



## Memorandum

To: Simon Pope, Manager Enforcement

From: Will McGrath, Senior Solicitor

Date: 26 May 2022

File Ref: 202100518

Subject: **Administrative penalty of \$30,000 for retrospective consent application post-investigation**

For Your: **Approval**

### Summary

1. A number of breaches of the Act have been identified involving sensitive land at 297 Te Puna Station Road, Tauranga (**the Land**), and several parties, namely Containerco (NZL) Limited (**ContainerCo**), Beaumont Investment Trust (**Beaumont**) and Te Puna Industrial Limited (**TPIL**). An associate relationship was involved in an acquisition by Beaumont (a non-overseas person), and then TPIL, of the Land as an interim measure until consent could be obtained for ContainerCo to acquire the Land.
2. An initial memorandum of understanding likely created an associate relationship between the parties. This associate relationship was not cured by subsequent legal advice advising a structure involving a further memorandum of understanding.
3. The lawyers that provided the second set of advice were well aware of the need for consent under the Overseas Investment Act but took a different interpretation of the associate provisions to the OIO, and recommended a structure they considered would comply with the Act. The parties always intended to apply for consent under the Act, but we consider the initial acquisition acted as a workaround to secure the Land while consent was applied for.
4. The lawyers involved have been cautioned, and we consider the matter is appropriate for a retrospective consent, given the parties acted on the advice of their legal advisers.

### Facts – why retrospective consent required

5. Applications referred this incident on 1 August 2021 following a pre-application meeting prior to receiving an application for consent application under the benefit to New Zealand pathway.
6. On 2 February 2021, s9(2)(a) and s9(2)(a) as trustees for Beaumont entered into an Agreement for Sale and Purchase with Iaccoca Holdings Limited to acquire the Land. This agreement was not conditional on obtaining consent under the Act.
7. The Land consists of 12.16 hectares of land in Te Puna, Tauranga. The land is sensitive because it is over 5 hectares of non-urban land. The land is also categorized as 'Multi-unit – Lifestyle' on the District Valuation Roll, and is therefore residential land under the Act.

8. Beaumont is a New Zealand investment trust whose trustees are s9(2)(a) and s9(2)(a), and whose beneficiaries are all members of the s9(2)(a) of Tauranga. Beaumont is a non-overseas person.
9. Prior to signing the ASP to acquire the Land, Beaumont entered into a memorandum of understanding with ContainerCo on 25 June 2020 (**the First MOU**) in which, among other things:
  - (a) trustees of Beaumont would make an offer on the Land;
  - (b) Beaumont would later nominate a joint-venture company (yet to be incorporated) as nominee purchaser;
  - (c) the joint-venture company would be owned and controlled 50% by Beaumont and 50% by ContainerCo;
  - (d) the Land would be leased to ContainerCo for a term of no less than 20 years.
10. ContainerCo is an overseas person, because it is ultimately 50% owned by overseas persons – including China COSCO Shipping Corporation Limited (18.59% - a state-owned enterprise of the Chinese Government), HKSCC Nominees Limited (10.53% - likely on behalf of investors) as well as other public investors on the Hong Kong and Shanghai Stock Exchanges (16.72%).
11. ContainerCo then sought legal advice on the First MOU, which made them aware that the Act may apply to the transaction contemplated by this agreement. As a result, they advised Beaumont they could not progress the acquisition of the Land unless it was conditional on obtaining OIO consent.
12. Beaumont proceeded to enter into the ASP in its own name on 2 February 2021. This agreement was not conditional on obtaining consent under the Act.
13. We consider at this point Beaumont was an associate of ContainerCo. Beaumont was therefore required to apply for consent before giving effect to the investment in sensitive land, and its failure to do so breached section 42 of the Act.
14. Following Beaumont entering into the ASP, Beaumont and ContainerCo engaged in further discussions and entered into a further memorandum of understanding of 4 June 2021 (**the Second MOU**) which, among other things:
  - (a) terminated the First MOU;
  - (b) required Beaumont to incorporate TPIL, a company 100% owned and controlled by Beaumont;
  - (c) ContainerCo would be granted redeemable preference shares such that, on the granting of consent under the Act the shares would be redeemed, and TPIL would be 50% owned by each of Beaumont and ContainerCo;
  - (d) Beaumont would nominate TPIL as purchaser once the ASP became unconditional;
  - (e) Beaumont would grant ContainerCo a lease over 4.8 hectares of the Land conditional upon the Land being re-categorised as 'industrial';
  - (f) the parties would enter a joint-venture agreement, by which ContainerCo would obtain 50% of the shares in TPIL conditional on obtaining consent under the Act;
  - (g) should consent not be obtained, or not obtained on terms reasonable to ContainerCo, Petroview Limited would replace CounterCo as joint-venture partner.
15. Petroview Limited (**Petroview**) is a non-overseas person that is 100% owned and controlled by Kenneth Harris, an employee of ContainerCo.

16. On 1 August 2021, a pre-application meeting was held relating to ContainerCo's application, at which point concerns around a possible associate relationship were raised by the Applications team with Enforcement. ContainerCo's application was later filed on 17 August 2021.
17. On 2 August 2021 the ASP became unconditional, and on 9 August 2021 TPIL was nominated as the purchaser under the ASP. The redeemable preference shares (**RPS**) deed between TPIL and ContainerCo was entered into on 11 August 2021. ContainerCo's RPS are intended to be issued in accordance with regulation 39 of the Regulations, in order that they are exempt from the requirement for consent.

## Breaches of the Act

18. During assessment of the incident, we identified actions which likely comprised breaches of sections 42 and 43 of the Act, including:
  - (a) an associate relationship between Beaumont, ContainerCo, and TPIL, following which
    - (i) Beaumont entered into the ASP without obtaining consent, and acquired an equitable interest in the Land;
    - (ii) Beaumont and ContainerCo entered into the Second MOU, a structure intended to circumvent the Act;
    - (iii) TPIL was nominated to acquire the property and acquired an equitable interest in the Land;
    - (iv) TPIL acquired the legal interest in the Land; and
    - (v) ContainerCo acquired a leasehold interest in the Land.
19. Subsequent conversations with the lawyers for ContainerCo, and documents provided to the OIO, confirmed our view that an associate relationship existed and that breaches of the Act, therefore, occurred.

## Inadvertence of the breach

20. We are satisfied that the parties did not intend to entirely circumvent the Act. This is demonstrated by the application for consent that was eventually filed by ContainerCo.
21. The parties have been upfront and co-operative with us from the point at which we raised concerns as to the nature of the relationship, and have not sought to withhold relevant information.
22. ContainerCo was only made aware of the requirement to obtain consent under the Act once the First MOU had been entered into. It then sought further advice from Russell McVeagh as to how best for to remedy the situation. The parties adopted a structure and staged transaction which they believed was compliant with the Act, albeit that it had the effect of being a 'work around' to enable them to secure the land while they went through the process of applying for consent under the Act.
23. We are satisfied, therefore, that it was always intended that consent be obtained, albeit that breaches of the Act occurred in the structure used to progress the transaction.
24. ContainerCo has agreed that it would convert its existing consent application to include a retrospective consent component on the basis that the actions in TPIL acquiring the Land required consent under the Act.

25. We were, however, also concerned by the fact that Russell McVeagh – a firm with frequent interaction with the office – took the interpretation of the Act that they did. We have communicated those concerns to Russell McVeagh separately through a compliance letter, and consider that this action is sufficient to address these concerns.

## Assessment of appropriate penalty

26. The value of the initial transaction was \$4,700,000.<sup>1</sup>
27. In accordance with regulation 36 of the Overseas Investment Regulations 2005, the amount of the retrospective penalty is \$30,000. I do not consider that requiring the applicant to pay this amount would be unduly harsh or oppressive given the nature of, and the reason for, the retrospective application.

## Recommendation

28. I recommend that the Regulator impose an administrative penalty of \$30,000.

s9(2)(a)

Simon Pope  
Manager Enforcement

Agree:   
Disagree:

Date: 26 May 2022

<sup>1</sup> ASP dated 2 February 2021.