**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2019-404-000685**
**[2019] NZHC 1561**

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| UNDER | Overseas Investment Act 2005 |
| BETWEEN | THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND<br>Plaintiff |
| AND | ZHONG LIANG HONG<br>First Defendant |
| | XUELI KE<br>Second Defendant |
| | IRL INVESTMENT LIMITED<br>Third Defendant |
| | GRAND ENERGETIC COMPANY LIMITED<br>Fourth Defendant |

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| Hearing: | 4 July 2019 |
| Appearances: | F Cuncannon and B Rorrison for the plaintiff<br>D A Campbell for the defendants |
| Judgment: | 4 July 2019 |

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**JUDGMENT OF WOOLFORD J**

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| Solicitors: | Meredith Connell (Office of the Crown Solicitor), Auckland<br>Kensington Swan, Auckland |

[1] The defendants were parties to transactions that resulted in overseas investment in sensitive land without consent under the Overseas Investment Act 2005 (the Act).

[2] The Chief Executive of Land Information New Zealand (Chief Executive) seeks the imposition of penalties on Mr Zhong Liang Hong, Mr Xueli Ke and IRL Investment Limited under s 48(1)(b) of the Act. The Chief Executive also seeks ancillary orders by consent for the disposal of the Lodge, a 44 hectare parcel of land in Wylie Road, Warkworth, under s 47 of the Act, and payment by Mr Hong and Mr Ke towards the plaintiff's costs. These orders are set out at the end of this judgment.

[3] The parties have agreed on and recommended penalties. Orders are sought on those terms. Because liability is admitted, the only issue for the Court to determine is whether the recommended quantum of the penalties is appropriate.

**Agreed Facts**

[4] Mr Hong and Mr Ke are both Chinese citizens and businessmen. They are the beneficial owners of two companies at the heart of this proceeding - IRL Investment Ltd (IRL) and Grand Energetic Company Ltd (Grand Energetic).

[5] IRL is incorporated in New Zealand, and its sole director and shareholder is Mr Xinrong Gu. Mr Gu is a New Zealand citizen. Mr Hong and Mr Ke are beneficial owners of IRL, each owning a 50 per cent interest. Pursuant to an agency agreement signed on 10 December 2013, Mr Gu acts as an agent for Mr Hong and Mr Ke.

[6] Similarly, Grand Energetic is incorporated in New Zealand, and its sole director and shareholder is Ms Haiyang Zhang. Ms Zhang is also a New Zealand citizen. Mr Hong and Mr Ke each own a 50 per cent interest in Grand Energetic. Like the agreement with Mr Gu, Ms Zhang signed an agency agreement on 17 April 2014 where she agreed to act as an agent for Mr Hong and Mr Ke.

[7] In 2012, Mr Hong and Mr Ke formed a partnership with Mr Arthur Qui Churchill, a New Zealand citizen, to undertake property investments in New Zealand (the investment partnership). It operated on an undocumented basis for around a year, until it was formalised on 24 June 2013. Mr Churchill was, at all relevant times, an

associate of Mr Hong and Mr Ke under s 8 of the Act. The investment partnership was an "overseas person" under s 7 of the Act. Churchill Estate Limited (Churchill Estate) is a company incorporated in New Zealand, in which Mr Churchill is the sole shareholder and director.

*The Lodge*

[8] On 20 July 2012, the investment partnership entered into an agreement to purchase the Lodge. The Lodge is a 44.421 hectare parcel of land in Wylie Road, Warkworth, and includes the Kourawhero Lodge accommodation. The agreed price was $2,550,000. The sale settled on 29 October 2012, and title to the Lodge transferred to the Churchill Estate on behalf of the investment partnership. Consent was required under the Act, but was neither sought nor obtained.

[9] In October 2013, Mr Hong and Mr Ke became aware that Mr Churchill had misappropriated funds in relation to the Lodge and had taken out a mortgage against the Lodge for his own purposes. Mr Hong and Mr Ke became concerned about their investment and took steps to protect their interests. On 16 January 2014, they registered a caveat against the title to the Lodge. They later commenced legal proceedings against Mr Churchill in the High Court. The proceeding settled, and on 17 April 2014, Grand Energetic entered into a formal settlement agreement to purchase the Lodge from Churchill Estate for $2,570,000. Title to the Lodge was transferred to Grand Energetic on 1 May 2014. Again, consent under the Act was not obtained.

*The Farm*

[10] On 11 December 2012, the investment partnership entered into an agreement to purchase the Farm, a 79.3364 hectare parcel of land in Sandspit Road, Warkworth, for $4,480,000.00. The agreement provided for a settlement date of 16 December 2013. On that date, Mr Churchill and Mr Gu signed a deed of nomination, nominating IRL to settle the purchase agreement. On 6 January 2014, the agreement settled and title to the farm was transferred to IRL.

[11] On 18 June 2018, IRL transferred legal title to the farm to a third party pursuant to a sale and purchase agreement dated 17 January 2018. IRL received total

consideration of $10,100,000.00 from this sale. Their net quantifiable gain has been calculated as $2,747,360.00.

*Retrospective Consent*

[12] Ministerial consent was not sought prior to the sale and transfer in title of both the Lodge and the Farm. Mr Hong and Mr Ke were aware from at least 5 April 2014 that consent was required to purchase the Lodge, but took steps to circumvent the requirements.

[13] No steps were taken until 30 October 2014, when Mr Hong and Mr Ke submitted a retrospective application for consent to be granted in relation to the Farm and the Lodge. The Overseas Investment Office declined the consent application for the Farm on 1 September 2016. Mr Hong and Mr Ke withdrew their retrospective consent application for the Lodge on 14 September 2017.

**Statutory Framework**

[14] The Overseas Investment Act 2005 regulates investment by overseas persons in New Zealand. The purpose of the Act is set out in s 3:

> **3 Purpose**
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> The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by –
>
> (a) Requiring overseas investment in those assets, before being made, to meet criteria for consent; and
>
> (b) Imposing conditions on those overseas investments.

[15] Pursuant to s 10 of the Act, Ministerial consent is required for a transaction which results in overseas investment in sensitive land or significant business assets. Section 11(1) requires consent to be obtained for such a transaction before overseas investment is given effect. The overseas person or associate making the overseas investment must apply for consent.

[16] Section 48 provides the Court with the power to order a person in breach of the Act to pay a civil penalty to the Crown.

**Agreed Statutory Breaches**

[17] There is no dispute that the defendants meet the definition of "overseas person" under s 7(1) of the Act. Nor is there any dispute that the defendants have breached the Act. Each of the defendants acquired an interest in the properties in terms of s 12 of the Act. However, they did not obtain consent pursuant to the requirements in ss 22 and 23. As such, the parties agree that the defendants are liable under ss 42 and 43 of the Act in the following ways:

(a) In giving effect to the investment in the Lodge via Churchill Estate without obtaining consent, Mr Hong and Mr Ke are liable under s 42 of the Act.

(b) In transferring the Lodge to Grand Energetic, Mr Hong and Mr Ke breached s 42 by failing to seek and obtain consent, and circumvented the operation of the Act, an offence under s 43.

(c) In entering into the Farm agreement and subsequently settling the sale through IRL, Mr Hong, Mr Ke and IRL are liable under s 42 of the Act by giving effect to the overseas investment in the Farm without obtaining consent.

**Approach to fixing penalties**

[18] Where parties have agreed on proposed penalties, the Court is not required to embark on its own enquiry as to the appropriate figure, nor consider the appropriateness of the parties' chosen methodology in reaching that figure. Instead, the Court must only consider whether the proposed penalty is within the appropriate range.[1]

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1 *Chief Executive of Land Information New Zealand v Carbon Conscious* [2016] NZHC 558 at [24]-[25]; *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [19]; *Chief Executive of Land Information New Zealand v Agria (Singapore) Pty Ltd* [2019] NZHC 514 at [36].

[19] To ascertain whether the proposed penalty is appropriate, the Court's approach has been to adopt criminal sentencing principles.[2] First, the Court will assess the seriousness of the offending, identifying relevant aggravating and mitigating factors, to arrive at an appropriate starting point. Second, the Court will consider any factors that are specific to the defendants that may warrant an uplift, or reduction, from that starting point. The primary purpose of penalties imposed under the Act is deterrence.[3]

[20] I am advised that there are only three cases in which civil penalties have been fixed under s 48. In *Carbon Conscious Ltd*, the Court identified several factors that may provide guidance when fixing the starting point for pecuniary penalties:[4]

(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 pecuniary penalties that have been imposed in previous similar situations; and

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

[21] As for features specific to the offender, Edwards J drew on factors said to be relevant in the Commerce Act context:[5]

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

(b) The size of the offender;

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2 *Chief Executive of Land Information New Zealand v Agria (Singapore) Pty Ltd* at [37].
3 At [40].
4 *Carbon Conscious* at [31], citing Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [16.47].
5 At [47].

(c) Any co-operation with the authorities;

(d) Any admission of liability; and

(e) Any compliance programmes put in place by the offender.

[22] The policy rationale behind this approach was also explained by Edwards J, who referred to Rodney Hansen J's judgment in *Commerce Commission v Alstom Holdings SA* as follows:[6]

> … there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

**Mr Hong and Mr Ke**

*Maximum Penalty*

[23] The maximum penalty that can be imposed is the highest of the four alternatives set out in s 48(2)(a) – (d).

[24] Mr Hong and Mr Ke have not received any quantifiable gain in respect of the Lodge. In respect of the Farm, the quantifiable gain went to IRL, not Mr Hong or Mr Ke personally. The maximum penalty available for Mr Hong and Mr Ke is therefore $300,000.

*Starting point*

[25] In respect of the Lodge, the parties agree the defendants' conduct appears to be negligent and careless, as opposed to deliberate. Further, neither Mr Hong nor Mr Ke received any financial gain. Both factors reduce the gravity of the offending and justify the imposition of a lower starting point.

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6 At [24], citing *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

[26] Counsel for the plaintiffs liken this proceeding to *Chief Executive of Land Information New Zealand v Tang*, which also concerned an overseas investment made without consent under the Act.[7] In that case, a starting point of $130,000 was imposed. This was "at the upper end of the available range".[8] The plaintiff suggests implementing the same starting point in this proceeding.

[27] There is perhaps a case that *Tang* is distinguishable as the offending in the present circumstances could be characterised as less serious. Although Mr Hong and Mr Ke are both experienced businessmen, as was the case in *Tang*, there is no evidence they received erroneous legal advice. The value of the land in question is also under half the value of land in *Tang*. However, a Judge cannot substitute his or her preferred methodology for that of the parties. A small reduction also may be mere tinkering. Therefore, while a starting point at that level is in the upper end of the available range, having regard to the factors outlined by Edwards J in *Carbon Conscious*, it nonetheless falls within the appropriate range.

[28] In respect of the Farm, the parties suggest a starting point for Mr Hong and Mr Ke of between $200,000 - $220,000. This reflects the deliberateness of the breach, as the defendants continued to proceed with the sale without obtaining consent after they became aware of their obligations under the Act. It also reflects the fraudulent nature of their conduct as they sought to obtain retrospective consent in order to regularise their affairs. Particularly having regard to the importance of deterrence, I consider this to be appropriate in the circumstances.

[29] The combined starting point for Mr Hong and Mr Ke's breaches is between $440,000 - $500,000. I agree with the parties that this should be reduced to reflect totality, given the interrelated nature of the breaches. Accordingly, the parties' chosen starting point of $410,000 is appropriate.

*Adjustment of penalty to reflect factors personal to the defendants*

[30] There are no aggravating features personal to the defendants.

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7 *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382.
8 At [24].

[31] The fact that the defendants have acknowledged liability is an obvious mitigating factor. They have sought to resolve matters at the earliest opportunity, and have co-operated with the investigation, provided documents, attended voluntary interviews, and have agreed to pay penalties. This has saved significant time and cost, which is of benefit to the community.

[32] In *Carbon Conscious*, Edwards J applied a 50 per cent discount to reflect the defendants' admissions of liability and their co-operation with the authorities.[9] This was not followed in *Tang*, as Lang J considered that discount to be too high where the plaintiffs made quantifiable gains.[10] On this basis, it could be argued that a higher discount should be warranted in this case. Like the defendants in *Carbon Conscious*, Mr Hong and Mr Ke made no quantifiable gains and co-operated fully with the proceeding. However, the 25 per cent discount sought is higher than that imposed in *Tang*, and there is arguably greater culpability than in *Carbon Conscious*, as there is no evidence Mr Hong and Mr Ke received and relied on poor legal advice. As such, I consider 25 per cent is appropriate.

*End Penalties*

[33] Adopting a $410,000 starting point and applying the 25 per cent discount results in a total penalty of $307,500 for both Mr Hong and Mr Ke.

**IRL**

*Starting Point*

[34] IRL made a quantifiable gain of $2,747,360 on the sale of the Farm. The parties suggest that the appropriate starting point is the full disgorgement of IRL's gain. Given the importance of deterrence, I consider this to be appropriate in the circumstances.

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9 *Chief Executive of Land Information New Zealand v Carbon Conscious* [2016] NZHC 558 at [56] – [57].

10 *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [35] – [36].

*Adjustment of penalty to reflect factors personal to IRL*

[35] The parties suggest imposing a 15 per cent discount to reflect IRL's co-operation with the investigation. I think this is appropriate. In *Tang*, Lang J noted that in cases where the defendant has made a quantifiable gain, the "desirability of making allowance for mitigating factors is tempered significantly by the concurrent need to ensure the penalty does not lose its deterrent effect".[11] However, the total removal of any discount for mitigating conduct would remove the incentive to comply with authorities. A 15 per cent discount should be applied.

*End Penalty*

[36] Applying a 15 per cent discount to IRL's net gains of $2,747,360 results in a final penalty of $2,335,256.

**Result**

[37] The respondents accept the Chief Executive's submissions in their entirety and accept the proposed penalties and orders. I am satisfied that the sums suggested are appropriate. These orders are therefore set out accordingly:

(a) Mr Hong is ordered to pay a final civil penalty of $307,500.

(b) Mr Ke is ordered to pay a final civil penalty of $307,500.

(c) IRL is ordered to pay a final civil penalty of $2,335,256.

(d) Grand Energetic is to dispose of the Lodge by 16 October 2019.

(e) Mr Hong and Mr Ke must each make a payment of $10,000 to the Chief Executive towards his costs.

Woolford J

[11] At [36].