



Memorandum

To: Simon Pope, Manager Enforcement

From: Jatin Mistry – Senior Investigator

Date: 10 November 2021

File Ref: 202100540 / 202100563 / 202100656

Subject: **Imposition of an administrative penalty of \$30,000 on 576 GSR Development Limited and \$40,000 on Parnell Park Development Limited post-investigation**

For Your: **Approval**

Summary

- 104 Dixon Street Limited (**DSL** or the purchaser) is a subsidiary of DIALOG Group Berhad (**Dialog**) - a publicly listed company in Malaysia. DSL and Dialog are overseas persons under the Overseas Investment Act 2005 (the **Act**).
- DSL and/nominee had entered into seven residential and commercial property acquisition transactions in Auckland between 23 March 2021 and 2 July 2021. Five of the seven agreements breached the Act because they contained residential land, which is deemed sensitive land under the Act, and were not subject to OIA consent.
- DSL self-reported the breaches of the Act to the OIO on 21 July 2021 (prior to settlement of these properties) and have been co-operative with our enforcement enquiries.
- The breaches are believed to be inadvertent in nature due to DSL's erroneous belief that Council's zoning (business mixed use) was the relevant factor in determining the residential land sensitivity rather than the property category. DSL did not obtain expert legal advice concerning overseas investment matters.
- Post-investigation, we have received two retrospective consent applications for the residential properties acquired in breach of the Act as follows:
 - (a) 5, 7 & 7A Main Highway properties in Ellerslie were acquired through two separate agreements which are treated as a single transaction for a total consideration of **s9(2)(b)(ii)** (**Ellerslie properties**). DSL will nominate 576 GSR Development Limited to be the purchaser of Ellerslie properties. 576 GSR Development Limited has submitted a retrospective consent application – case reference 202100563.
 - (b) 491, 493 and 509 Parnell Road in Parnell were acquired through three separate agreements which are treated as a single transaction for a total consideration of **s9(2)(b)(ii)**. DSL will nominate Parnell Park Development Limited to be the purchaser. Parnell Park Development Limited has submitted a retrospective consent application – case reference 202100656.
- Our **recommendation** is that the following administrative penalties under s 53 should be imposed:

- (a) \$30,000 on 576 GSR Development Limited provided retrospective consent is granted by the Applications Team.
- (b) \$40,000 on Parnell Park Development Limited provided retrospective consent is granted by the Applications Team.

7. If retrospective consent is declined the OIO will need to consider other enforcement options to resolve the breaches.

Facts – why retrospective consent required

Agreements which breached the Act

- 8. Dialog is a publicly listed company in Malaysia, and it is an overseas person under the Act.
- 9. DSL is a New Zealand subsidiary of Dialog and considered to be an overseas person under the Act.
- 10. DSL entered into seven property acquisition transactions in Auckland between 23 March 2021 and 2 July 2021 as follows:

Transaction No.	Date	Key event	Purchase price	ASP breached the Act?
1	23-Mar-2021	Entered into Agreement for Sale and Purchase for 576 – 580 Great South Road & 5-7 Main Highway, Ellerslie	s9(2)(b)(ii)	Yes – contained residential land - 5&7 Main Highway
	21-Jun-2021	Entered into Agreement for Sale and Purchase for 7A Main Highway, Ellerslie	s9(2)(b)(ii)	Yes - residential category land
2	2-Jul-2021	Entered into Agreements for Sale and Purchase for 491 Parnell Road, Parnell	s9(2)(b)(ii)	Yes - residential category land
	2-Jul-2021	Entered into Agreements for Sale and Purchase for 493 Parnell Road, Parnell	s9(2)(b)(ii)	Yes - residential category land
	2-Jul-2021	Entered into Agreements for Sale and Purchase for 501 Parnell Road, Parnell	s9(2)(b)(ii)	No – Commercial category land
	2-Jul-2021	Entered into Agreements for Sale and Purchase for 509 Parnell Road, Parnell	s9(2)(b)(ii)	Yes - residential category land

3	15-Jun-2021	Entered into Agreement for Sale and Purchase for 1 Domain Drive, Parnell	s9(2)(b)(ii)	No – subject to OIA consent condition
---	-------------	--	--------------	---------------------------------------

11. Five of these seven agreements breached the Act because:

- (a) they contained residential land, which is deemed sensitive land under Schedule 1, Table 1, of the Act since the October 2018 changes. As a result of these agreements, DSL acquired an equitable interest in the sensitive land without OIA consent.
- (b) DSL and its parent company are an overseas person under the Act and therefore consent was required before it entered into these agreements, or these agreements should have been made subject to obtaining OIA consent.

12. To remedy these breaches, retrospective consent is required.

Grouping of agreements into relevant transactions

13. Multiple titles were treated as a single transaction based on the development proposed by the Applicants. For example, multiple Ellerslie property titles were acquired to do a single development at Ellerslie. Similarly, multiple sites on Parnell Road were acquired to do a single development at Parnell Road. Therefore, each development site is treated as a single overseas investment transaction.

Consideration calculation for 5 & 7 Main Highway

14. DSL acquired five titles in a single agreement for a total price of s9(2)(b)(ii) and the total land area acquired is 0.4683ha. Only two of these titles were residential land (NA981/273 – 0.0799 ha and NA119C/360 – 0.0400 ha). Therefore, the overseas investment is in two residential titles.

15. Our approach to calculation of the consideration for the overseas investment reflects this approach, and apportionment has been done based on land size of the residential titles which equated to s9(2)(b)(ii) for title NA981/273 and s9(2)(b)(ii) for title NA119C/360.

16. All other residential land titles were acquired separately, and we used the consideration noted on the relevant agreements.

The breaches of the Act are considered inadvertent

17. The breaches of the Act are considered to be inadvertent because:

- (a) DSL and Dialog’s representative erroneously relied on the Council zoning rather than the property category under the district valuation roll;
- (b) DSL did not seek expert legal advice concerning OIA matters;
- (c) documents provided to the OIO showed no intention to circumvent the Act;
- (d) breaches of the Act were self-reported to OIO prior to DSL and/or nominee acquiring legal interest in the land;

18. We had some concerns whether or not the representative of DSL/Dialog was reckless regarding the *possibility* of land being residential land. However, we do not consider that DSL or its representative have tried to disguise their behaviour or reasons for their error. We were ultimately satisfied that it was an honest mistake.

Assessment of appropriate penalty – for transactions on or post 22 October 2018

19. In accordance with regulation 36 of the Overseas Investment Regulations 2005, the amount of the retrospective penalty is:
- (a) \$30,000 for 576 GSR Development Limited; and
 - (b) \$40,000 for Parnell Park Development Limited.

Penalty amount is not unduly harsh or oppressive

20. We do not consider that requiring the applicants to pay this amount would be unduly harsh or oppressive given the nature of, and the reason for, the retrospective applications.
21. The retrospective penalties recognise breaches of the Act occurred and provide a deterrent effect to avoid future breaches.
22. The amount of the penalties is not unduly harsh or oppressive when viewed in the context of the total value of investments across five transactions of approximately \$500m. The penalty amount is therefore unlikely to cause any financial hardship on the Applicants.

Why administrative penalties are an appropriate option to resolve the breaches

23. The administrative penalties are considered the most appropriate option to resolve the breaches given:
- (a) the breaches were inadvertent in nature;
 - (b) the Applicants have no previous adverse compliance history with OIO; and
 - (c) the early self-reporting of the breach that ensured that OIO had the opportunity to impose meaningful conditions of consent to deliver benefits to NZ.
24. Alternative enforcement options such as Court proceedings seeking orders to dispose of the properties or pay civil pecuniary penalties were not considered appropriate because:
- (a) They were seen as a disproportionate response given the investors had voluntarily reported their breaches of the Act to the OIO, had fully cooperated with our investigation, and the breaches were considered to be inadvertent; and
 - (b) The Investors delayed acquiring their legal interest in the transactions by deferring the settlement of the properties while cooperating with OIO enquiries; and
 - (c) Administrative penalties are considered a sufficient deterrent on the particular facts of this case.

Recommendation

25. I recommend that the Regulator impose administrative penalties of:
- (a) \$30,000 for 576 GSR Development Limited; and
 - (b) \$40,000 for Parnell Park Development Limited.
26. I do not consider the amount to be unduly harsh or oppressive having regard to the value of the consideration paid for the Shares, or the nature of, and the reasons for, the retrospective consent.

s9(2)(a)


Agree: X
Disagree:

Simon Pope
Manager Enforcement

Date:

Released under the Official Information Act 1982