Clevedon-Kawakawa Road Ltd* [2021] NZHC 1831; *Chief Executive of Land Information New Zealand v HK Search Ltd* [2022] NZHC 444; *Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd* [2019] NZHC 514.

15 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18], referring to *NW Frozen Foods v ACCC* (1996) 71 FCR 285 and *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV-2005-404-2080, 6 April 2006, (2006) 11 TCLR 581.

16 *BCH Investments*, above n 14; *FFG Investment*, above n 14; *Hong*, above n 14; *West Drury Holding*, above n 14; *Lee*, above n 14.

land acquired, and the contravener's awareness of the Act's requirements. Starting points for penalties ranged from $103,000 to $300,000, and from $130,000 to $170,000 for "inadvertent" or "negligent and careless" breaches.[17]

[14] The Law Commission has observed "[w]hich factors will be relevant will depend on the features of the specific legislative regime and what it is seeking to achieve."[18] At the time of the partnership's acquisition, the Act's purpose was:[19]

> … to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—
>
> (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
>
> (b) imposing conditions on those overseas investments.

[15] Relevantly here, the Act requires advance consent be obtained for acquisitions of non-urban land exceeding five hectares in area. At the time of the acquisition, under s 16(1), the criteria for such consent included the overseas person's "good character", possession of relevant "business experience and acumen" and demonstration of "financial commitment to the overseas investment". As Suet Ching Ho neither was ordinarily resident in New Zealand nor intending to reside in New Zealand indefinitely, under s 16(1), her effective investment through the partnership needed to be determined by Ministers (or their delegates) as at least likely to "benefit New Zealand (or any part of it or group of New Zealanders)" and, as in non-urban land exceeding five hectares in area, such being of at least "substantial and identifiable" benefit. In making that determination, a range of factors was to be considered.[20]

[16] Clearly then — under the Act, for assessment of the partnership's penalty — the size of non-urban land in excess of five hectares in area is a material factor. So too is the overseas investor's character, business skills and financial resources. As is the investment's substantial and identifiable benefit to New Zealand. The less likely consent may have been obtained, the larger should be the penalty to reinforce the

---

17 *Lee*, above n 14, at [51]; *West Drury Holding*, above n 14, at [31]; *Hong*, above n 14, at [25].

18 Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R113, 2014) at 16.50.

19 Overseas Investment Act, s 3.

20 Section 17(2).

privilege of acquisition. Conversely, the more the impugned transaction did not require to rely on overseas investment (and particularly if it has been restructured without qualifying overseas investment), a less severe penalty may be ordered.

[17] From those perspectives, the value of the land — if demonstrative of the overseas investor's financial resources, or the transaction's benefit to New Zealand — may be more a mitigating than aggravating factor in assessment of breach. But any prospective gain in value to the overseas investor, whether or not quantifiable, plainly aggravates the breach and may do so quite substantially.[21] I have some resistance to an overseas investor's lack of "awareness" of the Act mitigating any breach. If the Act applies, the overseas investor necessarily is to be taken to know of it.[22] Any lack of awareness instead may resound in the investor's culpability or responsibility for the breach. Where, as here, the investor appropriately has relied on professional assistance in formalising the transaction, that culpability may be thought low.

[18] The overseas investment at issue here is in non-urban land materially in excess of the five-hectare threshold, pulling any penalty above the lower third of the maximum penalty. There is no evidence the partnership demonstrated any financial commitment to the investment beyond its purchase price. Thus any benefit to New Zealand from the land's prospective residential subdivision is not attributable to the partnership. That aggravates the breach to a penalty of, say, $150,000. On the other hand, there is no evidence the partnership stood to obtain any gain from the investment and its culpability for the breach is low.

[19] On that basis, consistently with (and disregarding outliers in) the cases on which the regulator relies, I take a starting point of $130,000–$140,000, from which a discount of 25–30 per cent should be available for prompt voluntary disclosure and co-operation with the regulator.[23] That brings me to an end penalty somewhere in the $90,000–$100,000 range. I endorse the parties' agreement on a penalty of $97,500.

---

21 See, for example, the maximum available penalty starting point adopted in *BCH Investments*, above n 14, at [10].

22 See for example Crimes Act 1961, s 25.

23 Comparably with discounts on an early guilty plea: *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [70] and [75]; *Moses v R*, above n 10, at [22]–[26]; and for "special assistance" or "co-operation": *Hessell v R*, above, at [73]; *R v Strickland* [1989] 3 NZLR 47 (CA) at 51.

Result

[20] Under s 48 of the Overseas Investment Act 2005 as it applied over the period of the contravention, I **order** Trinity Green Estate Partnership pay a civil penalty in the amount of $97,500 to the Crown.

—Jagose J