

# **Enforceable Undertakings to the Chief Executive of Land Information New Zealand**

Pursuant to section 46A of the Overseas Investment Act 2005

**JL of Auckland**

**JH of Auckland**

**QL of China**

Dated: 24 February 2022

## 1 Relevant Parties

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- 1.1 This Undertaking is made by:
- (a) **JL**, a New Zealand permanent resident Ordinarily resident in New Zealand. Mr L is the husband of JH and the son of QL. He is also known as GL.
  - (b) **JH**, a New Zealand permanent resident Ordinarily resident in New Zealand.
  - (c) **QL**, an Overseas person, currently resident in China
- 1.2 Collectively, JL, JH and QL are referred to in the Undertaking as the **Investors**.
- 1.3 The Undertaking is given to the Chief Executive of Land Information New Zealand, being the chief executive of the department ("**the Regulator**") under section 46A of the Overseas Investment Act 2005 ("**Act**").

## Definitions

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- 2.1 In this document:
- (a) **Act** means the Overseas Investment Act 2005.
  - (b) **Associate** has the meaning set out in section 8 of the Act.
  - (c) **Overseas person** has the meaning set out in section 7 of the Act.
  - (d) **Ordinarily resident in New Zealand** has the meaning set out in section 7 of the Act.
  - (e) **Regulator** has the meaning set out at clause 1.3 above.
  - (f) **Sensitive land** has the meaning set out in section 12 of the Act.
  - (g) **Sensitive residential land** means residential (but not otherwise sensitive) land as defined in section 6(1) of the Act.
  - (h) **Undertaking** means this document, and **undertakings** refer to the specific obligations listed in clause 8.
  - (i) **Property** means the land at [REDACTED] being Sensitive residential land.
  - (j) **Retrospective consent** means consent granted in terms of section 25(1)(f) of the Act.
  - (k) **Increased Housing Test** has the meaning set out in section 6 of the Act.

## 3 Introduction

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- 3.1 The Regulator has investigated suspected breaches of the Act by JH and JL acquiring an equitable interest in Sensitive land as Associates of QL, an Overseas person, without first obtaining consent under the Act.
- 3.2 The Investors wish to provide enforceable undertakings to resolve matters and this document records the Regulator's reasons for accepting those undertakings.
- 3.3 The Regulator will publish a copy of this Undertaking on the Land Information New Zealand website.

## 4 Background

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- 4.1 In or around March 2020, the Parties began discussing the potential for a family investment in residential property in Auckland. Though nothing was firmly decided at that point, the idea was for QL to provide around 80% of the funding and to have a similar share in the ownership.
- 4.2 In July 2021 JL met with an accountant to discuss setting up a company to acquire residential land with QL having an 80% share. During that conversation he became aware that the involvement of his mother might raise issues under the Act.
- 4.3 On 18 August 2021 JL sought information from the Overseas Investment Office about which pathways might be available for Overseas persons to invest in residential property.
- 4.4 Shortly afterwards, on or about 26 August 2021, the Investors became aware of the Property which had recently been passed in at auction. They wanted to move quickly and so put in an offer on 29 August 2021. JL signed the agreement for sale and purchase. QL paid the \$150,000 deposit.
- 4.5 The Investors did not seek legal advice before signing the agreement. They were under the mistaken impression that if a New Zealand permanent resident signed the contract, and if they sought consent prior to settling the Property, that they would not be in breach of the Act.
- 4.6 The Investors intended to use the six-month period before settlement to determine an appropriate structure to settle the Property with QL's involvement and seek consent from the Overseas Investment Office. They anticipated they would have consent in place in time to settle the Property.
- 4.7 On 5 September 2021, JL sought a meeting with the Overseas Investment Office to discuss the proposed consent application. He noted that the investment was to involve his mother who was living in China and that they proposed to form a company to hold the Property.
- 4.8 The Overseas Investment Office expressed concern that the agreement for sale and purchase had been entered without consent and without being made conditional upon consent. It noted that QL had paid the deposit and there was an understanding as to her ongoing involvement at the time the agreement for sale and purchase had been signed.
- 4.9 It considers the Investors were Associates in relation to the investment and that consent should have been sought prior to entering the agreement and obtaining an equitable interest.
- 4.10 The Overseas Investment Office investigated the circumstances behind the acquisition of the Property and is satisfied that the failure to obtain consent was inadvertent.
- 4.11 It discussed its findings with the Investors and suggested the Investors apply for Retrospective consent through the Increased Housing Test which, if accepted, would enable the Investors to hold the Property as originally intended (ie as a Company/Overseas person with consent).
- 4.12 The Investors have indicated that they do not wish to apply for Retrospective consent, and that QL no longer intends to be part of the ownership of the Property.
- 4.13 As an alternative to applying for Retrospective consent, the Investors give this Undertaking to address and remediate the breach. The Undertaking constitutes a formal and binding promise to remove all overseas Associates from the ownership of the Property.

## **5 Obligations under the Act**

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- 5.1 Sections 10 to 12 of the Act require consent to be obtained for a transaction before an overseas investment in Sensitive land is given effect under the transaction. This includes an Associate of an Overseas person.
- 5.2 Section 8 of the Act provides that a person ("**A**") is an Associate of another person ("**B**") in relation to an overseas investment or any other matter if (amongst other things):
- (a) A is B's agent, trustee, or representative, or acts in any way on behalf of B, or is subject to B's direction, control, or influence, in relation to the overseas investment or the other matter;
  - (b) A acts jointly or in concert with B in relation to the overseas investment or any other matter;
  - (c) A participates in the overseas investment or the other matter as a consequence of any arrangement or understanding with B;
  - (d) A would come within those descriptions if the reference to B were instead to another Associate of B.

For these purposes, it does not matter whether the control, direction, power, influence, arrangement, or other relationship between A and B is direct or indirect, general or specific, or legally enforceable or not.

If A is an Associate of B, B is also an Associate of A.

- 5.3 Section 42 of the Act provides that 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 this Act.

## **6 Why the conduct contravenes the Act**

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- 6.1 The Regulator has concluded, and the Investors acknowledge, that JH and JL were acting as Associates of QL when JH signed the Agreement for Sale and Purchase. In particular:
- (a) JH secured the Property on behalf of the Investors when she signed the sale and purchase agreement
  - (b) QL paid the deposit on the understanding that she would be sharing in the ownership of the Land
  - (c) The Investors therefore breached the Act by acquiring an equitable interest in the Sensitive residential land without first seeking consent under the Act, or making that interest conditional on consent being obtained under the Act.

## **7 Commencement of this Undertaking**

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- 7.1 In accordance with section 46B of the Act this Undertaking comes into effect when:
- (a) the Undertaking is executed by the Investors; and
  - (b) this Undertaking so executed is accepted by the Regulator.

## **8 Undertakings**

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- 8.1 In connection with the contraventions outlined in this document, for the purposes of section 46A of the Act, the Investors collectively and severally undertake:
- (a) The purchase of the Property will be completed without the involvement or any direct or indirect financial contribution by QL or any other Overseas person (other than a recognised lending institution providing a loan on arms-length commercial terms).
  - (b) The deposit paid by QL will be returned to her prior to the completion of the purchase.
  - (c) QL ceases to have any further involvement with the Property, including the Property's future development and any rental arrangements with the Property.
  - (d) The Parties will provide confirmation and supporting documents to the OIO within 5 days of settling the purchase to demonstrate:
    - (i) the return of the deposit to QL; and
    - (ii) the source of the funds used to settle the purchase, including details of the originating source of any funds coming from the investors' bank accounts.
  - (e) The Investors will ensure future compliance with the Act including, but not limited to, ensuring that:
    - (i) they do not form any structure that meets the definition of an Overseas person; and
    - (ii) they, or any structure they may form, do not act as an Associate of any Overseas person,without seeking prior approval as required by the Act.
  - (f) The Investors will co-operate with any requests for information from the Regulator for the purpose of monitoring compliance with this Undertaking.

## **9 Reasons for acceptance**

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- 9.1 The Regulator accepts the Undertaking because it:
- (a) provides an appropriate way to end the Associate relationship in respect of the Property;
  - (b) ensures the Overseas person has no further involvement with the Property acquired in breach of the Act;
  - (c) promotes compliance with the Act by the Investors; and
  - (d) serves a public deterrence purpose by being published on the Land Information New Zealand website and being the subject of public comment.
- 9.2 The Regulator accepts this Undertaking as an alternative to requiring the Investors, to dispose of the Property altogether. In doing so, the Regulator notes:
- (a) JL and JH are New Zealand investors and entitled to purchase the Property for their own purposes, independently of any Overseas person, without needing to seek consent under the Act.
  - (b) The breach was inadvertent and was identified quickly, prior to the settlement of the property.

- (c) The investors have been open and transparent with the Overseas Investment Office and have co-operated with its enquiries.
- 9.3 In the circumstances, provided the Investors comply with the Undertaking, the Regulator is prepared to allow JL and JH to retain the Property. Compliance will be strictly monitored.
- 9.4 The Investors are taken to be on notice about their responsibilities under the Act and this may be taken into account in relation to any compliance or enforcement matters concerning any of the Investors in future.

## **10 Acknowledgements**

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- 10.1 The Investors acknowledge that:
  - (a) If any Investor contravenes this Undertaking:
    - (i) The Regulator may apply to the High Court for an order under section 46F of the Act for a civil pecuniary penalty not exceeding \$50,000 for an individual or \$300,000 in any other case, or an order to comply with or discharge the Undertaking.
    - (ii) The High Court may make further orders including an order directing the person to pay to the Regulator the costs of the proceedings and the reasonable costs of the Regulator in monitoring compliance with the Undertaking in the future, and an order in respect of the contravention or alleged contravention of this Act or regulations made under the Act to which the Undertaking relates, as if this Undertaking had not been made.
  - (b) the Regulator will publish a copy of this Undertaking on the Toitu Te Whenua, Land Information New Zealand website in accordance with section 46C of the Act.
  - (c) The Regulator may make public comment in relation to this Undertaking, including in a media release, other comment to the media, or in the Regulator publications (including as a case study in public information). This is important for the public interest for transparency and to act as a deterrent to other prospective investors.
  - (d) This Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct described in this Undertaking.
- 10.2 The Regulator and Investors acknowledge that the Undertaking may be executed in two or more counterpart copies each of which will be deemed an original and all of which together will constitute one and the same instrument. Any party may execute the Undertaking by signing a counterpart copy and sending it to the other parties (including by email).

**[Signature pages omitted]**

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