IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2229
[2022] NZHC 444

UNDER	the Overseas Investment Act 2005
BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	HK SEARCH LIMITED First Defendant
	DR WON JOO HUR Second Defendant
	DR JAEHO CHOI Third Defendant

Hearing:	24 February 2022; further submissions 28 February 2022
Appearances:	JCL Dixon QC, SM Lowery and S Scott for the Plaintiff AH Waalkens QC and SA Beattie for the First and Third Defendants TW Kwon for the Second Defendant
Judgment:	11 March 2022

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 11 March 2022 at 3.00pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar Date……

To: A Waalkens QC, Auckland
J Dixon QC, Auckland
T Kwon, Auckland
S Beattie, Auckland

And to: Overseas Investment Office, Wellington

Introduction

[1] The defendants have each admitted breaches of the Overseas Investment Act 2005 (the Act) in connection with the purchase of a property in Helensville (the Property).[1] The plaintiff (referred to in this judgment as "the Regulator") and defendants have subsequently engaged on the appropriate penalties to be imposed on the defendants for the admitted breaches. Agreement has now been reached on those penalties.

[2] The parties request the Court to impose a penalty on each of the defendants in the agreed amount, pursuant to s 48(2) of the Act. The Court's task in this context is not to determine the precise penalty it would have imposed on each defendant had agreement not been reached; rather, it must be satisfied that the penalty proposed by the parties falls within the appropriate range of penalty amounts which the Court considers available.

[3] Foreshadowing the outcome of this judgment, I am satisfied that the penalties proposed by the parties fall within the appropriate range. I accordingly make orders below that each defendant pay the penalty in the agreed amount.[2]

Agreed facts

[4] The factual background to the breaches is set out in an agreed statement of facts which has been provided to the Court. Through counsel, each defendant has signed the agreed statement of facts.

[5] The following summary of the (detailed) summary of facts is adopted from counsel for the Regulator's written submissions. Neither defendant suggested this was anything other than an accurate summary of the agreed facts.

---

1 Being that property comprised in CT 331543 legally described as Lot 1 Deposited Plan 331543 and having a total land area of 18.5531 hectares. The Property is "sensitive land" under s 12 and Schedule 1, Part 1 of the Act because it is non-urban land that has an area that exceeds five hectares.

2 See [101]–[103] below.

[6] The first defendant (HK Search) is a company having its registered office at 1 Princes Street, Auckland. Its sole director is the third defendant's (Dr Choi's) wife.

[7] The second defendant (Dr Hur) is a Korean citizen and a medical doctor by profession. He holds a New Zealand permanent resident visa and had previously owned property in New Zealand. However, because Dr Hur had not been present in New Zealand for at least 183 days of the 12 months before the acquisition of the Property, he was not "ordinarily resident in New Zealand" under s 6(2) of the Act. Dr Hur was therefore an "overseas person" under s 7 of the Act.

[8] Dr Choi is a Korean citizen with a New Zealand permanent resident visa. At all relevant times he resided in Auckland and practised as a lawyer on his own account.

[9] On 3 July 2016, Dr Hur signed an unconditional agreement for the sale and purchase of the Property with him or his nominee as purchaser (the Agreement). The purchase price was $3 million. Dr Hur paid the deposit of $300,000 on 5 July 2016. Dr Hur acquired an equitable interest in the Property by entering into the Agreement and paying the deposit.

[10] The Agreement was not conditional on Dr Hur obtaining consent under the Act to acquire the Property.

[11] As an overseas person under s 7 of the Act, Dr Hur was required to obtain consent under the Act before acquiring an interest in the Property. He did not do so. The real estate agent acting on the transaction did not advise Dr Hur that he may require consent or recommend that he seek legal advice before signing the Agreement.

[12] After paying the deposit, Dr Hur engaged a solicitor (referred to in this judgment as "Solicitor A") to undertake the conveyancing transaction. Solicitor A only considered the overseas investment consent issue within the fortnight before settlement was due to take place (being 30 September 2016). On 23 September 2016, Solicitor A engaged another solicitor (referred to as "Solicitor B") to provide specialist advice regarding consent under the Act. Solicitor B advised that entering the Agreement breached the Act, and Dr Hur should seek to cancel the Agreement. The

agreed statement of facts records that this would likely result in Dr Hur forfeiting his deposit and being exposed to a claim for consequential damages.

[13] On 26 September 2016, four days before the scheduled settlement, Dr Hur engaged Dr Choi to act for him in relation to the Property. On 28 September 2016, Dr Choi emailed the Overseas Investment Office (OIO) to ask about Dr Hur's options. The OIO suggested he should seek legal advice on whether the Act applied.

[14] On 29 September 2016, Dr Choi and Dr Hur met, together with members of Dr Hur's family. Dr Hur and his family urged Dr Choi to find a lawful way to avoid cancellation of the Agreement. The Hur family returned from New Zealand to South Korea on 30 September 2016.

[15] On 30 September 2016, the vendor's solicitors issued a settlement notice requiring settlement by 18 October 2016. In the intervening period, Dr Hur and Dr Choi continued to try to find a solution to the OIO issue.

[16] On 4 October 2016, Solicitor B provided further advice to the effect that there was no risk-free way to complete the transaction or cancel the Agreement. Dr Choi and Dr Hur tried to cancel or postpone the settlement, but their attempts were unsuccessful.

[17] Dr Hur and Dr Choi discussed the prospect of another person purchasing the Property on Dr Hur's behalf and holding it for a short period until either:

(a) Dr Hur could find another person to whom title could be transferred; or

(b) Dr Hur or his wife became eligible for OIO consent.

[18] On 18 October 2016, the settlement date, there was a phone call between Dr Hur and Dr Choi, in which Dr Choi advised nominating HK Search as the purchaser of the Property.

[19] Dr Hur followed this advice and nominated HK Search as the purchaser. Dr Hur paid the funds required to settle the transaction ($2.72 million) and the Property settled, with HK Search as the title holder.

[20] It is accepted by the defendants that the intention was that HK Search would hold the Property for a short period until either of those matters referred to at [17] above came about.

[21] Dr Choi advised Dr Hur to take this course on the basis that it would avoid the provisions of the Act. Dr Choi accepts that this advice was wrong, and also that he lacked the requisite experience to give it. Dr Hur relied on Dr Choi's erroneous advice.

[22] Although HK Search held legal title to the Property, it is accepted that Dr Hur was the Property's beneficial owner. This meant HK Search was Dr Hur's "associate" within the meaning of s 8 of the Act. OIO consent was therefore required before the title to the Property could pass to HK Search.

[23] Following settlement, HK Search held the Property on Dr Hur's behalf and Mrs Choi managed the Property for Dr Hur.

[24] When the OIO began to investigate the transaction in early 2017, Drs Hur and Choi initially obstructed the investigation by telling the OIO that the transfer to HK Search took place in an arm's length transaction, and by creating a back-dated loan document to support this version of events. The OIO charged Drs Hur and Choi with obstruction under s 44(1) of the Act, to which they pleaded guilty in the District Court. Dr Hur was fined $100,000 and Dr Choi was fined $62,500. Those District Court proceedings are distinct from the penalty the Court is asked to assess in these proceedings.

[25] After the initial obstruction, the defendants co-operated with the OIO. This included an OIO-approved process under which the Property was marketed for sale to the public, so that other eligible purchasers could bid for it. No third party bids were received. In the event, HK Search transferred the Property to Mrs Hur, who had become eligible to acquire the Property during these proceedings.

Admissions

[26] HK Search accepts it:

(a) was Dr Hur's "associate" under s 8 of the Act; and

(b) breached s 42 of the Act by taking title to the Property without obtaining consent under the Act.

[27] Dr Hur accepts he:

(a) was an "overseas person" under s 7 of the Act; and

(b) breached s 42 of the Act by taking the following steps without obtaining consent under the Act:

(i) entering into the Agreement; and

(ii) nominating HK Search as purchaser of the Property.

[28] Dr Choi accepts he breached s 43 of the Act by advising Dr Hur to nominate HK Search as purchaser of the Property, in circumstances where he was not an expert in the area of OIO consent, and where his advice was contrary to that of specialist advice received from Solicitor B (whom he did not consult on the matter).

[29] The defendants filed a notice of admissions admitting the Regulator's first, second and third causes of action to the extent they are admitted in the agreed statement of facts.[3]

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

---

[3] Notice of admissions dated 29 September 2021.

Legislative framework

[31] Under the Act, persons who are "overseas persons" include individuals who are neither a New Zealand citizen nor ordinarily resident in New Zealand.[4]

[32] A transaction requires consent under the Act if it will result in an "overseas investment in sensitive land" or in significant business assets.[5]

[33] An "overseas investment in sensitive land" is the acquisition by an overseas person, or an "associate" of an overseas person, of an estate or interest in land if:[6]

(a) the land is "sensitive" under Part 1 of Schedule 1 to the Act; and

(b) the estate or interest acquired is a freehold estate, a lease, or any other interest for a term of three years or more and is not an exempted interest.

[34] Each overseas person or associate making the overseas investment must apply for consent to an overseas investment transaction.[7] Consent must be obtained for a transaction before the overseas investment is given effect.[8]

[35] As noted earlier, it is accepted that HK Search was an "associate" of Dr Hur.

[36] Section 42 of the Act provides that it is an offence for a person to give effect to an overseas investment without the consent required by the Act.

[37] Section 43(1) 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.
>
> (emphasis added)

---

4 Overseas Investment Act 2005, s 7(2)(a).
5 Section 10(1).
6 Section 12(1)(a).
7 Section 22(1)(a).
8 Section 11(1).

[38] At the time of the admitted breaches in this case, s 48 of the Act relevantly provided that:

> (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
>
> (c) failed to comply with a notice under section 38 or section 39 or section 40 or section 41; or
>
> (d) failed to comply with a condition of a consent or of an exemption.
>
> (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
>
> (c) the cost of remedying the breach of condition; or
>
> (d) the loss suffered by a person in relation to a breach of condition.
>
> (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.

Approach to penalty

[39] In assessing appropriate penalties under the Act, the Court has adopted an approach that is similar to that adopted in sentencing for criminal offending. This broadly involves:[9]

---

[9] This approach is similar to the approach adopted when fixing penalties under the Commerce Act 1986, which is frequently referred to in decisions of this Court on the proper approach to determining penalties under the Act; for example, *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 [*Carbon Conscious*] at [27].

(a) determining the appropriate "starting point" for the breaches, by identifying aggravating or mitigating factors of the contravening conduct itself; and

(b) then adjusting the starting point in light of those factors specific to the defendant and which warrant an uplift to or reduction from the starting point.

[40] Decisions of this Court on appropriate penalties to which I was referred acknowledge the benefits of the Regulator and defendants resolving proceedings such as these, and thus avoiding scarce court resources, and the parties' resources, being directed to what could otherwise be lengthy and complex litigation. Because of this, it is recognised that the Court has a role in promoting resolution of proceedings such as this by accepting penalties in amounts agreed by the parties that are within an appropriate range.[10]

[41] Counsel submit, and I accept, that the following factors will be relevant to setting a starting point:[11]

(a) the nature and extent of the breach;

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

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

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

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

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

---

10 At [24]; and see *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [19]; and *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561 at [18].

11 *Carbon Conscious*, above n 9, at [31]; and *Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd* [2019] NZHC 514 at [41].

[42] Aggravating and mitigating factors specific to the defendant, and which may warrant the identified starting point being increased or decreased, include:[12]

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

(b) the size and resources 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.

Parties' submissions on why the agreed penalties are within range

[43] It was evident at the hearing before me that the Regulator had done the "heavy lifting" of preparing submissions on why the parties say the agreed end-point penalties fall within the appropriate range. I accordingly summarise below why the Regulator says the penalties in this case fall within the appropriate range, and then briefly address any additional points raised on behalf of the defendants.

The Regulator's submissions

Starting point

[44] For the purposes of s 48(2)(a) of the Act (see [38] above), the parties agree there is no quantifiable gain in respect of the Property:

(a) Dr Hur and HK Search co-operated with the OIO to market the Property for sale to an eligible purchaser, via a public process approved by the OIO. No third party bids were received. The Property was subsequently transferred to Mrs Hur, who had become eligible to acquire the Property during the proceedings.

---

12 *Carbon Conscious*, above n 9, at [47]; and *Agria (Singapore) PTE Ltd*, above n 11, at [42].

(b) Dr Choi did not receive any financial benefit from the transaction, other than his fee of $3,071.74 plus GST and disbursements (in all, $3,622.50).

[45] Accordingly, the maximum penalty to be imposed on each defendant is $300,000.

[46] Turning to the appropriate starting point, the Regulator submits that the defendants' breaches were moderately serious. The Property's sale price ($3 million) and size (18.5531 hectares) are significant, but accepted as lower than in many of the comparable cases. The Property has no special historical value and is not located on the foreshore.

[47] The first breach, being Dr Hur's acquisition of an equitable interest in the Property by signing the Agreement, is accepted by the Regulator to have been inadvertent. Dr Hur was not advised of his responsibilities under the Act and while responsibility for being aware of his obligations sat with him, there is no suggestion of prior knowledge on his part (as has been the case in some of the earlier authorities to which I was referred, for example *Chief Executive of Land Information New Zealand v Tang*).[13]

[48] The Regulator submits that the second breach, being Dr Hur's nomination of HK Search as the purchaser, was negligent by Dr Hur and reckless by Dr Choi. This is said to be because:

(a) Dr Hur sought Dr Choi's assistance to find a lawful means of settling the transaction.

(b) Dr Hur relied on Dr Choi's incorrect legal advice when nominating HK Search. The Regulator accepts that in some cases, reliance on incorrect legal advice may be viewed as a mitigating factor.[14] But in this case, the Regulator submits that Dr Hur would have known

---

13 *Tang*, above n 10.
14 *Carbon Conscious*, above n 9, at [35].

Dr Choi's advice was contrary to that of Solicitor B, a specialist in OIO matters, and instead preferred to follow Dr Choi's advice rather than Solicitor B's.

(c) Dr Choi provided the incorrect advice to nominate HK Search even though he was not an expert in the area (and that must have been known to Dr Choi), and his advice was contrary to the specialist advice received from Solicitor B.

[49] Turning to the starting point adopted in other cases, the Regulator submits that the approaches to the adoption of starting points in *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*,[15] *Tang*[16] and *Chief Executive of Land Information New Zealand v FFG Investment Ltd*[17] are the most helpful.

[50] Carbon Conscious (CCNZ) was a subsidiary of an Australian company and an overseas person under s 7(1) of the Act. It acquired several forestry properties with OIO consent.

[51] CCNZ found a further property it wished to purchase but did not have time to obtain OIO consent before settlement of the transaction. It sought legal advice on how it could purchase the property. On legal advice, CCNZ formed a company, Katey LR Investments Ltd (Katey LR), which was a New Zealand resident company, to take title. Katey LR was an associate of CCNZ in terms of s 8(1)(c) of the Act.

[52] Katey LR purchased the property and later agreed to sell it to CCNZ, subject to OIO consent. In the meantime, it granted forestry rights to CCNZ in respect of the property.

[53] The defendants' legal advice was accordingly that this structure would not breach the Act.

---

15 *Carbon Conscious*, above n 9.
16 *Tang*, above n 10.
17 *Chief Executive of Land Information New Zealand v FFG Investment Ltd* [2019] NZHC 3293.

[54] CCNZ was ordered to pay a penalty of $40,000, which was a 50 per cent discount on the adopted starting point of $80,000. That discount reflected the fact the defendants had not previously contravened the Act, their co-operation throughout the investigation and legal proceedings, and the reliance on erroneous legal advice.

[55] Counsel for the Regulator observe that *Carbon Conscious* was the first penalty judgment issued under the Act. By reference to a helpful schedule annexed to counsel's submissions, counsel submit that penalties have generally increased since that time. Counsel submit that that is understandable and appropriate, given the Act has been in place for longer and market participants have had more time to become familiar with its requirements.

[56] Turning to the decision in *Tang,* Mr Tang was an overseas person under the Act. He entered into an agreement to purchase residential property in Glendowie for $5.1 million. Mr Tang later nominated three other overseas persons to settle the transaction, which they did. Neither Mr Tang nor the three nominees obtained OIO consent.

[57] Mr Tang was an experienced businessperson with previous experience purchasing land in New Zealand. Neither the real estate agent nor the solicitor who acted for him on the transaction raised the need for OIO consent.

[58] Lang J viewed the poor legal advice Mr Tang received as a mitigating factor, although his Honour considered Mr Tang's culpability to be higher than in *Carbon Conscious,* due to his experience as a businessman (and thus he ought to have been aware of or at least alert to OIO consent issues) and the presence of the "OIA consent" checkbox on the agreement for sale and purchase (which should have further alerted Mr Tang to the consent requirement).[18]

[59] Counsel for the Regulator observe that in the context of penalties under the Commerce Act 1986, the Court has not always viewed the receipt of legal advice as a mitigating factor. Receipt of legal advice has been described as "the absence of an

---

[18] *Tang*, above n 10, at [23].

aggravating factor, rather than one that attracts a credit, by way of mitigation".[19] However, the Regulator accepts that the receipt of legal advice may show that a breach was not deliberate.

[60] The Court in *Tang* approved the parties' proposed starting point of $130,000, though Lang J observed it was at the upper end of the available range.[20] After discounts, Mr Tang's end penalty was $110,500.

[61] In *FFG Investment,* Mr Cai, a New Zealand resident, entered into an agreement to purchase land, which was deemed sensitive under the Act because it adjoined a scenic reserve. The property had an area of 2.78 hectares and a purchase price of $4.76 million. The intention was to develop the property into a 27-lot subdivision.

[62] Mr Cai entered a deed of nomination with FFG Investment Ltd (FFG) prior to settlement. FFG was an overseas person. It held equitable and legal title to the land from September 2013 until February 2016. FFG subsequently entered into an agreement to sell the land to Grand Sky Ltd (Grand Sky). At the time of the agreement, on 18 December 2015, Grand Sky was also an overseas person, but when the sale was completed a month later, it was no longer an overseas person due to changes in its shareholdings.

[63] The maximum penalty for each of FFG and Grand Sky was $300,000, as there was no quantifiable gain. The Court held that the breaches were not deliberate but were also more serious than in *Carbon Conscious*. The starting point for FFG was set at $103,000. After a discount of 20 per cent for co-operation, early acceptance of liability and agreement as to penalties, the end penalty was $82,500.

[64] The starting point for Grand Sky was $54,000. It received a 25 per cent discount for full co-operation, early acceptance of liability, agreement on penalties, and undertaking to retain sufficient funds in trust from the sale of its sections to enable it to meet any civil penalty. The end penalty was $40,500.

---

19 *Commerce Commission v Barfoot & Thompson Ltd* [2016] NZHC 3111 at [27].
20 *Tang*, above n 10, at [24].

[65] As against the agreed facts in this case, the Regulator submits that the appropriate starting point for Dr Hur is a penalty of around $140,000. The Regulator says that Dr Hur's culpability is higher than in all of *Carbon Conscious, Tang* and *FFG* because:

(a) In *FFG*, the defendants addressed the breach before settlement by changing the shareholdings such that consent was not required. There was no corrective action by Dr Hur prior to settlement.

(b) The breach in *FFG* was also less serious because the consent requirement was triggered by the shareholdings in the purchasing companies. For Dr Hur, the situation was more straightforward since he is a natural person who plainly required OIO consent.

(c) As in *Tang* and *Carbon Conscious*, Dr Hur relied upon poor legal advice. In this case, however, there was an element of Dr Hur "running the risk" of a breach, since Dr Choi's advice to nominate HK Search was contrary to specialist advice received earlier from Solicitor B.

[66] Nevertheless, the Regulator accepts that the starting point should not be near the top end of the range because:

(a) there was no intentional breach by Dr Hur of the Act;

(b) the acquisition was not for a commercial purpose;

(c) unlike the defendant in *Tang*, Dr Hur's experience is in medicine rather than commercial transactions; and

(d) the $3 million purchase price was lower than many of the other cases that have come before the Court.

[67] The Regulator therefore submits that a starting point of around $140,000 is appropriate for Dr Hur.

[68] Turning to Dr Choi, the Regulator submits that the starting point should be higher than Dr Hur's, and that $150,000 to $160,000 is appropriate.[21]

[69] This is submitted to be because Dr Choi advised Dr Hur to nominate HK Search to purchase the Property, which was reckless and contrary to the specialist advice of Solicitor B. Dr Choi has acknowledged that he was acting outside his area of expertise. Balanced against that, Dr Choi did not benefit from the breach, other than through his fee, and was at all times attempting to assist Dr Hur as a client.

[70] In setting a starting point for Dr Choi, the Regulator submits that the decision in *Tang* is of greatest assistance. As noted, the Court adopted a $130,000 starting point for a client who relied on incorrect legal advice. The Regulator submits that Dr Choi's starting point should be higher since he was the *provider* of the incorrect advice, rather than the recipient, and in circumstances where the provision of that advice was reckless.

[71] No penalty is sought by the Regulator for HK Search. It operated as the agent of Drs Choi and Hur, and co-operated in an OIO-approved process to market the Property to the public. The parties accordingly agree that it is appropriate for penalties to be limited to the natural persons, being Drs Choi and Hur.

Adjustment of starting point to reflect factors personal to defendants

[72] Turning first to Dr Hur, the Regulator does not suggest any aggravating factors personal to Dr Hur.

[73] The Regulator notes that Drs Hur and Choi initially obstructed the OIO's investigation in the manner discussed at [24] above. The Regulator accepts, however, that that conduct has been dealt with through criminal proceedings in the District Court, and on that basis, accepts it should not be viewed as an aggravating factor in these proceedings.

---

[21] This is in fact the only area of disagreement between the Regulator and Dr Choi.

[74] The Regulator accepts there are several mitigating factors in relation to Dr Hur:

(a) Dr Hur has admitted liability and agreed to pay a civil pecuniary penalty.

(b) Since Dr Hur engaged Bell Gully in July 2017, he co-operated fully with the OIO's investigations, including travelling to New Zealand for two voluntary interviews, and voluntarily submitting to the New Zealand jurisdiction.

(c) Dr Hur co-operated in an OIO-approved process to market the Property.

(d) Dr Hur has not previously breached the Act.

(e) Dr Hur was fined $100,000 in the District Court for his part in obstructing the OIO's investigation. While that fine reflected conduct different to that at issue in these proceedings, it adds to the overall financial burden for Dr Hur in relation to the Property.

[75] The Regulator submits that discounts of around 25 per cent are appropriate for all the above factors. This equates to a $35,000 reduction from the proposed starting point of $140,000, resulting in a penalty of $105,000. The Regulator accepts it is appropriate to round that amount down to $100,000, which the parties agree is an appropriate end penalty.

[76] Turning to Dr Choi, like Dr Hur, Dr Choi co-operated with the OIO's investigation (after admitting the initial obstruction), admitted liability, and has not breached the Act previously.

[77] The Lawyers & Conveyancers Disciplinary Tribunal suspended Dr Choi from practice for five and a half months due to his conduct in relation to the Property. Dr Choi was also fined $60,250 in the District Court on the obstruction charge, adding to the financial burden to Dr Choi from his involvement in the transaction to purchase the Property.

[78] The Regulator submits that an additional relevant factor is Dr Choi's limited financial means (the size and resources of the defendant being recognised as a relevant factor, see [42(b)] above). Based on information provided to it, the Regulator is satisfied that Dr Choi is unable to pay a penalty of more than $30,000.

[79] The Regulator accordingly agrees that $30,000 is the appropriate penalty, given it is the most Dr Choi can pay. The $30,000 agreed penalty is lower than the Regulator would ordinarily consider appropriate, but adopting this as the "end" penalty is consistent with a similar approach taken in Commerce Act decisions on penalty, when it is clear a defendant can pay only a modest, or even no, penalty.

[80] The Regulator also does not oppose Dr Choi's request that his penalty be paid by way of payment arrangement at the amount of $500 per month.

Submissions for HK Search and Dr Choi

[81] HK Search and Dr Choi do not take any issue with the submissions made by the Regulator, other than Dr Choi says that a slightly lower starting point should be adopted in his case. For the avoidance of doubt, however, Dr Choi endorses the Regulator's submission that an end penalty of $30,000 be adopted.

[82] In terms of the (relatively small) difference between the parties on a starting point, while Dr Choi acknowledges that he acted recklessly in taking steps that had the effect of circumventing the operation of the Act, counsel submits that it is important that he did not do so knowingly. That Dr Choi did not benefit from the breach other than a very modest fee, and that at all times he was attempting to assist Dr Hur as his client, is said to further ameliorate the culpability attaching to Dr Choi's reckless conduct.

[83] On this basis, Dr Choi's submission is that a slightly lower starting point of between $120,000 to $130,000 would be appropriate.

[84] Counsel for Dr Choi notes that this is the first case where the provider of incorrect advice on OIO consent has been joined as a defendant. Counsel submits that this distinguishes this case from many of those that have previously come before the

courts. Counsel also refers to the decision in *Chief Executive of Land Information New Zealand v Hong*, where deliberate and fraudulent actions led to a starting point of $200,000 to $220,000.[22] Further, counsel notes that the starting point in *Tang* was considered by the High Court to be "at the upper end of the available range".[23] Counsel also notes that the property in *Tang* was considerably more valuable than in this case, and had special features (being in a coastal setting). Counsel submits that while the defendant in *Tang* was the recipient of incorrect advice, the other factors in fact make *Tang* a more serious case.

Submissions on behalf of Dr Hur

[85] Dr Hur is no longer represented by those solicitors representing him during the Regulator's investigation.

[86] Counsel for Dr Hur noted in his written submissions that none of Dr Hur's actions were without his lawyers' advice. Counsel was also critical of the fact that other parties, including the vendor and the vendor's lawyer, have never been investigated or had similar action taken against them as in respect of the defendants in this case. Of some concern to me prior to the hearing, the written submissions recorded that Dr Hur "was innocent as explained above" and that the Regulator is ultimately "using an innocent foreigner as a scapegoat for somebody's rich and fame [sic]".

[87] Given the content of the written submissions made on behalf of Dr Hur, I sought confirmation from counsel for Dr Hur at the outset of the hearing that it remained appropriate for the matter to be dealt with on an agreed basis. Counsel for Dr Hur confirmed that that was the case. In my view that must be so, given the formal admissions made by Dr Hur in response to the Regulator's claim, and his express agreement to the agreed statement of facts. There had been no applications or similar to "retreat" from these positions.

---

22 *Hong*, above n 10, at [28].
23 *Tang*, above n 10, at [24].

[88] The written and oral submissions made on behalf of Dr Hur accordingly endorsed the agreed end penalty of $100,000. However, and perhaps reflecting those aspects of the written submissions to which I have referred earlier, counsel for Dr Hur submitted it would be appropriate to allow deferred payment of the penalty by 100 years ("which may not be enforceable on his estate in case he passes away before the payment date comes"), or alternatively, payment by instalment of $100 per month, which also may not be accrued to Dr Hur's estate.

Discussion

[89] For the comprehensive reasons outlined in counsel for the Regulator's submissions, I am satisfied that the proposed penalties fall within the appropriate range.

[90] Turning first to Dr Hur, there is no real dispute about the starting points and discounts in this case. In particular, I accept the Regulator's submission that Dr Hur's culpability is somewhat higher than in each of *Carbon Conscious*, *Tang* and *FFG* for those reasons outlined at [65] above. In particular, while Dr Hur did rely on legal advice, he effectively received specialist advice from Solicitor B that there was no risk-free way to settle the transaction in this case. At the hearing before me, counsel for Dr Hur challenged Solicitor B's expertise, though the fact that Solicitor B was a specialist is an agreed fact set out in the agreed statement of facts which Dr Hur has signed.

[91] Dr Hur was accordingly on notice of that advice from Solicitor B. He then took and followed Dr Choi's advice, and it must have been evident to him that it was contrary to the advice received from Solicitor B. Nevertheless, Dr Hur did rely on that legal advice. It is accordingly appropriate to categorise his conduct as negligent rather than anything more culpable.

[92] Reflecting that Dr Hur's culpability is somewhat more serious than that in *Tang*, I am satisfied that the starting point of around $140,000 falls within the appropriate range. I observe, however, that given the starting point in *Tang* fell at the upper end of the range, so too does the starting point adopted in this case for Dr Hur.

[93] Turning to the factors personal to Dr Hur, I have considered whether the active obstruction of the Regulator's investigation, at least at an initial stage, ought to be considered an aggravating factor. I have concluded that it should not be. Rather, full co-operation is generally regarded as a mitigating factor personal to the defendant. In this case, the initial obstruction has the effect of reducing the discount that might otherwise have been available for co-operation. I also note those steps in particular taken by Dr Hur in voluntarily travelling to New Zealand on multiple occasions for interviews and submitting to the courts of this jurisdiction. Those are significant and tangible steps. But for the initial (and serious) obstruction of the Regulator's investigation, the mitigating factors collectively might have warranted a slightly greater discount than that agreed by the parties. I therefore consider a discount of around 25 per cent to be in line with the appropriate range discussed in the authorities, resulting in the "rounded" penalty of $100,000.

[94] Turning to Dr Choi, I agree with the Regulator that Dr Choi's culpability warrants a (slightly) higher starting point than that adopted for Dr Hur. But I also agree with counsel for Dr Choi that the starting point suggested by the Regulator is a little high, or at the very least, at the very upper end of the available range. It has been accepted by the Regulator and Dr Choi that his conduct was reckless, rather than involving a deliberate or knowing breach. A starting point of around $160,000, particularly when compared with the starting points in *Hong* for deliberate and fraudulent breaches (see [84] above), would in my view likely fall outside the upper end of the range. I would accordingly see the appropriate range in the case of Dr Choi as being more around the $120,000 to $150,000 mark. This range for a starting point is approaching half of the maximum penalty, reflecting the reckless but not knowing breach, that there was no gain on the part of Dr Choi, that Dr Choi was seeking to assist his client at all times, and that the Property was not as large or as valuable as in many of the cases that come before this Court.

[95] At the hearing, I sought further information from counsel on whether it was appropriate to effectively "cap" the appropriate penalty by reference to Dr Choi's financial means, rather than Dr Choi's financial means simply being a factor which is taken into account when assessing the appropriate end penalty. Counsel for the Regulator has helpfully provided me with further authorities in which a similar issue

has been considered in the context of penalties under the Commerce Act.[24] In *Commerce Commission v Rural Livestock Ltd*, a final penalty would have been in the order of $1.2 million to $1.5 million.[25] The parties had nevertheless proposed a penalty of $475,000, reflecting Rural Livestock's financial position. The Commission in that case accepted that Rural Livestock's conduct did not justify putting it out of business. The Court stated:[26]

> I am satisfied, like the Commission, that a penalty of $475,000 is within, and at the maximum, of Rural's financial means. In those unusual circumstances I will impose such a reduced penalty.

[96] In *Commerce Commission v International Racehorse Transport NZ*, the Commission made it clear that ordinarily it would seek a pecuniary penalty for the breaches in that case.[27] It did not do so, however, because of the defendant's financial position, which meant it was unable to pay any penalty. There was also potential for job losses and a risk of creating a monopoly in the industry if the defendant failed. The Court held in those circumstances that the breaches did not require the imposition of a pecuniary penalty.

[97] It is common ground that the maximum financial penalty Dr Choi can pay is $30,000. The Regulator submits that there is no interest in bankrupting Dr Choi.

[98] In the particular circumstances of this case, I am satisfied it is appropriate to impose the agreed penalty of $30,000. There is no reason not to accept the Regulator's position that this is indeed the maximum penalty that Dr Choi can pay. This is on the basis of a statement of financial position that has been provided to and accepted by the Regulator. A $30,000 penalty, to be paid by an individual, is not insignificant. Further, Dr Choi has also been the subject of a substantial fine in the criminal proceedings, and has been suspended from practice as a legal practitioner. These matters add to the financial implications for Dr Choi arising from his advice on the transaction in question.

---

24 *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361; and *Commerce Commission v International Racehorse Transport NZ* [2020] NZHC 1716.
25 *Commerce Commission v Rural Livestock Ltd*, above n 24.
26 At [59].
27 *Commerce Commission v International Racehorse Transport NZ*, above n 24.

[99] I accept that it is not necessary in order to provide for general deterrence in OIO cases to impose a financial penalty in an amount which is accepted to be well beyond the defendant's means of paying, at least where the financial ruin of the defendant is not warranted by their contravening conduct.[28] Acceptance of the agreed penalty in this case also encourages resolution, which is of benefit to all parties involved, and the community more generally, for the reasons outlined at [40] above.

[100] Finally, and as noted at [80] above, the Regulator has agreed to accept payment by Dr Choi at a rate of $500 per month. The orders sought initially envisaged I would make a formal order to that effect. Counsel for the Regulator provided me with two decisions relating to penalties under the Commerce Act in which the Court did make orders for payment by instalments.[29] However, I consider the precise mode and mechanism for payment of the penalty is generally best left to be agreed between the party collecting the court-ordered penalty and the defendant. That provides for flexibility if circumstances change in the future (for example, if Dr Choi wanted to pay in greater instalment amounts). And given the Regulator has agreed before this Court to repayment by Dr Choi by way of instalments of $500 per month, it would hardly seek to unilaterally step away from such agreement.

Result

[101] Dr Hur is ordered to pay a civil penalty in the sum of $100,000.

[102] Dr Choi is ordered to pay a civil penalty in the sum of $30,000.

[103] There is no penalty imposed on HK Search Limited.

[104] No party sought costs.

Fitzgerald J

---

[28] Egregious conduct may nevertheless warrant such an outcome; see *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [34].

[29] *Commerce Commission v Thai Airways International Public Company Ltd* [2013] NZHC 844; and *Commerce Commission v Barfoot & Thompson Ltd* [2017] NZHC 218.